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# The Immigration Consequence of Mergers, Acquisitions, and Other Corporate Restructuring: A Practitioner's Guide

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# The Immigration Consequence of Mergers, Acquisitions, and Other Corporate Restructuring: A Practitioner's Guide

## **Cover Page Footnote**

International Law; Commercial Law; Law

# The Immigration Consequences of Mergers, Acquisitions, and Other Corporate Restructuring: A Practitioner's Guide

*Stephen M. Hader, Esq.<sup>†</sup> and Scott D. Syfert, Esq.<sup>‡</sup>*

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**I. Introduction**

When businesses make corporate changes that affect their structure, location, or, in some instances, even name, they must also consider the immigration consequences. Failure to act quickly and effectively to regulate the status of their foreign employees could result in the loss of such employees' work eligibility in the United States, or in employer sanctions if the foreign employee continues to work without proper authorization, or both. Although in some circumstances compliance may be simply a matter of notifying the Immigration and Naturalization Service (INS) of the change, more often than not it involves the filing of a new or amended petition. Either way, as this Article will discuss, it is important to understand and appreciate how corporate changes may effect the immigration status of individuals in the most common nonimmigrant visa categories.

*A. The Merger and Consolidation Waves of the 1990s*

Understanding and appreciating the immigration consequences of mergers, acquisitions, and other corporate (re)organizations, or what is generally lumped together for purposes of this Article as

"M&A,"<sup>1</sup> has never been as important as it is today.

First, the transnational character of contemporary business has made immigration law far more critical to American businesses than in the past. More and more often, foreign corporations are setting up American subsidiaries to distribute or market their goods and sending key executives to the United States to start up and oversee their operations. Additionally, large American corporations, such as chemical companies, pharmaceutical manufacturers, software developers, or aerospace engineering firms, search around the world for the most talented, intelligent, and creative minds.

Often these companies, which can afford to purchase the best, both in terms of materials and people, look to India, China, Canada, or Britain for their key employees and then bring them to the Silicon Valley in California or the Research Triangle Park in North Carolina to work. Consequently, over the last two decades, and especially since the collapse of Soviet communism enabled scientists, artists, doctors, and others formerly behind the Iron Curtain to travel to and work in the West, American corporations have sought and relocated thousands of immigrants and non-immigrants to work in the United States.<sup>2</sup>

Second, the late 1980s and the 1990s have seen a flurry of corporate mergers and combinations, many involving large diversified corporations with widespread international operations. M&A activity in the technology sector, for example, occurred at record highs in 1997.<sup>3</sup> That year there were of 4,040 M&A transactions in the information technology, media, and communications fields totaling over \$240 billion.<sup>4</sup>

Moreover, in the first six months of 1998, American

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<sup>1</sup> For a more in depth discussion of the components of this definition, see *infra* notes 118-49 and accompanying text.

<sup>2</sup> See Penny Singer, *In Hiring Aliens, Companies Face Hurdles*, N.Y. TIMES, Apr. 14, 1996, at 10, available in LEXIS, News Group File; Marcus Stern, *A High-Tech Battle over Immigrants*, SAN DIEGO UNION-TRIB., June 8, 1998, at A-1, available in LEXIS, News Group File.

<sup>3</sup> See Daniel R. Mummery & Robert M. Finkel, *The Emergence of Technology Strategic Alliances*, 2 M&A LAW. 1, 1 (1998).

<sup>4</sup> See *id.*



companies spent approximately \$25.6 billion buying 455 companies based in the European Union.<sup>5</sup> In the same period, British companies sold 325 companies worth approximately \$39 billion.<sup>6</sup> The two largest multinational European acquisitions in 1998 were the acquisition of Générale de Banque by Fortis, the Dutch-Belgian financial services provider, valued at \$13 billion, and the acquisition of PolyGram (Holland) by Seagram (Canada), valued at \$10.2 billion.<sup>7</sup> As one M&A practitioner put it, “[t]he level of cross-border [M&A] activity has never been higher.”<sup>8</sup>

The finance world has also seen high level and high profile M&A activity of late. In August 1998 the Federal Reserve Board approved the merger of NationsBank Corp. and BankAmerica Corp.<sup>9</sup> The rechristened Bank of America has \$572 billion in assets<sup>10</sup> and is now the largest bank in the United States. In addition, Bank of America is truly a multinational operation, with offices in thirty-eight countries and doing business with two million businesses worldwide in one hundred ninety countries<sup>11</sup>

Further, in industries that employ a large number of foreign employees, such as defense and aerospace, consolidation in recent years has been aggressive, with far reaching implications for foreign born but American employed workers. For example, on August 1, 1997 Boeing and McDonnell Douglas, both corporations with extensive international operations, completed a merger valued at \$16.3 billion.<sup>12</sup> In all of these cases, corporate restructuring has or will have profound consequences to foreign employees working pursuant to E, L, H, or similar business visas.

<sup>5</sup> See Jerry Walter, *International Mergers and Acquisitions*, Paper Presented at International Business Transactions Seminar, Chicago, Ill., 45 annex 1 (Nov. 17, 1998).

<sup>6</sup> See *id.* at 46 annex 1.

<sup>7</sup> See *id.* at 4-5.

<sup>8</sup> *Id.* at 3.

<sup>9</sup> See *Fed Approves Huge Bank Deal*, N.Y. TIMES, Aug. 18, 1998, at D18, available in LEXIS, News Group File.

<sup>10</sup> See *id.*

<sup>11</sup> See *It's Official: NationsBank and BankAmerica Merge* (visited Oct. 8, 1998) <<http://www.nationsbank.com/newsroom/press/1998/930MERGE.HTM>>.

<sup>12</sup> See *Boeing Completes McDonnell Douglas Merger* (visited Oct. 8, 1998) <[http://www.boeing.com/news/releases/1997/news\\_release\\_970731c.html](http://www.boeing.com/news/releases/1997/news_release_970731c.html)>.

### *B. Immigration Planning as M&A Due Diligence*

Surprisingly, given the expertise of many law, accounting, and consulting firms in dealing with complex, multinational M&A work, the question of how such transactions will affect employees is often forgotten. Considering the costs and expenses incurred in valuing a potential acquisition target; analyzing the antitrust, ERISA, and federal and state tax consequences of restructuring; conducting due diligence and drafting the primary purchase or merger documents; and the voluminous ancillary documents that accompany such a transaction, it is startling how little time or energy is committed to examining the extent to which a particular M&A transaction will actually affect the companies' foreign employees.

This attitude is changing. Assessing the consequences of M&A on foreign employees and assisting corporations that employ large numbers of non-immigrants in key managerial or specialized positions is a relatively new and uncharted area of law. But, due to the trends of globalization and consolidation discussed above, it is a field ripe with possibilities. Currently, the INS is considering new guidelines for assessing M&A transactions in the immigrant petition context.<sup>13</sup> Similarly, law firms, human resource (HR) personnel, and other key executives are becoming more alert and sophisticated regarding immigration issues.

This Article is designed to assist M&A practitioners, immigration attorneys, and HR personnel in understanding when immigration related issues may be triggered by a corporation's business activities, what the consequences may be, and what to do about them. Part II provides a general overview of the business-related non-immigrant categories most often used by American corporations to employ foreigners: the L, H, and E categories.<sup>14</sup> Part III gives a brief overview of M&A law and reviews the

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<sup>13</sup> See Charles C. Foster & Matthew G. Thompson, *Managers and Executives: Merger and Acquisition Update – New INS Regulation*, in 2 IMMIGRATION & NATIONALITY HANDBOOK: ADVANCED PRACTICE [1998-99] 82, 82 (1998). The proposed regulations would affect the successor-in-interest analysis used to assess the validity of immigrant petitions in the M&A context. See *id.* The proposed regulations have not been finalized as of this writing.

<sup>14</sup> See *infra* notes 19-117 and accompanying text.

terminology with which immigration attorneys should be familiar.<sup>15</sup> Part IV discusses the immigration consequences of various M&A transactions, specifically insofar as they relate to the non-immigrant categories discussed in Part II.<sup>16</sup> Part V discusses the effect of M&A on immigrant visa petitions (*i.e.*, petitions towards lawful permanent residency).<sup>17</sup> Finally, Part VI provides a summary regarding the nexus between immigration law and M&A work.<sup>18</sup>

## II. Overview of Immigration Law—The Three Important Business Visa Categories

### A. Key Distinction—Immigrant vs. Non-Immigrant Visas

The first key distinction in immigration law with which practitioners and corporate executives should be familiar is the distinction between immigrant<sup>19</sup> and non-immigrant visas.<sup>20</sup> An immigrant visa entitles the holder to Lawful Permanent Residency (LPR), or the “green card.”

LPR status may be gained either after entering the United States with an immigrant visa or by “adjusting status” from nonimmigrant to immigrant in the United States. LPR status permits an alien to live and work in the United States permanently, provided that the individual does not engage in criminal activities or other actions that could result in the removal of his permanent residence status and his deportation from the United States. Persons with LPR status may freely change employers and generally possess all rights and obligations of U.S. citizens. LPR is most often gained either through an offer of permanent

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<sup>15</sup> See *infra* notes 118-49 and accompanying text.

<sup>16</sup> See *infra* notes 151-202 and accompanying text.

<sup>17</sup> See *infra* notes 203-30 and accompanying text.

<sup>18</sup> See *infra* p. 599.

<sup>19</sup> “Immigrant” is defined as “every alien” except those listed within the various nonimmigrant categories set forth in the statute. 8 U.S.C. § 1101(a)(15) (Supp. 1998).

<sup>20</sup> While the term “nonimmigrant” is not specifically defined in the statute, it is used to describe the various classes of aliens who are specifically excluded from the definition of “immigrant.” See CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 12.01, at 12-4 (Mar. 1998); 8 U.S.C. § 1101(a)(15).

employment from a U.S. company or through a qualifying family relationship to a U.S. citizen or LPR.

### *1. Business Related-Immigrant Visas*

The Immigration Act of 1990 (1990 Act)<sup>21</sup> was the most comprehensive revision to the U.S. immigration laws in more than thirty years. When it went into full force and effect on October 1, 1991, it dramatically changed the categories of business-related and family-related immigrant visas.

Business-related immigrant visas generally require an offer of permanent (*i.e.*, long term and/or indefinite) employment from a U.S. company. Under the 1990 Act, 140,000 business-related immigrant visas may be issued annually, as compared with the previous level of 54,000.<sup>22</sup> The increase in visa numbers and the restructuring of the business-related visa categories has resulted in immigrant visas being more readily available to many individuals than under the previous system.

The business-related visa preference categories are as follows: (1) priority workers;<sup>23</sup> (2) advanced degree professionals and aliens of "exceptional ability";<sup>24</sup> (3) "skilled workers, professionals and other workers";<sup>25</sup> (4) "certain special immigrants";<sup>26</sup> and (5) investors.<sup>27</sup>

"Priority workers" include managers and executives who have worked with an overseas employer in a managerial or executive position for at least one year out of the past three.<sup>28</sup> The term also

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<sup>21</sup> Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (adding or amending sections of the Immigration and Nationality Act of 1952, Pub. L. No. 82-412, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1524) [hereinafter INA]).

<sup>22</sup> See generally *id.*

<sup>23</sup> See 8 U.S.C. § 1153(b)(1)(A)-(C). The "priority worker" is further subdivided into three categories: (1) aliens with "extraordinary ability"; (2) "outstanding professors and researchers"; and (3) certain multinational executives and managers. *Id.*

<sup>24</sup> *Id.* § 1153(b)(2).

