# OFF WITH THEIR HEADS! THE IMPACT OF MERGERS & ACQUISITIONS ON NONIMMIGRANT EMPLOYEES

*by Karin Wolman*[*]

> "I don't think they play at all fairly," Alice began, in rather a complaining tone, "and they all quarrel so dreadfully one can't hear one's self speak – and they don't seem to have any rules in particular; at least, if there are, nobody attends to them." —*Alice in Wonderland, Ch. VIII, The Queen's Croquet Ground*

## INTRODUCTION: THE CURRENT STATE OF SUCCESSORS IN INTEREST

In companies undergoing a merger or acquisition, the past couple of years have been a trying time for personnel managers and corporate counsel struggling to identify which employees can be saved from the impact of a transaction that changes the employing entity, and what legal standards apply to that employer's ability to retain its foreign workers.

In the immigrant visa context, and in certain nonimmigrant situations, the question of who can be saved turns on whether the resulting employer after a change in corporate structure or ownership may be deemed a "successor in interest" to the previous employing entity. After a long and gradual relaxation toward a standard in keeping with modern corporate transactional practice and common sense,[1] U.S. Citizenship and Immigration Services (USCIS) reversed course in 2007[2] and reinstated an onerous and unrealistic standard. USCIS once again seeks to define a "successor in interest" as an entity that has assumed "all of the rights, duties, assets and obligations of the original employer." This standard originates from the decision in *Matter of Dial Auto Repair Shop Inc.*,[3] and has generated a wave of I-140 denials. The Texas Service Center asserted that this standard is still in effect, repudiating the more relaxed guidance offered in the letters from Efren Hernandez III,[4] which said legacy Immigration and Naturalization Service (legacy INS) was concerned only with a successor's assumption of immigration-related rights and liabilities. The Texas Service Center said that those letters were not designated as policy statements, and are not binding on legacy INS.

---

[*] **Karin Wolman** is a sole practitioner in New York, focusing on individuals of extraordinary ability, and a wide range of employment-based immigration options for healthcare, the arts and design, business and the sciences, as well as non-profits. A member of AILA since 1996, she is a frequent speaker and writer on business immigration topics, for AILA and others. For the New York Chapter, she has served on a wide variety of committees and as Editor of the NY Symposium Handbook. Nationally, she serves on AILA's Board of Publications and as moderator of the O & P message board on InfoNet. She earned her B.A. from Columbia and her J.D. from UCLA.

[1] A succinct history of successor-in-interest standards through mid-2008 appears in S. Ellison & P. Hejinian, "USCIS Says, 'All or Nothing': Latest Developments on Successor-in-Interest," *Immigration & Nationality Law Handbook* 93 (AILA 2008-2009 Ed.).

[2] Per the USCIS I-140 National Standard Operating Procedures, *published on* AILA InfoNet at Doc. No. 07083067 (*posted* Aug. 30, 2007); and "AILA/Texas Service Center Liaison, Questions & Answers" (Dec. 3, 2007), *published on* AILA InfoNet *at* Doc. No. 08010365 (*posted* Jan. 3, 2008).

[3] *Matter of Dial Auto Repair Shop Inc.*19 I&N Dec. 481 (Comm. 1986 – *often cited by USCIS as* Comm. 1981), reaffirmed as policy in Immigration and Nationality Service (INS) Memorandum, J. Puleo, "Amendment of Labor Certifications in I-140 Petitions" (Dec. 10, 1993), reproduced in 70 *Interpreter Releases* 1692-1693, App. III (Dec. 20, 1993). The Puleo memo says that for an I-140 or labor certification to remain valid following a change in ownership, merger, or purchase, the successor company must take over the business and file a new I-140 petition, and must document that it has assumed *all* the rights, duties, obligations and assets of the original petitioner.

[4] Letter of Efren Hernandez III, Director, INS Business & Trade Services, to Steven M. Ladik, HQ 70/6.2.8 (March 22, 2001), *reprinted at* 78 Int. Reel. 621, App. III (Apr.2, 2001), *published on* AILA InfoNet *at* Doc. No. 01032901 (*posted* Mar. 29, 2001); Letter of Efren Hernandez III, Director, INS Business & Trade Services, to J. Douglas Donenfeld, HQ 70/6.1.3 (Oct. 17, 2001), *published on* AILA InfoNet *at* Doc. No. 01101939 (*posted* Oct. 19, 2001).

As Laurie Grossman and Susan Cohen[5] warned over a decade ago, practitioners should exercise caution when relying on any memoranda or opinion letters that are unclassified or bear a 'C' code, which means that legacy INS and USCIS classify them as correspondence, and therefore not binding.

The pertinent part of the *Dial Auto Repair* decision, and the standard to which USCIS has retrenched, reads:

> The successor in interest has the burden of proof to establish that it has assumed **all** of the rights, duties, obligations, and assets of the original employer. Additionally, the successor in interest must continue to operate the same type of business as the original employer. Finally, the new business must establish that it has the ability to pay.[6]

As of this writing, the standard for qualifying as a successor-in-interest remains in flux. Per the minutes of an October 28, 2008, liaison meeting with USCIS Headquarters,[7] AILA objected to a rash of denials on the successor-in-interest issue that applied the *Dial Auto Repair* standard, noting that those decisions contravene the current language of the Adjudicator's Field Manual (AFM), and a USCIS memorandum from Michael Aytes in 2006, detailing amendments to the AFM.[8] The standard set forth in the AFM at §22.2(b)(3)(D) is that a successor must assume "substantially all" of the rights, duties and obligations of the original employer. USCIS responded that its policies in this area are currently under review, and that it is holding I-140 denials based solely on the successor in interest issue, to await further clarifying guidance.[9]

Since that clarifying guidance has yet to be published, the scope of this article is limited to how mergers and acquisitions affect employees who hold employment-based nonimmigrant visa status, and practice tips for assessing the damage and keeping as many of those foreign workers as possible in valid status.

