

H-3 TRAINEE VISA: THE RARELY USED GEM!

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BACKGROUND/PURPOSE

The H-3 category is a rarely used option available for temporary workers, including medical externs and nurses, and for participants in a special education exchange visitor program.¹ The primary purpose of this visa status is to enable a foreign national to receive instruction and training, with the exception of graduate medical education or training, and not to provide productive employment, unless such employment is incidental and necessary to the training.²

H-3 TRAINEES

The H-3 trainee is a nonimmigrant who seeks to enter the United States at the invitation of an individual or organization for the purpose of receiving training in any field of endeavor, including, but not

limited to, commerce, communications, finance, government, transportation, agriculture, or the professions, with the exception of physicians. Physicians are statutorily ineligible to use H-3 classification in order to receive any type of graduate medical education or training, or training in a purely industrial establishment.³

POINTER: H-3 trainee status is an excellent non-immigrant option to utilize for training in the information technology and engineering fields.

Medical Students Qualifying as H-3 Externs

A hospital approved by the American Medical Association or the American Osteopath Association for either an internship or residency program may petition to classify a student attending a medical school abroad as an H-3 trainee, if the foreign medical student will engage in an externship during his or her medical school vacation.⁴

Certain Nurses Eligible for H-3 Classification

A nurse who is not qualified for H-1 status may qualify for H-3 classification if the nurse has a full and unrestricted license to practice professional nursing in the country where the nurse obtained his or her nursing education, or such education was obtained in the United States or Canada, and upon the petitioner's certification that, under the laws where the training will take place, the nurse is fully qualified and that the petitioner is authorized to give such training.⁵ The petitioner must establish that there is a genuine need for the nurse to receive a brief period of training, that the training is unavailable in the nurse's home country, and that such training is designed to benefit the nurse and the foreign employer upon the nurse's return to his or her home country.⁶

POINTER: The foreign health care worker certifications required under Immigration and Nationality Act (INA) §212(a)(5)(C) are not necessary

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¹ Immigration and Nationality Act (INA) §101(a)(15)(H)(iii); 8 Code of Regulations (CFR) §214.2(h)(7).

² INA §101(a)(15)(H)(iii); 8 CFR §214.2(h)(7)(ii)(A)(3).

³ 8 CFR §214.2(h)(7)(i).

⁴ 8 CFR §214.2(h)(7)(i)(A); 9 *Foreign Affairs Manual* (FAM) 41.53 N21.

⁵ 8 CFR §214.2(h)(7)(i)(B); 9 FAM 41.53 N20.

⁶ 9 FAM 41.53 N20.

for trainees.⁷ However, the Vermont Service Center (VSC) has affirmed a denial of an H-3 visa where there was insufficient information on the teaching staff, the proposed trainees' experience and background from the Philippines were unclear, the petitioner had not established sufficiently that the trainees would not be doing normal nursing care, and the training might have been incompatible with the petitioner's business as a recruiter of highly trained nurses.⁸

H-3 Participant in a Special Education Exchange Visitor Program

An H-3 participant in a special education exchange visitor program is a nonimmigrant entering the United States to participate in a structured program that provides for practical training and experience in the education of children with physical, mental, or emotional disabilities.⁹ The petition must be filed by 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.¹⁰

EVIDENTIARY REQUIREMENTS

H-3 Petition for Trainee

An H-3 petition is filed by the U.S. employer/petitioner directly with VSC on Form I-129 and I-129H supplement, along with a detailed supporting statement, description of the training program, and evidentiary documentation proving the petitioning company's validity.¹¹ Unlike for the J-1 nonimmigrant exchange visitor or trainee visa, the training program that is developed and administered by the petitioner does not have to be pre-approved by a third-party qualifying organization. The petition may be filed up to six months prior to the start of the training.¹² Premium processing is available for ex-

pedited processing. Further, the petition may be filed for one employee training at one or more locations with an itinerary, or for multiple employees training at the same location.¹³ Separate petitions are required if all aspects of the itinerary, training, and location are not the same.¹⁴ The prospective trainee must not have immigrant intent; he or she must have a foreign residence to which he or she intends to return.¹⁵

Conditions

Under the regulations, the H-3 petitioner must clearly demonstrate the following:

- 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 United States.¹⁶

Training Program

By regulation and by case law, each H-3 trainee petition must include a training program that:¹⁷

- 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;

POINTER: Productive employment should be kept at a minimum, because the applicant must be receiving training and not performing productive work, which may be seen as displacing U.S. citizens and legal permanent residents.¹⁸

⁷ 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).

