H-3 and J-1 Visas: Are They Really an Alternative to an H-1B?

BACKGROUND

Training visas have clearly not been the "sexiest" visa category in recent years. That distinction surely belongs to H-1Bs and L-1s, which have been the subject of more recent Congressional action, not to mention heartache and heartburn by both proponents and detractors of these visa categories, who have tried to either expand or contract usage, depending on the advocate. Recently, however, the little-used and -understood H-3 and J-1 training visas have slowly been coming to the forefront. Particularly with the dirth of available H-1Bs and the increase in Requests for Evidence on L-1s (particularly L-1Bs), attorneys appear to be considering the use of H-3s and J-1 training visas as an alternative to the H-1B more and more frequently. But is that really appropriate? This article will address some of the issues associated with the use of the H-3 and J-1 training visa categories, as well as the pros and cons of using these visas.

H-3 TRAINEES

By its very terms, H-3 visas contemplate training, rather than work. An H-3 trainee may come to the U.S. temporarily based on an approved petition by an individual or organization for the purpose of receiving *training* in any field of endeavor, including commerce, communications, finance, government, transportation, agriculture or the professions.[1]

Medical Professions

Physicians are statutorily ineligible to receive any type of graduate medical education or training or training in a purely industrial establishment.[2] However, medical students who are on summer vacation are permitted to participate as an H-3 trainee based on an approved petition from a hospital approved by the American Medical Association or the American Osteopath Association for either an internship or residency program.

Some nurses also qualify for H-3 classification. To be eligible, a nurse must have a full and unrestricted license to practice professional nursing in her home country (unless her education was from the U.S. or Canada). She must also evidence that she is fully qualified to receive training in the jurisdiction where the training will occur and the petitioner must demonstrate that it is authorized to give the requested training.[3] The Immigration Service has advised that the nurse does not need to have the health care worker certifications normally required under the Immigration and Nationality Act (INA) § 212(a)(5)(C).[4]

Special Education Exchange Visitor Program

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[1] 8 CFR § 214.2(h)(7)(i).
[2] 8 CFR § 214.2(h)(7)(i)(A); 9 *Foreign Affairs Manual*(FAM) 41.53 N21.
[3] 8 CFR § 214.2(h)(7)(i)(B); 9 FAM 41.53 N20.
[4] USCIS Memorandum, W. Yates, "Final Regulation on Certification of Foreign Health Care Workers: Adjudicator's Field Manual Update AD 03-31" (Sept. 22, 2003), *published on* AILA InfoNet at Doc. No. 03092641 (*posted* Sept. 26, 2003).

There is also a special category for H-3 trainees who are participants in a special education exchange visitor program. These trainees must demonstrate that they are participating in a structured program that provides for practical training and experience in the education of children with physical, mental or emotional disabilities.[5] In this case, the petitioner must satisfy the additional requirements of proving that they are a facility that has professionally trained staff and a structured program for providing education to children with disabilities and for providing training and hands-on experience to participants in this program.[6] The petition must also evidence that the beneficiary is nearing completion of a baccalaureate or higher degree in special education, already holds such a degree, or has extensive prior training and experience in teaching children with physical, mental, and emotional disabilities.[7] Only 50 people per year may participate in a special education exchange visitor program.[8]

FILING THE PETITION

To petition for an H-3 trainee, the petitioner must file the I-129 petition with the appropriate Service Center (either California or Vermont) having jurisdiction over the location of training. The petition must include the H Classification supplement, although only the top portion of the form and Section 4 should be completed. Section 4 mirrors the requirements set forth in the regulations and makes clear that the purpose of the petition should be the training of a relatively unskilled individual who cannot receive such training in his home country, rather than an end-run around obtaining a valid work visa, such as an H-1B. Specifically, the Regulations require (and Section 4 seeks to confirm) that:

- The proposed training is not available in the alien's own country;
- The beneficiary will not be placed in a position that 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 U.S.[9]

