The Immigration Consequences of Mergers and Acquisitions[1]

OVERVIEW

When companies merge or are acquired, the focus is often on dollars and cents of blockbuster deals, but what is often ignored until after the deal is completed is the fate of the workers who are now employed by a different legal entity. The problem is accentuated when the affected workers are foreign nationals. From I-9 issues to the loss of valid immigration status, the consequences of ignoring immigration laws are real and tangible. A company's failure to give credence to immigration issues which arise as a result of its corporate restructuring could have dire results for both the foreign nationals employed by the company (some of whom may be in supervisory and essential positions) and for the company through penalties, fines and loss of its critical employees. Only by understanding the immigration issues associated with mergers and acquisitions before the deal is finalized can employment eligibility compliance and proper nonimmigrant status be maintained.

INTRODUCTION

The form that a corporate restructuring may take are many, and with each restructuring method comes certain immigration consequences that counsel must be aware of in order to fulfill their due diligence with respect to the transaction. The major corporate changes that carry potentially costly immigration consequences are stock acquisitions, asset purchases, mergers, and consolidations. Depending on the size of the business, the character of the workforce (e.g., low-skilled hourly labor; professionals in STEM occupations), and the industry in which the company operates, counsel should consider the repercussions of different transaction strategies on the company's bottom line if immigration problems were to arise. Ultimately, it is far less expensive to take the time and be proactive about immigration problems rather than deal with the repercussions of noncompliance. This article will briefly discuss strategic implications of an asset purchase versus a stock acquisition, followed by an overview of I-9 compliance issues. After discussing I-9 compliance, the article will address the effect of corporate transactions on the most prevalent nonimmigrant visa categories. We will close with a discussion of the costly and time consuming process of sponsoring foreign workers for Legal Permanent Residence, and the pitfalls that may present themselves in a pending corporate transaction as a result of said sponsorship.

It is critical to remember that despite the increasing reliance on technology to assist with the daily operations of a corporation, the beating heart of any business is its employees, from the low skilled laborer all the way up to the global executive. Immigration compliance primarily concerns individuals (foreign national workers in particular), and the impacts that large scale corporate restructuring can have on these individuals, and ultimately on the bottom line of any business in the United States.

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ASSET PURCHASE V. STOCK ACQUISITION

Most acquisitions fall into one of two camps – either a stock purchase or an asset purchase. With respect to immigration matters, the decision to pursue a stock purchase may be a double-edged sword. One the one hand, proceeding with a stock purchase, and thus not altering the legal entity, will allow the buyer to easily assume the role of a successor-in-interest for immigration purposes and take advantages of certain flexibilities with respect to continued sponsorship of foreign nationals. On the other hand, stock purchases also carry with them an assumption of all liabilities (disclosed and undisclosed) of the selling entity, including, importantly, those associated with immigration compliance.

The consequences of unknowingly inheriting the seller's liabilities for immigration noncompliance may be very costly and may interrupt the business of the seller if these issues come to light upon purchase of the corporate entity. The issues which can be inherited from the existing entity upon purchase are numerous, and can include liability for improperly completed I-9 forms, prior regulatory violations, and sponsorship obligations.

In the case of asset purchases, the obligations of the buyer are often very different from those associated with a stock transition. Although asset transfers often may come with a higher price tag as a result of transfer costs and taxes, existing liabilities, such as the ones mentioned above, do not necessarily transfer to the buying entity. Although an asset transfer may limit the liabilities assumed by the purchaser, doing so also makes it more difficult for the new entity to demonstrate that it is a qualifying successor-in-interest for immigration law, and thus complications may arise with respect to the continued sponsorship of the purchased entity's foreign national employees.

Once the form of the transaction has been determined, counsel should have a few issues at the forefront: the seller's (or merge target's) compliance with I-9 workforce immigration requirements; the impact of the transaction on the seller's foreign national employees (as well as the costs and efforts associated with maintaining same); and the potential for penalties and costs associated with maintaining compliance with relevant immigration laws.

