

Immigration Concerns for M&A Transactions

David J. Garrett
Nexsen Pruet

Can the immigration tail wag the corporate dog?

When working with mergers, acquisitions and other types of corporate restructuring and business entity transformations, immigration counsel can either be your best friend or, if consulted too late in the transaction, be the one to advise you that you get to explain to your client why some of their most valuable executives and employees are no longer authorized for work in the U.S., that perhaps hundreds of workers and their families have invalid visas and may be subject to deportation proceedings, and that the company and its executives are now subject to civil and perhaps even criminal penalties.

In today's enforcement environment, knowing what questions to ask your client—before you get too deeply into an M&A transaction—is crucial.

Ideally, immigration counsel should be contacted, and perhaps even brought in on the M&A team, well in advance of closing so that they can advise the M&A team and the acquiring company about the immigration consequences of the proposed deal. Some options that may be available before closing may not be available after closing.

*After the closing is too late:
immigration law cannot
be regarded as a second-tier
concern to be handled
after the closing.*

For some companies immigration concerns are on the front burner, especially closely-held corporations or entities where the executives are foreign nationals. These companies usually contact their immigration attorney first when contemplating a corporate event. For most other companies however, immigration issues are an afterthought. As such, corporate counsel bears the burden of identifying whether various immigration issues need to be reviewed whenever a merger, acquisition or other corporate restructuring is being considered.

Always obtain and review the target company's I-9 forms.

This often-overlooked first step is to examine the target company's I-9 forms. Examining I-9 forms, while tedious, accomplishes two things:

(1) It should provide you with a clear picture of the company's workforce. This identifies which employees are in an immigration status, which employees are on nonimmigrant visas, and which employees are working on employment authorization cards. It also provides the expiration dates of applicable visas and employment authorizations.

(2) It allows to ascertain whether the target company has complied with I-9 regulations and determine what potential liabilities may exist to the target company for non-compliance. Take note that in some cases, such as where the surviving company

qualifies as a “successor in interest”,¹ unless the option to complete new I-9 forms is exercised, the target company’s I-9 forms are adopted. This carries the risk of assuming liabilities for non-compliance.

Bad News:

In some situations during an ICE, DOL or state enforcement audit, the agency may—at least initially—ignore disclaimers and non-assumption of liability provisions in your beautifully-prepared M&A document.

In essence, ask these questions:

a. Does the target company have a written I-9 policy?

Examine the target’s I-9 policies and consider whether the target company’s I-9 policies are consistent with the acquiring company’s I-9 policies, and whether there will be any difficulties in integrating the two systems. In particular, if one company was required to use E-Verify and the other was not (or did not), plans should be made early in the process as to what needs to be done to ensure compliance at closing.

Note that under some state laws, you may find your company in a chicken-and-egg scenario regarding state immigration laws, in that the state law may technically not provide time after closing to E-Verify or I-9 all new employees of the successor company. On the other hand, you cannot E-Verify those employees until they are employees, which cannot happen until after the closing.

¹ See *Successor in Interest* discussion below.

This is uncharted territory; hopefully rational thinking will prevail at state-level enforcement audits.

b. Does an I-9 exist for every employee of the company?

I-9 forms must be maintained for all employees hired after Nov. 6, 1986 and still employed on or after June 1, 1987.² Forms must be maintained for the duration of the employment, and after employment, must be retained by the company for either three years after the date of hire or one year after termination, whichever is later. Employees who left the company and have subsequently been rehired must complete a new form if rehire is more than three years from the original date of hire.

Check the I-9 records against payroll records to verify that I-9s are being maintained for all employees.

c. Have the I-9s been fully and properly completed?

d. If there are errors on the I-9s, are they technical errors or substantive errors?

