

# Transactions carry visa risks

Changes in corporate ownership—through mergers, IPOs or other means—are dicey for employers and immigrant workers.

BY GREGORY SISKIND  
AND ARDA BES KARDES  
SPECIAL TO THE NATIONAL LAW JOURNAL

A CORPORATE LAWYER usually greets the closing of a deal with a sense of relief. Unfortunately, however, the ink on the signature to a corporate transaction may have already dried by the time a company realizes that something terrible has occurred. A merger, an acquisition, an initial public offering or some other corporate transaction can render a company's immigrant workers illegal and subject an employer to serious exposure for mandatory employment eligibility verification violations, known as I-9 violations. In October 2000, Congress passed a law that seeks to reduce the likelihood of the kind of surprise scenario noted above. Despite congressional intervention—and an additional regulation issued by the Department of Labor on Dec. 22, 2000—the risks of a merger or acquisition becoming immigration "train wreck" remain substantial. The new law covers only one visa category—the H-1B visa—and only a subset of cases within this category.

The solution to the problem begins with the due diligence process. Rarely, however, is the visa status of a company's immigrant employees or the company's I-9 compliance record checked. It is also rare to see representations and warranties on immigration matters in a closing document. Unfortunately, a transition team's oversight may not only render all of a company's immigrant employees out of status—terminating their work eligibility for several months—but it may also force the employees to leave the country and go to a U.S. consulate abroad because out-of-status aliens cannot change their visas in the United States. Employers, on the other hand, may not only be subject to fines up to \$1,000 per employee for not having a valid I-9 on file, but may also be subject to lawsuits from employees terminated and rendered illegal as a result of the company's failure to keep their work eligibility valid.<sup>1</sup> This is a serious threat because falling out of status significantly diminishes an alien's chances of gaining lawful permanent residence here. Finally, corporate attorneys who fail to warn clients of the immigration consequences of their transactions may face malpractice liability themselves. Practitioners therefore should integrate immigration issues into the due diligence process.

The consequences of a corporate change differ depending on the visa category of an affected worker and the type of transaction involved. A transition team should first map the immigration structure of the corporation to provide a blueprint for handling potential immigration problems. Also, counsel should test the I-9 compliance of the target corporation by conducting a sample audit or at least a review of I-9 forms. To prevent illegal or unauthorized employment, all employers are federally mandated to verify the employment eligibility of their work force via the I-9 Employment Eligibility Verification Form. The employer examines and determines the validity of those documents.<sup>2</sup> The law divides alien workers into two groups: nonimmigrant and immigrant. Nonimmigrant workers usually fall under the H-1B, L, E and TN visa categories, while immigrant workers are those who have obtained or are in the process of obtaining lawful permanent residency (LPR).

## Nonimmigrants

The most common employment visa, the H-1B, is used for an "alien who is coming to perform services in a specialty occupation" in the United States;<sup>3</sup> L visas are used for intracompany transferees who enter the United States to render services "in a capacity that is managerial, executive, or involves specialized knowledge;" E visas are used for "treaty traders and investors."<sup>4</sup> The TN category includes Canadian and

Mexican citizens seeking temporary entry for professional business activities under the North American Free Trade Agreement.<sup>5</sup>

In an H-1B visa case, one should analyze whether a corporate change results in a new employer and, if so, to what extent the interests of the target corporation are being assumed. Different corporate actions yield different results. In a merger, two or more legal entities combine all their assets in what is called the "surviving entity." Other entities, which are called the "merged entities," cease to exist. In a consolidation, however, two or more legal entities combine all of their assets to form a new entity. An IPO changes the ownership structure of a corporation, similarly to an acquisition.

In general, an H-1B visa requires separate applications to the Labor Department and the Immigration and Naturalization Service (INS). A petitioner should first obtain an approved Labor Condition Application (LCA) from Labor. Then he must get the I-129 Petition for a Nonimmigrant Worker approved by the INS. Before December 2000, however, Labor considered a change in an employer's federal Employer Identification Number (EIN) enough to trigger a need to file a new LCA. Under the rules adopted on Dec. 22, 2000, however, a new LCA will not be required merely because a corporate reorganization results in a change of corporate identity, regardless of whether there is a change in the EIN, provided that the successor entity, before the continued employment of the H-1B worker, agrees to assume the predecessor's obligations and liabilities under the LCA with a memorandum to the "public access file" kept for LCA purposes.

