MERGER AND COMPLIANCE ISSUES: HOW TO ENSURE SUCCESS POST-FILING

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If the downturn in the economy has taught us anything, it is that changes in the corporate landscape are inevitable. Corporate mergers and acquisitions are more prevalent now than in years past. Immigration practitioners need to understand the immigration consequences of such mergers and acquisitions for our corporate clients and their foreign national employees. This practice pointer will address the complex issues that arise in connection with the Program Electronic Review Management (PERM) labor certification process when there is a corporate merger or acquisition.

TIMING IS EVERYTHING: POINTS OF ANALYSIS AND ADVICE FOR THE DIFFERENT STAGES OF THE PERM FILING PROCESS

When the U.S. Department of Labor (DOL) rolled out the PERM labor certification system, it forever changed the way labor certification applications were prepared and processed. Prior to PERM, DOL permitted the substitution of a successor employer if it occurred before a final determination and the job opportunity continued to be in the same area of intended employment as outlined in 20 CFR §656.30(c)(2). In such situations, employers would notify DOL of all the relevant changes, often initialing and dating each change on the ETA-750 form. Once certified, the ETA-750 looked like a first draft of a manuscript covered with strike outs, initials, dates, and many colors of ink. However an employer was able to use this approved labor certification application with its noted modifications to file the I-140 petition and was not required to argue successor-in-interest as part of the I-140 submission.

Unfortunately, under PERM, modifications of the labor certification application are no longer permitted.[1] This is true both during the processing of the case by DOL and after the PERM labor certification application has been approved. While some typographical errors have been permitted by the Board of Alien Labor Certification Appeals pursuant to the ruling in *Matter of HealthAmerica*,[2] these changes cannot include material matters such as the name of the employer. Since no material changes to the Form ETA-9089 are permitted under PERM, the way practitioners address corporate changes must now take into account where the case is in the PERM process when the corporate change occurs.

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[1] 20 CFR §656.11(b).

[2] *Matter of HealthAmerica*, 2006 PER 1 (BALCA July 18, 2006).

Corporate Changes Occurring Before the PERM Is Filed with DOL

Often a practitioner will learn of a corporate merger or acquisition while in the midst of the PERM recruitment process. Company A is now part of Company B but the job order, Sunday ads, notice of filing and other recruitment activities were done in Company A's name. The question turns to whether all is lost or if that recruitment can still be used given the corporate change. Thankfully, DOL has issued an FAQ on point:

> **Q**: After completing our recruitment, but before filing the Form ETA-9089, our company's name was changed after it was wholly acquired by another company. Does the company name used in the advertisements used for recruitment have to match the company name used on the Form ETA-9089?
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> **A**: The employer must conduct recruitment using its legal name at the time of the recruitment. However, an Application for Permanent Employment Certification (Form ETA-9089) must be filed in the name of the employer's legal name at the time of submission. If the merger, acquisition, or any other corporate change in ownership occurs between the time of recruitment and the time of submission, resulting in a disparity between the employer's name shown on the advertising used to recruit for a job opportunity and the employer's name on the submitted Form ETA-9089, the employer must be prepared to provide documentation—in the event of an audit—proving that it is the successor in interest, a determination made based on a totality of the circumstances, including whether the current employer has assumed the assets and liabilities of the former entity with respect to the job opportunity.[3]

While the FAQ is helpful in clarifying that recruitment done in the name of Company A can be used for a Company B PERM submission (assuming Company B is a successor in interest), it also indicates that there are some best practices we should follow:

- Ensure that documentation of the corporate change is in the audit file. The new entity needs to be able to prove that it is a successor in interest to the original corporate entity.
- Review the dates of the recruitment and the date the corporate change occurred to ensure that the recruitment was done in the correct entity's name. Many times immigration counsel learns of a change in the corporate relationship only after the change occurs. Thus it is possible that recruitment would be done in Company A's name even after the corporate change took place. The above FAQ indicates that such recruitment may be problematic if the recruitment was not done using the company's legal name at that time.

In addition, the following considerations should also be taken into account when a corporate change occurs before the PERM labor certification application is filed with DOL:

- Has the company laid off employees in the occupation or a related occupation as a result of the merger or acquisition? It is common in the merger or acquisition scenario for there to be layoffs as some positions become unnecessary when the two entities are combined. If there have been layoffs in the occupation or a related occupation, this could impact the viability of the PERM submission.
- Has the position changed as a result of the merger or acquisition? There are situations in which the entity that has been acquired or merged must alter their employee's job titles and/or duties to become integrated into the new entity's system. A change in job title or duties should be carefully reviewed to see how the change will impact the PERM submission.