If there are errors or non-completions, analyze their nature to determine whether a claim of substantial compliance or good faith can be made. “Good faith compliance” is a rebuttable affirmative defense that can be asserted in some cases.³

e. What are the potential civil and/or criminal penalties?

i. Paperwork violations. Civil penalties for failure to properly fill out and maintain I-9s can range from \$110 to \$1,100 for each I-9. Factors in determining the actual amount

² INA §274A(b)

³ INA §274A(a)(3); 8 CFR §274a.6; 8 CFR §1274a.6

imposed are the size of the employer, whether there was good faith present, seriousness of the violation, whether the employee was an unauthorized alien, and the company's prior history of violations.⁴

ii. Employing Unauthorized Aliens. If the offense occurred before 3/27/2008: \$275 - \$2,200 for the first offense, \$2,200 - \$5,500 for the second offense and \$3,300 - \$11,000 per alien for third or higher offense. If the offense occurred after 3/27/2008: \$375 - \$3,200 for first offense, \$3,200 - \$6,500 for second, and \$4,300 - \$16,000 for third or higher offense.⁵

iii. Criminal Penalties. If a person or entity engages in a pattern or practice of unauthorized employment, then the criminal penalty is a fine of not more than \$3,000 for each unauthorized alien, not more than 6 months imprisonment for the entire pattern or practice, or both.⁶

f. Are there any Compliance Orders or Orders to Remediate?

Check to determine whether the target company has been the subject of ICE, DOL or state agency enforcement. If so, examine all orders from the state agency and from ICE regarding immigration compliance orders. If the surviving company qualifies as a successor in interest, make sure that the company has taken affirmative steps to comply with all orders.

g. If the surviving entity is a “successor in interest”, make a decision whether to reverify the workforce or adopt existing I-9 forms.

A surviving company that qualifies as a successor in interest has the option to either reverify the entire workforce or to adopt existing I-9s and assume all liabilities. If adoption is the choice made, the successor company will stand in the target company's shoes and will be deemed responsible for all of the target company's sins. Past violations will also likely be imputed to the surviving company, even in a case where the surviving company is found liable for its own I-9s.

On the other hand, if the successor company reverifies, it should plan to obtain new I-9s for all its newly-acquired employees, and must treat all employees consistently in order to avoid any discrimination claims under INA §274B.

Ascertain whether any employees are on Immigrant Visas

Establish as soon as possible how many workers in the target company are being sponsored for permanent residence. Next, determine what stage in the process they are in. Further, determine whether there will be any layoffs as a result of the transaction. And finally, don't forget to inquire whether there are any contractual obligations in the form of offer letters, employment agreements, or other documents that require the employer to sponsor the employee for permanent residence status.

A work-related immigrant visa is a visa that, after a long process, results in permanent residence status for the employee, i.e., a green card.

⁴ INA §274A(e)(5)

⁵ 8 CFR §274a.10(b)

⁶ 8 CFR §274a.10(a)

If the target company has committed to sponsor an employee for permanent residence status and the successor company has agreed to assume all contractual obligations, the immigration inquiry cannot end there. Counsel must decide whether the successor company qualifies as a successor in interest or whether green card portability applies. If neither applies, then the surviving company may be contractually obligated to start the entire green card process over again in its own name.

Determine the Stage in the Process

Applying for and obtaining permanent residency requires a variety of complex filings with the US DOL, the USCIS and the US Department of State. Employees may be adversely affected, depending on what stage in the process the employee is in at the closing of the transaction.

Generally, there are four stages to be aware of; stages 1 – 3 reside with the US DOL:

1. Pre-Labor Certification. For most cases, the employer must first use a specific set of recruiting efforts to try to hire a willing, able and qualified US worker for the position that is being offered to the alien. If the target company is in this process, at this stage the company is actively recruiting and interviewing potential candidates for the position. Listen for obscure catch-words such as “PERM”, “labor certification”, “job orders”, and “internal postings” coming from HR professionals to identify this stage.

If the new employer is a successor in interest and the employee’s job duties and location will not change, the successor company may use the recruiting efforts of the target company and later file an application for labor certification.

2. Pending Labor Certification. If the target company filed an application for labor certification after July 16, 2007 that is still pending (yes, this is possible), the successor company cannot be substituted for the target company.⁷ Currently, however, most employers use an electronic labor certification application process called PERM, which is dramatically decreasing the amount of time that labor certifications are in pending status. Under the above circumstances, the pending application should be withdrawn and the successor company should submit a new application in its own name.