<sup>25</sup> *Id.* § 1153(b)(3).

<sup>26</sup> *Id.* § 1153(b)(4).

<sup>27</sup> See *id.* § 1153(b)(5).

<sup>28</sup> See *id.* § 1153(b)(1).

includes individuals of “extraordinary ability in the sciences, arts, education, business, or athletics”<sup>29</sup> and “outstanding professors and researchers.”<sup>30</sup> Extraordinary ability is defined as a level of expertise obtained only by that small percentage of persons at the very top of their fields of endeavor.<sup>31</sup> Individuals in this category are not required to obtain labor certification, as discussed below.

The “advanced degree professionals and aliens of exceptional ability”<sup>32</sup> category includes individuals who hold a U.S. academic or professional degree at the Masters level or higher, as well as those individuals whose expertise is significantly above that ordinarily encountered in the sciences, arts, or business.<sup>33</sup> Individuals immigrating in this category will be required to obtain labor certification.<sup>34</sup>

The “skilled workers, professionals and other workers” category is split into two subcategories: (1) skilled workers and professionals and (2) other workers.<sup>35</sup> The skilled workers and professionals subcategory includes individuals with offers to work in the United States in jobs requiring two years or more of post-secondary education, training, and/or experience.<sup>36</sup> The unskilled workers subcategory includes individuals in positions requiring less than two years of experience, post-secondary education, and/or training.<sup>37</sup> A total of thirty thousand visas per year are available to individuals immigrating in the skilled workers and professionals subcategory;<sup>38</sup> only ten thousand visas per year are available in the unskilled workers subcategory.<sup>39</sup>

<sup>29</sup> *Id.* § 1153(b)(1)(A).

<sup>30</sup> *Id.* § 1153(b)(1)(B).

<sup>31</sup> *See id.* § 1153(b)(1)(A)(i); (2)(C).

<sup>32</sup> *Id.* § 1153(b)(2).

<sup>33</sup> *See id.* § 1153(b)(2)(A).

<sup>34</sup> *See id.* § 1153(b)(3)(C). Specifically, 8 U.S.C. § 1153(b)(3)(C) provides that labor certification is required for three classes within § 1153(b)(3). *See id.* *See generally* HOWARD DAVID DEUTSCH, IMMIGRATION THE EASY WAY 98 (1992).

<sup>35</sup> *Id.* § 1153(b)(3).

<sup>36</sup> *See id.* § 1153(b)(3)(i)-(ii).

<sup>37</sup> *See id.* § 1153(b)(3)(iii).

<sup>38</sup> *See id.* § 1153(b)(3)(B).

<sup>39</sup> *See id.*

Special interest workers include certain individuals who have been employed by the U.S. government, religious workers, and other groups of special concern to the United States.

The investor category is for individuals who invest \$1 million or more in a new commercial enterprise in the United States, creating employment for not less than ten U.S. employees.<sup>40</sup> The investment can be as low as \$500,000 in designated areas of high unemployment or rural areas.<sup>41</sup>

Employers of workers in the "advanced degree professionals and aliens of exceptional ability" category and the "skilled workers, professionals and other workers" categories are required to seek individual labor certification from the U.S. Department of Labor (DOL) for their prospective employees before they can petition the INS for an immigrant visa.<sup>42</sup> Labor certification is a time-consuming and complicated process whereby the employer must prove to the DOL that there are no U.S. workers available who are able, willing, and qualified to fill the position in question. Labor certification requires that the employer actively recruit U.S. workers for the position in question as if the position were vacant and interview all seemingly qualified U.S. workers found as the result of the recruitment efforts.

## 2. *Family-Related Immigrant Visas*

In order to obtain LPR status through a qualifying family relationship, a petition must be filed by the U.S. citizen or LPR relative with the INS. Documentation that affirms the qualifying relationship between the foreign national and the U.S. citizen or LPR petitioner must accompany the petition. Categories are available for spouses, parents, children, and siblings of U.S. citizens, as well as spouses and unmarried children of LPRs. The availability of immigrant visas varies considerably depending on

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<sup>40</sup> See *id.* § 1153(b)(5); 8 C.F.R. § 204.6(f)(1) (1998). See generally William Branigin, *For Sale: U.S. Green Card to Investors of \$500,000*, INTL HERALD TRIB., Dec. 30, 1997, at 1, available in LEXIS, Academic Universe, Document (discussing the investment requirements immigrants must establish in order to receive a U.S. green card).

<sup>41</sup> See 8 C.F.R. § 204.6(f)(2).

<sup>42</sup> See 8 U.S.C. § 1153(b)(3)(c); *supra* note 34 and accompanying text.

the category and the country of birth of the individual for whom the petition is being filed.

LPR permits the holder to permanently reside in the United States with most of the rights and obligations of U.S. citizens. Acquiring LPR is lengthy, complex, expensive, and not the usual means by which foreigners come to the United States to work or study. The vast majority of foreigners employed in the United States do so through some sort of non-immigrant visa. There are several types of non-immigrant business visas that, depending upon the type, entitle the holder to work in the United States for specified periods of time and according to certain requirements and rules.

*B. The Three Important Non-Immigrant Business Visa Categories*

The three principal non-immigrant visas, the L, E, and H visas, which are commonly used by multinational corporations to employ foreigners in the United States, are discussed below.

*1. The L-1 Intracompany Transferee Category*<sup>43</sup>

The L-1 (Intracompany Transferee) visa is perhaps the most commonly used non-immigrant visa to accomplish the transfer of key employees among an international group of affiliated companies. The L category permits multinational organizations with operations abroad to transfer their key personnel to the United States for temporary periods.<sup>44</sup> For that reason, the L category is especially valuable to corporations with operations both in the United States and abroad.<sup>45</sup> In most instances qualified persons can obtain their visa within two to three months after their employer files a complete petition with the INS.

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<sup>43</sup> See 8 U.S.C. § 1101(a)(15)(L).

<sup>44</sup> See GORDON ET AL., *supra* note 20, at 24-3.

<sup>45</sup> See *id.* at 24-4.

a. *The Beneficiary Must Be Serving in an Executive, Managerial, or Specialized Knowledge Capacity with the American Organization*

To qualify for an L-1 visa, the beneficiary (the alien who ultimately is to receive the visa) must be transferring from an overseas company to a properly related U.S. company.<sup>46</sup> The individual must have served in either an "executive,"<sup>47</sup> "managerial,"<sup>48</sup> or "specialized knowledge"<sup>49</sup> capacity (each as statutorily defined) with the overseas company and must be transferring to the U.S. company to serve in one of these specified capacities.<sup>50</sup> Managers and executives are classified as L-1A and are entitled to remain in the United States for up to seven years.<sup>51</sup> Specialized knowledge personnel are classified as L-1B and are entitled to remain in the United States for up to five years.<sup>52</sup>

The regulations set forth the specific criteria for each category, and proving to the INS that a candidate meets the particular definition is critical to assessing whether the beneficiary is eligible for the L visa.

i. *"Executive" Capacity Defined*

For purposes of L-1A classification, "executive capacity" has a

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<sup>46</sup> See 8 C.F.R. § 214.2(l)(1)(i). The statute provides that the L-1 nonimmigrant may enter the United States "to [temporarily] render his services to the same employer or a subsidiary or affiliate thereof." 8 C.F.R. § 214.2(l)(1)(ii)(A). Either the foreign employer abroad or the American subsidiary or affiliate may petition to bring the alien into the country as a transferee. See GORDON ET AL., *supra* note 20, at 24-5.

<sup>47</sup> 8 U.S.C. § 1101(a)(15)(L) (Supp. 1998); 8 C.F.R. § 214.2(l)(1)(ii)(C) (1998) (defining executive capacity).

<sup>48</sup> 8 U.S.C. § 1101(a)(15)(L); 8 C.F.R. § 214.2(l)(1)(ii)(B) (defining managerial capacity).

<sup>49</sup> 8 U.S.C. § 1101(a)(15)(L); 8 C.F.R. § 214.2(l)(1)(ii)(D) (defining specialized knowledge).

<sup>50</sup> 8 C.F.R. § 214.2(l)(1)(i) ("[A]n alien who within the preceding three years has been employed abroad for one continuous year by a qualifying organization may be admitted temporarily to the United States to be employed . . . in a managerial or executive capacity, or in a position requiring specialized knowledge.").

<sup>51</sup> See GORDON ET AL., *supra* note 20, at 24-9.

<sup>52</sup> See *id.*



four-part definition.<sup>53</sup> An alien serving in an “executive capacity” is one holding an assignment within an organization in which the employee primarily:

- (1) directs the management of the organization or a major component or function of the organization;
- (2) establishes the goals and policies of the organization, component, or function;
- (3) exercises wide latitude in discretionary decision-making;
- and (4) receives only general supervision or direction from higher level executives, the board of directors or stockholders of the organization.<sup>54</sup>

### *ii. “Managerial” Capacity Defined*

Like the definition of “executive,” the definition of “managerial capacity” is also four-fold.<sup>55</sup> First, an alien serving in a “managerial capacity” is one holding “an assignment within an organization in which the employee primarily” manages the organization, or a department, subdivision, function, or component thereof.<sup>56</sup> Second, managerial duties include activities such as supervising and controlling the work of other supervisory, professional, or managerial employees or managing an essential function within the organization or a department or subdivision thereof.<sup>57</sup> Third, if the employee is supervising employees, the employee must have the authority to hire and fire or recommend similar personnel related actions.<sup>58</sup> If the employee is not supervising employees, the employee must serve in a senior level within the organization with respect to the function managed.<sup>59</sup> Fourth, the alien must exercise discretion over the day-to-day operations of the activity or function for which the employee has authority.<sup>60</sup> A first-line supervisor will not be considered a manager unless the employees supervised are professional or

<sup>53</sup> See 8 C.F.R. § 214.2(l)(1)(ii)(C).

<sup>54</sup> *Id.* § 214.2(l)(1)(ii)(C)(1)-(4).

<sup>55</sup> *Id.* § 214.2(l)(1)(ii)(B).

<sup>56</sup> *Id.* § 214.2(l)(1)(ii)(B)(1).

<sup>57</sup> See *id.* § 214.2(l)(1)(ii)(B)(1)-(2).

<sup>58</sup> See *id.* § 214.2(l)(1)(ii)(B)(3).

<sup>59</sup> See *id.*

<sup>60</sup> See *id.* § 214.2(l)(1)(ii)(B)(4).

unless the first-line supervisor manages an essential function.<sup>61</sup>

*iii. "Specialized Knowledge" Defined*

For purposes of qualifying for an L-1B petition, an employee with "specialized knowledge" is one with such particular knowledge relating to the organization's "product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures."<sup>62</sup> Specialized knowledge is knowledge that is not widely known or held commonly throughout the industry "but is truly specialized."<sup>63</sup>

Further, the transferee must have been employed by the overseas entity in a managerial, executive, or specialized knowledge capacity (again, as defined in the Act) for at least one year within three years prior to the transfer.<sup>64</sup> Further, any time spent in the United States prior to the transfer does not count toward (but does not interrupt) the required one year of employment.<sup>65</sup>

*b. The Corporate Relationship*

The beneficiary must be transferred to the United States to work for a parent, branch, subsidiary, or affiliate of the foreign corporation that is "doing business" in the United States.<sup>66</sup> "Doing business" is a term of art in the immigration world and means "the regular, systematic and continuous provision of goods and/or services"<sup>67</sup> by the American entity. The mere presence of an agent or office in the United States does not meet the definition,<sup>68</sup> and the INS can and will reject (or in immigration terminology, "kick

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<sup>61</sup> *See id.*

<sup>62</sup> *Id.* § 214.2(l)(1)(ii)(D)-(E).

