



“You’re Fired!”
or maybe not

The Effect of Restructuring on Foreign National Employees

By Megan Raesner &
Elaine Martin

"It isn't so much that hard times are coming; the change observed is mostly soft times going."
—Groucho Marx

The

economic stresses of the past few years have forced many companies to restructure in various ways — mergers, acquisitions, layoffs and

furloughs, among others. There are many legal issues for corporate counsel to grapple with in dealing with these situations. Unfortunately for foreign national employees, the effect of the restructuring on their immigration status is often an afterthought. This may be because corporate counsel does not often deal with immigration — instead, it is a HR function. It could also be that the foreign national population is too small to warrant attention. Or it could be that the issue is too complicated. It's really complicated.

Counsel dealing with any corporate restructuring needs to consider the immigration aspect well before the deal is done, especially given the current political climate. President Obama's administration is increasing enforcement of immigration laws in the workplace. In April 2009, Secretary of Homeland Security Janet Napolitano issued guidance, outlining that Immigration and Customs Enforcement (ICE) would focus its resources in the worksite enforcement program on the criminal prosecution of employers who knowingly hire illegal workers, to target the root cause of illegal immigration. In mid 2009, US Citizenship and Immigration Services (CIS) received significant funding for a substantially increased volume of random site visits to H-1B employers. CIS quickly began making unannounced site visits to workplaces and administrative offices of companies that employ foreign nationals. In July 2009, ICE issued Notices of Inspection to review the I-9 records of 652 employers nationwide; in November 2009, the government announced audits of yet another 1,000 employers; and in March 2010, ICE served audit notices to 180 business in five states.¹ The trend toward workforce enforcement is gaining momentum, and employers can expect both announced and unannounced visits from the government, and must plan accordingly.

Dealing with immigration issues before finalizing a restructuring is not only good for employee morale, but it also ensures compliance with regulations. In private practice, we have worked with many companies that have undergone changes without considering the potential affect on the foreign national population. This is incredibly frustrating for the employees. As outside immigration lawyers, we often hear about the restructuring after the fact, and then we have to scramble to rectify any avoidable complications. Naturally, this costs the company more money than if we had been involved at the outset, or at least before the ink dried on the deal.

Where a corporate identity changes because of a merger or acquisition, it is very important to ensure that foreign national workers continue to be authorized to work for the new employer. In some cases, the work authorization will not automatically transfer to the new entity, and the employer will need to file additional paperwork.

"Successor-in-interest"

An analysis of "successor-in-interest" is critical in deciding which foreign national employees are affected by a restructuring transaction. If the new employer entity does not

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fit the CIS definition of "successor-in-interest," the new company will have to start the permanent residence ("green card") process again from the beginning. This could delay the green card by years and be very expensive for the acquiring company. In addition, qualifying as a "successor-in-interest" could save the new employer from having to file new nonimmigrant petitions for the affected foreign national employees.

CIS has revised the definition of "successor-in-interest" over the years. For many years, the agency adopted a strict definition whereby the acquiring company had to assume *all* of the target entity's rights, duties and obligations. In August 2009,² CIS eased their stance, acknowledging that "business practices change over time, particularly in the areas of acquisitions, mergers, and transfers of assets and liabilities between entities," and that "business entities do not always wholly assume certain assets or liabilities of entities they acquire or merge with and that businesses may choose not to assume certain assets or liabilities in connections with a perfectly legitimate transaction."

The less restrictive definition is a welcome relief to immigration attorneys. For some time, we successfully argued that the new entity was a "successor-in-interest" if it assumed all the immigration-related rights, duties and obligations of the target entity. However, CIS started questioning this argument and asking for evidence that the new entity had assumed *all* the rights. If we could not provide this, CIS would deny the case.

CIS position now is that a new company is a "successor-in-interest" for purposes of the permanent residence process if:

- the job opportunity offered by the successor is the same as the job opportunity originally offered in the labor certification;³
- the successor establishes eligibility as a successor-in-interest in all respects, including the provision of required evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the date of filing of the labor certification with the Department of Labor (DOL); and
- the successor's I-140 petition⁴ fully describes and documents the transfer and assumption of the ownership of the predecessor entity.

Mergers and acquisitions

Mergers and acquisitions can take many forms. For this analysis, we assume the following scenario, which tends to be the most common: Company A acquires all of Com-

pany B, Co. B's employees become employees of Co. A, and Co. B ceases to exist.