I-9 COMPLIANCE

As mentioned above, a stock acquisition will result in the buying entity assuming all of the seller's liabilities, both known and unknown. Because of the potential for massive noncompliance issues, counsel for the purchasing entity must be sure to review the seller's I-9 records to determine potential exposure and take appropriate corrective steps. Such a review may be achieved either through a spot audit of the seller's I-9 policy and compliance, or by conducting a thorough review of all of the selling entity's employees' I-9s. Depending on the size of the newly created entity, a full I-9 audit is can be both costly and time-consuming. Therefore, a good starting point for I-9 review should be via spot check, along with a review (in conjunction with an experienced immigration attorney) of the selling entity's I-9 policies. Reviews of this nature are usually informative regarding the general scope and nature of any issues with the selling entity's I-9 practices or records, and further action can be taken in the event that the review turns up serious issues. In addition, proactive efforts to identify and address I-9 issues at the time of purchase may be treated as a mitigating factor in the event that penalties are levied in the future.

In the case of a corporate transaction involving a business that employs many hourly laborers, counsel may find it advantageous to require all employees of the acquired or merged entity to complete I-9s on the date of closing, which will ensure that past violations are not continued. Although the cost of completing I-9s anew for all employees may be substantial, counsel should be sure to keep employers abreast of the potential alternative: substantive and uncorrectable technical violations will result in

monetary fines ($110 - $1100 per violation), and employers who knowingly hire undocumented workers can receive fines and face criminal prosecution (fines go as high as $16,000 per violation).

SHOCKWAVES OF A CORPORATE MERGER

Due diligence with respect to I-9 compliance by the former employer (the seller) is mainly about looking backward to analyze the former employer's compliance policies and execution. However, a large-scale corporate merger or acquisition will often carry with it unintended consequences for foreign nationals at all levels of the organizational hierarchy. In particular, there are three types of employment-based visa classifications which can be significantly impacted by a change in corporate structure: the L-1 visa for intra-company transferees, the E-1/E-2 visa for treaty traders or investors, and the H-1B visa for temporary workers in a specialty occupation. In addition, a change in corporate structure can have a significant impact on foreign national employees who are moving through the permanent residency ("green card") process. The impact of a corporate transaction on each of these processes will be discussed below, followed by a brief overview of a number of additional visa types which may occasionally be encountered.

INTRA-COMPANY TRANSFEREES – L-1

The L-1 visa category is for Intra-Company Transferees fulfilling managerial/executive positions (L-1A), or specialized knowledge positions (L-1B). *See* (8 C.F.R. § 214.2(l)(1)(ii); INA § 101(a)(15)(L); 8 USC § 1101(a)(15)(L)). As the L-1 visa is only available to those holding advanced roles, in such classification are, by necessity, an integral part of the company's operations.

In pertinent part, in order to be eligible for an L-1 visa, the foreign national must have been employed overseas for one year (within the three years prior to entering the United States) by a company that has a qualifying relationship the foreign national's prospective employer in the United States. For the purpose of the L-1 process, a "qualifying relationship" means that there is a shared nexus of control between the sending employer abroad and the United States employer, such as a parent/subsidiary relationship, a common parent entity, or a situation in which both employers are branches of the same entity. Importantly, a qualifying relationship with an employer abroad must be maintained at all times during the L-1 sponsorship, although it need not necessary be the same relationship that existed at the time the L-1 was originally obtained.

Because the L-1 visa is dependent on the existence of a qualifying relationship with an employer abroad, a change in corporate structure which severs this relationship may invalidate transferees' immigration status and placing them in a situation in which they must depart the United States immediately (or change to another nonimmigrant visa classification). In determining the impact of a purchase on L-1 employees, the key factor to consider is whether or not the U.S. entity will maintain a qualifying relationship with at least one other real, active, and operational entity abroad. Thus, while a purchase which leaves the U.S. employer without a qualifying relationship to a foreign entity is likely to invalidate existing L-1 visas, other transactions, such as the purchase of the parent company owning both entities, or a transaction which, following the purchase, will create a qualifying relationship abroad, may permit the L-1 employees to maintain status. (Please note this example is illustrative and not definitive.)

Finally, it is important to note that, even if the qualifying relationship between the foreign national's employer abroad and his or her employer in the United States is maintained, the successor entity must still notify the USCIS that a change has occurred at the time the employer petitions on behalf of the foreign national for an extension of L-1 status.

