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LIFE AFTER MERGERS AND ACQUISITIONS:

THE IMMIGRATION IMPACT ON U.S. EMPLOYERS AND ALIEN WORKERS

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The authors gratefully acknowledge the generous assistance of Lawrence J. Weinig, Deputy Assistant Commissioner for Adjudications, Immigration and Naturalization Service ("INS"), who has kindly provided a collection of advisory letters, many previously unpublished, on U.S. immigration consequences of mergers, acquisitions and other business-entity changes. Mr. Weinig, through his letters (attached as Exhibits to this paper), has made a substantial contribution to the legal literature on this important subject.

I. INTRODUCTION.

A. The New Guest at the M & A Party. There you are -- attending a fashionable party at a chic locale in Beverly Hills. The business suits and power ties are huddled in one corner. Your host tells you that this is the "M & A" crowd. Having heard about Beverly Hills parties, and wondering if M & A is Herb Alpert's new music company, you edge closer to the group, hoping to overhear some music industry cocktail chatter. The M & A's speak of "poison pills", "white knights", "greenmail" and "golden parachutes". You're confused but intrigued. Then the faces of the M & A's become distorted with fear, their voices take on hushed tones, their brows bead with sweat. They speak excitedly of "Weinig letters!"

The alarm rings and you wake up, realizing of course that you are, after all, an immigration lawyer about to begin another day of business visa practice. Your task today, and probably for many months to come, is to decipher the perplexing and contradictory regulations found in Volumes 8, 20 and 22, Code of Federal Regulations, and apply them to the modern world of mergers, acquisitions and other business-entity changes.

The world of mergers and acquisitions, spiced with "poison pills", "white knights", "golden parachutes" and "greenmail", has captivated the public's attention.[1] As savvy immigration practitioners know, much less attention has focused on the role and impact of the immigration laws in such business changes.

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[1] A "poison pill" is a change in the capital structure or financial condition of a target company, e.g., the assumption of a debt obligation, designed to make the target unpalatable and therefore less attractive to potential acquirers. In a hostile takeover, a "white knight" is an acquiror considered by the current management of a target company to be more desirable than the hostile acquiror who, if successful in a takeover bid, would probably fire current management. "Greenmail", a variant of blackmail, is the purchase of a significant block of stock of a target company by a potential acquiror, made in an effort to induce the target to repurchase the stock at a premium in order to prevent a tender offer. A "golden parachute" is a lucrative compensation package offered to an executive as a form of safety net in the event the executive is terminated from employment, e.g., as a result of a corporate takeover or dissolution.

In the coming months and years, however, immigration issues are likely to be given much greater prominence. As the "Economic Trends" columnist for Business Week noted in a recent article, aptly titled "Where Will Merger Mania Strike Next?":

> "[M]erger and acquisition activity is increasingly taking the form of cross-border deals as the world economy becomes global. . . . [T]his year they accounted for 37.8% of takeovers, with the bulk of them involving a foreign company getting a foothold in the U.S. market."[2]

B. Corporate-Changes Look-Out List. As will be shown, inattention to the immigration consequences of business changes can be costly and painful -- to U.S. employers, their alien workers and immigration practitioners. Adverse immigration consequences can arise from any business-entity change which has the effect of undermining (a) an employer's qualification as an individual or entity eligible to confer a particular work-visa classification; or (b) an alien-worker's eligibility for prospective or continuing employment authorization or lawful permanent residence.

There are many events which can trigger immigration consequences. Such triggering events may include changes in:

(a) an entity's stock or asset ownership, e.g., a reduction in the percentage of corporate ownership to less than 50%, or the loss of a controlling interest in an entity;

(b) an entity's business activity, e.g., a corporate dissolution, the cessation or reduction of trading activity, or the commencement of a new or different line of business;

(c) an entity's business location;

(d) an alien-worker's job location, job title or job duties;

(e) an alien-worker's managerial or executive responsibilities over other personnel; or,

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[2] C. Farrell, "Where will Merger Mania Strike Next?", Business Week, Dec. 18, 1989, page 32.

(f) an alien-worker's use of essential skills or specialized knowledge.

C. Why Employers Should Care About the Immigration Consequences of Business-Entity Changes.

1. The IRCA Sledgehammer. The Immigration Reform and Control Act of 1986 ("IRCA"), as immigration practitioners know, ushered in a new era in INS enforcement of the immigration laws. IRCA imposes new responsibilities on U.S. employers to maintain proper paperwork (the form I-9), examine documents confirming the identity and employment eligibility of all employees hired on or after November 6, 1986, and refrain from hiring and from continuing to employ persons who are not authorized to work in the U.S. INS enforcement mechanisms include a series of civil fines, escalating up to $10,000 per unauthorized worker, injunctive restraints and criminal exposure for "pattern and practice" violations and for the harboring of illegal aliens.

Recent case decisions in this area have held employers to a strict standard. A knowing violation may occur when an employer has constructive knowledge of facts which would lead the employer to understand that the worker never was or is not now authorized to work in the United States.[3] In other words, since the passage of IRCA it has become even more important for employers to continue monitoring the status of their alien workers and to make sure that there is full compliance with all regulations regarding non-immigrant extensions, periods of work authorization and changes in the conditions and terms of employment. For example, the form I-9 must be annotated after the employer receives approval of the extension of the employee's work-visa status. 8 C.F.R. § 274a.2 (b)(vii). Failure to make this annotation is a paperwork violation, and if the alien was not properly maintaining status, the failure to update the I-9 might also be used as a basis to charge the employer with a violation for knowingly employing an alien without authorization.

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[3] See Mester Manufacturing v. INS, ___ F.2d ___, No. 88-7296 (9th Cir. 1989, amended August 8, 1989) (Employer cannot use "willful blindness" to avoid liability). See also U.S. v New El Rey Sausage, Case No. 88-100080 (OCAHO, July 7, 1989) (adopting a "reason to know" standard for liability).

Prudent employers will therefore avoid the hammer of IRCA by taking care that business entity-changes are accomplished without impairing the employment authorization of alien workers.

2. **Avoiding Business Hardship and Loss of Key Workers.** While complying with IRCA, US. employers must nonetheless compete in the global economy. Inattention to the immigration consequences of business changes can delay or doom a merger and can deprive an employer of vital foreign personnel as INS examiners or U.S. consular officers consider applications that will allow for continuing employment authorization. In addition, INS regulations expressly consider an employer's IRCA compliance record in determining whether to approve petition extensions for "H" or "L" aliens. See 8 C.F.R. § 214.2(h)(13)(i)(B)(1) and § 214.2(l)(16)(i)(B)(1).

D. Why Alien Workers Should Care About Business Changes?

The alien employee is often directly and dramatically impacted by a change in the sponsoring employer's business. Let us examine some all too typical cases:

1. An E-1 and E-2 example.

A French corporation transfers certain key employees who hold French citizenship to its U.S. subsidiary under E-1 or E-2 visas. The controlling interest in the French company is sold to an Italian corporation. The E-2 relationship has been severed because the U.S. business is no longer principally owned by French citizens. The key employees cannot continue to work in E-1 or E-2 status, since the "treaty nationality" requirement is no longer satisfied.

2. An E-1 Example.

A Japanese trading company, incorporated and doing business in Japan, purchases all of the stock of another, unrelated U.S. company. This U.S. company is involved in a completely different type of business which has no current trade in goods or services with Japan. The Japanese trading company desires to transfer all of its E-1 employees to the newly acquired U.S. company from another Japanese affiliate in the U.S. As the facts are presented here, the E-1 employees cannot be placed on the new company's payroll, given that the acquired company is not engaged in U.S.-Japan trade.

3. An H-1 and Individual Labor Certification Example.

A scientist, currently in H-1 status, is the beneficiary of an approved (non-Schedule A) labor certification and a third preference visa petition. The sponsoring employer purchases a new subsidiary and wishes to relocate the scientist to that corporation. Both the H-1 transfer and the labor certification may require governmental approval or else the alien's non-immigrant status and eligibility for adjustment of status to permanent residence may be in jeopardy.

4. An L-1 Example.

An English corporation transfers an executive on an L-1 visa to its wholly owned U.S. subsidiary. If the English corporation later sells the controlling interest in the subsidiary to a company operating solely in the United States, the former subsidiary no longer meets the test of an L-1 qualifying organization. See 8 C.F.R. § 214.2(l)(l)(ii)(G) (a qualifying organization must do business in the U.S. and "at least one other country.")

5. A Schedule A, Group IV Example.

A chief executive on an L-1 visa is the beneficiary of both an approved Schedule A, Group IV blanket labor certification and a third preference immigrant visa petition. The third preference priority date is not yet current. All of the shares of the U.S. sponsoring company are purchased by an unrelated U.S. corporation which does not purchase the related foreign entity that had employed the executive for the year prior to his U.S. entry in L-1 status. This purchase may have the effect of invalidating the Schedule A, Group IV labor certification.

In each of these cases, if the proper steps are not taken to preserve non-immigrant status or to obtain a different non-immigrant status for the alien employee, the alien worker runs the risk of falling "out of status." The consequences of falling out of status are both immediate and long range. The alien would lose the ability to work in the United States, become subject to deportation for failure to maintain status, be barred from receiving an extension of stay or change of status in the United States and perhaps encounter difficulty in obtaining, or be refused, a new non-immigrant visa. The alien and his or her family members would probably also be ineligible

to adjust his or her status to permanent resident within the United States but would instead be required to apply for an immigrant visa at a U.S. consulate abroad.[4]

For aliens who have been sponsored by their employer for permanent residence, these types of changes may have the effect of invalidating individual or Schedule A labor certifications and third or sixth preference immigrant visa petitions. For example, consider the following scenario: a Schedule A, Group IV labor certification application is pending or has been approved; the priority date has not arrived; the sponsoring employer is considering the possible sale of the foreign affiliate that had previously employed the alien. The question arises whether the sale would invalidate the labor certification.[5] Moreover, the alien worker arguably could face deportation or rescission proceedings if as a result of an undisclosed business-entity change, he or she accepts permanent employment in a position other than the job for which labor certification has been approved. [6] Obviously, these types of dramatic effects are of crucial concern to alien workers.