I-9 requirements

Co. A assumes the liabilities of Co. B in the transaction documents, including I-9 liability.⁵ Because of this, we strongly recommend that Co. B retain immigration counsel to conduct an audit, or sample audit if the company has many employees, before the deal is signed. If Co. A is unhappy with Co. B's I-9 compliance, it can require the appropriate indemnifications and warranties at closing.

If Co. B's I-9 files are unsatisfactory, Co. A could ask each acquired employee to complete a new I-9 within three days of the acquisition. However, there is some disagreement among lawyers about this issue. Some opine that asking for new I-9s may not alleviate liability on historic I-9s. The option may create additional liability if the new forms are defective, and could even be considered document abuse, if the existing I-9s are preceived as an asset purchased by the buyer. Other attorneys consider that checking every I-9, and possibly asking many employees to provide whatever is

necessary to correct any mistakes, is just as burdensome — if not more so — as asking everyone to complete a new I-9.

H-1B specialty workers

H-1B workers are authorized to work for a specific employer, at a specific location, in a specific position and for a specific salary. If the H-1B holder changes employers, the new employer usually needs to file a new H-1B petition. However, if Co. A is a “successor-in-interest” to Co. B, an amended petition *might* not be needed.

With appropriate advance planning, Co. A can acquire all of Co. B's H-1B employees, with minimal paperwork. Co. A can include a statement in each employee's Labor Condition Application (LCA)⁶ file, agreeing to assume Co. B's liabilities and obligations under the existing LCA. This statement must be executed and placed in the file *before* Co. A acquires the employees. Further, Co. A should only include this statement if immigration counsel has audited the LCAs and ensured that they are correct. If this statement is not done in advance, Co. A must file amended H-1B petitions for all H-1B workers.

The employee might change location because of the restructuring. If she moves to a new Metropolitan Statistical Area (MSA), Co. A must file a new LCA for that location *before* the move. If DOL does not certify the LCA before the move, not only does Co. A need to file an LCA, it now needs to file a new H-1B petition also.

Co A may be responsible for filing amended H-1B petitions in some other circumstances:

- If the employee's position changes materially as a result of the restructuring, a new H-1B petition is required.
- If immigration counsel finds a pattern of incorrect, missing or incomplete LCAs during the pre-closing audit, Co. A might be better off filing new LCAs and corresponding H-1B petitions.

Filing a new H-1B can be an expensive process — up to \$3,320 in government filing fees per employee, plus attorney fees. Involving immigration counsel as early as possible can save money in the long run.

L-1 intracompany transferees

L-1 employees are authorized to work for a US company by virtue of having worked for a foreign parent, subsidiary, affiliate or branch outside the United States for at least one year before transferring to the United States. A qualifying relationship between the US employer and an overseas entity must continue to exist for an employee to maintain L-1 status. We turn to a few possible scenarios to analyze whether an employee can maintain L-1 status. Each scenario assumes that the employee will continue to work in a specialized knowledge (L-1B) or managerial/executive (L-1A) capacity.

Immigration Categories and Employment Eligibility

1. **US Citizens.** This can include native-born citizens or naturalized citizens. Employment compliance laws do not differentiate between them.
2. **Lawful Permanent Residents.** Often called green card holders.
3. **Non-immigrants.** These workers hold a temporary status, which allows them to work for a specific employer for a period of time allowed by USCIS. The most common nonimmigrant categories for employees are H-1B, TN, L-1, E and O.
4. **People with Employment Authorization Documents (EADs).** An EAD usually allows unrestricted work authorization, i.e., the employee can work for any employer. Examples of people who might have EADs include:
 - certain students;
 - people at the final stage of permanent residence processing;
 - asylees and refugees;
 - spouses of L-1 and E holders; and
 - people in temporary protected status.
5. **Undocumented Workers.** Hopefully, you have none of these. These individuals are not authorized to work in the United States and may not be authorized to be in the country at all.

Co. A acquires only the US arm of Co. B, and Co. A has no overseas affiliate, parent, branch, etc. The employee is no longer entitled to L-1 status because there is no qualifying corporate relationship. The company must change the employee's status to something else (such as H-1B or TN), if there is another status available. This should be done as soon as possible after the corporate structure changes; otherwise, the employee is out of status as soon as the new structure takes effect. Ideally, Co. A will have anticipated this work and will be ready to file the new petitions as soon as the deal closes.