TREATY TRADERS AND INVESTORS: E-1/E-2

The E-1 and E-2 visa classifications are available to owners and key employees of qualifying corporate entities bearing the nationality of a designated treaty country which are either engaged in substantial trade between the treaty country and the United States (E-1 visa) or which have been established as the result of substantial investment by nationals of the treaty country (E-2 visa). *See* INA §101(a)(15)(E); 8 USC §1101(a)(15)(E); 8 CFR §214.2(e); 22 CFR §41.51. A "treaty country" is one with which the federal government has entered into a bilateral trade agreement (about 84 countries in total). A comprehensive list of treaty countries is available on the Department of State website. Notably, the BRIC (Brazil, Russia, India, China) countries are not included in this list.

The E visa may be accorded to a variety of employees, including business owners, as well as executives, managers, supervisory employees, or individuals possessing skills which are essential to the operation of the enterprise. Critically, in order to qualify for an E-1 or E-2 visa (regardless of the nature of the offered role), an employee **must possess the same nationality as the employer**. (Corporate "nationality" may be determined by a number of factors, but, generally speaking, is based upon the nationality of the individual(s) who ultimately owns at least 50% of the company.)

Thus, in the event of a change in ownership, the key consideration, at least as far as E-1/E-2 visa holders are concerned, will be whether or not the employing entity will maintain the same corporate nationality it had prior to the transaction. For example, if an Irish-owned company which had been recognized as an E-2 corporate entity were purchased by other Irish nationals (or a majority Irish-owned company), then its E-2 employees would likely maintain their immigration status.[2] However, a purchase which changed the ultimate corporate nationality of the selling entity would likely disrupt the E visa holders' status and require their departure from the United States (or change to another nonimmigrant visa classification).

As with the L-1 visa, E-1/E-2 visa holders are, by definition, critical to the business, and thus the loss of these employees may well be detrimental to the operations of the newly-acquired business. Corporate counsel must ensure that, if there are E visa holders employed by the target company, a contingency plan is in place to replace these workers if the change in ownership disqualifies the company from its E status.

SPECIALTY OCCUPATION WORKERS – H-1B

Multinational companies are not the only entities which need to be mindful of immigration law when it comes time for corporate restructuring. The most prevalent of the visa classifications that require employer sponsorship is the H-1B (Specialty Occupation) visa. There are hundreds of thousands of foreign nationals employed in the United States pursuant to H-1B status, with a heavy emphasis on the Information Technology sector, although most positions requiring a bachelor's degree in a specific field will likely qualify for H-1B classification. *See* 8 C.F.R. § 214.2(h)(4)(i)(A)(1).

Unlike the classifications described above, the H-1B visa classification involves filings with both the Department of Labor (DOL) and United States Citizenship and Immigration Services (USCIS), and

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[2] It is important to note that, although a transaction such as that described above will likely not disrupt individual E-1/E-2 status, many consular posts (which are usually responsible for making initial determinations regarding recognition as an "E" entity) may require that the transaction be reported. The specific requirements and procedures for doing so will vary by location and may not be required in all cases.

both aspects of the process carry with them their own unique issues in the context of a change in ownership. Understanding these issues with critical, as noncompliance with the relevant regulations can result in substantial fines and additional sanctions.

The first step in the H-1B process is the submission of a Labor Condition Application (LCA) with the DOL. In pertinent part, the LCA serves as the employer's attestation to the DOL that the employer will pay the employee at least the prevailing wage for the specific occupation in that region, and that proper notice of the submission has been posted in the location of employment. *See 20 20 C.F.R. § 655.731 – 655.734.* Information pertaining to the LCA, including the relevant wage information, a copy of the LCA itself, and other, related material must, by regulation, be maintained in a "public access file" maintained at either the employer's place of business or the location of employment. DOL's Wage and Hour division is known to investigate employer's compliance with the LCA regulations and the public access file based on adverse information it may receive regarding a given employer. *See 20 CFR 655.760.* In the event of a stock purchase, it is critical to realize that the purchasing entity will assume liability for any LCA violations, including Wage and Hour violations, as well as those associated with improperly completed LCA forms or record-keeping violations.