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[4] See 8 C.F.R. § 245(c). The prohibition on adjustment of status does not apply where the alien fails to maintain status through no fault of his or her own or for technical reasons. An argument could be made that an employer's failure to correct a non-immigrant petition upon the occurence of a business-entity change is a situation over which the alien has no control, or that such a failure is in essence a "technical" violation. In at least one case, however, the INS has denied adjustment of status where the employer transferred an L-1 manager to a newly acquired subsidiary without filing a new petition or amending the old pursuant to 8 CFR § 214.2(1)(7)(i)(C). See Exhibit D, Sept. 26, 1988 letter from L. Weinig to Stella Jarina (INS Assistant District Director for Examinations, New Orleans). This letter does not address the question whether the "no-fault-of-the-alien" or "technical-reasons" exceptions to the § 245(c) bar on adjustment of status may apply.

[5] For a discussion of this issue and possible solutions, see D. Buffenstein, C. Foster, S. Mailman & A. Paparelli, "Advanced Business Visa Strategy Roundtable, "Immigration Briefings, No. 89-9, pp. 27-31 (September, 1989).

[6] Generally, See Annot: "Alien's Taking of Employment Other Than Type Specified in Labor Certification as Warranting Deportation Under Immigration Laws," 62 ALR Fed. 402; In Re Marcoux, 12 I. & N. Dec. 827 (1968); In Re Fotoupolos, 13 I. & N. Dec. 847 (1971); Spyropoulos v. INS, 590 F. 2d 1 (1st Cir, 1978).

II. IMMIGRATION LAW ON BUSINESS-ENTITY CHANGES. WHAT LAW?

Immigration practitioners who attempt to counsel employers or alien workers on the law in this area immediately encounter a befuddling array of contradictory regulations, an absence of black-letter law, and regional and local variations in policy and procedure. INS officials at the Central Office have acknowledged that the agency's regulations in this area are inconsistent, confusing, and should be revised. See Exhibit A, May 25, 1988 letter from Richard E. Norton, Associate Commissioner, Examinations, to Angelo A. Paparelli, and Exhibit B, May 11, 1988 letter from Lawrence J. Weinig, Deputy Assistant Commissioner, Adjudications, to Richard Steele. [7]

A. Regulatory Conflict at INS: The Tension Between Examinations and Enforcement Policies. As many commentators have observed, the INS is an agency charged with potentially contradictory objectives. On the one hand, the Service adjudicates applications, conferring or withholding immigration benefits. On the other, it acts as a police agency, enforcing the immigration laws. This contradiction is particularly apparent in the area of business changes and the resulting immigration consequences to employers and alien workers.

The problem lies in determining what action ought to be taken by the employer, the alien worker and the INS when a business-related triggering event occurs.

1. The E-1/E-2 Method. A hard-line approach would require that the alien worker and the employer (a) apply to INS in advance of any and every entity-change, job-change or other triggering event which might arguably affect work-visa classification; (b) request employment authorization, and then (c) await the INS' adjudication before taking any further action. See, e.g., 8 C.F.R. § 214.2(e) (requiring E-1 treaty traders and E-2 treaty investors to apply for, and receive INS approval before switching employment to another "E"-qualifying employer). This approach poses the prospect of significant business and personal hardship as the engine of commerce grinds to a halt pending the often tardy response of a historically understaffed agency.

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[7] For brevity's sake, given the number or letters attached as exhibits, this paper will hereafter use a condensed reference format, e.g., "5-25-88 Norton/Paparelli Letter (Ex. A)".

2. The L-1 Method. Another approach might involve a notice procedure: The alien or the employer merely gives INS prior or contemporaneous notice of an arguably significant triggering event and assumes that the alien worker may continue in employment, unless and until INS registers an objection and takes action to revoke the employer's petition and the alien's employment authorization. See, e.g., 8 C.F.R. § 214.2(l)(9)(l) (imposing on employers of L-1 intracompany transferees the duty to give INS notice, within 10 days, of "any changes in the relationship between approved entities" or in the employment of the alien worker which "would affect [L-1] eligibility") and 8 C.F.R. 214(l)(9)(iii) (relating to INS petition-revocation/notice procedures). Alien workers and their employers pursue this approach at their peril, however, for if they guess wrong about how the INS ultimately views the immigration consequence of the triggering event, the employer faces the loss of a valued employee and significant IRCA exposure, while the alien falls out of status, loses employment eligibility, may be barred from adjusting status and becomes deportable.

3. Enforcement Branch Regulations on Related, Successor, and Reorganized Employers. Still another approach -- attractive to employers and aliens because of its simplicity and ease of implementation -- is suggested in the INS Enforcement Branch regulations on continuing employment for I-9 purposes. See 8 C.F.R. 274a.2(b)(l)(viii)(G). The cited provision outlines circumstances of "Continuing employment" where an employer is relieved of the burden of re-verifying a worker's employment eligibility and preparing a new form I-9. Presumably, the employer is relieved of this burden in cases of continuing employment because the employee is considered as continuing to possess work authorization. Hence, the only procedure required in the cited regulation is the transfer of relevant records and any I-9 forms from the original to the related, successor or reorganized employer.

As the regulation states, "'Continuing employment' includes but is not limited" to a variety of specific occurrences. One of these addresses business-entity changes directly:

> "(G) The employee continues his or her employment with a related, successor, or reorganized employer, provided that the employer obtains and maintains from the previous employer records and Form I-9 where applicable. For this purpose, a related, successor, or reorganized employer includes:

"(1) The same employer at another location;

"(2) An employer who continues to employ some or all of a previous employer's workforce in cases involving a corporate reorganization, merger, or sale of stock or assets; or

"(3) [involving employers in multiemployer associations and employees in the same bargaining unit under the same collective bargaining agreement]."

4. Are the Regulations on Related, Successor, or Reorganized Employers Too Good to Be True? 8 C.F.R. § 274a.2(b)(1)(viii)(G) raises a number or intriguing issues:

*** Does this provision supercede and override earlier-promulgated regulations requiring prior INS notice and/or approval before an alien worker may transfer to another company?

*** Will the provision operate to forgive an employee transfer not approved in advance by INS?

*** What sort of entity change must occur to constitute a "reorganization"? Must it be a fundamental change in business activity, stock ownership or control, or, will some lesser event suffice?

*** What is a "related" employer? Under this regulation, would INS consider a licensee, a minority stockholder, a franchisee, or a blood relative of the company president as a related employer?

*** Is "related" in this context intended to be something less than the relationship of "affiliate" or "subsidiary" as defined in the L-1 regulations?

*** Given that the regulation includes but is not limited to certain examples, what other business-entity changes might conceivably qualify for the apparent "safe harbor" of this provision?

Immediate answers to these perplexing questions are not yet available. Past agency practice suggests, however, that INS will probably not allow the use of the I-9 regulation on related, successor or reorganized employers to substitute for the traditional requirement that the Service be given prior notice and provide its consent whenever a significant business-entity change occurs. Prudent practitioners will err, therefore, on the side of caution, and advise clients (a) to provide INS with prior notice of all but the most minor business-entity changes; and (b) to seek the agency's prior confirmation of continuing employment authorization for all alien workers affected by the change.

4. INS Letters: Law or Lore? For several years, officials in the INS Central Office, the regions and the districts have responded by letter to attorneys' inquiries on the agency's interpretations of the immigration laws. A collection of such letters, relevant to the topic, appears in the Exhibits to the present article. Courts generally pay deference to agency interpretations that are not plainly erroneous or inconsistent with applicable statute or regulation. As noted, however, in Diaz v. INS, 648 F. Supp. 638, 645 (E.D. Cal., 1986):

> "It is not clear *** what sorts of statements emanating from an agency are to be considered by the court as 'agency interpretations.' It is in the nature of a complex bureaucracy to issue a variety of reports, releases, opinions, advisory letters, and other similar statements in performing its tasks.
>
> ***
>
> "[I]t appears fair to state that the court must give great weight to the pronouncements emanating from an agency's national office which are intended to provide guidance to an agency nationwide, and at least some consideration to other statements. [Emphasis added.]"

Are the letters attached to this paper and other similar letters addressed to inquiring attorneys from the INS Central Office "intended to provide guidance to an agency nationwide"? A safe, but uncertain answer is: "probably not".

The reader should note that virtually every INS letter included in the Exhibits bears a file reference in the upper right margin, e.g., "CO 214.2H-C". The authors understand from discussions with INS Central Office personnel that the reference can be deciphered as: "CO" = Central Office; "214.2H" = a discussion of 8 C.F.R. § 214.2(h); and "C" = correspondence. The key abbreviation is the last, "C", which must be distinguished from INS file references ending in "P" for "policy". See for example the well-known October 27, 1988 letter from Richard E. Norton, clarifying the standards for L-1 specialized knowledge classification, published in 65 Interpreter Releases, 1170-71, 1194-95 (November 7, 1988), bearing the reference, "CO 214.2 L-P". Thus, it appears that INS does not consider itself bound by correspondence bearing a final, telltale symbol "C", but only by communiques ending with the letter "P".

While these advisory letters are apparently non-binding INS pronouncements, they do offer some hint of how the Service might interpret a given factual situation. The problem is that the letters often do not clearly state the operative facts or address apparently relevant regulations or Operations Instructions.

In addition, a careful reading of these letters suggests some lack of consistency in interpretation. For example, in the 10-4-88 Weinig/Goldsmith Letter (Ex. C), Mr. Weinig indicates that the transfer of an "H" employee from one subsidiary to another within a multinational corporation requires a new I-129B petition. Yet, in the 6-27-88 Weinig/Rosin Letter (Ex. D), Mr. Weinig suggests that where two hospitals merge their operations under one group, thereby forming one employer with two locations, prior Service approval is not required for H-1 medical personnel (previously employed by the two hospitals) who will then be employed by the newly merged entity.

This is a curious proposition, since in a merger at least one of the employing entities typically undergoes a dissolution. Hence, H-1 workers employed by the hospital entity in dissolution would presumably be transferred onto the payroll of the surviving merged entity. Thus, it is unclear why prior INS approval of both a new I-129B petition and an I-539 application, or at least the prior annotation of the H-1 workers' I-94 forms to authorize employment with the surviving employer, would not be required.