Employment-based nonimmigrant visa categories authorize work only for a specific employer, so the impact of any corporate change will depend on the worker's visa status. With respect to any class of nonimmigrant employees of a company facing the prospect of any corporate change, be it a merger, spinoff, consolidation, asset purchase, or stock purchase, the first question is: will that class of nonimmigrant employees remain eligible for the same visa classification after the transaction closes? If so, who must be notified of the changes, with what documentation, and when—and will it protect the workers only if the documentation predates the transaction? If they no will longer be eligible for the same status, are there measures that could be taken to protect workers who otherwise would fall out of status as soon as the transaction closes?

Identifying who among the nonimmigrant employees can keep their work-authorized status in the wake of a corporate transaction requires an audit by visa classification, whether it is before or after the deal, conducted internally by human resources or externally by the buyer's counsel. Nonimmigrant work visas are all employer-specific, and eligibility requirements differ among visa categories, so the entity that will be the resulting employer, and/or its counsel, must conduct a thorough immigration audit to assess the impact of a transaction on each category of nonimmigrant employees. Naturally, buyer's counsel will be more motivated to uncover deficiencies in I-9 files or public access files than the seller. In the best of all possible worlds, where immigration counsel is kept in the loop, or where buyer's counsel has had the forethought to view employees of the target company as "assets," or as part of the "human capital" inherent in the value of a target company and hence the pricing of the deal, such an audit will occur as a part of due diligence before the transaction closes. In the imperfect world most of us inhabit, such an audit may often happen after the deal is done, upon frantic prompting by immigration counsel. If counsel acts promptly in the wake of a deal to file new or

---

[5] "The Effect of Changed Circumstances on H-1B Nonimmigrant Workers," L. Grossman & S. Cohen, AILA 1997-1998 Immigration & Nationality Law Handbook, Vol. II, p.191 (AILA 1997).

[6] *Matter of Dial Auto Repair Shop Inc.*, 19 I&N Dec. 481 (Comm. 1986).

[7] Minutes of AILA/USCIS Liaison Meeting (Oct. 28, 2008), question #4, *published on* AILA InfoNet *at* Doc. No. 08110767 (*posted* Nov. 2008).

[8] USCIS Memorandum, M. Aytes, "AFM Update: Chapter 22: Employment-based Petitions," (Sept.12, 2006), *published on* AILA InfoNet *at* Doc. No. 06101910 (*posted* Oct. 19, 2006).

[9] In the October 2008 liaison meeting minutes, *supra* note 7, USCIS indicated that clarifying guidance on the standard for successor-in-interest would be "forthcoming soon." That was five months ago as of this writing.

amended petitions once the details of the transaction are known, the USCIS Service Centers have a tradition of using their discretion[10] favorably to treat such workers as though they have not already fallen out of status.

> "'Who are you?' said the Caterpillar.
>
> This was not an encouraging opening for a conversation. Alice replied, rather shyly, 'I – I hardly know, sir, just at present – at least I know who I was when I got up this morning, but I think I must have been changed several times since then.'" *—Alice in Wonderland, Ch. V, Advice from a Caterpillar*

**H-1B & E-3 EMPLOYEES**

Statutory changes have brought several concrete improvements to H-1B nonimmigrants, in the form of new sections INA §214(n),[11] authorizing portability and continued employment authorization for workers in H-1B status, and INA §214(c)(10),[12] which provides that certain changes to the corporate entity—"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*." (Emphasis added.)

This treatment corresponds to the U.S. Department of Labor (DOL) regulation enacted in December 2000,[13] permitting adoption of existing H-1B employees by the resulting entity after a merger, acquisition, etc. without the filing of new Labor Condition Applications (LCA),[14] if the new employing entity keeps a list of the transferred H-1B nonimmigrants, and maintains in its public access files a document containing:

- A list of each affected LCA by number, and its date of certification;
- A description of the new employing entity's actual wage system applicable to those workers;
- The Federal Employer Identification Number (FEIN) of the new employing entity, whether this differs from the FEIN of the old entity; and
- A sworn statement by an authorized representative of the new employing entity acknowledging its assumption of the obligations specified in each of the LCAs filed by the predecessor entity, agreeing to abide by the DOL regulations applicable to LCAs, agreeing to keep a copy of the sworn statement in the public access files, and to make it available upon request to any member of the public or any representative of DOL.

Note that this sworn statement could raise serious liability issues for the new employing entity. If an audit of the LCAs conducted during due diligence reveals a pattern of inadequacies, pay discrepancies, or nonexistent public access files, the new entity may be better off filing amended petitions for all the H-1B workers rather than assuming liability for the failings of its predecessor.

It is still a welcome change from the old rule, which required the filing of a new LCA, and thus a new or amended petition, any time a corporate entity changed its FEIN. However, DOL requires timely recordkeeping, in the form of amendments to the public access files, before the corporate change takes effect.[15]

---

[10] Under 8 CFR §214.1(c )(4), USCIS has discretion to excuse failure of timely filing if the delay is beyond the applicant or petitioner's control and the delay is commensurate with the circumstances.

[11] Added by §105(a) of the American Competitiveness in the Twenty-First Century Act of 2000, 114 Stat. 1251, P.L. 106-313, enacted Oct. 17, 2000.

[12] Added by §401 of the Visa Waiver Permanent Provision Act, P.L. 106-396, enacted October 30, 2000.

[13] 65 F.R. 80112 (Dec. 20, 2000), implementing changes dictated by the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), 112 Stat. 2681, P.L. 105-277, enacted Oct. 21, 1998, to Documentation of Corporate Identity under 20 CFR §655.760.

[14] 20 CFR §655.730(e), Change in employer's corporate structure or identity.

[15] 20 CFR §655.760.

