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Constanza Mundt

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LOSS OF HUMAN CAPITAL: CORPORATE TRANSACTIONS AND THEIR IMPACT ON THE L-1 VISA FOR EMPLOYEES

Constanza Mundt*

I. INTRODUCTION

Today's world economy is no longer based on the individual markets within one's country.¹ Instead, global interaction is dominant, which requires cooperation between nations by means such as the Group of Twenty ("G-20") summit.² Companies have expanded their business to different nations all over the world by trade, opening of subsidiaries, or acquisition of foreign entities.³ Today, mergers and acquisition ("M&A") account for a high volume of transactions compared to traditional means of economic interactions such as trade.⁴

*Juris Doctor Candidate, May 2018; German attorney, graduated Humboldt Universität zu Berlin. To my parents, for all the support and opportunities that they have offered me to grow as a person and to making me believe I can achieve whatever I wish to. To my siblings, Bettina, Annette, and Benedikt, for always inspiring me and giving me moral support. To Sabine Paul for showing me the possibilities of an international law career. Finally, to Rhona Mae Armorado and Professor Meredith Miller for their insight in the topic, guidance during the drafting, and understanding of the importance of this Note to me.

¹ Thieß Petersen, Ulrich Schoof, Erdal Yalcin, Gabriel Felbermayr, Marina Steininger, *Global Impact of a Protectionist U.S. Trade Policy*, GED FOCUS PAPER, Sept. 2017.

² The G-20 summit is a meeting of the twenty important industrial and emerging countries. During this summit wider interests beyond pure economics of these countries such as long-term development. See Michael Wilkinson, *Five Biggest Priorities for Theresa May at the G20 Summit in China*, THE TELEGRAPH, Sept. 3, 2016, <http://www.telegraph.co.uk/news/0/five-biggest-priorities-for-theresa-may-at-the-g20-summit-in-chi/>; Steven Erlanger and Julie Hirschfeld Davis, *Once Dominant the US finds itself isolated at G-20*, N.Y. TIMES, July 7, 2017, <https://www.nytimes.com/2017/07/07/world/europe/trump-g-20-trade-climate.html>.

³ Press Release Prensa, Siemens acquires Shinwha Electronics Ltd. and strengthens its global leadership position in the Fire Safety Market (Apr. 1, 2008), [https://www.siemens.com/press/en/pressrelease/?press=/en/pressrelease/2008/building_technologies/ibt20080401.htm&content\[\]=ICBT&content\[\]=BT](https://www.siemens.com/press/en/pressrelease/?press=/en/pressrelease/2008/building_technologies/ibt20080401.htm&content[]=ICBT&content[]=BT).

⁴ Iulian Warter & Liviu Warter, *Latest Trends in Mergers And Acquisitions Research. The New Pattern of Globalization*, BULETINUL INSTITUTULUI POLITEHNIC DIN IASI, 27, (Oct. 6, 2014),

An example of M&A are the failed 2017 merger negotiations between T-Mobile, a German-based telecommunications company, and Sprint, a United States (“US”) company.⁵ The merger would have created a very competitive US mobile telecommunications network.⁶ If T-Mobile had acquired Sprint, T-Mobile would have likely benefitted from Sprint’s employees who have specialized knowledge concerning wireless data networks.⁷ To benefit from employees with specialized knowledge, many countries assist corporations with their international endeavors by providing an intracompany visa,⁸ which eases the visa application process.⁹ Assisting entities with a simplified visa process allows entities to transfer employees within a corporate global group with fewer difficulties.¹⁰

Facilitating global intracompany transfers of employees through a special visa type was adopted by the US in recognition of the trend toward globalized corporations.¹¹ In 1970, Congress created the predecessor of today’s L-1 visa, which was introduced to assist in the transfer of key personnel with unique knowledge of the business of the US and/or foreign employer to the US for a limited amount of time.¹² The L-1 visa, a non-immigrant visa for intracompany transfers, allows companies to ensure the uniformity of company policies and

https://www.researchgate.net/publication/267765136_LATEST_TRENDS_IN_MERGERS_AND_ACQUISITIONS_RESEARCH_THE_NEW_PATTERN_OF_GLOBALIZATION.

⁵ The merger finally failed because the stockholders of T-Mobile would not have profited enough from the merger given the high stock price. See Jackie Wattles & Seth Fiegermann, *Sprint and T-Mobile Abandon Merger Talks*, CNN, Nov. 4, 2017, <http://money.cnn.com/2017/11/04/news/companies/sprint-t-mobile-merger-deal/index.html>; Trefis Team, *Will the T-Mobile Sprint Merger finally come to Fruition?*, FORBES, Sept. 25, 2017, <https://www.forbes.com/sites/greatspeculations/2017/09/25/will-the-t-mobile-sprint-merger-finally-come-to-fruition/#65a68fcb7404>.

⁶ *Id.*

⁷ *Id.*

⁸ Intracompany transfer means the exchange of personnel between different entities within the same corporate group. *Intra-Company Transfer*, SOUTH AFRICAN HIGH COMMISSION, https://www.sahc.org.au/visas/Intra_Company_Transfer.htm (last visited Mar. 10, 2018).

⁹ *Intra-Company Transfer*, SOUTH AFRICAN HIGH COMMISSION, https://www.sahc.org.au/visas/Intra_Company_Transfer.htm (last visited Mar. 10, 2018).

¹⁰ *Id.*; *International Mobility Program: Canadian interests – Significant benefit – Intra-company transferees [R205a] exemption code C12*, GOVERNMENT OF CANADA, <http://www.cic.gc.ca/english/resources/tools/temp/work/opinion/transferees/index.asp> (last visited on Mar. 10, 2018); *Tier-2 (Intra-company Transfer) visa*, GOV.UK, <https://www.gov.uk/tier-2-intracompany-transfer-worker-visa> (last visited Mar. 10, 2018).

¹¹ Memorandum from the American Immigration Lawyers Association on the Interpretation of the Term “Specialized Knowledge” in the Adjudication of L-1B Petitions 4 (Jan. 24, 2012), www.aila.org/File/DownloadEmbeddedFile/45095 [hereinafter Specialized Knowledge].

¹² X, 2008 Immig. Rptr. LEXIS 12131, *22, (2008).

the application of propriety knowledge to a foreign entity within its corporate group.¹³

For example, Capital Air Survey Limited was a Canadian company that specialized in aerial survey photography. Capital Air Survey Inc., its US subsidiary,¹⁴ sought to classify its foreign employees as intracompany transferees based on their “specialized knowledge.” Thus, Capital Air Survey Inc. filed a petition with United States Citizenship and Immigration Services (“USCIS”) for the L-1 visa type as it was designed for employees that had essential knowledge of proprietary interests of the business or its management, who cannot easily be recruited in the local employment market.¹⁵

Specialized knowledge, under the L-1 visa, covers employees required for work with a product developed within a company unique to the market such as the aerial photography equipment and system of Capital Air Survey Inc.¹⁶ This visa is also used by a broad group of companies such as Price Waterhouse Coopers and Tata Consultancy Services Limited as it provides a reliable means for international entities to ensure business success by using entity knowledge within a group worldwide.¹⁷ The L-visa is popular with large corporations because it provides a reliable option to transfer key employees to the US.¹⁸

In 2015, 648,611 L-1 visas were issued to foreign nationals to allow them to take up employment in the United States.¹⁹ The Foreign Affairs Manual states, “A U.S. company, which is involved in business as an employer in the United States and in at least one foreign country, can utilize the L classification to transfer to the United States

¹³ Memorandum from Charles K. Edwards, Deputy Inspector General on the Implementation of L-1 Visa Regulations 6-7 (Aug. 9, 2013), https://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-107_Aug13.pdf [hereinafter L-1 Visa Regulations].

¹⁴ A parent is a corporation, firm, or other legal entity that has subsidiaries. A subsidiary is a corporation that directly or indirectly is owned to more than fifty percent by another and this entity has control over the owned entity. 8 C.F.R. § 214.2(l)(ii)(I)-(L)(3) (Lexis Advance through the July 19, 2017 issue of the Federal Register. Pursuant to 82 FR 8346 (“Regulatory Freeze Pending Review”).

¹⁵ Colley, 18 I. & N. Dec. 117 (Dep’t of Justice June 19, 1981).

¹⁶ *Id.*

¹⁷ Approved L1 Petitions by Employer Fiscal Year 2016, U.S. CITIZENSHIP AND IMMIGRATION SERVS., Aug. 15, 2017, <https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/BAHA/L1-Approved-Petitions-FY2016-12.27.17.pdf>.

¹⁸ L-1 Visa Regulations, *supra* note 13, at 5.

¹⁹ U.S. CITIZENSHIP AND IMMIGRATION SERVS., *supra* note 17.

employees abroad who are unattached to a foreign entity.”²⁰ Although the L-1 visa was developed to simplify the visa application process for key employees,²¹ there are multiple requirements for an employee to be eligible for the L-1 Visa, including a qualifying pre-employment in a specialized knowledge, managerial, or executive capacity for a qualified entity and qualified employment in the US, subject to specific nuances.²² Thus, only a limited group of individuals are able to satisfy the multiple eligibility requirements for this visa category.

Employees petitioned for an L-1 Visa need a qualifying employment abroad as either executives, managers, or employees in possession of specialized knowledge, and they must subsequently function as a specialist or executive in the US.²³ Further, employees must have prior employment in a qualifying position for one full year abroad, within the past three years, before applying for the L-1 status.²⁴ Even though not explicitly stated in the regulations, it is necessary that the prior employment was full-time.²⁵ The prior employment has to be within the corporate group of the US employer such as “by a parent, branch, affiliate, or subsidiary.”²⁶ Finally, the petitioning US entity must have a qualifying intracompany relationship with the foreign entity that employed the foreigner abroad.²⁷ The application requires voluminous evidence regarding the qualifying relationship as this is was the purpose of the introduction of the visa type.²⁸

The qualifying relationship between the US petitioner and the employer abroad is a key element in the visa eligibility to allow a foreign national to take up employment in the US under this simplified

²⁰ 9 FAM 402.12-10(B) (2015); *see* Thompson, Case No. ALB-N-45 (Aug. 11, 1981), <https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/2889.pdf>.

²¹ Specialized Knowledge, *supra* note 11, at 4.

²² 9 F.A.M. 402.12-4(A)(2) (2017); 8 C.F.R. § 214.2(l) (Lexis Advance through the Mar. 14, 2018 issue of the Federal Register. Title 3 is current through Feb. 2, 2018)

²³ 9 F.A.M. 402.12-4(A)(2) (2017); 8 C.F.R. § 214.2(l)(ii)(C)-(E) (Lexis Advance through the Mar. 14, 2018 issue of the Federal Register. Title 3 is current through Feb. 2, 2018). What position satisfies these requirements has been highly disputed in the past but is not within the scope of this article. L-1 Visa Regulations, *supra* note 13, at 5; X, 2008 Immig. Rptr. LEXIS 12131, *56-61.

²⁴ 9 F.A.M. 402.12-4(A)(1) (2017).

²⁵ 9 F.A.M. 402.12-13(b) (2015).

²⁶ 8 C.F.R. § 214.2(l) (Lexis Advance through the July 12, 2017 issue of the Federal Register. Pursuant to 82 FR 8346 (“Regulatory Freeze Pending Review”), certain regulations will be delayed pending further review. See Publisher’s Note under affected rules. Title 3 is current through July 7, 2017).

²⁷ 9 F.A.M. 402.12-9(A)(a).

²⁸ L-1 Visa Regulations, *supra* note 13, at 4.

visa category.²⁹ When this visa category was implemented in its current version in 1990, however, cross-border M&A transactions were not prevalent.³⁰ Cross-border M&A only represented around USD 100 billion worldwide in the period from 1987 to 1994.³¹ By the year 2000, the number of cross-border M&A transactions had risen to approximately USD 800 billion worldwide and were driven by transactions in the service and telecommunication sector.³²

The increased relevance of corporate restructuring and transactions, as well as the impact of these proceedings on the corporate relationships, has challenged, and continues to challenge, the definition of a qualifying relationship under an L-1 visa.³³ A changed corporate structure may sever the qualifying relationship.³⁴ When an entity or a part of an entity is sold, there may no longer be a connection between the past employing entity and the current US employer.³⁵ The employee may lose the required qualifying pre-employment by the severed connection between the foreign and US employing entity depending on the form of acquisition.³⁶

In 2016, the global M&A market accounted for USD 3.9 trillion, showing the economic importance of M&A and the possible scope of its impact despite political movements³⁷ for more protected local markets.³⁸ Of the USD 3.9 trillion M&A transactions, 36% were cross-border M&A transactions.³⁹ Under US immigration law, such corporate restructuring can impact the qualifying relationship between

²⁹ Stephen Hader & Scott Syfert, *The Immigration Consequences of Mergers, Acquisitions, and Other Corporate Restructuring: A Practitioner's Guide*, 24 N.C.J. INT'L L. & COM. REG. 547 (Spring 1999).

