

NONIMMIGRANT OPTIONS FOR HOSPITALITY WORKERS

by Becki L. Young*

The hospitality industry (which includes accommodation, *i.e.*, hotels and lodging, and food-service) comprises about 8.1 percent of all employment in the United States.¹ Employment in the industry is predicted to grow 18 percent between 2002 and 2012, adding more than 1.6 million new jobs.²

The industry faces significant challenges in the areas of hiring, training, and retention, which include a poor image (hospitality careers are often stereotyped as low wage and entry-level with little opportunity for advancement), recruitment difficulties (the supply of available workers does not satisfy demand), high turnover, lack of language skills (many hospitality workers are not native English speakers) and training, difficulty finding workers who possess the necessary interpersonal skills, and inconsistent training models between organizations.³ The federal government has acknowledged these challenges and is working with the industry to address them; however, despite these efforts, significant labor shortages remain and are expected to endure.

Nonimmigrant Options

Many hospitality employers suffer a consistent inability to fill certain positions, particularly those for unskilled or low-skilled labor, with U.S. workers. Ironically, a sizeable pool of foreign workers is available and willing to fill these jobs, but current immigration laws provide extremely limited options to sponsor these essential workers in the hospitality industry.

This article will review some of the major nonimmigrant categories that may be used by hospitality employers to fill vacancies for essential workers at their organizations, if they can comply with the myriad rules and requirements.

Q-1 Status

To file a Q-1 petition, the employer must show that it operates an international cultural exchange program designed to provide practical training, employment, and the sharing of the history, culture, and traditions of the foreign national's home country with the American public. The program must take place in an establishment where the American public is exposed to aspects of a foreign culture as part of a structured program, it must have a cultural component that is an essential and integral part of the international cultural exchange visitor's employment or training, and the employment or training may not be independent of the cultural component of the program.

The sponsored foreign national must be at least 18 years old, qualified to participate in the program, and able to communicate effectively about the cultural attributes of the home country to the American public. Q-1 status can be requested for an initial period of 15 months and cannot be renewed.

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¹ From U.S. Bureau of Labor Statistics, see www.doleta.gov/Brg/Indprof/Hospitality_profile.cfm.

² *Id.*

³ See www.doleta.gov/BRG/Indprof/Hospitality.cfm.

This category was created at the behest of the Disney Corporation to supply workers for its international-themed EPCOT Center and is available, in theory, to private businesses. In practice, the Q-1 category is a minefield for the unwary petitioner, as significant, negative case law and legislative history exist. Practitioners considering this category for their private employer clients are advised to read the numerous administrative decisions regarding the use of the Q-1 category in the hospitality industry⁴ as well as the legislative history of the Q-1 provision,⁵ and to proceed only if their facts can be distinguished from these negative authorities.

Despite the above disclaimer, the Q-1 category has been used successfully by private hotels and restaurants when they have shown that the offered position truly involves cultural exchange with the American public, and that the cultural exchange is an intrinsic part of the offered position. Due to the nature of the classifi-

⁴ See, e.g., *In re [name not provided]*, EAC 00 172 50149, 2001 WL 34078338 (Administrative Appeals Unit (AAU) May 22, 2001), *In re [name not provided]*, 1998 WL 34057075 (Apr. 2, 1998), *In re [name not provided]*, EAC 93 208 51530, 1997 WL 33306349 (AAU Aug. 18, 1997), *In re [name not provided]*, EAC 93 208 51516, 1997 WL 33306348 (AAU Aug. 15, 1997), *In re [name not provided]*, EAC 93 049 50178 1997, WL 33306347 (AAU Aug. 14, 1997), *In re [name not provided]*, EAC 96 144 51960, 1997 WL 33306323 (AAU Jan. 23, 1997).