<sup>63</sup> GORDON ET AL., *supra* note 20, at 24-33.

<sup>64</sup> *See* 8 C.F.R. § 214.2(l)(1)(ii)(A).

<sup>65</sup> *See id.*

<sup>66</sup> *See id.* § 214.2(l)(1)(i).

<sup>67</sup> *Id.* § 214.2(l)(1)(ii)(H).

<sup>68</sup> *See id.*

back”) petitions where the American entity appears to be merely a way-station for a single foreign employee to visit or a purely marginal operation.

But the key issue for any L petition is establishing that the foreign corporation and the American entity are properly related. The L category, after all, is designed for multinational corporations with presences here and abroad so that key executives may be transferred temporarily to the United States. The INS regulations recognize four types of corporate relationships that constitute a “qualifying relationship”<sup>69</sup> for purposes of assessing the qualifications for L status, which are discussed below.

*i. U.S. Parent Corporation or Entity That Has Foreign Subsidiaries*

In a relationship between an American parent corporation with foreign subsidiaries, the beneficiary may be employed abroad by a subsidiary of the American parent corporation.

*ii. U.S. “Branch” of a Foreign Organization*

For purposes of the regulations, a “branch” is “an operating division or office of the same organization housed in a different location.”<sup>70</sup> In other words, the alien is being transferred abroad to work for an entity that may not have been incorporated or that perhaps does not meet the ownership requirements of a full-blown subsidiary.

*iii. U.S. Subsidiary of a Foreign Entity*

A “subsidiary” is defined as a “firm, corporation, or other legal entity of which a parent owns, directly or indirectly,” half or more than half of the entity and controls the entity, “or owns, directly or indirectly, fifty percent of a fifty-fifty joint venture and has equal

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<sup>69</sup> § 214.2(l)(1)(i). (The statute defines a “qualifying organization” as “a United States or foreign firm, corporation, or other legal entity which: [(1)] meets one of the qualifying relationships of parent, branch, affiliate or subsidiary; [(2)] is or will be doing business . . . as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien’s stay in the United States [in L status]; [and (3)] otherwise meets the requirements for L status. *Id.* § 214.2(l)(1)(ii)(G).

<sup>70</sup> *Id.* § 214.2(l)(ii)(J).

control and veto power . . . , or owns, directly or indirectly, less than half of the entity but in fact controls the entity.”<sup>71</sup>

*iv. U.S. Affiliate of a Foreign Entity*

An “affiliate” is defined as “one of two subsidiaries both of which are owned and controlled by the same parent or individual, or one of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.”<sup>72</sup>

Regardless of which of these four corporate relationships the petitioner has presented to the INS, the nexus between the U.S. and foreign corporations is so essential to the success of an L petition that changes in corporate relationships caused by corporate restructuring can have profound impacts on L visa holders.

*c. The L-1 Petition Process*

Regardless of whether the prospective L candidate is a manager, an executive, or specialized knowledge personnel, the U.S. employer normally files the initial L-1 petition with the appropriate INS Service Center in the United States.<sup>73</sup> Generally, numerous documents must be submitted to substantiate that the company and the employee qualify for L-1 status; less documentation is required for well-known or established companies.<sup>74</sup> Once approval is granted by the INS, the transferring

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<sup>71</sup> *Id.* § 214.2(l)(1)(ii)(K).

<sup>72</sup> *Id.* § 214.2(l)(1)(ii)(L).

<sup>73</sup> *See id.* § 214.2(l)(2)(ii). There are four INS Service Centers in the United States (Vermont, Texas, Nebraska, and California), each with jurisdiction over certain states. The L petition is filed in the Service Center with jurisdiction where the applicant is to be employed. *See GORDON ET AL., supra* note 20, at 24-9.

<sup>74</sup> *See* 8 C.F.R. § 214.2(l)(3)(i)-(viii); *GORDON ET AL., supra* note 20, at 24-9. The amount and type of documentation required will depend upon how well established the petitioning company is, and whether the L beneficiary is to be categorized as a manager or an executive or as possessing specialized knowledge. Generally, an annual report, a corporate brochure, a business plan, or similar financial or corporate information (including proof of the qualifying relationship between the overseas corporation and the U.S. entity) will minimally be required for the petitioner. Documentation related to the beneficiary generally includes such items as copies of educational credentials, letters attesting to his expertise, resumes, and the like.

employee, his spouse, and minor children (under the age of 21) apply for L-1 and L-2 visas, respectively, at a U.S. Consulate or Embassy.<sup>75</sup> Spouses and children admitted to the United States under L-2 visas are not permitted to work in the United States without work authorization.<sup>76</sup>

Initial admission to the United States for L-1 managers, executives, and specialized knowledge employees, except those entering the United States to be employed at a "new office" (discussed below), may be admitted for a maximum period of three years.<sup>77</sup> Extensions of stay in increments of two years may be granted.<sup>78</sup> Managers and executives, L-1A individuals, may remain in the United States in L-1 status for up to seven years.<sup>79</sup> Specialized knowledge employees, L-1B individuals, may remain in the United States in L-1 status for five years.<sup>80</sup> Spouses and minor children are entitled to remain in the United States for the same period as the principal.<sup>81</sup>

*d. "New Office" Petitions*

An organization that has been doing business in the United States for less than one year is considered a "new office" for L-1 visa purposes.<sup>82</sup> Petitions approved on behalf of managers and executives to be employed at new offices will be valid for only one year, during which time the company is expected to grow. Prior to the conclusion of the first year, if the U.S. company wishes the employee to remain in the United States, the U.S. company and the employee must petition to secure additional time in L-1 status. At the time the petition and application for extension are filed, the company and the employee must establish that the employee qualifies as a "true" executive or manager (*i.e.*, the start-up company has shown sufficient growth to support an

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<sup>75</sup> See 8 C.F.R. § 214.2(l)(7)(ii).

<sup>76</sup> See *id.*

<sup>77</sup> See GORDON ET AL., *supra* note 20, at 24-9.

<sup>78</sup> See *id.*

<sup>79</sup> See 8 C.F.R. § 214.2(l)(12).

<sup>80</sup> See *id.*

<sup>81</sup> See *id.* § 214.2(l)(7)(ii).

<sup>82</sup> See *id.* § 214.2(l)(1)(ii)(F).

executive or manager).<sup>83</sup> Failure to show an increase in factors such as gross income and staffing levels may result in a denial of the extension request.

*e. Blanket Petitions*

The blanket L-1 petition is an alternative procedure to filing individual petitions for large multinational companies that frequently use the L visa category. The blanket L-1 petition procedure is designed to avoid repetitive INS adjudication of the same general issues for employees within a single family of corporate entities (*i.e.*, continual re-determinations that the appropriate relationship exists between the overseas corporation and its subsidiaries/affiliates). Since the INS has to approve only one petition rather than numerous individual petitions, a blanket L petition can save a corporation time and money.

In order to qualify for blanket L status, a corporation must meet the following requirements: (1) all qualifying organizations within the international structure of the petitioner must be engaged in commercial trade or services;<sup>84</sup> (2) the petitioner must have an office in the United States that has been doing business for at least one year<sup>85</sup> (*i.e.*, no "new office" petitions are allowed); (3) the petitioner must have at least three domestic or foreign branches, subsidiaries, or affiliates;<sup>86</sup> and (4) among all of the qualifying organizations within the petitioner's organization, one of the following must be present: (a) at least ten L-1 approvals in the past year for executives, managers, or specialized knowledge personnel;<sup>87</sup> (b) U.S. sales of at least \$25 million;<sup>88</sup> or (c) a U.S. work force of at least one thousand employees.<sup>89</sup>

The blanket petition, once approved, may authorize the issuance of L-1 visas to executives, managers, and specialized

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<sup>83</sup> See generally § 214.2(l)(14)(ii)(C)-(D).

<sup>84</sup> See *id.* § 214.2(l)(4)(i)(A).

<sup>85</sup> See *id.* § 214.2(l)(4)(i)(B).

<sup>86</sup> See *id.* § 214.2(l)(4)(i)(C).

<sup>87</sup> See *id.* § 214.2(l)(4)(i)(D).

<sup>88</sup> See *id.*

<sup>89</sup> See *id.*

knowledge professionals by a Consular Officer at the Consulate closest to the beneficiary's place of residence. The blanket L-1 petition is filed on Form I-129, the same form used for an individual L-1 petition, with supporting documentation attached. The petition would be filed with the INS Regional Service Center having jurisdiction over the area where the petitioner is located.

*f. Conclusion*

The L-1 Intracompany Transferee category is popular with foreign based corporations that own or are forming American subsidiaries or branch offices and that seek to transfer key employees to the United States for temporary periods to serve in key roles. As discussed above, because one of the key attributes of the L category is the qualifying relationship between the foreign corporation and the American entity, M&A transactions that affect this nexus, such as the sale of the stock or assets of the U.S. entity to another person or entity, may dramatically alter the status of foreign employees in the United States pursuant to L visas.

*2. E-1/E-2 Treaty Trader/Treaty Investors*

E-1 (treaty trader) and E-2 (treaty investor) visas are issued pursuant to bilateral treaties of friendship, commerce, and navigation between the United States and various other countries.<sup>90</sup> Most Western European countries are parties to such treaties with the United States.<sup>91</sup> Generally, these treaties provide that the nationals of the treaty country involved may live and work in the United States for employers sharing their nationality in certain specified capacities. The E visa is the statutory means whereby these treaty provisions are made effective.

*a. Petition Process*

The visa, whether E-1 or E-2, has several unique features.

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<sup>90</sup> Section 101(9)(15)(E) of the Immigration and Naturalization Act requires the existence of a Treaty of Friendship, Commerce, and Navigation (or comparable treaty) between the United States and another nation in order for foreign nationals of that state to receive E visa status. See 8 U.S.C. § 1101(a)(15)(E); 9 DEPARTMENT OF STATE, FOREIGN AFFAIRS MANUAL § 41.51 n.2. (1996) [hereinafter F.A.M.]. Treaties or the equivalent currently in effect are listed in 9 F.A.M. § 41.51 Exhibit I.

<sup>91</sup> See, e.g., 9 F.A.M. § 41.51 Exhibit I.

First, it is the only non-immigrant visa to permit employment in the United States that does not require the prior approval of a non-immigrant visa petition by the INS. (It is possible to apply for E-1 or E-2 status by applying directly to the INS; however, the individual applicant must be physically present in the United States to do so.) Direct filing with the Consulate or Embassy often speeds up the approval process considerably. However, since the application has not been "pre-approved" by the INS, it is much more closely examined by the staff of the Consulate or Embassy than, for example, a visa application based on an approved L-1 or H-1B petition. Documentary requirements on E visa applications can be quite rigorous, far more so than L applications.

*b. Duration of Stay*

E visas also potentially allow for an indefinite duration of authorized stay in the United States.<sup>92</sup> The visas themselves are usually issued for a period of two years.<sup>93</sup> However, there is no statutory limitation on the time one may stay in the United States in E status. Thus, the visa may be renewed for similar terms indefinitely so long as conditions of eligibility continue to be met.

