Assuage Therapy -
Enticing M & A Lawyers to Help with Immigration Successorship

By Angelo A. Paparelli*

Corporate counsel can be a timorous, risk-aversive lot. Transactional lawyers, when crafting agreements on behalf of the purchaser of a business, often visualize a host of worst-case scenarios. With these woeful outcomes in mind, corporate attorneys then draft provisions in the "deal docs" that place every conceivable liability and risk on the seller, or require the seller to indemnify the buyer against all manner of imagined or imaginary reversals of fortune.

Immigration lawyers, however, are accustomed to dealing with risk and uncertainty. After all, we make our livelihood by repeatedly swallowing the huge risk that – year in and year out – we can expend just enough time and effort (without a cost overrun on our typically flat and often meager legal fees) to coax a dysfunctional and resistant federal bureaucracy to grant immigration benefits within the short deadlines of our deserving but demanding clients.

Not surprisingly, when an immigration lawyer encounters a transactional attorney at the epicenter of a corporate restructuring, personalities and lawyering styles often clash. Neither wants to be dubbed the spoiler, but each lawyer works with a specific agenda. The immigration practitioner hails from the tradition that law is a helping profession, and wants to see that sponsored foreign workers and family members keep their U.S. jobs and households intact while moving along on the path to permanent residence. Therefore, the immigration lawyer wants foremost to preserve nonimmigrant status and in-the-pipeline employment-based permanent residence initiatives. For the M & A lawyer, however, preservation of the purchaser's income and asset values, while minimizing the client's risks and liabilities, is often the overarching concern. Perhaps a few lost jobs of foreign workers may seem to the corporate lawyer as the inevitable eggs that must be cracked to make a tasty omelet.

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To compound the challenges, U.S. immigration law places significant obstacles in the way of a lawyerly rapprochement. The venerable and evolving (albeit largely uncodified) principle of successorship in interest enables the preservation of immigration status and of pipeline green-card benefits, but only if the acquiring party assumes all (or substantially all) of the seller's immigration-related assets and obligations.[1]

An earlier line of legal authority, or more precisely, a single precedent decision stretched far beyond its facts – *Matter of Dial Auto Repair Shop*, 19 I. & N. Dec. 481 (Comm'r 1986) – and several nonbinding immigration-agency advisory letters, held the strict view of successorship in interest. Under this strict construction, immigration successorship was only available if the buyer acquired all of the seller's assets and liabilities and, after the closing, engaged in the same business as the seller. Later, the stance softened. Successor in interest eligibility could be attained if the buyer merely acquired substantially all of the assets and liabilities of at least a division of a seller's company. With the enactment, however, of § 401 of the Visa Waiver Permanent Program Act, Pub. L. 106-396, AILA InfoNet, Doc. No. 00101901, codified at Immigration and Nationality Act (INA) § 214(c), 8 USC § 1184(c), the test for immigration successorship – at least for the H-1B visa category – is now in the relaxed form described above, requiring merely the assumption of the acquired entity's immigration-related assets and liabilities.

How then can the deal go forward while preserving immigration status and future employment-based benefits for the seller's erstwhile employees? The "woe is me," "I'm just a lowly immigration lawyer" approaches will not do, because they are nothing but synonyms for victimhood and self-pity.

The resourceful immigration lawyer must instead be proactive. Immigration practitioners must have an ear to the ground and a finger in the wind (a good yoga class might help the less flexible achieve this seemingly awkward but utilitarian posture). He or she must consistently remind employer representatives and foreign workers at every touchpoint that any change in company business activity or structure, and any other potential triggering events, must be discussed with immigration counsel before they are allowed to transpire. This is also a good way for the immigration practitioner to try and preserve the legal representation when the transfer of personnel shifts to the buying entity. With the following approach, consistently applied, the proactive immigration lawyer will become aware of many more deals before they occur.

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[1] For a discussion of the gradual relaxation of eligibility requirements for a successorship in interest, *see* Angelo A. Paparelli, Alan Tafapolsky, Ted Chiappari, Susan Cohen, & Stephen Yale-Loehr, "It Ain't Over Till It's Over: Immigration Strategies in Mergers, Acquisitions and Other Corporate Changes," *Bender's Immigration Bulletin* (Oct. 1, 2000 and Oct. 15, 2000); Alan Tafapolsky, Angelo A. Paparelli, A. James Vazquez-Azpiri and Susan K. Wehrer, "Thriving on Change: How to Solve Immigration Problems in Merger & Acquisition Deals," *New Rules for the New Millennium* (AILA 2001), Angelo Paparelli, Daryl Buffenstein & Robert Banta: *Evading "the Slings and Arrows of Outrageous Fortune": The Immigration Consequences of Mergers, Acquisitions and Other Business Changes*, 93-11 Immigr. Briefings (Nov. 1993).