This could result in a new round of recruitment efforts. To avoid this costly scenario, companies in the past sometimes allowed the labor certification to be approved, and then argued to the USCIS at the I-140 petition stage that the successor company qualifies as a successor in interest. Now, due to a recent revision of the labor certification regulations and the USCIS interpretations of the same,⁸ the continued success of this strategy is questionable.

3. Approved Labor Certification. If the labor certification is approved, and the worker’s job description and location described on the form are unchanged, then the successor company may be allowed to use the approved labor certification to support the next step in the process: the filing of an immigrant visa petition. The issue remains unclear at this time. In the past, the USCIS has allowed an entity that qualifies as a successor in interest to assume the labor certification and proceed with the permanent residency petition. However, the recent amendment and USCIS interpretation of the US DOL regulations cited above casts

⁷ 20 CFR §65.11(b)

⁸ Id.

doubt on the continued viability of this process.

4. Immigrant Visa Petition. There is a two-pronged test to determine if green card portability applies: If (a) an employment-based immigration visa petition has been approved by the USCIS, and (b) an application to adjust status to permanent residency has been pending for more than 180 days, then the employee can start working for the new employer without the successor company filing a new immigrant visa petition.⁹ On the other hand, if the petition is still pending or if the adjustment of status petition has been pending less than 180 days, then the new employer will need to file a new immigrant visa petition.

Layoffs – A bad omelet.

INA §212(a)(5)(A) states that an alien seeking to enter the US to perform labor is inadmissible unless the Secretary of Labor has determined and certifies that there are not sufficient workers available to perform such labor. Before issuing the labor certification, the US DOL requires the employer's good faith, but unsuccessful, recruitment of US workers. A requirement of good faith is implicit in the regulations.¹⁰

The provisions in the new PERM method promulgated by the US DOL in obtaining labor certifications regarding layoffs clearly demonstrate that the DOL views layoffs as relevant to the employer's good faith recruitment efforts and whether there has in fact been a bona fide job opportunity. The layoff provisions in the CFR state that the employer must "notify and consider" all

"potentially qualified" US workers laid off within 6 months of filing the labor certification.¹¹

In M&A contexts, layoffs and lost jobs are eggs that must be broken in order to make an omelet. In many cases, layoffs are unavoidable and—to the M&A attorney—they can help preserve the acquiring company's income and asset values, helping to minimize client risks and liabilities.

But, wait. If labor certifications are being sponsored by the target company, and/or the successor company in some cases, be aware that the US DOL requires your client to come clean in labor certification filings. Specifically, the questions asked are:

"Has the employer had a layoff in the area of intended employment in the occupation involved in the application or in a related occupation within six months immediately preceding the filing of this application?...If Yes, were the laid off U.S. workers notified and considered for the job opportunity for which certification is sought?"

A layoff is defined as "any involuntary separation of one or more employees without cause or prejudice".¹² Even one laid-off employee is enough to trigger the requirements for notification and consideration. Further, if an employee has agreed to a voluntary resignation in exchange for a financial settlement, whether this counts as a layoff is considered on a case-by-case basis. How voluntary was it, exactly?

"Related occupation" is defined as "any occupation that requires workers to perform a majority of the essential duties involved in the occupation for which certification is

⁹ American Competitiveness in the Twenty-First Century Act of 2002, Pub. L. No. 106-313, 114 Stat. 1251 (also known as "AC21")

¹⁰ H.C. LaMarche Ent., Inc., 87 INA 607 (Oct. 27, 1988).

¹¹ 20 CFR §656.17(k)(1)

¹² 20 CFR §656.17(k)(1).

sought.”¹³ This demands comparison of the duties of the occupation for which labor certification is being sought with the duties of the occupation of any worker laid off within the past six months. If there is a majority of duties that are similar and essential,¹⁴ then the answer is “yes,” and the notice and consideration regulations kick in. If the layoff occurs after the filing of the labor certification, the regulations are not as clear as to whether notice and consideration are required. The supplemental information in the Federal Register supports the argument that the employer is responsible for notifying the US DOL of layoffs that occur before the filing, and the Certifying Officer at the US DOL is responsible for determining if there are layoffs after filing but before adjudication.¹⁵

The end result is that if there are foreign nationals on immigrant visas for either the target company or the successor company, layoffs as a result of an M&A transaction can have a significant impact on the labor certification process.