So here is the good news—if there has been a corporate restructuring before the filing of a PERM labor certification application and the above issues have been reviewed and resolved, the PERM case can be filed in the new entity's name and a successor in interest argument will not need to be made at the I-140 immigrant visa petition stage.

Corporate Changes Occurring While the PERM Application Is Pending with DOL

As discussed previously, modifications can no longer be made to the labor certification application once it is filed with DOL. If a merger or acquisition occurs while the PERM labor certification application is

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[3] "DOL Round 10 PERM FAQ" (May 9, 2007), *published on* AILA InfoNet at Doc. No. 07051160 (*posted* May 11, 2007), *available at* www.aila.org/content/default.aspx?docid=22312.

pending, practitioners cannot request that the labor certification be updated to reflect the change. However, the following issues should still be taken into consideration:

- If the corporate change occurs right after filing and the recruitment has not yet expired, does it make sense to file a new PERM labor certification application in the new entity's name in order to avoid a successor-in-interest argument at the I-140 stage?
- If the PERM case is audited, should the DOL be notified of the corporate change as part of the audit response? While there is nothing in the regulations which requires such notification, many practitioners choose to include this information with the audit response.
- Has the position changed as a result of the merger or acquisition? As noted in the previous section, a change in job title or duties should be carefully reviewed to see how the change will impact the green card case.

A merger or acquisition occurring after the PERM is filed with DOL will need to be addressed at the I-140 stage. Thus it is important to analyze how the corporate change will impact the I-140 petition. Practitioners will want to ensure that new employer qualifies as a successor-interest and should consider the following:

- Before the deal is completed - can the relevant corporate document transferring ownership be reviewed by immigration counsel? While many times immigration counsel is brought into the loop after the corporate change occurs, if we are able to be a part of the process beforehand we can ensure that beneficial successor-in-interest language is added to the corporate documents evidencing the merger or acquisition.
- Is it possible to obtain ability to pay documentation of the acquired/merged company? It is always easiest to obtain ability to pay documentation for the predecessor company during the period that the corporate change is occurring. It may prove more difficult to secure this documentation a year or two after the change takes place.
- Will there be an ability to pay issue at the I-140 stage? Companies are often acquired or merged because they are not in a strong financial position. This may be reflected in the company's financial statements. As noted in a U.S. Citizenship and Immigration Services (USCIS) memorandum from Donald Neufeld,[4] documentation of the original employer's ability to pay the offered salary must be provided for the period from when the labor certification application is filed until the date of the transfer of ownership.

Thanks to the Neufeld memorandum, practitioners have a clearer understanding of how a successor-in-interest is defined for I-140 purposes. If a corporate change occurs while the PERM labor certification application is pending, we can analyze the successor-in-interest factors immediately to determine if there will be issues at the I-140 stage.

ADDITIONAL ISSUES TO CONSIDER WHEN AN ACQUISITION AFFECTS THE PERM PROCESS

Compliance: Whose Obligation Is It?

After the PERM application is filed—and even once the application is certified--the employer's obligation to retain certain application related documents (often referred to as the "audit file" or the "retention file") continues. This requirement lasts for five years from the date of filing the PERM application. While this rule may seem burdensome to many employers, particularly after the employee becomes a permanent resident or the employment is terminated, it is even less welcome in the event that the entity that applied is acquired. In addition, while the proper retention could be vital to the success of a PERM application, it is likely to fall so far to the bottom of the employer's priorities, that it barely gets a thought. So it becomes the responsibility of the attorney to get these issues on the parties' due diligence and transaction to-do lists before it's too late and the documents get lost in the corporate shuffle.

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[4] USCIS Memorandum, D. Neufeld, "Successor-in-Interest Determinations in Adjudications of Form I-140 Petitions" (Aug. 6, 2009), *published on* AILA InfoNet at Doc. No. 09090362 (*posted* Sept. 3, 2009), *available at* www.aila.org/content/default.aspx?docid=29962.