There are other puzzling comments or apparent inconcistencies in the Exhibits. See, e.g., the 7-6-89 Weinig/Caraulo Letter (Ex. E). This letter states: "A treaty alien may engage in incidental work for a subsidiary of the same employer company as long as the subsidiary independently qualifies as a treaty alien employer and the work performed is managerial, supervisory or essential-skilled." The letter does not indicate whether prior INS permission is required to perform such incidental work, yet one can fairly infer that prior approval is not necessary, given that the preceding paragraph describes circumstances where INS permission is not required for an "E" employee to "transfer a position of equal or higher level of responsibility within the same company."

Similarly, consider the December 21, 1983 (pre-IRCA) letter from Mr. Weinig's predecessor, Thomas W. Simmons (now head of the INS Administrative Appeals Unit), to Alan Lee, Esq., (Ex. F), suggesting in answer to Mr. Lee's question 1. c.), that an alien in L-1 status, previously authorized to work for a New York corporation, may perform services for a California subsidiary (formerly a branch) of the New York company.

This proposition would appear to conflict with other advisory letters included among the Exhibits, suggesting that prior Service approval is necessary. See, for example, the 9-26-88 Weinig/Jarina letter (Ex. G), where the L-1 alien, employed by Pepsico in the United States, was transferred to Pepsico's newly acquired subsidiary, Kentucky Fried Chicken, without prior INS approval; on these facts, Mr. Weinig indicated that the alien had engaged in unauthorized employment and was therefore barred from adjusting status.

III. RECOGNIZING AND RESOLVING THE PROBLEMS

If the immigration practitioner is fortunate and has received advance notice of an impending business change, there are a number of steps to take which may allow the change to take place and nonetheless preserve the immigration status of alien workers.

A. Relevant Issues. Consider the following questions:

1. Will the merger, acquisition or other triggering event result in a change which would affect the underlying visa eligibility of all non-immigrant employees? This is similar to the situation described in the L-1 Example, above, where the U.S. company is no longer a subsidiary of the foreign entity.

2. Will there be a change in the new employer's business activity? See the E-1 Example where the U.S. trading company plans to engage in an unrelated business activity which may not involve U.S.-treaty country trade.

3. Will there be a change in any alien employee's job title, duties, managerial or executive responsibilities, or use of specialized knowledge, essential skills or place of employment? Obviously, a demotion, a lateral transfer or a change from an executive or managerial position to a job merely requiring specialized knowledge or essential skills involve greater concern than a promotion or a transfer in the same job to another location of the same employing entity.

4. If the change apparently undermines the alien's current non-immigrant status, what other types of non-immigrant categories may be utilized? This analysis involves the typical considerations, familiar to immigration lawyers, of the alien's academic record, career history and anticipated job duties in the United States.

5. Can the priority date and/or labor certification be preserved for aliens sponsored for an immigrant visa? As discussed below, the answer may be different depending on whether the case involves Third or Sixth Preference classification and individual or Schedule A labor certification.

6. Before acquiring a new company, has the purchasing entity reviewed the I-9 forms of the target company? In addition, the purchaser should review (a) the target's payroll records in order to verify the completeness of the I-9 forms and the dates of hire for all employees; (b) copies of all applications for any non-immigrant or immigrant visas filed by the target company; and (c) information concerning (i) past violations of the immigration laws, (ii) the company's prior encounters with the INS (including any "surveys" or raids); and (iii) any previous denials of labor certifications or visa petitions[8].

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[8] The denial of a labor certification within the last six months may preclude the employer and successor employer from filing any new labor certification applications in that occupation. See 20 C.F.R. § 656.29. Further, many of the visa applications and petition forms ask if the employee has ever had a visa petition denied, and the alien must disclose prior visa denials in many future applications.

7. Determine Whether the New Employer Should Redocument the Workforce. Under the INS regulations discussed previously concerning "Continuing employment", an employer can take over the I-9 forms and supporting employment records. If this occurs, the related, successor or reorganized employer need not complete new I-9 forms on the acquired work staff. However, the new employer may also be acquiring the past liability of the previous employer.

In a recent case, INS investigators charged with enforcement of employer sanctions issued a notice of intent to fine Churches Fried Chicken. The intended fine exceeded $600,000 and was based on lack of I-9 forms and incomplete or erroneous records. Churches had recently been acquired by Popeye's Chicken. Popeye's, the new corporate owner, was able to negotiate a lesser fine ($80,700) due to its own record of immigration compliance.[9] Popeye's was lucky to reach this settlement given that it had assumed Churches' liability for compliance with the employer sanction regulations through the merger of the two employers.

Employers involved in mergers or other acquisitions should carefully consider the ways to minimize this type of liability. It should be noted that in a corporate merger, the successor typically acquires all of the liabilities of the prior corporation. There is no statute of limitations for IRCA violations and, conceivably, the INS could have chosen to fine Popeye's as the successor to Churches' past violations. Purchasing or surviving employers may want to require an indemnification agreement for the past violations of the employer. The IRCA regulations prohibit indemnity agreements or bonds from individuals for current liability. See 8 C.F.R. § 274.8.

Necessary Documents and Information. In addition to the foregoing, the attorney will require:

a. the names of each foreign employee and his or her family members.

b. complete copies of the passports (reflecting the current visa) for each alien employee and family member;

c. a copy of the front and back of the current form I-94 for each alien employee and family member, indicating the current expiration date and non-immigrant status.

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[9] See the discussion of this case in Employee Relations Weekly (BNA), p. 1303, (Oct. 16, 1989)

d. copies of all previous visa applications and all INS applications for extension or change of non-immigrant status and letters of support, and, in the case of L-1 and H-1 visas, the INS notice of approval or extension (Forms I-171C and I-797).

e. current job titles and job descriptions for all non-immigrant workers.

f. information on (i) any past or proposed change of job duties, employing entity, location or other business-entity changes, and (ii) whether or not the INS, the Department of State or the U.S. embassy or consulate which issued the alien's work visa were notified of the change.

g. information on proposed additional or new job titles and duties.

IV. POTENTIAL SOLUTIONS

A. Group Solutions. In practice, there is rarely a group solution which will resolve all of the issues created by a fundamental business change. In some situations, however,the employer may simultaneously submit all of the individual corrections, amendments or new petitions in order to receive "group" treatment by the INS, the Department of State (for visa annotations involving no change in the alien employees' work-visa category) or the appropriate U.S. consular post abroad (for visas-by-mail, pursuant to Vol. 9 Foreign Affairs Manual, Note 2.1 to 22 CFR § 41.101).

For example, if the L-1 employer and the foreign affiliate are jointly acquired in a merger, the successor entity may want to file with the INS, new I-129L forms simultaneously, together with documentation of the continuing affiliation of the U.S. and foreign company and verification that there are no other significant changes in the terms or conditions of the L-1 beneficiaries' employment. Perhaps better classified as a group filing is the situation involving U.S. companies with large numbers of alien workers in E-1 or E-2 status. If E-1 or E-2 company eligibility issues are raised, the U.S. consulate or embassy which issued the original "E" visas abroad should be informed of the change. New forms I-126 (Report of Treaty Trader or Investor) should also be filed simultaneously for all alien workers in E-1 or E-2

classification whose status is affected. These reports should be filed with the INS pursuant to 8 C.F.R. § 214.2(e), discussed supra.

B. Individual Solutions. In many situations only individual filings can solve the problems. Individual filings are recommended when an alien will require an extension of stay in 60 days or less and in most cases involving H-1 or L-1 classification. Individual filings are also essential to correct or amend a labor certification if such an amendment is possible.

1. Changes in Job Location and/or Employing Entity. For H-1 and L-1 cases, if the alien employee is simply transferring to a new job location of the same employer and performing the same duties, the employer need not file an amended I-129B or I-129L petition. The change can be noted in the next extension application, if any, is required. See O.I.214.2(h). See also, 10-4-88 Weinig/Goldsmith Letter (Ex. C).

Note, however, that if an H-1 or L-1 worker is being transferred from one subsidiary to another subsidiary or affiliate of the original petitioning employer, a new I-129B petition must be filed since the separate corporate entity is deemed a "new employer". See, 6-2-88 Weinig/Clark Letter (Ex. H). Similarly, as described in the E-1 example, if an E-1 or E-2 employer wishes to transfer personnel to a new or separate subsidiary, INS approval is also required. See 8 C.F.R. § 214.2(e) and 7-11-89 Weinig/Maltby letter (Ex. I)

Practitioners should note that the alien worker is not authorized to commence the new employment until approval from the INS is received. In a least one reported decision, the filing of the application for work authorization and subsequent approval was deemed retroactively to authorize the alien to have begun employment prior to approval. See Salehpour v. INS, 761 F.2d 1442 (9th Cir, 1985). Although the INS has not expressly adopted a regulation which authorizes retroactive work authorization, it has been a long standing, albeit unevenly applied practice of the agency. See authorities cited in Salehpour, and S. Bernsen, "Employment of Aliens Under the Immigration Laws," 61 Interpreter Releases, No. 33, 679, 691 (August 24, 1984). Moreover, the language of § 245(c), which allows the INS to excuse technical violations of status, apparently also authorizes the INS retroactively to cure a period of unauthorized employment by characterizing the violation as "technical," or as one which occured through no fault of the alien.

2. Successor in Interest Situations. Where the new employer has acquired all of the stock or assets of the current employer, the new employer may be considered as a successor in interest. Nevertheless, the stock ownership, corporate address, name or other facts may have changed. For these situations, the employer may want to file requests for amendment of the I-94's on all alien workers and family members, and also amend pending I-140 petitions so that the new name or address is reflected in the INS and Department of State records. In two letters, the INS suggests making this filing at the time of regular extension for an H-1 situation. See 6-27-88 Weinig/Rosin Letter (Ex. D) and 5/11/89 Weinig/Lubiner Letter (Ex. J). 8 C.F.R. § 214.2(e) requires this type of filing whenever the treaty trader or investor wishes to change from one employer to another. The application must document the eligibility of the new employer for treaty trader or investor status.