*c. Corporate Eligibility Requirements*

Both E visas require that the employing company and the transferring individual meet certain eligibility requirements. For the U.S. company to qualify, it must have the same nationality as a U.S. treaty partner; that is, it must be at least fifty percent owned by a company that is owned by treaty country nationals or it must be at least fifty percent directly owned by treaty nationals who are not lawful permanent residents of the United States. The individuals who are to be transferred to the United States must be of the same nationality as the ultimate owners of the U.S. company, such that they must be of the same nationality as the treaty partner.

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<sup>92</sup> See 8 C.F.R. § 214.2(e)(19) (stating that the initial duration of the stay is two years; that two-year term, however, is renewable for additional two-year increments).

<sup>93</sup> See *id.*



*i. E-1 Requirements*

The two subcategories of E visas differ in their eligibility requirements. In the case of the E-1 (treaty trader) visa, the U.S. company must document that it is engaged in “substantial trade” between the United States and the treaty country.<sup>94</sup> Substantial trade does not refer so much to a dollar level of trade as to regular and frequent trade in goods or services.<sup>95</sup> The trade between the United States and the treaty country must account for more than fifty percent of the U.S. company’s trading revenues.<sup>96</sup>

*ii. E-2 Requirements*

In the case of the E-2 (treaty investor) visa, the foreign owner, whether company or individual investors, must have made a “substantial investment” in the U.S. company.<sup>97</sup> The term “substantial investment” escapes precise definition, and no minimum dollar amounts have been set.<sup>98</sup> However, the State Department does define substantial investment as a bona fide or real, active commercial or entrepreneurial undertaking, which produces a service or commodity, rather than a marginal enterprise.<sup>99</sup>

Among other things, the U.S. company must employ some U.S. workers. The State Department uses a “proportionality test”

<sup>94</sup> For example, evidence submitted in support of an E-2 application must establish, *inter alia*, that: (1) the applicant has investing or is actively investing in the United States; (2) the enterprise is a real and operating commercial operation; (3) the investment is “substantial”; and (4) the investment is more than a marginal one solely to make a living. 9 F.A.M. § 41.51 n1.2. Documentary evidence to prove each element above can obviously be extensive. For example, a typical E-2 application would minimally include: the Articles of Incorporation and other organizational documents of the American enterprise; an annual report or other public information, if any; copies of contracts proving that the U.S. entity is currently conducting business; and financial information regarding the size, amount, and type of the investment.

<sup>95</sup> See 8 U.S.C. § 1101(a)(15)(E); 9 F.A.M. § 41.51 n.5 (“[T]he word ‘substantial’ is intended to describe the flow of goods and services which are being exchanged between the treaty countries. That is, the trade must be a continuous flow which should involve numerous transactions over time.”).

<sup>96</sup> See 9 F.A.M. § 41.51 n.5.

<sup>97</sup> *Id.* n.6.

<sup>98</sup> See 8 U.S.C. § 1101(a)(15)(E); 9 F.A.M. § 41.51 n.9.

<sup>99</sup> See 9 F.A.M. § 41.51 n.9.

that weighs the investment against the total value of the business or the usual amount needed for successful similar businesses to determine whether a substantial investment has been made.<sup>100</sup> Small- and medium-sized businesses should generally plan to invest at least half of the value of the business or the usual amount required to start up similar businesses.<sup>101</sup> Investment funds may be borrowed so long as the investor, and not just the U.S. subsidiary, is liable for the debt.<sup>102</sup>

#### *d. Individual Eligibility Requirements*

In addition to the corporate requirements, the individuals who are to come to the United States must serve as executives, managers, or essential skills employees.<sup>103</sup> The executive and manager classifications require broad discretionary authority over either the entire operation or a distinct division thereof.<sup>104</sup> The essential skills employee should have special qualifications that make the services he will render essential to the efficient operation of the enterprise.<sup>105</sup> Mere technicians rarely qualify for E visas except in start-up situations and then for only a short period of time. Further, essential skills employees may have difficulty obtaining a visa for longer than a few years. Spouses and minor children of the E-1 or E-2 principal are also given E-1 or E-2 visas.<sup>106</sup>

### *3. H-1B Temporary Professional Workers*

#### *a. Specialty Occupations*

The H-1B visa category allows a U.S. employer to hire certain foreign nationals in "specialty occupations."<sup>107</sup> Most H-1B

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<sup>100</sup> See *id.* n.9.3.10.

<sup>101</sup> See *id.* n.9.3.

<sup>102</sup> See *id.* (discussing the specific rules that govern the nature of loans that count for investment purposes).

<sup>103</sup> See *id.* nn.13.2-13.3.

<sup>104</sup> See *id.*

<sup>105</sup> See *id.* n.13.

<sup>106</sup> See 8 C.F.R. § 214.2(e)(4) (1998).

<sup>107</sup> *Id.* § 214.2(h)(4)(ii).

petitions are filed on behalf of professionals. Professionals are persons who hold at least a bachelor's degree or the equivalent in a specialized field of knowledge relating to their employment,<sup>108</sup> where holding such a degree ordinarily is considered a prerequisite to entering the field.<sup>109</sup> In addition to the individual's qualifications, the actual position being offered must require the services of a professional.<sup>110</sup> Examples of job classifications that may qualify for H-1B status are engineers, accountants, chemists, computer professionals, and certain business professionals.<sup>111</sup>

*b. Labor Condition Attestation*

Pursuant to the provisions of the Immigration Act of 1990,<sup>112</sup> employers are required to file a Labor Condition Attestation (LCA) with the U.S. Department of Labor prior to the filing of an H-1B petition.<sup>113</sup> By filing the LCA, the employer attests: (1) it will pay the alien the "required wage" (the higher of the prevailing wage or the actual wage paid to U.S. workers similarly employed); (2) the alien's employment will not adversely affect the working conditions of U.S. workers similarly employed; (3) there is no strike or lock-out that necessitated the hiring of the alien; and (4) notice of the hiring of the alien has been provided to the company's employees.<sup>114</sup>

*c. The H-1B Petition Process*

Once the LCA is certified by the U.S. Department of Labor, the U.S. employer must file an H-1B petition with the INS Regional Service Center that has jurisdiction over the location where the foreign employee will be employed (just as with the

<sup>108</sup> See 8 U.S.C. § 1101(a)(15)(H); 8 C.F.R. § 214.2(h)(1)(ii)(B)(1) (except registered nurses, agricultural workers, and other enumerated aliens); see also 8 C.F.R. § 214.2(h)(4)(ii) (statutorily defining specialty occupation).

<sup>109</sup> See 8 C.F.R. § 214.2(h)(4)(i)(A)(1).

<sup>110</sup> See *id.* § 214.2(h)(4)(ii).

<sup>111</sup> See *id.*

<sup>112</sup> Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (amending or adding certain sections of the INA).

<sup>113</sup> See 8 U.S.C. § 1153(b)(3)(C) (1998); § 1182(a)(5)(A)(i).

<sup>114</sup> *Id.* § 1182(a)(5)(A)(i).

filing of an L petition).<sup>115</sup> If the petition is approved, it may be valid for a maximum initial period of three years.<sup>116</sup> An individual may not remain in the United States in H-1B status for more than an aggregate period of six years.<sup>117</sup>

If the foreign employee is outside the United States, the foreign employee will apply for the H-1B visa at the appropriate U.S. Consulate. Foreign employees already in the United States, either in H-1B status for another employer or in another valid non-immigrant status, may apply for an extension or change of their non-immigrant status. The spouse and minor children of the H-1B may be granted H-4 visa status. H-4 status entitles the family members to remain in the United States for the duration of the H-1B petition but does not authorize employment in the United States.

#### *d. Conclusion*

The H-1B category is particularly useful for employing highly skilled foreign employees, especially in medical, science, engineering, or technology related fields. Completing the H-1B application process may take slightly longer than for an L petition due to the LCA process and the need to fully document the beneficiary's technical skills. Because the focus in the H-1B category is more on the beneficiary's skills and employment situation and less on the employer's status or relationship with the employee, M&A transactions which affect the employee's particular job situation are of special concern and should be watched carefully.

### **III. Overview of Mergers, Acquisitions, and Other Corporate Restructuring**

#### *A. Introduction to M&A Law*

Like immigration law, the field of corporate mergers, acquisitions, and other corporate (re)organizations is a specialized

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<sup>115</sup> See *id.* § 1184.

<sup>116</sup> See *id.*

<sup>117</sup> See *id.*

and often highly technical field that can be imposing to non-practitioners. Fortunately, the intersection of these two highly specialized fields is, in fact, quite narrow. Immigration law does not consider or extensively discuss the possible corporate transactions in detail but rather paints in very broad strokes the sort of transactions that trigger immigration consequences.

In other words, immigration law appears to be blissfully ignorant of the complexities of corporate M&A law. Therefore, the good news for immigration practitioners and other non-corporate attorneys is that a mere general familiarity with the basic concepts of M&A law goes quite a long way in understanding the immigration ramifications of M&A work.

What is lumped together as M&A work for purposes of this article encompasses three transactions: (1) a statutory merger or consolidation; (2) the purchase by one entity of the assets of another entity; and (3) the purchase by one entity of the stock (or partnership shares) of a corporation (or partnership). All three transactions are instruments by which the purchase and sale (*i.e.*, the acquisition) of a corporation may be carried out.

## *B. The Statutory Merger*

### *1. Generally*

A merger is not the same as an acquisition. In the M&A field, the term "acquisition" describes a transfer of ownership, generally of a corporation, by merger, stock or asset sale, or some combination thereof.<sup>118</sup> The term "merger," however, is a narrow technical term that relates to a statutorily created procedure in which two or more corporations or other entities combine into one.<sup>119</sup> A merger may or may not have anything to do with a corporate acquisition. A merger is one means by which an acquisition can be carried out.

A merger is utterly the creature of state statute, and any interstate merger will have to be conducted in accordance with the

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<sup>118</sup> See STANLEY FOSTER REED & ALEXANDRA REED LAJOUX, *A MERGER ACQUISITION BUYOUT GUIDE* 4 (2d ed. 1995).

<sup>119</sup> See *id.*; ELEANOR M. FOX & BYRON E. FOX, *1 FOX & FOX AND MERGERS* § 5A.02 (1998).

procedures set forth in each state's merger statutes.<sup>120</sup> Generally, to conduct a merger, the Board of Directors of the companies participating in the merger approve and adopt a plan of merger and submit the plan to the shareholders of the participating corporations for approval.<sup>121</sup> Every state varies as to which companies' shareholders may vote, how many votes are required, and whether particular classes of securities are entitled to a separate vote.<sup>122</sup> Upon the completion of the necessary corporate actions and documentation, the plan or articles of merger are filed with the Secretary of State where the surviving corporation is located, and the merger is complete.<sup>123</sup> Upon the completion of a merger, the merged corporation legally disappears, and the surviving corporation becomes the owner of the properties and rights of the merged corporations and assumes responsibility for their liabilities.<sup>124</sup> This transfer of ownership, and the consequent assumption of liabilities, occurs by operation of law after compliance with the procedural requirements of the state statute(s).<sup>125</sup>

## 2. *The "Short Form" Merger*

One variant of the statutory merger is the "short form" merger.<sup>126</sup> A short form merger is a simplified merger procedure

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<sup>120</sup> See, e.g., N.C. GEN. STAT. §§ 55-11-01; DEL. CODE ANN. TIT. 8, §§ 251(a)-(b) (1998); N.Y. BUS. CORP. LAW §§ 901, 902(a) (1998). The charters and by-laws of the participating corporations may also affect the mechanics of a statutory merger.

<sup>121</sup> For purposes of illustration we use the term "corporation"; however, under many states' laws, corporations may merge with general partnerships, limited partnerships, LLCs, or other entities, and each of these may merge with the other, depending upon what state statutes permit.

