The Current State of Immigrant Petition Successorship in Interest

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Executive Summary

This article provides an overview of the current state of immigrant petition successorship in interest. The centerpiece of the discussion will be the August 6, 2009, United States Citizenship and Immigration Services' ("USCIS'") memorandum creating new standards for successorship in interest determinations in the adjudication of I-140 immigrant petitions.[1] We will begin with a survey of the evolution of this doctrine since its creation over seventeen years ago, paying particular attention to the events that precipitated the publication of this memorandum. The next section will analyze the memorandum itself, examining in some detail the opportunities and problems it creates for practitioners representing aspiring successors in interest. The final section of the article will provide some practical guidance to practitioners on assessing possible immigrant petition successorship in interest situations and preparing immigrant petitions in a manner designed to establish such successorship in interest successfully.

I. Introduction

The normative structure for employment-based immigration to the United States is predicated upon the existence of a prospective offer of employment by a specific employer, with determinate terms and conditions, that is not to be taken up by the foreign national beneficiary until the immigrant process is completed and permanent residence is granted.[2] This means that the passage of time will necessarily be involved between the initiation and the completion of the process. The fact is not in and of itself problematic, but the practical reality of the process is that the period of time required to complete the process may, depending on a number of contingencies over which neither the prospective employee nor the employer may have any control, extend over several years or more.[3] Leaving aside the obvious damage to the morale of the prospective employee and to the business planning of the employer, the basic hazard posed by the time span over which the process will extend is that any number of *a posteriori* events may occur after the process is initiated to alter the state of

[1] Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, Successor in Interest Determinations in Adjudication of Form I-140 Petitions; Adjudicators Field Manual (AFM) Update to Chapter 22.2(b)(5) (AD09-37), File No. HQ 70/6.2 AD 09-37 (Aug. 6, 2009), available at http://www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pd and AILA Infonet Doc. No. 09090362 (posted Sep. 3, 2009) [hereinafter Neufeld Memo or memorandum]. Practical guidance on the preparation and filing of immigrant petitions that claim successorship in interest has recently been forthcoming from the USCIS. *USCIS Q&As on Petition Filing and Processing for Form I-140* (Jan. 20, 2010), available at AILA Infonet Doc. No. 10012269 (posted Jan. 22, 2010) [hereinafter 1/22/2010 Guidance]. The Neufeld Memo has attracted the attention of a number of commentators and the reader is encouraged to refer to some of the articles on this subject that have already appeared. See A. Paparelli & T. Chiappari, New Homeland Security Memo Poses Problems for M&A Deals, 14 Bender's Immigr. Bull. 1477-1480 (Dec. 1, 2009) [hereinafter Paparelli & Chiappari], which highlights with characteristic verve and insight the many aspects of the Neufeld Memo that remain troublesome; see also E. Freeman, The USCIS Relaxes "Successor in Interest" Standard (Oct. 8, 2009), available at http:///www.ilw.com/articles/2009,1008-freeman.shtm [hereinafter Freeman].

[2] *See* INA §203(b)(2)(A), 8 USC §1153(b)(2)(A); 8 CFR §204.5(k)(4) and (l)(3)(i); 20 CFR §656.30(c)(2); *see generally* C. Gordon, S. Mailman, and S. Yale-Loehr, *Immigration Law and Procedure*, §39.01[1] (Matthew Bender, Rev. Ed.).

[3] The State Department *Visa Bulletin* for March 2010 indicates cut-off dates for individuals in the EB-3 category chargeable to India and China of July 1, 2001, and December 15, 2002, respectively. One can extrapolate from these dates a waiting period of between eight and nine years between the filing of a labor certification application and the moment when such individuals become eligible to file adjustment of status applications. The monthly *Visa Bulletin* is available at http://www.travel.state.gov/visa/frvi/bulletin/bulletin_4611.html.

affairs, including the identity and even existence of the employer making the offer of employment, prevailing at the time the process was begun and thus render the prospective employee ineligible for the benefit sought.

