

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.

We will also prepare stock certificates evidencing the other various transfers of US Computer Company Technologies stock, as described above, with agreements from the non-public transferees making certain representations necessary to comply with U.S. securities laws.

US Computer Company Technologies will be a completely new legal entity. The transfer of the TechB assets, liabilities and employees to US Computer Company Technologies will not happen by operation of law. The fact that US Computer Company Technologies is a completely different legal entity may trigger the need to assign or transfer numerous contracts and agreements, and, in some cases, the need to obtain required consents. It will also require seeking approval of the employment transfers of numerous employees in E, L and H visa status, and in other legal status authorized through permanent resident applications.

We will prepare an Assignment and Bill of Sale and other closing documents to transfer the Technology Business assets and liabilities. The transaction will be described in the Agreement and Plan.

LEGAL ISSUES

There are a number of legal issues that we need to tackle immediately:

1. ERISA may require that all plans be amended, although hopefully not, given the initial common ownership of US Computer Company and US Computer Company Technologies. The ERISA rules may not treat US Computer Company and US Computer Company Technologies as affiliates.
2. The transfer of employees will occasion the need to obtain Non-Competition Agreements and Confidentiality Agreements and any necessary Employment Agreements with US Computer Company Technologies.
3. US Computer Company's space leases will need to be reviewed to see if a portion of its space can be sublet to US Computer Company Technologies without landlord permission.
4. All major contracts, service or customer, and leases of equipment, should be checked as to assignability without consent of the other party or what consent must be obtained.
5. Licenses of technology in and out must be reviewed for assignment issues and any tax issues.

6. US Computer Company Technologies will have to set up completely separate bank accounts.
7. All credit agreements will need to be reviewed, especially as to covenants that might be breached and events of default that might be triggered by a transfer of assets in the Spin Off.
8. A courthouse search should be done in order to make sure there are either no financing statements or liens on the Technology Business assets to be transferred or assigned, or that waivers can be obtained.
9. We will confirm that the Spin Off will be free of tax from Georgia income tax.
10. We will confirm that the transfer of assets in the Spin Off will fit the Georgia exemption from Georgia sales and use tax.
11. We will confirm that the Hart-Scott-Rodino Act does not apply.
12. We will confirm the Immigration issues and steps to be taken.

**Privileged & Confidential
Client Communication
Attorney Work Product**

TO: Corporate Counsel, Esq., US Computer Company, Inc.

CC: Canfield Barrister, Esq., Managing Partner, Philistine, Solicitor & Scribe, LLP.

FROM: Lili Avvocato, Partner, Immigration Practice Group, Philistine, Solicitor & Scribe, LLP.

DATE: June 15, 2005

RE: Immigration Consequences² of Spin Off of Technology Business – Action Required to Support Employee Transfer³

This memorandum will address the U.S. immigration law requirements and required action items that must occur in order to maintain compliance with the immigration laws and regulations, ensure uninterrupted employment authorization of employees affected by the change of entity structure, and preserve efforts already underway to obtain lawful permanent residence (“green card” status) for these workers and their family members. I have carefully reviewed the memorandum prepared by Snively Harrison, defining the Spin Off of the Technology division of US Computer Company, Inc. (“US Computer Company”) to the newly formed US Computer Company Technologies, Inc. (“US Computer Company Technologies”).

The required immigration action items are quite important. Any failure to comply with the immigration laws can risk possible fines and penalties for a culpable employer and could subject the affected employees and their family members with deportation (now known as “removal”) from the United States and threaten the loss of eligibility for lawful permanent residence in the future. Fortunately, because your company solicited immigration counsel before the corporate spin-offs took effect, all of these adverse outcomes can be avoided.

As a first step, I have reviewed our status report of all active and ongoing immigration cases for US Computer Company and will initiate an audit of our immigration files. I have defined and listed the foreign nationals working in the Technology Division as well as their immigration status. There are 25 foreign nationals working in E-2 visa status in the Technology Division; 20 in H-1B visa status; 5 in L-1A status; and 20 in L-1B status. There are 20 foreign nationals who have applied for Adjustment of Status (green card status) in the United States and whose applications have been pending for less than six months; 10 who have applied for Adjustment of Status in the United States whose applications have been pending for more than six months; and 25 who have applied for consular processing of their U.S. immigrant visas in Germany.