<sup>122</sup> New York law, for example, requires that the plan of merger be submitted to the shareholders of each participant corporation, that the plan of merger be adopted by two-thirds of all outstanding shares, and that an additional vote of the majority be required if the plan of merger contains any provision which would exclude, limit, or otherwise alter certain rights and privileges of such class or series. See N.Y. BUS. CORP. LAW §§ 804, 903(a)(2); see also DEL. CODE ANN. TIT. 8 § 251(c) (allowing stockholder vote regardless of board approval).

<sup>123</sup> See, e.g., N.C. GEN. STAT. §§ 55-11-01; 55-11-03.

<sup>124</sup> See FOX & FOX, *supra* note 119, § 5A.02.

<sup>125</sup> See *id.*

<sup>126</sup> See REED & LAJOUX, *supra* note 118, at 5; FOX & FOX, *supra* note 119,

permitted under many states' merger laws, which is allowed when all or substantially all of the stock of one corporation is owned by another corporation and the parent wishes to merge that subsidiary "upstream" into the parent corporation.<sup>127</sup> Short form merger statutes generally do not require an affirmative vote of the shareholders of either corporation because such a vote would be a formality due to the parent corporation's control of the subsidiary.<sup>128</sup> Some states' merger statutes also permit a "downstream" merger whereby the parent is merged into the subsidiary entity.<sup>129</sup> To effectuate a short form merger, the Boards of Directors of both corporations must approve the merger and then file the necessary articles or other documents with the appropriate state agency.<sup>130</sup>

### C. Acquisition of Assets

#### 1. Generally

In addition to a merger, there are two other principal ways whereby one corporation acquires another corporation: asset acquisition and stock acquisition. The first includes buying all the target corporation's tangible and intangible assets. In an asset acquisition, one corporation acquires all or substantially all of the assets of another corporation in exchange for cash, stock, or other consideration.<sup>131</sup>

The buying corporation may acquire the selling corporation's tangible assets, including real estate, equipment, and raw materials, as well as any intangibles, including intellectual property rights, contract rights, leases, and goodwill.<sup>132</sup> Alternatively, the buying corporation may select certain key

§ 5B.02[9].

<sup>127</sup> See REED & LAJOUX, *supra* note 118, at 5; FOX & FOX, *supra* note 119, § 5B.02[9]. See, e.g., N.C. GEN. STAT. § 55-11-04 (1998); DEL. CODE ANN. tit. 8, § 253.

<sup>128</sup> See REED & LAJOUX, *supra* note 118, at 5; FOX & FOX, *supra* note 119, § 5B.02[9].

<sup>129</sup> See, e.g., DEL. CODE ANN. tit. 8, § 253(a).

<sup>130</sup> See FOX & FOX, *supra* note 119, § 5B.02[9].

<sup>131</sup> See *id.* § 5C.01.

<sup>132</sup> See *id.* § 5C.01; REED & LAJOUX, *supra* note 118, at 283-84.

tangible items it wishes to purchase and leave the remainder with the selling corporation.<sup>133</sup> Depending upon the size and nature of the acquisition, the documentation required to effectuate a transfer of such assets could include deeds, consents to assignment of contracts, assignments of patents, bills of sale, and the like.<sup>134</sup> Following an asset acquisition, the selling corporation may be dissolved or may continue to exist as a legal entity or "shell" corporation since it no longer retains any assets.<sup>135</sup>

## 2. *Advantages and Disadvantages*

An asset acquisition has several advantages. First, unlike a merger, the buyer assumes only those liabilities that it expressly consents to assume,<sup>136</sup> with certain exceptions, primarily related to fraudulent conveyances and bulk transfers.<sup>137</sup> Second, in circumstances where the seller will realize taxable gain from the sale, a buyer may obtain significant tax savings in an asset acquisition because the basis of the asset basis will be "stepped up" for tax purposes to the purchase price.<sup>138</sup> Finally, the rights and remedies available to shareholders and creditors of the selling corporation are more limited in asset acquisitions than mergers.<sup>139</sup>

Some of the disadvantages of asset acquisitions include the fact that all assets must be legally transferred, which, depending upon the size of the deal, could require a terrific amount of paperwork.<sup>140</sup> Second, many intangible assets, such as contract rights, distribution agreements, and leases, may require consent to be transferred.<sup>141</sup> The transaction costs of acquiring the consents of lenders, distributors, or other third parties are often high.<sup>142</sup> Finally, asset acquisitions may require bulk sales law compliance

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<sup>133</sup> See REED & LAJOUX, *supra* note 118, at 284.

<sup>134</sup> See *id.*

<sup>135</sup> See FOX & FOX, *supra* note 119, § 5C.06[1].

<sup>136</sup> See REED & LAJOUX, *supra* note 118, at 284.

<sup>137</sup> See *id.* at 284-85.

<sup>138</sup> See *id.* at 284.

<sup>139</sup> See FOX & FOX, *supra* note 119, § 5C.02.

<sup>140</sup> See REED & LAJOUX, *supra* note 118, at 285.

<sup>141</sup> See *id.* at 285-86.

<sup>142</sup> See *id.*



and, in some circumstances, could cause negative tax implications.<sup>143</sup>

#### *D. Acquisition of Stock*

##### *1. Generally*

The third principal way by which one corporation acquires another corporation is through a stock sale. In a stock acquisition, the buyer purchases all of the selling corporation's capital stock from the corporation's shareholders for cash, stock, or other consideration.<sup>144</sup> Because the buyer is, in essence, buying the company (that is, acquiring all of the shareholders' ownership rights), the buyer assumes all liabilities of the company as well as the market risk associated with ownership. Depending upon the type of consideration and whether or not the selling corporation is a public corporation, stock acquisitions may require greater securities law compliance.

##### *2. Advantages and Disadvantages*

The first advantage of a stock acquisition is simplicity. The sale of a corporation's stock can be consummated without the approval of the selling corporation's Board of Directors.<sup>145</sup> Unlike an asset acquisition, a stock deal typically requires less documentation because only the stock is being bought and sold, not all of the individual assets of the corporation. Further, stock acquisitions can be structured to be tax-free under Internal Revenue Code Sections 361 and 368 under certain circumstances.<sup>146</sup>

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<sup>143</sup> See *id.* at 285-86.

<sup>144</sup> See *id.* at 287. The term corporation is used for illustrative purposes only. A stock acquisition could involve the sale of a partnership's partnership interests or, in the case of an LLC, its membership interests.

<sup>145</sup> See FOX & FOX, *supra* note 119, § 5D.01.

<sup>146</sup> See *id.* § 5D.03. To gain tax-free status under IRC §§ 361 and 368, the buying corporation must pay only voting stock as consideration for the acquisition of the selling corporation's stock and must acquire 80% or more of the combined voting power of all classes of the selling corporation's stock entitled to vote and at least 80% of the total number of shares. See *id.* Stock transactions may or may not be beneficial for tax purposes. A stock acquisition may result in tax disadvantages after the acquisition that

The disadvantages of stock acquisitions are that as its new owner, the buyer acquires all of the risk of the business, as well as all of the corporation's liabilities.<sup>147</sup> Second, a stock acquisition may be difficult to complete if a corporation has numerous shareholders.<sup>148</sup> Finally, stock acquisitions are generally treated as "carryover basis" transactions for federal income tax purposes, which may be detrimental to the new owners.<sup>149</sup>

### *E. Conclusion*

The three methods of corporate acquisitions discussed above, while simple in their broad strokes, permit almost endless variations and complexities in their execution. Moreover, the three methods are not mutually exclusive. As a practical matter, the sale of a corporation may be achieved through any combination of these three devices. For example, a corporation could directly purchase some assets of a corporation, force the seller to distribute other unwanted assets as liabilities to third parties, and then purchase all of the selling corporation's stock. In some circumstances, a stock acquisition and a merger could be conducted simultaneously, whereby the selling corporation sells its stock to the buyer, while simultaneously merging the seller into the buyer or a subsidiary of the buyer. In addition, numerous other hybrid and complex forms of corporate restructuring exist, including leveraged buyouts, split-ups, spin-offs, and split-offs, among others. Fortunately, the INS regulations rarely differentiate between the more complex corporate restructuring techniques. Instead, the various visa categories (with the exception of the E

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can be avoided by structuring the deal as an asset acquisitions. See REED & LAJOUX, *supra* note 118, at 288. "Under [IRC] Section 338 ... it is possible to have most stock transactions treated as asset acquisitions for federal income tax purposes." *Id.*

<sup>147</sup> See REED & LAJOUX, *supra* note 118, at 288. However, this is less of a disadvantage than it may seem as the buyer will insist upon indemnification against undisclosed or contingent liabilities in the stock purchase agreement. See *id.*

<sup>148</sup> See *id.*

<sup>149</sup> See *id.* Asset acquisitions, by contrast, are treated as "cost basis" transactions, meaning that the tax basis of the assets acquired in the asset acquisition is their purchase price, or "cost." See *id.* at 302. On the other hand, when a buyer buys a corporation's stock, the basis of the assets in the corporation's possession is generally not affected. See *id.* The tax basis of the assets carries over to the buyer due to the change in ownership of the corporation's stock. See *id.*

category, discussed below) only deal with how the status of individuals holding various visas are affected by corporate changes most commonly found in mergers and changes of ownership caused by stock sales.

#### IV. Immigration Consequences in the Wake of Corporate Change

##### A. L-1 Intracompany Transferee

###### 1. Qualifying Relationships

As discussed above, a key element to establishing the employer's eligibility for L status is the nature of the relationship between the foreign and U.S. entity.<sup>150</sup> By the same token, the aspect of the L visa category that is most often affected by corporate change is the nature of the qualifying relationship between the corporate entities.

###### 2. The Legal Standard: Changes in "Approved Relationships"

The regulations set forth a legal standard for when corporations must petition the INS due to a change in their corporate situation caused by M&A activity.

According to 8 CFR § 214.2(l)(7)(i)(C), the corporation must file an amended petition under the following circumstances:

[P]etitioner shall file an amended petition . . . 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 [INA].<sup>151</sup>

As to a change in the beneficiary's employment, the regulations are clear that filing an amended petition is only necessary if the change is from a specialized knowledge position

<sup>150</sup> See *supra* notes 66-72 and accompanying text.

<sup>151</sup> 8 C.F.R. § 214.2(l)(7)(i)(C) (1998).

to a managerial or executive position or vice versa.<sup>152</sup>

3. *Specific Examples of Employer Changes and How They Affect the L Visa Holder*

Of the potential reasons for filing an amended petition, the most problematic is assessing what changes are material enough to constitute "changes in approved relationships." Corporations make changes constantly. Some, such as a change of registered agent or a change of name, are nonmaterial while others, such as the merger of one corporation into another, clearly are material. Which changes require INS approval and which do not?

a. *Corporate Name Change*

A corporate name change would likely not require any INS filing. Because there is no change in the nature of the qualifying relationship of the companies or in the working conditions of the employee, there is no need to file a new or amended petition.<sup>153</sup>

b. *Corporation A Merges with Corporation B  
Creating Corporation C (Assume Employee X  
Works for Corporation A)*

The merger of two corporations to form a new corporation would likely require INS approval. Because the INS needs to reevaluate the nature of the qualifying relationship and any potential changes to the working conditions of the employee, the company, Corporation C, must file an amended petition regarding any of its employees in L status.<sup>154</sup> If the beneficiary was brought in under a blanket petition, the corporation must file an amended petition listing the new employer as a qualified organization. If Corporation C continues to have the same qualifying relationship with the overseas entity, the INS should approve the new petition.