Two legal doctrines have been manufactured to protect foreign nationals seeking permanent resident status through the employment-based immigrant process from the disqualifying effect of supervening events by allowing them to accept employment with employers other than the ones that made the initial offer of employment and initiated the immigrant process. The first, employee-centric doctrine, immigrant petition portability (also often referred to as adjustment of status portability), was created by the American Competitiveness in the Twenty-First Century Act of 2001, and allows an approved or pending I-140 immigrant petition filed on behalf of a foreign national under Immigration and Nationality Act ("INA") Sections 203(b)(1)(B), 203(b)(1)(C), 203(b)(2) or 203(b)(3) to remain "valid" if: (1) the foreign national's adjustment of status application has been filed and remained unadjudicated for 180 days or more; and (2) the foreign national changes jobs or employers and the new job is in the same or similar occupational classification.[4] This provision also mandates that any underlying alien labor certification remains valid in these circumstances.[5] No connection between the employer making the initial offer of employment (and filing the relevant labor certification application and immigrant petition) and the employer employing the foreign national when he or she becomes a permanent resident is required.

The second, employer-centric doctrine, is immigrant petition successorship in interest, which addresses situations where the identity of a petitioner has changed through an acquisition, merger, or other corporate transaction, and enables an entity that has acquired the assets of another entity that has filed an alien employment certification application or immigrant petition on behalf of a prospective employee also to assume ownership of the immigrant process and, by filing a new or amended immigrant petition, become the new petitioner for this process so that the process may continue without interruption or termination.

Reasonable debate may be had over this issue, but it is arguable that immigrant petition successorship in interest is a mechanism that need only be used when an asset transaction is involved, and will be unnecessary in the context of a stock transaction. Certainly, the apparent position of the Neufeld Memo is that the mechanism is to be invoked as a remedy in a situation where something less than a stock transaction has taken place. In very rudimentary terms, a stock transaction involves the transfer of all of the outstanding shares of the stock of the target entity from the seller to the buyer. The buyer effectively steps into the shoes of the seller, with the latter subsumed into the former, and the operation of the business continues in an uninterrupted manner. The seller generally has no continuing interest in, or obligation with respect to, the assets, liabilities or operations of the target entity. In an asset transaction, the seller retains ownership of the shares of stock of the business and the buyer either creates a new entity or uses an existing entity for the transaction. Only assets and liabilities that are specifically identified in the purchase agreement are transferred to the buyer, and the buyer is able to specify the liabilities it is willing to assume, and those that it chooses to leave behind.[6] In an immigration context, if a corporate entity has acquired the stock of an entity that has filed labor certification applications and immigrant petitions for its employees, it can be tenably argued that there is simply no need for it to attempt to demonstrate that it is a successor in interest to the entity it has acquired, since there is no existential difference between the two entities.

Immigrant petition successorship in interest differs from immigrant petition/adjustment of status portability in that a connection between the two entities involved in the process is required; this connection is premised upon a basic notion of heredity. If a sufficient nexus is established between the acquiring entity and the acquired entity, the former may inherit the process begun by the latter and exercise all the rights inherent in this process, including, most importantly, the right to employ the foreign national worker in a position that will qualify him or her for a grant of permanent residence. The key issue in immigrant petition successorship in interest jurisprudence is the sufficiency of this nexus, and it is to an examination of this issue that the Neufeld Memo, and, consequently, this article, is devoted.

II. The Evolution of Immigrant Petition Successorship in Interest

The Neufeld Memo is an extension of, and a reaction to, the various activities that have shaped the understanding of immigrant petition successorship in interest over the past seventeen years. A full

[4] INA §204(j), 8 USC §1154(j); s*ee generally* E. Pelta and A. James Vazquez-Azpiri, *AILA's Focus on Immigration Practice Under AC21* (AILA 2009) [hereinafter Pelta], at 55-71.

[5] INA §212(a)(5)(A)(iv), 8 USC §1182(a)(5)(A)(iv).

[6] *See generally* D. Oesterle, *Mergers and Acquisitions* (Thompson/West 2006), at 11-19.

understanding of the Neufeld Memo is thus not possible without a diachronic study of these activities.