⁵ It is stated in the supplementary information to the current regulations at 8 CFR §214.2(q), *published at* 57 Fed. Reg. 55056, 55058 (Nov. 24, 1992): “The Q visa provision is designed to foster ‘cultural exchange.’ The statute uses precisely this term and requires that a cultural exchange program have the purpose of ‘providing practical training, employment, and the sharing of the history, culture, and traditions of the country of the alien’s nationality.’ This language suggests that Congress envisioned a sharing of culture more widespread and accessible than the private cultural exchanges suggested by the commentators. It also suggests that the culture-sharing aspect of the status is the feature distinguishing this from nonimmigrant classifications that are tied solely to employment. Based on this language, the Service has retained in the final rule the requirements that a Q cultural exchange program must have structured public activities with specific culture-sharing goals, and that the cultural exchange visitor’s employment or training must serve the cultural objectives of the program. Where training or employment is the primary reason for an alien’s visit to this country, the alien should seek a visa classification that is appropriate for temporary workers, such as H-1B, H-2B, or H-3.”

cation, positions that involve regular interaction with the public (front desk, waiters) are more appropriate for this category than behind-the-scenes positions (cooks, housekeepers).

The petitioner has the burden of showing that it has an established cultural exchange program, that it has an employee designated to administer the Q-1 program, and that it will pay the Q-1 worker in accordance with wages paid to similarly situated U.S. workers. Employers may petition for multiple Q-1 workers on a single petition, and if one of the workers drops out (or leaves early), a new worker may be substituted for the remainder of the program duration.

The Q-1 category includes a “one-year home residence requirement,” but this requirement only applies to subsequent readmission in Q-1 status. The regulations state that “any alien who has been admitted into the United States [in Q-1 status] shall not be readmitted in Q-1 status unless the alien has resided and been physically present outside the United States for the immediate prior year.”⁶ This provision does not prohibit a change of status, or readmission in any status other than Q-1.

Because the Q-1 is a nonimmigrant visa, applicants will have a strong burden to prove home country ties. If the applicant possesses property or financial assets in the home country, evidence should be brought to the interview; otherwise it is advisable to prepare items such as a list of relatives in the home country, evidence of membership in clubs or organizations in the home country, or a letter from a prospective employer in the home country offering a position upon completion of the offered position in the United States. If the applicant still lives at home, evidence of the family’s assets (family home, bank accounts, parents’ employment letters) can sometimes help.

⁶ 8 CFR §214.2(q)(2)(ii).

Also, note that the Immigration and Nationality Act (INA)⁷ does not provide derivative status for the spouse and children of Q-1 international cultural exchange visitors. Therefore, a dependent accompanying or following to join a Q nonimmigrant must obtain a B-2 visa or any other classification for which he or she is qualified.⁸

P-3 Status

The P-3 category for culturally unique performers is similar to the Q-1 category for international cultural exchange visitors in many ways. P-3 status is available for an initial period of one year (as opposed to 15 months for the Q-1), and can be extended in one-year increments. A P-3 petition can include multiple performers; note, however, that if a group includes performers and support personnel, *i.e.*, a sound technician, a separate (P-3S) petition must be filed for those support personnel.

The P-3 requires a labor consultation, which the petitioner must obtain from the appropriate union (or another labor organization or industry association, if no union exists in the field of expertise).⁹ P-3 consultations should discuss the cultural uniqueness of the beneficiary’s skills, confirm the cultural nature of the events in which the beneficiary will participate, and confirm that the event or activity is appropriate for P-3 classification. For essential support personnel, the consultation should evaluate the worker’s essentiality to and working relationship with the artist or entertainer and state whether U.S. workers are available.¹⁰ The regu-

lations indicate that no consultation is required if the petitioner can establish that an appropriate labor organization does not exist.¹¹

The P-3 category has various potential applications in the hospitality industry, in positions where workers will practice a culturally unique art in a hotel, spa, or restaurant. For example, teppanyaki chefs (who grill meat and vegetables in front of guests at Japanese steakhouses), belly dancers who perform in Middle Eastern restaurants, or Thai massage practitioners might be eligible for this classification.

Below is a chart comparing the Q-1 and P-3 categories:

Q-1 VS. P-3 COMPARISON

	P-3	Q-1
Initial duration	1 year	15 months
Extension?	Yes, in 1-year increments	No, but possible to change status
Other considerations	Must obtain labor consultation	Must pay same wage as paid to U.S. workers Must show you have an existing cultural exchange program
Premium Processing available	Yes	Yes
Multiple Workers	Only if part of a group	Yes
Substitution	Only if part of a group	Yes

F-1 Status

F-1 academic students enjoy a variety of practical training and employment options, both during and after completion of their studies.