If you find yourself advising a PERM applicant that is being acquired, you may need to address the following issues:

- Who is responsible for retaining the audit file? If the acquisition occurs before the application is filed, it is pretty clear that the retention obligation falls on the new company, as it is the applicant. However, if the acquisition takes place after the application is filed, it could be argued that the retention obligation remains with the first company, as it filed the application, or with the new company, as it succeeded to the application and is directly impacted by the result of the application. In the absence of clear guidance, best practice is for both companies to retain copies of the materials. Even though the foreign national is no longer employed by the first company, it is in the company's best interest to be able to demonstrate that it complied with the requirement.
- Who must respond to an audit? If there is an audit request after the acquisition, the new company—that succeeds to the interests of the application and now employs the foreign national—should respond to the audit. However, the first employer, who will probably receive the notice from DOL, should take steps to ensure that the audit notice is delivered to the new employer and that the new employer responds.
- Audit response following employee termination. If the corporate change took place after the PERM application was filed and the employee was terminated after the transaction, the new employer may have no interest in responding to the audit notice. As it did not continue to the employ the employee, it never agreed to take over the PERM application, and, thus, the application remains the responsibility of the first employer. As with any audit notice for a terminated employee, the applicant employer can either respond with notice of the termination or not respond at all, resulting in the denial of the application. Depending on the specific situation, either route may be strategically preferable.
- Distinction between acquisitions in which the original employer survives the acquisition and acquisitions in which the original employer dissolves. Of course, the entire discussion of whether retention responsibilities should fall on the first or second employer assumes the continued existence of the first employer. However, in many transactions, the seller ceases to exist, either because it is merged into the purchaser or because it is liquidated following the purchase.

Documenting the Transaction

If the transaction follows the PERM filing and the employee remains with the new employer, the new employer will, in the future, likely need to document and explain the nature of the transaction in order to demonstrate succession of interest. Best practice is to get as much as possible as early as possible while "Company A" still exists and is in the "document providing" mode. Keep the following in mind:

- There is no substitute for the formal transaction documents. Make sure to request a full set while they are fresh. If you need to ask questions to understand the nature of the transaction, do it now while the first company and its corporate law counsel are still available and willing to speak with you.
- Press releases often offer a good summary of the transaction in plain English. They can be an invaluable tool in communicating the essence of the deal to DOL or USCIS, who, like you, may not fully understand the formal agreements.
- When the available documents are not sufficiently clear on their own—either because the parties are unsophisticated or because the deal is very complicated—try to work with the employer and/or counsel to develop a one or two page summary of the key elements. Again, it is crucial to strike while the iron is hot.
- It is important to get both companies' financials up front. This could be very important down the line in establishing "ability to pay."

Employee Perspective vs. Employer Perspective

In a corporate reorganization, the interests of U.S. employer and foreign national employee are not necessarily identical. For U.S. employers, corporate reorganizations have a human component; however, such transactions are first and foremost about business and profit. In contrast, corporate reorganizations impact foreign nationals on a very personal level and can be the source of great personal anxiety. The U.S. employer seeks to minimize liabilities arising from the transaction and minimize disruptions in workforce productivity. The foreign national employees, on the other hand, seek to preserve their U.S. employment, their

nonimmigrant status and any pending U.S. permanent residence application. Unfortunately, the foreign national employee does not control such transactions and will often feel helpless.

In a corporate reorganization, corporate immigration counsel will need to advise employers on minimizing employer liability and workforce disruption while also soothing the frayed nerves of employees, ensuring that the foreign nationals' legitimate immigration concerns are being communicated to the business. The employee's counsel, on the other hand, will attempt to encourage the employer to structure the transaction in a manner most beneficial for the employee and push the employee's concerns to the top of the priority list.

Pre-Transaction Advice to Parties re: Impact on Immigration Matters

Stock Purchase vs. Asset Purchase

Prior to the transaction, immigration counsel must advise the parties regarding how the form of purchase (*e.g.*, stock purchase or asset purchase) can impact a PERM labor certification application.

As a general matter, in a stock purchase, all of the outstanding shares of stock of a business are transferred from the seller to the buyer. In effect, the buyer steps into the shoes of the seller, and the operation of the business continues in an uninterrupted manner. Unless specifically agreed to, the seller has no continuing interest in, or obligation with respect to, the assets, liabilities or operations of the business. In contrast, in an asset purchase, the seller retains ownership of the shares of stock of the business. The buyer must either create a new entity or use another existing entity for the transaction. Only assets and liabilities which are specifically identified in the purchase agreement are transferred to the buyer. All of the other assets and liabilities remain with the existing business and thereby the seller.

For immigration purposes, including purposes of a PERM labor certification application, a stock purchase will almost always be the preferable form of transaction. Asset purchases must be carefully evaluated to ensure that the purchasing company has acquired all of the rights and obligations of the original employer. In many asset purchase situations, the purchasing company does not assume the obligations of the original employer, in which case the purchasing company may not be considered a "successor-in-interest". As described below, being a "successor-in-interest" is critical to preserving pending green card applications filed by the original employer.

The purchasing company should also be advised that asset purchases must not create a "gap" between when original employer stops functioning and the when the purchasing company takes over the original employer's assets or operations. For an employee of the original employer with a pending green card application, his or her prospective job opportunities ceases to exist during such a "gap", thus possibly invalidating that employee's pending or approved labor certification application.