³⁰ Cross-border refers to transactions that are not limited to one nation but that extend beyond national borders and involve parties in multiple nations. SIMON J. EVENETT, *THE CROSS-BORDER MERGERS AND ACQUISITIONS WAVE OF THE LATE 1990s*, 419, (Robert E. Baldwin and L. Alan Winters eds., 2004).

³¹ *Id.*

³² *Id.* at 419-24.

³³ Hader & Syfert, *supra* note 28, at B.1.b.

³⁴ *Id.* at B.1.f.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Petersen, et al., *supra* note 1.

³⁸ 2017 M&A Global Outlook: Finding opportunities in a dynamic market, J.P. MORGAN, 2, (2017), <https://www.jpmorgan.com/jpmpdf/1320723701797.pdf>.

³⁹ *Id.*

the entities and, thus, result in the loss of L-1 visa status for current foreign employees in the US.⁴⁰

Multiple entities that have international recognition such as Price Waterhouse Coopers and Tata Industries participate in the L-1 visa program and regularly expand their market access and success through acquisitions of foreign entities, which can impact the eligibility of employees for an L-1 visa.⁴¹ During these business-driven decisions, the impact on existing employee structures is generally disregarded, which leads to potentially undesired results such as termination of employees' visas and loss of substantial human capital of a US entity upon conclusion of these transactions.⁴² Today, substantial investments such as the acquisition of internet start-ups are especially reliant on the employees of the acquired entity who have specialized knowledge of the products developed.⁴³ In the start-up acquisitions, the possible loss of employees or ineligibility for the L-1 visa can be crucial.⁴⁴ Given the economic significance of M&A and the inherent risk of loss of human capital due to immigration rules, M&A structuring must be well-planned to avoid the loss of employee expertise.

This Note takes the position that conventional M&A consulting does not examine immigration law impacts in corporate takeovers, which leads to a loss of employees, also referred to as human capital. Human capital is valued in the acquisition process and can be essential in M&A negotiations given proprietary knowledge of the employees. However, the L-1 visa, which is specifically targeted towards easing the visa application process for human capital, is vulnerable to corporate restructuring. Thus, structuring M&A transactions requires substantial care to avoid significantly impacting the international employee structure within the US entity employing L-1 visa holders.

⁴⁰ *Id.*; Stephen Hader & Scott Syfert, *The Immigration Consequences of Mergers, Acquisitions, and Other Corporate Restructuring: A Practitioner's Guide*, 24 N.C.J. Int'l L. & Com. Reg. 547, (Spring 1999) B.1.f..

⁴¹ Sachin Dave & Vinod Mahanta, *Deloitte, KPMG & PwC in close race to acquire BMR Advisors*, THE ECONOMIC TIMES, July 16, 2017, <https://economictimes.indiatimes.com/industry/services/consultancy/-audit/deloitte-kpmg-pwc-in-close-race-to-acquire-bmr-advisors/articleshow/59622605.cms>; Morgen Witze, *Case study: Tata*, FIN. TIMES, Dec. 29, 2010, <https://www.ft.com/content/8e553742-136c-11e0-a367-00144feabdc0>.

⁴² Hader & Syfert, *supra* note 28, at I.

⁴³ Hugh McIntyre, *Spotify Has Acquired Blockchain Startup Mediachain*, FORBES, Apr. 27, 2017, <https://www.forbes.com/sites/hughmcintyre/2017/04/27/spotify-has-acquired-blockchain-startup-mediachain/#7ce0664c69ee>.

⁴⁴ *Id.*; X, 2008 Immig. Rptr. LEXIS 12131, *49.

This Note will be divided into five parts. Part II will introduce the L-1 visa and define the requisite qualifying relationship. Part III will analyze the main M&A forms, the statutory merger, asset acquisition, and stock acquisition. Part III also includes a discussion of the impact of the different forms of transactions on the L-1 visa. Thereafter, Part IV will outline a recommendation on structuring transactions regarding a single entity as well as transactions in a corporate group. In Part V, the Note will conclude that, overall, the most preferable method of acquisition is a stock purchase as it does not impact the legal persona of the acquired entity.⁴⁵ Finally, Part V will also discuss possible legislative changes to meet the modern transactional environment.

II. THE L-1 VISA

When an employer in the US files a visa application for an employee, the employer is called the petitioner because it is filing for the employment authorization of the employee through a visa (i.e., the petition) with the USCIS.⁴⁶ The employee is called the beneficiary because he will be conferred the benefit of the employment authorization in the US.⁴⁷ The employer must file an amended petition once there is a change in the employment relationship between the foreign employee and the employer.⁴⁸ An amended petition provides USCIS with information such as a promotion of the employee, a change of the employer name, or if one US subsidiary switches to another US subsidiary of the corporate group in a similar position.⁴⁹

The two generally available types of work visas for foreign nationals of all nationalities are the H-1B and the L-1 visa.⁵⁰ The regular work visa for professionals, also known as H-1B visa, is a

⁴⁵ 1-5A ELEANOR FOX & BYRON FOX, *CORPORATE ACQUISITIONS AND MERGERS* § 5A.04 (Matthew Bender 2017) [hereinafter 1-5A Fox & Fox].

⁴⁶ *Instructions for Petition for Nonimmigrant Worker*, DEP'T HOMELAND SEC., <https://www.uscis.gov/sites/default/files/files/form/i-129instr.pdf>, (last visited Mar. 26, 2018) [hereinafter *Instructions for Petition*]; 9 FAM 402.12-8(B).

⁴⁷ *Instructions for Petition*, *supra* note 46; 9 FAM 402.12-8(C).

⁴⁸ 9 FAM 402.12-16(C)(c).

⁴⁹ Memorandum from William R. Yates, Assoc. Dir. Operations on The Changes to the L Nonimmigrant Classification made by the L-1 Reform Act of 2004 and Revisions to Adjudicator's Field Manual (AFM) Chapters 32.3, 32.4(a), and 32.5 (AFM Update AD05-26) 9 (July 28, 2005), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2005/lvisareform072805.pdf.

⁵⁰ L-1 Visa Regulations, *supra* note 13, at 5.

lengthy process and does not provide an employer with the security of being able to employ foreign talent as it is limited to 65,000 regular H-1B visas per year.⁵¹ In 2016, over 236,000 applications were filed for the 65,000 available H-1B visas.⁵²

The immigration authorities draw the H-1B applications randomly. Once chosen, the application will be processed to determine if it fulfills several requirements such as a minimum of a bachelor's degree, employment in a position that usually requires the minimum of a bachelor's degree, and an approved Labor Conditions Application ("LCA") from the Department of Labor.⁵³ The LCA certifies that the foreign national is employed—in a comparable form to local employees in this area—and no similarly qualified US national has previously applied to this specific position, which has been publicized in a good faith effort (i.e., two different forms of media such as an online job platforms and a national or local newspaper).⁵⁴

By contrast, the L-1 visa process is easier for the employer.⁵⁵ The process exempts employers from completing an LCA and allows for a direct visa application with the USCIS.⁵⁶ The regulatory intent of the L-1 visa was to ease the application process for international companies so these entities have an effective means to transfer employees between different global locations.⁵⁷ However, the employees will only be granted an L-1 visa if the employee meets the eligibility criteria as follows:

⁵¹ USCIS Completes the H-1B Cap Random Selection Process for FY 2017, U.S. CITIZENSHIP AND IMMIGRATION SEVS., <https://www.uscis.gov/news/alerts/uscis-completes-h-1b-cap-random-selection-process-fy-2017> (last visited Mar. 10, 2018).

⁵² *Id.*

⁵³ *H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models*, U.S. CITIZENSHIP AND IMMIGRATION SEVS., <https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-models> (last visited Mar. 16, 2018) [hereinafter *H-1B Specialty Occupations*].

⁵⁴ *Id.*; 9 FAM 402.10-4(B); Labor Condition Application for Nonimmigrant Workers, U.S. Dep't Labor, https://www.foreignlaborcert.doleta.gov/pdf/eta_form_9035cp.pdf, (last visited: Mar. 16, 2018).

⁵⁵ L-1 Visa Regulations, *supra* note 13, at 5.

⁵⁶ U.S. CITIZENSHIP AND IMMIGRATION SEVS., ADJUDICATOR'S FIELD MANUAL – REDACTED PUBLIC VERSION 32.6(e)(2)(C), <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-15111/0-0-0-15335.html> (Last visited Mar. 16, 2018).

⁵⁷ X, 2008 Immig. Rptr. LEXIS 12131, *22; L-1 Visa Regulations, *supra* note 13, at 6-7.

- The employee has been employed continuously for one year within the past three years by the same employer or a company within the employer's corporate group;⁵⁸
- The employee possesses employment experience in a specialized knowledge, managerial, or executive capacity abroad;⁵⁹
- The employee will work in the US in either a specialized knowledge, managerial, or executive role; and⁶⁰
- The employer must be doing business in at least one other country.⁶¹

Thus, while the L-1 visa process is simpler than the H-1B application, there are stricter requirements that employers and employees must satisfy. Specifically, petitioners for L-1 visa must satisfy the prerequisites of working within the corporate group, also known as the “qualifying relationship” and “doing business.”

⁵⁸ 8 C.F.R. § 214.2(l)(ii) (Lexis Advance through the July 12, 2017 issue of the Federal Register. Pursuant to 82 FR 8346 (“Regulatory Freeze Pending Review”).

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge. Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement.

⁵⁹ 8 C.F.R. § 214.2(l)(ii) (Lexis Advance through the July 12, 2017 issue of the Federal Register. Pursuant to 82 FR 8346 (“Regulatory Freeze Pending Review”), certain regulations will be delayed pending further review.).

⁶⁰ *Id.*

⁶¹ 8 C.F.R. § 214.2(l)(ii)(G)(3) (Lexis Advance through the July 12, 2017 issue of the Federal Register. Pursuant to 82 FR 8346 (“Regulatory Freeze Pending Review”), certain regulations will be delayed pending further review.).

A. Doing Business

As a prerequisite for the qualifying relationship, an employer must be “doing business” abroad. “Doing business” is defined in the Code of Federal Regulations (“C.F.R.”) as the “regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the US and abroad.”⁶²

To satisfy the element of “doing business,” the employer is required to submit evidence such as annual reports, employee records, contracts, or invoices.⁶³ The evidence must show that the US entity or organization’s activity exceeded “mere presence” and requires an active market participation, even if this may have been abroad.⁶⁴ Thus, the activities must be targeted toward market expansion internationally with activities such as generating revenue through local clients and employing local work forces.⁶⁵

For a US entity, “doing business” does not require a specific form of incorporation.⁶⁶ An employee working directly for a US entity abroad is eligible to file for an L-1 Visa without the necessity of an established foreign entity of the US business.⁶⁷ The business abroad must undertake activities that benefit the corporation overall to meet this element.⁶⁸

In comparison, for a foreign entity sending an employee to the US, establishment of a legal entity in the US is an essential element to conform with the “doing business” requirement.⁶⁹ Thus, opening a sales office will not be deemed sufficient for a foreign entity wishing to enter the US. On the other hand, a US entity may employ a foreign national, who was working for the US entity in a home office abroad,

⁶² 8 C.F.R. § 214.2(l)(ii)(H) (Lexis Advance through the July 12, 2017 issue of the Federal Register. Pursuant to 82 FR 8346 (“Regulatory Freeze Pending Review”), certain regulations will be delayed pending further review.

⁶³ Petition for Nonimmigrant Worker (Dep’t of Homeland Sec. June 10, 2005), [https://www.uscis.gov/sites/default/files/err/D7%20%20Intracompany%20Transferees%20\(L-1A%20and%20L-1B\)/Decisions_Issued_in_2005/JUN102005_46D7101.pdf](https://www.uscis.gov/sites/default/files/err/D7%20%20Intracompany%20Transferees%20(L-1A%20and%20L-1B)/Decisions_Issued_in_2005/JUN102005_46D7101.pdf).