First, F-1 students (except students in English language training programs) are eligible for practical training that they may commence after

⁷ Immigration and Nationality Act of 1952 (INA), Pub. L. No.82-414, 66 Stat. 163 (codified as amended at 8 USC §1101 *et seq.*).

⁸ *9 Foreign Affairs Manual (FAM) 41.57 N11.*

⁹ The legacy Immigration and Naturalization Service’s (INS) Operations Instructions provide a list of labor unions to be consulted in connection with H-2B petitions; this list can also prove useful in the P-3 consultation context. See INS Operations Instruction (OI) 214.2. For an in-depth discussion of the P status, see AILA’s Occupational Guidebook, *Immigration Options for Artists & Entertainers*, by visiting www.ailapubs.org.

¹⁰ 8 CFR §214.2(p)(7).

¹¹ 8 CFR §214.2(p)(7)(i)(F).

completion of one full year of studies.¹² Two primary types of practical training are available:

F-1 students in hospitality schools may have an opportunity to complete *curricular practical training* (CPT) with private employers, if such training is an integral part of the school's established curriculum. CPT must be related to the student's field of study and can be granted for alternative work/study, internship, cooperative education, or any other type of required internship or practicum that is offered by sponsoring employers through cooperative agreements with the school. Note that the student will forfeit *optional practical training* (OPT) if CPT is utilized full-time for a year or more. Students request authorization for CPT from the designated school official (DSO) at their school, and may not begin employment until receiving Form I-20 with the DSO's endorsement.

Hospitality students also may benefit from OPT with hospitality employers relating to their studies. The student must apply directly to U.S. Citizenship and Immigration Services (USCIS) for authorization to complete OPT, and may not commence employment until the date indicated on the employment authorization card issued by USCIS. The training must be related to the student's field of study. Students are eligible for OPT:

- Full-time during vacation periods and times when school is not in session.
- Part-time (maximum 20 hours per week) while school is in session.
- Full-time after completion of the course of study (or after completion of all course requirements excluding thesis or dissertation).

To apply for OPT, the student must first have the DSO endorse Form I-20, then submit the endorsed Form I-20 along with Form I-765 to USCIS. The total periods of authorization for OPT may not exceed a maximum of 12 months.

In addition to the available practical training options, students who can demonstrate unforeseen economic hardship¹³ can qualify for employment authorization, which is issued in increments of up to 12 months and can be renewed if the hardship continues. The student must have been in F-1 status for at least one year to qualify. The benefit of this category is that students can work in any field and are not restricted to their field of study (this is the only type of F-1 employment authorization that would allow a hospitality employer to hire a non-hospitality student). The difficulty is that the student must be able to prove a truly unforeseen hardship. Examples include loss of financial aid or on-campus employment without fault on the part of the student, substantial fluctuations in the value of home country currency or exchange rate, inordinate increases in tuition and/or living costs, unexpected changes in the financial condition of the student's source of support, medical bills, or other substantial and unexpected expenses.

M-1 Status

Since many vocational students, *i.e.*, students in the culinary arts, are issued M-1 visas, hospitality employers should be familiar with the provisions for employment authorization for these students.¹⁴

M-1 students are authorized for practical training only after completion of their course of study. To apply, the student must submit a completed Form I-765 and endorsed Form I-20 to USCIS within the 90-day period prior to the program end date. The DSO must certify that: (a) the proposed employment is recommended for the purpose of practical training; (b) the proposed employment is related to the student's course of study; and (c) employment comparable to the proposed employment is not available to the student in the country of the student's foreign residence.

¹² See 8 CFR §214.2(f)(10).

¹³ See 8 CFR §214.2(f)(9)(ii)(C).

¹⁴ See 8 CFR §214.2(m)(14).

The M-1 student may not begin employment until he or she has been issued an employment authorization document by USCIS. One month of employment authorization will be granted for every four months of full-time study that the M-1 student has completed, with a six-month maximum.

H-2B Status

In theory, the H-2B category should be the classification of choice for essential workers in the hospitality industry. It is available to all workers regardless of skill level, as long as they will fill jobs for which no U.S. workers are able, willing, qualified, or available. It can be used successfully for a variety of hospitality occupations, just to name a few: cooks, servers, housekeepers, and front desk agents.

