



IMMIGRATION LAW

3.5 MILLION REASONS TO REVIEW IMMIGRATION ISSUES DURING CORPORATE CHANGE SITUATIONS

by Chris Musillo, Esq.

It is no secret that the last several years have represented some of the greatest shifts in the post-war American economy. Fly-by-night websites have turned dramatic profits, only to give them all right back. These shifts in the corporate scene have resulted in fantastic avenues for attorneys. For a while, securities lawyers were taking more things public than *The National Enquirer*. Tax lawyers, delirious with work, became as weak-kneed as a freshman getting asked to the prom by the starting quarterback.

As the aftermath of the technology boom settles on the economy, companies are tripping over themselves to merge, spin off, lay off, acquire, become acquired, discontinue, divest, downsize and/or declare bankruptcy. Currently, corporate lawyers are swamped with work relating to any or all of these situations.

One issue tends to get ignored in these situations: immigration. Most corporate lawyers are simply unaware that these issues are critical in corporate restructuring scenarios. For instance, in many corporate merger situations, workers on the oft-utilized H-1B visa may become out of status (and subject to removal or deportation) if their H-1B documentation is not updated with the Immigration and Naturalization Service (INS). Moreover, the surviving company may be significantly penalized and fined for unintended violations of the U.S. Department of Labor's (DOL) Public Access Files rules, if those files are not amended to reflect corporate changes.

Perhaps even more significantly, as foreign nationals become more "Americanized," they are starting to become litigious. In a May 2001 lawsuit, "Frank" Chen, a Chinese computer scientist, sued PricewaterhouseCoopers (PwC) for \$3.5 million. Chen alleged that PwC had promised him that they would sponsor him for a permanent residency card (a "green card"). When PwC laid off Chen, he filed suit. His damage demand is based on an expectation of 35 more years of potential employment at his \$102,000 per year salary.

Because of suits like these and allegations of gaps in immigration documentation, the INS and DOL have promised to step-up enforcement proceedings. Both agencies are focusing on corporate change situations. Attentive corporate counsels are beginning to

examine immigration issues in conjunction with their due diligence review. Among the issues that impact significant corporate change scenarios are:

► TERMINATION OF H-1B VISA HOLDERS

Most non-immigration practitioners and aliens themselves are surprised to find out that H-1B "worker" visas are conditioned on ongoing employment with a sponsoring company. In other words, a computer programmer who holds an H-1B visa must maintain employment with his sponsoring company in order to maintain his H-1B visa. When foreign workers who hold facially valid H-1B visa-stamps are terminated, these persons are out-of-status and subject to removal or deportation immediately upon termination. There is no grace period, no transition time to find a new job and no legal ground to rely on the facially valid visa.

► RELIANCE ON WELL-INTENTIONED HR REPRESENTATIONS

In many corporate change situations, HR persons unaware of the strict and harsh immigration laws often tell aliens that the company will not "cancel" the alien-worker's H-1B visa until that alien finds new work. The alien, relying on the company's goodwill gesture, believes he has time to find new employment. Unfortunately, the act of "canceling" the visa has little legal significance, since the alien is removable upon the termination of employment. This reliance sows the seeds for litigation.

► I-9 IMPLICATIONS

The Immigration Reform and Control Act of 1986 (IRCA) makes the knowing employment of unauthorized aliens unlawful. It introduced the current system of I-9 verification for all employees. The I-9 system was intended to simplify the process for worker authorization verification. The penalties for I-9 errors can be significant both in "hard costs" (i.e., fines) and "soft costs" (i.e., News Flash: "XYZ Company employs illegal aliens!!!")

► PUBLIC ACCESS FILES

Employers must maintain a Public Access File (PAF) on each H-1B worker. The PAF lists a plethora of information that is, theoretically, available to any member of the public for review. There are strict guidelines in the DOL's regulations that govern the documentation that must be placed in the PAFs. All

files must be amended in corporate restructuring, mergers, and spin-offs. Companies can expose themselves to significant penalties for failure to maintain their PAFs. Violations can exceed \$1,000 per error, even for unintentional errors.

► **RELOCATING H-1B EMPLOYEES**

In many merger and purchase situations, whole sets of employees are moved from worksite to worksite. Indeed, the goal of many mergers is to take advantage of economies in overlapping business units and merging other business units. Corporate attorneys ought to be aware that in most instances H-1B employees cannot be moved from one worksite to another without filings to the DOL and the INS. Moreover, amendments must always be made to the corporation's Public Access Files.

► **THE MYTH OF THE 10-DAY GRACE PERIOD**

There is a wide-spread myth circling the HR and immigrant community that aliens are granted a 10-day grace period upon the conclusion of their H-1B period. The rumor probably came into being because 8 C.F.R. §214.2 (h)(13)(i)

states that the INS "may" be admitted for an additional 10 days beyond the period authorized for stay. The irony here is that the INS has, on several occasions, misapplied its own rule and, in several interviews, acknowledged this phantom "grace" period. Alas, the rumor has little basis in law.

► **PERMANENT RESIDENCY APPLICATIONS**

Often the foreign national's greatest downside to being terminated is that his permanent residency (or green card) application terminates when his relationship with the corporation is severed. When and if the foreign national begins employment with a new organization, his permanent residency application must start anew. Since permanent residency applications take between two and five years to process, the perils of starting anew are obvious. This factor served as the impetus for the Chen lawsuit mentioned earlier in this article.

► **FREE FLIGHT HOME RULE**

In corporate down-sizing situations, one cost factor that is never worked into the analysis is the cost of flying all laid-off H-1B workers back to their native country. The reason for this oversight is

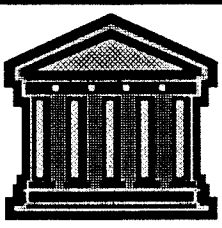
obvious. It is the rare corporate attorney who is aware of the rule.

► **H-1B DEPENDENCY RULES**

Under the Department of Labor's recent ACWIA regulations, employers who employ more than 15 percent of their workforce under the H-1B program are potentially subject to a variety of additional DOL attestations. Some of these attestations include evidence that the employer is not terminating U.S. workers and that the employer has an active campaign to attract U.S. workers. Most of these attestations even apply to "downstream" worksites (i.e., where employers place H-1B workers at third-party client worksites). Companies that make these attestations and then fail to follow-through on their burden open themselves to DOL penalties. Moreover, these penalties are enforceable to successors-in-interest. Corporate attorneys ought to ask these questions when purchasing businesses and business units that are primarily staffed with H-1B employees. Likewise, after spinning-off immigrant-heavy divisions, the H-1 dependency rules ought to be re-examined.

Obviously, this article is not intended to serve as a comprehensive "hot list" of immigration issues in corporate change situations. Rather, the purpose is to highlight the fact that there are many immigration issues that any corporate attorney performing due diligence ought to consider. In recent months, the Department of Labor and Department of Immigration and Naturalization Service have both hinted that more and more resources will be allocated to enforcement and auditing of companies' employee registers. Likewise, suits like Chen's are expected to become more commonplace. Therefore, it is a wise move for corporate lawyers to familiarize themselves with the immigration issues and call on specialists in corporate change situations. ■

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