If the responsible officers of the new employing entity have not yet been appointed, or for some other reason the memorandum with all the above-detailed attachments does not get to the public access files before the change occurs, then new LCAs must be filed, resulting in a corresponding obligation to file amended H-1B petitions. "The Department cautions that an employer which undergoes a change in structure and EIN, but chooses not to insert the required memorandum in the public access file is required to file new LCAs."[16]

In practice, this is nonsense: if the employer does not yet have sufficient information about the successor entity to prepare a memorandum for the H-1B public access files, how in the world is it supposed to have sufficient data to prepare and timely file LCAs and H-1B petitions on behalf of the new entity? Luckily, USCIS takes up the slack here by exercising its discretion, as noted above; petitions filed shortly after a change takes effect often are treated as timely.

Where it is not possible to execute the required memorandum and have it distributed to all LCA public access files before the change occurs, the successor entity should file amended H-1B petitions at the earliest time possible, even if that is shortly after the new employing entity comes into being. One expedient method is to begin with a friendly appeal to the business supervisor at the relevant service center, outlining the corporate transaction and requesting the USCIS's cooperation in using a single "class representative" as a feasible means of providing the it timely notice with respect to all the affected workers. Then, the employer can file an amended petition for one worker, using premium processing to guarantee a rapid response, describing and documenting the change in the corporate entity, and attaching a list of all the similarly affected nonimmigrant workers. As suggested by Angelo Paparelli in a panel discussion reported in Bender's Immigration Bulletin,[17] this "class representative" strategy should be treated as a collaborative effort with USCIS, with the proviso that some service centers may be more receptive to this idea than others.

Amended petitions will be required in situations where the new entity does not explicitly assume the liabilities and obligations of the original petitioner. Given the uncertain treatment of successors-in-interest at present, it is unclear in the H-1B context whether USCIS currently interprets INA §214(c)(10) as requiring the successor to have assumed **all** the rights, duties, and liabilities of the predecessor, **substantially all** of them, or just the **immigration-related** obligations pertaining to the LCAs, as specified in the labor department regulations, in order to be absolved of any re-filing obligation. Amended petitions for each worker are undoubtedly required in situations where the transaction involves any cherry-picking of personnel, and does not result in all employees of the target entity being moved automatically to payroll of the new entity.

In addition to changes to the employing entity, any changes that affect the terms and conditions of individual jobs must be examined. A concept that long has been present without formally or consistently being defined in the regulations, is the "material," or in some cases "substantive," change. This is a common benchmark of when an amended petition must be filed for workers in H, E, L, or O status.[18] Normal incremental changes in the upward direction, such as getting a promotion, a raise, or moving to a new office nearby, usually are not deemed material, whereas lateral or downward changes typically are material.[19]

**Change in Job Duties**

Lateral changes such as switching to new job duties may be deemed material, even if the job title remains the same.[20] This is an important consideration in corporate transactions where only some employees are retained and those who remain may take on additional duties due to staffing reductions. It always will require careful case-by-case review, as a change in job duties may be enough to indicate a difference in the applicable prevail-

---

[16] 65 Fed. Reg. 80124 (Dec. 20, 2000).

[17] A Paparelli, "It Ain't Over 'Till It's Over … " 5 *Bender's Immigr. Bull.* 800-801 (Oct. 1, 2000).

[18] 8 CFR §§214.2(h)(2)(i)(E), 214.2(e)(8), 214.2(l)(7)(i)(C), §214.2(o)(i)(D).

[19] For further discussion particular to H-1B employees, *see* P. Nallainathan *et al*., "Weighing When to Amend or Terminate H-1B Petitions," *Immigration & Nationality Law Handbook* 76 (AILA 2007–08 Ed.).

[20] INS Memorandum, T. Aleinikoff, "Amended H-1B Petitions," (Aug. 22, 1996), *reprinted in* 73 *Interpreter Releases* 1231-32, App. III (Sept. 16, 1996); INS Memorandum, J. Hogan, "Guidelines for the Filing of Amended H and L Petitions," (Oct. 22, 1992), *reprinted in* 69 *Interpreter Releases* 1448-50, App. II (Nov. 9, 1992).

ing wage level, or even a different Standard Occupational Classification—such as where a teacher takes on duties as a practitioner, or an "individual contributor" professional takes on duties as a manager.

**Change in Location**

A red flag for required action is any movement or reassignment of H-1B or E-3 employees to new job locations. If the new worksite address is within the same city, town, or metropolitan statistical area named on the original LCA, then notice must be posted in two places at the new worksite before the H-1B or E-3 employees may begin working there, and the new posting notices must be retained in the public access files thereafter.[21] If the new worksite address is in a different city, town, or metropolitan statistical area not named on the original LCA, then a new LCA must be filed, which in turn triggers the requirement to file an amended petition.[22] This is a crucial distinction—an employer's failure to file a new LCA based on a change of job location to a new area, especially to a new state, may result later in a finding that the professional employees worked there without authorization and thus failed to maintain valid visa status.[23]

**Reduction in Salary or Hours**

Salary reductions may be material, and may require filing a new LCA, and thus, an amended petition. DOL regulations note that the "required wage" that must be paid is the higher of the actual wage or the prevailing wage.[24] USCIS had said that where there was a company-wide salary change but the company continued to pay the required wage, no new or amended petition need be filed.[25] That pronouncement, however, was made before the 5 percent prevailing wage allowance was eliminated on March 8, 2005.[26] Because an H-1B or E-3 worker always must be paid an actual wage that is at least equal to the prevailing wage, any reduction in the actual wage below the prevailing wage is by definition a reduction below the "required wage."

For any job described in the original LCA as full-time, a reduction in a worker's hours of employment will have no effect and requires no action by the employer until it dips below 35 to 40 hours per week, whatever is the normal full work week for that employer.[27] Any reduction from full-time to part-time employment is deemed material, and requires a new LCA stating the prevailing wage and offered wage at hourly rates, and thus an amended H-1B petition must be filed.[28] On the other hand, if the original LCA stated an hourly rate of pay and specified that the position was part-time, then a reduction in hours worked must be checked against the original petition or application to see if it is still within the range of hours stated, and the rate of pay must be checked against the hourly rate stated on the LCA. If the wage was hourly and is still being met, and the number of hours is still within the specified range, no amendment is needed. If either falls below the terms previously stated, then a new LCA and amended H-1B petition may be required.

