Checklist

Immigration Due Diligence in M&A Transactions

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Due diligence in M&A transactions often requires a review of immigration-related issues. Most companies have a number of highly skilled key employees who hold H-1B visas or are being sponsored for lawful permanent residence. Acquiring such a company and integrating its business and workforce requires a specialized investigation and may have implications that do not align with normal business, corporate law, and tax concerns. To avoid costly mistakes, executives and their counsel should evaluate up front the immigration impact of an acquisition and evaluate whether to mitigate those impacts by revising the deal structure.

M&A Factors to Consider

Most employment-based immigration processes require employer sponsorship and are tied to the employing entity, job duties, location of work, and wages promised in a foreign worker's visa application. A change to any of these elements through an M&A transactions can trigger immigration-related issues. Practitioners should evaluate the following triggers when conducting M&A due diligence.

M&A Effects	**Evaluation Items**
Change to Employing Entity	• Will the Federal Employer Identification Number (FEIN) of the sponsoring employer change? • If a qualifying relationship with a foreign entity is required for visa status, will that qualifying relationship change?
Change to Job Duties	• Will a visa employee's job duties change substantially after the M&A transaction? A substantial change is one in which more than 50% of job duties differ.
Change to Location of Work	• Will the acquired employee work in a different county or metropolitan area after the M&A transaction?
Change to Wages	• Will the acquired employee be paid lower wages after the M&A transaction?

Impact of M&A Transactions on Specific Immigration Processes

The chart below discusses, by visa type, the specific rules and requirements implicated by M&A transactions.

Status	**Rules & Requirements**
H-1B	As a general rule, a change to the FEIN, location, occupation, or reduction in wages will require the filing of an amended petition with USCIS. See USCIS, Adjudicator's Field Manual 31.2(e) (2010); USCIS, Draft Guidance on When to File an Amended H-1B Petition after the Simeio Solutions Decision (May 21, 2015). The exception to this rule is where an acquiring company assumes the predecessor's labor condition application obligations (including the payment of wages), executes an affidavit to that effect, and places it in the public access files for the affected H-1B employees. 20 C.F.R. § 655.730(e)(1) (2012).
L-1 Visas	L-1 visas require common ownership and control between the U.S. employer and the foreign affiliate from which an employee was transferred. A change to the qualifying relationship caused by an M&A transaction will preclude eligibility for L-1 visa status. 8 C.F.R. §

	214.2(l)(7)(i)(C) (2011). In this instance, the acquiring entity should evaluate other visa types for an acquired employee. The exception is where the qualifying relationship survives the acquisition—as illustrated below. Further, a substantial change to the employee's job duties will require an amendment to be filed. However, changes to geography or to wages do not affect L-1 visa employees.
Pending Green Card Applications	Employment-based green card sponsorship is a three-step process for most occupations. The implications for M&A transactions depend on where in the process each employee stands. **Step 1 PERM Labor Certification.** Changes to the FEIN, the occupation, the geographic location, or a reduction of wages while the PERM is in process will likely invalidate the PERM filing. In these instances, the acquiring entity must restart the PERM process. **Step 2 I-140 Pending or Approved.** Changes to the occupation, the geographic location, or a reduction of wages occurring after the I-140 filing will invalidate the PERM and I-140. Changes to just the FEIN will require the filing of a new I-140 successor-in-interest petition. A successor may retain its predecessor's PERM and I-140 by filing a new I-140 establishing that: • The successor job is in the same occupation • The employee continues to meet occupational requirements • The successor entity is able to pay the wage offered by the predecessor • The successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor See USCIS, Policy Manual, Vol. 6, Part E, Ch. 3: Successor-in-Interest in Permanent Labor Certification Cases (2021). If the acquiring entity is not an eligible successor in interest, it must restart the PERM and I-140 processes. **Step 3 Adjustment of Status.** If at the time of an acquisition, an adjustment of status application has been pending for fewer than 180 days, the I-140 is revoked upon termination of the petitioning business. To overcome this, the acquiring entity must file a new I-140 successor-in-interest petition, and the successor must notify USCIS that it is changing the basis of the adjustment of status application to the new I-140. See 8 C.F.R.205.1(a)(3)(iii)(D) (2016); USCIS, Policy Manual, Vol. 7, Part A, Ch. 8: Transfer of Underlying Basis (2021). If the adjustment of status application has been pending for more than 180 days at the time of acquisition, the foreign national is eligible to port their application to another employer and/or location so long as the occupation is substantially similar. See USCIS, Policy Manual, Vol. 7, Part E, Ch. 5: Successor-in-Interest in Permanent Labor Certification Cases (2021); see also 8 C.F.R. § 245.25(a)(2)(i) (2016).
Lawful Permanent Residents (Green Card holders)	Lawful permanent residents are eligible to work for any employer, in any occupation, and at any wage greater than the applicable minimum wage. Their work authorization is generally unaffected by M&A transactions.

Others Working on Employment Authorization Documents (EAD Cards)	Most foreign nationals authorized to work with an EAD card may work for any employer. Their work authorization is generally unaffected by M&A transactions. F-1 student visa workers must notify their universities of any changes to their employer's FEIN, name, or occupation.

Examples of Transactions & Immigration Impact

The following tables illustrate the impact of common M&A transaction structures on visa workers.