3. I-94 and Visa Annotations. In the situations described above where the business name or the employing entity is changing, the INS should be asked to annotate the I-94 card of the non-immigrant employees to reflect the proper name of the prospective employer. [10] The State Department will annotate the visa. The request for reissuance, formerly known as revalidation, and/or annotation is sent with supporting documentation to the Diplomatic Liaison Division of the Visa Office in Washington, D.C. See Letter from Gary Basek, Chief Public Inquiries Division, U.S. Dept. of State to James Bach, dated July 1, 1989. (Ex. K) Some consular posts may be willing, in the exercise of discretion, to provide such visa annotations or approve new visa applications even while the alien remains in the United States. See 9 Foreign Affairs Manual, Note 2.1 to 22 C.F.R. § 41.101

Where annotation is requested from the Visa Office, the attorney should also send notification to the U.S. consulate or Embassy which issued the visa. This notification should describe the business change and provide relevant

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[10] The INS is expected to soon adopt a uniform employment authorization document (EAD). The EAD is generally not required for categories of employment covered in 8 C.F.R. § 274a.12(b), i.e., H, L, E; however, an application is necessary if more than 120 days has passed from the filing of a nonimmigrant extension covered in 8 C.F.R. § 274a.12(c)(15). Potentially, EAD documents may have to be annotated as well. See 66 Interpreter Releases pp. 1057-1060 (Sept. 25, 1989) for a discussion of the EAD and Form I-765, Application for Employment Authorization.

documentation. Many posts require a company with E-1 or E-2 employees to file Annual Company Profiles. This supplemental form is required at U.S. Consular posts in England, France, Japan and elsewhere. At a minimum, these business events must be disclosed and documented at the time of that annual filing if not completed prior to or contemporaneously with the business-entity change.

4. Labor Certification and Third/Sixth Preference Cases.

A. Labor Certification Modifications

1. Change in Job Location

In labor certification cases, a change in job location can invalidate the entire certification because the labor certification is specific to a relevant job market. See 20 C.F.R. § 656.30 (c)(2). If the job was only locally advertised, the Department of Labor will evaluate whether the new location changes the possible pool of U.S. workers available for the position. Further, the change in job location may impact on the determination of whether or not the wage originally certified continues to be the prevailing wage. The employer must seek an amendment to the old labor certification. If the amendment is granted, the visa petition, if already filed, should also be amended or refiled. See (undated) Weinig/Allen Letter (Ex. L).

2. Change in Employer

If the new employer can be characterized as a successor in interest to the employer who originally obtained the labor certification, the Department of Labor will annotate the approved labor certification to reflect the name of the new employer. See Matter of Dial Auto Repair, Inc., Int. Dec. #3035 (Comm'r, Oct. 23, 1986). The Department of Labor will require information concerning the acquisition and a reverification that the terms and conditions of employment have not changed. Further, the new employer must also be able to pay the offered wage. See 1-7-87 Weinig/Gard Letter (Ex. M). See also 5/19/88 Weinig/Rosin Letter (Ex. N).

Families sponsoring aliens for domestic positions cannot use this "successor in interest" strategy to transfer a labor certification from the sponsoring family to a new family. In one case, a partnership which had obtained a labor certification was deemed to have "closed" and the labor certification rendered invalid, although the individual partners continued to do business but in separate business entities. See Matter of United Investment, Int. Dec. 2990

(Comm'r June 25, 1984) (no annotation of the labor certification was sought from the Dept. of Labor).

Generally, in cases not involving a successor in interest, the new employer will only be able to hire the alien on a permanent basis if the employer first obtains a new individual labor certification; however, the priority date of any earlier approved third preference petition may be transferred to the new petition. See 8 C.F.R. 204.6(a). A more detailed discussion of priority date preservation is provided below.

B. Schedule A Third and Sixth Preference Cases.

1. Change in Job Location. Immigrant petitions which are exempt from the individual labor certification requirement because the job offered is listed in the Schedule A exemptions are more likely to survive a business-entity change. If the location of the employer changes after the approval of the petition but before a visa is available and nothing changes in the nature of job or qualifications for the Schedule A exemption, the petitioning employer should file an amended I-140 petition. The original priority date (third or sixth preference) will remain intact. See (undated) Weinig/Allen Letter (Ex. L) (noting that Schedule A certifications are nationwide).

2. Changes in Employer

(a). Successor in Interest

If the new employer has purchased the petitioning employer and the job terms and conditions are unaltered, the new employer may at the time of the visa issuance demonstrate the successor-in-interest relationship and the petition remains valid. See 1-7-87 Weinig/Bautista Letter (Ex. O). The INS also recommends submitting an updated Form ETA-750. Id. A successor may also choose to file a new I-140 petition and should submit proof of the first approval and original priority date. See 1-7-87 Weinig/Gard Letter (Ex. M).

(b). Non-Successor-in-Interest Cases

(i) Third Preference.

In cases where the new employer cannot qualify as a successor in interest, the original third preference priority date may be saved if the new job offer and the alien continue to qualify for Schedule A exemption. Generally, only Schedule A, Groups I, II, or III would be transferrable because the status is not based on the corporate

structure. In Group IV cases the only transfer possible would be to businesses that satisfy the intracompany affiliation which was the basis of the L-1 or original Schedule A, Group IV exemption. In these situations, the new employer must file a new third preference I-140 petition documenting the continued Schedule A eligibility and the proof of the original priority date. Under 8 C.F.R. § 204.6(a) the third preference priority date may be transferred to the new petition so long as the Schedule A exemption remains intact. But see 11-30-88 Weinig/Maggio Letter and attached correspondence (Ex. P). In this letter, Mr. Weinig suggests that the new subsidiary need only file a new ETA-750 as in successor-in-interest cases. Perhaps this result occurred because he viewed the subsidiary as the "same" employer. This characterization of "same employer" appears to contradict the INS restrictions, discussed earlier, on transfers of L-1 personnel to separate subsidiaries without prior approval. Therefore, the safest course would be to treat the new subsidiary in a Schedule A, Group IV situation as a new employer and to use the provisions of 8 C.F.R. § 204.6(a) to "trade" or transfer the original priority date.

(ii) Sixth Preference.

For sixth preference cases, the original Schedule A approval will remain intact in only two situations. The first is where the employer is a successor in interest and maintains the same terms and conditions of employment. In that situation, the sixth preference petition remains valid because of the successor in interest characterization. See 1-7-87 Weinig/Gard Letter (Ex. M) See also 9-12-88 Weinig/Satler Letter (Ex. Q).

If the new employer is not a successor in interest, the sixth preference date may be maintained if the alien also qualifies for third preference classification. Only third preference priority dates may be transferred to new employers under 8 C.F.R. § 204.6; but where the alien qualifies for both third and sixth preference classification, the transferred third preference date may be used for a new sixth preference petition. Obviously, this is of primary importance in case involving aliens from countries where the third preference category is slower than the sixth preference. See 8-21-88 Weinig/Blanco Letter (Ex. R). See also 5-11-88 Weinig/Steele Letter (Ex. B).

IV. AVOIDING FUTURE PROBLEMS

Many practitioners have had the unhappy experience of a client calling to report that the "deal has closed." Clients must be educated about the types of business-entity changes

which can impact on the work authorization of aliens. It may be advisable for the practitioner to send the employer and the alien worker a letter at the time of the initial visa issuance warning that changes in job duties, location, stock ownership and business activities of the company may invalidate the visa petition and the alien's work authorization. Hopefully, the employer and alien beneficiary will monitor their situation and alert the immigration lawyer before changes have occurred.

U.S. Department of Justice

Immigration and Naturalization Service

425 Eye Street N.W.
Washington, D.C. 20536

May 25, 1988

Angelo Paparelli, Esq.
Southern California Chapter
American Immigration Lawyers Association
725 S. Figuroa Street, Suite 1200
Los Angeles, California 90017

Dear Mr. Paparelli:

Thanks again for providing the opportunity to speak at both the liaison and chapter meetings on May 17. I thought you would be interested in the steps we have taken to follow up on some of the recommendations.

One of the main themes of the afternoon liaison meeting was confusion between Enforcement Branch regulations on in-status employment for I-9 purposes and Examinations Branch policy on when valid status expires. The best example provided was that of the L-1 alien who changes subsidiaries. We have convened a joint working group which will explore all areas of regulatory conflict and assure a constant policy is adopted.

Several members were also concerned about applications for extension of L-1 status that were denied for reasons relating solely to facts in the L-1 petition. Specifically, they want to know if there was an implicit right of appeal in those circumstances. Please note that extension cannot be denied on such grounds; the petition itself would have to be revoked and of course an appeal could ensue from that action.

The group recommended that employment authorization be done in a uniform manner, possibly by use of a form to be filed with the Service. We are developing such a form, and hope to have it available in the near future.

Finally, we note your concern about whether appeals can be accepted based on postmark rather than actual filing date. We will be making adjustments to our filing policy, most likely by allowing additional time for the appeal.

EXHIBIT A

As I said at the close of the evening session, these opportunities invariably provide me with ideas. I especially enjoyed discussing our legal immigration plan and getting feedback on the proposal outside the confines of Washington.

Sincerely,

Richard E. Norton
Associate Commissioner,
Examinations

CO 204.9-C

11 MAY 1988

Richard D. Steel, Esq.
Steel, Rubin & Rudnick
Suite 936, Public Ledger Building
Sixth and Chestnut Streets
Philadelphia, PA 19106

Dear Mr. Steel:

I refer to your letter of April 26, 1988, in which you request an interpretation of Operations Instruction 204.4(b)(5). Specifically, you ask whether this instruction means that the original priority date of a sixth preference visa petition approved on the basis of a Schedule A labor certification would be retained by a subsequent sixth preference petition with a Schedule A certification filed by a different employer for the same beneficiary.

In the situation described, the earlier priority date would not be retained. The basis for this determination is 8 CFR 204.6(b) which states:

> When a new petition by another employer is approved in behalf of the beneficiary of a previously approved sixth-preference petition, and the beneficiary has accepted or intends to accept employment with the new petitioner, the beneficiary shall no longer be entitled to the priority date as of the date of filing of the original petition and that petition shall be deemed invalid. Instead, his priority date shall be the date of filing of the subsequently approved petition for sixth-preference classification.

