

No Broom and Shovel Brigade:
Cleaning Up Immigration Messes in M & A Transactions
Before They Occur

By Teri A. Simmons, David Grunblatt and Angelo A. Paparelli¹

Lili Avvocato knew she'd been working too hard and welcomed the evening outing.

Lili and the others in the Immigration practice group at her law firm, Philistine, Solicitor & Scribe LLP, had been putting in far too many nights and weekends keeping up with the many rapid-fire changes in the practice and the frantic client emails and calls since the beginning of the year. Even though she had made partner and practice-group leader last year, she knew that, at her hard-driving firm, this abundance of work was welcome because you're only as good as last month's billings and collections.

Still, she was exhausted. So when Suzy Bengoshi – her old friend from law school – called to invite her to a dinner concert at the Japan-America Friendship League, Lili jumped at the chance. Anything would be better than leaving the office at 9:30 p.m., bleary-eyed from too much squinting at her computer screen, and fretting about how the next day's caseload could ever be filed on time.

Suzy had said that a world-famous Taiko performance troupe would be providing the entertainment at the concert. Lili didn't know about Taiko and was reluctant to ask Suzy to explain. Instead, Lili had her secretary Google the word and print out whatever information might be found. But then, in rushing out the door with an urgent USCIS filing and racing to catch up with the Fedex driver, Lili had forgotten to retrieve the Google printout. Dinner at the Friendship League was fabulous, featuring a resplendent display of sushi, sashimi, tempura and Kobe beef. Though shy and squeamish about business development, she even enjoyed exchanging business cards the Japanese way, with reverence and awe. The sake warmed Lili's insides, and she sat back to enjoy the show.

After the master of ceremonies hushed the crowd, he spoke first at length in loud, stirring Japanese, and then translated in many fewer English words. Engrossed in a sidebar conversation with Suzy, Lili didn't quite hear the English introduction. The stage curtains opened to reveal 10 Japanese men and women in traditional multi-colored cotton garb with white headbands. Noteworthy for their enthusiastic jumping and their buff arm muscles, the troupe divided before three rows of drums of varying sizes and shapes, from gargantuan to tiny. Suddenly, the performers began a drumbeat that grew in intensity, rumbling the torsos and stirring the stomachs of every audience member.

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So this was Taiko! Lili was unsure if she could tolerate the incessant drum beats, but decided to make the best of the experience. She tossed down another cup of sake, and focused intently upon the action onstage. Lili found that, by closing her eyes and feeling the drumbeats resonate inside her, she began to enjoy the sensations. But then the sounds of the drums took on a pulsating staccato rhythm. In her reverie, the sounds boomed louder and took on a disturbingly familiar beat:

*PERM, PERM, PERM,
H-1B, H-1B
PERM, PERM, PERM,
H-1B, H-1B
PERM, PERM, PERM,
H-1B, H-1B
PERM, PERM, PERM*

Then the vibrations seemed to be stronger on one side, and Lili felt her right shoulder shake. The shaking grew stronger until Lili awoke from her sake- and drum-induced trance. Suzy was shaking Lili's shoulder and calling her name. "Lili, wake up! Your cell phone was in vibrate mode and I caught it before it slid off the table. It's your boss, Canfield, on the line and he says it's an emergency. He needs to speak to you."

Lili knew it was trouble. Can Barrister, the firm's Managing Partner, had rarely called her at this hour – unless there was an emergency. She grabbed the phone. "Hello. Okay, okay, Can. I understand. I know we could lose this client if we don't dazzle them on our speed and effectiveness. I'll have it to you tomorrow by 10 a.m."

Lili cursed herself for the lunchtime seminar she'd presented at the firm just last week to the Corporate Group. She had tried to gain greater visibility among the partners, especially the all-powerful M & A lawyers. She also knew how hard it was to fix immigration screw-ups when transactional lawyers neglected to put immigration matters on their due-diligence checklist. So she had arranged to offer a presentation on why immigration law concerns should be addressed before the deal closes. The presentation seemed to have gone well, although she was unsure if attendance at the lunch was motivated more by the basil, tomato and buffalo mozzarella sandwiches (on ciabatta, no less). Or was it the rare roast beef on baguette?

Anyway, septuagenarian Can Barrister, who never even acknowledges her in the hallway, had actually listened! As Lili's bad luck would have it, Barrister's largest client had just decided on a spin-off transaction that needed to close yesterday.

Lili knew what to do. She bid a hasty, apologetic farewell to Suzy and her table mates, and ran out to the street. Lili knew of a Starbucks in the neighborhood, and

rushed inside just before closing. Ordering a triple espresso macchiato, Lili waited a minute, and when it arrived, downed the brown nectar in two throat-burning gulps.

In five minutes she was back at her office. It would be a long night, but she'd have that memorandum to Barrister on time. She'd prove to him that she could keep up with the "Brooks Brothers Suits" in her staid and stodgy firm. She found Barrister's email and printed the deal memo that Barrister's senior associate had drafted (what a "kiss-up/kick-down" type he was!). She read it carefully, absorbing the details of the spin-off. She knew what to do. After all, she was a veteran immigration lawyer who attended every M & A session at the AILA annual conferences for the last several years.

By 1 a.m., Lili had finished proofing and then emailed her memo to Barrister on how to address the immigration action items required before and after the deal closed. In this way, she knew that all parties would be in a position to comply with the law and maintain uninterrupted employment authorization and pipeline green-card benefits without skipping a beat. She knew it was late, and she vowed to arrive at the office by 10 a.m. the next day. Just let anyone try to comment or raise an eyebrow. They'd hear it from Lili, the newly minted Power Partner and Taiko enthusiast!

