Impact of M&A

Corporate Acquistions & Restructuring

MVA's Global Immigration

Immigration Considerations for Mergers & Acquisitions

MVA's GLOBAL IMMIGRATION

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GLOBAL IMMIGRATION

The Impact of M&A on Foreign National Visa Holders

This packet will help you assess the impact of corporate mergers, acquisitions, and other restructuring ("M&A") on foreign national visa holders of U.S. non-immigrant visas (i.e., H-1B, L-1, etc.), and in particular what pre-Closing/ due diligence actions a company that is engaging in an M&A transaction can take to assess the post-Closing impact of such transactions on its foreign national employees. The discussion in this packet details the unique immigration considerations that corporate changes invoke and details the proper procedure to identify and address immigration issues during the due diligence process and beyond, including tools such a due diligence checklists and document templates.

Overview of Impact of M&A on Visa Holders

As an overall comment, the impact of M&A activity on foreign national visa holders will depend on two factors: [1] the status of the foreign national employee; and [2] the nature of the M&A transaction. We will address these in order.

Status of Foreign Nationals

The most important issue in determining what impact M&A activity will have on a company's foreign national employees is a proper understanding of the status of the individual in question. Foreign nationals will also be impacted differently depending upon whether they are non-immigrant ("NIV") visa holders or applicants for permanent residency ("green cards").

The impact upon NIV holders will depend upon the type of visa they have. For example, H-1B NIV holders may not be impacted by M&A activity due to a specific law that protects the status of H-1B visa holders. (Generally, H-1B visa holders are not required to amend their petitions as a result of M&A activity.) This provision would not, however, protect other visa holders, such as an L-1. Similarly, changes in ownership of a foreign parent company could dramatically affect E-2 visa holders, without necessarily affecting L-1 visa holders. The rules of each category are specific to that category. Consequently, it is difficult to make broad statements about the impact M&A activity will have on NIV holders; in each case it will depend upon the exact type of NIV at issue and review by counsel on a case by case basis. A more detailed discussion of the potential impacts for each specific visa type is included in this packet.

Similarly, with respect to applicants for "green cards," the impact of M&A upon these applicants will depend upon what stage of the process they are in. Generally

speaking, the more advanced the process, the more likely it is that a remedial solution will be available that will permit foreign nationals applying for "green cards" to maintain the process. Specifically, applicants for Adjustment of Status whose cases have been pending in excess of six (6) months may have statutory protection from M&A activity impacting their cases. Applicants earlier in the process will not have this protection, and consequently their applications may be voided. Due to the complexity of the "green card" process, each case will need to be assessed on a case by case basis. Discussion of how each step is impacted by a corporate change is included in this packet.

Nature of M&A Transaction

The impact of M&A transactions on foreign national employees will also depend upon the nature of the transaction. Simple reorganizations or name changes may have no impact upon visa holders, while more complex transactions (i.e., sales of a division; "spin offs" of foreign assets; material changes in ownership), may render underlying visas void, unless proper remedial action is taken.

Moreover, corporate mergers and acquisitions are not the only corporate changes that have immigration consequences; even internal restructuring or consolidation of related entities can produce changes in an employee's working conditions that affect their immigration status. Prior to closing a facility location and/or transferring employees to a different work location (even one that is owned by the same employing company), a review of each employee's immigration status at that location should be conducted to determine if any employee is working for the company pursuant to a location-specific nonimmigrant classification such as an H-1B. An amended petition must be filed for the H-1B worker prior to the worksite location change if such a change places the worksite in a different city or metropolitan area than was contemplated in their H-1B petition.

Corporate restructuring that involves changes to the employing entity's name, EIN# or ownership may also trigger immigration concerns. Nonimmigrant workers employed by the company as intra-company transfers (L-1A and L-1B status holders) may require that amended petitions be filed prior to the restructuring, H-1B visa holders may require attestations to be made and placed in the company's public access file, and all nonimmigrant visa holders may desire documentation to carry explaining the corporate restructuring to Immigration Officials in order to facilitate travel on existing visas.