Co. A acquires the US arm of Co. B, as well as Co. B's overseas operations. Employees can maintain L-1 status provided that the overseas operations continue to conduct business. Co. A should file an amended L-1⁷ to show the change in corporate structure, with evidence that the overseas and US employers remain part of the same corporate group.

Co. A acquires only the US arm of Co. B; however, Co. A has other related companies overseas. Somewhat surprisingly, CIS allows a person to maintain L-1 status in this situation, even though the relationship that entitled the employee to L-1 status in the first place no longer exists.

E-1 treaty traders and E-2 treaty investors

Some countries have special treaties with the United States, which allow their citizens to come to the US in E-1 or E-2 status. E-1 status is given to people who work for a company that conducts most of its trade with the treaty country when the employee is a treaty company national (e.g., a Mexican citizen coming to the United States to work for a company that imports food products from Mexico). E-2 status is granted to people who come to the United States to work for a company owned by nationals of the same treaty country as the employee (e.g., a French citizen coming to the United States to work for the French champagne company, Veuve Clicquot).

In order for the E-1 or E-2 employee to come to the United States, Co. B must have qualified as a treaty company, either because of its ownership or because of its major trading partner.

In the E-1 scenario, if Co. B is acquired and the new company, Co. A, continues to do a majority of its trade with Mexico, the Mexican E-1 can maintain E-1 status. However, we still recommend filing an amended petition to reflect the change in corporate structure. If Co. A is more diversified, and cannot show that more than 50 percent of its trade is with Mexico, the E-1 employee will no longer qualify for that classification and must change to some other status.

In the E-2 situation, if Co. B (Veuve Clicquot in the example above) is bought by a company that is not French, then the treaty qualification ends. The E-2 holder should immediately change to another status, if possible.

TN NAFTA professionals

TN status is granted to citizens of Mexico and Canada who are working in specific occupations listed in the North American Free Trade Agreement (NAFTA) treaty. The nationality of the employee, not of the company, is relevant, so a change in the employer's ownership alone should not affect TN eligibility. The new employer needs to do a basic "successor-in-interest" analysis, and only file new petitions if no successor-in-interest exists. Additionally, the

I-9 Explained

The I-9 is a short form that all employees, regardless of nationality, must complete when they start a job in the United States. The form verifies the employee's identity and her eligibility to work in the United States. The employer must certify that it has verified the employee's supporting documents. The form must be completed within three business days of an employee starting work with a new employer.

I-9 resources online

- **I-9 and instructions:** www.uscis.gov/files/form/i-9.pdf
- **Guide to completing the I-9:** www.uscis.gov/files/article/E3eng.pdf
- **FAQs on I-9:** www.uscis.gov/files/article/I9_qa_12dec08.pdf
- **Handbook for Employers:** www.uscis.gov/files/native/documents/m-274_3apr09.pdf
- **E-verify:** <http://tinyurl.com/yslx4b>

Penalties for I-9 violations

- Failure to properly complete and retain I-9 forms can result in a fine between \$110 and \$1,100 per violation. In determining the fine, consideration will be given to the size of the business, the good faith of the employer, the seriousness of the violation, whether the violation concerned an undocumented worker and the employer's history of violations.
- Penalties for knowingly hiring, recruiting, referring for a fee or continuing to employ an unauthorized worker:
 1. First Offense: Not less than \$375 and not more than \$3,200 for each unauthorized alien;
 2. Second offense: \$3,200 - \$6,500 each alien; or
 3. Subsequent Offenses: \$4,300 - \$11,000 each; and
 4. Pattern or Practice: AG can request injunction, restraining order or other order as necessary.

Criminal penalties: If convicted of pattern or practice, the company and/or responsible official(s) can face a fine of up to \$3,000 per unauthorized employee and/or up to six months of imprisonment.

TN regulations allow the TN employee to change locations without needing any new filing.⁸

Permanent residence (“green card”) applicants

The permanent residence process normally involves three steps (see sidebar on pg. 43). The employee’s ability to continue with the existing permanent residence process will depend on what stage she has reached when the corporate structure changes.

Labor certification pending A pending labor certification may continue and remain valid if the new company is the “successor-in-interest” to the employer that filed the original labor certification. DOL takes a liberal view on this issue and allows CIS to decide whether a company is a “successor-in-interest” during the second step of the permanent residence process — the I-140. If Co. A is completely comfortable that

it will qualify as a successor-in-interest to Co. B, and if the job location and position have not changed, no action on Co. A’s part is required regarding the pending labor certifications. Once a labor certification is approved, Co. A must file the I-140 with certain documents specified by CIS,⁹ including proof of the successor-in-interest relationship.