Successor or Not

Prior to the transaction, immigration counsel must assess whether the purchasing company will be a "successor-in-interest" for PERM labor certification application purposes. If not, immigration counsel must advise the purchasing company of the immigration and financial implications of not being such a "successor-in-interest".

As a general rule, an approved labor certification application is only valid for the employer to which it was issued. Unless a merger, acquisition, or reorganization creates an employer that may be considered a "successor-in-interest" to the original employer, an approved labor certification application will no longer be valid and, if applicable, an approved immigrant visa petition may be denied or revoked.

In the context of a pending immigrant visa petition, USCIS has issued recent guidance (in August 2009) as to the circumstances under which a new employer will be determined to be a "successor in interest." Specifically, USCIS has stated that a valid successor-in-interest relationship exists where: (1) the prospective job opportunity offered by the successor is the same as the job opportunity originally offered on the labor certification application; (2) the successor has borne the burden of proof with regard to establishing immigrant visa eligibility in all respects, including the provision of required evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage, as of the date of filing of the labor certification with DOL; and (3) the petitioner has fully described and documented the transfer and assumption of the ownership of the predecessor by the successor. USCIS notes that there can be instances

when a valid successor relationship exists even though the successor entity has not assumed all of the assets, rights, obligations, and liabilities of the predecessor entity.

Prior to the transaction, immigration counsel must warn the purchasing company of the costs and fees which it will incur if it is not a "successor-in-interest" post-transaction, specifically including the costs and fees associated with re-commencing the "green card" process for any employees who have not yet obtained U.S. permanent residence at the time of the transaction (other than those employees who can benefit from the portability provisions of the American Competitiveness in the Twenty-First Century Act (AC21),[5] as described below).

Keeping the Employee in Substantially the Same Position

For any employee of the original employer with a pending green card application, immigration counsel must advise the purchasing company pre-transaction of the importance of it preserving the offer of prospective employment to that employee in the same position as originally offered on the labor certification application.

As described above, a valid "successor-in-interest" relationship can exist only where the job opportunity offered by the successor is the same as the job opportunity originally offered on the labor certification application. Not being a "successor-in-interest" potentially implicates the negative consequences described above.

Also of significance, under AC21,[6] foreign nationals who have filed for adjustment of status and whose cases have been pending for more than 180 days may change employers, without affecting the validity of the underlying labor certification application and immigrant visa petition, as long as the job is in the same or a similar occupational classification. Such "portability" provision permits an employee to continue to work and benefit from an I-140 immigrant petition that was filed by a company that has been involved in a merger, acquisition, or other corporate restructuring without having to file a new I-140 petition or labor certification application. For this reason, it is again important that the purchasing company maintain the foreign national's offer of prospective employment in the same or similar occupational classification, as described on the foreign national's labor certification application.

Making Lemonade Out of a Lemon: the Silver Lining of Corporate Acquisitions

From the perspective of the immigration lawyer, a corporate acquisition is often the source of great anxiety and frustration. Just when you thought you had successfully negotiated the PERM application process, a legal and client relations mine field, a new—sometimes insurmountable—obstacle is presented! Yet remember that part of the role as counsel is to identify and use the positive aspects of each factual situation.

In the PERM arena, an acquisition, and concurrent transition of the foreign national to a new employer, often allows the applicant employer the ability to build a stronger application—be it in the context of needing to re-file the PERM application or to reshape the application when the transaction happened between the recruitment and the filing.

Here are some examples of points to consider when faced with an acquisition:

- Can you convert experience gained on the job into experience gained with a prior employer? Often employers need to conduct PERM recruitment at a lower level than they otherwise would, as the employee gained a large portion of her experience while employed in a similar role at the employer. By filing under a new company with a new employer identification number, the experience at Company A may overnight become prior experience, rather than experience with a current employer.
- Does the acquisition rid the application of weaknesses relating to ownership and control? Family-owned and closely held corporations often have difficulty demonstrating to the satisfaction of DOL that the

[5] American Competitiveness in the Twenty-First Century Act of 2000 (AC21), Pub. L. No. 106-313, §§101–16, 114 Stat. 1251, 1251–62.

[6] *Id*.

foreign national does not have undue influence over the recruitment and that the employer recruited in good faith. Once such a company is acquired, the ownership and control can shift radically, effectively dissolving the entire concern.

- Is the new company in a better position to establish its ability to pay the employee the proffered wage? When the new employer needs to re-file a PERM application, it may benefit from being in a better financial position than the first company. This can significantly strengthen the chances of approval of the I-140 petition.