I. Introduction:

A corporate lawyer usually greets the closing of a deal with a sense of relief. Unfortunately, the ink on the signatures on a corporate transaction usually has dried before a company realizes that something terrible may have occurred. More than just changing the ownership of a business, the closing of a merger, acquisition, IPO or other corporate transaction can single-handedly render all of a company’s immigrant workers illegal and subject an employer to serious exposure for I-9 immigrant verification violations.

In October 2000, Congress passed legislation that seeks to reduce the likelihood of the kind of surprise scenario noted above. But even with Congress’ intervention (and an additional regulation issued by the Department of Labor ("DOL") on December 22, 2000), the risks of a merger or acquisition becoming an immigration "train wreck" remain substantial. The new law only covers one visa category -- the H-1B visa -- and only a subset of cases within this category.

The solution to the problem begins with the due diligence process. As part of their due diligence, lawyers examine the legal and financial structure of a company in detail to find potential risks. It is a very careful process covering "almost" everything. Almost, because, rarely the visa status of a company’s immigrant employees’ or the company’s I-9 compliance is checked. It is also equally rare to see representations and warranties covering immigration matters in a closing document.

This really is not surprising. Corporate attorneys seem to know very little about immigration law and lack an understanding of the immigration consequences of the deals about which they are advising.

Unfortunately, this single short-coming or oversight of the transition team may not only render all of a company’s immigrant employees out of status, hence terminating their work eligibility for several months, but may also force them to travel outside the country, to a US Consulate, since out-of-status aliens cannot change their visas in the US.

Employers on the other hand, may not only be subject to fines up to 00 per employee for not having a valid I-9 on file, but may also be subject to lawsuits from employees terminated and rendered illegal as a result of the company’s failure to keep their work eligibility valid. This is a serious threat, considering the fact that falling out-of-status significantly diminishes an alien’s chance of gaining lawful permanent residence in the US.

Finally, corporate attorneys who fail to warn clients of the immigration consequences of their transactions may face malpractice liability themselves. Therefore, prudent corporate practitioners should integrate immigration issues into the due diligence process and identify the potential risks at the outset.

The consequences of a corporate change differ depending on the visa category of an affected worker and the type of corporate transaction involved. Therefore, a transition team should first "map" the immigration structure of the corporation. This map will provide a blueprint for handling potential immigration problems and risks. Also, they should test the I-9 compliance of the target corporation by conducting a sample audit, if feasible, or at least a review of the immigrant employees’ I-9 forms.
II. Basic Concepts:

The law divides the alien workers into two separate groups: non-immigrant and immigrant. Non-immigrant workers usually fall under the H-1B, L, E and TN visa categories, while immigrant workers are those who have obtained or in the process of obtaining lawful permanent residency. Also, employers are federally mandated to verify the employment eligibility of their entire workforce via the I-9 Employment Eligibility Verification Form.

The most common employment visa, H-1B, is used for an "alien who is coming to perform services in a specialty occupation" in the United States. L visas are used for intracompany transferees that enter the US to render services "in a capacity that is managerial, executive, or involves specialized knowledge", while E visas are used for "treaty traders and investors". Finally, the TN category includes "Canadian and Mexican citizens seeking temporary entry to engage in business activities at a professional level" as listed in the North American Free Trade Agreement.

Corporate changes that typically have immigration consequences are stock or asset acquisitions, mergers, consolidations, initial public offerings, spin-offs, corporate name changes, changes in payroll source, and the relocation of an employer or its employees.

Acquisitions involve the purchase of assets or stock. In an asset acquisition, the purchaser may not accept the liabilities of the seller. In a merger, two or more legal entities combine all their assets in what is called the "surviving entity". Other entities, which are called the "merged entities", cease to exist. The surviving entity assumes all of their liabilities. In a consolidation, however, two or more legal entities combine all their assets to form a new entity. The new entity assumes their liabilities, and they seize to exist. An IPO changes the ownership structure of a corporation, similar to an acquisition.

III. Spotting the Issues: Different Visa Types, Different Implications

In an H-1B visa case, the questions to analyze are whether a corporate change results in a new employer and, if so, to what extent are the interests of the target corporation being assumed.

An H-1B visa requires separate applications to the DOL and the U.S. Citizenship and Naturalization Services ("USCIS"). A petitioner should first obtain an approved Labor Condition Application from the DOL, and then should get its I-129 Petition for a Nonimmigrant Worker approved by the USCIS.

Prior to December 2000, the DOL considered a change in an employer’s Federal Employer Identification Number enough to trigger a need to file a new LCA. Under the rules adopted December 22, 2000, a new LCA will not be required merely because a corporate reorganization results in a change of corporate identity, regardless of whether there is a change in EIN, provided that the successor entity, prior to the continued employment of the H-1B worker, agrees to assume the predecessor's obligations and liabilities under the LCA with a memorandum to the "public access file" kept for LCA purposes.

