

Mergers & Acquisitions: What to do with H-1(b) Workers

The regulatory scheme governing H-1(b) workers leads employers to two government agencies, the Department of Labor and the Immigration and Naturalization Service. Often the rules set forth by the two government agencies conflict, leaving employers unsure of the right course to follow. The field of mergers, acquisitions and other changes in corporate ownership used to be such an area. Recently, however, both the Immigration and Naturalization Service (INS) and the Department of Labor (DOL) have clarified the requirements for companies employing H-1(b) workers

required not only all new Labor Condition Applications but new or amended H-1(b) petitions on behalf of all H-1 workers as well.

Recently, in the interim final rule implementing the American Competitiveness and Workforce Improvement Act of 1998, the DOL changed its policy and provided some relief to employers. Under the new rules, a new Labor Condition Application is not required where an employer undergoes a change in corporate structure, regardless of whether there is a change in the employment identification number (EIN), provided that the new entity agrees to assume the predecessor's obligations and liabilities under the Labor Condition Application(s).

Each public access file must contain a document with the following:

- (1) A list of each affected Labor Condition Application number and the date of certification;
- (2) A description of the new employer's actual wage system applicable to H-1(b) workers;
- (3) The employer identification number (EIN) of the new employer (whether or not it is different from that of the predecessor entity); and
- (4) A sworn statement by an authorized representative of the new employer expressly acknowledging the new employer's assumption of all obligations and liabilities arising from or under attestations made in each certified and still effective Labor Condition Application. The statement shall include the new employer's explicit agreement to (a) Abide by DOL H-1(b) regulations applicable to Labor Condition applications; (b) Main-

The DOL Rules

Prior to filing an H-1(b) petition with the Immigration and Naturalization Service, an employer must file a Labor Condition Application with the Department of Labor (DOL). The Labor Condition Application sets forth basic information regarding the employer and the H-1(b) employment, including rate of pay, period of employment and work location. The Labor Condition Application must be certified by the DOL and then filed with the H-1(b) petition.

Historically, the DOL required a new Labor Condition Application whenever a new corporate entity took over the H-1(b) employees and there was a corresponding change in the employer identification number (EIN or employer tax identification number) used to report payroll for federal income tax purposes. Because INS rules required a new or amended H-1(b) petition if a new Labor Condition Application was filed, a merger, acquisition or other corporate restructuring

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tain a copy of this statement in the public access file(s); and (c) Make the document available to any member of the public or the Department upon request.

Without such statement, the new employer may not employ any H-1(b) workers without the filing of new Labor Condition Applications. Note that the new employing entity must still file new Labor Condition Applications when it hires any new H-1(b) workers or seeks an extension of H-1(b) status for any existing H-1(b) workers.

The regulations appear to require that the employer execute the necessary statement and document the public access file before the newly formed entity can begin to employ the H-1 workers. Historically immigration has often been an afterthought to the corporate restructuring process. With these new rules, it is important to elevate immigration to the forefront to ensure that the documentation is in place when the corporate reorganization takes place.

The INS Rules

The INS rules have also been simplified. Congress amended the Immigration and Nationality Act to provide that:

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An amended H-1B petition shall not be required where the petitioning employer is involved in a corporate restructuring, including but not limited to a merger, acquisition, or consolidation, where a new corporate entity succeeds to the interests and obligations of the original petitioning employer and where the terms and conditions of employment remain the same but for the identity of the petitioner.

cally to avoid these filings, it seems as though all the advantages of the new laws are lost with this guidance. Although the safest route at this point may be to do an amended filing, as immigration inspectors at the ports of entry receive training and see more of these cases, most problems are likely to disappear.

Remember the Old Rules

The language used by Congress is very broad. In a nutshell, no new H-1(b) filing is required by the newly created or reorganized entity as long as the H-1 worker is doing the same job. The new rules clearly help employers by reducing the paperwork required when a merger or other corporate change results in the company taking on more H-1 workers. Where previously a new company had to file all new H-1 petitions, now no filing at all is required.

The new rules on mergers, acquisitions or other corporate changes as discussed above do not provide a safe harbor for all employment changes that may occur as a result of a corporate restructuring. Do not forget the old rules on material changes. The general INS rule that an amended H-1 petition is necessary when there has been a material change in the terms and conditions of the H-1(b) worker's employment remains in effect. Examples of material changes include a change in geographic location, certain types of promotions or changes in job duties.

Because there is no new filing, H-1(b) workers who travel on valid visas endorsed with the name of the prior entity may get some questions at the border when attempting to re-enter the United States. In a letter written in response to an attorney question on this subject, the INS stated that a new employer may wish to file an amended H-1 petition to ensure a smooth re-entry into the U.S. As the new law and DOL regulations were issued specifi-

And Don't Forget the I-9s

To comply with the law, employers are required to verify the identity and employment eligibility of all workers.

Form I-9 Employment Eligibility Verification was developed to aid employers in verifying that persons are eligible to work in the United States. Under the law, the new employer may rely on the I-9s completed by the previous employer. However, by doing so, the new employer accepts full responsibility and liability for those I-9s. Therefore, at the very least, an audit of the I-9s is a good idea to ensure that the forms have been properly completed.

Conclusion

When mergers, acquisitions and other corporate reorganization plans are being discussed and executed, immigration issues rarely surface as a concern. Typically, the immigration attorney gets a call only after the corporate reorganization has been completed. Given the new rules, it would be wise to notify the immigration attorney as soon as possible to take advantage of these new rules.

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O Visas

Among the less frequently used visas, the O visa can often be a useful alternative to the H-1(b) visa. The O visa classification is used for "extraordinary ability aliens" and is available to qualified workers in one of four disciplines: business, sciences, education and the arts. This article will focus on O visas for those in business, sciences and education.

The O visa classification is especially helpful (1) to persons who lack professional degrees; (2) where the H-1(b) visa is an impractical visa classification

because of difficulties meeting prevailing wage requirements; and (3) when the H-1(b) visa cap has been reached. In order to obtain an O visa, a beneficiary must demonstrate sustained national or international acclaim. "Extraordinary" is a standard much higher than the H-1(b) standard of "professional." In order for a beneficiary to be approved in O visa classification, it is necessary that the individual's extraordinary ability be documented extensively.

The documentation can take many

forms. Documentation of one highly acclaimed, well-recognized international award, such as a Nobel Prize, can in and of itself qualify one for O visa approval. More commonly, the beneficiary must be able to document at least three distinct types of achievement:

1. Receipt of nationally or internationally recognized prizes/awards for excellence in the field;
2. Membership in associations in the field that require outstanding