Why Does It Matter?

Mergers and acquisition (M&A) and other corporate restructuring deals can have devastating effects on foreign workers' ability to work for the new entity and maintain their immigration status. It can also negatively impact the company through penalties, fines, loss of critical employees, and claims against the company for negligence in handling immigration matters.

With the excitement and financial focus of these transactions, the importance of compliance with immigration matters is often overlooked until after the deal is complete. Moreover, most attorneys engaged in these deals are not immigration attorneys. They may be unaware of the immigration compliance requirement or consequences of foreign nationals' inability to work for the acquiring company if visa and/or I-9 compliance issues are not addressed proactively.

To properly advise companies and their board of directors and effectively negotiate a deal, the acquirer's due diligence should include an early assessment of the targeted company's immigration compliance, foreign workforce status, and employment verification/I-9 compliance.

This article will assist with this process, which should be implemented with the help of an immigration attorney experienced in business matters and corporate restructuring. Ultimately, it is far less expensive to invest the time and money to be proactive about immigration matters than to deal with the repercussions of noncompliance and lack of key employees' ability to work.

Forms of Corporate Restructuring

There are various forms of corporate restructuring including: stock acquisitions, asset purchases, mergers and acquisitions and consolidations.

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The size of the business, the composition of the workforce (e.g., professionals in H-1B visas, managers in L-1, H-2B seasonal workers and others), and the industry involved also impact the types of problems that can arise and the strategy and due diligence required.

Here, we will discuss the immigration importance of:

- Demonstrating that the acquirer qualifies as a successor-in-interest;
- Considerations relating to the impact of the deal on work visas and green card process;
- Considering and addressing I-9 compliance issues.

Importance of Demonstrating that the acquirer qualifies as a successor-in-interest

Immigration law at INA §214(c)(10) provides that certain changes to the corporate entity such as —"a corporate restructuring, including but not limited to a merger, acquisition or consolidation"—will *not* require an amended H-1B petition, "where a new corporate entity *succeeds to the interests* and obligations of the predecessor, and where the terms and conditions of employment remain the same, but for the identity of the petitioner."

Thus, if the new entity qualifies as a successor-in-interest, it is generally not necessary to file a new or amended H-1B, TN, O-1 or some other petitions. 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.

Considerations Relating to the Impact of the Deal on Work Visas

Foreign nationals coming to the U.S. to work are generally sponsored for an employer-specific employment-based visa. This includes the H-1B, L-1, E, TN, and O-1 visas. As a result, many corporate changes have an impact on the employment status of these workers. Depending on the transaction, necessary steps might vary.

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H-1B Visa

The H-1B visa classification is the most commonly used employment-based visa. It requires filings by the employer with the DOL and USCIS and is used primarily to sponsor professionals with bachelor's degrees or higher to work in the U.S. in professions such as IT workers, healthcare workers, professors, researchers, architects, designers, engineers, scientists, teachers, and physicians.

In order to benefit from the successor-in-interest benefits and avoid filing a new petition, the acquirer must follow certain procedures to ensure that the H-1B employees maintain lawful immigration status. First, the acquirer must obtain and maintain a list and Public Access files of all of the transferred foreign nationals in H-1B status within certain timing and documentary requirements.

Prior to closing, the acquirer (successor in interest) should audit and update the public access files. Otherwise new petitions will need to be filed for each worker involved. The file must contain a sworn statement by an authorized representative of the new entity acknowledging the assumption of the obligations specified in each of the LCAs filed by the predecessor entity.

Material changes in the employee's duties, salary, and work location may require the filing of new petitions.

For certain H-1B workers, primarily in the healthcare and education sectors, it is critical to check whether the employee received a cap-exempt H-1B as a result of the targeted employer's status. If so, they might lose cap-exempt status eligibility as a result of the deal, which will prevent them from being employed by a cap-subject acquiring entity.

L-1 Visa

The L-1 visa classification is used by multinational companies to transfer qualified executives, managers, or workers with "specialized-knowledge" to the U.S. to work for a related (parent, subsidiary, affiliate, or branch) company in an executive or managerial (L-1A), or specialized knowledge (L-1B) capacity.

Because the L-1 visa requires a qualifying relationship between the foreign and U.S. entities and specific work duties and requirements, a corporate restructuring could affect and invalidate the person's status. The guidance relating to the need to file an amended petition in the L-1 context is not as strong as with the H-1B category.

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In the absence of clear authority, some employers may choose to file an amendment.

However, the case law and USCIS memoranda suggest that if the surviving entity maintains a qualifying entity abroad, even if it was not the foreign entity where the L-1 employee gained the qualifying experience, no new or amended petition might be necessary. The prior petition remains valid and USCIS should allow ongoing employment by the foreign national in L-1 status.

When a petition for extension of time is filed, that petition must contain information about the successor entity to notify USCIS that a restructuring change has occurred. Alternative visa categories, such as the H-1B, E, TN, or others, might also need to be considered.

It is worth noting that the analysis changes if the L-1 beneficiary is being sponsored by the U.S. entity for permanent residency under the EB-1-3 category for multinational executives or managers and the foreign entity where the beneficiary workered no longer exists as a result of the reorganization.