The petition must also include a support letter from the petitioner, a detailed training program, and proof of the legitimacy of the petitioner.[10] A single petition may support either one trainee or numerous trainees, so long as they are all pursuing an identical training program at the same location.[11]

Although petitioners must provide the wages or remuneration that the trainee will receive, there is no prevailing wage requirement, as with H-1B visas. The only restriction on wages is that the

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[5] 8 CFR § 214.2(h)(7)(iv)(1).
[6] 8 CFR § 214.2(h)(7)(iv)(2).
[7] 8 CFR § 214.2(h)(7)(iv)(B)(2).
[8] 8 CFR § 214.2(h)(8)(i)(D).
[9] 8 CFR § 214.2(h)(7)(ii)(A).
[10] 8 CFR § 214.2(h)(1)(i), 214.2(h)(7)(i), (ii).
[11] 8 CFR § 214.2(h)(2)(i)(B), (C).

foreign trainee earn sufficient wages or have personal funds to ensure that he or she will not become a public charge.

Premium processing is available for the regular additional fee of $1000. For most H-3 petitions, there is no cap to contend with in the H-3 context, thus – as with other I-129 petitions -- the petition may be filed at any time up to six months before the training is scheduled to start.[12] Spouses and minor children are eligible to enter as H-4 dependents.[13]

Training Plan

Of course, the crux of an approvable H-3 visa petition is the training program. The training program must clearly demonstrate that the foreign national will be a "trainee", rather than a full-time employee. By regulation, the H-3 trainee petition must include a training program that:

- Describes the type of training and supervision to be given and the structure of the training program;
- Sets forth the proportion of time that will be devoted to productive employment, if any;
- Shows the number of hours that will be spent in classroom instruction and on-the-job training, respectively;
- Describes the career abroad for which the beneficiary is being given the training;
- States the reasons why such training *cannot* be obtained in the alien's country and why it is necessary for the alien to be trained in the United States;
- And indicates that the source of any remuneration received by the trainee and any benefit the petitioner will receive for providing the training.[14]

In addition, the Regulations specifically provide that an H-3 petition may not be approved if the training program:

- 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 field of training;
- Is in a field in which it is unlikely that the knowledge or skill will be used outside the United States;
- Is designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States;
- Will result in productive employment beyond that which is incidental and necessary to the training;
- 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 a nonimmigrant student.[15]

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[12] 8 CFR § 214.2(h)(9)(i)(B).
[13] 8 CFR § 214.2(h)(9)(iv).
[14] 8 CFR § 214.2(h)(7)(ii)(B).

Given the restrictions and limitations on the use of the H-3 visa category, it is clear that training programs that demonstrate significant on-the-job training will not be approved, unless they evidence a rotation through departments. For example, a trainee who goes to work for a large multinational company may spend the majority of his time in on-the-job training, if he rotates between marketing, accounting/finance, operations, human resources, manufacturing, etc., as it is clear that he is not taking the job of any single employee, but is obtaining a broad-based perspective over the entire operations of the company. This type of training might be appropriate, for example, where a trainee needs to learn all aspects of a company's operations because he/she will be establishing a foreign subsidiary of the U.S. company and needs to understand the entire business.

On the other hand, companies in which a trainee will be working in a single department (i.e., the engineering department) must show that the trainee will be receiving a significant proportion of classroom training, as opposed to hands-on work. This demonstrates to the Service that the trainee will not be taking the position of a regular, full-time employee and assures the Service that the purpose of the visit is to pass on knowledge and skills to a foreign national, rather than to overcome a lack of skilled workers or serve as an end-run around the H-1B visa shortage.