To avoid or minimize disruptions in foreign national employees' ability to live and work in the U.S., it is important that immigration counsel is consulted prior to any corporate restructuring, consolidation or acquisition takes place. To determine if a company employs foreign nationals that could be affected by corporate changes, certain questions need to be asked and answers provided to immigration counsel to analyze and advise as to what action, if any, needs to be taken prior to the corporate change.

Pre-Closing Issues

As a preliminary comment, it is important to note that except in rare circumstances, no remedial action is required to be taken for foreign national visa holders until the transaction has closed. Generally, the government permits a reasonable time following the closing of an M&A transaction for any amended filings (should they be required). Given the vagueness of the rules in this area, the government rarely requires any pre-Closing filings to be made.

That being said, pre-Closing planning and due diligence is strongly recommended in this area both to create a game plan for post-Closing filings as well as to counsel foreign national employees who will have legitimate concerns about their status as a result of any transaction. In our experience, it is this latter issue that will consume most of the time and energy of staff (particularly HR staff), rather than legal filings or work resulting from the transaction in this area.

Proper due diligence can prevent any unforeseen problems or issues, such as the voiding of a visa or green card process as a result of a material change in the company. Counsel can often determine if a company employs foreign nationals that would be affected by a corporate change by reviewing the Company's completed I-9 forms. However, in many cases it may not be feasible to provide immigration counsel with copies of a company's I-9 forms prior to

the corporate change, either because the I-9 forms are incomplete, they are too numerous to be reviewed in the time allowed, or the company does not wish to disclose their I-9 forms prior to the deal close. Additionally, the company may also have immigration-related compliance issues that should be identified and addressed prior to the corporate change. Counsel may also recommend certain representations and warranties (and possibly indemnities) be included in the acquisition agreements to address specific identified concerns. To determine what actions need to be taken in the course of a corporate change to address immigration-related concerns, we have provided in this packet a list of immigration –related questions to be added to your due diligence questionnaires.

The information obtained in answering these questions should be provided to immigration counsel to identify which foreign nationals will be materially affected by the corporate change; determine continuing eligibility for their current status or devise strategies to obtain a different status; prepare and file amended petitions for those employees that require them; and draft the necessary documentation for the H-1B public access file and employees traveling internationally after the corporate change. ❒

Checklist Questions for Mergers & Acquisitions

1. How many Company employees are foreign nationals with temporary work authorization?

2. For each employee identified above, please provide their name, job title, and status. Also please provide a copy of their EAD, current visa and I-94 card or any related immigration documents and their US start date.

3. Of those listed above, how many are key employees (executives, managers, or important technical personnel) working for the company pursuant to temporary work authorization that will need to be renewed or extended upon deal close? Please identify each one providing name, title and current immigration status as well as their current expiration date.

4. Are their any planned new hires that will require company sponsorship to obtain work authorization? If so please provide their name, proposed title and start date and status of any work in progress to acquire US work authorization

5. Please identify any employees who currently have PERM, I-140 petitions or I-485 applications pending. Please provide their name, title and status of any Green Card-related filing currently in process.

(i) Has the Company had been subject of any investigations from ICE, IRS, legacy INS, CIS, the Dept. of Labor, or any similar entity to date? If yes, please describe and provide copies of the government correspondence related thereto.

(ii) Has the Company ever received any Notices of Inspection or Notice of Unauthorized Alien from ICE, CIS, INS, or any other investigating federal agency? If yes, please provide copies of these notices and describe outcome of each.

(iii) Has ICE, CIS, legacy INS, DOJ, or DOL visited the physical premises or client worksites? If so, why? Did they take custody of any records, documents, employees or contractors?

(iv) Have the Company's I-9 forms or payroll records ever been audited by ICE, legacy INS, DOL or IRS? Results?