Even though E-3 Australian professionals do not necessarily have an underlying petition because they may apply directly for the visa, E-3 status must be based on an underlying LCA.[29] As a result, like H-1B workers, E-3 workers will require an amended petition filed with a new LCA if the wage is reduced, if hours are reduced as described above, or if the job location moves outside the approved metropolitan statistical area. Likewise, if a job moves within the original area, notices must be posted at the new job site before the E-3 worker is moved to that new location, and the new posted notices must be retained in the LCA public access

---

[21] 20 CFR §655.734(a)(2).

[22] 20 CFR §655.735; *and see* Aleinikoff memo, *supra* note 20.

[23] *CDI Information Services, Inc. v. Reno*, 101 F. Supp. 2d 546, 549 (E.D. Mich. 2000).

[24] 20 CFR §655.715.

[25] "Service Center Operations Teleconference," (Jul. 24, 2003), *published on* AILA InfoNet at Doc. No. 03080713 (*posted* Aug. 7, 2003).

[26] H-1B Visa Reform Act of 2004, enacted as a part of the Omnibus Appropriations Act for FY 2005, Pub. L. 108-447, Sec. 415 (Dec. 8, 2004).

[27] 20 CFR §655.736(a)(2)(iii)(A) defines full-time employees as those who work 40 or more hours per week, "unless the employer can show that less than 40 hours per week is full-time employment in its regular course of business (However, in no event would less than 35 hours per week be considered to be full-time employment)."

[28] A reduction in pay or hours may also fall afoul of the no-benching provisions. See 20 CFR §655.731(c)(4)-(7).

[29] INA §101(a)(15)(E)(iii); 9 FAM 41.51, note 16.

file. While E-3 nonimmigrants are akin to H-1Bs as concerns the LCA, remember the limitations of E-3 status: E-3s do not have portability, premium processing service is not available, and their work authorization does not continue automatically for 240 days upon filing of an extension request or amended petition.

**What is a New Employer?**

8 CFR §214.2(h)(2)(i)(D) *Change of employers.*

> "If the alien is in the United States and seeks to change employers, the prospective new employer must file a petition on Form I-129 requesting classification and extension of the alien's stay in the United States…. The alien is not authorized to begin the employment with the new petitioner until the petition is approved."

This sounds clear enough at first: where an entity is a "new employer," the entity must file a new petition and cannot employ the nonimmigrant until the petition is approved. However, no allowance or exception is made in this section for H-1B nonimmigrants commencing new employment with a subsequent employer under the "portability" provision authorized by statute, which clearly prevails. While the regulation quoted above may cause some confusion because it states that employment is not authorized under conditions where the statute explicitly provides for work authorization, the mechanics of documenting work authorization for H-1B workers pursuant to the portability provision hopefully will be resolved in future amendments, either to this section or to the employment eligibility regulation for nonimmigrants at 8 CFR §274a.12(b). In the meantime, employers should treat I-9 documentation of these workers as they would treat any H-1B extension or portability hire, retaining a copy of the worker's valid passport, most current I-94 at the time of filing, and receipt for the new petition.

8 CFR §214.2(h)(2)(i)(E) *Amended or new petition*.

> "The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application."

Note that this regulation leaves it up to the petitioner to elect whether a new or amended petition is more appropriate in any situation where there is a "material" change. Following the imposition of additional fees authorized by the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA),[30] and by the H-1B Visa Reform Act of 2004,[31] this choice now makes a difference for H-1B petitioners because a new petition incurs both the $500 fraud detection fee and the $1,500/$750 worker training fee,[32] but an amended petition does not incur either, so long as the petition does not request an extension of stay beyond the date of the previously approved petition.

Another distinction between a new and an amended petition, where one or the other must be filed because the new employing entity did not assume all the original employer's obligations but has assumed certain nonimmigrant employees, is that filing an amended petition automatically continues that employee's work authorization during the pendency of that petition for up to 240 days[33] whereas the filing of a new petition does not. That employment eligibility regulation covers all nonimmigrants authorized to work for a specific employer

---

[30] ACWIA, *supra* note 13, enacted Oct. 21, 1998, and contained in title IV, Division C of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277. Section 414 of ACWIA authorizes a $500 fee. The fee was increased to $1,000 upon enactment of the AC21 on Oct. 17, 2000, with an effective date of December 17, 2000.

[31] H-1B Visa Reform Act of 2004, Pub. L. No. 108-447, §4, div. J, secs. 421–30, 118 Stat. 2809, 3353–61, enacted Dec. 8, 2004, as a part of the Omnibus Appropriations Act for FY 2005, established the Fraud Detection and Prevention Fee of $500 for all new H-1B petitions, and raised the U.S. worker-training fee, previously $1,000 (per *supra* note 30), to $1,500 for most employers, but reduced it to $750 for those with fewer than 25 employees.

[32] According to the enabling legislation in ACWIA, these fees are intended to fund grants to U.S. workers from the National Science Foundation and technology skills training programs administered by the DOL.

[33] 8 CFR §274a.12(b)(20).

incident to status. While it is no longer so important for H-1B workers now covered by portability,[34] the grant of continued work authorization conveyed by an amended petition remains a key consideration in choosing whether to file amended petitions or new petitions for employees in H-2 or H-3, E-1, E-2, L-1, or O-1 status.