Notice that this regulation does not differentiate between sixth preference visa petitions with individual or Schedule A labor certifications.

To interpret OI 204.4(b)(5), one must read it in conjunction with OI 204.4(b)(1)-(4). These instructions were meant to be read as a set and refer to third or sixth preference petitions filed subsequent to the filing of petitions for the opposite classifications. In such cases an original filing date based on a Schedule A certification would be retained if the job offer and intended employment remain the same.

EXHIBIT B

The regulations and operations instructions pertaining to priority dates of third and sixth preference visa petitions are very confusing. We intend to remedy this situation with a rewriting of these regulations and operations instructions. I contemplate that this will be accomplished in the not too distant future.

Sincerely,

LAWRENCE J. WEINIG
Deputy Assistant Commissioner,
Adjudications

CC: Official File
ADJ Log
INS:COADN:ESkerrett:jsm:633-3946:5/11/88

CO 214L-C

04 OCT 1988

Charles M. Goldsmith, Esq.
Suite 1505
225 Broadway
New York, N.Y. 10007

Dear Mr. Goldsmith:

This is in response to your letter of September 13, 1985 with questions regarding the requirement for a new I-129B petition.

The situation described in your letter relates to the transfer of H and L employees from one subsidiary to another within a multinational corporation. You question whether a new petition is required in the case of L employees and H employees. The answer is yes in both cases.

Our Operations Instructions at 214.2(h) provide that the transfer of an H or L employee to another location with the same employer performing the same duties does not require a new I-129B. This applies to a branch or office of the same employer, not to separately incorporated subsidiaries of a parent company. Each subsidiary is considered a separate employer. Therefore the transfer of an H or L from one subsidiary to another requires a new petition.

We hope this information is helpful to you.

Sincerely,

Lawrence J. Weinig
Deputy Assistant Commissioner,
Adjudications

cc: Official File

INS:COADN:FTRichardson:pm:10/04/88

EXHIBIT C

CO 214h-C

27 JUN 1988

David I. Rosin, Esq.
2156 Penobscot Building
Detroit, MI 48226

Dear Mr. Rosin:

This is in response to your letter of June 3, 1988 enclosing a carbon copy of your February 5, 1988 letter to which you did not receive an answer.

We regret that we have no record of your previous correspondence. You were inquiring about the status of H-1 medical personnel employed by two hospitals which have merged their operations under one group. The situation now appears to be one employer with two locations.

An H-1 beneficiary may transfer to different locations of the same employer without obtaining approval from the Service. The mere change in ownership of the entity does not effect the alien's status. When approval of an extension of stay is needed for an H-1 beneficiary, changes such as a new location and change in owners should be explained.

We hope this information is helpful to you.

Sincerely,

LAWRENCE J. WEINIG
Deputy Assistant Commissioner,
Adjudications

cc: Official File
[redacted]
INS:COADN:FTRichardson:pm:06/27/88

EXHIBIT D

CO 214c-C

06 JUL 1989

Andrew Coraulo, Esq.
150 Broadway, Suite 1615
New York, N.Y. 10038

Dear Mr. Coraulo:

This responds to your letter of April 27, 1989, with questions about treaty aliens. Assuming that the facts presented in your letter stand, answers to your questions are as follows: *

1. A foreign national having a valid E visa may be readmitted as a treaty alien after a period of absence from the United States provided that he or she is entitled to that status. As with all of the nonimmigrant aliens seeking temporary entry into this country, the prospective treaty alien will have to be inspected for admissibility at the port of entry. He or she will have to show that the employment is with a qualified employer and is in a managerial, supervisory or essential-skilled position. Upon determination of entitlement to treaty alien status pursuant to the provisions of 8 CFR 214.2(e), the alien will be admitted.

2a - 2c. A treaty alien employee does not need to ask for INS permission to accept a transfer to a position of equal or higher level of responsibility within the same company. The treaty alien may be transferred from one branch office to another as long as the new position entails similar duties and is of equal or higher level of responsibility (assuming that these branch offices are not independent subsidiary companies).

3. A treaty alien may engage in incidental work for a subsidiary of the same employer company as long as the subsidiary independently qualifies as a treaty alien employer and the work performed is managerial, supervisory or essential-skilled.

Sincerely,

Lawrence J. Weinig
Deputy Assistant Commissioner,
Adjudications

cc: Official File
Adj Log
INS:COADN:[redacted]:jsm:633-3946:6/30/89:E-q&a

*Retyped from illegible first paragraph

EXHIBIT E

U.S. Department of Justice
Immigration and Naturalization Service

425 Eye Street N.W.
Washington, D.C. 20536

CO 214L-C

21 DEC 1983

Alan Lee, Esq.
Two Pennsylvania Plaza, Suite 2640
32nd Street on 7th Avenue
New York, New York 10121

Dear Mr. Lee:

Thank you for your letter dated October 21, 1983 in reference to L-1 visa petitions.

Under current regulations, a visa petition must be in force before a request for extension can be approved. Consequently, both an I-129B and an I-539 must be filed when an extension is requested.

Your question 1.a. asks about utilizing the assets of an unincorporated branch office in support of an I-140, Schedule A, Group IV. This is a little confusing since any funds of a corporation used to establish a branch office still belong to the corporation and must be reflected in the financial statement of the corporation. It is the same corporation whether the branch office is located in New York or in California.

Question 1.b. - Yes.

Question 1.c. - Yes, but if he is going to stay in California, he will need to file an I-129B and I-539 in California to establish an immigration file in that area.

Question 2.a. - If the New York corporation is actively doing business and the business is, in effect, transferred to California, there is no real interruption of the function. However, if the New York firm goes out of business and, at some future date, a new firm is opened in California, a new year of qualification must be established.

Question 2.b. - Yes.

Question 2.c. - See question 1.a.

You should realize that many of these situations could be slightly different in each specific case. I hope these answers will be of some help to you.

Sincerely,

Thomas W. Simmons

Thomas W. Simmons
Deputy Assistant Commissioner
Adjudications and Naturalization

EXHIBIT F

Exhibit 7
01/8 VILA Monthly Mailing
File ref: Intracompany
Transferees;
Schedule A

ALAN LEE
ATTORNEY AT LAW
TWO PENNSYLVANIA PLAZA SUITE 2640
132ND ST ON 7TH AVENUE
NEW YORK, N.Y. 10121
(212) 564 8488
PRACTICE LIMITED TO IMMIGRATION AND NATURALIZATION LAW ONLY

October 21, 1983

Mr. Lloyd Sutherland
Adjudications Section,
Central Office
Immigration & Naturalization Service
U.S. Department of Justice
425 "I" St., N.W.,
Washington, D.C. 20536

Dear Mr. Sutherland:

With respect to Assistant Commissioner Marple's letter of October 6th asking me to contact you for further clarification of points included in her letter (copy attached), I take this opportunity to clear up some remaining questions in my mind.

As I understand the letter, a new corporation formed in California has to submit another I-129B to transfer the alien from New York to California - however, that an alien is also eligible to shift between the New York corporationand a branch office in California without need of further paperwork.

1.) Assuming that the New York corporation is maintained on a lesser volume basis, a branch office is established in California, and the alien works in both the New York and California operations, but principally in California:

a.) If he subsequently desires to become a permanent resident under Schedule A, Group IV, can he show the economic viability of the unincorporated branch office in support of the economic viability of the entire corporation?

b.) If the branch in California is incorporated as a subsidiary of the New York corporation, can he show the economic viability of the California branch in support of the economic viability of the New York operation for purposes of Schedule A, Group IV?

c.) If the California branch is incorporated as a subsidiary of the New York corporation, is the alien allowed to perform services on behalf of the California corporation under L-1 status granted in New York?

2.) For purposes of Schedule A, Group IV, the Code of Federal Regulations states that a company must be doing business in the U.S. for one year before it can petition for its workers.

e.) If the New York corporation is closed and another corporate subsidiary of the overseas firm is established in California under the same name, can the past years of doing business in New York be shown to establish immediate eligibility for schedule A, Group IV benefits under the California corporation?

b.) If the New York corporation is maintained and a corporate subsidiary of it is established in California, can the California subsidiary show the past years of doing business in New York to establish immediate eligibility for Schedule A, Group IV benefits under the California corporation?

c.) If the New York corporation is maintained and an unincorporated branch of it is established in California, can the California branch sponsor the alien and show the past business years of the New York corporation to establish immediate eligibility for Schedule A, Group IV benefits?

I would greatly your answer to these remaining questions.

Thank you for your courtesy and kind attention.

Very truly yours,

Alan Lee

-27-

ALey

CO 204.8-C
CO 214L-C

I-140/I-485 case denied at Louisville

16 SEP 1988

Stella Jarina, ADD/E
New Orleans

Adjudications
(COADN)

On September 15, 1988, you contacted this office about an I-140/I-485 case denied by the Louisville sub-office.

According to the information you supplied, the applicant entered the United States in 1985 as an L-1, transferring from Pepsico in Great Britain to Pepsico in the United States. His job title at that time was Manager of Field Employee Relations. Subsequently, an I-140 visa petition with a Schedule A, Group IV labor certification application was filed for the same job. The petition was approved by the Eastern Regional Service Center.

In 1987 Pepsico acquired Kentucky Fried Chicken as a fully-owned subsidiary, and in December of that year the applicant was transferred to Kentucky Fried Chicken as the Director of International Human Resources. An adjustment application, which was filed in February of 1988, was denied in that the applicant no longer intended in engage in the job on which the I-140 was based.

A reading of 8 CFR 204.6(a) is germane to this case. That particular part of 8 CFR 204 pertains to the effect of changed employment on a third preference priority date. In 8 CFR 204.6(a), the words "and an individual labor certification under section 212(a)(14) in the case of an occupation not listed in Schedule A" are parenthetical and refer only to individual labor certification cases. Consequently, in a Schedule A case, only a new Job Offer for Employment portion of form ETA-750 need be submitted, and the petition will be deemed reinstated with the original priority date.