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<sup>152</sup> See Steven A. Clark, *Labor Certification Practice Authority*, AILA MONTHLY MAILING (Am. Immigr. Law. Ass'n, D.C.), Feb. 1993, at 107.

<sup>153</sup> See *id.*

<sup>154</sup> See *id.*; Angelo Paparelli & Catherine Haight, *Business Metamorphosis: The Effect of Changed Circumstances on U.S. Employers and Nonimmigrant Workers*, in AILA IMMIGRATION AND NATIONALITY LAW 1993-94 70, 78 (R. Patrick Murphy et al. eds., 1994).

c. *Corporation A Changes Its Location or Transfers Employee X to Another Location (Assume Employee X Works for Corporation A)*

As long as there is no change in the qualifying relationship of the two companies and no change in the employee's working conditions, a change in worksite does not require the filing of an amended petition.<sup>155</sup> This includes situations where the L-1 employee works at a third entity that is not part of the petitioning corporate family.

d. *Corporation A Transfers Employee X from One Subdivision Within the Corporate Organization to Another Subdivision Within That Same Corporate Organization (Assume Employee X Works for Corporation A)*

Where there is an employer change from one distinct legal subdivision of a corporation to another, the employer must file an amended petition so that INS may determine the nature of the qualifying relationship and the working conditions of the employee.<sup>156</sup> However, where the original petitioner remains the employer, no amended petition needs to be filed.<sup>157</sup> In other words, so long as Employee X continues to work directly for Corporation A and no other changes to his individual employment occur, no INS approval is required. This is obviously a fine line, and here the outcome would likely turn on who exactly the Employee X continues to work for, as well as whether his job has changed in any way.

Where the petitioner has an approved blanket L petition, the petitioner needs only to file an amended petition if there is a substantial change in the qualifying structures, such as the acquisition or sale of an affiliate or subsidiary. If the employee's transfer is to another entity already on the blanket list, no amended petition needs to be filed.

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<sup>155</sup> See GORDON ET AL., *supra* note 20, at 24-18.

<sup>156</sup> See Clark, *supra* note 152, at 107.

<sup>157</sup> See *id.*

*e. Sale of the Assets or Stock of Corporation A, the U.S. Entity (Assume Employee X Works for Corporation A)*

Substantive changes which affect the ownership structure of the American or foreign entity, such as the sale of all of the assets of one of the qualifying corporations, are the sort of changes which can have the most direct and profound impact on individuals holding L status.

For example, suppose that Corporation A is the U.S. subsidiary of Corporation B, a German GmbH (*Gesellschaft mit beschränkter Haftung*) (similar to an American limited liability company). Employee X works in L-1B status as a specialized knowledge worker at Corporation A's factory in South Carolina. Corporation B then decides to divest its holdings in Corporation A by selling off all the stock of Corporation A. Once Corporation B sells off the stock of Corporation A to Corporation C, Employee X has immediately lost his status as an L-1B worker. The qualifying relationship of Corporation A to Corporation B, that of subsidiary to parent, has been broken, and, once broken, Employee X is out of L status.

Now imagine the same hypothetical, except that as part of its divestiture strategy, Corporation B decides to sell off all the tangible and intangible assets rather than the stock of Corporation A to Corporation C. Here the outcome is trickier. Conceivably, Corporation B could retain Employee X in L status if Corporation A continued to exist. On paper, the qualifying relationship of A to B has not been broken; Corporation A still exists, only now it is a shell corporation. In reality, however, Corporation A is no longer "doing business" as defined in the regulations. Corporation A may continue to exist as a legal entity, but as a practical matter it is gone. It is probable that the INS would take the position that the qualifying relationship between Corporation A and Corporation B is gone, not because the nexus has been broken but rather because Corporation A is no longer a functioning enterprise. Of course, if after the sale of all of the assets of Corporation A, Corporation A was dissolved and Employee X worked in reality for Corporation C, the qualifying relationship would definitely be broken.

*f. Sale of the Assets or Stock of Corporation B (the Foreign Entity)*

Assume the same principals as in the above hypothetical, Corporations A, B, and C and Employee X. Now assume that Corporation B is restructured so that all of the stock Corporation B is sold to another German GmbH called Corporation C. Unlike the situation above, where a sale of the stock of Corporation A severs the qualifying relationship, the sale of the stock of Corporation B should not destroy the qualifying relationship of Corporation B to Corporation A. Corporation B still owns Corporation A; however, Corporation B itself is now owned by Corporation C. The regulations still imply that Corporation B should file an amended petition in this circumstance. However, it is likely that a well argued, well presented petition should present little difficulty to the INS, since the ownership structure of Corporation A to Corporation B has not been broken.<sup>158</sup>

A sale of all the assets of Corporation B to Corporation C, again, is more complex, and the answer here would depend on what happens to Corporation B as a legal entity. Suppose that Corporation B continues to exist after the sale of all its assets to Corporation C. Rather than being merely a shell corporation, Corporation B could continue to function as a holding corporation; that is, its only assets would be the shares of the stock of Corporation A (that would also assume that the asset sale was structured in such a way to achieve this outcome). In this situation, the qualifying relationship would still exist: Corporation B would still own Corporation A. Again, the petitioner would have to file an amended petition with the INS reflecting this reality. But again, as the qualifying relationship has not changed, this should present little problem.

*B. E Treaty Trader/Treaty Investor*

*1. Generally*

Eligibility as a treaty employer is primarily based on the foreign ownership of the U.S. entity and the foreign non-

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<sup>158</sup> See *id.*

immigrant status of the treaty beneficiaries: Whenever there is a substantive change to the corporate structure that may affect the terms and conditions of the E status, the employer must obtain prior approval from either the appropriate U.S. Consulate outside the United States and, often, the INS to maintain the visa status of its employees.

## 2. *The Legal Standard: "Substantive" and "Non-Substantive" Changes*

At the end of 1997, a new set of regulations governing the eligibility and procedures of the E visa were passed.<sup>159</sup> These new rules more clearly address the reality of corporate change and usually require that the INS receive some sort of notification.<sup>160</sup> As a result of these revisions, a petitioner must obtain INS approval when a "substantive change" occurs in the terms and conditions of E status.

### a. *"Substantive Changes"*

The revised regulations read, in relevant part, as follows:

*Substantive Changes.* Prior [INS] approval must be obtained where there will be a substantive change in the terms and conditions of E status . . . [The INS] will deem there to have been a substantive change necessitating the filing of a new Form I-129 application in cases where there has been a fundamental change in the entity's basic characteristics, such as a merger, acquisition, or sale of the division where the alien is employed.<sup>161</sup>

Due to these revisions, the E category is the only visa category that specifically enumerates the kinds of corporate activities, which occasions the filing of amended petitions with the INS.<sup>162</sup> However, although the term "substantive change" is not specifically defined elsewhere in the regulations, this section does

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<sup>159</sup> See 8 C.F.R. § 214.2(e)(8) (1998); 62 Fed. Reg. 48,138 (1997), *reprinted in* 74 INTERPRETER RELEASES 1425 (Sept. 22, 1997).

<sup>160</sup> See 8 C.F.R. § 214.2(e)(8); 62 Fed. Reg. 48,138, *reprinted in* 74 INTERPRETER RELEASES 1425 (Sept. 22, 1997).

<sup>161</sup> 8 C.F.R. § 214.2(e)(8)(C)(iii).

<sup>162</sup> See *id.*



specify that mergers or acquisitions are substantive for purposes of this section. However, note that the section is vague as to whether acquisitions *by* or *of* the employer require amended petitions; the language seems to imply that either would necessitate filing an amended petition.<sup>163</sup>

The section specifies that when substantive changes occur, the treaty alien must file a new application on Form I-129 and E supplement requesting an extension of stay.<sup>164</sup> With that petition, the alien must submit evidence of continued eligibility for E classification in the new capacity.<sup>165</sup> Alternatively, the alien must obtain from a consular officer a visa reflecting the new terms and conditions of employment and subsequently apply for readmission at a port-of-entry.<sup>166</sup>

*b. "Non-Substantive Changes"*

The revised regulations regarding non-substantive changes read, in relevant part, as follows:

*Non-substantive changes.* Prior approval is not required, and there is no need to file a new Form I-129, if there is no substantive, or fundamental, change in the terms or conditions of the alien's employment which would affect the alien's eligibility for E classification. Further, prior approval is not required if corporate changes occur which do not affect the previously approved employment relationship, or are otherwise non-substantive.<sup>167</sup>

Two other situations are also classified as being "non-substantive." First, performing work for subsidiaries of the treaty corporation is carved out from the definition of "substantive." Second, "non-substantive" changes also include working for subsidiaries of a common parent company if, at the time E status was granted to the corporation, evidence was presented establishing:

- (1) the enterprise or organization, any subsidiaries thereof,

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<sup>163</sup> *See id.*

<sup>164</sup> *See id.*

<sup>165</sup> *See id.*

<sup>166</sup> *See id.*

<sup>167</sup> *Id.* § 214.2(e)(8)(iv) (1998).

where the work will be performed; the requisite parent-subsidiary relationship; and that the subsidiary independently qualifies as a treaty organization of enterprise under this paragraph; (2) in the case of any employee of a treaty trader or treaty investor, the work to be performed requires executive, supervisory, or essential skills; and (3) the work is consistent with the terms and conditions of the activity forming the basis of the classification.<sup>168</sup>

In other words, superficial or non-fundamental changes in employment do not require amended petitions.

Unfortunately, there is no bright line distinguishing substantive from non-substantive changes other than the clear examples given in the definition itself. For this reason, the INS created a procedure whereby employers may petition the INS, enclosing a filing fee as well as "a complete description of the change, to request appropriate advice."<sup>169</sup> Further, "[i]n cases involving multiple employees, an alien may request that a [INS] Service Center determine if a merger or other corporate restructuring requires the filing of separate application . . . [by filing, *inter alia*] an explanation of the change or changes."<sup>170</sup> In most borderline cases, corporations would be well served by erring on the side of caution and at least requesting an INS ruling that a proposed corporate restructuring is not substantive, rather than risking a post-hoc determination that could result in their employees being adjudicated as out of status.

### 3. *Specific Examples of Employer Changes and How They Affect the E Visa Holder*

#### a. *Corporate Name Change*

A name change would not constitute a substantive change, and thus no INS approval would be required.<sup>171</sup> However, we would recommend that the appropriate Embassy or Consulate where entities in the United States were registered be notified.

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<sup>168</sup> *Id.* § 214.2(e)(8)(ii)(A)-(C) (1998).

<sup>169</sup> *Id.* § 214.2(e)(8)(v) (1998).

<sup>170</sup> *Id.*

<sup>171</sup> *See* 75 INTERPRETER RELEASES 254 (Feb. 23, 1998).