H-2B status is available if the employer's need is seasonal, peakload, intermittent, or based on a one-time need.¹⁵

A **seasonal** need must be tied to a particular season of the year; the season must recur at the same time each year and is usually tied to weather patterns.

A **peakload** need is established when the employer normally employs permanent workers in the offered position, but needs to supplement those positions on a seasonal or short-term basis.

An **intermittent** need is one for which the employer has not employed permanent or full-time workers in the past, but needs temporary workers on an occasional, short-term basis.

A **one-time** need, as one might expect, is a position for which the employer has not employed workers in the past, and does not expect to employ workers in the future.

For example, if a ski resort employs ski instructors only during high season, this would be a seasonal need; if they keep their restaurant open year-round, but need more waiters during high season, this would be a peakload need. If the resort needed to bring in a technician occasionally to repair a snowmaking machine purchased abroad, this would be an intermittent need; if they hosted a competition for which they needed extra staff such as judges, security personnel, etc., this would be a one-time need.

In practice, the H-2B process is extremely cumbersome and frustrating to the average hospitality employer. In addition to being subject to a cap, which, just as in the H-1B context, is far too low to satisfy real-world demand, the H-2B has its own peculiar timing issues that render it irrelevant for many hospitality employers who need to fill seasonal needs (or peakload needs based on seasonal fluctuations).

The H-2B petitioning process involves two steps: first, a labor certification application (like a mini-PERM application) at the Department of Labor (DOL), first at the state level and then at the federal level; and second, an I-129 petition with USCIS. The labor certification application may not be filed more than 120 days, nor less than 60 days, prior to the date of the intended need; the I-129 petition may be filed up to six months prior to the requested start date.

The H-2B category is subject to a cap of 66,000 per year, with 33,000 numbers available during the first six months of the fiscal year (FY) (October 1-March 31) and the remaining 33,000 numbers available during the second half of the fiscal year (April 1-September 30). In theory, hospitality businesses with a winter season (such as ski resorts) would apply for their H-2Bs in the fall, and hospitality businesses with a summer season (such as beach resorts) would apply for their H-2Bs in the spring. In practice, when these businesses request H-2B numbers in accordance with their seasons, they often lose out to the cap. Here's why:

¹⁵ See the Department of Labor's (DOL) General Administration Letter (GAL) No. 1-95, "Procedures for H-2B Temporary Labor Certification in Classification: ES/Nonag.," 60 Fed. Reg. 7216 (Feb. 7, 1995), published on AILA InfoNet at Doc. No. 95020730 (posted Feb. 9, 1995).

Take the example of a summer resort that has a high season of April 1 to September 30. Because DOL will not accept an H-2B application more than 120 days prior to the start date of the anticipated need, the earliest this business can submit its H-2B application to DOL is December 1. However, even if the application moves through the DOL phase at lightning speed, based on past year statistics, the employer still may miss the cap at the USCIS phase. For example, the cap for the second half of FY 2008 (beginning April 1, 2008) was reached on January 2, 2008, which means that an employer with a need beginning April 1, 2008, would have needed to complete the H-2B certification process in one month (a nearly impossible feat) in order to receive an elusive H-2B number.

The explanation for this unfortunate situation is that employers with seasons starting earlier than April (say January) already will have taken the available H-2B numbers. An employer whose season starts January 1 would be eligible to start the DOL process 120 days ahead of the start date of the intended need, or September 1. If that employer completes the DOL phase quickly (in one month), it will be able to submit its I-129 petition on October 1, the earliest date possible for an April 1 start date (since USCIS will only accept petitions six months ahead of time). Such employers with unusual seasons stand the best chance of getting their H-2B petitions accepted under the cap, but this is a bitter-sweet victory, because they will still lose out on the first few months of the need that they must demonstrate in order to qualify for the H-2B category in the first place. Although they must prove a need beginning in, *i.e.*, January, to get a number under the cap, they will not be able to employ the H-2B workers until April!