DURATION OF VISA AND OTHER POST-FILING CONSIDERATIONS

H-3 petitions are normally valid for up to two years at a time.[16] H-3 trainees who have spent the maximum period of time permitted for their program (either 24 months or 18 months) are ineligible for an extension or change of status or to be readmitted to the U.S. in the respective classification, unless the trainee has resided and been physically absent from the U.S. for the immediate prior six months.[17] However, a trainee who has not been present for the maximum petition period is eligible for an extension of stay through the filing of an I-129 extension petition. Similarly, if the H-3 engages in training that is intermittent in nature and the training time does not amount to an aggregate of six months within one year, the two-year limit does not apply.[18]

H-3 petitioners must affirmatively demonstrate that the trainee will be in the U.S. only temporarily and will be leaving at the end of the training program to use his or her training in another country. As a result, the H-3 category expressly does not permit dual intent and an H-3 petition or visa (initial or extension) may be denied if the trainee has a certified PERM application or Petition for Immigrant Worker filed by the same petitioner on his or her behalf.[19] However, less explicit, but clearly contemplated by the H-3 regulations, is a similar prohibition on filing H-3 petitions merely as a placeholder for an H-1B or other work visa. Consequently, attorneys should be very cautious in counseling employers on the appropriate uses of the H-3 visa, as it is clear that filing any paperwork with the government that is known to be false (i.e.,

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[15] 8 CFR § 214.2(h)(7)(iii); 55 Fed. Reg. 2628-29 (Jan. 26, 1990).
[16] 8 CFR § 214.2(h)(9)(iii)(C)(1); *but see* 8 CFR § 214.2(h)(9)(iii)(C)(2) (limiting special education exchange visitors to 18 months).
[17] 8 CFR § 214.2(h)(15)(ii)(D).
[18] 8 CFR § 214.2(h)(13)(v).
[19] 8 CFR § 214.2(h)(16)(ii).

with regard to the purpose, duration or temporariness of the training program) is unethical and could lead to sanctions against both the attorney and the petitioner.

J-1 TRAINEES AND INTERNS

The J-1 visa for training and internships is essentially a partnership between American business, the DOS-designated visa sponsor, and the Department of State itself to fulfill public policy objectives. It allows American business to tie the needs for firmly established overseas contacts with the larger American policy need to create a pool of pro-American attitudes around the world. The J-1 visa combines the best business practices with the altruistic goal of developing a safer world. It is the "soft power" visa, harnessing the power of personal experience to influence individual perceptions in the business, personal and government realms.

The J-1 visa grew out of the Mutual Educational and Cultural Exchange Act of 1961,[20] also known as the Fulbright-Hays Act. The use of the J-1 visa is overseen by the Office of Exchange Coordination and Designation, Bureau of Educational and Cultural Affairs (ECA) at the U.S. Department of State. As of Oct. 28, 2008, ECA has designated 102 trainee program and 73 intern program sponsors.[21] At the heart of the visa category is the concept of cultural exchange.

Questions for clients looking at the J-1 training or intern visa.

J-1 program regulations cover both the U.S. company, known as the "host site", and the foreign national. The regulations are written in two parts, the general provisions, "Subpart A"[22], and the category specific regulations for trainees and interns.[23] Additionally, each J program sponsor has its own unique policies and is designated by the Department of State to sponsor certain specific occupational areas. The layers of complexity can be simplified by working with a designated J program sponsor before submitting an application to make sure you understand what is possible. Here are a few questions to help determine if the J-1 is the correct visa for your client:

- Is the primary reason for the foreign national's stay in the United States to receive training?
- Does the proposed training or internship correspond with the foreign national's educational or occupational field?
- Is the proposed training or internship unique and not duplicative of the foreign national's prior work experience?
- Do the foreign national and the U.S. company understand that the intent of the J visa is for the foreign national to return to his/her home country at the end of the program?
- Does the U.S. employer have sufficient resources and trained personnel available to provide the specified training or internship program?

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[20] (Public Law 87-256) as amended, 22 U.S.C. 2451, et. seq. (1988)

[21] A total of 1435 active J programs are designated across the fifteen separate categories of the J visa covering everything from alien physicians to camp counselors. On Oct. 7, 2008 these programs represented a total of 220,415 active participants and an additional 50,266 J-2 dependents.

[22] 22 CFR 62.1-17

[23] 22 CFR 62.22

- Does the foreign national have post-secondary education and/or work experience from outside of the United States?