⁶⁴ X, 2008 Immig. Rptr. LEXIS 12131, *23.

⁶⁵ Chartier, 16 I. & N. Dec. 284, 286-88 (1977).

⁶⁶ *Id.* at 286-88; 9. F.A.M.402.12-10(B).

⁶⁷ Chartier, 16 I. & N. Dec. at 286-88; 9. F.A.M.402.12-10(B).

⁶⁸ 8 C.F.R. § 214.2(l)(ii)(H) (Lexis Advance through the July 19, 2017 issue of the Federal Register. Pursuant to 82 FR 8346 (“Regulatory Freeze Pending Review”), certain regulations will be delayed pending further review.); 9 FAM 402.12-10(A).

⁶⁹ 9 F.A.M. 402.12-10(B).

on the basis of the L-1 visa.⁷⁰ When the prerequisite element of “doing business” is met, the petitioner must also fulfill the requirement of a qualifying relationship between the US entity and the foreign entity.

B. Corporate Structures that Meet the Standard of “Qualifying Relationship”

The qualifying relationships that suffice for application purposes include parent-subsidiary, branch, affiliate, and partnership relationships.⁷¹ To establish uniform decisions regarding the qualification of corporate structures, 8 C.F.R. § 214(2)(I)(ii)(I)–(L) contains definitions for qualifying relationships for pre-employment of the foreign national.⁷² While the regulations clearly define “parent” and “branch,”⁷³ difficulties arise in determining the necessary relationship in a subsidiary, affiliate, and joint venture structure (See Illustration).

⁷⁰ *Chartier*, 16 I. & N. Dec. at 286-88.

⁷¹ 8 C.F.R. § 214.2(l)(ii)(I)–(L)(3) (Lexis Advance through the July 19, 2017 issue of the Federal Register. Pursuant to 82 FR 8346 (“Regulatory Freeze Pending Review”), certain regulations will be delayed pending further review).

⁷² *Id.*

(I) Parent means a firm, corporation, or other legal entity which has subsidiaries.

(J) Branch means an operating division or office of the same organization housed in a different location.

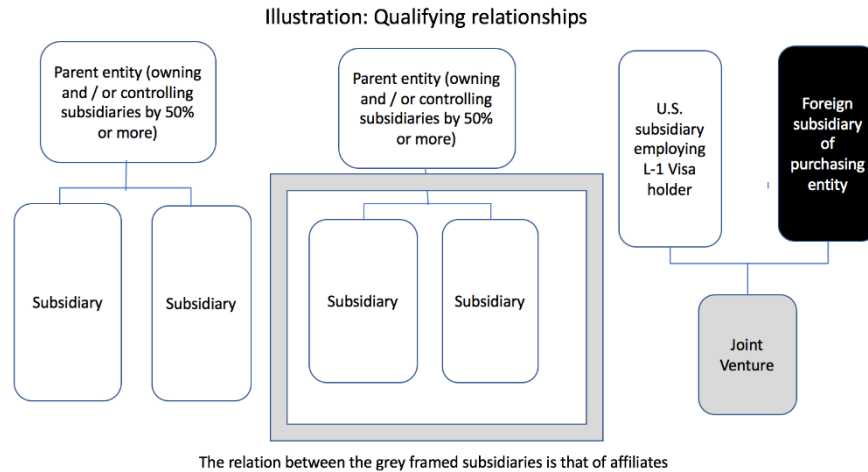
(K) Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) Affiliate means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity, or

(3) In the case of a partnership that is organized in the United States to provide services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement accounting services along with managerial and/or consulting with the worldwide coordinating organization of which the United States partnership is also a member.

⁷³ Immigrant Petition for Alien Worker, 2004 Immigr. Rptr. LEXIS 897, at *3 (2004) (Even though this case refers to an immigrant petition, this petition has the same requirements in regard to the qualifying relationship between the entities).



A qualifying relationship exists in the context of a subsidiary or affiliate when the two entities meet the key element of a connection by ownership and control.⁷⁴ Ownership is the “direct or indirect legal right of possession of the assets of an entity with full power and authority to control.”⁷⁵ Thus, a form of common ownership must exist between the entities, whether through an individual, a group of individuals, a corporation, or the ownership of stock.⁷⁶ A subsidiary, in the immigration law context, is an entity which is held by another company directly, also referred to as the parent.⁷⁷ An affiliate relationship is the relationship between two or more entities that “have no direct linkage, but are directed, controlled, and at least partially owned by the same parent”⁷⁸ An affiliate relationship does not require majority ownership, but must exceed a marginal ownership of the related entities.⁷⁹

Control over a subsidiary or affiliate, for the purpose of applying for an L-1 visa, can be established either *de jure*, when the ownership exceeds 50%, or *de facto*, through voting or vetoing

⁷⁴ Siemens Med. Inc., 19 I. & N. Dec. 362, 365 (1986); Petition for Nonimmigrant Worker, 2009 Immig. Rptr. LEXIS 7191 at * 51 (2009).

⁷⁵ Immigrant Petition for Alien Worker, 2004 Immig. Rptr. LEXIS 897 at *11.

⁷⁶ Hughes, 18 I. & N. Dec. 289, 293 (1982); Petition for Nonimmigrant Worker, 2005 Immig. Rptr. LEXIS 45079 at *17 (2005).

⁷⁷ 9 FAM 402.12-9(A).

⁷⁸ Siemens Med. Inc., 19 I. & N. Dec. at 365.

⁷⁹ Hughes, 18 I. & N. Dec. at 293. A joint venture may be considered a subsidiary or an affiliate depending on whether the percentage of ownership exceeds fifty percent. *Id.* at 291.

powers.⁸⁰ Control may be established when one party has a majority of concentrated ownership or the holding of the majority of voting proxies for other owners.⁸¹ The form in which control over an entity is established can be through any means, including contract, as long as the form allows common “power to direct or cause the direction of the management and policies.”⁸² The USCIS has clarified that proxy votes are only considered for control when they are irrevocable from the time of filing until the expiration of the requested visa validity.⁸³ Thus, it is important to show within an application that there is a linkage between the entities by ownership and common management control to successfully apply and maintain L-1 visa status for employees.⁸⁴ If the linkage can no longer be shown due to a corporate transaction, this will result in the loss of the L-1 visa status for the employee.

III. SPECIFIC CORPORATE TRANSACTIONS AND THEIR IMPACT ON THE L-1 VISA

In order to understand how different means of corporate acquisitions impact the requisite qualifying relationship of the L-1 visa, one must examine the different transaction forms and their impact on the corporate structure. Depending on relevant state law, to acquire another entity, three methods are prevailing: statutory merger in accordance to the relevant state law, asset acquisition, and stock purchase.⁸⁵

A. Merger

One method of acquisition of an entity is by merger.⁸⁶ A “merger” describes the situation when two or more corporations are combined so that only one of the corporations survives.⁸⁷ Upon merging, the surviving corporation absorbs the other prior existing

⁸⁰ Hughes, 18 I. & N. Dec. at *293; Siemens Med. Inc., 19 I. & N. Dec. at 364.

⁸¹ Hughes, 18 I. & N. Dec. at *293.

⁸² *Id.* at 292

⁸³ A proxy is the grant of ones voting power to another. U.S. CITIZENSHIP AND IMMIGRATION SEVS., PM-602-0155, L-1 QUALIFYING RELATIONSHIPS AND PROXY VOTES, 3 (Dec. 2017)

⁸⁴ Hughes, 18 I. & N. Dec. at *292-93.

⁸⁵ 1-5A FOX & FOX, *supra* note 45, at I., §5A.syn.

⁸⁶ *Id.*

⁸⁷ 1-5B ELEANOR FOX & BYRON FOX, CORPORATE ACQUISITIONS AND MERGERS, at § 5B.01 [hereinafter 1-5B FOX & FOX].

corporation, which then ceases to exist.⁸⁸ Mergers involve the acquisition of an entire entity by agreement in accordance to statutory law.⁸⁹

State laws of the entities generally govern the combination through a merger transaction.⁹⁰ State laws generally require a plan and/or agreement regarding the merger of the two corporations, which will be submitted to the shareholders of the entity that will be consumed by the other for approval.⁹¹ Upon statutory merger, one entity is proverbially merged into the surviving entity; meaning, all rights, responsibilities, and liabilities are transferred, by statute, through the consumption of ownership.⁹² No rights or liabilities remain with the merging entity.⁹³ The merged entity ceases to exist upon the conclusion of the merger, and only the surviving entity remains in existence.⁹⁴

However, the merged entity does not cease to exist in cases where the acquiring entity forms a new subsidiary solely for the purpose of merging the subsidiary with the acquired entity.⁹⁵ In a merger called the Statutory Share Exchange, the acquired entity will survive within the newly formed subsidiary, meanwhile limiting the new parent company's liabilities only to the newly formed subsidiary.⁹⁶ The limitation does not usually apply in the employment benefit context, making the new parent company liable for any obligations of the newly acquired subsidiary.⁹⁷ Merging the newly established subsidiary into another entity—the opposite of the aforementioned scenario—will not impact the legal status of the absorbing parent company.⁹⁸ Generally, in the case of a merger, the surviving entity is a successor in interest⁹⁹ to the consumed entity.¹⁰⁰

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ 1-5A Fox & Fox, *supra* note 45, at I., § 5A.02.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ 1-5B Fox & Fox, *supra* note 87, at III. A., § 5B.01.

⁹⁶ *Id.* at §§ 5B.01-.02

⁹⁷ *Id.* at § 5B.02.

⁹⁸ *Id.*

⁹⁹ Successor in interest means that the new corporation assumes the risks and liabilities from the merged entities. *Id.* § 5A.02.

¹⁰⁰ 1-5B Fox & Fox, *supra* note 87, at III. A., § 5B.02.

1. One Subsidiary Merger

The difficulty of a merger is that one entity absorbs an already existing entity possibly employing foreign nationals.¹⁰¹ The merger can, thus, impact the prerequisite connection between the former qualifying organization abroad and the employing US entity as well as the necessary year of prior employment.¹⁰² Both requirements are indispensable for the continued employment of an L-1 visa holder for a related company of his former employer abroad.¹⁰³ In any case, these prerequisites are impacted through the change in the approved qualifying relationship of the original petition, which requires the employer to file an amended petition upon completion of the merger.¹⁰⁴ When the relationship is severed or the year of prior employment within the corporate group is no longer fulfilled, the L-1 visa of the employee can be revoked.¹⁰⁵ Depending on the structure of the merger, however, the qualifying relationship may or may not be severed for all employees impacted by the transaction.¹⁰⁶

The qualifying relationship continues to exist if “[c]ommon ownership and/or control between the United States business entity and the foreign business entity” remains.¹⁰⁷ The Administrative Appeals Office (“AAO”) clarified the existence of a continuous qualifying relationship in a case where a South African entity already had a US entity employing a foreign national as an executive.¹⁰⁸ The US entity then proceeded to acquire another US entity, which it merged into its existing US entity that employed the foreign national. The application was initially denied because USCIS assumed that the qualifying relationship was severed by the merger. However, when the AAO reviewed the denial of the L-1 application, the AAO

¹⁰¹ 1-5A Fox & Fox, *supra* note 45, at I., § 5A.02.

¹⁰² Hader & Syfert, *supra* note 28, at IV. A. 3. B.

¹⁰³ 8 C.F.R. § 214.2(l) (Lexis Advance through the July 19, 2017 issue of the Federal Register. Pursuant to 82 FR 8346 (“Regulatory Freeze Pending Review”), certain regulations will be delayed pending further review.).

¹⁰⁴ 8 C.F.R. § 214.2 (Lexis Advance through the July 19, 2017 issue of the Federal Register. Pursuant to 82 FR 8346 (“Regulatory Freeze Pending Review”), certain regulations will be delayed pending further review.).

¹⁰⁵ 8 C.F.R. § 214.2 (Lexis Advance through the July 19, 2017 issue of the Federal Register. Pursuant to 82 FR 8346 (“Regulatory Freeze Pending Review”), certain regulations will be delayed pending further review.).

