



E3 OVERVIEW

Established by the READ ID Act of 2005, the E3 visa category was created for Australian professionals entering the United States to perform services in a specialty occupation.

While the E3 visa category has similar characteristics to the H1B visa category, there are significant differences between the two classifications. The E3 visa category is similar to the H1B visa category in that the category is subject to an annual numerical limitation of 10,500; the E3 visa category requires the employer to obtain a certified Labor Condition Application (LCA) and requires that the E3 national be employed in a specialty occupation in the United States with a United States sponsoring employer. However, the methods for securing an E3 visa and the nonimmigrant intent issues for the E3 vary from the H1B visa category. In addition, spouses of E3 visa holders may apply for and receive employment authorization. Premium processing is also not available for the E3 visa category.

The below overview addresses:

- Summary and Scope of E3 Nonimmigrant Visa
- Younossi Law's Processing Steps for E3 Applications
 - Consulate Applications
 - USCIS Petition filings
- When can the E3 Employee Be Placed on Payroll?

SUMMARY AND SCOPE OF E3 NONIMMIGRANT VISA

ELIGIBILITY:

The E3 category is designated for Australian national employees coming to the United States to perform services in a specialty occupation (temporary professional workers). A "specialty occupation" means an occupation that requires:

- A theoretical and practical application of a body of highly specialized knowledge AND
- Attainment of at least a bachelors degree (or equivalent) in the specialty.

If an occupation requires state licensure (ie: pharmacist or architectural license, etc), the E3 candidate must demonstrate that he has full state licensure to practice in the occupation.

In order to qualify for E3 status, the foreign national must meet the following criteria:

- Be a national of Australia (Australian citizen in possession of an Australian passport);
- Possess a legitimate offer of employment in the United States;
- Possess the necessary academic or other qualifying credentials; and
- The E3 position must qualify as a specialty occupation.

ANNUAL NUMERICAL LIMITATION:

Congress has established a yearly cap of 10,500 new E3 workers. For purposes of the cap, “new E3 workers” are those who:

- Coming from abroad, are admitted initially in E3 classification
- Those who change their nonimmigrant status to E3 classification
- Those who change employers while in E3 status.

AUTHORIZED PERIODS OF STAY:

The E3 nonimmigrant status is initially granted for no more than two (2) years at a time. Extensions of stay may be granted indefinitely in increments of not to exceed two (2) years. While there is no stated limit on the number of years an E3 visa holder can stay in the United States, the longer one remains in the U.S. in E3 status, the less likely U.S. immigration officials will deem that the E3 applicant has no immigrant intent.

NO DUAL INTENT:

The E3 nonimmigrant visa is a strictly nonimmigrant intent visa. As such, E3 employees may NOT have immigrant intent while they hold E3 status in the United States which impacts the ability to pursue permanent residency while in E3 status. Consequently,

port-of-entry or consulate officers reviewing an applicant's E3 eligibility may also review the "temporariness" of the E3 position and period of E3 stay by making sure the E3 assignment in the U.S. will end at a "predictable time" and that the E3 employee will depart the U.S. upon the completion of the assignment.

While E3 employees are not specifically required to maintain a foreign residence while in E3 status, E3 employees must satisfy the consular officer that he or she intends to depart upon termination of status. As such, the maintenance of such a residence or other significant ties to the home country can be a criteria for port-of-entry or consulate officers to review in determining the immigrant intent of a E3 applicant.

EMPLOYER SPONSORSHIP:

E3 status requires a sponsoring U.S. employer. Once an employer indicates they wish to pursue sponsorship of an E3 visa on behalf of a candidate, the employer should notify Younossi Law so that relevant fact gathering information may be sent both to the employer and the E3 candidate.

SPOUSES AND DEPENDENT CHILDREN UNDER AGE 21:

The spouses and dependent children under age 21 are eligible for dependent E3 status. Spouses and dependent children of E3 visa holders are not subject to the E3 visa numerical limitation and need not be Australian nationals.

E3 spouses are also eligible to apply for an Employment Authorization Document (EAD) card based on their E3 status. This work authorization eligibility does not apply to E3 children.

YOUNOSSI LAW'S PROCESSING STEPS FOR E3 APPLICATION FILINGS

E3 APPLICATIONS AT THE CONSULATE: For E3 applications that will be presented for consulate adjudication, below is an outline of Younossi Law's processing of the application.