Answering "yes" to all of the above questions is an indication that it's time to call a J program sponsor about an application.

The J Program Sponsor

The J-1 visa is not administered by USCIS; designated J program sponsors vet the foreign national, the U.S. employer, and the training plan. In practical terms, this means that applicants are not working in a vacuum when trying to understand necessary documentation, craft acceptable training plans, or determine eligibility requirements. Working closely with the J program sponsor in the development of a J-1 training or internship program is expected and encouraged.

The J program sponsor has three areas of responsibility:

- To oversee compliance with the training program
- To intercede on the J-1 participant's behalf in the event of a problem with the training
- To maintain accurate SEVIS records

Note the second responsibility. The J-1 is a great visa for individuals who want to know that they are not on their own in the United States. For the U.S. employer, this is also a tremendous benefit. The J program sponsor helps navigate cultural differences in the workplace, payroll questions for non-resident alien taxpayers, Social Security enumeration delays, and training program issues.

Fourteen Things to Love about the J-1 Visa category

There are some important differences between the J-1 training or intern visa and other training visa categories. These differences can help you determine if the J-1 visa is the right choice for your client.

- No annual quota[24]
- Available for skilled professional workers and post-secondary students and recent graduates of overseas Universities
- Trainees can stay for up to 18 months, Interns for up to 12 months
- Repeat participation is available under certain circumstances[25]

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[24] While the visa category has no annual quota, individual program sponsors negotiate an annual allotment with the Department of State. If large groups of J-1 applicants are anticipated, it is best to work with a program sponsor in advance to make sure the sponsor's allotment will be sufficient to cover your needs.

[25] Repeat participation for interns is possible so long as the foreign national continues to be enrolled in a degree or certificate granting program at a non-U.S. post-secondary academic institution. Trainees may return to the U.S. for second training programs if they have been outside of the United States for a period of 24 months. The second program needs to offer new training that does not duplicate the previous program(s).

- Extensions within the maximum length of stay are handled by the J program sponsor, not USCIS
- Training can be available in the home country (cultural exchange is the purpose of the visa)
- Financial support can come from a variety of sources (total must be sufficient to support J participants for their entire stay in the United States, including housing and living expenses)[26]
- On-the-job training is allowed if tied to specified development of skills or competencies
- No labor condition application required
- No USCIS involvement
- Available for a wide variety of fields (but none permitting direct patient contact)
- Benefits the employer, the foreign national, and the United States
- J-2 dependents can apply for work authorization
- J-1 Trainee or intern can enter U.S. up to 30 days before the J program starts and stay up to 30 days after it ends.

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[26]Typically, financial support comes from any of the following: remuneration from the U.S. host company for on-the-job training, salary from overseas employer, grants, or personal funds. Each program sponsor will have its own policy on what constitutes adequate financial support.

The Exchange Visitor Program of the American Immigration Law Foundation looks for a combination of financial support of roughly three times the reasonable rent for the area where the training program will be located.

Issues to watch

Foreign nationals who hope to immigrate to the United States or apply for a future visa status that could lead to a green card are not a good fit for the J-1 visa. The visa category does not allow for dual intent. After all, the purpose of the visa is for the foreign national to return to his/her country of permanent residence and share with family, friends and colleagues a first-hand perspective of the United States and the American public. The public policy objective of the J-1 visa is only achieved after the foreign national returns to his/her home country. In some cases, to prevent so-called "brain drain," the United States has entered into agreements with other countries requiring J-1 exchange visitors to reside in their home country for two years before returning to the U.S. in an immigrant visa status, or a nonimmigrant status that could lead to permanent residency.[27]

Here are a few questions to consider before recommending a J-1 visa program:

- Does the foreign national hope to immigrate to or work in the U.S. within two years of the end of the J-1 program?
- Does the U.S. employer understand that "training" is not synonymous with "employment" in the United States?
- Will the training or internship position fill a position that is held or could be held by a U.S. permanent resident?
- Is the post-secondary education of the foreign national from a U.S. institution?
- Is the work experience of the foreign national in the U.S.?
- Is the U.S. employer qualified to offer the proposed training?
- Does the proposed training include any form of patient contact or training in the fields of physical therapy, clinical counseling, veterinary services, dental services, medical services, or clinical social work?
- Do the U.S. employer and foreign national understand that signing form DS-7002 (the training plan), subjects them to U.S. perjury laws if the submitted training plan is a fraudulent presentation of the proposed training?[28]
- Does the U.S. employer have either a minimum of $3 million in gross annual revenue or at least 25 full-time permanent employees?