Transaction	**Status & Result**
Private Equity Fund A acquires 100% membership interest in sponsoring Employer B from Foreign Company C. Employer B continues its normal operations after the transaction. Sponsoring Employer B has: • Three H-1B employees • One L-1 employee • One employee with an approved I-140 • One employee with an adjustment of status pending for fewer than 180 days	**H-1B**: No impact as employer entity remains the same. **L-1**: Employee loses their visa status and eligibility because the qualifying relationship between Employer B and Foreign Company C terminates. **I-140**: No impact as employer entity remains the same. **Adjustment of Status**: No impact as employer entity remains the same.
Tech Company A acquires Sponsoring Employer B through a merger. Company A is the survivor. Company A continues sponsoring Employer B's work as a separate division. Sponsoring Employer B has: • Three H-1B employees • One employee with an approved I-140 • One employee with an adjustment of status pending for fewer than 180 days • One employee with an adjustment of status pending for more than 180 days	**H-1B**: Tech Company A can rely on the successor-in-interest doctrine because it has acquired the employment liabilities of Employer B but must execute an Affidavit pursuant to 20 C.F.R.§ 655.730(e)(1). **I-140**: Tech Company A can rely on the successor-in-interest doctrine because it has acquired the employment liabilities of Employer B and is continuing Employer B's operations but must file a new I-140 successor-in-interest petition. It does not have to file new PERM applications for affected employees. **Adjustment of Status**: **Employee 1**: Tech Company A must file a new I-140 successor-in-interest petition and must notify USCIS to change the basis of the adjustment of status to the new I-140. **Employee 2**: Tech Company A may file a port application to Tech Company A because her adjustment of status application has been pending for more than 180 days.
Tech Company A acquires substantially all of sponsoring Employer B's assets through an asset purchase agreement. The APA requires Tech Company A to re-hire all of Employer B's employees, but excludes all employment liabilities of Employer B.	**H-1B**: Tech Company A must apply for new H-1B amendments for all subject employee because it has excluded all of Employer B's employment liabilities. **I-140**: Tech Company A must restart the green card process—PERM and I-140—because it has excluded all of Employer B's employment liabilities.

Employer B has: • Three H-1B employees • One employee with an approved I-140 • One employee with an adjustment of status pending for less than 180 days • One employee with an adjustment of status pending for more than 180 days	**Adjustment of Status**: **Employee 1**: Tech Company A must restart the green card process—PERM and I-140—because it has excluded all of Employer B's employment liabilities, and the adjustment of status has been pending for fewer than 180 days. **Employee 2**: The employee may file a port application to Tech Company because the adjustment of status application has been pending for more than 180 days.
Tech Company A acquires substantially all of sponsoring Employer B's assets through an APA to prevent Employer B's production of a competing product. The APA requires Tech Company A to re-hire all of Employer B's employees and assumes the employment liabilities of Employer B. However, after the acquisition, Tech Company A re-assigns employees to its products. Employer B has: • Three H-1B employees • One employee with an approved I-140 • One employee with an adjustment of status pending for more than 180 days	**H-1B**: Tech Company A can rely on the successor-in-interest doctrine because it has acquired the employment liabilities of Employer B but must execute an affidavit pursuant to 20 C.F.R. 655.730(e)(1). **I-140**: Tech Company A must restart the green card process—PERM and I-140—because it is not carrying on the business of Employer B, despite assuming employment liabilities. **Adjustment of Status**: The employee may file a port application to Tech Company A because the adjustment of status application has been pending for more than 180 days.
Tech Company A is a wholly owned subsidiary of Foreign Megacorp. Sponsoring Employer B is also a wholly owned subsidiary of Foreign Megacorp. Employer B is merged into Tech Company A. Tech Company A is the survivor. Company A continues Employer B's work but moves all of Employer B's former employees from Memphis to Houston. Employer B has: • Three H-1B employees • Two L-1 employees • One employee with an approved I-140 • One employee with an adjustment of status pending for more than 180 days	**H-1B**: Tech Company A must file H-1B amendments for all subject employees due to the geographical change. **L-1**: Tech Company A can rely on the successor-in-interest doctrine as Tech Company A and Employer B share the same qualifying relationship with Foreign Megacorp, and because L-1 visas are not tied to geography. **I-140**: Tech Company A must restart the green card process—PERM and I-140—due to the geographical change, despite satisfying the successor-in-interest criteria. **Adjustment of Status**: The employee may file a port application to Tech Company A once the adjustment of status application has been pending for more than 180 days.
Tech Company A is a wholly owned subsidiary of Foreign Megacorp. Sponsoring Employer B is also a wholly owned subsidiary of Foreign Megacorp. Employer B is merged into Tech Company	**H-1B**: Tech Company A may not rely on the successor-in-interest doctrine due to the lower wages. It may file H-1B Amendments to reflect lower wages, so long as they are justified by lower occupation

A. Tech Company A is the survivor. Company A continues Employer B's work, but substantially reduces the wages of Employer B's workers. Employer B has: • Three H-1B employees • Two L-1 employees • One employee with an approved I-140 • One employee with an adjustment of status pending for more than 180 days	requirements. Company A may lose eligibility to sponsor the H-1B workers if the wages offered are below the prevailing wage in effect. **L-1**: Tech Company A can rely on the successor-in-interest doctrine as Tech Company A and Employer B share the same qualifying relationship with Foreign Megacorp, and because L-1 visas are not subject to prevailing wage requirements. **I-140**: Tech Company A can rely on the successor-in-interest doctrine so long as it agrees to pay the predecessor's wage upon the employee's grant of a green card. Otherwise, it must restart the PERM and I-140 process. **Adjustment of Status**: The employee may file a port application to Tech Company A so long as Company A agrees to pay the predecessor's wage upon the employee's grant of a green card. A lower wage may indicate that the occupations are not substantially similar and may lead to denial.

Conclusion

M&A transactions can have a significant impact on the work eligibility for key employees and the expenses associated with the acquiring company's sponsorship of their employment. Executives and their counsel should evaluate the immigration filing costs associated with an M&A transaction, whether key employees will lose work authorization, and whether to revise the M&A deal structure to mitigate impacts.