The first step involves a polite but insistent request for an introduction to the buyer's corporate counsel, and for a copy of the actual contract documents, preferably while still in draft, in order to ascertain the precise form that the corporate restructuring will take. This request should ultimately produce an opportunity to confer with the lawyer drafting the contract documents and receive a copy of the current draft or a reply that the draft is not yet prepared.

With client consent, the immigration lawyer should then reach out to the transactional lawyer and explain the possible downside risks if immigration-compliance concerns are ignored. The immigration lawyer should describe for corporate counsel how truly unfortunate it would be if immigration requirements are overlooked and as a result the key foreign personnel (who just happen to have in their heads the intellectual property that makes the deal worth doing), along with their immediate relatives, were to lose nonimmigrant status and eligibility for lawful permanent residence and be involuntarily pushed into unlawful immigration status, and conceivably as well, be placed in removal proceedings.

This conversation is also the optimal time to mention to the M & A attorney other foreseeable consequences if immigration formalities are not satisfied. Here, with a deft touch, the immigration lawyer would lightly adumbrate the proliferation of Swift-style raids, other recent ICE enforcement initiatives against employers, possible debarment from participation in government contracts, loss of eligibility to sponsor foreign workers in the future, the potential for mandatory Sarbanes-Oxley disclosures of immigration-related material changes affecting the bottom line, RICO class actions for immigration violations, and the trend toward criminal enforcement of the immigration laws.

As corporate counsel's perceived threat level goes from green (low) or blue (guarded), to yellow (elevated) or orange (high), and in the case of the truly fearful, red (severe),[2] the immigration lawyer can then suggest that the risk of adverse immigration consequences can be virtually eliminated with a tad of artful, collaborative drafting.

This, then, is the moment of therapeutic assuagement, when the immigration attorney can explain to transactional lawyer the wholesome benefits that the body corporate can gain from immigration successorship in interest. The immigration lawyer would therefore outline the legitimate techniques available by use of the successorship principle to secure federal government approval for the buyer's lawful authorization to employ key foreign personnel and to arrange for the uninterrupted transfer from the payroll of the seller to that of the buyer. With a reassuring but never unctuous or arrogant tone, the immigration lawyer then would offer the M & A lawyer an explanation of how to accomplish an immigration successorship, and provides (for purposes of illustration) the following

[2] For an analogous color-coded warning system, one oft-ridiculed by late-night comics as fear-inducing and virtually useless, *see* the Department of Homeland Security's "Advisory System" for terrorist threats, accessible at http://www.tiny.cc/Z3bNL (last accessed on March 21, 2007).

suggested contractual provision intended for insertion in the purchase and sale agreement:

> **[Suggested contract language to create immigration-related successorship in interest]**[3]
>
> Effective as of the closing of the **[insert only one: asset acquisition or stock acquisition]** created by this Agreement, **[Seller]** shall cease to serve and **[Buyer]** shall commence to serve as the sponsoring and petitioning employer for U.S. immigration law purposes with respect to individuals formerly employed by the **[Seller]** and hereafter offered employment by **[Buyer]**. As a result, **[Buyer]** shall therefore assume all immigration-related obligations and liabilities that have arisen or will hereafter arise in connection with the submission of petitions, applications or other filings to certain bureaus within the U.S. Department of Homeland Security (U.S. Citizenship and Immigration Services, Immigration and Customs Enforcement, and Customs and Border Protection), the U.S. Department of Labor or the U.S. Department of State (including any U.S. embassy or consular post) requesting the grant of employment-based nonimmigrant and immigrant visa benefits on behalf of these persons. Notwithstanding the foregoing assumption of the specific immigration-related assets and obligations, **[Buyer]** expressly declines to assume all other actual or contingent liabilities of **[Seller].**
>
> The Parties intend that **[Buyer]** (by agreeing to hire the Employees formerly employed by the Company, and agreeing, as a sponsoring employer, to assume the immigration-related obligations and liabilities described above) shall be considered the successor in interest to the **[Seller]** solely and exclusively for U.S. immigration law purposes.

The careful reader will note that the suggested text does not expressly refer to, or assume, any immigration-related liabilities arising under INA §§ 274A, 274B or 274C, 8 USC §§ 1324a, 1324b or 1324c, pertaining to the employment of any person with knowledge that the individual is an unauthorized alien, failure to maintain the Form I-9 (Employment Eligibility Verification), the violation of laws prohibiting immigration-related employment discrimination, and violations for document fraud and falsely made documents. The courts and the agencies charged with interpreting the immigration laws

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[3] The three samples of suggested text provided in the body of this article are meant for illustration purposes only. Every immigration situation presents unique elements which may require a competent immigration lawyer to modify or jettison the suggested text to suit the needs of the client in a given case. The suggested text should not be relied upon as complete or suitable for the reader's particular set of facts and circumstances or applicable law. Caveat lector!

have not formally required the assumption of these additional distinct liabilities to qualify for successor in interest immigration benefits. These potential liabilities are not necessarily related to liabilities arising in connection with the employer-specific petitions and related applications for permission to employ a named nonimmigrant and to allow his/her dependents to accompany the worker in the United States. Therefore, unless clearly required, counsel could endeavor to limit the assumption of immigration-related liabilities to those arising from an employer's status as a petitioner requesting immigration benefits.