- **Step 1-- Initiation & Fact Gathering:** Upon employer's request to initiate an E3 petition, Younossi Law will send out fact gathering information to the employer and E3 candidate.
- **Step 2-- Labor Condition Application (LCA):** Upon receipt of completed fact gathering documents, Younossi Law will prepare a Labor Condition Application

(LCA) which is filed with the Department of Labor. The LCA will later be included in the E3 Visa Application package the E3 candidate presents to the consulate. Younossi Law will prepare the LCA based on the information provided by the employer with respect to worksite, job description, job requirements and offered wage. In the LCA, the E3 employer must attest that wages offered to the E3 employee are at least equal to the actual wage paid by the employer to other workers with similar experience and qualifications for the job in question, or alternatively, pay the prevailing wage for the occupation in the area of intended employment, whichever is greater. Younossi Law will review available prevailing wage data and discuss any potential issues with the employer before finalizing the LCA and sending it to the employer for posting.

The E3 employer is required to post the LCA at two conspicuous locations at the worksite for a period of at least 10 days. Once the E3 employer confirms that the LCA has been posted at the worksite, Younossi Law will submit the LCA to the Department of Labor (DOL) for certification. DOL processing is approximately seven (7) days.

- Step 3-- Sending Documents to Employer for Signature: For E3 candidates that will be applying for the E3 visa at the consulate, Younossi Law will prepare an E3 Visa Application package and forward the package to the employer for signature. Once the LCA has been certified by the DOL, Younossi Law will forward the certified LCA and E3 Application paperwork to the employer for signature. The E3 Application paperwork will describe the E3 employer, the offered position, and the E3 employee's background and qualifications for the position. Once the employer signs the documentation, the E3 Visa Application package can be sent by the employer to the E3 candidate.

Younossi Law will also forward to the employer a Public Access File (PAF) in connection with the LCA along with instructions for recordkeeping requirements. The regulations require that the E3 employer make available for inspection certain documentation in connection with the LCA--Younossi Law provides this required documentation to the E3 employer in the form of a PAF which must be retained by the employer for at least one year beyond the end date listed on the LCA or for at least one year after the termination of employment of the E3 employee---whichever occurs earlier.

By signing the LCA, the E3 employer attests that: (1) the prevailing wage rate for area of employment will be paid to the E3 worker; (2) the working conditions of E3 position will not adversely affect conditions of similarly employed American workers; and (3) the place of E3 employment is not experiencing labor disputes involving a strike or lockout.

- **Step 4-- The E3 Candidate Applies for the E3 Visa at the Consulate:** Upon receipt of the E3 Visa Application package, the E3 candidate will need to apply for an E3 visa stamp to be placed in his passport at a U.S. consulate. The E3 visa stamp application process will vary per consulate, but typically entails an appointment be made with the consulate, submission of Form 160 (or Form DS 156 and DS 157 for consulates that still use these versions of the forms---applicants should check directly with the consulate as to which form is required by the particular consulate) as well as an in-person interview. Photo requirements, payment of visa fees, as well as passport validity requirements will also apply as with any visa stamp application. Visa issuance timeframes also vary by consulate.

Upon issuance of the E3 visa stamp, the E3 candidate can enter the United States in E3 status and commence employment with the U.S. petitioning employer. At entry, the port-of-entry officer will issue the E3 applicant a Form I-94 Arrival and Departure Record (I-94 card) which indicates E3 status, the date of entry, and the date of expiration of the E3 status. It is key that the E3 applicant forward Younossi Law a copy of the I-94 card after each entry or at least advise Younossi Law of each re-entry into the U.S. so that status and expiration dates may be accurately tracked for employment authorization and status purposes.

E3 PETITION FILINGS WITH USCIS: For E3 candidates already in the United States or individuals already in E3 status seeking to extend their stay or change employers, an E3 petition filing may be submitted to USCIS. Below is an outline of Younossi Law's processing of the application.

- **Step 1-- Initiation & Fact Gathering:** Upon employer's request to initiate an E3 petition, Younossi Law will send out fact gathering information to the employer and E3 candidate.
- **Step 2-- Labor Condition Application (LCA):** Upon receipt of completed fact gathering documents, Younossi Law will prepare a Labor Condition Application (LCA) which is filed with the Department of Labor. The LCA will later be submitted with the E3 petition filing. Younossi Law will prepare the LCA based on the information provided by the employer with respect to worksite, job description, job requirements and offered wage. In the LCA, the E3 employer must attest that wages offered to the E3 employee are at least equal to the actual wage paid by the employer to other workers with similar experience and qualifications for the job in question, or alternatively, pay the prevailing wage for the occupation in the area of intended employment, whichever is greater. Younossi Law will review available prevailing wage data and discuss any potential

issues with the employer before finalizing the LCA and sending it to the employer for posting.