⁸ *Matter of [name withheld]*, EAC 03 085 52660 (AAO Oct. 30, 2003).

⁹ 8 CFR §214.2(h)(7)(iv)(1).

¹⁰ 8 CFR §214.2(h)(7)(iv)(2).

¹¹ 8 CFR §§214.2(h)(1)(i), 214.2(h)(7)(i), (ii).

¹² 8 CFR §214.2(h)(9)(i)(B).

¹³ 8 CFR §§214.2(h)(2)(i)(B), (C).

¹⁴ 8 CFR §§214.2(h)(2)(i)(B), (C).

¹⁵ INA §101(a)(15)(H)(iii); 8 CFR §214.2(h)(1)(ii)(E).

¹⁶ 8 CFR §214.2(h)(7)(ii)(A).

¹⁷ 8 CFR §214.2(h)(7)(ii)(B); *Matter of Frigo*, 18 I&N Dec. 164 (Comm'r 1981); *Kurzban's Immigration Law Sourcebook* 554 (AILA 10th Ed. 2006), available at www.ailapubs.org.

¹⁸ *Matter of St. Pierre*, 18 I&N Dec. 208 (R.C. 1982).

- shows the numbers of hours that will be spent in classroom instruction and on-the-job training, respectively;

POINTER: Classroom hours should be as many as possible, to show that the petition is for training and not for work.

- describes the career abroad for which the beneficiary is being given the training;

POINTER: Document details of the job and show how the training will prepare the beneficiary in the future for this job. Show that the training will prepare the trainee for a type of work that is not available in or is new to the country where the beneficiary will work.

- 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;

POINTER: Show that this type of program does not exist in candidate's home country, that it is unique to the degree, that it does exist in the U.S. and that it is not readily available in any other country.

- and indicates the source of any remuneration received by the trainee and any benefit that will accrue to the petitioner for providing the training.

POINTER: There is no prevailing wage requirement for H-3 trainees as there is for H-1B workers; however, the trainee must earn sufficient wages or have personal funds available to prove that he or she will not become a public charge.

This article includes as an appendix a sample training program for your reference.

Restrictions on the Training Program

A training program may *not* be approved if it:¹⁹

- 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;

- is designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States;²⁰

- will result in productive employment beyond that which is incidental and necessary to the training;

POINTER: Factors such as substantial salary or a long, repetitious training program consisting primarily of on-the-job training have contributed to a finding that the training offered to a beneficiary is productive employment.²¹

- 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 non-immigrant student.

Some legitimate types of training programs may include those involving management training programs for multinational corporations, training programs that will enable clients or prospects to enter the United States to gain further exposure to a company's business (with the goal of increasing business opportunities abroad), and training joint venture partners on the company's business operations in the United States to enable them to establish similar ventures in their own country.

PETITION FOR PARTICIPANT IN A SPECIAL EDUCATION EXCHANGE VISITOR PROGRAM

The H-3 trainee petition requirements do not apply to petitions for participants in a special education exchange visitor program.²²

An H-3 petition for a participant in a special education exchange visitor program must be accompanied by:

- A description of the training program;²³
- A description of the facility's professional staff;²⁴

¹⁹ 8 CFR §214.2(h)(7)(iii); 55 Fed. Reg. 2628–29 (Jan. 26, 1990); *Kurzban's Immigration Law Sourcebook* 554 (AILA 10th Ed. 2006).

²⁰ See *Matter of Glencoe Press*, 11 I&N Dec. 764 (R.C. 1966).

²¹ *Matter of Koyama*, 11 I&N Dec. 424 (R.C. 1965).

²² 8 CFR §214.2(h)(7)(iv)(A)(3).

²³ 8 CFR §214.2(h)(7)(iv)(B)(1).

