ORIGINALLY PUBLISHED IN THE
LOS ANGELES
Daily Journal
OCTOBER 2005

Complete Immigration Review Avoids Unwelcome Surprises

By Mark Ivener

No big merger would ever be consummated without a comprehensive due diligence analysis. Yet while prudent deal makers will always conduct a thorough financial analysis of a prospective merger partner, an issue that has become critical in today's global economy often gets little pre-merger consideration: immigration compliance.

The lack of adequate immigration due diligence can have serious repercussions for any major corporate restructuring, whether it occurs by way of a merger, acquisition, asset sale, stock sale, joint venture or spin-off. If immigration considerations are not assessed in advance, employees who are crucial to the company's success could suddenly discover that the change in corporate structure has invalidated their authorization to continue working in the United States.

Even if they qualify for reauthorization, this still can be highly disruptive. Out-of-status aliens are not permitted to change their visa status in the United States, so they will have to leave the country and apply at a U.S. consulate abroad for reinstatement.

Such problems can be addressed in advance, but mainly if they are detected before the merger takes effect. A thorough immigration review as part of the initial risk assessment can go a long way toward preserving the status of essential foreign employees—and easing the integration of the two organizations' employees.

Immigration complications can arise in a surprising number of ways following a merger. Consider, for example, the case of a U.S. division of a Japanese company, headed by a Japanese national who was working in the United States on an E-2 investor visa. If a U.S. company acquired the Japanese unit, the company president's E-2 visa, issued because the petitioning entity was Japanese-owned and the president was Japanese, would no longer be valid after the merger.

The president could encounter difficulties when attempting to re-enter the United States on this visa and might even face charges of entry fraud. At a minimum, the president would be unauthorized to stay on the job until a new visa could be obtained.

Or consider the case of a president of a U.S. subsidiary of a foreign enterprise working in the United States on an L-1A visa, granted to an intra-company transferee. After an acquisition, the company structure would be transformed and the president's employer would no longer be a subsidiary. As a result, the L-1A visa would no longer be valid and the president would be an illegal worker in the eyes of the U.S. immigration agency, now called the U.S. Citizenship and Immigration Services.

The major disruptions that occur when key employees lose their work authorization is only one consequence of the lack of advance planning on immigration issues. Individuals who find themselves even inadvertently out of compliance with immigration laws could face repercussions for years to come.

In the future, every time the executive reapplies for a work visa, he or she would be confronted with a question on the visa application asking if the applicant has ever violated his/her previous status, or committed a willful misrepresentation upon entry to the United States. Any future application for permanent residency (Green Card) could also be jeopardized.

For the company, the failure to undertake immigration planning as part of a merger, leading to violations of immigration laws, could expose the organization to sanctions under federal immigration and employment regulations, including the Immigration Reform and Control Act.

Corporate and immigration attorneys and other risk management advisors can help companies and their employees avoid these problems by taking several steps in advance of any corporate reorganization.

The first step consists of reviewing the personnel files of all employees of the company that will be acquired to assure that each includes a completed I-9, the Employment Eligibility Verification Form. Next, special care must be taken in reviewing the immigration status of all employees on visas. Depending on the structure of the company after the merger, visa applications may need to be amended or entirely new petitions may need to be filed with U.S. Citizenship Immigration Services. The paperwork should be completed well in advance to ensure that all employees are in compliance with immigration regulations before the organizational changes take effect.

The due diligence review of immigration compliance must include a comprehensive analysis of the prospective changes in ownership and structure of the company. Even seemingly minor differences, such as company name or tax ID number changes, revised job descriptions, or geographic relocations of employees, can immediately invalidate foreign workers' employment authorization.

To resolve immigration problems that emerge in a corporate restructuring, each affected employee must be considered on a case-by-case basis. The solution will depend on the nature of the restructuring as well as the visa category of the alien worker. Non-immigrant temporary work visas, for example, are always "employer-specific." In other words, work authorization is allowed only with the sponsoring company, and generally any change of employer requires a new or amended petition. However, minor exceptions exist under a few categories.