Immigrant Visa Petitions

As noted above, there is a two-pronged test to determine whether the successor company can take advantage of the green card portability provisions in AC21. When portability is not possible, the successor company must file a new petition for an immigrant visa. Note too, that if the company is using consular processing of an

immigrant visa instead of adjusting the status of the visa, green card portability is not possible. In other words, if the foreign national is outside of the US waiting for a green card before he or she makes entry to the US to begin working for the company, a new immigrant visa petition must be filed by the successor company.

Unfortunately, neither the INA nor the CFR establish the successor in interest rules for an immigrant visa in this case. Regardless, if the successor company can show that it would otherwise qualify as a successor in interest, the USCIS has historically granted the visa petition without the successor company having to re-do the labor certification process.

A greater discussion on successor in interest is below.

Ascertain whether any employees are on Non-Immigrant Visas

Counsel also needs to determine if any employees at the target company, and in some cases at the successor company, are working on non-immigrant visas. If so, what needs to happen for each individual case varies depending on the type of non-immigrant visa the employee holds. This discussion is limited to the most frequently encountered work visas.

A Non-Immigrant Visa is a visa that allows a foreign national to work for a specific company in a specific job for a specific (and often limited) period of time.

¹³ 20 CFR §656.17(k)(2).

¹⁴ I am simplifying this: the regulations do not clearly lay out what a “potentially qualified” person is that requires notice, but comments in the Federal Register accompanying the proposed regulation seem to support the notion that if the US worker can perform more than the majority of the duties, then notice and consideration apply. Supplementary Information, 69 Fed. Reg. at 77355.

¹⁵ 69 Fed. Reg. at 77395

L Intracompany Transferees

An L intracompany transferee visa is a visa that allows a company having a qualifying relationship with a foreign company to transfer certain executives, managers and people who work in a specialized knowledge position to the US-affiliated corporate entity.

There are two primary considerations for L visas:

1. Will a change occur in the qualifying relationship?

Prior to the M&A event, immigration counsel for either the target company or the successor company will have meticulously documented the relationship between the company and an overseas entity that is related to the US entity in some specific way. Counsel will also have used that relationship between the two entities to argue to the USCIS that there is a qualifying relationship between the companies. If the qualifying relationship disappears or is changed, the M&A can invalidate the visas of these workers.

Keep in mind that there is no grace period in the regulations to notify the USCIS of the change in the qualifying relationship post-closing.

Because the regulations afford no grace period, amended L visa applications should be filed at the time of closing for all workers who are on L visas, if there is a material change in the qualifying relationship. On the other hand, if there is a nonmaterial change in the qualifying relationship, the USCIS can be notified when the employee's immigration status is extended. However,

the employee's immigration status must be maintained at all times in order for the extension of status to be granted.

When one or both of the entities involved in the M&A event has Blanket L Visa approval, consulting with an immigration attorney well in advance of closing is highly recommended.

2. Will there be any change in the capacity of employment?

The second question that must be addressed is whether as part of the merger event any change will be made to the L visa employee's job. For example, will someone in a specialized knowledge capacity be promoted to work in a managerial capacity? This is typically done because the duration of a managerial or executive L visa is longer than the duration for a specialized knowledge L visa. If so, you will need to obtain copies of the employee's pre- and post-merger job descriptions.

Further, time limitations require that the employee be performing executive or managerial-capacity work under an amended L visa for six months prior to the end of the specialized knowledge L visa.

As a result, diligence must be done prior to the M&A event to determine whether the employee's promotion is even feasible.

H-1b Temporary Workers

Somewhat similar to workers with immigrant visas, H-1b workers are subject to both USCIS requirements and US DOL requirements. Prior to obtaining an H-1b visa, the employer will have obtained a signed Labor Certification Application (LCA) from the US DOL. In some cases the

LCA must be amended as well as the H-1B visa.