The E3 employer is required to post the LCA at two conspicuous locations at the worksite for a period of at least 10 days. Once the E3 employer confirms that the LCA has been posted at the worksite, Younossi Law will submit the LCA to the Department of Labor (DOL) for certification. DOL processing is approximately seven (7) days.

- Step 3-- Sending Documents to Employer for Signature: Once the LCA has been certified by the DOL, Younossi Law will forward the certified LCA and E3 petition paperwork to the employer for signature. The E3 petition paperwork will describe the E3 employer, the offered position, and the E3 employee's background and qualifications for the position.

Younossi Law will also forward to the employer a Public Access File (PAF) in connection with the LCA along with instructions for recordkeeping requirements. The regulations require that the E3 employer make available for inspection certain documentation in connection with the LCA---Younossi Law provides this required documentation to the H1B employer in the form of a PAF which must be retained by the employer for at least one year beyond the end date listed on the LCA or for at least one year after the termination of employment of the E3 employee---whichever occurs earlier.

By signing the LCA, the E3 employer attests that: (1) the prevailing wage rate for area of employment will be paid to the E3 worker; (2) the working conditions of E3 position will not adversely affect conditions of similarly employed American workers; and (3) the place of E3 employment is not experiencing labor disputes involving a strike or lockout.

- Step 4-- Filing the E3 Petition with USCIS: Once Younossi Law receives the signed LCA and E3 petition paperwork from the employer, the LCA and E3 petition are filed with the USCIS Vermont Service Center. USCIS processing time is approximately 3-4 months and longer if USCIS issues a Request for Evidence (RFE).

*****PREMIUM PROCESSING UNAVAILABLE FOR E3 CATEGORY***:** E3 classification has **not** been added as a visa classification eligible for premium processing. As such, employers should anticipate this government processing time when planning hiring dates for the candidate.

WHEN CAN THE E3 EMPLOYEE BE PLACED ON PAYROLL?

The E3 employer should consider the following when deciding when to place an E3 employee on payroll:

- The E3 employer cannot commence the E3 employee's employment before the start date of the labor condition application (LCA) and the E3 petition. This includes any mandatory orientation programs for which the employee's presence is required.
- Pursuant to Department of Labor (DOL) regulations (20 CFR 655.731(c)(6)) below are the timeframes in which an E3 Employee must be placed on payroll:
 - If the E3 employee is coming to the United States from abroad in E3 status, the employee must be placed on payroll on the date that he presents himself for employment or by the 30th day after entry in the U.S. in E3 status (whichever is earlier).
 - If the E3 employee is in the U.S. and a change of status has been applied for, the employment relationship may **not** commence until the effective date of the change of status. From that date, the employment must commence on the date that the employee presents herself as ready for employment or by the 60th day after the effective date of the change of status to E3 (whichever is earlier).
 - If the E3 employee is already in E3 status with another employer and an E3 Change of Employer petition has been filed, the employment relationship may **not** commence until the effective date of the change of employer petition. From that date, the employment must commence on the date that the employee presents herself as ready for employment or by the 60th day after the effective date of the change of status to E3 (whichever is earlier). The H1B portability provisions allowing an H1B employee to change employers prior to the approval of the USCIS petition do **NOT** apply to E3 Change of Employer petitions.
 - If the E3 employee is already in E3 status and an E3 Extension of Stay petition is filed by current E3 employer, the E3 Extension of Stay petition must be approved prior to the expiration of the current period of authorized stay to avoid a lapse in work authorization. The rule allowing 240 days of work authorized stay as long as a timely extension petition is filed with USCIS does not apply to E3 Extensions of Stay. As such, E3 employers filing extensions should aim to file six (6) months in advance of

expiration to allow ample time for USCIS adjudication. As referenced above, premium processing is not available for the E3 visa category. If the E3 extension petition is still pending when the current E3 status expires, the individual must be taken off payroll until the petition is approved.

* * *

Should further questions arise regarding E3 classification, please contact the immigration professional at Younossi Law with whom you usually work to discuss. Should questions arise regarding E3 and LCA compliance, employers should contact Younossi Law to discuss and resolve such issues. Employers should also contact Younossi Law regarding terminations and resignations of E3 employees so that timely notification to the relevant government agencies can be prepared and submitted.