H-3 AND B-1 TRAINEE VISAS—DETERMINING THE APPROACH

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INTRODUCTION

Training visas—H-3, J-1, and B-1 in lieu of H-3 and J-1—are very useful visas for both U.S. companies and for the candidates who are interested in learning new skills in the United States. Knowing which visa to use, what procedures to follow to get the appropriate visa, and the probability of success with a particular approach is not always easy. This practice advisory is intended as a guide to assist you with some of the factors you should consider when determining a particular training visa approach. Given the breadth of considerations for J-1 training/internship visas, we will limit our discussion to H-3 visas, B-1 in lieu of H-3 visas, and B-1 in lieu of J-1 visas.

H-3 VISAS

The primary purpose of an H-3 visa is to enable foreign nationals to participate in a training program in any field of endeavor, which is not designed primarily to provide productive employment.[1] To qualify for an H-3 visa, the H-3 petitioner must establish the following elements: the proposed training is not available in the foreign national's own country; the beneficiary will not be placed in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed; the beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training; and the training will benefit the beneficiary in pursuing a career outside the United States.[2] It cannot be overstressed that the H-3 is not an appropriate classification for someone seeking a "place-holder" visa until an H-1B becomes available; filing an H-3 petition in such circumstances may be viewed as fraudulent.

In order for an H-3 petition to be approved, a training program must describe the type of training and supervision to be given, and the structure of the training program; set forth the proportion of time that will be devoted to productive employment; show the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training; describe the career abroad for which the training will prepare the foreign national; indicate the reasons why such training cannot be obtained in the foreign national's country and why it is necessary for the foreign national to be trained in the United States; and indicate the source of any remuneration re-

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[1] Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163, §101(a)(15)(H)(I)(iii); 8 CFR §214.2(h)(7)(i). The statute and regulations specifically prohibit H-3 visas for graduate medical education or training. H-3 visas are authorized for medical externs, nurses, and participants in a special education exchange visitor program. However, this discussion is limited to trainees.

[2] 8 CFR §214.2(h)(7)(ii)(A).

ceived by the trainee and any benefit which will accrue to the petitioner for providing the training.[3] Given concerns of U.S. Citizenship and Immigration Services (USCIS) with end-runs around the H-1B, it is particularly important to have an extremely well-documented case filed at the outset, or employers may expect to receive a very lengthy Request for Evidence (RFE) for further documentation.

By regulation, a petition may be denied if it deals in generalities with no fixed schedule, objectives, or means of evaluation; is incompatible with the nature of the petitioner's business or enterprise; is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training; is in a field in which it is unlikely that the knowledge or skill will be used outside the United States; will result in productive employment beyond that which is incidental and necessary to the training; is designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States; does not establish that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified; or is designed to extend the total allowable period of practical training previously authorized for a nonimmigrant student.[4]

To obtain an H-3 visa, a sponsor first must file Form I-129 and the H Supplement, with employer's training program, at the appropriate USCIS service center.[5] Premium processing currently is available.[6] The maximum period of time permitted in H-3 status is 24 months. If a beneficiary has remained in H-3 status for the full 24 months, then no change of status/extension of status is permitted until the beneficiary has remained outside the United States for six months.[7] There is no dual intent for H-3s. If a labor certification application has been approved, or an immigrant petition has been filed on behalf of the beneficiary, that shall be a reason by itself to deny the petition.[8]

Practice Tips:

- Maximize classroom hours and minimize productive employment, to the extent possible.
- Outside courses (taught through university, professional organization, etc.) also can be included for classroom hours.
- The training plan should be well-structured, and each phase of training should explain the objectives of that phase and should build on knowledge gained in previous phases or demonstrate that the new phase is part of a rotation through departments.
- There is no prevailing wage requirement, but the beneficiary must not be at risk of becoming a public charge.
- The beneficiary is not required to hold a university degree or have any work experience.
- Limit training to 23 months or less to avoid six-month foreign residency requirement.
- H-3s are a good alternative to J-1s if the training program duration is longer than 18 months (or 12 months for J-1 intern), the beneficiary does not have the required degree or experience, or the beneficiary would be subject to a J-1 INA §212(e) two-year foreign residency requirement.
- H-3s also are a good (if not the only) training visa alternative if the student went to school in the United States and/or missed the filing window for optional practical training (OPT) while in F-1 status.
- It is possible to obtain approval of an H-3 petition, even after an individual has completed a J-1 training program.

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[3] 8 CFR §214.2(h)(7)(ii)(B).