A. The 1992 INS/DOL Agreement

The genesis of the immigrant petition successorship in interest doctrine can be identified as the 1992 interagency agreement executed by the legacy Immigration and Naturalization Service ("INS") and the Department of Labor ("DOL") that for the first time empowered the INS to "handle" amendment requests reflecting employer-related changes occurring after the approval of a labor certification application. Under labor-saving and revenue-generating compact entered into by the INS and the DOL, the INS assumed responsibility for whether or not the requested amendment would affect the validity of the underlying labor certification and, if a new employer had replaced the one that filed the labor certification application, whether or not the new employer could be considered a valid successor to the original employer.

Through this agreement, which was summarized in an April 27, 1992, memorandum[7], the DOL, which was apparently beleaguered by requests to amend labor certification applications that had been certified, empowered the INS to make "changes" relating to the name and address of the employer making the relevant offer of permanent employment, including those changes resulting from a sale, merger, reorganization, and movement to a new location. The assignment of this responsibility to the INS was justified on the basis of this agency's experience in determining whether an entity involved in an event such as a sale, merger, or other reorganization remains the same employer. The fact that the INS, unlike the DOL, could charge a fee for making such a determination was apparently not considered worthy of reference in the memorandum.

B. The 1993 Puleo Memorandum

The term "successor in interest" was not mentioned in the 1992 memorandum, nor was the specific mechanism through which the INS was to address the relevant employer change. In a December 10, 1993, memorandum authored by James A. Puleo, Acting INS Executive Associate Commissioner and designed to explain how the INS would discharge its responsibility under the 1992 compact with the DOL, the INS articulated for the first time its position that the immigrant process begun by an employer that has been involved in a sale, merger, or other corporate restructuring may only continue if the entity that results from such an event establishes that it is a successor in interest to that employer, and also stipulated that the only appropriate mechanism for demonstrating the necessary successorship in interest was the filing of a new I-140 immigrant petition.[8] The central provision of the Puleo Memorandum was of course its elaboration of what is required from the resulting employer to establish that it is a successor in interest. The Puleo Memorandum stated the following in this respect:

> A successor in interest must assume *all* of the rights, duties, obligations, and assets of the original employer and continue to operate the same type of business as the original employer.[9]

The problematic aspect of this statement is of course the inclusion of the adjective "all"; this suggests that anything short of the assumption of everything the prior employer has to offer will defeat a claim of successorship in interest and effectively abort the immigrant process begun by that employer.

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[7] Memorandum from Donald J. Kulick, *Amending Certified Labor Certification Applications*, no file no. provided (Mar. 30, 1992), *reprinted in* 69 Interp. Rel. 505, App. III (Apr. 27, 1992).

[8] Memorandum from James A. Puleo, Acting Executive Associate Commissioner, Office of Operations, *Amendment of Labor Certifications in I-140 Petitions*, File No. HQ 204.24-P, HQ 204. 24-P (Dec. 10, 1993), *reprinted in* 70 Interp. Rel. 1692, App. III (Dec. 20, 1993) [hereinafter Puleo Memorandum]. Readers of a less churlish disposition than the author's might reasonably opine that the fact that such a mechanism was created reflects creditably on the INS, which was under no obligation to permit inheritance of the immigrant process and could simply have required an acquiring entity to restart the process begun by the acquired entity if it wished to employ the relevant foreign national on a permanent basis. An equally plausible interpretation is that the patent inefficiency of such an approach would soon have subjected the INS to legitimate criticism from a number of quarters, including, not least, from the DOL, whose workload would have seen an exponential and unwelcome increase.