This limiting interpretation, involving the assumption of only petition-related liabilities as the sole requirement for an immigration successorship, is consistent with the wording of the INA § 214(c), discussed above, which provides that an "amended H-1B *petition* shall not be required where the *petitioning* employer is involved in a corporate restructuring, including but not limited to a merger, acquisition, or consolidation, where a new corporate entity succeeds to the interests and obligations of the original *petitioning* employer and where the terms and conditions of employment remain the same but for the identity of the *petitioner* [italics supplied]."

Immigration counsel would also provide the corporate client and M & A attorney with the usual supporting letter to serve as factual justification for entitlement to immigration successor in interest eligibility, signed by the buying entity as prospective employer under the employment-based immigration petition:

> **[Suggested language in the company letter of support submitted by the Buyer to U.S. Citizenship and Immigration Services, and/or to the U.S. Department of Labor or Department of State to confirm that the contracting parties intended to create immigration-related successorship in interest]**
>
> Under the terms of the **[Seller]** purchase and sale agreement ("the Agreement"), **[Buyer]** has contracted to serve as the sponsoring employer and petitioner for U.S. immigration purposes with respect to individuals formerly employed by **[Seller]** and offered employment by **[Buyer]**. The Agreement expressly provides that effective as of the closing of the transaction **[Buyer]** shall assume all immigration related obligations, liabilities and costs that have arisen or will hereafter arise in connection with the submission of petitions or applications seeking immigration-related benefits to U.S. Citizenship and Immigration Services, U.S. Department of Labor or U.S. Department of State. As further noted in the agreement, the parties intend that **[Buyer]** shall be considered the successor in interest for immigration-related purposes to **[Seller]**. **[Cite relevant sections of the purchase and sale agreement here].**

The immigration lawyer should buttress the submission with a letter or legal brief to demonstrate legal eligibility for treatment of the acquiring entity as successor in interest for immigration purposes:

> **[Suggested language in the immigration attorney's correspondence or legal brief submitted to U.S. Citizenship and Immigration Services, and/or to the U.S. Department of Labor or Department of State to confirm that continued immigration benefits on the basis of an immigration-related successorship in interest is warranted under the facts in the case]**
>
> The USCIS and legacy INS have long recognized the salutary principle of successorship-in-interest. In both the nonimmigrant and permanent-resident contexts, the USCIS and legacy INS have consistently and liberally applied the principle of successorship-in-interest as a means of allowing businesses to continue to conduct their U.S. operations without disruption following a corporate restructuring, including a sale of stock or assets. This flexible regulatory standard is also reflected in the USCIS's existing regulations. These regulations illustrate the USCIS's enlightened approach in the treatment of successorship in the I-9 context. See 8 C.F.R. § 274a.2(b)(1)(viii)(A) which defines successorship for purposes of continuing employment authorization in the following way: "[successorship and continued employment authorization apply to] an employer who continues to employ some or all of a previous employer's workforce in cases involving a corporate reorganization, merger, or sale of stock or assets." Similarly, INA § 214(c) dispenses with the need to file new or amended H-1B petitions following a corporate restructuring "where the petitioning employer is involved in a corporate restructuring, including but not limited to a merger, acquisition, or consolidation, where a new corporate entity succeeds to the interests and obligations of the original petitioning employer and where the terms and conditions of employment remain the same but for the identity of the petitioner."

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As this article demonstrates, the meeting of the transactional attorney and the immigration lawyer in the heat and tension of an M & A deal need not resemble the pasta-on-the-wall scene in *The Odd Couple*.[4] Peaceful coexistence is attainable, and no

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[4] In the classic scene from the Broadway play and motion picture, *The Odd Couple,* Oscar Madison (played by Walter Matthau) lifts a plate of pasta – lovingly prepared by Felix Unger (Jack Lemmon) – and calls the dish spaghetti, only to have Felix clarify scornfully that it is not spaghetti but linguini. Oscar then angrily throws the plate at the kitchen wall, replying: "Now it's gahhrbijjgg!"

one need sing *Kumbaya*.[5] With a confident and assertive immigration lawyer directing the orchestration, the successor-in-interest balm can keep the client's band of loyal foreign workers marching forward happily, on and on and on, down the green card road.

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[5] For background on the transition of this ditty from folk song to satirical reference, *see* http://en.wikipedia.org/wiki/Kumbaya (last accessed on March 21, 2007).