KEEPING IT IN THE FAMILY: THE IMPACT OF CORPORATE RESTRUCTURING ON INTRACOMPANY TRANSFERS

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International companies often transfer their highest level executives and managers and other key employees to the United States as L-1 intracompany transfers. However, when these very companies are considering a merger, acquisition, or internal reorganization, the decisions are rarely made with immigration implications in mind. This article will review the various ways of ensuring that valuable intracompany transfers stay "in the family," and that a corporate blanket transfer program remains valid in light of corporate restructuring.

ELIGIBILITY CRITERIA

Specific organizational requirements must be met to allow a company to transfer its international employees to the United States. Additionally, the qualifying relationship between the petitioning entity and its parent, branch, subsidiary and affiliate *must* be preserved in order for employees in the United States in L classification to remain in valid status.[1] If, in light of corporate restructuring, a qualifying relationship no longer exists, the foreign national and the company must explore other nonimmigrant visa options. On the other hand, if the corporate restructure merely modifies the qualifying relationship, it may be necessary to notify the government of this change via an amended L-1 petition or by amending the list of entities on an approved L blanket approval. Or there may be no obligation to affirmatively notify the government of the change until an extension is sought.

Generally, the regulations require the petitioner to file an amended petition whenever there are changes in approved relationships, additional qualifying organizations under a blanket petition, or a change in capacity of employment.[2] Guidance from the legacy Immigration and Naturalization Service (INS) attempted to clarify that "an amended petition must be filed when there is a material change in the terms and conditions of employment or the beneficiary's eligibility."[3] While the INS, and subsequently U.S. Citizenship and Immigration Services (USCIS), maintains that minor or immaterial changes may be addressed at the time of extension, little guidance has been provided clarifying the threshold for notifying the government of changes in corporate structure in an amendment rather than merely through extension. However, it is clear that if the change in the qualifying relationship does not affect L-1 eligibility, there is no need to notify the government until extension is sought. For example, if the employing entity abroad is no longer doing business or no longer has a qualifying relationship with the U.S. petitioner, but the U.S. employer is still a continuing, qualifying part of the multinational organization and proof of that has already been filed with USCIS (such as by including an organizational chart in the original petition that listed an additional entity abroad, or by proving that the parent company is located abroad in the original filing), there is no

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[1] 8 CFR §214.2(*l*)(1)(ii)(G).

[2] 8 CFR §214.2(*l*)(7)(i)(C).

[3] *See* legacy Immigration and Naturalization Service (INS) Memorandum CO 2141-C (Oct. 22, 1992), *reproduced in* 69 *Interpreter Releases* 1431, 1449–50 (Nov. 9, 1992).

need to amend the petition to notify the government of this change.

TIMING

Unfortunately, immigration attorneys are often the last to hear about a corporate restructuring. As there is no regulatory grace period for notifying the government of material changes in the qualifying corporate relationship, this hypothetically could have devastating effects on the validity of an employee's L classification and the company's blanket approval. In reality, however, Service Centers historically have been relatively lenient in allowing belated amendments. That being said, it is imperative that amendments be filed as quickly after the effective date of the corporate restructure, date of sale, or date of closing as possible.

While immaterial changes should be brought to USCIS's attention only at the time of extension, immigration status must be maintained in order for a change or extension of status to be granted.[4] In particular, if an L-1 employee's duties change from specialized knowledge to managerial or executive in nature due to a change in corporate relationship or otherwise, that change must be reported to USCIS at the time of the change.[5] The notification timing requirements of other material changes to ensure maintenance of status are not so clear. Therefore, a conservative approach requires that an amendment reflecting the material change to an L petition be filed before any attempt to extend status is sought. A more aggressive approach, often brought about by necessity and lack of knowledge of the material change until it is time to extend status, would allow an amendment and extension to be sought at the same time.