[9] *Id.* [emphasis added]. Shortly before the Puleo Memo appeared, the INS , in a letter that responded to an inquiry about the need to file amended nonimmigrant H-1B and TC petitions in a situation where a firm had acquired a substantial portion of the assets and liabilities of another firm, recognized the "generally accepted concept" of successorship in interest and decided that such amended petitions were not necessary. Letter from Jacquelyn A. Bednarz, Chief, Nonimmigrant Branch, INS Adjudications, to Mark N. Bravin (Sept. 10, 1993), *reproduced in* 70 Interpr. Rel. 1564, 1573-74 (Nov. 22, 1993). This position was later codified in INA §214(c), 8 USC §1184(c), which makes it clear that amended H-1B petitions are not required in a merger, acquisition, or consolidation situation, as long as the acquiring entity succeeds to the interests and obligations of the original petitioning employer and the terms and conditions of employment remain the same.

It is not clear how much thought went into the elaboration of the Puleo Memorandum's all or nothing standard. The only authority cited in support of the totality standard was a 1986 precedent decision from the INS Commissioner, *Matter of Dial Auto Repair Shop*.[10] A reading of this opinion will make it clear that a detailed exegesis of *Matter of Dial Auto* either did not occur or was made with a deliberate disregard for the analysis and conclusions made in the opinion.[11] One could offer three plausible explanations for the INS' misreading of *Matter of Dial Auto*: first, the agency was simply ignorant of the nature of most corporate acquisitions and mergers, very few of which involve the type of wholesale assumption of rights, duties, obligations, and assets contemplated by the Puleo Memorandum. Second, the INS may have wanted to give adjudicating officers an uncomplicated bright-line test, recognizing that many lack the education in business and corporate law and regulation necessary to understand the nuances of corporate transactions. Third, the agency may, in a not wholly uncharacteristic contrarian spirit, simply have wanted to impose the most restrictive standard possible in order to protect the immigrant process from the abuse and fraud that the agency continues to this day to perceive in virtually every component of the scheme for immigration to this country.[12]

C Post-Puleo Memorandum Developments

The defensive posture of the Puleo Memorandum experienced a progressive relaxation over the fourteen years following its publication; in 1995, the INS attempted regulatory action to soften the Puleo Memorandum's rigidity, proposing a qualified "*substantially* all of the rights, duties, obligations, and assets" standard for successorship in interest.[13] Although this rule was never promulgated in final form, the qualified standard was incorporated in the relevant section of the INS' *Adjudicator's Field Manual* ("AFM"), where it currently remains, apparently unbeknownst to a number of adjudicating officers at the Service Centers.[14] The totality standard was further diluted just after the turn of the century in a series of private but widely publicized letters authored by Efren Hernandez, the then INS Director, Business and Trade Services, resident at INS headquarters in Washington, D.C.[15] These letters

[10] *Matter of Dial Auto Repair Shop*, 19 I&N Dec. 481 (Comm'r 1986) [hereinafter *Matter of Dial Auto*]. The facts involved in this case should be familiar to most practitioners, and a brief summary should suffice: an auto repair shop filed a labor certification application to employ an automotive technician. The application was certified, but, shortly thereafter, the auto repair shop went out of business and a new repair shop took over its premises without any clear transaction between the two having taken place. This second repair shop then filed an immigrant petition based upon the labor certification issued to the first repair shop. This petition was denied on the basis that, although the second repair shop was apparently able to pay the proffered wage, no evidence had been provided that the first repair shop had the ability to pay this wage at the time the labor certification application was filed. The opinion in this case affirmed the denial on the same ground and did not mention successorship in interest as a factor considered in issuing the denial. Precisely how a case involving such simple facts and modest actors gave rise to a rule that purports to govern the immigration dimension of the most complex corporate transactions involving multi billion dollar organizations should remain a source of bewilderment to most practitioners. In an earlier decision, *Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984), the INS upheld the denial of an immigrant petition where the petitioner was deemed a newly constituted partnership comprising only some of the partners of the partnership that had obtained the underlying labor certification.

[11] The opinion in *Matter of Dial Auto* did not uphold the denial of the subject immigrant petition on the basis that the second repair shop had not established that it was a successor in interest to the second, and no attempt was made to define what should be required to establish such successorship in such a context. The only reference made to the issue of successorship in interest was a parenthetical comment (one that does not even rise to the level of *dictum*) that noted that, if the second repair shop's claim to have assumed all of the first repair shop's rights, duties, obligations, etc., was found to be untrue, grounds would exist for the DOL to invalidate the labor certification, and that, if the converse were true, the petition "could" be approved if eligibility were "otherwise" shown. *Matter of Dial Auto*, *supra* n. 1 at 482-83.