*b. Corporation A Merges with Corporation B  
Creating Corporation C*

A merger constitutes a substantive change, and thus INS approval would be required for employees of Corporation A or B in E status.<sup>172</sup>

*c. Corporation A Transfers Employee X from One Firm or Entity Within the Corporate Organization to Another Firm or Entity Within That Same Corporate Organization*

*i. Transfer Between Branch Offices*

INS approval is required where there is a change in job duties or a transfer to another branch office of the corporation.<sup>173</sup>

*ii. Transfer to Subsidiary or Affiliate*

Whether INS approval is necessary prior to the transfer of Employee X to a subsidiary or affiliate depends on whether the transfer constitutes a “substantive” change.<sup>174</sup> If at the time the E treaty status was initially determined, the petition included evidence demonstrating the corporate relationships and that the subsidiary or affiliate would independently qualify as treaty employers, there is no need to obtain prior INS approval because the change would not be substantive.<sup>175</sup> However, in all other cases, prior INS approval is required so that INS may evaluate the qualifying relationship.<sup>176</sup>

*d. Changes in Ownership Structure (Via Asset Sale, Stock Purchase, or Merger)*

Primary treaty aliens and treaty employees, who have the derivative status of the primary, depend on the existence of a foreign ownership. In order to maintain E status, the employing

<sup>172</sup> See *id.*

<sup>173</sup> See 8 C.F.R. § 214.2(e)(8)(ii); 75 INTERPRETER RELEASES 249 (Feb. 23, 1998).

<sup>174</sup> See 8 C.F.R. § 214.2(e)(8)(ii).

<sup>175</sup> See *id.*

<sup>176</sup> See *id.*

entity must remain under majority foreign ownership – that is, the U.S. business must be at least fifty percent owned by a person having the nationality of a treaty country.<sup>177</sup> If the U.S. operation becomes independent, through the sale of more than fifty percent of its stock, it will no longer qualify for E status unless it can show that there is still majority foreign ownership. Either way, the INS should be notified or must give approval.<sup>178</sup> Unless there is clearly no effect on the alien's employment or the qualifying relationship of the treaty owner, the employer must obtain prior INS approval.<sup>179</sup>

As discussed above, certain changes in ownership structure, such as mergers or acquisitions, are enumerated as “substantive” and therefore, at a minimum, require that employers file with the INS requesting a ruling.<sup>180</sup> Some changes, such as short-form mergers effectuated merely to clean up a corporate structure or for tax purposes, will be essentially non-substantive and, upon filing with the INS, will be adjudicated as such. Other corporate changes, however, especially those that could affect the percentage ownership by foreign nationals of the treaty enterprise in the United States, would be substantive.

Similarly, because “acquisitions” are specifically enumerated as substantive changes, employers would be wise to file amended petitions or requests for ruling on any stock or asset sales involving the treaty enterprise.

### *C. H-1B Temporary Worker in a Specialty Occupation*

#### *1. Generally*

As discussed, the H-1B visa category is unique in that it is job specific and requires the approval of the DOL through the LCA process.<sup>181</sup> Unlike the L category, which requires that a “qualifying relationship” exist between the foreign and U.S.

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<sup>177</sup> See 8 C.F.R. § 214.2(e)(3)(ii).

<sup>178</sup> See 71 INTERPRETER RELEASES 1361 (Oct. 7, 1994).

<sup>179</sup> See 75 INTERPRETER RELEASES 254 (Feb. 23, 1998).

<sup>180</sup> See *supra* notes 171-79 and accompanying text.

<sup>181</sup> See *supra* notes 107-17 and accompanying text.

entities, the H category is less concerned with corporate structure, and more concerned with the conditions of employment regarding the H employee.

As a result, the INS is concerned whenever there is a "material change" in the terms and conditions of employment or training or the beneficiary's eligibility as they were specified in the original petition. Material changes may occur when there is a change in job duties or conditions or a change to the actual legal entity that employs the foreign national. As a general rule, any change that requires the filing of an amended LCA with the DOL also requires filing an amended H-1B petition.

## 2. *The Legal Standard: "Material Changes"*

The specific legal standard that governs when corporate M&A may require the filing on an amended petition with the INS is set forth at 8 C.F.R. § 214.2(h)(2)(i)(E):

[P]etitioner shall file an amended or new petition . . . with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or the beneficiary's eligibility as specified in the approved petition.<sup>182</sup>

Material changes are not further defined, and the INS has specified that what may constitute a "material change" is determined on a case-by-case basis.<sup>183</sup> However, the INS has opined in the past as to several conditions that would require a new petition. For example, it is well established that if a change in the job requires different academic training or qualifications than that mentioned in the original petition, such as a change in duties from one specialty occupation to another, a new or amended petition must be filed.<sup>184</sup> Similarly, if the employee changes employers, the new employer must file a new petition.<sup>185</sup>

<sup>182</sup> 8 C.F.R. 214.2(h)(2)(i)(E). Because INS does not generally differentiate circumstances where the petitioner must file a new petition or an amended petition, it will usually accept either. See Paparelli & Haight, *supra* note 154, at 74.

<sup>183</sup> See 72 INTERPRETER RELEASES 1579 (Nov. 20, 1995).

<sup>184</sup> See 73 INTERPRETER RELEASES 1223 (Sept. 16, 1996); 72 INTERPRETER RELEASES 1579 (Nov. 20, 1995); Clark, *supra* note 152, at 107.

<sup>185</sup> See 8 C.F.R. § 214.2(h)(2)(i)(D) (1998).

### 3. *Specific Examples of Employer Changes and How They Affect the H-1B Visa Holder*

#### a. *Corporate Name Change*

A change in the corporation's name is not a "material" change for purposes of the H regulations. Because the employer remains the same legal entity, there is no need to file a new or amended petition. However, the employer is counseled to advise the INS of the change in name when filing an extension.<sup>186</sup>

#### b. *Corporation A Merges with Corporation B Creating Corporation C (Assume Employee X Works for Corporation A)*

A merger would require the filing of a new petition. The INS takes the position that if the employer is a new legal entity, a new or amended petition must be filed.<sup>187</sup> In this situation, because a new legal entity becomes the employer, the petitioner must file a new or amended petition.<sup>188</sup> Like many of the rules regarding M&A, this rule is broad in its sweep and uncertain in its application. Many mergers, especially short-form mergers, are accomplished to clean up or streamline the corporate structure of corporate holdings and, as a practical matter, do not result in any substantive changes. They are, in short, paper mergers that have little practical effect on the business or the employer. Notwithstanding this reality, the INS rule is quite clear that mergers, whether substantive or not, require filing with the INS.

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<sup>186</sup> See 73 INTERPRETER RELEASES 1222 (Sept. 16, 1996).

<sup>187</sup> See GORDON ET AL., *supra* note 20, at 20-145. The express assumption by the new entity of the rights and obligations of the previous employer may provide an argument that no new or amended petition needs to be filed. See *id.* at 20-145 n.25.3. Note that the word "firm" used by the INS indicates a separate or new legal entity. See Paparelli & Haight, *supra* note 154, at 73.

<sup>188</sup> See 74 INTERPRETER RELEASES 189 (Jan. 27, 1997); 73 INTERPRETER RELEASES 1222-23 (Sept. 16, 1996); Clark, *supra* note 152, at 107.

c. *Corporation A Changes Its Location or Transfers Employee X, a H-1B Employee, to Another Worksite (Although Corporation A Remains the Employer)*

Generally, the rule is that the employer must file an amended or new petition whenever a new LCA is required. Would this change in worksite require a new LCA? In the case of Employee X working at a different job site, the INS takes the view that if the LCA is invalidated by the move because Employee X is no longer within a normal commuting distance of the location in which the original LCA was approved, then there is a "material change" and a new or amended petition must be filed.<sup>189</sup> By the same token, if Employee X is working only a short distance from the petitioning job site, then a new petition would not be required. Note, however, that this example contains a further twist: if the employer knows when filing the original petition that the employee will shift job locations, the petitioner must file an itinerary with the original petition.<sup>190</sup>

d. *Corporation A Transfers Employee X, a H-1B Employee, from One Division or Entity Within a Corporate Organization to Another Division or Entity Within That Same Corporate Organization*<sup>191</sup>

In a transfer between divisions or entities, the outcome depends upon which entity remains Employee X's employer.<sup>192</sup> If the new entity becomes the employer, the petitioner must obviously file an amended or new petition.<sup>193</sup> On the other hand, if the same entity remains Employee X's employer, a change from one branch of the organization to another branch does not require the filing of a new or amended petition.<sup>194</sup>

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<sup>189</sup> See 73 INTERPRETER RELEASES 1222 (Sept. 16, 1996); Clark, *supra* note 152, at 107.

<sup>190</sup> See 8 C.F.R. 214.2(h)(2)(i)(B); 73 INTERPRETER RELEASES 172 (Feb. 5, 1996).

<sup>191</sup> See 73 INTERPRETER RELEASES 1222 (Sept. 16, 1996); Clark, *supra* note 152, at 107.

<sup>192</sup> See 73 INTERPRETER RELEASES 1222 (Sept. 16, 1996).

<sup>193</sup> See *id.*

<sup>194</sup> See *id.*

e. *Corporation A "Leases" Employee X, a H-1B Employee, to Corporation B*

The INS does not recognize co-employers, so there needs to be an agreement between the two corporations as to who is technically the employer for purposes of LCA compliance. Otherwise, both entities need to file a petition as separate employers, each assuming such liability.<sup>195</sup> In this situation, depending on the agreement and who actually controls (*i.e.*, hires, fires, and supervises) the H employee, Corporation B could still be subject to the LCA conditions.<sup>196</sup>

f. *Change in Ownership Structure (Asset or Stock Purchase, Etc.) of the U.S. Employer (Corporation A)*

INS takes the view that changes that affect the legal entity, such as the change of the employer tax identification number, are material,<sup>197</sup> whereas many other seemingly more important corporate changes, such as the sale of all of the employer's stock, are not.<sup>198</sup> For this reason, a merger (which as discussed above creates a new legal entity by operation of law) requires INS approval, whereas a stock or asset sale (where there is no change in legal entity) does not. On the other hand, if there is no change in the legal entity, *despite a change in the ownership structure* (such as a purchase/sale of assets or stock), no new or amended petition need be filed.<sup>199</sup> In this situation, the INS presumes that the new owner is assuming the rights and liabilities of the original owner for immigration purposes.<sup>200</sup> This is obviously quite incongruous. The change of control of a corporation is often far more "material" than a superficial change such as the change of the corporation's tax identification number.

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<sup>195</sup> See 73 INTERPRETER RELEASES 334 (Mar. 18, 1996).

<sup>196</sup> See Paparelli & Haight, *supra* note 154, at 75.

<sup>197</sup> See 74 INTERPRETER RELEASES 1083 (July 14, 1997); Paparelli & Haight, *supra* note 154, at 74.

<sup>198</sup> See 74 INTERPRETER RELEASES 1083 (July 14, 1997).

<sup>199</sup> See GORDON ET AL., *supra* note 20, at 20-145-46.

<sup>200</sup> See *id.* at 20-146.



#### *D. Consequences of Failure to File an Amended L, E, or H Petition After Corporate M&A Transactions*

Failure to file a new or amended petition on behalf of an alien may result in loss of his ability to work in the United States; denial of extensions of his current visa; problems in acquiring lawful permanent residency or even citizenship later on; possibly being required to be processed at a consul or embassy abroad; or even deportation. Failure to file a new visa petition means that the alien is unlawfully present, and under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, aliens unlawfully present for more than 180 days are statutorily barred from reentry for three years.<sup>201</sup> Aliens unlawfully present for more than a year are barred for ten years.<sup>202</sup>

### **V. Immigrant Visa Petitions**

#### *A. Effects on the Labor Certification Process*

##### *1. Generally*

For the most part, Labor Certifications are unique to the employer, job opportunity, and geographic location stated on the original application. Therefore, any change that may affect the validity of assertions made on the application must be reported to either the DOL (when the Labor Certification is pending) or the INS (after the certification has been approved). Commonly, unless a merger, acquisition, or other reorganization results in the new employer's being considered the "successor-in-interest" to the original employer (as discussed below), the Labor Certification is no longer valid.<sup>203</sup> Therefore, as a general rule, it is best to notify the appropriate agency whenever there has been a corporate change to the employer petitioner.