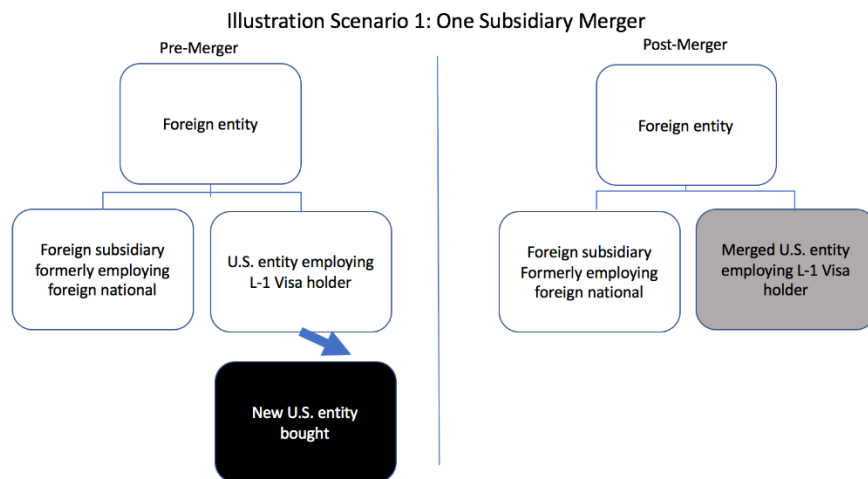
¹⁰⁶ Hader & Syfert, *supra* note 28, at IV. A. 3. B.

¹⁰⁷ Petition for a Nonimmigrant Worker, 2003 Immig. Rptr. LEXIS 1995 at *4 (2003).

¹⁰⁸ *Id.* at *6-9.

determined there was a continuously existing relationship and prior employment.¹⁰⁹ The AAO reached this determination because the US subsidiary of the South African entity purchased another US entity and merged the other entity into its existing US subsidiary.¹¹⁰

The AAO reasoned that the qualifying relationship was never destroyed despite the substantial change of the US subsidiary in its corporate form because the entities were still under the same ownership and control.¹¹¹ The ownership and control remained with the same ultimate individuals as the prior US organization and the foreign entity as the newly merged corporation that employed the beneficiary, also known as the foreign employee.¹¹² The prior qualifying relationship was never destroyed because the newly acquired US entity became part of the existing US employer of the foreign national.¹¹³ (See Illustration Scenario 1).



A different outcome emerges, however, when a US subsidiary, employing the foreign national, merges into another entity.¹¹⁴ When a US employer of the foreign national is absorbed by an acquiring entity, the qualifying relationship is severed.¹¹⁵ Generally, there is no longer

¹⁰⁹ *Id.* at *6-9.

¹¹⁰ *Id.* at *6-9.

¹¹¹ Petition for a Nonimmigrant Worker, 2003 Immig. Rptr. LEXIS 1995 at *9.

¹¹² *Id.* at *6-8.

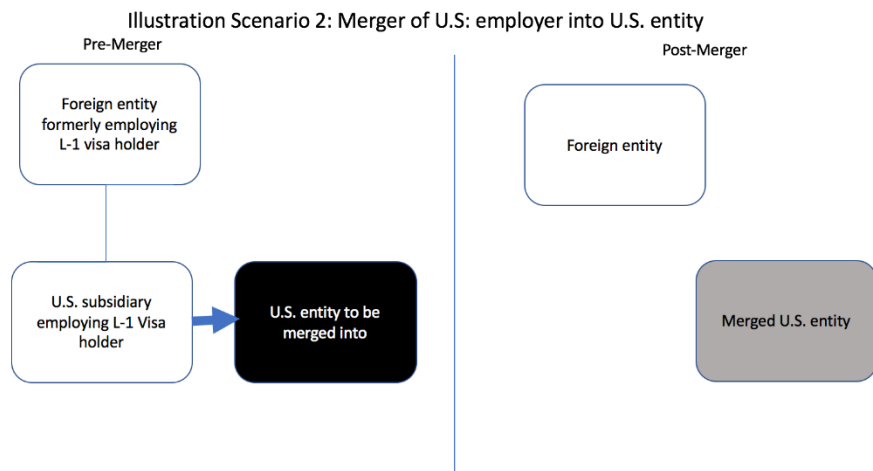
¹¹³ *Id.* at *7-9.

¹¹⁴ Petition for a Nonimmigrant Worker, 2014 Immig. Rptr. LEXIS 5020, *12 (2014).

¹¹⁵ *Id.*

actual control over the foreign and US entity when a US employer is merged with another entity.¹¹⁶ The severance of the qualifying relationship also applies if the foreign entity holds 50% of the merged US employer, but the foreign entity cannot show control over the surviving entity despite a signed partnership agreement between the two entities.¹¹⁷

An example of the lack of control is when two US entities merge into each other, but the former, two parent companies abroad, do not.¹¹⁸ This was confirmed in another AAO case regarding the merger of two US entities both owned by two Indian businesses.¹¹⁹ The two US businesses merged while the Indian entities only signed a partnership agreement.¹²⁰ The AAO found that the employee would only have the qualifying pre-employment with the former foreign parent in India of the merged entity, but there was no longer a qualifying pre-employment for the new entity.¹²¹ (See Illustration Scenario 2).



When the employing entity merges into a new entity, the qualifying relationship would generally break as there will no longer be common control and ownership of the US employer and the foreign

¹¹⁶ *Id.*

¹¹⁷ *Id.* at *11-12.

¹¹⁸ Petition for a Nonimmigrant Worker, 2014 Immig. Rptr. LEXIS 5020, *18.

¹¹⁹ *Id.* at *13-15, 18.

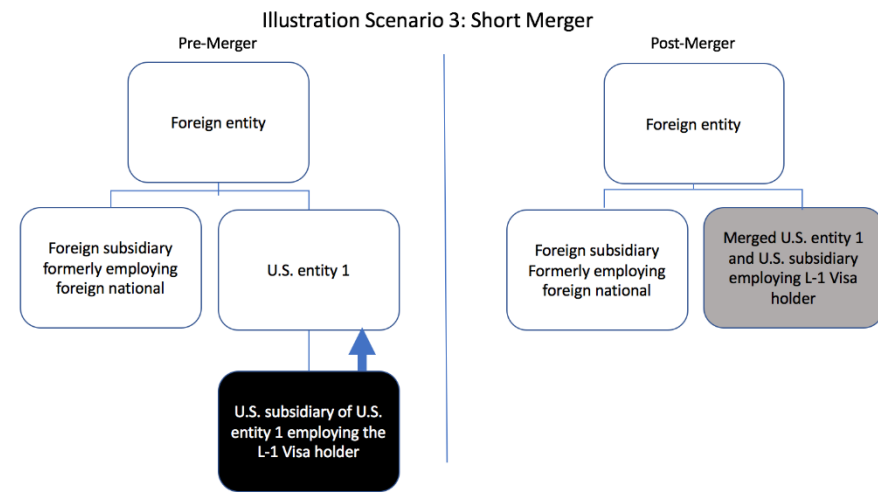
¹²⁰ *Id.* at *13-15.

¹²¹ *Id.* at *18.

former employer.¹²² An exception, however, is a merger within the corporate group called the short-form merger that exists as a merger up or merger down.

2. Short-form Merger

Mergers can also be performed within a corporate group under short-form mergers such as a merger up or merger down. A merger up allows a subsidiary to be merged into the parent.¹²³ For the short-form merger procedure, the merging subsidiary must generally be owned by the parent by at least ninety percent.¹²⁴ In a merger down, on the other hand, the parent merges into the subsidiary, also called a “downstream” merger.¹²⁵ Affiliates may also be merged in short-form mergers.¹²⁶ In the short-form mergers, the entities are still within the same corporate group; thus, the entities remain under the same common control and ownership. (See Illustration Scenario 3).



In these situations, the qualifying relationship would not be severed as common ownership and control remains unchanged. Furthermore, the move of the employee would be comparable to

¹²² Hader & Syfert, *supra* note 28, at 3.b, d; Immigrant Petition for Alien Worker, 2010 Immig. Rptr. LEXIS 8516, *10 (2010) (referring to the same required qualifying relationship within a EB-1 Green Card application).

¹²³ 1-5B Fox & Fox, *supra* note 87, at III. A., § 5B.02.

¹²⁴ This may differ from state to state. *Id.*

¹²⁵ *Id.*

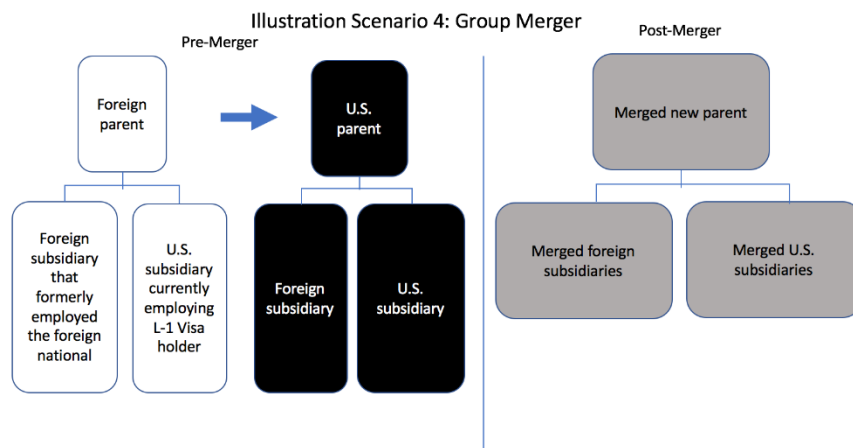
¹²⁶ *Id.*

transferring an employee from one subsidiary to another, which would be permissible under an amended L-1 petition.¹²⁷

3. Group Merger

An entire corporate group may also merge with another business. Group mergers happen when two separate corporate entities globally merge to form one new entity.¹²⁸ An example of a group merger with relation to L-1 visas is the 1998 merger between the US Chrysler Corporation and the German Daimler AG to form DaimlerChrysler.¹²⁹ For an L-1 visa to remain valid in a group merger the qualifying relationship must persist despite an alteration of its form.¹³⁰ The qualifying relationship must be continuous with the employer abroad and the current US employer.¹³¹

In the DaimlerChrysler merger, the qualifying relationship and prior employment within the qualifying relationship no longer existed for L-1 visa holders of Chrysler employees despite the “sole” change of the form of the relationship; thus, not preserving their L-1 visas.¹³² (See Illustration Scenario 4).



¹²⁷ Hader & Syfert, *supra* note 28, at 3. D.

¹²⁸ *Merger of Growth Annual Report 1998*, DAIMLERCHRYSLER, 20, 25, 35, 43, (1998), <https://www.daimler.com/documents/investors/berichte/geschaeftsberichte/daimlerchrysler/daimler-ir-annualreport-1998.pdf>; Petition for a Nonimmigrant Worker, 2008 Immig. Rptr. LEXIS 12921, *23 (2008).

¹²⁹ *Id.* at 3-7.

¹³⁰ Immigrant Petition for Alien Worker, 2006 Immig. Rptr. LEXIS 28226 at *22 (2006).

¹³¹ *Id.* at *22-24.

¹³² *Daimler AG Int'l Auto. Co.*, ENCYCLOPEDIA BRITANNICA (2007), <https://www.britannica.com/topic/Daimler-AG>.

The qualifying relationship would no longer exist when the common ownership and control is lost.¹³³ Common ownership and control between the foreign employer and the current US employer would no longer exist upon conclusion of a merger because the foreign employer ceases to exist.¹³⁴ Because the former foreign employer is absorbed into the new entity, the pre-employing entity has no relationship to the newly merged entities globally.¹³⁵ Thus, there is no longer a full year of prior employment by the same employer within the same corporate group.¹³⁶ The immigration authorities may consider whether the merged entities are entitled to retain the visas as a successor-in-interest through the assumption of all rights and liabilities of the merged entity.¹³⁷

However, the AAO has stated in other cases that a successor-in-interest claim does not apply in the L-1 context.¹³⁸ The AAO clarified that the L-1 statute requires the US employer to show that it is a “parent, subsidiary, affiliate, or branch of the entity that employed the beneficiary during his . . . year of qualifying employment abroad.”¹³⁹ When the former employer ceases to exist, which is the case in a statutory merger,¹⁴⁰ the US employer would no longer have a relationship to this organization.