[12] *See, e.g., H-1B Benefit Fraud & Compliance Assessment*, *available at* http://www.uscis.gov/files/nativedocuments/H-1B_BFCA_20sep08.pdf.

[13] 60 Fed. Reg. 29711 (Jun. 6, 1995) [emphasis added]. The proposed rule would have amended 8 CFR §204.5 to insert a new subsection (h)(3) that specifically stated that, to be a successor in interest, a new employer must "have substantially assumed the duties, rights, obligations, and assets of the original employer." The preface to the proposed rule is notable for its recognition that successorship in interest could be established when only a division of a petitioning employer is acquired or purchased and its articulation of a regrettably unelaborated and now abandoned "substantial continuity" standard for successorship in interest determinations. *Id.* at 29774-29775.

[14] USCIS *Adjudicator's Field Manual* §22.2(b)(5), *available at* http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=afm.

[15] *See, e.g.*, Letter of Efren Hernandez III, Director, INS Business & Trade Services, to J. Douglas Donnenfeld (Oct. 17, 2001), *available at* AILA Infonet Doc. No. 01101939 (*posted* Oct.19, 2001).

shifted the immigrant petition successorship in interest analysis from the quotient of rights, duties, obligations and assets acquired to the quality of the obligations the acquiring entity was willing to inherit. Specifically, Mr. Hernandez articulated an agency "position" that allowed successorship in interest to be established when the acquiring entity takes on all of the immigration-related liabilities of the entity it has acquired. The urbane business-friendly approach prescribed by the Hernandez letters governed successorship in interest determinations at the USCIS Service Centers for the next six years and was relied upon by practitioners to advise their clients on the preservation of the immigrant processes of their employees in a corporate reorganization setting.

This reasonably satisfactory state of affairs continued until the latter part of the decade, when metropolitan sophistication unexpectedly gave way to provincial indelicacy. The USCIS' Texas Service Center ("TSC"), one of the two Service Centers responsible for immigrant petition processing under the bi-specialization initiative, began to exhibit a trend of denying immigrant petitions filed by aspiring successors in interest on the basis that these entities had not acquired all of the assets and liabilities of the entities they had acquired or been merged with.[16] We are of course not privy to the internal machinations that regulate the application of legal standards to the adjudication of petitions at the TSC, and can only guess as to why the trajectory of immigrant petition processing took this particular unwelcome turn. When the issue was raised at an AILA liaison meeting in December 2007, the TSC responded with a cursory dismissal of the Hernandez standard, a facile invocation of the INS' misreading of *Matter of Dial Auto*, and a misstatement of the relevant provision of the AFM.[17] This may suggests to the less charitably disposed members of the immigration bar that the TSC's stance was the product as much of simple obtuseness as of a reasoned and thoughtful analysis of the legal issue presented.

Although its views on this issue were not publicized as widely as those of the TSC, the USCIS' Nebraska Service Center ("NSC") apparently shared in the TSC's narrow view of successorship in interest; a search for USCIS Administrative Appeals Office ("AAO") opinions involving immigrant petition denials issued by the NSC during the period at issue on the basis of a failure to meet the putative *Matter of Dial Auto* standard yielded a significant number.[18] In addition, this review produced a relatively clear picture of the perspective adopted by the AAO with respect to successorship in interest in an immigrant petition context. The AAO is apparently immune from the vicissitudes of successorship in interest analysis at the Service Centers and USCIS headquarters. Its traditional position, a position that predates the 2007 developments at the TSC, has been to require assumption of all rights, duties, obligations, and assets for successorship in interest, and to cite *Matter of Dial Auto Repair* as the sole governing authority for such an analysis. With due respect to this august body, the level of analysis in virtually all of the AAO opinions issued between 2007 and the present addressing immigrant petition denials based on a perceived failure to establish successorship in interest seldom goes beyond an uncritical (and arguably unthinking) recitation of the "all of the rights, duties, obligations, and assets" standard falsely ascribed to *Matter of Dial Auto Repair* and the outcome in the overwhelming majority of these cases is a dismissal of the appeal of the denial of the subject immigrant petition.[19]

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[16] For an illuminating account and discussion of the TSC's activities in this respect, see S. Ellison & P. Hejinian, *USCIS Says "All or Nothing": Developments on Successor in Interest*, in Immigration & Nationality Law Handbook 2008-09 at 95-95.