Material changes in the employee's duties and job requirements and the relocation of the employee may also require a new LCA. If employees are relocated due to a merger or sale, new LCAs will be required for H-1B workers. A simple name change will not trigger the need for a new LCA.<sup>7</sup>

### **New rules, new exemptions**

The rules governing when a new I-129 petition must be filed are similar to the LCA, but not identical. Filing a new I-129 can be a fairly expensive requirement. For each new employment petition, the employer must pay the American Competitiveness and Workforce Improvement Act fee,<sup>8</sup> which was recently increased to \$1,000.<sup>9</sup>

The new law creates an exemption from filing a new I-129 in cases of corporate structuring in which the new employer is a successor-in-interest that assumes the interests and obligations of the prior employer. This is a restatement of the existing INS policy which says that if an employer, for H-1B purposes "assumes the previous owner's liabilities which include the assertions the prior owner made on the labor condition application," there is no need for a new or amended petition.<sup>10</sup> Because the implementing regulation has not yet been published and the law has not yet been tested, however, there is room for a variety of interpretations. If a new or amended petition is not needed, then the employer may wait until filing an extension petition for the employee to notify the INS.

The implications are similar for Mexican workers on TN visas because the process for obtaining visas for them is similar to the H-1B process. Nationals of Canada do not need an LCA and may obtain their visas by simply applying to their port of entry to the United States. A basic successor-in-interest analysis is required to determine how to proceed in such cases.

For an L-1 visa, the law requires a qualifying relationship between the United States and the foreign entity from which the employee will be transferring. This relationship must be within the definitions of a "parent, branch, affiliate or subsidiary" as defined by the INS.<sup>11</sup> Obviously, changes in the ownership structure of either one of the entities through a corporate change may terminate the qualifying relationship and, consequently, invalidate the underlying L visas. If the petitioner, after a corporate change, can document that the qualifying relationship survives, however, then only an amended petition will be necessary. Under the E-1 and E-2 visas, certain investors and traders may be admitted to the United States and be employed, if a "treaty-qualifying" company petitions and obtains status for them.<sup>12</sup> A company is qualified based on its nationality. A corporate change may change a corporation's nationality, and may therefore result in the termination of the qualification.

An immigrant's LPR application consists of three steps. First, the employer must usually prove that, despite reasonable recruitment efforts, he has not been able to find a domestic employee to fill the alien's position. This is called the labor certification and is handled through the Labor Department. Second, the employer has to file a Form I-140, the Immigrant Petition for Alien Worker, with the INS. After the I-140 petition is approved, the employee files a petition for the adjustment of his or her immigration status to the status of a lawful permanent resident.

### **A liberal view of deadlines**

The Labor Department takes a liberal view of when a new labor certification petition must be refiled. If, after an acquisition, the new owner remains the worker's employer, and has assumed all of the past owner's obligations, then the new owner qualifies as the "successor-in-interest," and the labor certification will survive.<sup>13</sup>

In LPR cases, the INS has traditionally used a stricter version of the successor-in-interest theory, and has permitted an employer to continue with the prior employer's petition, only if the new employer assumed all of the prior employer's liabilities. Without successorship, a new I-140 petition may be necessary even when an adjustment of status application is already pending.

The LPR process may take several years and, until recently, unless the case fit under certain exceptions, beneficiaries of immigrant petitions were not able to change employers until the completion of the entire process. Corporate changes that created a new employer therefore were potentially causing further delays. Congress, however, recently passed another law that makes it possible in many instances to change employers while an adjustment application is pending. So this may be a moot issue.<sup>14</sup>

Finally, a successor also assumes the I-9 liabilities of a corporation. Failure to comply with I-9 requirements may result in serious sanctions-up to \$1,000 per employee. Before a corporate re-structuring takes place, therefore, the transition team should examine the I-9 compliance of the entity by either a sample I-9 audit or a review of the alien employees' I-9s. Especially for I-9 Issues, representations and warranties should be required at the closing.

(1) 8 C.F.R. 274a.10.

(2) 8 C.F.R. 274a.2.

(3) 8 C.F.R. 214.2(h).

(4) 8 C.F.R. 214.2(e) and (1)

#### **(5) 8 C.F.R. 214.6.**

(6) The Labor Department uses the Standard Metropolitan Statistical Area (SMSA) as a criterion to determine the need for a new LCA or Labor Certification.

If the employee is relocated outside the SMSA, then new filing is required.

(7) Letter from Flora T. Richardson, chief of Labor's Division of Foreign Labor Certification to attorney Harry J. Joe (July 16, 1996), reprinted in 73 Interpreter Releases 1045 (Aug. 5, 1996). And later from James Norris, chief of Labor's Division of Foreign Labor Certifications, to attorney Donald H. Freiberg. (March 4, 1997), reprinted in 74 Interpreter Releases 1094 (July 14, 1997).

(8) Pub. L. No. 105-277 (1998).

(9) Pub. L. No. 106-313 (2000).

(10) INS Headquarters Memorandum CO 214-H, CO 214L-C (Oct. 22, 1992), by James Hogan, executive associate commissioner for operations, reprinted in 69 Interpreter Releases 1448 (Nov. 6, 1992).

(11) 8 C.F.R. 214.2(I)(1)(ii)(G)

(12) 8 C.F.R. 214.2(e)(1)

(13) Matter of Dial Auto Repair Shop Inc., 19 I & N Dec. 481 (1986).

(14) Pub L. No. 106-313 (2000).