**OTHER H WORKERS/H-3 TRAINEES**

As noted above, the regulations at 8 CFR §214.2(h)(2)(E) require filing of a "new or amended" petition where a material change occurs, with the corresponding "current or new" LCA determination from DOL. There is no LCA filing with DOL for H-3 trainees, but H-2A and H-2B temporary workers go through a temporary labor certification process, so corporate transactions that result in changes in name or location of the H-2 employer require amended filings with DOL, as well as amended petitions.

Because INA §214 (c)(10) on its face applies only to H-1B nonimmigrants, even where a change in corporate structure or ownership results in a successor-in-interest, the successor entity should file amended petitions for any H-3 and H-2 nonimmigrants. If the successor entity does not, there is no established procedure to document that these workers remain in status, particularly where their payroll documents abruptly change to reflect another entity name or entity with a different federal employer identification number. A minimum precaution would be to put a memorandum documenting the date and nature of the corporate change and the new entity's assumption of the original petitioner's immigration and employment rights, liabilities, etc. into the I-9 and personnel files of all H nonimmigrants.

**EMPLOYEES IN E & L STATUS – THE MOST VULNERABLE**

If a corporate change alters the ownership and control of the U.S. entity, or severs a relationship with a foreign parent, affiliate, or subsidiary company, then E treaty company managers and essential employees, and L-1 intracompany transferees, may fall out of their nonimmigrant visa status immediately as of the effective date of the change. Unlike H-1B workers, these nonimmigrants derive their visa eligibility in part from the corporate structure or ownership of the U.S. employer. As a result, changes to the entity that do not directly have any impact on their individual jobs may still be material to their maintenance of nonimmigrant visa status.

8 CFR §214.2(e)(8)

"(iii) *Substantive changes*. Prior Service approval must be obtained where there will be a substantive change in the terms or conditions of E status… the treaty alien must submit evidence of continued eligibility for E classification in the new capacity…The Service will deem there to have been a substantive change necessitating the filing of a new Form I-129 application where there has been a fundamental change in the employing entity's basic characteristics, such as a merger, acquisition, or sale of the division where the alien is employed.

(iv) *Non-substantive changes.*

…prior approval is not required if corporate changes occur which do not affect the previously approved employment relationship, or are otherwise non-substantive."

The E regulations also allow for both E-1 and E-2 treaty employees to be transferred freely among any subsidiaries of a common treaty parent enterprise, so long as the parent organization and the subsidiaries were named in the original petition or application.[35] This means that moving some E employees to the payroll of another U.S. entity with a different name and FEIN will not be a deemed a material or substantive change if that entity is and has been named in previous filings as part of the treaty company or group. This may be a necessary strategic choice where the entity or division the employee has been working for becomes part of a non-treaty company.

[34] Now codified at INA §214(n).

[35] 8 CFR §214.2(e)(8)(ii).

**E-1 Treaty Traders**

E-1 Treaty trader eligibility derives from the U.S. employer being engaged principally in substantial international trade with the treaty country[36] and on the company and the worker both having the nationality of the treaty country.[37] For these employees to maintain status, the ownership of the U.S. employer must remain at least 50 percent in the hands of nationals of the treaty country,[38] and the company must maintain a level of international trade with the treaty country that still constitutes over 50 percent of its international trade.[39]

If a corporate change in structure or ownership leaves the treaty nationality of the company intact, the company still may qualify but will require amended petitions if the ownership of the U.S. entity shifts outside the bounds of the previously-approved parent group or enterprise. If it results in the E-1 worker being employed by any subsidiary of the parent or group enterprise named in the original application, it is deemed a "non-substantive" change, and the only remaining concern with respect to continued work authorization of the E-1 employees is whether the U.S. entity is sustaining its level of principal trade with the treaty country.

**E-2 Treaty Investors**

E-2 Treaty investor eligibility derives from an individual or corporation that has the nationality of the treaty country investing a substantial amount of capital in the United States.[40] Because most criteria for eligibility relate to the nature and application of the investment, the ongoing work authorization of E-2 employees depends on maintaining the treaty-country ownership of the enterprise in the United States, and whether the treaty-country majority owner is part of the originally-approved parent group or enterprise (in which case it is non-substantive and no amendments are required), or shifts to new owners who are nationals of the treaty country but come from outside that original group (in which case amended petitions are required). The only true disaster for E-1 treaty trader and E-2 treaty investor employees is if the U.S. employer ceases to be a treaty company due to change of nationality, where majority ownership and control of the U.S. entity shifts out of the hands of nationals of the treaty country.

In situations where the U.S. entity is involved in a corporate entity change that does not require an amended petition ("non-substantive"), and the E-2 employees need to travel, the E-2 regulations leave a lot of room for choice.

8 CFR §214.2(e)(8)(iv)

"…To facilitate admission, the alien may:

Present a letter from the treaty-qualifying company through which the alien attained E classification explaining the nature of the change;

Request a new Form I-797, Approval Notice, reflecting the non-substantive change by filing with the appropriate Service Center Form I-129, with fee, and a complete description of the change, or;

Apply directly to State for a new E visa reflecting the change. An alien who does not elect one of the three options contained in paragraph (e)(8)(iv)(A) through (C) of this section, is not precluded from demonstrating to the satisfaction of the immigration officer at the port-of-entry in some other manner, his or her admissibility under section 101(a)(15)(E) of the Act."

This is a rare instance of USCIS regulations formally acknowledging that the guidance they provide is unclear, and that the traveling E-2 treaty worker may have to present persuasive evidence documenting a corporate change even where the employer does not.

---

[36] INA §101(a)(15)(E)(i).

[37] INA §101(a)(15)(E)(i), 8 CFR §214.2(e)(1)(i).

[38] 8 CFR §214.2(e)(3)(ii).

[39] 8 CFR §214.2(e)(11).

[40] INA §101(a)(15)(E)(ii).