In addition to the considerations regarding the LCA process (which primarily pertain to DOL regulations), USCIS regulations state that, whenever a material change to the H-1B employment has occurred, a new or amended H-1B petition must be submitted to the USCIS. *See* 8 *CFR 214.2(h)(2)(i)(E).* Material changes include but are not limited to: change in employment location; change in employment (substantial change in job duties); and a change of employer (in some circumstances). At a cost of up to approximately $3,500 per employee in government filing fees alone (plus attorney's fees), the cost of filing new H-1B petitions for every employee can quickly add up. It is therefore necessary for counsel to have an understanding of the breadth of their exposure to costs associated with the maintenance of status for H-1B workers employed at the selling entity, a task which can be accomplished by obtaining an exhaustive accounting of all H-1B employees. By doing so, the purchasing entity will not only gain a valuable tool for determining its sponsorship costs, but also will gain useful information regarding future sponsorship obligations.

Much of the authority for determining whether or not an employer qualifies as a successor-in-interest to the original H-1B employer for immigration purposes comes from an amendment to the H-1B statute, which states that "an amended H-1B petition shall not be required where the petitioning employer is involved in a corporate restructuring, including but not limited to a merger, acquisition or consolidation, where a new corporate entity succeeds to the interests and obligations of the original petitioning employer and where the terms and conditions of the employment remain the same but for the identity of the petitioner." *See INA 214(c)(10); 8 USC 1184(c)(10).* These regulations, which are echoed in DOL regulations, state that it will not be necessary to file new or amended H-1B petitions if the new entity qualifies as a successor-in-interest. *See 20 C.F.R. § 655.730(e)* A successor-in-interest, for the purposes of the H-1B and corresponding I-129 nonimmigrant petitions, is a company that assumes "substantially all" of the owners' assets and liabilities, including, importantly, all obligations related to the immigration sponsorship of the workers in question.

Critically, the successor-in-interest must follow certain procedures to ensure that the H-1B employees maintain lawful immigration status. First, the new employer must keep on record a list of all of the foreign nationals under H-1B status being transferred to the new entity (a task which should already have been completed as part of due diligence prior to the transaction). The successor-in-interest must also maintain a Public Access file with the following documentation:

- A sworn statement by an authorized representative of the new employing entity acknowledging the assumption of all the obligations, liabilities, and undertakings arising from or under the attestations made in each certified and still effective Labor Conditions Application filed by the predecessor;
- A list of all of the Labor Condition Applications being assumed;
- The LCA number and its date of certification; and
- A description of the new employing entity's actual wage system applicable to each of the H-1B nonimmigrants who have become employees of the new employing entity."

See 20 C.F.R. § 655.730(e).

Finally, although an entity which qualifies as a successor-in-interest for immigration purposes is not required to submit a new or amended petition at the time of the change in corporate structure in order to secure ongoing employment authorization for the corresponding H-1B workers, the new entity **will** be required to establish its qualifications as a successor-in-interest when next submitting a petition on behalf of the relevant foreign national(s) (such as an extension of stay, etc.) Thus, although new entities are spared the immediate need to take steps to maintain status and employment authorization for these individuals, there remain some future obligations.

If the acquiring entity or the newly merged company is not a successor in interest (perhaps the deal was formed as an asset purchase and thus the company did not assume all of the liabilities and obligations of the seller), then the regulations also provide for what is referred to as "H-1B portability," which allows the employee to begin working for a new entity as soon as the petition is filed, rather than after the approval of the petition, which may take a significant period of time, depending on whether or not the employer opts for premium processing. *INA § 214(m)(1) and (m)(2)(A-C); 8 USC §1184 (m)(1) and (m)(2)(A-C); 8 CFR § 103.2(a)(7)(i).* Employers utilizing the accommodations inherent in the H-1B "portability" provisions, however, must be mindful of the timing issues which may present themselves, as H-1B employees who perform work for an entity other than their petitioning employer (such as the acquiring or merged entity) may be deemed to have violated their status, thus rendering them ineligible for "portability" and requiring additional steps (usually a trip outside of the United States) in order to regain employment authorization. Thus, H-1B "portability" petitions must, in most cases, be filed **prior** to beginning employment with the new entity- a situation which may prove to be a burden when finalizing transactions (particularly if the original employer is being dissolved or otherwise ceasing to operate as a part of the transaction).