For H-1B specialty workers, the most common employment visa, new or amended petitions do not need to be filed if the successor organization is regarded as the same legal entity as the original petitioner. According to immigration regulations, that will be case "where a new corporate entity succeeds to the interests and obligations of the original petitioning employer and where the terms and conditions of employment remain the same but for the identity of the petitioner," (8 U.S.C. §1184(c)(10)(c)).

The legal obligations that the successor company must assume in order to avoid the need to apply for new visas include maintaining proper documentation for all H-1B workers and an affidavit in a publicly accessible file acknowledging assumption of all responsibilities and liabilities of the prior employer's Labor Condition Application. A company that does not qualify as a successor to the prior corporate entity will have to go through the

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two-step process, first by filing an amended LCA with the Department of Labor and then a new or amended I-129 H-1B petition with U.S. Citizenship Immigration Services.

Employees who hold other types of non-immigrant visas, such as the O-1 for aliens of extraordinary ability in arts, sports, sciences, business and other specialized fields, and Canadian and Mexican citizens classified as TN employees under the North American Free Trade Agreement, could potentially fit under the "related, successor or reorganized employer" umbrella. But more than likely, they will need to file new petitions.

Multi-national companies rely heavily on L-1 visas to transfer executive, managerial, and specialized workers to U.S. subsidiaries, branches, affiliates or a parent company. Employees holding L-1 visas may need to file a new type of petition following a corporate restructuring if the qualifying relationship between the U.S. subsidiary and the foreign parent company has changed.

If the qualifying relationship remains essentially the same after the merger or reorganization, only an amended petition will be necessary.

Companies will need to conduct a similar analysis of the post-merger status of employees with E-1 and E-2 treaty visas, which are given to foreign nationals engaged in international trade or investing in the United States. The central premise of this visa category is that a qualifying treaty exists between the United States and the country of the foreign national.

Therefore, any corporate restructuring that changes the "nationality" of the surviving employer will invalidate the E-visa.

Corporate reorganizations may also adversely affect a foreign executive's pending application for permanent residency by either delaying the process or rendering the application for a Green Card invalid. The permanent residency process can be protracted, even without such complications. Any change that would require an entirely new application could involve delays for many years.

To determine the best course of action in these cases, the immigration lawyer for the company or individual applicant would examine both the surviving entity's "successor in interest" qualification, as well as the qualifying relationship of the foreign entity to the U.S. organization, depending on the type of permanent residency application. If certain conditions are met, including the aforementioned necessary qualifications, the surviving entity may maintain the sponsorship of the pending Labor Certification or Green Card application, and the application will be allowed to proceed without interruption.

Corporate mergers and acquisitions inherently involve a certain degree of risk. The trail of failed or struggling consolidations of the past decade affirms as much. (AOL-Time Warner and Daimler's purchase of Chrysler come to mind.) However, the lure of economies of scale, increased corporate profits and diversification of risk is once again driving companies toward a new wave of mergers.

In today's globalized economy, buyers are likely to find that their target acquisition employs a substantial number of foreign nationals in jobs ranging from scientists and engineers to chief executives. The loss of any of these key personnel because of immigration problems that arise during a merger or corporate reorganization could have serious and far-reaching effects on vital aspects of the enterprise, including operations, management, and research and development. Sanctions, fines and possible deportation imposed by the Department of Homeland Security for violations of federal immigration regulations could add insult to injury.

During the due diligence process that precedes a merger, immigration issues often get short shrift, if they get much consideration at all. In light of the high costs of immigration violations once they occur, acquisition minded companies must accomplish compliance with immigration laws far in advance of closing a transaction.

Uncovering and resolving visa and work permission problems of corporate executives and key workers before they arise can help assure a solid foundation for the newly formed company.

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