B. Asset Acquisition.

A business may also be acquired by asset acquisition.¹⁴¹ In an asset transaction, the entity itself is not acquired; only the entity’s assets.¹⁴² When assets are acquired in an asset acquisition, there is a separate transaction for any assets and liabilities.¹⁴³ Assets as well as

¹³³ Petition for Nonimmigrant Worker, 2014 Immig. Rptr. LEXIS 5020 at *12-13 (2014); Siemens Med. Inc., 19 I. & N. Dec. at 364-65.

¹³⁴ 1-5A FOX & FOX, *supra* note 45, at I., § 5A.02, James J. Hogan, *Guidelines for the Filing of Amend H and L Petitions*, 69 INTERPRETER RELEASES 1448, 1448-50 (1992).

¹³⁵ *Id.*

¹³⁶ 8 C.F.R. § 214.2(l)(ii)(I) (Lexis Advance through the July 19, 2017 issue of the Federal Register. Pursuant to 82 FR 8346 (“Regulatory Freeze Pending Review”), certain regulations will be delayed pending further review.).

¹³⁷ 1-5B FOX & FOX, *supra* note 87, at III. A., § 5B.02.

¹³⁸ See, e.g., Petition for Nonimmigrant Worker, 2009 Immig. Rptr. LEXIS 7191, *56-57.

¹³⁹ *Id.*

¹⁴⁰ 1-5A FOX & FOX, *supra* note 45, at I., § 5A.02.

¹⁴¹ *Id.* at § 5A.03.

¹⁴² *Id.*

¹⁴³ *Id.*

liabilities that are not explicitly transferred to the acquiring entity remain with the selling entity.¹⁴⁴

1. Asset Acquisition

Ordinarily, the asset selling entity remains active after the asset acquisition and can have a different function such as a distributor of dividends or an investment company.¹⁴⁵ The asset-selling entity must be voluntarily liquidated in order to cease existing.¹⁴⁶ The asset acquisition allows the acquiring entity to decide which assets and liabilities it wishes to assume and, therefore, limit its possible liability.¹⁴⁷ Generally, the entity acquiring the assets is not liable for the selling entity's obligations.¹⁴⁸

Only the entity's assets are acquired and not the entity's liabilities;¹⁴⁹ thus, the entity is not integrated into the acquiring company's corporate group and continues to exist as its own entity.¹⁵⁰ Consequently, the foreign or US employer of the L-1 visa holder remains active and independent from the acquiring entity. When the relevant entities coexist, meaning that the asset selling entity remains active without the assets,¹⁵¹ there is no common ownership or control for the part of assets sold.¹⁵²

Under immigration law, ownership requires the "direct or indirect legal right of possession of the assets of an entity with full power to control."¹⁵³ Thus, any common right of possession does not exist in an asset acquisition as these assets have been transferred.¹⁵⁴

¹⁴⁴ *Id.*

¹⁴⁵ 1-5A FOX & FOX, *supra* note 45, at I., § 5A.03.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Exceptions would apply if the asset sale is considered a *de facto merger*, the liabilities have been assumed, the transaction results in a continuation of the business, or the aim was to fraudulently default on the selling company's debt. These scenarios will not be investigated in detail this article due to variations depending on jurisdiction. The selling entity, however, should be aware that these exceptions could trigger different results depending on the relevant jurisdiction. 1-5C ELEANOR FOX & BYRON FOX, CORPORATE ACQUISITIONS AND MERGER at § 5C.05. [hereinafter 1-5C FOX & FOX].

¹⁴⁹ 1-5A FOX & FOX, *supra* note 45, at I., § 5A.03.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Siemens Med. Inc., 19 I. & N. Dec. at 364-65.

¹⁵³ Petition for Nonimmigrant Worker, 2009 Immig. Rptr. LEXIS 7191 at *51; Church Scientology Int'l, 19 I. & N. Dec. 593, 595 (1988).

¹⁵⁴ 1-5A FOX & FOX, *supra* note 45, at I., § 5A.03 (2017).

The mere acquisition of assets does not impact the corporate structure; therefore, the L-1 visas of the acquiring entity remain valid. The assessment of whether there is continued ownership and control in the L-1 visa context may vary in asset transaction cases, which are considered a *de facto merger* or the transaction results in a continuation of the business by the acquiring entity.¹⁵⁵

2. *De Facto Merger in Asset Acquisition*

A *de facto merger* will result in the treatment of an asset acquisition as a statutory merger even though it was planned as an asset sale and did not comply with the statutory merger statute.¹⁵⁶ Thus, it must be examined whether an L-1 visa can survive due to the nature of the merger because, in a merger, successor liability is applicable to the acquiring entity.¹⁵⁷

Asset acquisition is treated like a statutory merger;¹⁵⁸ as such, the *de facto merger* would result in the absorption of the asset-selling entity by the acquiring entity.¹⁵⁹ The treatment of the asset acquisition as a merger would mean that the asset-selling entity would automatically cease to exist upon completion of the merger.¹⁶⁰ If the asset-selling entity ceases to exist, the requirements of pre-employment for one continuous year within a qualifying organization and an existing qualifying relationship between the foreign employer and employing US entity would not be satisfied.¹⁶¹ The result of the asset-sale by the US entity would be comparable to the circumstances in Illustration Scenario 2.¹⁶²

3. “Mere Continuation” Asset Acquisition

An asset acquisition is also treated differently under the “mere continuation” asset acquisition.¹⁶³ When there is solely “a mere

¹⁵⁵ 1-5C FOX & FOX, *supra* note 148, at III. B. 1., § 5C.05.

¹⁵⁶ *Id.* at § 5C.06.

¹⁵⁷ *Id.* at § 5C.05.

¹⁵⁸ *Id.* at § 5C.06.

¹⁵⁹ 1-5C FOX & FOX, *supra* note 148, at § 5C.06.

¹⁶⁰ 1-5A FOX & FOX, *supra* note 45, at I., § 5A.02.

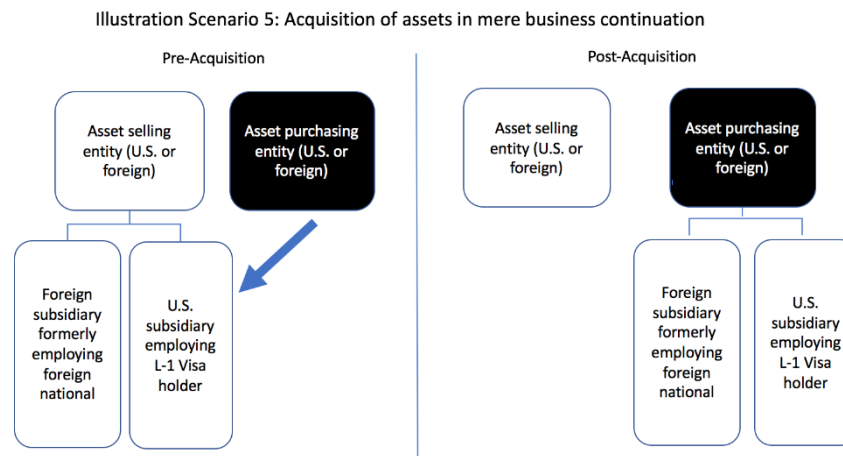
¹⁶¹ 8 C.F.R. § 214.2(l)(ii)(I) (Lexis Advance through the July 19, 2017 issue of the Federal Register. Pursuant to 82 FR 8346 (“Regulatory Freeze Pending Review”), certain regulations will be delayed pending further review.).

¹⁶² See discussion *supra* Section III.A.1.

¹⁶³ 1-5C FOX & FOX, *supra* note 148, at III. B. 1., § 5C.05.

change in form without significant change in substance” the transaction qualifies as a mere continuation of the business.¹⁶⁴ In cases where a mere continuation of the business is determined by the courts, a successor liability is imposed on the asset acquiring entity.¹⁶⁵ The courts assume that the acquiring entity would be the same entity as the selling entity, but the actual selling entity does not survive the sale.¹⁶⁶ Taking this reasoning into account, the entity remains intact and the acquiring entity integrates with the selling entity. However, in a case where the entity only acquires the assets of the US employer, there is no common ownership and control between the former foreign employer and the continuously existing US employer.

If the purchasing entity acquires the assets of both the foreign and the US employer, leading to a mere continuation of business, the qualifying relationship should persevere. The AAO does not require the qualifying relationship to remain the same, but to continuously exist.¹⁶⁷ In the mere continuation of business context, the qualifying relationship of common ownership and control exists during the year of prior employment. At the time the assets are acquired, the owner itself changes without destroying the commonality of control and ownership between the two entities; thus, the employer is the same as previously abroad and in the US (See Illustration Scenario 5).



¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at § 5C.07.

¹⁶⁶ *McCarthy v. Litton Indus., Inc.*, 570 N.E.2d 1008, 1012-13 (Mass. 1991).

¹⁶⁷ *Petition for Nonimmigrant Worker*, 2009 Immig. Rptr. LEXIS 7191 at *56-57.

The commonality of control and ownership are determining factors for a qualifying relationship under the L-1 Visa.¹⁶⁸ In the context of a subsidiary to subsidiary transfer, the L-1 Visa holders would, thus, meet the requirement of commonality of control and ownership under their predecessor and the new entity, after the acquisition, even with a different ownership.

C. Stock Purchase

Businesses can also be acquired by a stock purchase. A stock purchase is generally the preferred mechanism for corporate transactions as it is subject to fewer statutory restrictions such as limitations of foreign entity mergers within the US.¹⁶⁹ In this scenario, the acquiring entity purchases stock from existing shareholders to become the sole shareholder.¹⁷⁰ Another option is the acquisition of the majority of the controlling shares of the desired entity.¹⁷¹

When there are multiple minority shareholders and the purchasing entity acquires the most concentrated shares and establishes a relationship with the existing board, the purchasing entity achieves working control as well.¹⁷² An advantage of this process is that the acquiring entity becomes a shareholder of the existing entity without having to negotiate agreements for each acquired asset or liability and the purchased entity continues to exist in its current corporate identity.¹⁷³ Another advantage of stock acquisitions is that the purchase only affects the ownership of the corporation and the corporate status itself remains unchanged.¹⁷⁴ Throughout this process, the acquiring entity limits its liabilities for the acquired entity and the liabilities remain limited within the purchased entity.¹⁷⁵ Generally, the

¹⁶⁸ *Hughes*, 18 I. & N. Dec. at 291-92.

¹⁶⁹ An exception to the regulation freedom applies to the cases of a tender offer, which are heavily regulated. 1-5A FOX & FOX, *supra* note 45, at I., § 5A.04.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² 1-5D ELEANOR FOX & BYRON FOX, CORPORATE ACQUISITIONS AND MERGERS at § 5D.04 . [hereinafter 1-5D FOX & FOX].

¹⁷³ 1-5A FOX & FOX, *supra* note 45, at I., § 5A.04.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* Exceptions apply in states that have a *de facto merger doctrine* which would transfer the liabilities to the purchasing entity. In these cases, a court will determine that the acquisition of stock or assets is in reality a merger. Thus, when such a transaction is approved the surviving corporation will be subject to liabilities it may not have explicitly assumed. 1-5B FOX & FOX, *supra* note 87, at III. A., § 5B.02

purchased entity then becomes a subsidiary of the purchasing entity.¹⁷⁶ Stock purchases can be used for the acquisition of a single entity as well as the acquisition of a corporate group.

1. Stock Purchase of One Entity

When a business wishes to acquire only one entity it can do so by purchasing shares of only that entity. In such a stock purchase, the corporation continues to exist in its current legal form; only the shareholder and, thus, the ownership, changes.¹⁷⁷ Alternatively, to acquire the company, the purchasing entity may opt to only buy the controlling shares of the targeted entity.¹⁷⁸ In this scenario, one must again focus on the common ownership and control of the foreigner's employer abroad ("Foreign Employer") and the US employer to determine whether a qualifying relationship exists.¹⁷⁹ Through the continuous existence of the entity in the same legal forms,¹⁸⁰ the scope of the sale is relevant to determine whether the qualifying relationship is preserved.¹⁸¹ It is crucial for the Foreign Employer and the US employer of the foreign national to retain common ownership and control when only select entities within a corporate group change ownership due to the sale of stocks.¹⁸² Therefore, if a foreign parent company only sells the stocks of the US subsidiary, the ownership of the US visa-petitioning entity would transfer to the purchaser.¹⁸³ However, if the new owners are not the same individuals or group of individuals as the owners of the former Foreign Employer, the transaction would sever the qualifying relationship between the foreign employer and the US petitioning entity.¹⁸⁴ (See Illustration Scenario 6).