However, if the job location or position has changed, or if Co. A cannot be considered a successor-in-interest to Co. B, the pending labor certifications are invalid. This can have serious consequences on workers who are relying on these pending cases to extend their nonimmigrant status. Co. A may need to start new permanent residence cases very quickly to allow these workers to remain in status and on the company’s payroll.

I-140 pending. As mentioned above, the permanent residence process can continue if CIS agrees that Co. A is a

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- *Public Mergers and Acquisitions in Canada (Nov. 2008).* This article gives a brief overview of the key issues involved in public mergers and acquisitions in Canada. www.acc.com/pubm&a_canada_nov08
- *Merger & Acquisition Practice in China (Jan. 2007).* This article provides an overview of the laws regarding mergers and acquisitions in China. www.acc.com/m&a_inchina_jan07

Program Material

- *A Practical Approach to Compliance Challenges in the International Arena (Oct. 2008).* This material addresses multiple laws and regulations of the countries in which the company has employees and/or operations, and gives consideration to language, cultural, and ethical differences and issues. www.acc.com/intl_complchallenges_oct08

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successor-in-interest to Co. B. If the I-140 is pending when the restructuring occurs, Co. A needs to file amended I-140s with CIS, showing that the required successor-in-interest relationship exists. The documents to be included with this are similar to those described above.¹⁰

In some corporate re-organizations, the company will need to file multiple amended I-140s. CIS recently issued guidance allowing for consolidated processing of multiple successor-in-interest I-140 petitions.¹¹ The successor entity must still file an amended I-140 petition for each employee; however, the new company can provide consolidated supporting evidence of the restructuring, at the discretion of the CIS Service Center director.¹²

I-140 approved, no I-485 pending. To continue with the employee's permanent residence case, the new company needs to file an amended I-140 petition in this scenario, as described above.

I-140 approved, I-485 pending. This is typically the best scenario for both the company and the foreign national employees. Legislation allows a foreign national to change employers if the I-140 is approved, the I-485 "has been filed and remained un-adjudicated for 180 days or more," and the new position is in the "same or similar occupational classification."¹³ In deciding whether a new position is in the "same or similar occupational classification", CIS adjudicators compare (a) the job description on the labor certification and the new position; (b) the DOL's Dictionary of Occupational Titles (DOT)¹⁴ and/or Standard Occupational Classification (SOC)¹⁵ codes assigned to the old and new positions; and (c) the salaries of the old and new positions to see if there is a large difference between the two.

The government does not require petitioners or foreign nationals to notify CIS when there has been a change of employers while the I-485 is pending. Some attorneys recommend proactively sending a letter to CIS explaining the change of employers, and confirming that the new position is the "same or similar" as described above. This is often called an "AC21 letter" or a "180-day letter." Given the widespread job insecurity in the current climate, CIS often asks for updated proof of employment before approving a long-pending I-485. Some attorneys recommend waiting until receiving such a request before notifying CIS that the employer has changed.

Layoffs

Layoffs are unfortunately often part of the corporate restructuring process. The next section considers how layoffs affect an employee of nonimmigrant workers and workers pursuing employment-based permanent residence.

Nonimmigrant workers: H-1B, TN, L-1, etc.

Most nonimmigrant categories do not include a requirement to notify CIS if the employment relationship ends. Em-

ployers should however notify CIS and DOL when it terminates an H-1B worker. CIS regulations require an employer to withdraw the H-1B petition.¹⁶ In addition, we recommend that the employer also withdraw the LCAs related to each terminated H-1B employee. If the LCAs are not withdrawn, there is a chance that the employer will remain liable for the obligations under the LCA, including the salary obligation.

Employers who terminate an H-1B worker before the end

Permanent Residence Process Via Labor Certification

Employer and attorney analyze the foreign national's position and job requirements, and decide recruitment strategy.