BLANKET APPROVALS

Blanket L approval provides a useful tool for international organizations to quickly transfer executive, managerial, or specialized knowledge personnel to the United States. However, corporate restructuring often results in fundamental organizational changes to the corporate relationships among the entities listed on the blanket approval. For example, new entities may become qualifying entities while others may no longer be affiliated with the petitioning entity approved for the blanket approval. Furthermore, a new acquiring parent company may not possess a blanket approval while the acquired subsidiary has an approval with indefinite validity. With proper planning and strategic use of a blanket L approval, either through amendment or a new petition, companies should be able to continue to transfer employees seamlessly within the new corporate family.

If it has not already done so, the completion of a corporate restructuring may be the perfect time for a qualifying organization to pursue a blanket approval. From a practical standpoint, the names and ownership structure of all parents, branches, subsidiaries and affiliates are likely to be readily available. These logistical details are the cornerstone of any blanket approval petition and may be difficult for large conglomerates to gather after the fact.

A company should consider amending its existing document as soon as the intention to restructure or create new corporate relationships is announced. The documents reflecting the new relationships of entities on the blanket approval should be submitted as soon as the relationships have been formed or terminated. This is usually evidenced by the actual transfer of stock or the closing date of the sale. Acting with speed and diligence prior to, and immediately after, the sale will allow new transfers to take place under the blanket approval without having to file individual petitions and possibly pay USCIS the $1,000 premium processing fee.

Amending an existing blanket approval following a corporate restructuring may involve new issues that must be resolved, but it also may provide new opportunities for the organization as a whole. An amendment is required whenever there are changes in the corporate structure or positions that may qualify for L classification under the blanket. It is important for a company's blanket petition to accurately reflect the current list of qualifying entities in order to facilitate rapid transfer by employees when required. The last thing any immigration attorney wants to tell his or her corporate client is that it may not transfer the Vice President of its new subsidiary to the United States in two weeks because it failed to list that subsidiary on the company's blanket approval.

A merger or acquisition, in particular, may qualify a previously ineligible petitioner to apply for blanket approval. If, cumulatively, the petitioner and other qualifying organizations meet the requirements for blanket L approval, the newly formed or modified

[4] 8 CFR §§214.1(c)(4), 248.1(b).

[5] 8 CFR §214.2(*l*)(15).

corporate family may be ripe for a blanket L petition.[6] A merger or acquisition may provide a corporate family with a new petitioner that has an office in the United States and has been doing business for over a year,[7] or the new family may cumulatively have the three or more domestic and foreign branches, subsidiaries, or affiliates required to apply for blanket approval.[8] Finally, a merger or acquisition may push a corporate family over the threshold of 10 approved L petitions in the last year, annual sales of at least $25 million, or a U.S. workforce of at least 1,000 employees.[9]

It is important to note that the petitioner under a blanket petition need not be a U.S. entity. Instead, it must have an office in the United States that has been doing business for one year or more.[10] Nor is it required that the actual parent company be the holder of the L blanket approval. If a U.S. corporation with a blanket approval is acquired or owned by a foreign entity, it may hold a blanket approval permitting intracompany transfers within the whole corporate family. Additionally, a foreign entity with a branch in the United States may be eligible for blanket approval.

Creative lawyering may be required when an entity acquires an organization with a valid blanket L approval. Immigration attorneys should carefully examine any existing blanket petitions to determine which entities and corporate structures are listed on the approval notice. In addition, the validity period of any blanket approvals should be reviewed. It is well worth taking measures to ensure a blanket that is valid indefinitely remains so. Rather than pursue a new blanket petition for a newly expanded corporate family, practitioners should consider amending an existing blanket approval that is valid indefinitely but held by what is now a corporate "subsidiary" to include the new corporate parent and all of the corporate parent's existing qualifying organizations.