The problem is that most hospitality businesses have high seasons (April to September, October to March) that are relatively set in stone, and thus are unable to document a season starting in (approximately) July or January, which is often what is required to get a cap number in the current system. The DOL requires voluminous

documentation of the employer's seasonal need (such as payroll records, monthly revenue statements, etc.), so employers will find little flexibility in these draconian timing requirements.

E Status

E visa status is for treaty traders or investors from countries with which the United States has an investment treaty in place. Although few essential workers are likely to qualify as treaty traders or investors themselves, the E visa provisions allow a qualified foreign national who owns a business in the United States (the treaty trader or investor) to hire essential employees, supervisors, and managers from their home country; these provisions could substantially benefit certain essential workers.

To determine whether a worker qualifies for E status, several questions must be addressed:

- *Is there a treaty?* The threshold inquiry for an E visa application or petition is the existence of an investment treaty between the United States and the worker's home country. A list of existing treaties is available in the Department of State's (DOS) *Foreign Affairs Manual* (FAM).¹⁶ As an example, countries that have treaties include: Bolivia, Chile, Colombia, Ecuador, Honduras, Jamaica, Mexico, Panama, Paraguay, and the Philippines. Countries that do *not* have treaties include India, Russia, Peru, El Salvador, Guatemala, China, Vietnam, and Nicaragua.
- *Does the U.S. business possess the same nationality as the sponsored worker?* The U.S. business must be at least 50 percent owned by nationals of the treaty country, who do not possess U.S. citizenship or legal permanent resident status. The most straightforward case is when a company that is already qualified (or will qualify) as an E treaty trader or investor wishes to hire an employee

¹⁶ See 9 FAM 41.51 Exhibit 1.

from the home country. Sometimes, however, an employee who is a citizen of a treaty country may seek out a qualifying employer, and may approach counsel for recommendations. Although no “master list” of qualifying E treaty companies exists, word of mouth among friends and co-workers, and inquiries with local ethnic/cultural organizations sometimes prove fruitful. Some foreign missions also keep data on U.S. businesses owned by their citizens; for example, the French Trade Office offers a list of French-owned businesses in the United States for about \$400 (although not all of the businesses on such a list necessarily qualify as E treaty companies, it may be a good place for a worker who is seeking E visa sponsorship to start).

- *Is the offered job supervisory, or one requiring essential skills?* While “supervisory” is self-explanatory, whether a job is “essential” requires analysis. DOS’s definition of essential involves a two-part test: first, that the employee’s skills are needed by the enterprise, and second, that the employee’s skills are specialized. Factors to be considered in determining specialized skills include: the experience and training required to perform the offered job, the details of the offered job, the offered salary, the alien’s degree of expertise, the uniqueness of the required skills, and the availability or unavailability of U.S. workers. In addition to proving that the offered position is supervisory or essential, the employer must also establish the duration of need, either short term, *i.e.*, one or two years, or long term (on an ongoing basis). Although the “essential employees” category is normally reserved for specialists, in some cases ordinary skilled workers can qualify, usually when their services are required at

the start up of a business, or to train U.S. workers.¹⁷

If a treaty exists, the worker in question possesses the treaty country nationality, and the offered job requires specialized skills, E classification could be a good choice for some essential workers in the hospitality industry. This category can be used for all sorts of specialized/supervisory positions in restaurants and hotels, for example: specialty chef, front desk supervisor, restaurant supervisor.

The most important practice point to remember about the E visa category is that it lies primarily within the jurisdiction of DOS rather than the Department of Homeland Security. Although it is possible to file a petition to classify someone as an E worker within the United States, as a general rule, it is advisable to process E visas at overseas consular posts whenever possible, even if the foreign national is already present in the United States. Each consular post has special processes and procedures that E visa applicants must follow. Practitioners are advised to consult the post’s website to ascertain whether any special procedures apply (or to contact the post directly, if the procedures are not posted online). Be aware that E visa processing can be relatively quick (several weeks) or very lengthy (several months). Also, for E visas, the DOS’s regulations (and the FAM) are a much better reference point than are the USCIS regulations.