In order to effect a payroll and employment transfer within one month, we will need to begin work immediately to prepare and file the immigration forms and supporting documentation authorizing the transfers.⁴ We will also need to define the travel plans of the foreign nationals since international travel may affect the manner in which we proceed.⁵

I will summarize our plan of action for each of the foreign nationals in the respective status defined below:

H-1B Employees

Prior to the payroll transfer from US Computer Company to US Computer Company Technologies, we should complete an audit of US Computer Company's Labor Condition Application Supporting Documentation files to make sure that each and every employee maintains a Labor Condition Application covering the current location of employment, as US Computer Company Technologies will assume liability for the H-1B employment of these individuals by location. We will also need to ensure that the Labor Condition Application accurately covers the position and level of employment, and that the files are being properly maintained.

If the respective Labor Condition Application ("LCA") correctly covers the employee's location of employment, job title and level of employment, I believe that we will be in a position to transfer the employees effective July 15, 2005. Section 401 of the Visa Waiver Permanent Program Act contains a corporate restructuring provision that allows certain H-1B professionals to continue to work for successor employers without the need to file and obtain approved amended petitions. Specifically, Section 401, which amended Section 214(c) of the INA, states that "an amended H-1B petition shall not be required where the petitioning employer is involved in a corporate restructuring, including but not limited to a merger, acquisition, or consolidation, where a new corporate entity succeeds to the interests and obligations of the original petitioning employer and where the terms and conditions of employment remain the same but for the identity of the petitioner."⁶

In this Spin Off transaction, you have indicated that US Computer Company Technologies will succeed to the interests and obligations of US Computer Company and that US Computer Company Technologies will offer similar terms and conditions of employment. Provided the level of similarity is quite high, I believe that amended petitions should not be required provided the H-1B workers continue to serve in precisely the same capacity and work location as noted in the underlying H-1B petition and supporting Labor Condition Application.⁷

Regulations implementing the American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA") provide that we must make the following documents available for inspection by the public: "a sworn statement by a responsible official of the new employing entity that it accepts all obligations, liability and undertakings under the LCAs

filed by the predecessor employing entity, together with a list of each affected LCA and its date of certification and a description of the actual wage systems and EIN of the new employing entity.”⁸ I am attaching model documents that will serve as a basis for completing this information prior to closing.

We should also prepare a comprehensive memorandum and affidavit detailing the nature of the Spin Off and the reason we believe it complies under the terms of Section 401 of the Visa Waiver Permanent Program Act and under the regulations implementing ACWIA. Specifically, we must prepare a memorandum confirming the facts that show that US Computer Company Technologies succeeds to the interests and obligations of US Computer Company and that US Computer Company Technologies accepts all obligations, liability and undertakings under US Computer Company's LCAs.

If the respective LCA does not correctly cover the employee's location of employment, job title and/or level of employment, US Computer Company Technologies should file amended H-1B visa petitions with the USCIS and obtain approval prior to closing on July 15.⁹ This will necessitate the payment of the \$1,000 premium processing fee as well as the filing fee of \$2,185 for the Principal H-1B and \$195 for his or her dependents if extension of stay is also requested.

Employees in H-1B status may travel internationally after the Spin Off and be readmitted to the U.S. provided they maintain current H-1B visas in their passports¹⁰; however, we should prepare brief letters to USCIS officers stipulating the employment terms and the fact that the employees are authorized to work for US Computer Company Technologies based on provisions in Section 401 of the Visa Waiver Permanent Program Act since US Computer Company Technologies has succeeded to the obligations and liabilities of US Computer Company.

L-1 Visa employees

US Computer Company Technologies will also be required to file¹¹ and obtain approval of L-1 visa petitions on behalf of Technologies Business employees prior to their payroll transfer.¹² We will need to file copies of the following documentation to support the L visa petitions:

- Share Certificates showing ultimate ownership of US Computer Company Technologies by German Co.;
- Sublease of Space executed by US Computer Company Technologies, Bylaws and Articles of Incorporation;
- Copies of Bank Account Statement evidencing operating funds; and
- Contract Assignments.