[4] 8 CFR §214.2(h)(7)(iii).

[5] 8 CFR §214.2(h)(2)(i)(A). Currently, H-3 petitions are filed to either the Vermont Service Center or the California Service Center, depending on the location of the training program. See the I-129 Form Instructions or *www.uscis.gov* for detailed filing instructions.

[6] *See www.uscis.gov* (search on "premium processing" for a list of applications for which premium processing currently is available).

[7] 8 CFR §214.2(h)(13)(iv).

[8] 8 CFR §214.2(h)(16)(ii).

B-1 IN LIEU OF H-3 VISAS

There are many reasons why it might be more appropriate and/or desirable to proceed with a B-1 in lieu of H-3 visa, rather than petitioning outright for an H-3 visa. Cost is a major consideration in determining whether to pursue an H-3 versus a B-1 in lieu of H-3 visa. Clearly, entry on the Visa Waiver Program or on an existing B-1 visa is significantly less expensive than preparing and filing an H-3 visa petition with USCIS, and then obtaining and processing an H-3 visa at the consulate.

Despite these situations in which B-1 in lieu of H-3 is advantageous, the authors have found in practice that more often H-3 might be the better choice. For example, H-3 visas may be used by any U.S. company and on behalf of any foreign individual, regardless of the trainee's connection to a foreign employer, as long as he or she is legitimately coming to the United States to receive training. On the other hand, use of a B-1 in lieu of H-3 visa presupposes that the foreign national currently is employed by a company abroad.[9] This makes the H-3 visa far more useful—if not the only option (within the context of this discussion)—for recent graduates, those in second careers seeking training in a new field in the United States, and those who currently are between jobs.

Excluding J-1 visas, H-3 visas are the only option for U.S. employers who want to pay the foreign trainee directly, given the restriction on the foreign trainee's receipt of "any salary or other remuneration from a U.S. source other than an expense allowance or other reimbursement for expenses incidental to the alien's temporary stay."[10]

The duration of the training will influence whether it is more appropriate to seek an H-3 visa or a B-1 in lieu of H-3 visa. Given the limitation on B-1 admissions to six months, companies that have training programs lasting longer than six months normally should seek an H-3 visa from the outset. This approach will avoid the need to seek an extension of stay after the trainee's arrival and possibly jeopardize the trainee's ability to complete the program. Obviously, those employers who normally might seek to avoid visa issuance altogether by using the Visa Waiver Program will have no option but to use the H-3 or B-1 in lieu of H-3 program if the training program will last longer than three months.

Choice of adjudicator also may influence a company's decision to pursue an H-3 versus B-1 in lieu of H-3 visa. There is some comfort in presenting an official USCIS approval notice at the consulate for many visa applicants. Moreover, despite the fact that consulates do reassess a visa applicant's eligibility for a particular status, there is no doubt that effectively overturning USCIS's approval through the denial of a visa probably is less likely than the consulate's rejection of a candidate's B-1 in lieu of H-3 visa application at the visa interview. This is particularly true for those applying at consulates that may not be as familiar with business or training visas.

Where the B-1 in lieu of H-3 visa is determined to be the best approach, however, it should be remembered that certain criteria must be followed. Specifically, according to the Foreign Affairs Manual (FAM), it is essential that the remuneration or source of income for services performed in the United States continue to be provided by the business entity located abroad, and that the foreign national meets the following criteria:

> (1) With regard to foreign-sourced remuneration for services, the Department has maintained that where a U.S. business enterprise or entity has a separate business enterprise abroad, the salary paid by such foreign entity shall not be considered as coming from a 'U.S. source;'
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> (2) In order for an employer to be considered a 'foreign firm' the entity must have an office abroad and its payroll must be disbursed abroad. To qualify for a B-1 visa, the employee must customarily be employed by the foreign firm, the employing entity must pay the employee's salary, and the source of the employee's salary must be abroad; and
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> (3) An alien classifiable H-2 [sic] shall be classified as such notwithstanding the fact that the salary or other remuneration is being paid by a source outside the United States, or the fact that the alien is working without compensation (other than a voluntary service worker classifiable B-1 in accordance with 9 FAM

[9] 9 *Foreign Affairs Manual* (FAM) 41.31 N.11.

[10] *Id.*

41.31 N9.1-5). A nonimmigrant visa petition accompanied by an approved labor certification must be filed on behalf of the alien.[11]

Again, however, as with the H-3, it cannot be overstressed that the B-1 in lieu of H-3 visa is not appropriate if the employer's ultimate objective is to obtain an H-1B for a particular worker or in situations where employment—rather than training—is the objective. This is particularly true in today's enforcement climate where unannounced worksite inspections are becoming more common.