Memorandum

TO: M & A Practice Group, Philistine, Solicitor & Scribe LLP.
FROM: Snively Harrington, Senior Associate
DATE: June 15, 2005
RE: Spin Off of Technology Business of US Computer Company, Inc.

In a meeting held this afternoon, we learned from Corporate Counsel to our firm's client, US Computer Company, Inc., that German Computer Company AG ("German Co.") wishes to separate its Learning Business from its Technology Business worldwide. Currently, German Co.'s wholly-owned subsidiary, US Computer Company, Inc., a Georgia corporation ("US Computer Company"), is engaged in both the Learning and Technology Businesses (the "Businesses") in the United States. German Co. intends to carry out a Spin Off of its Technology Business into separate companies around the world.

The following is a brief description of the facts, the transaction steps, the implementing mechanics, including legal issues, and practical and business considerations.

FACTS

German Co. is a company duly incorporated and existing under the laws of the Federal Republic of Germany. German Co. is an information technology company providing software and learning solutions to customers worldwide through operations in Germany and through subsidiary companies in various countries of the world.

German Co. is engaged in, primarily, two distinct businesses, namely:

- 1) The Global Learning Business ("GLB") that is engaged primarily in providing Education and Training in diverse areas of Information Technology; and
- 2) The Technology Business ("TechB") that is engaged primarily in two business activities, namely:

a) providing software services and solutions, business process outsourcing services and geographic information services; and

b) developing solutions, i.e., designing, developing, delivering and managing knowledge management systems, education computer software, content, content management and others.

The future business directions of the GLB and the TechB indicate areas of divergence in growth profiles and product offerings. Accordingly, the Supervisory Board and the Management Board of German Co. have decided to spin off the TechB into separate and distinct corporate entities worldwide. Segregation of these businesses in different companies will create focused entities, having the necessary flexibility to pursue individual growth strategies.

German Co. would like our law firm to undertake the legal work necessary to transfer the TechB to US Computer Company Technologies, Inc. ("US Computer Company Technologies"), a new Georgia corporation that will be formed.

The Spin Off should be completed in the interests of the shareholders, creditors and all other stakeholders of German Co., since it will allow a focused business approach for maximization of benefits to all stakeholders and opportunity for pursuing accelerated growth options.

All of the assets of the TechB will be transferred to US Computer Company Technologies. The land, together with the buildings standing thereon, and any documents of title/rights and easements in relation thereto shall be vested in and transferred to US Computer Company Technologies. All debts, liabilities, duties and obligations of US Computer Company pertaining to the TechB, secured or unsecured, shall become the debts, liabilities, duties and obligations of US Computer Company Technologies. All permits, quotas, rights, entitlements and licenses shall remain in full force and effect in favor of US Computer Company Technologies.¹

Any and all employees of US Computer Company engaged in the TechB shall become employees of US Computer Company Technologies and shall be employed on similar terms and conditions as to remuneration, and without any break or interruption of service. It is the intent that all of the rights, duties, powers and obligations of US Computer Company in relations to the TechB employees shall become those of US Computer Company Technologies on the date of closing.

STEPS

The following corporate steps will be taken to accomplish the US portion of the Spin Off:

Step #1 – We will form a wholly-owned Georgia subsidiary of US Computer Company, US Computer Company Technologies.

Step #2 – US Computer Company will contribute the assets and liabilities of its TechB to US Computer Company Technologies as of the date of closing, July 15, 2005.

Step #3 – US Computer Company will distribute the stock of US Computer Company Technologies to German Co. in a transaction intended to qualify for U.S. federal income tax purposes as a tax-free Spin Off pursuant to Section 355 of the Internal Revenue Code. Both US Computer Company and US Computer Company Technologies will ultimately remain wholly-owned subsidiaries of German Co.

Step#4 – US Computer Company Technologies will obtain an IRS employer identification number and establish a payroll and the TechB employees will be transferred to this payroll and become employees of US Computer Company Technologies as of the date of closing, July 15, 2005.*

CORPORATE MECHANICS

We will incorporate US Computer Company Technologies in Georgia. We can prepare the Articles of Incorporation and the relevant corporate documents for review. This incorporation can be done well in advance of the U.S. effective date of the Spin Off, which is to be July 15, 2005. Under Georgia law, the directors of US Computer Company can, without shareholder approval, authorize the officers of the corporation, or its attorneys, to form a subsidiary corporation for the purpose separating the businesses. One of our partners, acting as incorporator, can sign the German Co. approved Articles of Incorporation to create US Computer Company Technologies and elect the initial directors. Georgia law requires no minimum capital for US Computer Company Technologies. US Computer Company Technologies can then enter into an Agreement and Plan of Reorganization and Corporate Separation (the "Agreement and Plan"), which, in many ways, will resemble an Asset Acquisition Agreement, that is, an agreement whereby US Computer Company Technologies is acquiring the TechB assets in return for a transfer of all of its shares of capital stock to US Computer Company. This Agreement and Plan is not a public document.

Proper resolutions adopted by the boards of both US Computer Company and US Computer Company Technologies will approve the Spin Off. For U.S. tax purposes, it is important that the business purpose for the Spin Off be documented in these resolutions and the relevant German Co. resolutions as well.

The Spin Off will be effective July 15, 2005, the first day of US Computer Company's new tax year.

* It is critical that all TechB personnel be transferred to the US Computer Company Technologies payroll as of that date for tax reasons.