The last point does not exclude a company from hosting, but does require a visit from the J sponsor before an application can be considered. Also, all employers must have a worker's compensation policy for their employees and a Dun & Bradstreet DUNS Number[29]. Employers unwilling to share financial information about their company will not qualify as training sites under the J-1 regulations.

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[27] INA Section 212(e)
[28] 18U.S.C 1001
[29] An exception is made for family farms and government agencies.

Trends in U.S. Company J-1 Program Participation

In asking U.S. companies to respond to the question of why they host J-1 trainees and interns, answers most often resemble the following:

- The U.S. company needs to train a foreign national to serve as an overseas representative.
- A U.S. company executive meets a foreign national whose career they wish to help by offering U.S. training.
- The U.S. company benefits strategically from ideas generated through the interaction of a foreign national with U.S. staff.

Other popular reasons for hosting a trainee or intern are as follows:

- U.S. management has learned that American staff members perform better when their expertise is recognized by being appointed as a training/internship supervisor.
- U.S. management has learned that American staff members perform better when having to explain their jobs to the international trainee or intern. The American staff has to actually think through why and how they do what they do.
- U.S. managers enjoy making international connections.
- U.S. managers enjoy teaching and find the J-1 program a way to integrate this learning with company activity.
- Immigrant CEOs use the J-1 program as a way to "give back" to their country of origin.

SEVIS

SEVIS, the Student and Exchange Visitor Information System, was implemented following the events of 9/11/2001 to provide various government agencies information regarding the location and nature of international student and exchange visitor programs. All J-1 and J-2 information is initially entered into SEVIS by the visa sponsor, then updated by Consular Services, DHS, and/or other agencies as the trainee or intern is approved for program sponsorship, applies for the visa, enters the U.S., participates in the J program, completes the program and leaves the U.S. Maintaining SEVIS status by maintaining on-going contact with the visa sponsor is an important responsibility of both the J-1 visa holder and the host company. Address changes, adjustments to the training plan, overseas travel during the program, and active adherence to the training plan are all issues that must be reported to the visa sponsor to maintain SEVIS and, therefore, J-1 visa, status. The J program sponsor's involvement doesn't end when form DS-2019, the Certificate of Eligibility, is issued. Failure to maintain contact with the J program sponsor can result in the J-1 status of the foreign national being terminated with prejudice.[30]

The Training Plan

A training plan is not a job description. A job description conveys what an employee is going to do for a company. A training plan conveys what the company is going to teach the J-1 exchange

[30] Termination with prejudice can negatively affect the issuance of all future visas to the U.S. At the very least it will cause delays; in the worst case it will result in denials.

visitor. It is an 180°difference. Unlike the H-3 training plan, a J-1 training plan uses a government form to standardize training plans. J-1 training is understood by the regulations to be work-based, but all on-the-job training must be justified by specified objectives. Gaining experience is not an acceptable objective unless it is directly tied to the development of a specified skill or competency.

The training plan must reflect the education and work history of the J-1 trainee or intern without repeating training or work experience already accomplished. In other words, an English major will not qualify for sales training; a history major will not qualify for investment training. In these cases, it does not matter that the host company HR person sees a connection; the Department of State does not. The training plan should take the J-1 intern or trainee to the next logical step in his/her career.

Training plans answer three questions:

- What will the exchange visitor learn?
- How will the exchange visitor learn this?
- How will we know the exchange visitor has learned what was planned?