1. Labor Condition Applications.

Where the new corporate entity succeeds to the interests and obligations of the original petitioning employer and where the terms and conditions of employment have not changed, except for the identity of the company, an amended LCA is not required.¹⁶

Even if no new LCA is required, several due diligence action items must be analyzed prior to the merger event.

a. *LCA Files*

i. Verify that the public access files are being maintained for each H-1b employee. Records must be kept for one year beyond the LCA period, or if there has been a complaint filed with the US DOL, until a final determination has been made concerning the complaint.

ii. Check the payroll records against the wage listed on each LCA to verify that the target company has been paying at least the wage on the LCA. Payroll records must be kept for a minimum of three years.

iii. Check to make sure that the other documents in the public access files were adequately prepared and maintained. For example, was the posting notice requirement followed and was the notice as posted adequate? Other documents that should be in the public access file must be checked also, such as the actual wage memo and the prevailing wage documentation.

iv. Verify that the H-1b holders were provided with a copy of the certified LCA for their position.

v. Assess potential penalties for non-compliance with the above.

Further, if the surviving company is a successor in interest, the DOL requires that an acquisition memorandum be prepared.¹⁷

The acquisition memorandum must include a sworn statement by the successor entity that it expressly assumes all obligations, liabilities and undertakings arising from each certified and effective LCA filed by the target company. Further, the sworn statement is required to state that the successor company will abide by all of DOL's H-1b requirements and maintain a copy of the sworn statement in the public access file.

In addition, because 20 CFR §655.730(e)(1)(iv) provides that unless the sworn statement is both executed and made available to the public and the DOL, the new entity cannot employ any of the target company's H-1b employees without filing new LCAs with the US DOL and H-1b petitions with the USCIS. The preparation of the acquisition memorandum prior to closing is therefore essential in order to avoid compliance-related problems with the US DOL.

Making such a sworn statement available to the DOL or to the public can be a problem if the parties to the M&A event demand secrecy, as is often the case. Anyone off the street can demand to view LCA files from any company at any time. As a result, often the best approach is to prepare and execute the acquisition memorandum in advance and

¹⁶ INA §214(c)(10)

¹⁷ 20 CFR §655.730(e)(1)

make the acquisition memorandum available to the public at the time of closing.

Failure to have the acquisition memorandum in place at the time of closing can result in dire consequences for both the employees in H-1b status and the employer.

b. H-1b Dependent Employers

If the target company is H-1b dependent, then the target company (and perhaps, after the merger, the successor company) is subject to additional LCA attestations.

After the merger is complete, ascertain whether, with the addition of the target company's workforce, the successor company is now an H-1b dependent employer.

A company is H-1b dependent if (i) it employs 25 or fewer fulltime equivalent (FTE) employees and more than 7 are on H-1b visas; (ii) employs 26 to 50 FTEs and more than 12 are on H-1b visas; or (iii) if it employs more than 51 FTEs and 15% or more employees are H-1b visas.

If either the target company or the successor company after the M&A event is an H-1b dependent employer, verification must be made that the dependency LCA requirements are met and that there have been good faith efforts to recruit US workers.¹⁸

2. H-1b Visa Petitions

M&A events often require realignment of employees' job titles and duties. As part of the due diligence for the M&A, be sure to request information regarding changes that will be made to the job titles and duties of all workers on an H-1b visa.

¹⁸ 20 CFR §655.738, *et seq.*

If a material change is made in the terms and conditions of employment, a change from one specialty occupation to another, or if there is a change from one job location to a location not covered by the LCA (depending on the specific case), an amended H-1b application or a new H-1b is required.¹⁹ A general rule of thumb is that if a new LCA is required, the H-1b must be amended or filed as a new H-1b.

However, if an H-1b worker's job title and duties have not changed and the successor company qualifies as a successor in interest, a new H-1b filing is typically not required. If this is the case, another checklist item for M&A counsel is to ensure that the successor employer issues a letter to the employee, confirming that the company has succeeded the previous employer and that the terms and conditions of employment remain unchanged.²⁰ This will greatly aid the H-1b employee during subsequent re-entries to the United States in the event that they travel outside of the country.

E Treaty Traders and Investors

The nationality of the ultimate owners of the successor company is the pertinent issue for target companies with E visa holders.²¹ E visa holders are usually stakeholders, executive or supervisory employees, or have special qualifications to make the alien's services essential to the company.