**L-1 Intracompany Transferees**

L-1 intracompany transferees derive visa eligibility for this visa status from both the qualifying relationship between the corporate entity employing them in the U.S., and the entity for whom they previously worked abroad, as well as from the executive, managerial, or specialized knowledge nature of the job with the U.S. entity.[41] The relationship between the entities must meet one of the four regulatory definitions as parent, subsidiary, affiliate, or branch office.[42]

If that qualifying relationship is severed, the L-1 workers cease to qualify and must look to some other nonimmigrant status, but there are many scenarios in which both a U.S. company and some or all of its foreign affiliates may merge with or be acquired by a new owner, in which case amended petitions are possible.

8 CFR §214.2(l)(7)(i)(C)

"*Amendments*. The petitioner shall file an amended petition, with fee, at the Service Center where the original petition was filed to reflect changes in approved relationships, additional qualifying organizations under a blanket petition, change in capacity of employment (i.e., from a specialized knowledge position to a managerial position), or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act."

The key question with respect to the impact of any change in corporate structure or ownership on L-1 employees is: does it change the qualifying corporate relationship with the relevant foreign entity? If the relationship with any of the foreign entities is severed, some L-1 employees in the U.S. automatically may lose their status.

The addition of a new qualifying organization to the previously approved group under a blanket L petition warrants the filing of an amended petition, but has no negative impact on the relationship with the entity where the worker's qualifying experience abroad was obtained.

Where the U.S. entity will retain some, but not all, of its foreign affiliations after a restructuring, and there are multiple foreign entities, each L-1 nonimmigrant's file must be reviewed to determine whether the new employing U.S. entity will have the same relationship as its predecessor with the foreign entity where that L-1 nonimmigrant obtained his or her qualifying work experience abroad. If the relationship with that foreign entity will be changed but not severed, an amended petition may be filed as long as the entity abroad and the U.S. employer still have one of the qualifying relationships as parent, branch, subsidiary, or affiliate.

If the qualifying relationship is unequivocally severed, such as for all L-1 employees of a U.S. company being sold by a foreign parent company to a U.S. purchaser, then all L-1 positions and credentials must be reviewed prior to the transaction to determine eligibility for other nonimmigrant statuses before the restructuring occurs, to avoid having those employees fall out of status on the date the change takes effect.

Some corporate changes will have the effect of changing the majority ownership and control of the U.S. entity, and also its nationality. For example, if the original employer is a wholly-owned U.S. subsidiary of a French company, then any proposed sale or spin-off of that entity to a U.S. buyer will render all E and L employees immediately out of status because the sale changes the company's nationality, and also severs the qualifying relationship with a foreign parent company.

A proposed sale of that same U.S. subsidiary to a new, unrelated French company would maintain the U.S. company's treaty nationality, but would require amended petitions for E employees, and would still render all the L-1 transferees out of status, having severed the relationship with the entity with which they obtained their qualifying experience.

Wherever the employer and/or immigration counsel see the possibility of such changes coming, the files of all E and L employees should be reviewed for the possibility eligibility for some other status, for those who

---

[41] INA §101(a)(15)(L).

[42] As defined at 8 CFR §214.2(l)(1)(ii)(I) through (L), the entities must share common ownership and control, meaning that they have in common at least 50% ownership plus veto power. If an entity is a publicly-traded company, control can be demonstrated by a less-than 50 percent owner that is the largest shareholder.

qualify. These options are now limited given the annual time constraints of the filing window for case impacted by the annual H-1B cap.

## F-1 STUDENTS WITH OPTIONAL PRACTICAL TRAINING

F-1 students working under optional practical training will usually remain authorized to work because in many cases their Employment Authorization Document (EAD) is not employer-specific.

However, in some cases the site of permitted training is named by endorsement on the student's Form I-20 and the employer's name is entered into the Student and Exchange Visitor Information System (SEVIS) database. Each student's current I-20 should be reviewed carefully to see if the endorsement approving practical training names the employer. If the employer is named on the I-20, and its corporate name has changed, then the designated school official should be notified to see if he or she will provide an updated endorsement adding the new corporate name, and enter this information in SEVIS. In general, school officials are reluctant to make any changes to an I-20 after the student's date of graduation.

## J-1 EXCHANGE VISITORS

The J-1 program sponsor designation comes from DOS and is valid for intervals of five years at a time.[43] If the employing entity itself is the J-1 program sponsor and there is a change to its corporate name, address, majority ownership or control, financial circumstances or content of the program the new entity must report these changes to DOS promptly and in writing.[44] The sponsor may wish to re-designate the program so it can issue new Forms DS-2019 that reflect the new corporate data, but otherwise the program remains valid unless the Department of State actively withdraws its approval for the program designation.

Even if a J-1 program is cancelled, the workers already admitted to participate in it remain in valid status through the program dates on the Forms DS-2019 so long as their program-related activities are ongoing.

8 CFR §214.2(j)(3)

> "If the exchange visitor is currently engaged in activities authorized by the cancelled program, the participant is authorized to remain in the United States to engage in those activities until expiration of the period of stay previously authorized. The district director shall notify participants in cancelled programs that permission to remain in the United States as an exchange visitor, or extension of stay may be obtained if the participant is accepted in another approved program and a Form DS-2019, executed by the new program sponsor, is submitted. In this case, a release from the sponsor of the cancelled program will not be required."

In many cases, the designated program sponsor will be an umbrella organization accredited by DOS, and not the employer itself. Form DS-2019 reflects a program description that does not name the specific employer. If the J-1 sponsor is an umbrella organization and the program activities continue in full force, the J-1 visitor is maintaining valid status. However, because of increased scrutiny of DOS-accredited program sponsors and J-1 Exchange Visitors through the SEVIS database, the program sponsor may require the new employing entity to execute an amended Trainee/Internship Placement Program (form DS-7002), to reflect changes of name and entity, and to describe any changes in who will supervise the training.

Likewise, J-1 students and scholars with authorized practical training appear at first blush to be home free because they have work authorization without the need for an EAD, which remains in force so long as they continue training in the field indicated on their form DS-2019. However, in practice, they also are monitored through SEVIS, which shows a record of where the approved practical training is authorized to take place. Thus, they may need to apprise the Responsible Officer of the J-1 program of any changes to the employing entity.

