

Corporate Restructuring & Immigration Compliance: Where do YOU stand?

Why does it matter?

Mergers and acquisition activity has been extremely robust in 2015 and is expected to continue. And, with the excitement of these transactions, the challenge of staying compliant with immigration matters is typically overlooked. Additionally, most attorneys engaged in these deals are not traditionally immigration attorneys and/or aware of the immigration compliance requirement or the serious consequences of inaction. To properly advise companies and their board of directors and effectively negotiate a deal, the acquirer's counsel should perform an early assessment of the targeted company's immigration compliance and foreign workforce status. This article is to assist you with this process.



By: Giselle Carson, Esq.

In the present environment of increased immigration enforcement and new rules, it is extremely important for every company to include immigration due-diligence in its pre-closing checklist. The significance of this issue will magnify as globalization and changes in demographics lead to an increased number of foreign nationals coming to the U.S.

If immigration matters are not addressed pre-closing, immigration violations might create liability exposure for the acquiring company, affected employees might find themselves out of status and unable to work, and employees on work visas might have a claim against the companies for negligence in handling immigration matters.

Which employment visas are most affected by corporate changes?

Foreign nationals coming to the U.S. for employment are generally sponsored by a U.S. company and are working on an employer-specific visa. As a result, many corporate changes will have an impact on the employment status of these workers. Depending on the type of transaction, the steps needed to be taken might vary. To assist you, below is a general overview of the most commonly affected employment visas and preliminary due-diligence suggestions.

H-1B Visa

The H-1B visa is the most commonly used employment-based visa. It requires filings by the employer with the DOL and USCIS. It is used primarily to bring professionals with bachelor's degree to work in the U.S. such as: IT workers, healthcare workers, professors, researchers, engineers, scientists, teachers and physicians.

The employer must maintain a public access/inspection file for each H-1B employee. Check to see if these exist. The public access file should contain: posting notices, actual wage memoranda, prevailing wage documentation and evidence that the H-1B employee was provided

with a copy of the Labor Condition Application (LCA). Penalties for lack of compliance include: civil liability (monetary fine of \$1,000 to \$35,000 per violation) debarment and/or back wages.

If the transaction results in a successor in interest employer, a new petition might not be required, but changes to the public access file are required prior to the closing.

Material changes in the employee's duties, salary and work location may require new filings. For certain H-1B workers, primarily in the healthcare and education sectors, check whether the employee received a cap-exempt H-1B as a result of the targeted employer's status. If so, they might lose cap-exempt status eligibility as a result of the deal, which will prevent them from being employed by a cap-subject acquiring entity.

L-1 Visa

The L-1 visa is used by multinational companies to transfer qualified executives, managers or workers with "specialized-knowledge" to the U.S. to work for a related (parent, subsidiary, affiliate or branch) company in an executive or managerial (L-1A), or specialized knowledge (L-1B) capacity.

Because the L-1 visa requires a qualifying relationship between the foreign and U.S. entities and specific work duties and requirements, a corporate restructuring could affect and invalidate the person's status.

Check whether the surviving entity will maintain a qualifying relationship with at least one qualifying entity outside the U.S. With the filing of a new or amended petition, USCIS should allow ongoing employment by the foreign national in L-1 status if a qualifying entity exists. Alternative visa categories such as the H-1B, E, TN or others might also need to be considered.

E Visa

The E-1 and E-2 visas are used by individuals from certain countries that have treaties of commerce with the U.S. These individuals come to the U.S. to own and direct a business, or to be a key employee of a "treaty-qualifying" company.

Because these E visas are dependent on the person's duties and being employed by a "treaty-qualifying" company based on the company's nationality, a change in corporate structure can terminate the qualification. Check if the ultimate employer will have the required treaty-nationality.

Additionally, there are also E-3 visas used typically for professionals who are nationals of Australia. The E-3 visa in many ways is similar to the H-1B and similar considerations should be undertaken during corporate restructuring.

TN Visa

The TN visa is used for certain Canadian and Mexican professional workers, including accountants, architects, economists, engineers, hotel managers, designers, land surveyors,

dentists, pharmacists, physicians, nurses, teachers and scientists. If the new company is a successor in interests of an acquired company, new petitions are typically not required. But, other material changes might require the filing of a new or amended petition.

O-1 Visa

The O-1 visa is used for persons with extraordinary ability in the sciences, arts, education, business or athletics. To qualify for an O visa, the foreign national must satisfy at least three requirements such as being featured in professional publications; having made significant contributions to the field of expertise; being an employee with pivotal responsibility; and/or having received national and/or international acclaim and/or awards. A change in corporate structure might require the filing of a new or amended petition to ensure that the O visa holder can continue with his/her employment.

Permanent Residence or “Green Card”

If the acquired company has begun the “green card” process for any of its workers, the corporate restructuring will also have an impact of the process. The extent of the impact will depend on where in the process the person is at the time of the closing.