Notice that the training plan does not ask for how the host company will benefit. This is one of three major differences between the J-1 and H-3 training plan. The second major difference is the volume of classroom training for the J-1. While classroom training is an acceptable training activity, it need not be included if other training activities are more effective toward reaching the objectives of the training. The third major difference is that the training can be available in the J-1's home country.

The training plan must be understood by the J program sponsor and the U.S. visa officer. It must contain sufficient information to convey an idea of what the intern or trainee will be learning, when he/she will be learning, and how he/she will be learning. It should not contain company specific jargon or grandiose rhetoric. Generally, if a training plan is not transparent, it will not be accepted for a J-1 program.

There is an easy rule of thumb for developing training plans - work with the J program sponsor. There is no sense in trying to second guess what is required. Don't expect, however, to copy from a sample plan. The Department of State expects training plans to be tailored to the individual trainee or intern. Copying language that the company does not expect to follow will result in an unacceptable plan.

Ethics

As with the H-3, the J-1 visa cannot be used as a placeholder for or a bridge to an H-1B or other work visa. Information provided to the government on form DS-7002, including the nature and duration of the program, must accurately reflect the program in which the foreign national will participate. As mentioned above, providing false information on form DS-7002 subjects the host supervisor, the foreign national and the program sponsor to penalties of perjury. Furthermore, the Department of State has a unique method of controlling the number of J-1 participants who change status from the J-1 to other visa categories. If a pattern of change of status emerges for a specific visa sponsor, DOS simply cuts the sponsor's annual allotment. Most J visa sponsors will not do business with U.S. companies who use the J-1 visa for anything other than its intended purpose.

Getting started with the J

- Call a J visa program sponsor.
- If you are not familiar with a particular J visa program sponsor, call the American Immigration Law Foundation at 202.507.7500.
- Share the basic information you have collected about the potential U.S. host company and the foreign national with the program sponsor
- Discuss what the training plan might include with the program sponsor

For an immigration attorney, the beauty of a J-1 visa is that one doesn't have to figure out the process alone. Assistance in this process is the role of the J program sponsor. You have probably noticed the lack of footnotes in this article to specific sections of the J-1 regulations. That's because the interpretations that count are those of the J program sponsors and the Department of State. So, if you have a J-1 client, don't try to go it alone. Develop a relationship with the J program sponsor before the application is developed. It will save you a lot of time and trouble and help your relationship with J-1 clients.

A Final Word about Consular Processing

The final decision on J-1 visa issuance rests with a U.S. Consular officer. Consular officers are required to consider every J-1 applicant a potential immigrant unless the foreign applicant can show compelling evidence of home ties validating his/her intent to return home. DOS has issued a cable to all consular posts that evidence of home ties should be reflective of the applicant's stage in life. In other words, a student would not be expected to show the property ownership that a professional with five years of experience should have. All applicants should be able to talk about how they expect to incorporate the training into their careers upon returning home. A credible re-entry plan goes a long way toward facilitating the ease with which the J-1 visa is granted. Called the "Rah, Rah" visa by some U.S. consular posts, the J-1 is a visa consular officers want to grant when it is to be used for its intended purpose.

As a tool for developing the soft power of worldwide influence, the J-1 visa allows the attorney, the J-1 trainee or intern, the U.S. company and the J program sponsor to take part in a whole that is greater than its individual players. It offers an opportunity to combine the individual's interest

with a greater purpose. Used properly, it is a powerful tool for nothing less than changing the world.

CONCLUSION

H-3 and J-1 visas clearly have their place in the framework of business. However, as should be transparently clear, that place is not to be a substitute or placeholder for a valid work visa, such as an H-1B. Unfortunately, unless and until Congress acts to increase the number of available H-1B visas or provides an alternative or supplement to the H-1B visa, that problem remains unresolved. On the other hand, in situations where your clients are truly in need or could benefit in some way from the use of a trainee – or your client is a trainee in need of training with a U.S. company – the H-3 and J-1 visas are available for their intended purpose: training.