**Attorney requests a Prevailing Wage Determination from the Department of Labor.
Approx. time: 6 weeks**

**Employer advertises the open position as discussed with attorney and reviews all resumes received.
Approx. time: 60-90 days**

**If no qualified US workers are found, PERM application is filed with DOL.
Approx. time to approval: 8-16 months**

**Once PERM approved, employer files I-140 petition with USCIS, showing approved PERM and evidence that foreign national has the education and experience required.
Approval time: 6-18 months**

**Foreign National files I-485 with USCIS. If priority date is current, 485 can be filed with I-140. Otherwise must usually wait till I-140 is approved and priority date becomes available.
Approx. approval time from filing 485: 6-18 months**

***Steps in yellow involve government filings.**


of his authorized stay are liable for the “reasonable costs” of return transportation for the employee to his last country of residence.¹⁷ The employer does not have to pay the travel costs for dependent family members, and the offer does not have to be open-ended. After all, an employer does not want an employee contacting the company three years after the termination and saying: “OK, I want to go home now.” We recommend that employers pay the return costs if the H-1B employee signs the employer’s return transportation agreement or provides a receipt or other evidence of a ticket within a specified period of time after separation.

Permanent residence applicants

An employer does not owe any obligation to a laid-off employee who has a permanent residence process pending. The employee may be able to find a new employer and keep the permanent residence going if she fits the criteria listed in the above section *I-140 approved, I-485 pending*.

A layoff can affect the employer’s ability to file new labor certifications. DOL regulations state that if the employer has laid-off workers *in the occupation* within the past six months, the employer must attest that it contacted and considered these workers for the job described in the PERM labor certification application. In most situations, this will mean that an employer cannot file a new PERM application for the occupation in the area where the job offer is located until six months after the layoff.

As in-house counsel, it is imperative that during times

of corporate restructuring, you do not leave matters concerning foreign staff to HR. Immigration issues must be carefully considered. 

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NOTES

1. www.ice.gov/pi/nr/1003/100302neworleans.htm.
2. Aug. 6, 2009, Donald Neufeld, acting associate director, Domestic Operations, *Successor-in-Interest Determinations in Adjudication of Form I-140 Petitions: Adjudicators Field Manual* (AFM), Update to Chapter 22.2(b)(5)(AD09-37), HQ 70/6.2. www.uscis.gov/uscis/laws%20and%20regulations/memoranda/2009%20memos%20by%20month/august%202009/successor-in-interest-8-6-09.pdf.
3. “Labor certification” is the first step of the permanent residence (“green card”) process for many foreign nationals. See sidebar.
4. The I-140 Petition is the second step in most employment-based permanent residence applications. See sidebar on page 43.
5. 8 CFR §274a.2(b)(1)(viii)(A)(7)(ii).
6. The LCA is a document filed with the DOL in every H-1B case. The employer confirms that it will comply with various obligations, including: (a) the employer will pay the required wage, which is the greater of the prevailing wage or the actual wage paid to other employees in the same position; (b) the employment of H-1B workers will not adversely affect the working conditions of US workers; and (c) when the LCA was filed, there was no strike, lockout or other work stoppage because of a labor dispute.
7. 8 CFR §214.2(l): “*Amendments*. The petitioner must file an amended petition, with fee, at the USCIS office 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.”
8. 8 CFR §214.6(i)(3).
9. Adjudicator’s Field Manual (AFM) Chapter 22.2(b)(5)(F)2. www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=afm.
10. AFM Chapter 22.2(b)(5)(F)3.
11. Neufeld, above, n.1.
12. AFM Chapter 22.2(b)(5)(F)4.
13. American Competitiveness in the 21st Century Act (AC21) §106(c). For more information, and links to CIS memoranda visit: <http://martinvisalaw.blogspot.com/2009/07/ac21-changing-employerspositions-while.html>.
14. www.occupationalinfo.org/.
15. www.bls.gov/SOC/.
16. 8 CFR §214.2(h)(11)(i)(A). See *Amtel v. Yongmahapakorn*, ARB Case No. 04-087, holding that the employer did not effect a “bona fide” termination of an H-1B worker and therefore remained liable for the employee’s salary.
17. 8 CFR §214.2(h)(6)(vi)(E).

Checklist of Immigration Issues to Review Before a Restructuring

- Audit the target company’s I-9 files, or conduct a sample audit if it is a large corporation.
- Determine if new employer is a “successor-in-interest” to target company.
- Identify all employees in nonimmigrant status.
- Audit the target company’s LCA files to determine what remediation is required.
- Prepare new nonimmigrant petitions, as necessary.
- Prepare to withdraw H-1B petitions, if applicable.
- Identify all employees with permanent residence (PR) pending.
- Decide if these employees can continue with the PR process.
- Prepare to file new labor certifications, if required.
- Prepare to file amended I-140s, if needed.

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