In this case, however, the applicant's move as an L-1 from a position with Pepsico to a position with Kentucky Fried Chicken required the filing of either a new I-129L petition by Kentucky Fried Chicken or an amended petition by Pepsico, as prescribed by 8 CFR 214.2(l)(7)(i)(C). In either situation, the Service would have to determine that the alien was still an L-1 by examining the new relationship of entities and the alien's new job

EXHIBIT G

duties. Failure to file such a petition put the alien out of status and made him subject to section 245(c) of the Immigration and Nationality Act, as an alien who accepted unauthorized employment prior to filing an application for adjustment of status. Thus, although the alien could retain his third preference priority through the remedy noted above, an application for adjustment of status would be deniable.

Lawrence A. Weinig
Deputy Assistant Commissioner

cc: Official file
[redacted]
INS:COADN:ESkerrett:633-5014:jd:09/22/88

CO 214h-C
CO 214L-C

02 JUN 1988

Steven A. Clark, Esq.
P.O. Box 109
Cambridge, MA 02139

Dear Mr. Clark:

I refer to your letter of April 29, 1988, to Associate Commissioner Norton with questions which were raised at a recent meeting of the Massachusetts/Rhode Island AILA chapter. Answers to your questions are as follows:

1. See 8 CFR 274a.12(b)(9) and 8 CFR 274a.12(b)(15). Authorization for employment with an original employer continues for a period of 120 days while an extension is pending with the Service. If the alien is changing employers, he/she cannot work for the new employer until such time as the new I-129B and I-539 are approved.

2. If the validity period of the original petition has not expired, the alien may continue to work for the original employer. Aliens in B-1 status may work for more than one employer so long as each has an approved petition supporting the employment.

3. A new petition by the original employer would not be necessary if the original petition is still valid. Although not required, you may wish to notify the appropriate Service office that the new petition approval is no longer necessary.

4. For both classes the petition is revocable if the beneficiary is no longer employed in the same capacity as indicated on the original petition. See 8 CFR 214.2(h)(9)(ii) and 8 CFR 214.2(l)(9). In both cases a new petition would be in order unless the job duties are substantially the same. Minor changes in duties of the same job and salary increases would not effect petition validity.

5. See OI 214.2(h)(1). Job relocation of an B-1 or L-1 with the same employer does not require an amended petition. Notification of job relocation can be accomplished through the ordinary extension process.

EXHIBIT H

6. For an H-1, assumption by a new entity would not necessitate a new petition. This change, however, should be reflected at the time of extension. For an L-1, the original petition may be revocable pursuant to 8 CFR 214.2(1)(9). An amended petition, pursuant to 8 CFR 214.2(1)(7)(i)(C), should be filed to determine continued eligibility for L-1 classification. If either an H-1 or L-1 is laid off, the alien is not maintaining valid nonimmigrant status and, therefore, would be subject to deportation proceedings.

7. If an H-1 petitioner is a contractor or job shop, the address(es) where the services are to be performed, if known, would be appropriate for inclusion in item 6 on the original petition. If such locations are unknown at the time of filing, then the notation "various locations" would be appropriate. In either case there is no need to file a new petition each time the work site changes.

I hope that these answers are sufficient for your needs.

Sincerely,

LAWRENCE J. WEINIG
Deputy Assistant Commissioner,
Adjudications

cc: Official File

INS:COADN:EHSkerrett:633-3240:ew:05/01/88

FLYNN & CLARK
ATTORNEYS AT LAW

JOSEPH F. FLYNN, JR.
STEVEN A. CLARK
ANNE MARIE CARLEO

April 27, 1988

Mr. Richard Norton
Associate Commissioner for Examinations
U. S. Immigration and Naturalization Service
425 "I" Street, N.W.
Washington, D.C. 20536

Dear Mr. Norton:

I am writting for guidance regarding certain questions concerning H and L beneficiaries.

First, when a temporary worker in H-1 status changes employers, he will not change status but file an extension application. Normally, there is no problem if the worker is employed while the extension application is pending. In this context, however, does such beneficiary violate status by going to work for the new employer prior to the approval of the extension application?

Second, should the worker remain in the employ of the old employer for a month or so to give reasonable notice, will he be violating his status if he does so after the approval of the extension authorizing employment with the new employer?

Thirdly, should the employee decide not to proceed to change jobs, and remain with his old employer, must the old employer file a new petition if the previously approved petition remains valid? I presume in the situation it would be enough to notify the Immigration and Naturalization Service, but I hope you can clarify the matter.

Fourthly, when either an H-1 or L-1 beneficiary changes duties must a new petition be filed? Would it be material whether or not the job remains within the same basic Dictionary of Occupational Titles definition? Next, same question with regards to salary increases. Does it make any difference if the raise is a routine or a substantial jump in salary?

Fifth, should the employer of an H-1 or L-1 beneficiary relocate either within the same district, same region, or a different INS region, should the employer notify INS? File a new petition?

Sixth, when a new entity assumes all the rights, obligations, liabilities and employees of the old petitioner, is there a need to notify the INS or file a new petition? Same question, but when some employees are laid off and others remain at the time of change of employing entities?

Finally, when the beneficiary is employed by a contractor or job shop, the petition must list where the alien will perform services in item 6. Is it sufficient to list the office of the employer, or must the actual location of the employer's client where the duties are performed be shown? If the latter, must the petitioner file a new petition or notify INS each time the work site changes?

Thank you for your time and attention. These questions were raised by members of the Massachusetts-Rhode Island Chapter when I gave a presentation recently on H-1 status.

Our members will appreciate any clarification that may be possible at this time.

Very truly yours,

Steven A. Clark

SAC:nm

CO 214c-C

06 JUL 1989

Stephen J. O. Maltby, Esq.
665 Fifth Avenue
New York, N.Y. 10022-5305

Dear Mr. Maltby:

This responds to your letter of June 1, 1989, requesting clarification of INS regulations regarding intra-company transfers of E-2 executives. Assuming that all of the companies involved in these transfers are independently qualified as E-2 employer companies, the answers to your questions are as follows:

1. Advance approval by INS is required whenever an E-2 executive changes employer in the United States. This is true regardless of the geographic location of the job or the position title. In determining whether there has been a change of employer, you are advised to consult employer sanctions regulations at 8 CFR 274a.1, which defines "employer" as the "person or entity ... who engages the services or labor of an employee to be performed in the United States for wages or other remuneration."

2. INS approval is not necessary when an E-2 executive is transferred to a position of equal or higher level of responsibility within the same company. An E-2 executive may be transferred from one branch office to another as long as the new position entails similar duties and is of equal or higher level of responsibility (assuming that these branch offices are not independent subsidiary companies).

3. INS approval is required whenever an E-2 executive relocates in the United States from one independent subsidiary to another even if the responsibilities and position title remain the same.

To request INS permission to change employers, the E-1/E-2 treaty alien must submit a completed Form I-126, Status of a Treaty Trader or Treaty Investor.

Sincerely,

Lawrence J. Weinig
Deputy Assistant Commissioner,
Adjudications

cc: Official File
Adj Log
INS:COADN:[redacted]:jsm:633-3946:6/30/89:E2-q&A

EXHIBIT I

CO 214h-C

11 MAY 1989

Alan M. Lubiner, Esq.
115 Miln Street
Cranford, NJ 07016

Dear Mr. Lubiner:

I refer to your letter of April 28, 1989, with attached letter of January 19, 1989, regarding the impending take-over of a company and the effect of that take-over on H-1 employees. Please excuse the delay in my response, but we have no record of receiving your earlier letter.

I see the situation described in your letter as being one of assumption of the original petitioning company by a new entity. I do not equate this with the change in employment contemplated by 8 CFR 214.2(h)(iii); therefore, under current regulation I see no need to submit new petitions for the H-1 nonimmigrants in question. Of course, the change in ownership should be indicated when Forms I-129B and I-539 are submitted for extension of temporary stay.

Sincerely,

Lawrence J. Weinig
Deputy Assistant Commissioner,
Adjudications

cc: Official File
[redacted]
INS:COADN:EHSkerrett:05/10/89:md:LUBINER.EHS

EXHIBIT J

United States Department of State

Washington, D.C. 20520

RECEIVED JUL 10

July 1, 1989

Mr. James A. Bach
1999 Harrison Street
Oakland, CA 94612-3573

Dear Mr. Bach:

Thank you for your letter of May 30 requesting information on the revalidation of E visas.

If your clients change employers while having valid E-1 visas, the Department can amend the visas by writing in the name of the new company. This as well as E-1 revalidations is performed by the Diplomatic Liaisons Section.

Your clients should send their passports, photographs, and supporting documentation, as well as a visa application to the Diplomatic Liaison Division, Room 1310 SA-1, Visa Office, Department of State, Washington, DC 20522-0113.

I hope this information is helpful. If you write again about this matter, please return your letter and this reply, as no record is being kept of this correspondence.

Sincerely,

Gary S. Basek
Chief, Public Inquiries Division

Enclosure:
Correspondence returned

EXHIBIT K

Susan Au Allen
Paul Sherman Allen & Associates
1625 K Street, NW
Washington, DC 20006

Dear Ms. Allen:

This is in response to your July 27th letter, in which you requested an advisory opinion regarding the effect of a company's relocation on a labor certification. For your information, I have attached a copy of your letter, wherein you described the circumstances of the case.

I must assume from your letter that the labor certification in question is an individual certification, and not a Schedule A certification. As I am sure you are aware, Schedule A certifications apply to the entire United States.

I suggest that it would be more appropriate for you to direct that part of your inquiry relating to the continued validity of the individual certification to the Department of Labor, which issued the certification.

In so far as the petition and its priority date are concerned, the effect of the move would depend on whether a prior petition had been filed and approved based on the same employment. If not, and the Department of Labor does not amend the original certification and instead requires a new application for certification, then the priority date of the petition would be the date the new application for certification was filed. If a prior petition has been approved, then pursuant to 8 CFR 204.4(c) a new petition with an amended or new certification would, if approved, be considered a revalidation of the prior approval, and the priority date of the first petition would be maintained.