E Visa

The E-1 and E-2 visa classifications are used by individuals from certain countries that have treaties of commerce with the U.S. These individuals come to the U.S. to own and direct a business or to be a key employee of a "treaty-qualifying" company.

A key consideration is whether or not the employing (acquiring) entity will maintain the same corporate nationality it had prior to the transaction. Because these E visas are dependent on the person's duties and being employed by a "treaty-qualifying" company based on the company's nationality, a change in corporate structure can terminate the qualification.

As with the L-1 visa, E-1/E-2 visa holders are, based on their definitions, key to the business, so the loss of these employees can be detrimental to the operations of the acquiring business.

Additionally, there are also E-3 visas used for professionals who are nationals of Australia. The E-3 visa in many ways is similar to the H-1B, and similar considerations should be undertaken during corporate restructuring.

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TN Visa

The TN visa classification is employer- and occupation-specific and requires sponsorship by a U.S. employer. If the acquiring company qualifies as a successor in interest, then new petitions are not required. But other material changes might require the filing of a new or amended petition.

The TN visa category is used for certain Canadian and Mexican professional workers who qualify under the NAFTA agreement including accountants, architects, economists, engineers, hotel managers, designers, land surveyors, dentists, pharmacists, physicians, nurses, teachers, and scientists.

O-1 Visa

The O-1 visa classification is used for persons with extraordinary ability in the sciences, arts, education, business, or athletics, or with extraordinary achievements in the arts or the motion picture or television industry. As with most other classifications discussed, it is key to establish that the 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, and the foreign workers will not be able to begin working for the new entity until the new O-1 petition is approved.

Considerations Relating to the Impact of the Deal on the Green Card Process

If the acquired company has begun the green card process for any of its workers, the corporate restructuring will have an impact on the process. The extent of the impact will depend on where in the process the person is at the time of the closing.

PERM Process

The PERM regulations prohibit the modification of any pending application, including the sponsoring legal entity. As a result, if the sponsoring legal entity changes while the PERM application is pending, the application can become invalid. Months of work and money involved in the process are lost, and starting from the

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beginning might be required. Moreover, the foreign worker loses their place in line (priority date) towards the green card.

It is key to structure the deal so that the legal entity is preserved and only the owners have changed. Under these circumstances, the PERM application should be preserved.

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

If the restructuring takes place after the filing of the I-140 Immigrant Petition, the successor employer may assert that it is a qualifying successor-in-interest, which allows for the filing of an amended Form I-140, Immigrant Petition with USCIS. If successful, the foreign worker will retain their original Priority Date.

To establish a qualifying successor-in interest status, the amended petition will need to establish that:

- The job opportunity offered is the same as the job opportunity originally offered on the labor certification;
- The successor had the ability to pay the prevailing wage as of the date of the labor certification filing; and
- The successor has fully documented the transfer and assumption of the ownership of the predecessor.

If the successor-in interest status can't be established as required by the USCIS, a new petition (and underlying PERM process) will be required.

As noted previously in the L-1 visa section, a corporate restructuring might invalidate the green process for those in L-1 status applying to obtain a green card via the EB-1-3 process. The case law provides that the foreign entity where the beneficiary worked has to continue to exist at the time of filing, because the regulation uses the word "is", meaning the existence of the foreign entity. There could be arguments to defeat this reasoning but because of the very unclear nature of the guidance, it is best to proceed with caution and minimize the impact on L-1 workers and their green card process with a very proactive approach.

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As to the adjustment of status process, 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.

Considerations Relating to Form I-9

The acquirer is not required to review the I-9s of the acquired company until after the deal is complete, and the acquired company is not required to turn in its I-9s during the due diligence process.

However, it is best practice for the I-9s to be requested, shared, and reviewed beforehand.

A key decision to make relating to the I-9s is whether to assume the liability associated with the predecessor's I-9s and treat the new employees as "continuing employees" or to choose to execute new I-9s for the newly hired workforce immediately after the close of the deal.

To decide, it is important to consider the potential exposure and take corrective action. At a minimum, conduct a spot I-9 audit pre-closure with the guidance of an experienced immigration attorney. This spot audit should include a review of the acquired company's I-9 policies and process as well as the I-9 forms and supporting documents.

If the "continuing employment" option is chosen, the surviving entity need not complete a new I-9 for the employees joining the organization. This option avoids the administrative headache of completing new I-9s

within three business days of the closing of the deal. However, it also comes with accepting the potential liability for prior I-9 mistakes or errors.

If you opt to treat the employees as new hires instead, new I-9s will be required. In Section 2, the acquisition date will be the hire date. This approach cuts out potential liability but also creates the requirement of new I-9s completion.

The proactive efforts to identify and address I-9 issues as part of the due diligence process can be treated as a mitigating factor in the event of future penalties.

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Conclusion

Overlooking the importance of immigration law compliance in corporate restructuring deals can have dire consequences for the acquiring entity and its new employees. This is avoidable with proactive planning, due diligence, and engaging a business immigration attorney as part of the process.

The importance of immigration due-diligence in the pre-closing checklist will continue to magnify as globalization and changes in demographics lead to an increased number of foreign workers.

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