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<sup>201</sup> See 8 U.S.C. § 1182(a)(9)(B)(i) (1998) (noting that a three-year ban is to be levied against those deemed "unlawfully present" in the United States for a period of 180 or more consecutive days, and a 10-year ban against those deemed "unlawfully present" in the United States for a period of one year or more).

<sup>202</sup> See *id.*

<sup>203</sup> See Foster & Thompson, *supra* note 13, at 83.

## 2. *Types of Labor Certifications Affected by M&A*

There are two types of Labor Certifications, Schedule A and Non-Schedule A, each of which may be affected by M&A changes.<sup>204</sup>

### a. *Schedule A Labor Certifications*

Schedule A Labor Certifications are valid throughout the United States, unless specifically geographically limited (but only for the occupation stated on the application form).<sup>205</sup>

### b. *Non-Schedule A Labor Certifications*

Non-Schedule A Labor Certifications are valid only for the specific job opportunity, the specific alien employee, and the area of intended employment stated on the application form.<sup>206</sup>

### c. *Changes that Occur After the Labor Certification Process*

Once DOL has approved the Labor Certification, INS or a Consul may invalidate the Labor Certification upon a showing of fraud or willful misrepresentation of a material fact relating to the application.<sup>207</sup>

## 3. *Specific Examples of Employer Changes After DOL Approval*

### a. *Corporate Name Change*

Following a corporate name change, if the newly named corporation is the same legal entity as the original petitioner, petitioner should forward reasonable evidence of the name change to the consular post and/or appropriate INS Service Center to advise INS of the name change.<sup>208</sup>

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<sup>204</sup> See 20 C.F.R. §§ 656.10-11 (1998).

<sup>205</sup> See *id.* § 656.30(c)(1).

<sup>206</sup> See *id.* § 656.30(c)(2).

<sup>207</sup> See *id.* § 656.30(d).

<sup>208</sup> See *INS Issues Proposed Rule on Employment-Based Immigration*, AILA MONTHLY MAILING (Am. Immigr. Law. Ass'n, D.C.), July/Aug. 1993, at 556 [hereinafter *INS Issues Proposed Rule*].

*b. Merger or Change of Ownership – The “Successor-in-Interest” Test*

In a merger or change of ownership, the employee must file an amended I-140 petition so that INS may confirm that the employment relationship exists and is still viable.<sup>209</sup> In this situation the key question is whether the new employer is a “successor-in-interest” to the liabilities and obligations of the old corporation.

The regulations regarding the “successor-in-interest” test are unsettled. While a 1995 proposed rule to define this term has not yet been finalized,<sup>210</sup> under the current rules, if the new company substantially assumes the duties and liabilities of the old company, then it qualifies as a successor-in-interest.<sup>211</sup> The INS’s position on the “successor-in-interest” test is found in a 1993 memorandum (1993 Memorandum) that addressed the impact of a change in the employer’s ownership on an I-140 or Labor Certification.<sup>212</sup> The 1993 Memorandum states that a new I-140 petition has to be filed if the employer is bought out, merges, or has a significant change in ownership.<sup>213</sup> For the Labor Certification to stand after such an ownership change, the new employer has to establish that it is a “successor-in-interest” to the old.<sup>214</sup> To establish that it is a successor in interest, the successor company has to document that it has assumed all of the rights, duties, obligations, and assets of the original business and will continue to run the same sort of

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<sup>209</sup> See Amendment of Labor Certification in I-140 Petitions, memorandum to the field by James A. Puleo, Acting Executive Assoc. Comm’r of Operations, File HQ 204.24-P, HQ 204.25-P (Dec. 10, 1993), *reprinted in* 70 INTERPRETER RELEASES app. at 1692 [hereinafter Amendment of Labor Certification].

<sup>210</sup> See 60 Fed. Reg. 29711-81 (June 6, 1995); *see also* Foster & Thompson, *supra* note 13, at 83-86 (discussing the proposed regulation).

<sup>211</sup> See Foster & Thompson, *supra* note 13, at 82; *INS Issues Proposed Rule*, *supra* note 208, at 503.

<sup>212</sup> See Amendment of Labor Certification, *supra* note 209, at 1692; *see also Matter of Dial Auto Repair Shop, Inc.*, No. A-27468457, 1986 BIA LEXIS 21, at \*1 (Comm’r 1986) (noting that to establish a successorship-in-interest, it must be shown that the successor has assumed all of the rights, duties, and obligations of the predecessor enterprise).

<sup>213</sup> See Amendment of Labor Certification, *supra* note 209, at 1692.

<sup>214</sup> See *id.*

business.<sup>215</sup> The 1993 Memorandum leaves many issues open and for that reason may well be superseded by a clearer "substantial continuity" test in the future.<sup>216</sup> Unless and until such rule is finalized, however, the current "successor-in-interest" test will govern the immigration context of M&A.

Even if a corporation qualifies as a legitimate successor-in-interest, if the employee's job significantly changes, the Labor Certification could be invalidated. Generally, where there has been no significant change, the qualifying successors must file an amended I-140 demonstrating that it is a successor-in-interest, that it is able to pay the offered wage, and that the predecessor was able to pay the offered wage at the time of filing in order to reserve the priority date.<sup>217</sup>

*c. Corporation A Changes Its Location or Transfers  
the Labor Certification Employee to Another  
Location*

In a transfer of a Labor Certification employee, the need for corporate action regarding a petition depends on the type of Labor Certification that has been approved by the DOL. Schedule A Labor Certifications are usually valid nationwide, so there would be no need to file an amended petition.<sup>218</sup> On the other hand, Non-Schedule A Labor Certifications, are valid only for the specified geographical area on the form.<sup>219</sup> For Non-Schedule A Labor Certifications, the INS takes the position that if the transfer is within a normal commuting distance (generally within the same metropolitan statistical area) of the original offer, the original Labor Certification is still valid.<sup>220</sup> Otherwise, an amended Labor

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<sup>215</sup> *See id.*

<sup>216</sup> *See id.* at 1677; *see also* Foster & Thompson, *supra* note 13, at 86 (noting that a proposed rule change would require a demonstration of "substantial continuity" with the original petitioner to establish successorship-in-interest).

<sup>217</sup> *See Matter of Dial Auto Repair Shop, Inc.*, No. A-27468457, 1986 BIA LEXIS 21, at \*1 (Comm'r 1986).

<sup>218</sup> *See* 20 C.F.R. § 656.30(c)(1).

<sup>219</sup> *See id.* § 656.30(d).

<sup>220</sup> *See INS Issues Proposed Rule, supra* note 208, at 503.

Certification must be filed.<sup>221</sup>

*B. First Priority (EB-1) Multinational Manager or Executive Immigrant Petitions*

*1. Generally*

The EB-1 immigrant visa category for executives and managers of multinational corporations is fairly similar to the L-1 non-immigrant category. As in the L visa case, this immigrant status relies on the present existence of an ownership relationship between a U.S. and foreign business entity. Employers undergoing corporate changes must remain particularly alert to the immigration impact of such changes because the INS may deny permanent residency to individuals whose underlying immigrant visa is no longer valid.

*2. General Employer Requirements*

The requirements for the First Priority worker (EB-1) multinational executive or manager are very similar to those of the L-1A. Generally, the EB-1 category requires the following: (1) the employer must be doing business in the United States and at least one other country; (2) the prospective U.S. employer must be the same employer or a subsidiary or affiliate (or other legal entity) of the employer that employed the beneficiary abroad; and (3) generally, the employee transfer must occur in a corporate relationship where one party has effective control of the other or both are effectively controlled by a third entity.<sup>222</sup>

*3. Specific Examples of Employer Changes*

Again, employer changes are similar in almost all respects the L category discussed above.<sup>223</sup> With the specific exceptions noted below, the U.S. employer should refer to the general rules regarding L eligibility described above.

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<sup>221</sup> See *id.*

<sup>222</sup> See 8 C.F.R. § 204.5(j)(3) (1998).

<sup>223</sup> See *supra* notes 151-58 and accompanying text.

a. *Corporate Name Change*

After a name change, if the newly named corporation is the same legal entity as the original petitioner, the petition needs only to forward reasonable evidence of the name change to the consular post and/or the appropriate Service Center to advise INS of the name change.<sup>224</sup>

b. *Corporation A is Bought out, Merges, or Undergoes a Significant Change in Ownership*

In the case of a buyout, merger, or ownership change (through, for example, asset or stock purchase), the EB-1 category is slightly different from the L category. Generally, the employer must file an amended I-140 petition so that INS may confirm that the employment relationship exists and is still viable. Unlike the L regulations regarding the qualifying relationships, the EB-1 regulations focus on whether the new employer is a "successor-in-interest" as described above.<sup>225</sup>

Generally, if the new company substantially assumes the duties and liabilities of the old company, then it qualifies as a successor-in-interest.<sup>226</sup> For example, assume a foreign corporation acquires fifty percent of the stock of a U.S. corporation that has been doing business on its own for two years before the acquisition. Can the U.S. corporation now file an EB-1 multinational executive immigrant petition? Assuming that a qualifying relationship exists and that the U.S. corporation can establish that it has been doing business for at least one year (in that it has continued to operate in the same manner with the same assets, liabilities, obligations, and rights as it did before the acquisition so that the prior years count), the U.S. corporation may file the petition. However, the U.S. corporation must also demonstrate that it is a viable entity and not just a shell operation.<sup>227</sup>

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<sup>224</sup> See *INS Issues Proposed Rule*, *supra* note 208, at 556.

<sup>225</sup> See *supra* notes 209-27 and accompanying text.

<sup>226</sup> See Foster & Thompson, *supra* note 13, at 82; *INS Issues Proposed Rule*, *supra* note 208, at 503.

<sup>227</sup> See Edward H. Skerrett, *INS Discusses Impact of Stock Purchase on Multinational Executive Petition*, AILA MONTHLY MAILING (Am. Immigr. Law. Ass'n, D.C.), Mar. 1994, at 179.

*c. Corporation A is the U.S. Operation of Foreign Corporation B; Corporation B is Spinning off Corporation A*

The petition requirements following the spin-off of a U.S. corporation depend on when the U.S. corporation is divested from its foreign parent, but generally, as soon as the foreign branch is severed, the eligibility to file as a multinational employee is over.<sup>228</sup> The basis for the visa status must still exist at the time of the visa application.<sup>229</sup> Again, the rules describing L status above are generally applicable.<sup>230</sup>

## VI. Conclusion

The twin dynamics of globalization and consolidation will continue to propel immigration issues into the forefront of the business world. Corporations with numerous foreign employees working pursuant to business visas (that is, virtually all Fortune 500 corporations) will have to be increasingly sophisticated and alert to the repercussions on these employees caused by mergers, acquisitions, and other corporate restructuring. As discussed, the interaction of corporate reorganizations and its consequences on the various visa categories can be subtle and complex. At the same time, the penalties for noncompliance are high and are likely to get even higher. As we move into the twenty-first century, M&A practitioners and immigration attorneys alike will have to be increasingly aware of the overlapping area of their two specialties.

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<sup>228</sup> See Clark, *supra* note 152, at 106.

<sup>229</sup> See *id.*; 73 INTERPRETER RELEASES 1010 (July 29, 1996).

<sup>230</sup> See *supra* notes 151-58 and accompanying text.