An E Visa allows a foreign national to enter and work in the US pursuant to a treaty of

¹⁹ See Letter of Efrn Hernandez, Director, Business and Trade Services, Immigration & Naturalization Service HQ (Jun. 7, 2001); 78 *Interpreter Releases* 1185-90 (July 16, 2001).

²⁰ Memo of M. Cronon, Acting Associate Commissioner, HQPGM 70/6.2.8 (Jun. 19, 2001); 78 *Interpreter Releases* 1108-17 (July 2, 2001)

²¹ INA §101(a)(15)(E)

friendship, commerce and navigation (and sometimes a bilateral investment treaty, or specific legislation) between the US and the foreign country.

Only if the successor company shares the same nationality as the E visa holder will it be possible to maintain this visa status. When deciding whether the successor company is of the same nationality, the regulations provide that the ownership must be traced “as best as is practicable to the individuals” who are the ultimate owners of the company.²²

Further, the regulations for the E visa category are very clear that prior approval from the USCIS is necessary when there is a “substantive change” in the terms and conditions of the E visa status.²³

So what constitutes “substantive change”? Substantive change occurs when there has been a “fundamental change in the employing entity’s basic characteristics, such as merger, acquisition, or sale of the division where the alien is employed.”²⁴ This is very broad indeed. To help employers ascertain whether the planned corporate event will be substantive, the regulations provide that the alien can file an E visa application with the USCIS describing the proposed changes and ask the USCIS to determine whether the merger or corporate restructuring would require new E visa application to be filed with the USCIS.²⁵

As a result, it is recommended that, if there are E visa holders in either the target or successor company, immigration counsel is consulted well prior to the closing.

²² 8 CFR §214.2(e)(7)

²³ 8 CFR §214.2(e)(8)(iii)

²⁴ Id.

²⁵ 8 CFR §214.2(e)(8)(v)

On the other hand, a conservative approach to non-substantive changes still requires notification to the USCIS and/or the US State Department. The regulations provide that prior approval for non-substantive changes is not necessary. One of the options available, however, which is to provide the E visa holder with a letter from the target company explaining the changes.²⁶ This presents significant risk if the E visa holder is challenged by an officer at a port of entry.

As a result, a more conservative approach is recommended. There are two choices which could be used post-closing: (a) file a new E visa petition with the USCIS or (b) apply directly to the US State Department for a new E visa if the E visa holder is out of the US at the time of closing.²⁷

Is being a Successor in Interest a viable option?

One of the easiest ways to avoid many of the immigration issues presented to companies in M&A transactions is for the successor company to become a successor in interest. But, is this in the best interest of the successor company? In many cases, it is not.

First, realize that being a successor in interest, in the context of immigration, is a largely non-codified, conceptual idea that has developed through the years as a result of agency interpretation and reliance on a single Board of Immigration Appeals case. Further, that case (discussed below) is arguably not a binding case regarding what constitutes a “successor in interest”. The bottom line is that the concept of successor in interest is an evolving concept and

²⁶ 8 CFR §214.2(e)(8)(iv)(A)

²⁷ 8 CFR §214.2(e)(8)(iv)(B) and (C)

reliance on this concept carries inherent risk that a prudent M&A attorney may wish to avoid.

Initially, the US DOL and the USCIS (then the INS) allocated to the USCIS, by way of a 1992 agreement between the federal agencies, the responsibility for deciding whether a successor company qualifies as being a successor in interest.²⁸ The rule applied by the INS at the time required:

(a) that the successor company be engaged in the same business as the original employer;

(b) that the successor company prove its ability to pay the offered wages to the employees that were on immigrant visas;

(c) that the wage and job description were largely unchanged; and,

(d) that the new employer had acquired all of the target company's assets and liabilities.²⁹

The underlying legal authority used by the INS for asserting the “all assets and liabilities” standard was a 1986 Board of Immigration Appeals decision, *Matter of Dial Auto Repair Shop*.³⁰ In that case, the question of whether the repair shop was a successor in interest was raised near the end of the decision, and was an unresolved issue noted by the court. Further, that issue was incidental to the legal analysis of the final decision. In essence, the court merely restated the position of the employer that it qualified as a successor in interest because it assumed all of the liabilities and assets of the original employer.