---

[43] 22 CFR §62.6(c).

[44] 22 CFR §62.13.

## O-1 PERSONS OF EXTRAORDINARY ABILITY

Under 8 CFR §214.2(o)(i)(D), amended petitions are required "to reflect any material changes in the terms and conditions of employment or the beneficiary's eligibility."

The O regulations make no mention of changes to the employing entity, but they do further state: "In the case of a petition filed for an artist or entertainer, a petitioner may add additional performances or engagements during the validity period of the petition without filing an amended petition, provided the additional performances or engagements require an alien of O-1 caliber."

These regulations reflect that, with regard to O-1 nonimmigrants, USCIS is more concerned with the nonimmigrant's elite qualifications and the ongoing availability of work suited to his or her extraordinary level of renown and ability, than with any changes to the structure or ownership of the employing entity, which is not among the factors relating to O-1 eligibility.

As a practical matter, experience suggests that business O-1 employees of corporations that have restructured or changed hands are likely to be treated as having maintained status when any evidence at all of a "successor-in-interest" relationship with respect to the company's immigration and employment obligations is included with a petition for extension of stay, an adjustment application, or a new petition by a different O-1 employer.

## TN PROFESSIONALS UNDER NAFTA

The TN regulations require "immediate notification" of changes in the terms and conditions of employment which may affect eligibility[45] and provide for revocation on notice if the employer violates the terms or conditions of the approved application. However, eligibility for TN classification does not depend on the structure or ownership of the employer, nor does it depend on an underlying petition.[46] The terms and conditions material to TN eligibility are whether the job is in one of the occupations enumerated at Schedule 2 to Appendix 1603.D.1. of the North American Free Trade Agreement,[47] and whether the nonimmigrant has the required credentials for that job as listed for each job at 8 CFR §214.6(c). The petition is only a procedural requirement for TN nonimmigrants who want to extend their stay without traveling abroad and seeking readmission. However, the TN sponsor's name customarily is indicated on the I-94.

Accordingly, if the terms and conditions of the TN employment remain unchanged and the employer is a successor-in-interest to the original employer, it appears that no actions need be taken until either a petition is filed to extend the nonimmigrant's stay or until the individual re-applies for a new visa at a U.S. consulate or for a new period of admission at a port of entry. At that time, it would be appropriate for the employer's letter to explain any changes to the corporate entity.

## PREPARING THE WORKER FOR TRAVEL

Travel for H-1B nonimmigrants who have a petition pending by a new employer is now specifically authorized under the portability rules of the American Competitiveness in the Twenty-first Century Act (AC21),[48] per a legacy INS directive of January 29, 2001.[49] This provision also would cover amended petitions reflecting a change of name and structure by a previously-approved employer.

To gain readmission in this situation, the nonimmigrant must:

- Be admissible otherwise;

---

[45] 8 CFR §214.6(d)(5).

[46] Letter from Jacqueline A. Bednarz, Chief, Nonimmigrant Branch, Adjudications, to Mark Bravin (Sept. 10, 1993), *reprinted at* 70 *Interpreter Releases* 1573–74, App. I (Nov. 22, 1993).

[47] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 296, 612 (entered into force Jan. 1, 1994).

[48] American Competitiveness in the Twenty-First Century Act of 2000 (AC21), Pub. L. No. 106-313, §§101–16, 114 Stat. 1251, 1251–62.

[49] INS Headquarters Memorandum, "Interim Guidance for Processing H-1B Applicants for Admission…," HQOPS 70/20 (January 29, 2001), *reprinted at* 78 *Interpreter Releases* 381, App. I (Feb.12, 2001).

- Have an unexpired passport and H-1B visa showing prior petitioner;
- Show that he/she was previously admitted as H-1B or accorded change of status to H-1B; and
- Show evidence of timely filing by new petitioner (preferably the USCIS receipt notice, but the overnight courier tracking slip with Service Center delivery confirmation will do in a pinch).

For advising the H-1B nonimmigrant on travel abroad, where there has been a corporate change that did not require filing of a new petition, but the current employer's name is different, in the wake of INA §214(c)(10), it is prudent to advise the affected workers that they should travel with copies of:

1. LCA public access file memo;
2. Letter from the successor entity, directed to the worker by name, confirming that this entity now employs him or her as successor to the previous petitioner, briefly describing the change of entity; and
3. A corporate press release or published articles confirming the transaction.

For all nonimmigrant workers other than H-1Bs, there is no portability, so if a new or amended petition is required, the worker must stay in the United States until the petition is approved. Thereafter, the worker can re-enter on an old visa showing the previous entity as employer along with the new approval notice, relying on the 1997 legacy INS memo that says H, L, O, and P nonimmigrants can travel on any still-valid visa in the same classification with evidence of approval to work for a different employer.[50]

E-1 and E-2 nonimmigrants whose employer has had a "substantive change" eventually will have to make a de novo application at a U.S. consulate, but in the short term they are free to try their luck at a port of entry. As noted above, the E visa regulations at 8 CFR §214.2(e)(8)(iv) contemplate a wide array of permissible options. If the treaty company does not wish to file an amended petition, request an amended approval notice, or send the worker back to a consulate in the home country, the E employee who travels after a change to the corporate ownership or entity can present essentially any persuasive documentation at a port of entry. The advisability of this strategy will depend in part on the strength and simplicity of the employer's letter, and in part on the worker's temperament and English-language fluency.

Canadian TN workers are not petition-dependent and can continue to travel on their valid I-94 for the duration of the period authorized, but because the employer's name usually is shown on the back of their I-94, it may be advisable to have them re-apply with a letter from the new employing entity, and take that opportunity to request a new three-year period of admission. Because Mexican TN employees are issued a visa that will contain the old entity name on its face, they can either travel with a letter from the company explaining the corporate change and how it has no impact on the individual's TN eligibility, or the employer may choose to file amended petitions right away, possibly via a single "class representative" petition, using premium processing if necessary, so that those employees can travel with their existing visa and a new approval notice.