(v) Has the Company ever been fined or provided a Notice of Intent to Fine for incorrectly reporting social security numbers to the IRS or failing to properly complete and maintain I-9 records?

(vi) How many previous no-match (Code V) letters has the Company received, how many employees were listed on each and what action was taken to notify federal agencies of no match resolutions?

(vii) Does the Company have complete I-9 forms for every employee? Have they ever been audited internally or by a third party? If so, please provide dates of audits and results.

(viii) Does the Company make and keep copies of the supporting documents used to complete the I-9 forms? If so, where and how are they stored?

(x) Is the Company enrolled in the Department of Homeland Security's E-Verify program for confirming authenticity of social security numbers and immigration documents presented to complete the I-9 forms?

(xi) If so, how many tentative and final "no match" (TNC/ FNC) results has the Company received since enrolling in E-Verify?

(xii) Has CBP corresponded with your Company regarding the number of TNC and FNC results you have received?

(xiii) If so, please summarize the correspondence between CBP and the Company on this issue.

Corporate Acquisitions and Restructuring
Visa-specific Analysis

As most work visas are company-specific, acquiring a business or restructuring its ownership can affect the continued validity of U.S. work permits for foreign national employees. It is extremely important to identify early in the due diligence process if any key employees at the target company are working in the U.S. pursuant to temporary work authorization. To this end, there is a list of immigration-related due diligence questions included in this packet that should be incorporated by acquirer's counsel into the preliminary due diligence process. As each visa type carries various reporting requirements and is affected differently by corporate restructuring, the immigration consequences for each type will be discussed separately, below.

H-1B Visas

H-1B visas for specialty workers employed by sponsoring US organizations can be affected by a variety of company changes. If the H-1B employee's job duties, job location or salary will change significantly, a new Labor Condition Application must be approved and an amended H-1B petition must be filed with US Citizenship and Immigration Services prior to the change. If the H-1B employee's job duties and location will not change, but the company's ownership, EIN or legal structure will change due to a restructuring or acquisition, the successor company must complete a statement at deal close stating that they are assuming all of the immigration liabilities of the predecessor company, and specifically reference the existing Labor Condition Applications they will be assuming for affected H-1B workers. This statement must be placed in the company's H-1B Public Access file, and a copy should be carried by H-1B employees when traveling internationally, along with their new paycheck stubs and other existing travel documents. Sample language for the statement is included in this packet

L-1A and L-1B Visas

L-1 Visas are based upon the foreign national's current US employer, and former foreign employer sharing common ownership. If the corporate restructuring or acquisition will affect the relationship between the two companies, the post-restructuring ownership will need to be clarified to confirm that the foreign national employees holding L-1 visas will still be able to work in the US after deal close. If the acquirer has international subsidiaries abroad or acquires both the US and foreign operations, the L-1 foreign national can continue work upon the timely filing of an amended petition. US law requires the amended petition to be filed when the changes occur or immediately prior, so it is important to identify the affected employees and file the amended petition prior to deal close if at all possible, or as soon thereafter as is feasible. The L-1 petitions must be amended any time there is a significant change in the L-1 visa holders job duties, they are transferred from one related entity to another (even within the US) or there are material changes made to the company structure or ownership.

If the acquired company or successor company has several related entities and has frequently utilized the L-1 visa program, they may have a blanket L approval to facilitate intra-company transfers among the related entities listed on the blanket L approval notice. Is so, the blanket approval notice must also be amended any time a new qualifying entity is acquired or there are material changes to the ownership or structure of the entities listed on the blanket approval.

E Visas

E visas are based upon our trade and investment treaties with individual countries. Both the foreign national and the basis for qualifying trade or investment must be the same nationality at the qualifying treaty. So, if the E visa is based upon investment by the German parent in the US subsidiary, then the foreign nationals applying for the E visas must also be German citizens. The citizenship of a publicly traded company is determined by which country's stock exchange it is listed on. The citizenship of a privately held company is determined by the nationality of the majority of the owners. If the acquiring company is of a different nationality than the companies it has acquired, the foreign national employees will like lose their ability to work in the US on E visas. Any

material changes in the company's ownership or nationality that could impact their E visa eligibility requires a re-registry at the Consulate for future E visas and amended petition for those E visa holders currently in the U.S. If the current E visa holders require an amended petition, they will also be required to acquire new E visas on their next trip out of the U.S. Non-material changes include straightforward name changes and changes in ownership among nationals of the same treaty country.