¹⁷⁶ 1-5A FOX & FOX, *supra* note 45, at I., § 5A.04; 1-5B FOX & FOX, *supra* note 87, at III. A., § 5B.02 (2017).

¹⁷⁷ 1-5A FOX & FOX, *supra* note 45, at I., § 5A.04.

¹⁷⁸ *Id.*

¹⁷⁹ Immigrant Petition for Alien Worker, 2004 Immig. Rptr. LEXIS 897 at *11 (discussing the same required qualifying relationship in an immigrant I-140 application process).

¹⁸⁰ 1-5A FOX & FOX, *supra* note 45, at I., § 5A.04.

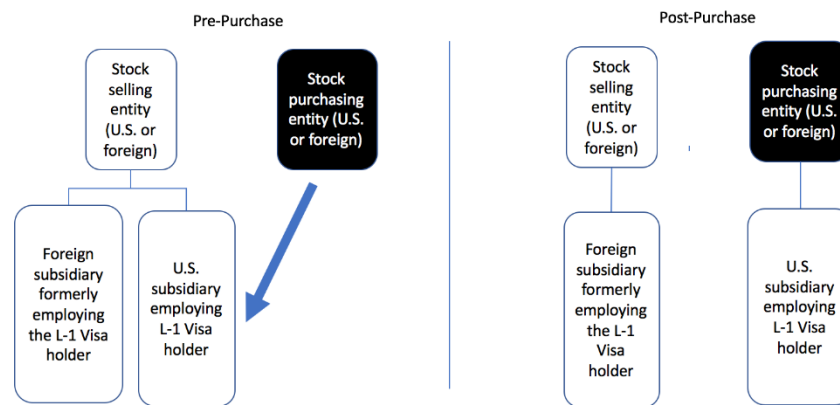
¹⁸¹ U.S. Citizenship and Immigration Svcs., *Adjudicator's Field Manual – Redacted Public Version*, 32.6(b).

¹⁸² Petition for Nonimmigrant Worker, 2005 Immig. Rptr. LEXIS 45079 at *9.

¹⁸³ 1-5A FOX & FOX, *supra* note 45, at I., § 5A.04; 1-5B FOX & FOX, *supra* note 87, at III. A., § 5B.02.

¹⁸⁴ Petition for Nonimmigrant Worker, 2005 Immig. Rptr. LEXIS 45079 at *20-22.

Illustration Scenario 6: Stock Purchase of U.S. entity



In effect, the foreign employer and the US petitioner are no longer in common ownership or control. An exception to common ownership and control in a stock sale applies when the foreign entity retains partial ownership and control over the US entity.¹⁸⁵ For the foreign entity to retain control it is sufficient to retain fifty percent of the stock and have a veto-power.¹⁸⁶

A different evaluation may be reached if the parent company is a US entity that later sells the stocks of its foreign entity at which an employee of the US entity was working prior to his relocation.¹⁸⁷ In this case, the sale of the former Foreign Employer will not affect the employee.¹⁸⁸ The different treatment is the result of the privilege for US businesses under the “doing business” element.¹⁸⁹ The privilege allows US entities to transfer unattached foreign employees to their US offices on the L-1 visa category.¹⁹⁰ Because of this privilege, the foreign employee is treated as if he was directly employed abroad by the US entity and, thus, would be eligible to apply for an L-1 Visa despite the former employment relationship with the Foreign

¹⁸⁵ Siemens Med. Inc., 19 I. & N. Dec. at 365.

¹⁸⁶ *Id.* at 364-65.

¹⁸⁷ Immigrant Petition for Alien Worker, 2006 Immig. Rptr. LEXIS 28225, *23-24 (2006) (decision regarding an immigrant intracompany transfer petition but stating in the dicta that in case of a L-1 Visa a sale or dissolution of the foreign entity does not automatically render the foreigner’s visa invalid.); Dep’t Justice, Interim Decision, *Matter of Thompson*, ALB-N-45, <https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/2889.pdf> (Aug. 11, 1981).

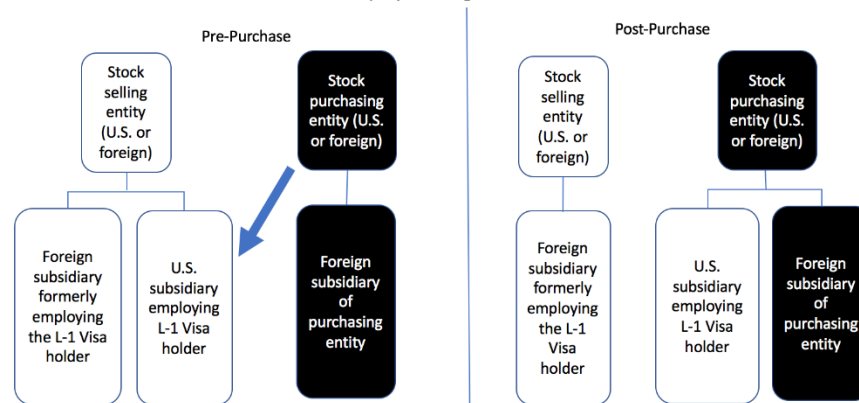
¹⁸⁸ Immigrant Petition for Alien Worker, 2006 Immig. Rptr. LEXIS 28225 at *23-24.

¹⁸⁹ *Id.*; 9 FAM 402.12-10(B); Petition for Nonimmigrant Worker, 2014 Immig. Rptr. LEXIS 1155, *9-10 (Jan. 16, 2014).

¹⁹⁰ 9 FAM 402.12-10(B).

Employer.¹⁹¹ Unattached foreign employees are those employees that the US entity directly employs and are subject to the US employer's control.¹⁹² For this exception to take effect, the US entity must still be "doing business" in at least one other foreign country outside of the US.¹⁹³ (See Illustration Scenario 7).

Illustration Scenario 7: Stock purchase by entity with foreign subsidiary and U.S. employment agreement



In some cases, however, USCIS officers have discretion to decide that the dissolution of the foreign employer does not result in ineligibility of the visa holder when a qualifying relationship to another foreign entity exists.¹⁹⁴ This "doing business" privilege exception would not take effect if the foreign employee is a direct employee of the foreign entity seconded to the US with a secondment agreement and the decision of granting a visa follows the wording of "doing business" in the Foreign Affairs Manual.¹⁹⁵ Because of the secondment agreement, the main employment relationship remains

¹⁹¹ Immigrant Petition for Alien Worker, 2006 Immig. Rptr. LEXIS 28225 at *23-24; *Matter of Thompson*, ALB-N-45.

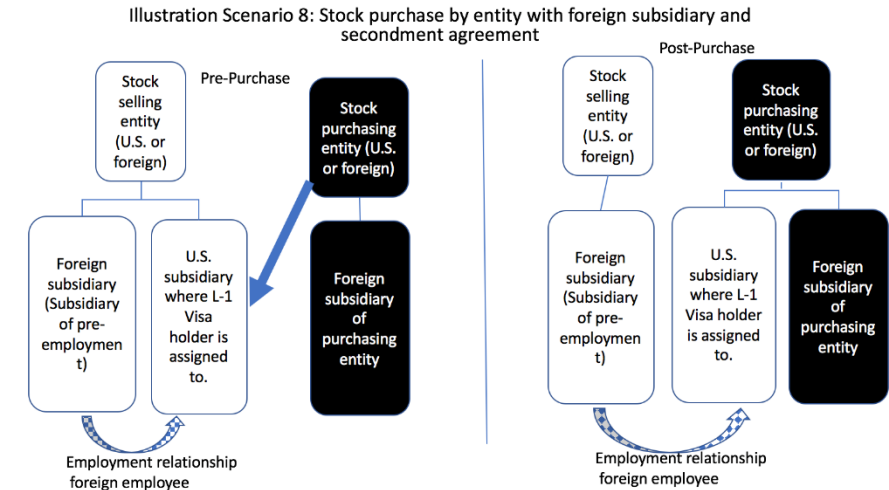
¹⁹² Petition for Nonimmigrant Worker, 2014 Immig. Rptr. LEXIS 1155, *10.

¹⁹³ A U.S. company, which is doing business as an employer in the United States and in at least one foreign country, can utilize the L classification to transfer to the United States employees abroad who are unattached to a foreign entity. The reverse of this situation, however, is not appropriate. A foreign organization must have, or be in the process of establishing, a legal entity in the United States which is, or will be, doing business as an employer in order to transfer an employee under INA 101(a)(15)(L)." 9 FAM 402.12-10(B), Immigrant Petition for Alien Worker, 2006 Immig. Rptr. LEXIS 28225 at *23-24., Petition for Nonimmigrant Worker, 2014 Immig. Rptr. LEXIS 1155, *9-10.

¹⁹⁴ U.S. Citizenship and Immigration Servs., AAO Decision, *LIN 06 189 52335* at 5 (Nov. 07, 2008); Immigrant Petition for Alien Worker, 2006 Immig. Rptr. LEXIS 28225 at *23-24.

¹⁹⁵ 9 FAM 402.12-10(B).

with the Foreign Employer and the employee is subject to its control.¹⁹⁶ (See Illustration Scenario 8).



The “doing business” privilege approach chosen by the USCIS officers conflicts with other areas of law.¹⁹⁷ When determining the eligibility of the employee, the decision should regard which entity the employee has his employment relationship at the time of the stock sale based on the contractual employment relationship with the entities. The officers should inquire whether the employee has a local employment agreement with the US entity or is working under the control of a foreign entity through the means of a secondment agreement.¹⁹⁸ Furthermore, the officers should also review which entity has the responsibility for the employee’s payroll to determine if the employee should be considered a direct foreign employee and not

¹⁹⁶ 9 FAM 402.12-10(B).

¹⁹⁷ The attribution of the employee to the U.S. entity would conflict with employment law as the seconding entity abroad is the legal employer and has control over the employee. Areas such as social security law that are related to the employment relationship will also conflict with the attribution of the employee to the U.S. entity. Such a decision also conflicts with accounting standards as the expenses for the employment of the employee are negatively credited to the foreign entity as an expense and not the U.S. employer.

¹⁹⁸ “A secondment is a type of expatriate assignment in which the employee remains employed by the home country employer, but is loaned to, and renders services for, the host country employer affiliate for some period.” Donald C. Dowling, Jr., *Secondment Agreements for Expatriates*, Thomson Reuters Practical Law, Practice Note 2-523-8982 (last visited Mar. 17, 2018).

a foreign employee attached to the US entity subject to the “doing business” privilege for US businesses.

The employee’s salary is a corporate expense of the employing entity, which, in the case of a secondment, is the foreign entity.¹⁹⁹ The balance sheet lists the employee with said entities and accounts for the employee in its liabilities.²⁰⁰ The contracting parties consult these balance sheets during negotiations of the sale of an entity.²⁰¹

An example scenario would be the transfer of an employee of a German entity such as BMW Germany to a US subsidiary such as BMW Mini USA.²⁰² The employee retains an active employment agreement with BMW Germany with a contract addendum assigning him to work for BMW Mini USA in the US (i.e., secondment agreement). The employee still receives his salary from the BMW Germany and, thus, is accounted for in BMW Germany’s bookkeeping. His employment can also only be terminated by BMW Germany and he is subject to the ultimate control of BMW Germany even though he may report to superiors at BMW Mini USA during his secondment to the USA.

As the L-1 visa does not require a local employment contract, it is possible that foreign employees are under the joint control of the foreign entity and the US entity by the means of a secondment agreement.²⁰³ Thus, if the USCIS privilege approach would be maintained,²⁰⁴ USCIS should implement a second determination, in case of stock sales, before maintaining an L-1 visa. This determination would focus on whether the foreign employees in the US of the sold foreign entity have received a US employment agreement with the petitioner or are working with the US entity based on a secondment

¹⁹⁹ Beth Laurence, *How Corporations are Taxed*, <http://www.nolo.com/legal-encyclopedia/how-corporations-are-taxed-30157.html> (last visited: Aug. 7, 2017).

²⁰⁰ *Id.*

²⁰¹ Stanford University Development Research, *How Do You Determine Value Of A Private Company?*, online resources (Aug. 2, 2012, 2:43 PM), http://web.stanford.edu/dept/OOD/RESEARCH/top-ten-faq/how_do_you_determine_the_value.html.

²⁰² This example is fictional and was developed by the author of this Note.