²⁴ *Id.*

- Details of the beneficiary's participation in the training program (any custodial care of children must be incidental to the training);²⁵ and
- Evidence that the beneficiary is nearing completion of a baccalaureate or higher degree in special education, or already holds such a degree, or has extensive prior training and experience in teaching children with physical, mental, and emotional disabilities.²⁶

Unlike for H-1B employees, there are no limits on the number of H-3 trainees that may enter the United States each year. However, only 50 people per year may participate in a special education exchange visitor program.²⁷ H-3 trainee petitions are valid for up to a period of two years,²⁸ whereas H-3 participants in a special education exchange program are limited to an 18-month stay.²⁹ A participant who has spent 18 months in the United States as a special education exchange visitor or 24 months as a trainee under INA §§101(a)(15)(H) and/or 101(a)(15)(L) may not seek a change or extension of status, or be readmitted to the United States under those sections unless the participant has resided and been physically present outside the United States for the immediate prior six months.³⁰

POSTAPPROVAL CONSIDERATIONS FOR THE H-3 STATUS

Consular Processing

Once an H-3 petition is approved for a foreign national who is outside the United States or is ineligible for a change of status, he or she must have a visa interview at the appropriate U.S. embassy or consulate to apply for and obtain the H-3 visa stamp.³¹ Please note that Canadian citizens are exempt from visa requirements and may present the approval notice and a valid passport at the port of

entry pursuant to the North American Free Trade Agreement,³² in order to be admitted in H-3 status.³³

Each consulate has its own requirements for additional documentation and its own instructions applicable to H-3 visas. It is helpful to review the particular requirements of the U.S. consulate where the beneficiary will be applying for the visa in advance of the application in order to obtain an estimate of the wait time for appointments as well as information about application procedures and processing times.³⁴ The attorney may wish to consider these time periods when preparing the H-3 training program and submitting the H-3 petition to U.S. Citizenship and Immigration Services (USCIS), to ensure that there is sufficient time to obtain the visa and begin training. Of course, if the foreign national is within the United States and maintaining valid nonimmigrant status, it is possible to request a change of status with the H-3 petition.

Dual Intent

As the H-3 category does not permit dual intent,³⁵ the applicant must demonstrate at the nonimmigrant visa interview that he or she will not abandon residence in a foreign country³⁶ and that he or she intends to depart the United States at the end of the training period.

An H-3 petition or visa (initial or extension) may be denied if the trainee has a certified permanent labor certification or has a Petition for Immigrant Worker filed by the same petitioner on his or her behalf.³⁷

Spouses and Children

The spouse and minor children of an H-3 nonimmigrant are granted H-4 status and may not en-

²⁵ *Id.*

²⁶ 8 CFR §214.2(h)(7)(iv)(B)(2).

²⁷ 8 CFR §214.2(h)(8)(i)(D).

²⁸ 8 CFR §214.2(h)(9)(iii)(C)(1).

²⁹ 8 CFR §214.2(h)(9)(iii)(C)(2).

³⁰ 8 CFR §214.2(h)(15)(ii)(D).

³¹ 9 FAM 41.53 N8.4.

³² North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (entered into force Jan. 1, 1994).

³³ 9 FAM 41.53 N8.3.

³⁴ Nonimmigrant visa application instructions for each U.S. embassy or consulate are available on their websites. See <http://usembassy.state.gov> for a listing of U.S. embassies, consulates, and diplomatic missions abroad, linked to their websites. Waiting times for nonimmigrant visa interviews at each U.S. embassy or consulate may be found at http://travel.state.gov/visa/temp/wait/tempvisitors_wait.php.

³⁵ 8 CFR §214.2(h)(16).

³⁶ 9 FAM 41.53 N3.2.

³⁷ 8 CFR §214.2(h)(16)(ii).

gage in employment unless they qualify for their own nonimmigrant status permitting work.³⁸

Extensions of Stay

An extension of stay in H-3 status may be granted within the two-year maximum period of stay or within the 18-month period of stay for those H-3 nonimmigrants participating in a special education program.³⁹ When an H-3 nonimmigrant has reached the end of the two-year period, it will not be possible to extend or change status or to be readmitted in an H or L status until the nonimmigrant has resided outside of the United States for a period of six months.⁴⁰ If the H-3 nonimmigrant engages in training that is intermittent in nature and training time does not amount to an aggregate of six months within one year, the two-year limit does not apply.⁴¹

Effect of a Strike

As with other H nonimmigrant categories, USCIS may deny or revoke an H-3 petition and U.S. Customs and Border Protection may refuse entry to the individual in H-3 status if there is a strike. The strike or labor dispute resulting in work stoppage must be certified by the Secretary of Labor and happen in the occupation at the place where the H-3 nonimmigrant would be trained. In the case of a strike, the training of foreign workers must have a negative effect on the wages and working conditions of workers who are U.S. citizens and lawful permanent residents for a denial or revocation to occur.⁴² If the H-3 nonimmigrant is in the United States when the strike begins, he or she is not out of status due to participation in the strike or work stoppage but must continue to comply with the terms of the H-3 petition and leave the United States when H-3 status ends.⁴³

ETHICAL CONSIDERATIONS

While the H-3 may appear at first blush to be a good option in light of the cap on the availability of H-1 visas each year, it is important for practitioners to be careful not to cross an ethical line. H-3 petitions require an employer to demonstrate that the trainee will be returning to another country to use the skills he or she gained in the United States in the training program. Therefore, an employer who uses the H-3 visa to overcome the H-1B cap problem and later wishes to file for an H-1 visa once numbers are again available may risk a determination by USCIS that the employer misrepresented its need for the H-3 visa.