Once the company moves, this Service must conclude that the original certification is no longer valid until such time as an amended certification is submitted with a new petition, or a new petition meeting the requirements of 8 CFR 204.4(c) is filed. If a petition has already been filed, it would be the petitioner's responsibility to advise us of the company's move as soon as it is made.

I hope this information is of assistance.

Sincerely,

Lawrence J. Weinig
Deputy Assistant Commissioner,
Adjudications

Attachment

EXHIBIT L

Official File
[redacted]

INS:COADN:MLAytes:633-3946:bs:1/7/86
Dic A-1

CO 204.8-C
CO 204.9-C

07 JAN 1987

Robert R. Gard, Esq.
Ruberry, Phares, Abramson & Fox
One East Wacker Drive
Chicago, IL 60601

Dear Mr. Gard:

This letter is in regard to your December 22nd correspondence concerning the effect of the purchase of the petitioning enterprise on a third or sixth preference priority date.

A successor in interest may pursue a predecessor's interest in a visa petition with the same standing as the predecessor. The total sale of a petitioning company to another would therefore not affect the validity of a petition. Recognition would not require the filing of a new petition, but merely the demonstration at the time of visa issuance that the current prospective employer is the successor to that which made the original job offer. Where the petition is based on an individual labor certification a showing of successorship requires issuance of an amended labor certification or a formal notice from the Department of Labor affirming its validity.

If a successor chooses to file a new petition based on an individual job offer, it may submit an amended or affirmed labor certification. If it files a new petition based on a Schedule A certification, it must demonstrate that it qualifies as a successor in interest. In addition, in either case it should also submit a copy of the first approval notice showing the original priority date.

I hope this information is of assistance.

Sincerely,

Lawrence J. Weinig
Deputy Assistant Commissioner,
Adjudications

EXHIBIT M

oo 204.9-C

19 MAY 1988

David I. Rosin, Esq.
2156 Penobscot Building
Detroit, MI 48226

Dear Mr. Rosin:

I refer to your letter of April 14, 1988, with attached letters dated in February of 1988, regarding the validity of a third preference visa petition. I regret the delay in responding to the February letters, but our records show that neither letter was received in this section for response.

Given the situation described, I must conclude that the original labor certification and petition in this case are now invalid. According to 8 CFR 204.4(b) a third or sixth preference visa petition is valid as long as the labor certification is valid and "provided there is no change in the respective intentions of the prospective employer and the beneficiary that the beneficiary will be employed by the employer in the capacity indicated in the supporting job offer."

In this case, although the capacity in which the beneficiary will be employed remains the same, the prospective employer has changed. "The issue in this proceeding in the context of the labor certification is whether the particular job opportunity remains as certified. If it does not, then the validity of the certification is considered to have expired. To remain as certified,...the specific employer-employee relationship stipulated and intended must continue both in present fact and prospectively." [Matter of United Investment Group, ID 2990 (Comm. 1984)]

Despite our conclusion that the labor certification and petition in this case must be deemed invalid, the situation can be remedied. I draw your attention to 8 CFR 204.6(a) which states that, in the case of an approved third preference petition where there is a change of employers, "...upon submission of a new Job Offer for Alien Employment form, and an individual labor certification under section 212(a)(14) in the case of an occupation not

EXHIBIT N

listed in Schedule A, the petition shall be deemed reinstated with the original priority date." This provision shall not apply, however, if the original petition has been revoked under section 203(e) of the Immigration and Nationality Act.

I hope that this response is helpful to your needs.

Sincerely,

LAWRENCE J. WEINIG EHS
Deputy Assistant Commissioner,
Adjudications

CC: Official File
[redacted]g
INS:COADN:ESkerrett:jsm:633-3949:5/10/88:retyped 5/17/88:5/19/88

Occ'l Petitioner Successor in interest

CO 204.9-C

04 MAY 1989

Samuel R. Bautista Jr., Esq.
Suite 303
188 East 64th Street
New York, NY 10021

Dear Mr. Bautista:

I refer to your letter of April 18, 1989, regarding the continued validity of an approved sixth preference visa petition, based on a Schedule A labor certification, where the employing firm has changed ownership.

There is no existing Service regulation to describe procedures to follow when an event, such as that described above, occurs. However, it is my conclusion that it is incumbent on the employer to demonstrate that there is a true successorship in interest in the case and that the successor still desires to employ the beneficiary. As a point of reference, I would refer you to Matter of Dial Auto Repair Shop, Inc., I. D. 3035 (Comm. 1986). That case concerns the acknowledgement of continuing validity of an individual labor certification by the U.S. Department of Labor. In a Schedule A case, acknowledgement of continuing validity should be accomplished by the Service.

I would say that the new owner should submit evidence of legal successorship, a new Job Offer portion of Form ETA-750 along with evidence that the profferred job remains the same, and evidence that the profferred wage can be met. This documentation should be submitted to the Service office which approved the petition.

Sincerely,

EHS

Lawrence J. Weinig
Deputy Assistant Commissioner,
Adjudications

cc: Official file
[redacted]

INS:COADN:ESkerrett:5/1/89:jd
a:bautista

EXHIBIT O

The state is distributing notices in both English and Spanish through CRLA and other agencies to inform aliens of the new law.

10. USIA Amends Exchange Visitor Skills List for PRC

In a notice published in the *Federal Register*, Vol. 53, No. 242, December 16, 1988, p. 50619, the United States Information Agency (USIA) has amended the country "skills list" for the People's Republic of China (PRC) to include additional fields. The notice expands the number of J–1 exchange visitors from the PRC who will now be subject to the two-year foreign residence requirement of INA §212(e). The notice, which takes effect on January 17, 1989, is reproduced in Appendix I of this *Release*.

INA §212(e) subjects three types of J–1 aliens to a two-year foreign residency requirement. This requirement forces affected J–1 visa holders to reside outside the U.S. in the alien's country of nationality or last residence for two years before being eligible to change to another nonimmigrant visa status or adjust to permanent resident status. The INS may waive this requirement in some limited instances, such as situations of persecution or exceptional hardship.[1]

The three types of J–1 aliens subject to the residence requirement are: (1) exchange visitors who came to the U.S. to receive graduate medical education or training; (2) exchange visitors whose participation in the J–1 program was financed in whole or in part by an agency of the U.S. government or by the government of the alien's home country; and (3) exchange visitors possessing skills particularly required by their own countries, as determined by a "skills list" promulgated by the USIA.

The first skills list was designated in April 1972 and has been amended periodically. The USIA last published a revised version of the overall skills list in 1984. See *Interpreter Releases*, Vol. 61, No. 25, June 29, 1984, pp. 518–519, 529–531. The skills applicable for each country can be found in the appendix to INS Operations Instruction 212.8.

The latest amendment to the skills list deals exclusively with J–1 aliens who are nationals of the PRC. The amendment increases the number of occupational fields for PRC nationals to encompass all the fields listed in the list. The practical result is that most PRC nationals who receive a J–1 visa after January 17, 1989 and who possess any skill on the skills list will be subject to the two-year foreign residence requirement.

The amendment may be partly the result of measures taken earlier this year by the PRC to reduce the number of students going abroad, especially to the U.S., and to encourage others to return to China. The measures were prompted by concerns in China that many students are staying overseas too long or becoming too Westernized.[2]

11. INS Discusses Work Authorization for J–1s With Pending Waivers

In recent correspondence the INS discussed employment authorization for J–1 exchange aliens who have applications pending to waive their two-year foreign residency requirement. Lawrence J. Weinig, INS Deputy Assistant Commissioner for Adjudications, responded on November 23, 1988 to an inquiry on the matter from New York City attorney Alan Lee. Both letters are reproduced in Appendix II of this *Release*.

Mr. Lee pointed out that J–1 exchange aliens face a dilemma when they apply for waivers of the two-year foreign residency requirement because they must often wait long periods of time while their applications are adjudicated. Many find it difficult to survive financially. He inquired whether such aliens could obtain work authorization in the interim.

The INS response: no. Mr. Weinig wrote: "Nonimmigrant aliens who choose to remain in this country to wait for their waiver requests to be adjudicated after the expiration of their J–1 status may not accept employment."

12. INS Advises on Job Changes By L–1s Applying for Adjustment of Status

The INS has answered a question left silent in its regulations: what effect does a job change by an L–1

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1 See generally Myers & Thompson, "A Practitioner's Guide to Business Visas: Part II," 88–7 *Immigration Briefings* 8–9 (July 1988).

2 See *New York Times*, April 4, 1988, at A5, col. 1; March 24, 1988, at A1, col. 1. See also *Interpreter Releases*, Vol. 65, No. 14, April 11, 1988, pp. 379–380.

EXHIBIT P

intracompany transferee alien have on an immigrant visa petition involving Schedule A, Group IV labor precertification, either while the application is pending or after it has been approved? The INS position on this issue came from Lawrence J. Weinig, INS Deputy Assistant Commissioner for Adjudications, who responded to an inquiry from Washington, DC practitioner Michael Maggio.

Mr. Maggio wrote the INS on November 14 and 18, 1988. He outlined the issue presented by an employer who filed a third preference, Schedule A, Group IV immigrant visa petition and an application for adjustment of status under INA §245 on behalf of an employee who had initially entered as an L–1 intracompany transferee nonimmigrant executive. While the applications were pending, a wholly owned subsidiary of the petitioning corporation desired to hire the employee as an executive. The employer proposed to amend the third preference application to show, among other things, that the petitioning corporation and the subsidiary were the same employer. In the meantime, however, the beneficiary third preference visa petition was approved.

Mr. Maggio suggested that because the employers are the same, the duties to be performed by the employee are executive in both instances, and no test of the labor market is involved, the employer's actions should not affect the employee's priority date.

Mr. Weinig responded on November 30, 1988. He first pointed out that 8 CFR §204.6(a) addresses the question of the effect of changed employment on a beneficiary's third preference priority date in the case of a petition already approved. Although the regulations are silent about the procedure to be followed in the case of a pending application, Mr. Weinig stated that the INS would apply the same rule in both cases. The Service interprets 8 CFR §204.6(a) as saying that to preserve the original priority date for a petition in a Schedule A case, only a new Job Offer for Alien Employment portion of Form ETA 750 need be submitted.