²⁰³ Erika C. Collins, *International Assignments: Issues and Best Practices for Employers*, ABA Section of Labor and Employment Law, https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2009/ac2009/122.authcheckdam.pdf (Annual CLE Conference, Nov. 4-7, 2009).

²⁰⁴ Immigrant Petition for Alien Worker, 2006 Immig. Rptr. 28225 at *23-24; *Matter of Thompson*, ALB-N-45; U.S. Citizenship and Immigration Servs., AAO Decision, *LIN 06 189 52335* at 5 (Nov. 07, 2008).

agreement. The second determination is necessary because the employees would not be under the control of the US employer in a secondment scenario, which would allow the application of the “doing business” privilege for US entities and would, in fact, be a development of employee intracompany assignment to employee leasing from the former Foreign Employer.²⁰⁵

The L-1 intracompany transferee visa was specifically designed to not allow employee leasing based on contractual agreements and would, in this case, circumvent the legislative intent.²⁰⁶ Should a foreign employee of a US parent work in the US, based on an assignment agreement from the sold foreign entity, the employer-employee relationship within the corporate group would no longer exist;²⁰⁷ thus, the qualifying relationship would be destroyed.²⁰⁸ The direct and controlling relationship, which allows for the hiring and firing of the employee, is then with a different corporate group. Because the US entity is not the employee’s contractual employer, nor in a corporate group with the contractual employer, the US entity is excluded from any control over said employee as an employer.²⁰⁹ If the US company, where the employee is sent to under a secondment agreement, would like to take any action against the employee, the company must do so through a contractual relationship with the new corporate group employer, which is comparable to the situation of employee leasing.²¹⁰ Overall, relying on an officer’s discretionary decision, which may be deemed discretionary abuse, is a very risky approach and should not be relied on to retain human capital.

²⁰⁵ Erika C. Collins, *International Assignments: Issues and Best Practices for Employers* (2009).

²⁰⁶ Employee leasing is the temporary use of another employer’s employee force for a service fee. The employment relationship between the employee and his employer remains and the place or company of employment only has a service agreement with the employer. AILA InfoNet Doc. No. 12012560, p. 11.

²⁰⁷ See Illustration Scenario 8.

²⁰⁸ *Siemens Med. Inc.*, 19 I. & N. Dec at 364-65; AAO Decision, *LIN 06 189 52335* at 5 (Nov. 07, 2008).

²⁰⁹ AAO Decision, *LIN 06 189 52335* at 5 (Nov. 07, 2008).

²¹⁰ A different treatment of a stock sale from an immigration perspective is necessary in a *de facto merger* as the courts treat this like a merger. In this case the foregoing regulations for a merger would be applicable. In essence, the stock purchase would not affect the acquiring entity’s employees, however the purchased entity’s employees may lose their visa eligibility. The exact repercussions depending on each jurisdiction cannot be examined in this article. 1-5B FOX & FOX, *supra* note 87, at III. A., § 5B.02; Immigrant Petition for Alien Worker, 2006 Immig. Rptr. LEXIS 28225, *9.

2. Group Stock Purchase

A group stock purchase occurs when an entity decides to purchase not only one entity of a corporate group, but also the stocks for all companies of that entire group, such as in the case of the acquisition of the Wella Group by Procter and Gamble.²¹¹ In an acquisition of the stocks of an entire corporate group, the visas of the employees within the purchased group should survive the acquisition.²¹²

The reason for the survival is the preserved qualifying relationship of the entities.²¹³ When an entity purchases both the foreign entity and the US entity's stocks, the entity remains the same legal person as prior to the acquisition;²¹⁴ only the ownership of the entities shifts.²¹⁵ The difference in the cases of a group stock purchase and a single entity stock purchase is that, in a group stock purchase, the two acquired entities continuously meet the requirement of common ownership and control.²¹⁶ The businesses will also meet the requirement of "doing business" abroad and within the US as they continue to exist in their current legal form.²¹⁷ In the case of a group stock purchase, the previous holder of shares transfers ownership and control to the new holder of the shares. (See Illustration Scenario 9).

²¹¹ Parija Bhatnagar, *P&G has a good hair day*, CNN MONEY, (Mar. 18, 2003), <http://money.cnn.com/2003/03/18/news/companies/Procter/>.

²¹² Immigration Petition for Alien Worker, 2006 Immig. Rptr. 28225 at *23-24; *Matter of Thompson*, ALB-N-45.

²¹³ *Hughes*, 18 I. & N. Dec. at 293; Immigrant Petition for Alien Worker, 2006 Immig. Rptr. LEXIS 28226, at *11-12.

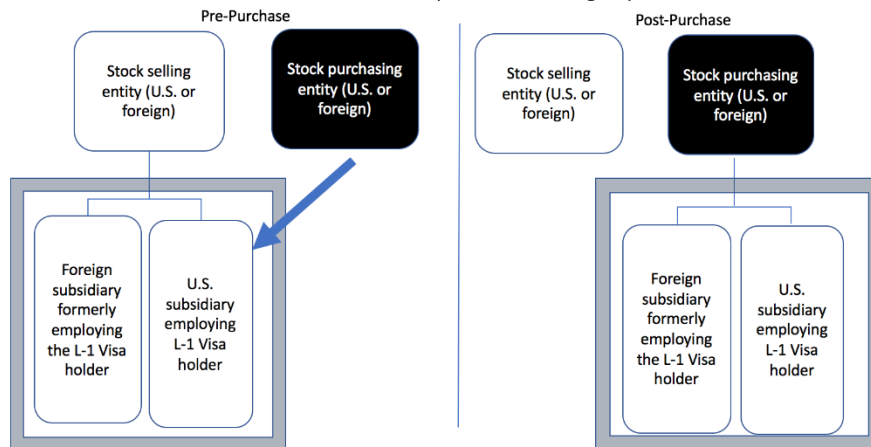
²¹⁴ 1-5A FOX & FOX, *supra* note 45, at I., § 5A.04.

²¹⁵ *Id.*

²¹⁶ U.S. Citizenship and Immigration Sevs., *Adjudicator's Field Manual – Redacted Public Version*, 32.6(b), <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-15111/0-0-0-15335.html> (Last visited Mar. 16, 2018).

²¹⁷ *Id.* at 32. 6 (c).

Illustration Scenario 9: Stock purchase within group



The regulations do not require that the ownership and control remains the same, but solely states:

[A]n alien who within the preceding three years has been employed abroad for one continuous year by a qualifying organization may be admitted temporarily to the United States to be employed by a parent, branch, affiliate, or subsidiary of that employer in a managerial or executive capacity, or in a position requiring specialized knowledge.²¹⁸

Thus, one must only have a qualifying relationship between the entities and the same employer. The analysis requires differentiation between the qualifying relationship and the employer. The qualifying relationship is determined by common ownership and control. Ownership and control was common with the prior shareholder and remains common with the new shareholder who acquires ownership and control over both the foreign entity and the US employer.²¹⁹ The qualifying relationship does not have to be identical as before so long as a qualifying relationship exists for the L-1 visa holder.²²⁰ The

²¹⁸ 8 C.F.R. § 214.2(I)(1)(i) (Lexis Advance through the Mar. 14, 2018).

²¹⁹ 1-5A FOX & FOX, *supra* note 45, at I., § 5A.04; U.S. Citizenship and Immigration Servs., *Adjudicator's Field Manual – Redacted Public Version*, 32.6(e)(2)(C), <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-15111/0-0-0-15335.html> (Last visited Mar. 16, 2018). 32.6 (b).

²²⁰ Petition for Nonimmigrant Worker, 2003 Immig. Rptr. LEXIS 1995 at *10 (2003).

qualifying relationship is closely connected to the qualifying pre-employment as this needs to be within the corporate group.²²¹

The question regarding whether the employee meets the required pre-employment of one year within the last three years can cause confusion.²²² This confusion stems from the fact that the legal entity remains the same and, therefore, the contractual partner of the employment relationship remains the same.²²³ Thus, the business entity is still “that employer” with whom the employee acquired the prior work experience, which qualifies him for the L-1 visa.²²⁴ By contrast, in the case of a merger, the legal identity of the absorbed employer changes; thus, the corporation is not the “that [same] employer.”²²⁵ The concept of the new legal identity may apply even when a foreign jurisdiction requires the transfer of the employment relationship as the contractual partner is the new legal entity.²²⁶

IV. STRUCTURING MERGERS AND ACQUISITIONS TO MAINTAIN L-1 VISAS

Corporate transactions have significant impacts, including the loss of employees in the US on L-1 visas; thus, it is apparent that M&As must be well structured to avoid the loss of important human capital.²²⁷ Mergers, stock, and asset acquisitions bear substantial risk of losing employees working in the US based on an L-1 visa due to the impact on the requisite qualifying relationship. Thus, the preferable method of structuring a corporate transaction would ensure that the

²²¹ 8 C.F.R. §214.2 (I)(1)(i) (Lexis Advance through the Mar. 14, 2018).

²²² *Id.*

²²³ 1-5A FOX & FOX, *supra* note 45, at I., § 5A.04.

²²⁴ 8 C.F.R. 214.2 (I) (1)(i); Society for Human Res. Mgmt., Merger & Acquisition: Orientation: Should employees complete new-hire paperwork after a merger or acquisition?, Jun. 21, 2013,

<https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/shouldemployeescompletenew-hirepaperworkafteramergeroracquisition.aspx>.

²²⁵ 1-5A FOX & FOX, *supra* note 45, at I., § 5A.02.

²²⁶ Pascal R. Kremp, *Employment and Employee Benefits in Germany*, Thomson Reuters Practical Law, [https://content.next.westlaw.com/Document/I0206eb7b1cb611e38578f7ccc38dcbee/View/FullText.html?contextData=\(sc.Default\)&transitionType=Default&firstPage=true&bhcp=1](https://content.next.westlaw.com/Document/I0206eb7b1cb611e38578f7ccc38dcbee/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true&bhcp=1) (Last visited Mar. 16, 2018).

²²⁷ Deloitte M&A Institute, *Leading through Transition – Perspectives on the people side of M&A* 61 (2010), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/mergers-acquisitions/us-ma-consulting-leading-through-transition-022315.pdf>.

loss of knowledge and expertise is minimized or a plan can be developed to account for the potential loss of knowledge and expertise.

Corporate negotiations and pricing rarely account for employee potential (*e.g.*, in the Research and Development departments), and immigration issues and their impact are disregarded in the structuring of these global transactions. The failure to consider vital immigration issues in these transactions can lead to the loss of knowledge and expertise, which can be detrimental to a corporation. The careful consideration of immigration law and its impact on the human capital of the entity prior to the transaction would enable the selling entity to adjust the immigration status of some employees or create a deal structure that would allow for a contingency plan in the transition phase of a corporate transaction.

The chosen form of a takeover will impact the employee structure. Thus, as the preceding sections have shown, the most advantageous proceeding is the method of stock purchase. This section will provide an analysis and recommendation on how to structure the takeover of a single entity and a group.

A. Preferable Structure of the Acquisition of Only One Entity

Structuring difficulties present themselves with greater complexity when only one entity is acquired in a corporate transaction. Currently, USCIS will adjudicate some L-1 visa cases as surviving in stock sales of a foreign entity, which was the qualifying employer of the foreign national abroad. If the US entity wishes to retain the employees of the sold foreign entity, it is recommended that, prior to the sale of the entity, the foreign employee switches to a US employment contract.²²⁸

To sever the ties to the foreign entity, the employee or foreign employer must terminate any possible dormancy agreement²²⁹ or contractual agreement with the foreign entity. With this proceeding,

²²⁸ Immigration Petition for Alien Worker, 2006 Immig. Rptr. 28225 at *23-24; *Matter of Thompson*, ALB-N-45.