Later, the INS relaxed its interpretation of successor in interest. In 1995, the INS proposed a rule stating that the successor company must assume only “substantially all of the assets and liabilities”.³¹ The rule was never formally promulgated, but now appears in the Adjudicator's Field Manual used by the USCIS:

Successor in interest occurs when the prospective employer of an alien (and the entity that filed the certified labor certification application form) has undergone a change in ownership, such as an acquisition or merger, or some other form of change such as corporate restructuring or merger with another business entity, and the new or merged, or restructured entity assumes substantially all of the rights, duties, obligations, and assets of the original entity.³² (emphasis added)

In 2001, the INS specifically addressed what successor in interest means in private opinion letters, the Hernandez Letters. In one letter regarding non-immigrant visas affected by an M&A event, a representative from the INS stated that “...the assumption of liabilities refers to immigration-related liabilities, such as LCA obligations and violations.... It does not refer to non-immigration related obligations and liabilities, such as environmental or tort obligations....”³³ A second letter from the same author confirmed this interpretation of

²⁸ FAM §22.2(a)(5)

²⁹ INS Memorandum, J. Pueblo, *Amendments to Labor Certifications in I-140 Petitions* (Dec. 10, 1993), 70 *Interpreter Releases* 1692 (Dec. 20, 1003).

³⁰ 19 I&N Dec. 481 (Comm, 1986)

³¹ 60 Fed. Reg. 29774 (Jun. 6, 1995)

³² FAM §22.2(a)(5)

³³ Letter of Efren Hernandez, Dir., Business and Trade Services, US DOJ HQ 70/6.2.8 (Mar. 22, 2001), *reprinted in* AILA InfoNet Doc 01032901.

the successor in interest concept in the context of an immigrant visa.³⁴

The USCIS has recently retreated from the more rational standards previously followed by the USCIS. Practitioners have been reporting that the USCIS has been demanding evidence proving the successor company has assumed all assets and liabilities of the target company. Further, at a December 2007 meeting between immigration lawyers and USCIS representatives, the USCIS stated that it must follow the precedent of *Dial Auto Repair* and distanced the Hernandez Letters stating that, since those letters were issued by the INS, the USCIS considers them to be nonbinding.

The US DOL, however, has retained the less stringent standard for successor in interest cases. For Labor Certification cases, the US DOL's standard is that it will determine whether the successor company is a successor in interest based on the totality of the circumstances "with respect to the job opportunity". As long as the M&A does not change the nature of the job opportunity, a pending case can proceed through approval at the US DOL, although as a practical concern this can be difficult.

As a result, whenever there is an asset purchase transaction, the current stance from the USCIS seems to preclude using the successor in interest tool to ease immigration issues in M&A events.

³⁴ Letter of Efrén Hernández, Dir., Business and Trade Services, US DOJ HQ 70/6.1.3 (Oct. 17, 2001), *reprinted in* AILA InfoNet Doc 01101939.

FACT PATTERN

Consider the following M&A transaction (simplified):

Target Company (“T”) is being acquired by Acquiring Company (“A”), which A intends to hold and manage as a minority-owned subsidiary (“S”). A is using leverage from a UK-based Equity Partner (“EP”) to partially fund the acquisition, for which EP is receiving stock in A and S.

T is a wholly-owned subsidiary of a company in London, and has executive and management employees working in the US on L visas. In order for the purchase by A to be viable, the executive and management team of T must carry on after closing and those executives and managers have signed three-year employment agreements with S that were effective as of the date and time of closing.

The structure of the closing was A selling stock to EP, EP contributing funds to S, and S acquiring by asset purchase only the assets of T. Closing occurred just over one year ago, and no one even thought of immigration concerns.

Are the executives and management of T who are on L visas “out of status”?

Are they deportable?

What happens when Executive leaves the U.S. to visit family in the UK?

After the re-entry is attempted by the Executive, ICE delivers a three-day notice of an I-9 audit. What now?