In the context of mergers, acquisitions, and other corporate restructurings, during the due diligence process, employers often overlook the immigration-related considerations related to impacted foreign national workers. However, failure to complete a pre-close assessment of impacted foreign national workers, including assessments of work visa statuses and lawful permanent resident (e.g., green card) processes, can have negative consequences. Depending on the employee’s visa type and the nature of the corporate restructuring, some temporary work visas may not be eligible for transfer to the new employing entity.

In addition, existing green card processes may need to be assumed where the prior company left off, amended to account for the corporate change, or even restarted altogether. These situations can lead to surprises and hardships for both the company and the employee if, after closing, it is discovered that managers, executives, or other essential employees are no longer authorized to work and no longer have valid immigration status in the United States. For this reason, employers may want to include immigration assessments of any foreign national employees as a top priority in their due diligence checklists.

Part one of this two-part series will outline common considerations related to temporary work visas. Part two will cover key considerations regarding green card processing.

**Nonimmigrant Work Visas**

Nonimmigrant visas control an employee’s ability to remain in the United States and continue working for the petitioning company. Most nonimmigrant visas are company-specific, meaning that the employer is required to prepare a petition that specifically identifies the sponsored employee, as well as provide information about the offered job, such as the worksite location, title, salary, requirements, etc. When the structure or ownership of the petitioning company is changed, the sponsoring company may need to take additional compliance actions for employees to retain their nonimmigrant work status and work authorization and, in some cases, the company may not be able to continue sponsoring the employees.

A common concept in the context of mergers, acquisitions, and other corporate restructurings is that of a “successor in interest.” Successor in interest relationships are possible both in the context of stock acquisitions and asset purchases. In asset purchases, the succeeding company must be able to show that a distinct piece of the predecessor company was purchased, such as a distinct division or business unit, and that the piece of the business that was purchased was transferred as a whole to the successor company, with the exception of certain unrelated liabilities. The succeeding company may qualify as successor in interest if, as the result of a merger, acquisition,
spin-off, or other similar corporate restructuring, it assumes the essential immigration-related rights and obligations attaching to former foreign national workers. The new employer must also be able to show that the job offered to an impacted foreign national worker must have been, and must continue to be, located within the transferred division or unit. Employers that can demonstrate successor in interest relationships may be able to continue sponsorship of most (but not all) nonimmigrant work visa types.

1. H-1B Visas for Specialty Occupation Workers

Immigration regulations provide that when a company changes its corporate structure as the result of an acquisition, merger, or other similar action, if the new employing entity qualifies as a successor in interest to the predecessor company, it is not required to file new labor condition applications (LCAs) and H-1B petitions on behalf of transferred H-1B nonimmigrants. This is permissible if the new employing entity expressly agrees to assume the responsibilities arising from the labor certification applications originally filed by the predecessor company and if it completes the appropriate documentation prior to the close date of the deal. This would permit transferred employees to continue employment without any interruption per the existing H-1B approval as long as there are no other material changes to the details of the employment (e.g., change in work location, substantial changes to duties performed, etc.).

Timing is important here. If the successor company fails to update the H-1B public access file documents prior to the close of the deal, it is required to file new H-1B amendment petitions with U.S. Citizenship and Immigration Services (USCIS) to update the U.S. government about the change in corporate structure.

2. L-1 Visas for Intracompany Transferees (Executives, Managers, and Specialized Knowledge Employees)

Following a corporate restructuring, immigration law allows an employee to continue to maintain L-1 status only if the successor company is part of a multinational group and maintains a related company (e.g., a subsidiary, parent, affiliate, or branch office) outside the United States. The related company that is outside of the United States does not need to be the same company or even in the same country where the L-1 visa employee originally gained the qualifying L-1 experience outside of the United States.

Where a corporate restructuring impacts L-1 visa holders, an amended L-1 visa petition must generally be filed with USCIS to alert the U.S. government of the change in corporate structure and reaffirm an ongoing "qualifying relationship."

If the succeeding company is not a multinational corporation and does not maintain a qualifying related company outside of the United States, it may not be possible to continue sponsorship of the L-1 visa, leaving certain executive, managerial, and essential employees without visa status and work authorization.

3. E-1 and E-2 Visas for Treaty Traders and Treaty Investor Employees

A key due diligence consideration for E-1 and E-2 visa holders is the nationality of the successor company’s ownership. E-1 and E-2 visa recipients include executives, managers, and essential skills employees who come to the United States under a treaty of commerce and navigation between the United States and the country of which the visa holder is a citizen or national. If the ultimate ownership of the succeeding company changes because of an acquisition, it can affect the individual’s ability to continue in E-1 or E-2 visa status.
For example, if an E-2 visa holder is a French national working in the United States for a French-owned company and a U.S. company purchases the French-owned employing entity, the nationality of the successor company will change and will no longer be French, severing the ability to continue the E-1 or E-2 visa.

4. TN Visas for NAFTA Employees

If an employee’s job duties remain substantially the same, he or she should be able to maintain TN status with the new employer (and therefore continue employment). Succeeding employers may want to file TN amendment petitions within a reasonable period after the close of the sale.

5. F-1 Student Visas

An employee holding F-1 student status can contact the designated school official (DSO) at his or her school to provide an update about the change in the identity of the employing entity. The DSO can then advise if any new documentation is needed, such as an updated Form I-20 or I-983 training plan, in order to continue the employment.

When a sponsoring employer undergoes a merger, acquisition, or other corporate change, it may want to take particular care to analyze the effect on its employees' nonimmigrant work visa processes. Employers may want to consider conducting a thorough pre-close due diligence process, including a complete successor in interest and role-based analysis, for its entire foreign national population.