²²⁹ A dormancy agreement is an agreement between the foreign (original) employer of an expatriate and the expatriate to put to rest all rights and duties from the original employment agreement during the time of the assignment and to reactivate this employment agreement upon return from the assignment abroad. Markulf Behrendt, *What We Have Been Working On Posting Employees Abroad*, ALLEN & OVERY: PRACTICAL KNOWLEDGE OF EMPLOYMENT LAW, Edition 4/2013, at 7.

the foreign employee's status evolves to a status analogous to the status of a foreign employee of the US entity assigned abroad.²³⁰

The application in the extension process would include the explanation that the employee, at the time of working for the foreign entity, was part of the same employer.²³¹ The application must outline that, during that time, the US employer and the foreign employer were under common ownership and control;²³² thus, within the corporate group of the same employer.²³³ Therefore, the employee was indirectly employed by the US entity.²³⁴

At the time of L-1 visa extension of the employee, the employee would be working directly for the US employer and have no more ties to the entity abroad, but still has the requisite foreign qualifying pre-employment.²³⁵ Thus, the employee's situation is comparable to a former direct employee of the US entity abroad "doing business" directly for the US employer.²³⁶

Prior direct employment by a foreign entity should not be detrimental to the employee's eligibility as the foreign entity may have required the direct employment for administrative purposes or local labor law regulations.²³⁷ The application must argue that, at the time of the extension filing, the employee is a direct employee of the US entity, unattached to a foreign entity abroad, which is in compliance with the wording of the Foreign Affairs Manual.²³⁸

In comparison, if the US entity is acquired, a similar structure of the employment would allow for the retention of the foreign employee under the L-1 visa.²³⁹ This would require that the employee's ties with the foreign entity are severed as outlined in the example above.²⁴⁰ However, in both scenarios it is important that the entities are connected to other foreign businesses.²⁴¹

²³⁰ *Matter of Thompson*, ALB-N-45; U.S. Citizenship and Immigration Servs., AAO Decision, 9 F.A.M. 402.12-10(B).

²³¹ Immigration Petition for Alien Worker, 2006 Immig. Rptr. LEXIS 28225 at *23-24; *Matter of Thompson*, ALB-N-45 (1981).

²³² See discussion *supra* Section III.C.1.

²³³ *Id.*

²³⁴ *Matter of Thompson*, ALB-N-45 (1981).

²³⁵ See discussion *supra* Section III.C.1

²³⁶ *Matter of Chartier*, 16 I. & N. Dec. at 287.

²³⁷ See discussion *supra* Section III.C.1.

²³⁸ *Id.*

²³⁹ See discussion *supra* Section III.C.2.

²⁴⁰ *Id.*

²⁴¹ *Id.*; *Matter of Thompson*, ALB-N-45 (1981).

On the other hand, some employees may resist to relinquish their ties to their home entity and possible employment law benefits granted by their home country jurisdiction.²⁴² For the acquiring company on the other hand, these employees' knowledge may be indispensable in the transitions phase.²⁴³ A possible solution in this context is to structure the acquisition of the entity with initially only fifty percent through a stock purchase with a conditional full acquisition at the time the transition period is completed.²⁴⁴ An acquisition structure, as just outlined, allows the acquiring company to gain control by the means of veto powers while retaining the qualifying relationship of common ownership and control for the seconding foreign entity and the US entity where the employee is working.²⁴⁵

For any visa adjudication process, future corporate changes are not relevant, only the factual basis at the time of the application filing is relevant.²⁴⁶ A future corporate takeover will not hurt the visa process as it may not be consulted within the adjudication process regardless of any contractual work.²⁴⁷ Therefore, through the conditional final acquisition, the prolonged time of shared control and ownership allows for a transition period and knowledge transfer from foreign talent to remaining staff.²⁴⁸ Such a deal structure is the only feasible approach for entities that rely on employee knowledge and expertise, such as start-ups, because—despite the reduced desirability from a business's perspective—it will allow for an important transition period to retain knowledge or switch employees to another visa type to retain them in the US for a certain amount of time.

B. How to Preferably Structure a Group Acquisition to Maintain L-1 Visas

The most desirable approach in acquiring an entire corporate group or unit, from an immigration law perspective, would be to structure the transaction as a stock purchase.²⁴⁹ The M&A attorneys

²⁴² *Secondment: Seconded Status*, APRIL INTERNATIONAL, (Nov. 21, 2012), <http://en.april-international.com/global/advice-information/secondment-seconded-status>.

²⁴³ Deloitte M&A Institute, *supra* note 227, at 61.

²⁴⁴ *Siemens Med. Inc.*, 19 I. & N. Dec. at 364-65.

²⁴⁵ *Id.*

²⁴⁶ *Katigbak*, 14 I. & N. Dec. 45, 49 (1971).

²⁴⁷ *Id.*

²⁴⁸ See discussion *supra* Section III.C.1.

²⁴⁹ See discussion *supra* Section III.C.2.

working on the transaction should ensure that a *de facto* merger is avoided²⁵⁰ because, if the stock purchase is considered a *de facto merger*, this would create the undesired immigration effect of a merger and, in turn, the creation of a new legal entity.²⁵¹

The advantage of this transactional proceeding is that corporate relationship between the different acquired entities would remain largely the same.²⁵² The only difference would be the change of the person holding ownership and control in common for the acquired entities.²⁵³ Thus, the qualifying relationship between the foreigner's former employer abroad and the US entity would remain preserved despite the two entities not retaining the same owner.²⁵⁴

Another advantage of this form of acquisition would be that the liabilities of the acquired entity are generally restricted to the entity itself.²⁵⁵ The restricted liability means limiting any prior immigration law violations to the acquired entity as well.²⁵⁶ Should the acquiring entity wish to have the acquired entity to match with its corporate identity, the acquiring entity can achieve this result with a corporate name change. The name change would not impact the qualifying relationship between the entities and easily allows for the amendment of the L-1 visa on the basis of a name change.²⁵⁷ Due to the nature of a stock purchase, the legal personas of the acquired entities remain the same and the foreign national continues to work for the "same employer."²⁵⁸

V. CONCLUSION

Corporate restructuring in the international employee context can result in the substantial loss of personnel if the impact of the restructuring remains disregarded prior to the corporate transaction.²⁵⁹ To ensure a minimal loss of human capital, an in-depth analysis of the employee structure is required. If the impact of corporate restructuring

²⁵⁰ *Id.*; 1-5B FOX & FOX, *supra* note 87, at III. A. at § 5B.02.

²⁵¹ 1-5B FOX & FOX, *supra* note 87, at III. A. at § 5B.02.

²⁵² See discussion *supra* Section III.C.2.

²⁵³ *Id.*

²⁵⁴ Petition for Nonimmigrant Worker, 2011 Immig. Rptr. LEXIS 7962 at *4-5.

²⁵⁵ 1-5D FOX & FOX, *supra* note 172, at III. C. at § 5D.01.

²⁵⁶ *Id.*

²⁵⁷ Hader & Syfert, *supra* note 28, at IV. A. 3. A.

²⁵⁸ Petition for Nonimmigrant Worker, 2005 Immig. Rptr. LEXIS 45079 at *20-22.

²⁵⁹ Hader & Syfert, *supra* note 28, at I.

does not consider the impact on the qualifying relationship of the US and foreign entity, the privileging element of an intracompany transfer or the requisite pre-employment is lost and the employee is no longer eligible for the L-1 visa.²⁶⁰

The most successful approach to structure a corporate acquisition concerning foreign employees in the US on the basis of a L-1 visa is by the means of a stock purchase agreement.²⁶¹ When only one entity, and not an entire corporate group, is acquired, the stock purchase agreement should be conditional on a certain transitional period. During the transition period, the acquiring company holds fifty percent ownership and control and prior stock holder retains the remaining fifty percent.²⁶² With this process, the entities can obtain control through veto power while retaining foreign talent in the critical transition period.²⁶³

However, given these limited opportunities to structure an acquisition, the difficulties arising during the mergers and acquisitions for the entities, and the importance of M&As for the economy, a political reform should be considered to accommodate economic needs in the time of growing international business transitions.

Currently, there are no visa types available that are specifically targeted to accommodate companies in periods of corporate restructuring. Considering the great economic impact that M&As represent, politicians should consider introducing a transition visa for the L-1 Visa (“Transition Visa”) category.²⁶⁴ A Transition Visa could ensure that companies can complete the transition of business and acquired human capital most effectively without delay by creating a transition period. Currently, corporate restructuring can be delayed in its final form solely for the purpose of creating a transition period to prevent loss of human capital.

The introduction of a Transition Visa, which currently is non-existent, would allow Human Resource departments to easily file for this type of visa and could allow the extension of a L-1 visa holder’s stay in the US for up to two years.²⁶⁵ One proposal for the

²⁶⁰ *Id.* at I. B. f.

²⁶¹ See discussion *supra* Section IV.

²⁶² See discussion *supra* Section VI.A.

²⁶³ *Id.*

²⁶⁴ Hader & Syfert, *supra* note 28, at I. B.1.f

²⁶⁵ 8 C.F.R. § 214.2(l)(ii)(M)(15)(ii) (Lexis Advance through the Mar. 14, 2018).

requirements of a Transition Visa could include the incorporation of the current requirements for an L-1 New Office application.²⁶⁶

The acquiring entity would have to provide a business plan outlining the business strategy after acquiring the entity and how the foreign employee will be retaining his position within the entity.²⁶⁷ The application should also outline why it is important to retain the employee within the US offices based on his executive or specialized knowledge role during the transition period.²⁶⁸ The Transition Visa could also include conditions such as the training of at least one US employee in the foreigner's position during the transition period and providing a training plan prior to filing and a report on the training progress after one year to extend the transition visa for the full two years.

Such a visa would ensure that the economic success of the US business is not jeopardized through the change of corporate structure. If conditions such as training are implemented in the visa requirements this would also strengthen the professional knowledge of US employees and, overall, benefit local staffing. The Transition Visa would also be aligned with the current policy goal of growing US employment by securing the provision of adequate training of local staff to retain the transitory L-1 visa.²⁶⁹

Another possible option would be to remodel the intracompany transferee after the German intracompany transferee regulations. These regulations require proof of a qualifying relationship between the entities, at least university education of the employee, entity's business abroad, and number of employees hired locally in Germany who are assigned abroad.²⁷⁰ The numbers of foreign employees in Germany are limited by the number of German employees going abroad from the German entity.²⁷¹ Thus, it is an exact numerical

²⁶⁶ 8 C.F.R. § 214.2(l)(ii)(M)(3)(v)-(vi) (Lexis Advance through the Mar. 14, 2018).

²⁶⁷ 8 C.F.R. § 214.2(l)(ii)(M)(3)(v)(C) (Lexis Advance through the Mar. 14, 2018).

²⁶⁸ 8 C.F.R. § 214.2(l)(ii)(M)(3)(v)-(vi) (Lexis Advance through the Mar. 14, 2018).

²⁶⁹ Jeremy Diamond, *Trump Pushes "Buy American, Hire American" policy in Wisconsin*, CNN, (Apr. 18, 2017), <https://www.cnn.com/2017/04/17/politics/trump-wisconsin-buy-american/index.html>.

²⁷⁰ Bundesagentur für Arbeit, *Weisung 201606018 vom 20.06.2016 – Fachliche Weisungen zur Beschäftigungsverordnung*, (June 20, 2016), https://www3.arbeitsagentur.de/web/wcm/idc/groups/public/documents/webdatei/mdaw/mtc2/~edisp/egov-content443255.pdf?_ba.sid=EGOV-CONTENT443258, § 10.

²⁷¹ *Id.*

exchange between the hosting entity and other entities within the corporate network.²⁷²

This type of regulation would avoid the dilemma of losing the qualifying pre-employment within the corporate network and would only require proving that the acquiring entity is also hosting employees from the US entity to retain the existing visas.²⁷³ This policy would also ensure that US employees are benefitting from the intracompany relationship and the local employment market is not disadvantaged through the employment of foreign personnel within the US. The foreign employees would not be replacing local labor, but are solely swapping the location of employment with US colleagues.²⁷⁴ The German intracompany transferee concept would also cater to the concerns that the L-1 visa category may be used to substitute US labor with cheaper foreign employees.²⁷⁵

Overall, it is important for the US economy that corporate transactions are well structured to ensure continuous success of the entity and, thus, employment opportunities within the US. Ideally, legislation would adopt new regulations to benefit the US economic interest by facilitating the retention process for L-1 visas in corporate transactions.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ Bundesagentur für Arbeit, *supra* note 286.

²⁷⁵ U.S. Citizenship and Immigration Sevs., William R. Yates, *Interoffice Memorandum Changes to the L Nonimmigrant Classification made by the L-1 Reform Act of 2004 - Revisions to Adjudicator's Field Manual (AFM) Chapters 32.3, 32.4(a), and 32.5 (AFM Update AD05-26)*, 4-6, July 28, 2005; Office of Inspector General, Dep't Homeland Security, *Implementation of L-1 Visa Regulations – OI-13-107*, 5 (Aug. 2013).