PENDING GREEN CARD APPLICATIONS

Businesses often find themselves requiring the work of a certain foreign national on an extended and even permanent basis. Under these circumstances, the business may choose to sponsor the employee for permanent residence (green card status). With the exception of the EB-1(c) visa classification for multinational manager, all nonimmigrant workers sponsored by their employers for permanent residence must go through a three-part process, each step of which presents its own unique issues and considerations when dealing with changes in corporate structure.

When beginning the green card process, foreign national employees first go through a process known as Permanent Alien Labor Certification, conducted via the Department of Labor's PERM

(Program Electronic Review Management) process. To move through this process, the employer must first conduct a series of wage determination and recruitment activities to test the job market. The purpose of these activities is to establish that the employment of the sponsored foreign national will not adversely affect the wages and/or working conditions of similarly situated workers (geographically and occupationally). If the employer establishes through this process that there are no minimally qualified United States workers (e.g. citizens; permanent residents) willing and able to fill the open position, the employer may submit the application for labor certification via the PERM system on Form ETA-9089. DOL may take up to ten months to approve the PERM, bringing the total timeline of advertising and filing to a minimum of nine to twelve months, and a maximum of several years (if the application is subjected to DOL audits or other secondary review).

If the employer successfully obtains a PERM certification, the second step of the green card process is to file an Immigrant Petition for Alien Worker (Form I-140) with USCIS. The I-140 petition serves to establish that the foreign national possesses the minimum qualifications for the position (as stated within the PERM application), and that the employer possesses the means to employ the foreign national in the position described within the PERM. Once the Immigrant Petition is approved, the foreign national will be eligible to apply for permanent residency once his or her Priority Date (see below) becomes current. *See INA 203(b)(2) and (3); 8 USC 1153(b)and(c); 8 CFR204.5(k) and (l).*

Following the approval of the Immigrant Petition, the foreign worker may submit the third and final portion of the green card process- Form I-485 (Application to Adjust Status to Permanent Resident) **provided** that his or her Priority Date is current. In pertinent part, the "Priority Date" essentially serves as a foreign national's place in the "line" for permanent residency, and corresponds with the date that a PERM application was submitted with the DOL. The range of dates which are considered to be "current" at any one time are determined by the U.S. Department of State and published on a monthly basis based on a number of factors, including nationality, overall availability of "visa numbers" and preference category (primarily determined by specific job factors). Depending on their nationality and qualifications, foreign nationals may face a substantial wait to complete this third step of the process.[3]

Acquisition Issues: PERM

PERM regulations prohibit the modification of any pending application, including, importantly, the legal entity sponsoring the application. *See 8 CFR 656.30(c)(2).* Thus, if the legal entity of the employer changes while the PERM application is pending, the application is invalid. Months of recruiting and advertising costs are lost, and the employer must begin the process from the beginning. This is one instance in which the form of a corporate restructuring will make all of the difference. For instance, in a stock acquisition, the legal entity is preserved, and only the owners have changed. Under these circumstances, the PERM application is preserved. Asset purchases can often be piecemeal and the legal entity may not be preserved, necessitating an entirely new PERM process by the new employer of the foreign national employees. As mentioned above, the consequences are not limited to costs borne by the employer: the employee will lose their place in line for permanent legal residency. If the PERM application must be resubmitted due to certain merger and acquisition activity, there can be significant consequences to the employer and the foreign national employee, especially for those foreign nationals running out of time in their underlying nonimmigrant visa classification.

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[3] In many cases, employers will have options available to secure employees' nonimmigrant status while they are waiting for their Priority Date to become current. However, such a discussion is outside of the scope of this article.

Acquisition Issues: I-140 Immigrant Petition and I-1485 Applications for Adjustment of Status

If a merger or acquisition has taken place subsequent to the filing of an I-140 Immigrant Petition, and there has been no change in legal entity, then no action needs to be taken regarding the already-filed Form I-140. However, if the transaction takes place after the filing of the petition and results in a change in legal entity, the successor employer may assert that it is a successor-in-interest, which will allow for the filing of an amended Form I-140, Immigrant Petition with USCIS. In cases where the employer is able to establish itself as a qualifying successor-in-interest, the foreign worker will retain his or her original Priority Date, and no new I-140 Petition is required.