TN Visas

TN status, granted to Canadian and Mexican nationals in specific occupations based upon NAFTA treaty provisions, also has amended petition filing requirements in the case of corporate reorganizations. If the employing company is being acquired or reorganized is such a manner that a new entity with a new EIN number will result as the new employing company, then an amended petition is required to be filed to allow for the change in employer. Material changes in the foreign national's job duties also requires an amended petition. Simple company name changes or change in job locations within the employing entity do not trigger the need for an amended petition.

Permanent Resident "Green Card" Processes

If a person is acquiring their Green Card through their US employment, and is the beneficiary of an approved labor certification or "PERM", the successor company can "take over" the remainder of the foreign national's Green Card process by then timely filing the I-140 petition and demonstrating that they have assumed the rights, obligations and assets of the original employer and continue to operate the same type of business. PERM applications that have not yet been filed at the time of acquisition will require re-advertising with the successor company prior to filing if the name, EIN, or location of company changes post deal close.

If the foreign national has an I-140 Immigrant Visa petition pending at the time of deal close, the successor company can file an amended I-140 and "take over" the sponsorship responsibilities of the acquired company by showing they have assumed the assets, obligations and rights of the acquired company and that the job the successor company is offering the foreign national is in the same or similar occupation as the originally offered position.

If the foreign national employee is the beneficiary of an approved I-140 and has had their I-485 (Application to Adjust Status) pending for more than 180 days at the time of deal close, no proactive filings are required to for the successor company to "take over" the foreign national's Green Card sponsorship. Occasionally the Service will request an employment confirmation from the successor company confirming that their job offer is the same or similar to the foreign national's original job offer prior to approving the case.

Additional immigration issues present themselves in the context of corporate acquisition and reorganizations when the acquired employee's work status has not been fully disclosed to the acquiring company. To ensure that employees maintain work authorization and the ability to travel internationally, it is important to use the included due diligence questions to ascertain the identity and nature of employment for foreign national employees with temporary work authorization. Often student hires will require carefully timed petition filings to transition from temporary student training to full time work visas. Employees may also have valid work permits but may need new work visas to leave and re-enter the U.S. in a timely manner. Additionally, new I-9 forms may need to completed or re-verified upon deal close and the successor company may have to decide if they want to enroll in the federal government's electronic verification program or lose valuable student workers. Use the due diligence questions included in this packet to identify these issues early in the acquisition process to allow time for decision making and proper petition filings, if needed. ❒

CERTIFICATE of
ACQUIRING COMPANY NAME

MEMORANDUM TO H-1B NONIMMIGRANT PUBLIC ACCESS FILE

Date

In my capacity as TITLE for Acquiring Company Name, I hereby certify that pursuant to the change in corporate structure resulting in the acquisition of ACQUIRED COMPANY, employer identification number _____, by Acquiring Company Name, employer identification number _____, the new employing entity, Successor Company Name provides the following information and certifications regarding immigration matters:

1. The employee of ACQUIRED COMPANY who is currently in H-1B status and was transferred to Successor Company Name on ACQUISITION DATE is _____ , a _____ citizen.
2. Successor Company Name hereby expressly acknowledges and assumes all of the obligations, liabilities and undertakings arising from or under attestations made in each of the following certified and still effective Labor Condition Application ("LCA") filed by ACQUIRED COMPANY for their CITY, STATE facility at any time prior to its ultimate ownership being acquired in whole by Acquiring Company Name, a STATE corporation:
   a. FOREIGN NATIONAL, ETA case number _____, certified on _____ and valid from _____ through _____.
3. Successor Company Name hereby expressly agrees to abide by the U.S. Department of Labor's ("DOL") H-1B regulations applicable to the above-referenced LCA.
4. Successor Company Name agrees to maintain a copy of this Certificate in the Company's H-1B Nonimmigrant Public Access File.
5. Successor Company Name agrees make this Certificate available to any member of the public or the Department Of Labor upon request.
6. Acquiring Company Name has attached a description of its actual wage system, applicable to H-1B nonimmigrants who were or are employees of Acquiring Company Name.