CONCLUSION

A close look at the H-3 category shows that it may be used to provide a nonimmigrant solution for training in a variety of industries. A thoughtful planning effort will go far in ensuring that an effective and successful H-3 training program leading to an approved H-3 petition is realized.

³⁸ 8 CFR §214.2(h)(9)(iv).

³⁹ 8 CFR §214.2(h)(15)(ii)(D).

⁴⁰ 8 CFR §214.2(h)(13)(iv).

⁴¹ 8 CFR §214.2(h)(13)(v).

⁴² 8 CFR §214.2(h)(17)(i).

⁴³ 8 CFR §214.2(h)(17)(iii).

APPENDIX: SAMPLE H-3 TRAINING PROGRAM

During the training period, Mr. Smith will visit a variety of our residential and commercial clients in the New Jersey area as well as throughout the eastern United States. He will engage in a rotation between departments and learn the technology necessary to select, develop, install, test, and maintain security and fire alarm equipment. He also will visit manufacturers and distributors of high fire alarm equipment in the United States as well as technological exhibitions.

Duration of training and proposed dates:

12 Months

January 2, 2008, to January 2, 2009

Monday through Friday

9:30 am to 6:00 pm

Field of Training: Engineering, Architecture, and Industrial Occupations

Title: Alarm Systems Trainee

Overall Program Objective

The objective of the training schedule is to provide Mr. Smith with a foundation in electrical and computer systems, architecture, and business procedures in the alarm industry. He will learn technical, practical, and theoretical information about alarm systems for a variety of industries.

He will gain an overview of all areas related to the design and implementation of alarm systems for a variety of commercial and residential projects. The program will allow Mr. Smith to follow projects from conception to finalization. He will learn how to determine a customer's needs for an alarm system as well as the technology needed.

He will learn how to formulate a budget for projects and to work within the constraints of that budget. He will learn how to design alarm systems based on architectural requirements. He will learn safety and health procedures for the industry. During the training program, Mr. Smith will visit developers and manufacturers of alarm technology.

Upon completion of the training period, Mr. Smith will be able to successfully manage security and fire alarm systems projects in his home country, England.

On-the-Job Training Necessary in the United States

Training with Acme Alarms will provide Mr. Smith with valuable experience due to our use of state-of-the-art alarm technology. Training in the United States will provide Mr. Smith with knowledge of the project management for the design of alarm systems.

Studying alarm systems and technology in New Jersey will give Mr. Smith experience with a variety of residential and commercial spaces not commonly found in his native country. By receiving training in the United States, Mr. Smith will have the opportunity to form professional relationships with manufacturers of alarm equipment. He will be able to draw on these professional resources when he returns to England to work at his employer, Atlas Alarms. In order to manage a successful alarm systems firm abroad, it will be necessary for Mr. Smith to provide potential clients with cutting-edge design and technology. Training in the United States will allow him to return to his current employer and to compete with other firms by giving him the skills to effectively manage a variety of alarm projects for both the commercial and residential customer.

Skills and Knowledge Acquired During Training

Completion of this training program will provide Mr. Smith with the knowledge and skills he will need to manage residential and commercial alarm systems projects from start to finish.

He will gain these skills through observation of our employees. He will observe as we design systems, select technical equipment, formulate budgets, adhere to standards and codes, install systems, test and evaluate systems, engage in problem solving and interact with outside contractors such as electricians.

Skills and knowledge to be acquired during training include:

- An understanding of the design and development process
- Technical skills, including building computer networks for the systems
- Reading blueprints
- Computer-aided drafting
- Application of alarm systems technology, including standards and code requirements for residential and commercial interiors
- Evaluation, testing, and troubleshooting
- Certification requirements
- Business procedure, legal, and ethical issues

Evaluation

The Acme Alarms employees who are supervising Mr. Smith will evaluate his work in each component of training. Evaluations will include written assessments of progress as well as personal meetings with Mr. Smith to discuss concerns and gain feedback about areas where further training is needed.