Mr. Maggio's letters and Mr. Weinig's response are reproduced in Appendix III of this *Release*.

13. HIV Instructions on INS Medical Form Misleading

New York City attorney Esther M. Kaufman recently brought to our attention a possibly misleading instruction in INS Form I–693, the medical examination form for persons applying for adjustment of status to permanent resident.

The instructions on Form I–693 mention three tests that are ordinarily required: (1) a chest X–ray for tuberculosis, if the person is 15 or older (if a person 14 or younger has to be tested, there is a choice of tests); (2) a blood test for syphilis, if a person is 15 or older; and (3) a test for Human Immunodeficiency Virus (HIV), which is a precursor to Acquired Immunodeficiency Syndrome (AIDS). This last instruction, however, makes no mention of age. Therefore, one may be left with the impression that all persons must take the HIV test regardless of age, when in fact only persons 15 years of age or over must take it. See 42 CFR 34.4(a)(2), reported on and reproduced in *Interpreter Releases*, Vol. 64, No. 33, August 31, 1987, pp. 988–989, 995–999. Ms. Kaufman expressed concern that many aliens may have spent unnecessary dollars having their children tested for the HIV virus because they thought it was required.

A later inquiry to the Department of Health and Human Services by Ms. Kaufman confirmed that the HIV test is required only of persons 15 years of age and older. According to the INS, the Service is aware of the misleading instruction and plans to correct the I–693 shortly.

14. SSA Issues Findings on Tonga, Suriname

In two notices published in the *Federal Register*, Vol. 53, No. 240, December 14, 1988, p. 50301, and No. 248, December 27, 1988, p. 52239, the Social Security Administration (SSA) has determined that citizens of Tonga and Suriname who have been outside the U.S. for six consecutive months may not receive monthly social security payments. The SSA made this determination after finding that neither Tonga nor Suriname permits similar payments to U.S. citizens under a certain social insurance system.

Under §202(t)(1) of the Social Security Act, an individual who is not a U.S. citizen is prohibited from receiving monthly payments after he or she has been outside the U.S. for six consecutive months. An exception to this provides that a foreign citizen may receive social security payments if the Secretary of Health and Human Services finds that the person's country (a) has in effect a social insurance or pension system that pays periodic payments and (b) permits

From AAP FYI

Maggio & Kattar
Attorneys
Seventh Floor
Eleven Dupont Circle, N.W.
Washington, D.C. 20036
Telephone: (202) 483-0053
FAX: (202) 483-6801
Telex: 984935 IMMLAW

Attorneys
Michael Maggio
Candace Kattar*
Alison J. Brown**
Phillip T. Williams***

Legal Assistants
Teresa Arene
Maureen Dunn
Judith McArthur
Brenda Rocha-Martinez
Andrea L. Tassara

Our File No. 88-577

November 14, 1988

DELIVERED BY MESSENGER

Mr. Lawrence J. Weinig
Deputy Assistant Commissioner for Adjudications
Immigration & Naturalization Service
Room 7122
425 Eye Street, N.W.
Washington, D.C. 20536

Dear Mr. Weinig:

Further to our conversation of November 11, 1988, this is to request confirmation of the Service's position with respect to a job change with the same employer by a Schedule A Group IV employee during the pendency of his application for adjustment of status.

Our client is a major Fortune 500 multinational corporation. In July 1988, a Third Preference Schedule A Group IV immigrant visa petition and an application for adjustment of status were filed on behalf of and by an executive employee originally admitted in L-1 status. Now, a long standing wholly owned subsidiary of the petitioning corporation wishes to hire the employee/beneficiary to serve as an executive in another jurisdiction. Our client proposes to amend the application for alien employment certification Form MA 750A to reflect the new offer of employment with the wholly owned subsidiary, document the relationship between the original petitioning corporation and its wholly owned subsidiary to show they are the same employer, and request that the file be transferred for adjudication to the jurisdiction of the wholly owned subsidiary.

The employers are the same, the duties are executive in both instances, and no test of the labor market is involved. Thus, it is our view that the actions proposed by our client will not prejudice the employee's July 1988 priority date. There seems to be nothing in the Service regulations or Operations Instructions which speaks to this issue. The Service's position will greatly be appreciated.

Thank you very much for your kind attention to this matter and for your past courtesies.

Sincerely yours,

Michael Maggio

Maggio & Kattar
Attorneys
Seventh Floor
Eleven Dupont Circle, N.W.
Washington, D.C. 20036
Telephone: (202) 483-0053
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Teresa Arene
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Andrea L. Tassara

Our File No. 88-577

November 18, 1988

DELIVERED BY MESSENGER

Mr. Lawrence J. Weinig
Deputy Assistant Commissioner for Adjudications
Immigration & Naturalization Service
Room 7122
425 Eye Street, N.W.
Washington, D.C. 20536

Dear Mr. Weinig:

I am writing to supplement the facts in my letter to you of November 14, 1988 in which I requested the Service's position on a unique question of law.

The beneficiary's Third Preference Schedule A Group IV immigrant visa petition has now been approved. 8 C.F.R. Section 204.6(a) addresses the question of the effect of changed employment on the beneficiary's priority date "...in the case of an occupation not listed in Schedule A". Again, the Service regulations do not speak to my client's problem even now that its employee's Third Preference immigrant visa petition has been approved.

In our view, both the original and amended facts presented for your opinion raise important issues about Third Preference Schedule A priority dates that will occur with increasing frequency because the Third Preference is no longer current worldwide and may not be current regularly ever again. Thus, we

will appreciate hearing your opinion light of both sets of facts.

Sincerely yours,

Michael Maggio

U.S. Department of Justice

Immigration and Naturalization Service

425 Eye Street N.W.
Washington, D.C. 20536

CO 204.8-C

30 NOV 1988

Michael Maggio, Esq.
Seventh Floor
Eleven Dupont Circle, N.W.
Washington, DC 20036

Dear Mr. Maggio:

I refer to your letters of November 14 and 18, 1988, regarding the Service's position on a job change with the same employer by a Schedule A Group IV employee during the pendency of his third preference visa petition and his application for permanent residence.

As you note in your second letter, 8 CFR 204.6(a) addresses the question of the effect of changed employment on a beneficiary's third preference priority date in the case of a previously approved petition. The regulations are silent on the procedure to be followed in the case of a pending petition. It is our position that the same rule would apply. Furthermore, our reading of 8 CFR 204.6(a) is that, to preserve the original priority date for a petition with a Schedule A labor certification, only a new Job Offer for Alien Employment portion of Form ETA 750 need be submitted.

I hope that this response is helpful to your needs.

Sincerely,

Lawrence J. Weinig
Deputy Assistant Commissioner,
Adjudications

CO 204.8-C
CO 204.9-C

12 SEP 1988

Susan A. Satler, Esq.
The International Building
Suite 1216
2455 East Sunrise Boulevard
Ft. Lauderdale, FL 33304

Dear Ms. Satler:

Thank you for your letter dated August 25, 1988 in reference to priority dates on third and sixth preference visa petitions.

Title 8 of the Code of Federal Regulations, Part 204.1 (d)(2) states, in part:

> In the case of a third or sixth preference petition for an occupation listed in Schedule A, the filing date of the petition will be the date it was properly filed at the Service office.

The priority date; or filing date, is based on the Schedule A labor certification. If your client has an approved sixth preference visa petition based on a blanket labor certificate, and you can substantiate the beneficiary's continued qualifications for the same blanket certification, the priority date for the third preference petition will be the same as the orginal sixth preference petition.

When filing the third preference petition you should include a copy of the approval notice for the sixth preference petition. You should also include a copy of the blanket labor certificate and substantiate that all employer/employee relationships are identical with the original blanket labor certification.

I hope this provides the information you need.

Sincerely,

Lawrence J. Weinig
Deputy Assistant Commissioner,
Adjudications

cc: Official file
[redacted]
LS:CADN:LSutherland:633-3240:jd:09/8/8

P91R2

EXHIBIT Q

CO 204.8-C
CO 204.9-C

21 AUG 1989

Franklin A. Blanco, Esq.
1780 Broadway
New York, NY 10019

Dear Mr. Blanco:

I refer to your letter of July 24, 1989, regarding retention of a preference priority date in the case of an alien who has changed employers.

In your letter you posit a situation where a third preference priority date has been established through the approval of a petition accompanied by a Schedule A labor certification. (You do not specify which group of Schedule A is involved.) Subsequently, a second third preference petition is approved based on a job offer with a second employer. This petition is, in turn, followed by a sixth preference petition filed by the second employer. Should the alien retain the priority date of the original third preference petition for the subsequent petitions? I will assume that all three petitions are accompanied by Schedule A (other than Group IV) labor certification applications.

In the case of a second third preference petition accompanied by a Schedule A application, in accordance with 8 CFR 204.6(a) the priority date would be that of the first third preference petition. This regulation does not even require the filing of a new petition and provides for reinstatement of the petition with the original priority date "upon submission of a new Job Offer for Alien Employment form, and an individual labor certification under section 212(a)(14) in the case of an occupation not listed in Schedule A." For a Schedule A occupation, only a new Job Offer form would be necessary.

With regard to the priority date of the sixth preference petition, we must turn to OI 204.4(b)(1)-(5). These instructions allow for the concurrent or subsequent filing of third or sixth preference petitions for professionals or persons of exceptional ability in the sciences or arts. OI 204.4(b)(5) provides that, in the case of a petition accompanied by a Schedule A certification, the priority date shall be the filing date of the initial petition. Therefore, I conclude that, if the petitions are consistently accompanied by Schedule A certifications

EXHIBIT R

for the same profession or occupation, the priority date of the sixth preference petition would be that of the second third preference petition which of course is the priority date of the first third preference petition.

I hope that this response is helpful.

Sincerely,

Lawrence J. Weinig
Deputy Assistant Commissioner,
Adjudications

cc: Official File
[redacted]
INS:COADN:EHSkerrett:08/16/89:633-3946:md:A:BLANCO.EHS