Acquiring Company Name

_____
NAME
TITLE

Conclusion

Corporate changes can trigger immigration concerns that require complex analysis and specific action prior to the deal closing to keep foreign national employees in legal status an authorized to work in the U.S. The discussion and question checklist are provided in this packet to help you identify factual situations where immigration issues may be triggered and to gather preliminary information to allow immigration counsel to advise on necessary actions to be taken. Occasionally follow up questions may need to be asked and answered and additional information provided to determine an employee's complete immigration background and the extent of a company's immigration compliance to provide devise strategy and provide proper advice.

Please consult us as your immigration counsel should you have any concerns regarding a proposed corporate change. We are available to assist you with any type of corporate change being planned, regardless of the size or complexity of the transaction. ❒

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GLOBAL IMMIGRATION

Moore & Van Allen's Global Immigration Practice is dedicated to providing comprehensive and efficient client services in global business immigration and nationality law and related employment matters. Our goal is to navigate the regulatory environment with speed and skill, allowing companies to realize the benefits of their greatest asset – their people.

Our attorneys advise on U.S. immigration matters in a wide range of visa categories to ensure the effective international movement and relocation of employees and new hires to and between countries worldwide.

Our global immigration attorneys provide diverse, global clients quick, responsive and practical solutions to their U.S. visa and immigration concerns. We work to simplify and speed the complex immigration and visa processes to help bring crucially needed international professionals—from biomedical researchers to noted athletes, from engineers to recording artists—into the U.S. for his pharmaceutical, biotech, banking, entertainment, manufacturing, information technology, and engineering clients.

Though we serve all types of business and industry, we have special insight into the pressures and challenges faced by companies in the pharmaceutical, biotechnology, entertainment, financial, manufacturing and telecommunications industries. These industries typically have particular needs that warrant aggressive and creative strategies. Our goal is to help you meet these needs with tailored solutions and desired results.

Our Approach

Moore & Van Allen's Global Immigration Practice takes a holistic approach toward the entire visa and immigration process. Our lead counsels take the time to handle personal telephone preparatory discussions and are always committed to a high level of service. We understand that your immigration needs are more than processing forms; we recognize the individual business and personal logistical needs of our clients.

Global Services Offered:

- Preparation of all employment-related visa petitions.
- Preparation of applications for permanent residence.
- Support and guidance on compliance issues.
- Compliance with employer sanctions.
- Counsel on potential legal consequences and immigration laws that impact changing corporate structure (mergers & acquisitions).
- Development of corporate immigration policy guidelines.
- Strategic planning and advice on immigration matters.

Visa Categories:

- B 1: Visitor for Business
- E 1/E 2: Treaty Trader/ Treaty Investor
- F -1 Employing Recent Graduates
- H 1B: Temporary Professional Worker
- L -1 Visa Category Description
- O 1: Extraordinary Ability
- Permanent Residency Via Labor Certification
- TN 1: Trade NAFTA (North American Free Trade Agreement)
- VISA Waiver Program

Please consult us as your immigration counsel should you have any concerns regarding a proposed corporate change. We are available to assist you with any type of corporate change being planned, regardless of the size or complexity of the transaction.

If you are not yet a client of Moore & Van Allen, and would like to schedule an immigration consultation with one of our attorneys, contact global immigration@mvalaw.com to request an appointment. Please include detailed information regarding your specific immigration inquiry.

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