Establishing that an entity is a legal successor-in-interest must be established affirmatively by the new employing entity. If the new entity is indeed able to establish itself as a qualifying successor-in-interest, as detailed within the USCIS Adjudicator's Field Manual (AFM Chapter 22.2(b)(5)(B)), an amended petition will be all that is necessary. In order to establish itself as a qualifying successor-in-interest for immigration purposes, an employer must prove the following:

- The job opportunity offered by the successor must be the same as the job opportunity originally offered on the labor certification;

- The successor bears the burden of proof to establish eligibility in all respects, including the provision of required evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage, as of the date of filing of the labor certification with DOL, and;

- For a valid successor-in-interest relationship to exist between the successor and the predecessor that filed the labor certification, the petitioner must fully describe and document the transfer and assumption of the ownership of the predecessor by the successor.

Alternatively, a new petition (and underlying PERM process) is required in the following circumstances:

- The successor entity has not established that a successor-in-interest relationship exists between the successor and the predecessor in accordance with the three successor-in-interest factors described in this memorandum;

- The labor certification is not valid for the new geographic area of the alien beneficiary's proposed employment; or

- There has been any other material changes in the job opportunity covered by the original labor certification.

It should be noted that if the foreign national's priority date is current and the Adjustment of Status Application has been filed and is pending for more than 180 days, the green card process does not need to be started anew regardless of whether or not a successor-in-interest exists.

OTHER COMMON EMPLOYMENT NONIMMIGRANT VISAS

TN (NAFTA Professionals)

The North American Free Trade Agreement (NAFTA) signed in 1994 by President Clinton established a visa category for citizens of Canada (TN-1) and Mexico (TN-2) engaged in business activities at a professional level. The regulations provide an exhaustive list specific occupational categories that qualify for TN status. *See 8 CFR §214.6(c)* The TN visa classification is employer and occupation specific and requires sponsorship by a United States employer. If, after a merger or acquisition, the successor company qualifies as a successor in interest of the prior company, then new petitions are not required. Here, counsel does not need to be concerned with the nationality of the new owners of the company, as the visa is linked to the nationality of the worker, not the company.

H-1B1/E-3

The H-1B1 (Chile/Singapore) and E-3 (Australia) visa categories were established in connection with free trade agreements between the United States and the respective countries named above. Although there are some differences, both classifications are very similar to the H-1B in a number of respects, including the need for an LCA (complete with the corresponding obligations and prevailing wage considerations), as well as the requirement that the offered position be a "specialty occupation". Unlike the H-1B, these visas are often obtained via direct application to an appropriate United States Embassy or Consulate abroad, bypassing the need for a petition to be filed with the USCIS (although both statuses can be obtained via petition if desired, albeit with a greater investment in time and money) .

Thus, following a change in corporate structure, the process used to determine the impact of the change will be virtually identical to that used to evaluate H-1B workers. A new entity which qualifies as a successor-in-interest will be able to continue to employ these workers without interruption (subject to the additional record-keeping requirements outlined above). If not, it will be necessary for the effected foreign nationals to depart the United States and apply for a new visa under the new entity. (Unlike the H-1B, there is no "portability" provision for either category.

O-1

The O-1 visa classification covers foreign nationals of extraordinary ability in the sciences, education, business, or athletics, or with extraordinary in the arts or achievement in the motion picture or television industry. As with most other classifications discussed herein, the key issue at hand is determining whether or not the new corporate entity is a qualifying successor-in-interest for immigration purposes. If the new entity does not qualify as a successor-in-interest, then a new O-1 petition will be required in order to secure a change of employer for the O-1 nonimmigrant(s). However, and importantly, the O-1 does not provide for "portability" or other, similar mechanism for changing employers immediately, and thus the foreign national will not be able to begin working for the new entity until after the new O-1 petition is approved.

CONCLUSION

With scores of other factors influencing business operations, major corporate decision-makers may overlook the importance of immigration law compliance in corporate restructuring. Such an oversight is unfortunate, as careful planning and due diligence can not only serve to help employers avoid hidden

costs and liabilities, but also to ensure (to the fullest extent possible) that all foreign national employees involved in the transaction retain their ability to work for their sponsoring employer.