

## Hiring Highly Skilled Foreign Grads

### *Beating the H-1B Cap*

By Colleen Caden

On April 1, 2010, the United States Citizenship and Immigration Service (“USCIS”) began accepting H-1B Specialty Occupation visa petitions. The H-1B is the work visa most commonly used by employers to hire highly skilled foreign workers. Since the H-1B filing season is historically brief, employers and their counsel are now preparing to file H-1B petitions on behalf of employees to ensure that work authorization is secured.

#### **THE PROGRAM**

The H-1B program is used to employ foreign workers in professional positions that require at least a bachelor’s degree education or its equivalent, e.g., architects, engineers, scientists and computer programmers. There are 65,000 H-1B visas available each fiscal year. An

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**Colleen Caden**, a partner in Pryor Cashman, LLP, has experience in all aspects of immigration and nationality law and ensuring compliance with immigration laws, U.S. Department of Labor regulations and the U.S. Citizenship and Immigration Services programs.

additional 20,000 H-1B visas are available to foreign workers who possess a master’s degree or higher from a U.S. university. H-1B petitions are valid on Oct. 1, the start of the fiscal year, and USCIS began accepting petitions on April 1, 2010.

For the first time since 2003, H-1B visas remained available from April 1, 2009 through Dec. 21, 2009. In the strong economy of years past, the coveted H-1B visas were in such high demand by U.S. employers that they were exhausted on or immediately after April 1. The USCIS then engaged in a lottery process to select the H-1B petitions to be adjudicated.

With a limited availability of H-1Bs and uncertainty as to how quickly they will be exhausted in this turbulent economic environment, employers and their counsel are strategically planning for the coming weeks.

#### **PRACTICE POINTS**

The following practice points are worth noting:

##### ***Job Requirements***

The H-1B requires that the duties of the job offered

require skills and a body of knowledge acquired through a university education, or its equivalent, in a field of study related to the position. If the foreign national possesses a foreign degree or is relying upon a combination of education and work experience, it is necessary for the degree and/or work experience to be evaluated by a professional evaluation service. Also, if the foreign national’s degree is not obviously related to the position, the employer should provide an explanation of how the specific course of study relates to the execution of the job duties.

##### ***The Labor Condition Application***

Employers are required to obtain an approved Labor Condition Application (LCA) from the United States Department of Labor (DOL) which had to be filed with the H-1B petition on April 1, 2010. The LCA is an attestation made by the employer to the DOL concerning wages and working conditions. With regard to wages, the employer is required to pay the “required salary,” which is defined as

being the higher of the prevailing wage or the offered wage, i.e., actual wage offered to the foreign national. The salary may not include bonus or fringe benefits.

It is important to note that LCAs may take up to seven calendar days to be approved by the DOL. Employers and counsel should consider this potential delay when preparing H-1B petitions for filing with the USCIS.

#### ***USCIS Fees***

The USCIS fees for each H-1B petition include:

- A base filing fee of \$320;
- An Education and Training fee of \$1,500 (or \$750 for employers with fewer than 25 full-time employees);
- A Fraud Prevention and Detection fee of \$500; and
- If the employer deems necessary, a \$1,000 “premium processing” fee to ensure the petition’s adjudication in 15 calendar days.

#### **CONCLUSION**

The H-1B is the employment visa of choice because it provides flexibility to hire skilled professionals who have not previously worked for the employer. The H-1B visa classification also enables employers to sponsor talented employees for green cards to remain in the U.S. permanently.