If both the company being acquired and the company doing the acquiring have L approvals, the blanket approval of either entity could be amended and appended to include all of the entities on the other's blanket approval. However, a company which previously had its own blanket but has been acquired by another entity with its own blanket should use caution if both companies plan to continue to use their own blanket approvals. An amendment to each approval must be filed to reflect changes in the approved relationships that may affect beneficiary eligibility.[11]

When a blanket petition is amended to reflect the name change and to include all of the merged entities, there appears to be no need to amend the individual petitions that were approved under the previous blanket, even if the beneficiaries' individual Approval Notices, Nonimmigrant Petitions based on Blanket L Petition, or Arrival/Departure cards reflect the old name. Most practitioners believe that the required notice of the change to qualifying organizations is satisfied by amending the blanket petition.[12]

In addition, the regulations permit a foreign national admitted to the United States under an approved blanket petition to be reassigned within the organizations listed in the blanket approval without notification to or amendment with USCIS if the employee will be performing virtually the same job duties as he or she was in the initial petition.[13] Therefore, if a foreign national is transferred to "virtually the same" position at a corporate affiliate that has been added to the petitioning company's blanket after a corporate restructure, that blanket-based I-129S petition need not be amended.

While I-129S petition amendments might not be necessary after amending the blanket approval appropriately, in most cases, it is recommended that counsel prepare a document for the company's execution clarifying the nature of the corporate reorganization and any name change and asserting that the visa and the approval notice remain valid. Such a letter can prove useful to the foreign national when questioned upon admission to the United States by a Customs and Border Protection (CBP) officer who may not have sufficient time to review the legality of visa authorization post-corporate reorganization.

INDIVIDUAL L PETITIONS

There is an obligation to notify USCIS when there is a material change to a foreign national's job duties or to the corporate relationship qualifying the petitioner to utilize the L program. Therefore, individual

[6] 8 CFR §214.2(*l*)(4)(i)(4).

[7] 8 CFR §214.2(*l*)(4)(i)(4)(A).

[8] 8 CFR §214.2(*l*)(4)(i)(4).

[9] 8 CFR §214.2(*l*)(4)(i)(4)(D).

[10] 8 CFR §214.2(*l*)(4)(i)(4)(B).

[11] 8 CFR §214.2(*l*)(7)(i)(C).

[12] *See id.*

[13] 8 CFR §214.2(*l*)(5)(ii)(G).

petitions that are not under L blanket approval may need an amendment to explain a new corporate relationship to USCIS, unlike I-129S petitions under blanket approval that do not need to be amended. In particular, when a foreign national is transferred from one company to another in the same organization and becomes an employee of the new company, whether necessitated by corporate restructuring or not, an amended individual petition must be filed in order for USCIS to confirm that the new entity is related to the foreign entity in a qualifying capacity.[14]

It also may be appropriate to file an amendment where the corporate relationship between the qualifying entities has changed, even though the relationship still qualifies for the L program and the duties the employee will be providing have not materially changed. If there is a material change in the terms and conditions of employment or the beneficiary's eligibility, an amendment must be filed.[15] For example, while a U.S. parent company may have initially applied for L classification for an employee of its subsidiary abroad, if that parent company and subsidiary are both acquired by a new parent company, it might be necessary to amend the individual employee's petition to explain the new corporate relationship, as this may be considered a material change to the terms and conditions of employment.

Although both USCIS and the Department of State (DOS) have maintained fairly liberal standards for "material change," the prudent practitioner may wish to amend petitions in light of any change that the government may consider "material." If a petitioner has a strong case going in, it is well worth the amendment time and cost to avoid a potential misrepresentation by the foreign national at the port of entry in subsequent trips to the United States. It would be an inopportune time for the government to be notified that, due to corporate restructuring, the foreign national is employed by an employer that has a different name than the one listed on his or her visa or arrival/departure card or I-797 Approval Notice.