Material changes in the employee’s duties and job requirements and the relocation of the employee may also require a new LCA. Therefore, if employees are relocated due to a merger or sale, new LCAs will be required for H-1B workers (DOL uses the Standard Metropolitan Statistical Area, SMSA, as criteria in determining the need for a new LCA or Labor Certification. If the employee is relocated outside the SMSA, then new filing is
required). However, a simple name change will not trigger the need for a new LCA.

The rules governing when a new I-129 petition must be filed are similar to the LCA, but not identical. The need to file a new I-129 can be a fairly expensive requirement. For each new employment petition, the employer must pay the American Competitiveness and Workforce Improvement Act fee, which was recently increased to 500 dollars.

The new law creates an exemption from filing a new I-129 in cases of corporate structuring where the new employer is a successor in interest that assumes the interests and the obligations of the prior employer. This is a restatement of the existing USCIS policy stating that if an employer, for H-1B purposes, "assumes the previous owner’s liabilities which include the assertions the prior owner made on the labor condition application" then there is no need for a new or amended petition. However, because an implementing regulation is not yet published and the law not yet tested, there is room for a variety of interpretations. If a new or amended petition is not needed, then the employer may wait until filing an extension petition for the employee to notify the USCIS.

Since LCAs are not required for obtaining a TN visa or status for a citizen of Canada or Mexico, a basic successor in interest analysis is required to determine how to proceed here.

For an L-1 visa, the law requires a qualifying relationship between the US entity and the foreign entity from which the employee will be transferring. This relationship must be within the definitions of a "parent, branch, affiliate or subsidiary" as defined by the USCIS. Obviously, changes in the ownership structure of either one of the entities, through a corporate change may terminate the qualifying relationship and, consequently, invalidate the underlying L visas. However, if the petitioner, after a corporate change, can document that the qualifying relationship survives, then, only an amended petition will be necessary.

Under the E-1 and E-2 visas, certain investors and traders may be admitted to the United States and be employed therein, if a "treaty-qualifying" company petitions and obtains status for them. A company is qualified based on its nationality. A corporate change may change a corporation’s nationality, and, therefore, result in the termination of the qualification.

A lawful permanent residency ("LPR") application consists of three steps. First, the employer usually must prove that despite reasonable recruitment efforts, it has not been able to find a domestic employee to fill the alien’s position. This is called the labor certification, and is handled through the DOL. Second, it files a Form I-140, Immigrant Petition for Alien Worker, with the USCIS. After the I-140 petition is approved, the employee files a petition for the adjustment of her immigration status to the status of a lawful permanent resident with the USCIS.

The Department of Labor takes a liberal view of when a new labor certification petition must be re-filed. If after an acquisition, a new owner remains the worker’s employer, and has assumed all of the past owner’s obligations, the new owner should qualify as a "successor-in-interest" and a labor certification will survive.

In LPR cases, USCIS traditionally used a stricter version of the successor in interest theory, and permitted an employer to continue with the prior employer’s petition, only if the new employer assumed "all" of the prior employer's liabilities. Without successorship, a new I-140 petition may be necessary even when an adjustment of status application is already pending.
The LPR process may take several years, and until recently, unless the case did fit under certain exceptions, beneficiaries of immigrant petitions were not able to change employers until the completion of the entire process. Therefore, corporate changes that created a new employer were potentially causing further delays. Another new law Congress recently passed, however, makes it possible in many instances to change employers while an adjustment application is pending, so this may be a moot issue.

Finally, a successor also assumes the I-9 liabilities of a corporation. Failure to comply with I-9 requirements may result in serious sanctions, up to 00 dollars per employee. Therefore, before a corporate re-structuring, the transition team should examine the I-9 compliance of the entity by either a sample I-9 audit or a review of the alien employees’ I-9s. Especially for I-9 issues, representations and warranties should be required at the closing.

IV. Conclusion:

In conclusion, given the potential risks, transition teams and corporate counsel should integrate immigration issues to the due diligence process, and should require warranties at the closing.

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Gregory Siskind (gsiskind@visalaw.com) is a partner in the law firm of Siskind, Susser, P.C. - Immigration Lawyers, which has offices in the United States and around the world. He has experience handling all aspects of immigration and nationality law and has represented numerous clients throughout the world. He is an active member of the American Immigration Lawyers Association (AILA) where he recently served as chairman of the Physicians Committee. He is currently chairman of the Foreign Medical Graduate Taskforce. He is a member of the American Bar Association (ABA), where he serves on the Governing Council of the Law Practice Management Section and recently served as Chairman of the Law Practice Management Publishing Board. He was one of the first lawyers in the country (and the very first immigration lawyer) to set up a website for his practice and he was the first attorney in the world to distribute a firm newsletter via e-mail listserv. He is the author of The Lawyer’s Guide to Marketing on the Internet, published by the ABA and a contributing author to Immigration Options for Physicians, Second Edition, recently published by the American Immigration Lawyers Association. He graduated magna cum laude from Vanderbilt University and received his law degree from the University of Chicago.