Twelve-Month Training Program

Classroom-type study with our firm: January 2, 2008, to May 1, 2008

January 2, 2008, to February 29, 2008

Through observation of our company's current and previous work, Mr. Smith will study the basic graphic communication skills needed to develop alarm systems projects. He will learn to read and to develop floor plans, blueprints, specifications, and drawings used in residential and commercial design. He will learn to develop two- and three-dimensional drawing skills. Draftsman Bob Morris will review his drawings and offer feedback.

Mr. Smith will study alarm system industry publications as well as instruction manuals to learn how the technology is operated and to identify what types of equipment are appropriate for certain types of systems.

He will review files and projects to learn the organization and preparation of project documents, material, and component schedules and detailing. He will accompany me (president of the company) and our independent contractors to on-site conferences with clients to see the spaces in which we are working.

March 1, 2008, to April 1, 2008

Mr. Smith will learn how to operate and maintain high-tech equipment, including computerized switchboards and panels, alarm sound and communication systems, fire alarm devices and transformers, security cameras, temperature sensors, and motion scanners. He will be supervised by Laurie Walsh, systems engineer.

He will learn how to use the software and hardware relating to this equipment. He will be trained by Leo Hogan, computer systems engineer.

April 2, 2008, to May 1, 2008

Mr. Smith will learn about conduit systems, including conduit fabrication, as well as the designing and installing of routers and circuits. He will observe the installation of lighting systems, including outlet boxes and conductors, as well as fixtures, lamps, and controls.

He will be trained by electrician Howie Siewers.

Through tutorials and observation, Mr. Smith will learn computer-aided design (CAD) commands, two- and three-dimensional drawings, enhancement, and plotting.

On-the-job training: May 2, 2008, to January 2, 2009***May 2, 2008, to June 1, 2008***

Mr. Smith will engage in the observation of fire and security alarm systems projects developed from inception to completion. This will provide Mr. Smith with experience in meeting clients' needs, determining the design and technology necessary based on architecture, customer use, performance and budget criteria, adhering to a budget and schedule, complying with all code requirements, coordinating tradespeople and craftsmen, and installation, evaluation, and troubleshooting of systems. I will supervise Mr. Smith in this component.

June 1, 2008, to August 1, 2008

Through observation and analysis, Mr. Smith will learn to identify the types of alarm systems to best meet client requirements. He will observe as the company develops alarm systems for commercial clients in a variety of industries. He will review code requirements and discuss issues with company management and our independent contractors. He will observe and monitor project management of each system, from the planning to the installation and activation of systems. He will be trained by Jack Harper, director of sales, and Benny Marshall, project manager.

August 2, 2008, to September 1, 2008

Mr. Smith will observe and learn how to test and evaluate the performance of fire alarm and lighting systems. He will be trained by Laurie Walsh.

Through computer tutorials and observation, he will learn how software is developed for use in meeting client specifications. He will study how electronic and computer technology is designed for alarm communication, sound, lighting, and display systems.

He will be trained by Leo Hogan.

September 2, 2008, to October 1, 2008

Mr. Smith will observe how computer models can be developed for the evaluation of the effectiveness of these systems. He will be trained by Leo Hogan.

Mr. Smith will observe all fire alarm systems projects handled by the firm during his training period. He will attend regular meetings with our management and employees, clients, and independent contractors to monitor the progress of projects. I will supervise him in this aspect of training.

October 2, 2008, to November 1, 2008

Mr. Smith will observe our sales department, engineers, and me as we interview clients to determine the needs, specifications, timeline, and budget for each alarm systems project.

He will assist the company in formulating a budget for projects. He will train with Mary Moore, accountant.

Mr. Smith will attend the World Wide Alarm Expo, held annually, to meet alarm manufacturers and vendors and to view the newest available technology.

November 2, 2008 to January 2, 2009

He will assist the company in the set-up schedule for projects as supervised by Benny Marshall, project manager.

He will observe oral presentations for customers and review written proposals.

Mr. Smith will study municipal building code requirements for residential, including single-family and multi-unit sites, as well as various types of commercial sites. He will assist the company in ensuring that the requirements are met.

He will review safety and health factors and assist the company in meeting the local, state, and federal standards.

He will monitor hours worked and fees charged by tradesmen and specialty workers to ensure that projects remain within budget.

He will review good business practice and firm procedures with our company. He will learn to draft agreements for provision of professional services.