## CONCLUSION

With respect to mergers and acquisitions, USCIS has not harmonized its nonimmigrant policies with its immigrant policies, and is in conflict with itself on immigrant policies. Recent USCIS efforts to revive the standard of *Dial Auto Repair*,[51] now more than two decades old, in an era when no competent transactional lawyer would allow a successor entity to assume explicitly all the liabilities of a target company (some of them potentially unforeseeable), make it clear that USCIS' standards are not formulated with the real world in mind—particularly in a contracting economy, where assumption of all the original employer's financial liabilities would in some cases doom the successor to fall short in its obligation to prove financial ability to pay the offered wage. USCIS has devoted far more attention to the fate of H-1B workers than to any other nonimmigrants, but this is appropriate to their relative numbers. USCIS policy is not only unclear, it leaves significant room for doubt about the best course of action in certain situations, notably how to handle nonimmigrant employees where the immigration-related impact of a corporate change cannot be documented before it

[50] INS Headquarters Memorandum, "Validity of Certain Nonimmigrant Visas," HQBEN (July 8, 1997) from Michael L. Aytes, Assistant Commissioner, *reprinted at* 74 *Interpreter Releases* 1459, App. VII (Sept. 22, 1997).

[51] *Supra* note 3.

has happened. Nonimmigrant workers who travel abroad in the wake of a corporate restructuring shoulder a heavy evidentiary burden, as they may not yet be beneficiaries of amended petitions, and they may be ill-prepared to explain the documentation of a corporate change on their own behalf, even if it is provided to them by the employer.

## Due Diligence Checklist for Immigration Issues Resulting from a Merger or Acquisition

by Joel H. Paget and Timothy Payne*

### Preliminary Issues

- Who do you represent, buyer or seller? Do you also represent affected employees?
- If you represent employees as well as the entity, do you have a joint representation agreement already in place?
- Do you have a conflict of interest?
- Who will pay for your time? Do you have a fee agreement in place covering legal advise on the impact of the merger/acquisition?
- Who is the responsible point person at your client for immigration-related issues?
- Which counsel will take the lead in addressing these issues?
- Who is responsible for communicating any immigration consequences of the transaction to the affected foreign nationals?
- When is the projected closing date for the transaction? Has it passed already?
- Is there any chance of extending the closing date, if the transaction will have a negative impact on any key employees?
- Will majority ownership or control of the company change?
- Will a new legal entity be created?
- Will the surviving or new entity that results from the transaction qualify as a "successor-in-interest" for certain immigration benefits?
- Will the new or surviving entity be willing to sponsor new PERM applications, and will it be able to demonstrate ability to pay the offered salaries?

### Determine Compliance Issues

Obtain and review all immigration documents that will be the responsibility of the new or surviving entity, including:

- I-9 Employment Eligibility Forms
  - Perform audit of all I-9 Forms.
  - Determine whether I-9 files are sufficiently compliant to inherit, or whether they warrant full-scale re-verification.
  - Consider if new entity is enrolled, or required to enroll, in e-Verify.
- Labor Condition Application Public Access Files
  - Perform LCA audit for all H-1B and E-3 employees.
  - Cross-check public access files of these employees against payroll records, to verify actual wages paid.
  - Correct any LCA violations, or determine that filing amended petitions is preferable, if violations are widespread (*e.g.*, absence of posted notices).

---

* **Joel Paget** is the Senior Member of the Immigration Group at Ryan Swanson in Seattle, WA. His immigration practice focuses on business and tax issues, and he lectures and writes frequently on these topics. He was adjunct professor of business law at Seattle Pacific University and chairman of the Taxation Section and Bar Examiner for the Washington State Bar Association. He continues to be recognized as one of the Best Lawyers in America (1997-08) and is honored to be selected "Super Lawyer."

**Timothy G. Payne** is a partner at Sidley Austin LLP and practices primarily business immigration law. Mr. Payne is a graduate of the University of Illinois and IIT-Chicago Kent Law School. He is the past chair of AILA's Chicago chapter, and served on AILA's Nebraska Service Center liaison committee.

– Determine which workers will still qualify as employees of the new/surviving entity under INA §214(c)(10), draft employer's sworn statement, and amend public access files.

**Determine Impact on Foreign Workers' Status and Advise as to Remedial Actions**

Obtain and review all nonimmigrant and immigrant files.

- Single out executives and other key employees to determine if they have any special immigration-related needs.
- Prepare a comprehensive list of foreign national employees, and determine any actions necessary to amend status (flag or group them by visa classification).
- Prepare a list of foreign national employees who do not require amended filings, but who require travel documentation.
- Prepare a list of foreign national employees with pending labor certifications, immigrant visa petitions, or permanent residence applications; -identify those with approved I-140 petitions and adjustment applications pending over 180 days; assess whether foreign national will work in "same or similar" occupation-determine necessary actions for all others.
- Prepare to address any layoffs or reductions in workforce resulting from the transaction: keep in mind the no-benching regulation at 20 CFR §655.731(c).
- If layoffs or terminations are over 10% of workforce, recalculate H-1B dependency.
- If there have been layoffs/workforce reductions, will they impact any necessary amended H-1B petitions, or recruitment for any PERM applications that must be re-filed as a result of the transaction?
- Determine whether any of the workforce will be relocated, or reassigned to new duties, as a result of the transaction: -for moves within same MSA, post new notices for H-1B or E-3 employees; -for other moves or material job changes, file amended petitions.
- Does the spouse of the employee have any better way of maintaining status for both, including employment authorization and for obtaining permanent residency?
- Is there any claim to U.S. citizenship by way of parents and grandparents of either the employee or his/her spouse?