H-1B Status

The H-1B category is of limited value for essential workers in the hospitality industry for various reasons: it applies only to specialty jobs that require a bachelor’s or higher degree, the filing fee is sky-high, and, due to the annual cap, it requires more advanced planning than is usually possible for most positions filled by essential workers. Nonetheless, it is important to bear in mind the three-for-one equivalency pro-

¹⁷ 9 FAM 41.51 N13.

visions,¹⁸ which provide that a worker may achieve bachelor's equivalency by substituting three years of employment experience for every missing year of a four-year bachelor's degree (thus bachelor's degree equivalency could be found for a worker with 12 years of experience and no degree, nine years of experience and one year of study, six years of experience and two years of study, or three years of experience and three years of study).

If you can obtain an expert opinion confirming that the worker possesses the equivalent of a bachelor's degree, you still must meet the second hurdle, which is proving that the job itself requires a degree. In the hospitality industry, this is normally limited to management positions and some specialized financial or administrative jobs.

It is important to note that some universities in the United States offer bachelor's degrees in hospitality subjects and therefore occupations such as Food and Beverage Manager, Front Desk Manager, Reservations Manager, or Executive Chef may qualify as specialty occupations if the employer in fact requires a degree or its equivalent. The hospitality field can be considered to be "in transition" with regard to H-1B visas, because more and more, high-level employers are requiring bachelor's degrees for managerial positions.

B-1 in lieu of H Status

The FAM outlines the criteria for B-1 in lieu of H status.¹⁹ This status is only available to an individual who remains on a foreign payroll, and who otherwise qualifies for H-1B or H-3 status (note that there is no category for "B-1 in lieu of H-2B"). The benefit of the B-1 in lieu of H category is that it avoids the cumbersome petition process at USCIS and therefore can be quite speedy; in the H-1B context, it also avoids the burdensome cap and the necessity of applying months ahead of the anticipated need.

One important point: in the case of B-1 in lieu of H-1B, consular posts normally require an actual degree rather than its three-for-one equivalent, which may put this classification out of reach for many essential worker candidates. Also, applicants in this category will still need to prove strong home country ties, and will not enjoy the dual-intent nature of the H-1B category.

As an example, a foreign restaurant chain sending an executive or manager to set up a new restaurant and train U.S. staff might be able to avail itself of the B-1 in lieu of H-1B category.

J-1 Status

The J-1 classification is widely used by the hospitality industry. The most common categories of J-1s applicable to hospitality workers are the trainee and intern categories. J-1s are not subject to a specific cap or annual limitation, so they are available throughout the year. One of the primary benefits of J-1s is that they are administered by private sponsors rather than by the federal government—meaning, among other things, that if you have a problem or question you can pick up the phone and get in touch with a live person in the program sponsor's office. Each sponsor has its own rules and requirements (for example, some sponsors will not process J-1 trainees who are under age 20, some require a police certificate, etc.); it pays to familiarize yourself with the different sponsors' requirements so you can select the one most appropriate for your client.

Although the J-1 category does not impose a maximum age, interns (who must be currently enrolled students or have completed a program of study within the past year) tend to be in their early 20s, and trainees (who must have a relevant degree plus one year of experience, or five years relevant experience) tend to be in their twenties or early thirties. Some consular posts are under the misimpression that an "age limit" of 30 (or some other random number) exists for the J-1 trainee category; this is simply untrue. Even a worker with several decades of experience could qualify for J-1 status if the employer can offer training that is new and different from

¹⁸ 8 CFR §214.2(h)(4)(iii)(C).

¹⁹ 9 FAM 41.31 N11.

what the worker has been doing, and which will benefit the worker's career abroad; however, the employer has a strong burden to prove that the offered training is legitimate in such a case.

An important distinction exists between training in "hospitality" versus training in "management." The former category is subject to a 12-month limit; the latter category is available for up to 18 months. While some program sponsors limit all training for hospitality workers to 12 months in duration regardless of the contents of the training, other sponsors will approve 18-month programs for individuals training in hospitality management, *i.e.*, hotel management, restaurant management.

Most J-1 training program sponsors will not authorize a trainee or intern to change status in the United States from another nonimmigrant status to J-1, so J-1s normally must apply for visas at an overseas consular post. J-1s have a very high burden to prove nonimmigrant intent, which is often complicated by the fact that they are young and thus have not accumulated significant assets in their home country.