We will also need to provide the new Federal Employer ID number and the projected gross and net annual income for Fiscal Year 2006.

For the L-1A transfers, we will need to provide evidence that they will continue to work in a management or executive capacity with US Computer Company Technologies.

For the L-1B transfers, we will need to provide an abundance of evidence that they maintain proprietary, specialized knowledge regarding German Co 's and US Computer Company's products, services and methodologies. Since the L-1 Visa Reform Act was recently enacted, we are seeing many requests for evidence in these cases requiring conclusive proof that the position is not a development position at client's site. Accordingly, we will need to be very detailed in our submission.

We will seek, where possible, two-year extensions of status for Tech B transferees. We will argue that US Computer Company Technologies does not constitute a New Office situation since it merely houses the Spin Off of a Business Division that has been operating in the United States for over 10 years. However, we cannot guarantee that an immigration officer will not limit the period of extension based on an alternative interpretation that the newly formed company does constitute a new office.¹³

E Visa Employees

Since US Computer Company Technologies will be owned by German Co., it should qualify for E registration at the U.S. consulate in Frankfurt. When we prepare the application for registration, however, we will need to provide substantial evidence confirming that US Computer Company Technologies is not a start-up, as the US Consulate in Frankfurt is reluctant to grant E status to start-ups.

We will need to either process new E visas for Employees at the US Consulate in Frankfurt prior to the closing authorizing the payroll and employment transfer, or we will need to file E visa petitions with the USCIS requesting premium processing and approval prior to closing.¹⁴ We will request a five-year visa authorization for Employees traveling to Frankfurt; we will request a two-year extension of status for Employees processing through the USCIS in the United States.

Applicants for Alien Employment Certification

As successor in interest to US Computer Company, US Computer Company Technologies should have the right to amend Applications for Alien Employment Certification and/or PERM applications to become the Corporate Applicant. US Computer Company will need to notify the Backlog Reduction Center of the Spin Off and will need to request to Amend the Application for Alien Employment Certification, or, the PERM processing center, as applicable.

Petitions for Immigrant Visas

US Computer Company Technologies must file amended immigrant visa petitions on behalf of its pre-certified priority workers and on behalf of its Labor Certification beneficiaries.¹⁵

In the case of its pre-certified priority workers, it will not only have to establish that it qualifies as a subsidiary of German Co. (or as an affiliate of a prior employer), but it will also have to argue that it is not a new office for purposes of qualification as a sponsor company. In this regard, we will present a copy of the Asset Purchase Agreement and related documentation showing that US Computer Company Technologies represents the Spin Off of an active, ongoing business and does not represent a new office situation.

Applicants for Adjustment of Status

Generally, Applicants for Adjustment of Status whose applications have been pending for more than 180 days and who are beneficiaries of Alien Employment Certification Applications and approved Immigrant Visa petitions may apply to port to another legal entity and continue the green card process. This is possible provided the new entity offers employment of a permanent nature in a position in the same occupation under similar terms and conditions. Provided US Computer Company Technologies agrees to continue green card processing on behalf of the Applicants for Adjustment of Status, I would recommend that we file portability packages on behalf of these adjustment applicants with the USCIS.¹⁶

While there are strong arguments that Applicants for Adjustment of Status who are beneficiaries of priority worker petitions may also port, regulations have not made this clear, and I would therefore suggest that immigrant visa petitions be amended by US Computer Company Technologies in this case.

While portability should also be possible for Applicants for Adjustment of Status whose immigrant visa petitions have not been approved, I find this too risky since status would be affected should the immigrant visa petition be denied for some reason.

Immigration Reform and Control Act Requirements

With regard to the Employment Eligibility Verification Forms I-9 for the foreign nationals and U.S. Citizens transferred to US Computer Company Technologies, US Computer Company Technologies will acquire liability.¹⁷ US Computer Company Technologies may decide to reexecute all Forms I-9 for employees or to assume the Forms I-9 as executed by US Computer Company. While conducting due diligence, we should perform an I-9 audit to determine what if any liability exists and request US Computer Company to make a good faith effort to correct all deficiencies prior to closing.¹⁸

