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purchasing a new brand – us immigration consequences

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Among the numerous practical and legal consequences faced by a purchaser acquiring a new company with a brand name is a key question: how to retain employees, especially those with critical or essential skills. During the course of conducting its due diligence, the purchaser must investigate which employees, if any, hold a temporary work visa and what the consequences of a change in ownership are.

In that regard, the purchaser should request from the seller copies of all visa applications filed with the USCIS or the US Department of State on behalf of any current employees.

The review of these files may be categorized into the various visa types.

1 – H-1B visa holders – Specialty Occupation

If any employees are present in the USA in H-1B visa status, the purchaser must assess how long each of the H-1B visa holders may continue in valid work status. H-1B visas are limited to a maximum of 6 years in duration. Consequently, a key employee, such as a designer, account executive, or production manager, who is nearing the 6-year deadline should not be counted on as remaining in the employee pool after the purchase is completed.

Furthermore, the purchaser should consider that, once the deal closes and ownership takes effect, the new owner may be required to file a new H-1B visa petition with the agencies (Department of Labor and USCIS) in order for the H-1B visa holder to continue employment. That is because temporary work visas are generally limited to the employer who originally filed the application. However, the process of applying for and retention of each employee's H-1B status will depend on the nature of the acquisition and the language contained in the purchase agreement.

In some instances, an acquiring company can be viewed for immigration purposes as a "successor-in-interest" to the acquired company. This outcome requires language in the purchase agreement confirming that the acquiring company agrees to succeed to the interests and obligations of the original employer (with respect to the existing employees), and that the terms and conditions of employment will remain the same, but for the identity of the "successor" employer.

The clear advantage to being a successor-in-interest in the immigration context is that no new petitions need to be filed for these key employees, which saves the purchaser time, effort, and several thousand dollars per application. As a successor-in-interest, the purchaser would need only to update each employee's existing H-1B "public access file" in the Human Resources records immediately upon closing. This is done with a signed affidavit stating the new owner assumes the liabilities associated with the employment of the existing H-1B visa employees.

On the other hand, if the new owner is not a successor-in-interest, he will need to file a change of employer H-1B petition for each individual. The cost of filing these petitions should be considered as it includes both legal fees and government filing fees for each applicant. If this is the chosen or required course of action, the H-1B visa petitions should be prepared as soon as both parties are confident the acquisition will be consummated, since each of these employees would no longer be in H-1B status after the close date. The timely filing of new H-1B visa petitions allow these employee to remain employed. Otherwise, they are out of visa status and cannot be employed.

2 – L-1 visa holders ¬Intracompany Transferees

If the purchaser determines an employee holds the L-1 visa, the purchaser should be aware this employee is probably not going to be retained. L-1A visa status depends on the continuous relationship between a foreign company doing business outside the USA, where the employee was previously employed, and the US company. Once the US company is purchased, the relationship between the existing US company and the prior foreign affiliated company will be severed. As a result, on the date the acquisition closes, the employee's current L-1A status will be terminated.

There is no way for such an employee to be retained in L-1A status beyond the acquisition date (unless the purchaser is also related to the foreign company), but there remains the possibility of changing the employee's L-1 intracompany visa status to the H-1B visa, described above, or to an E visa, described below.

3 – Treaty Trader E-1 and Treaty Investor E-2 Visas

E-2 visas require a foreign investor (individual or company) to invest a substantial sum of money into a new or existing US company. E-1 visas require the foreign investor (individual or company) to conduct substantial trade (at least 50%) primarily between the foreign country and the USA. If that occurs, then managerial, executive, and special skills employees who are foreign nationals from the same country as the investor company may qualify for the E-1 or E-2 visas. In addition, the USA must have in existence a treaty of friendship and commerce that allows the foreign investor to apply for the E visa classification and register the US company as an E-2-qualified company. To qualify, the purchaser must be foreign owned and must be able to document the amount of the

investment or the amount of trade by the foreign purchaser into the US company. This process generally takes several months and will require employees who are of the same nationality as the purchaser to depart the US while the application is being processed at the US embassy or consulate office abroad. If the E visa application is approved, the employee would then be allowed to return to the US and resume employment.

4 – Forms I-9 – Compliance

Finally, the purchaser should conduct an internal audit of the Forms I-9 for each and every employee as part of its preclosing due diligence efforts. The Forms I-9 are required for all employees regardless of nationality and are a matter of establishing employer compliance with US immigration laws and statutes. Depending on the findings of the Forms I-9 audit, the purchaser may decide to take over the existing forms or, on the date of closing, require a new Form I-9 from each and every employee.

Caveat – nothing in this blog post is intended to address any privacy or corporate issues that might otherwise arise, so if you find yourself making an acquisition that has immigration implications, it is critical to have members of the legal team well-versed in these areas on the team.

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