While a client may be hesitant to amend an individual L-1 petition for a change that the government may consider immaterial, many practitioners will combine an amendment with an extension of the L validity period in an attempt to maximize the benefit of pursuing an amendment. Although the government has accepted these "amend and extend" petitions, the petitioner runs the risk that USCIS may view this approach as invalid. In reality though, simultaneous "amendment and extension" is a necessity when a client fails to inform the attorney of corporate changes that may have been grounds for an amendment.

A promotion in and of itself may not necessitate an amendment.[16] However, it is important to note that if the job duties of an individual in L-1B classification change, due to corporate restructuring or otherwise, such that the individual's duties are now executive or managerial rather than utilizing specialized knowledge, and an amendment to L-1A status is required, the employee must be performing executive or managerial duties for six months prior to the end of his permitted five years in L-1B status.[17] When an amendment from L-1B to L-1A classification is filed with more than six months remaining in the foreign national's stay in L-1B classification, the individual may remain in the United States for a total of seven years in L status if the amendment is approved by USCIS.[18] Note that the amended petition seeking an "upgrade" to L-1A classification must be *approved* more than six months before the end of L-1B status.

It is also important to note that USCIS and DOS often interpret amendment requirements differently. While most counsel will advise companies to file amendments to petitions to advise regarding a managerial promotion, for example, DOS officers might feel that the notification through consular interview and visa revalidation might be excessive. In these days of zero tolerance, however, the best practice is usually to err on the side of caution and notify the government of any changes in employment which may be viewed as material.

CHANGE OF STATUS

At times, a qualifying corporate relationship no longer exists after corporate restructuring. In this situation, most common in spin-offs and divestitures, it is impossible to salvage L-1 eligibility even by timely notifying the government of the change. In that situation, the foreign national and the company must explore other nonimmigrant visa options, be-

[14] *See* legacy INS Memo CO 2141-C, *supra* note 3.

[15] *Id.*

[16] Legacy INS letter from J. Brown, Acting Branch Chief, Business & Trade Services Branch, Benefits Division, INS, HQ 70/6.2.18 (Oct. 14, 1997), *reproduced in* 75 *Interpreter Releases* 130, 155 (Jan. 26, 1998).

[17] 8 CFR §214.2(*l*)(15).

[18] *Id.*

cause the foreign national's L-1 classification technically becomes invalid immediately upon the dissolution of the qualifying corporate relationship.

Just as corporate restructuring may make a foreign national ineligible for continued L classification due to a change in the qualifying corporate relationship, it also may eliminate options for individuals working in the United States in other immigration classifications. In particular, if a U.S. company acquires a foreign company that had a significant investment in the United States and had employees or owners working in the United States in E-1 or E-2 classification, a change in the ownership structure of the company may mean that those employees are no longer eligible for E classification. However, those individuals may be eligible to change status to L-1 classification in certain circumstances.

Some corporate restructuring may have the very positive effect of allowing additional intracompany transfers to the United States. For instance, if a company acquires a new affiliate abroad, it can transfer employees who have served that affiliate abroad in executive, managerial or specialized knowledge positions for one year immediately after the new qualifying corporate relationship has been established. There is no need to wait until the employees have directly worked for the acquiring company for one year before filing an L petition.

THE AFTERMATH

While many clients may be hesitant to spend the time and money to notify their immigration attorney, let alone the government, of changes in corporate structure, the impact on their valued intracompany transfers could be devastating if they do not. A company executive may be denied entry by CBP because she mentions that the company listed as her employer on her visa or approval notice is not her current employer. Or an employee whose specialized knowledge is urgently needed by the U.S. company may have to wait weeks or months while his petition works its way through USCIS processing because the entity that employs him abroad was not added to the blanket approval after a corporate acquisition. Most seriously, valid L-1 classification may be inadvertently dismantled due to inattention by the company and its immigration attorneys to the impact of corporate restructuring. The very real implications of corporate restructuring on intracompany transfers should be affirmatively addressed in order to prevent such ineligibilities from occurring.