Attorneys should also take care to educate their clients (both trainee/intern and host site) regarding the J-1 category, which is intended for training, not employment. In the J-1 context, the foreign national is a trainee or intern, not a worker; he or she is coming to train and learn, not to work. Although improving English language skills is an important goal for many J-1 trainees and interns, the primary purpose of the visit to the United States must be to obtain occupational training, not to learn English. To qualify for a J-1 visa, the trainee/intern must already possess sufficient English language skills to complete the training/internship. Thus, it is best for the applicant to refrain from mentioning a desire to learn English in either the J-1 application or the consular interview, and instead focus on the substance of the training.

Another important consideration to keep in mind when utilizing the J-1 category is the two-

year home residence requirement.²⁰ J-1 trainees and interns can sometimes be subject to this requirement based on the skills list (a list negotiated between the U.S. government and the home country government which details the types of workers needed in the home country; J-1s whose occupations are included on this list will be obliged to return home for a minimum of two years after completing their program in the United States).²¹ If you are processing a J-1 application, it is critical to check the skills list first to confirm whether the client will be subject to the two-year home residence requirement (so that, if the client objects to this requirement, an alternative classification may be found). The skills list categories that most often apply to hospitality workers are: 1G (tourism and travel), 9A (business administration), 9B (international business), and 9P (hotel and motel management). As an example, some of the countries for which category 1G (tourism and travel) is included on the skills list include Brazil, Colombia, Ecuador, El Salvador, Guatemala, and Paraguay.

H-3

Employers may consider the H-3 category for trainees as another possibility for essential workers. This classification has been used successfully by hotels, restaurants, and other hospitality businesses for a variety of training positions. It is important to keep in mind that the H-3 trainee may not engage in productive employment (other than that which is incidental and necessary to the training program), so the H-3 trainee cannot be used to fill a job that would otherwise be filled by a U.S. worker, and adequate supervision must be provided. Furthermore, to obtain approval of an H-3 petition, the petitioner must demonstrate that the offered training is unique to the United States and will benefit the trainee's career in the home country.

²⁰ INA §212(e).

²¹See http://exchanges.state.gov/education/jexchanges/participation/skills_list.pdf.

A classic example would be a multinational hotel or a restaurant company that wishes to send an employee to the United States to learn about American management methods and techniques and gain exposure to American customs and culture, and that intends to employ the worker in the foreign operations after completion of the training.

Below is a chart comparing the J-1 and H-3 categories:

J-1 VS. H-3 COMPARISON

	J-1	H-3
Maximum duration	1 year for hospitality trainees, 18 months for management trainees	2 years
Extension?	No, but possible to pursue other statuses; also eligible for a second period of J-1 training after spending at least two years outside the U.S.	No, but possible to change status if the full two years of H-3 status have not been exhausted
Other considerations	Filed with private training program sponsor so can avoid USCIS Must be aware of two-year home residence requirement	Can't engage in productive employment Training must be unavailable in home country, and benefit trainee's career upon return home
Premium Processing available	n/a – filed with private training program sponsor (note that processing times vary widely by program sponsor)	Yes

Like the J-1, the H-3 category is not subject to an annual cap or limitation. When applying for an H-3 visa, the prospective trainee will be required to make a strong showing of nonimmigrant intent. Also, the regulations impose a six-month home residency requirement on H-3

trainees who spend a full two years in the United States in H-3 status.²²

Spouses – E, L, J

Hospitality employers should remember that spouses of E, L, and J workers are eligible to apply for unrestricted work authorization. Such work authorization generally takes several months to process and is valid for the duration of the principal's status. Because couples in the hospitality industry often travel and work together, this can be an important benefit for such workers and their employers.

Conclusion

This article has reviewed a variety of non-immigrant categories that may apply to essential workers in the hospitality industry. While none of these categories may be a perfect match in a given situation, with an in-depth knowledge of the current laws and a little creative thinking, practitioners should be able to assist hospitality employers and their workers in obtaining the maximum benefit from the existing paradigm. Of course, employers, employees, and practitioners should continue to advocate for much needed change and expansion of these existing categories as well as new solutions for this critical segment of our workforce.

²² 8 CFR §214.2(h)(13)(iv).