B-1 IN LIEU OF J-1 FOR U.S. GOVERNMENT-FUNDED ACTIVITIES

Under certain circumstances, persons coming to the United States to participate in programs that are funded in whole or in part by a U.S. government agency may be eligible for issuance of B-1 visas instead of J-1 visas. The Department of State (DOS) formalized a policy allowing this on January 20, 2004 (2004 DOS policy).[12] DOS apparently formalized this policy after it became clear that some consular officers were under the mistaken impression that only a J-1 would be appropriate for someone coming to the United States with funding in whole or in part from a U.S. government agency, even if the person was not going to participate in an exchange visitor program. Some consular officers also apparently believed, again mistakenly, that such persons would be subject to INA §212(e). The 2004 DOS policy was formalized to set the record straight.[13] On February 10, 2004, U.S. Customs and Border Protection (CBP) followed suit and issued a memorandum to encourage CBP compliance with the DOS policy.[14]

The 2004 DOS policy clarifies that if the sponsoring U.S. government agency certifies either that it has no authorized exchange visitors program, or that the activities the visitor will pursue in the United States are unrelated to activities described in that agency's exchange program, a visa other than J, such as B-1, might be appropriate. The policy indicates that the sponsoring agency may certify in writing that no exchange program exists or that the activities are unrelated to any existing program; indeed, persons applying for B-1 visas would be well served to obtain such a letter from the appropriate government agency and present the letter with their visa application. Taking this latter step will help ensure the visa applicant is issued the correct visa. DOS has cautioned consular officers that if the activities that the visitor will pursue in the United States are not appropriate in B-visa status, then, in most cases, they should issue the applicant a J visa, and that they may consult with the agency if they are unsure of the appropriate visa category for the activity.

Of course, if the visitor's travel is U.S. government-funded, and has as its purpose the goal of participating in an approved exchange visitor program, then the J-1 visa is the appropriate, and required, visa for such travel. Such exchange visitors are subject to INA §212(e), and the attendant restrictions associated with the two-year home residency requirement. It should be noted that U.S. government-funded visitors coming to the United States are eligible for MRV fee waivers if they are participating in DOS- or USAID-sponsored and funded educational and cultural exchanges, or if they are U.S. government employees traveling on official business.[15] Exchange programs eligible for MRV exemption will contain either a G-1 or G-2 program number on the DS-2019 Certificate of Eligibility for Exchange Visitor J-1 Status.

In counseling clients who have obtained funding for travel to the United States from a U.S. government agency and seek your advice prior to submitting their visa application, it is critical to have a thorough understanding of the nature of their anticipated visit. If there is any question about the nature of the activities, con-

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[11] *Id*.

[12] B-1 in Lieu of J-1 Visas for USG-Funded Travel, 92 State 201252 (Jan. 20, 2004), *published on* AILA InfoNet at Doc. No. 04022564 (*posted* Feb. 25, 2004).

[13] The DOS titled its policy "B-1 in Lieu of J-1 for USG-Funded Travel," but to a certain extent this title is a misnomer, because in this instance, the B-1 visa is not an alternative option to a J-1 visa; rather, the J-1 visa simply is not appropriate, because the person is not coming to participate in an exchange visitor program. Compare this "in lieu of" language with "B-1 in lieu of H-1B" and "B-1 in lieu of H-3" where either visa could be appropriate.

[14] CBP Memorandum, J. Ahern, "B-1 in Lieu of J-1 Visa for U.S. Government Funded Travel" (Feb. 10, 2004), *published on* AILA InfoNet at Doc. No. 05040471 (*posted* Apr. 4, 2005).

[15] 22 CFR §22.1.

sult with the government agency in question and help your client obtain a letter clarifying the activities, particularly if they support a B-1 visa application, as described above. This would add great value to your client's visa application. After all, when they understand the U.S. immigration law implications, most visa applicants would much prefer to have a B-1 visa stamp in their passport, as opposed to a J-1 *§212(e)-subject* visa stamp.

CONCLUSION

Many considerations come into play when determining the appropriate training visa to use. Ease of use, cost, comfort, and predictability are just some of the considerations. Although beyond the scope of this article, a well-informed practitioner also should carefully investigate the possibility for a J-1 trainee or intern visa in appropriate circumstances before determining the best approach to training in the United States.