[17] AILA/TSC Liaison Meeting, Dec. 3, 2007, Questions and Answers No. 11, *available at* AILA Infonet Doc. No. 08010365 (*posted* Jan. 3, 2008).

[18] *See, e.g.*, *Matter of* [name redacted], File No. [redacted], WAC 04-025-51775 (AAO Sep. 29, 2006) (no successorship because the acquiring entity did not show that it had assumed all of the rights, duties, obligations, and assets of the original employer). AAO opinions may be accessed at http://www.uscis.gov/uscis-ext-templating/uscis/jspoverride/errFrameset.jsp.

[19] *See, e.g.*, *Matter of* [name redacted], File No. [redacted], LIN 06-238-533915 (AAO Jun. 11, 2009) (no successorship when a corporation acquired the business and name of a sole proprietorship but did not show assumption of all the rights, duties and obligations of the sole proprietorship); *Matter of* [name redacted], File No. [redacted], LIN 07-101-53129 (AAO May 26, 2009) (no successorship when a motel claimed to be a successor in interest to an incorporated company but did not show assumption of all the rights, duties and obligations of that company); *Matter of* [name redacted], File No. [redacted], LIN 07-101-53129 (AAO May 26, 2009) (no successorship when a corporation acquired the business of a motel but did not show assumption of all the rights, duties and obligations of the motel); *Matter of* [name redacted], File No. [redacted], EAC 04-038-51741 (AAO Sep. 28, 2008) (no successorship when a construction company acquired another construction company but did not show assumption of all the rights, duties and obligations of that company); *Matter of* [name redacted], File No. [redacted], SRC 03-153-51881 (AAO Jun. 27, 2008) (no successorship when a manufacturing company acquired another manufacturing company but did not show assumption of all the rights, duties and obligations of that company); *Matter of* [name redacted], File No. [redacted], SRC 04-055-52618 (AAO Jun. 10, 2008) (no

III. The Neufeld Memo

The recrudescence of the perverted *Matter of Dial Auto* totality of the assets and liabilities standard at the TSC and NSC (and its consistent application by the AAO), and a realization that this brutal standard represents only a minority of the types of transaction that occur in today's business environment, in which the mechanisms available to corporate organizations to acquire, and merge with, each other, are, if not limitless, certainly prodigious in number, were undoubtedly the prime impulses behind the Neufeld Memo.

The fundamental purpose of the Neufeld Memo is to enlarge the applicability of immigrant petition successorship in interest to asset purchase transactions that do not involve an acquisition of all of a target organization's assets and liabilities; adjudicating officers are commanded to permit successorship in interest in such transactions, provided certain requirements are met.[20] The introduction to the Neufeld Memo makes it clear that the USCIS recognizes that businesses will not routinely assume all of the assets and liabilities of the entities they are acquiring or merging with and may deliberately eschew such assumption without affecting the legitimacy of the underlying transaction (and thus, implicitly, the legitimacy of their status as successors in interest).[21] The introduction goes on effectively to overrule the Puleo Memorandum (and, by extension, the mountain of AAO decisions that applied the Puleo Memo's totality test) by recognizing its misreading of *Matter of Dial Auto* as mandating the assumption of all of an acquired entity's rights, duties, and obligations as the sole means of establishing immigrant petition successorship in interest.[22] Somewhat surprisingly, the Neufeld Memo then goes on to articulate its concept of successorship in interest, not by reference to any legal authority, whether statutory, decisional, or regulatory, but by citing the definition of a successor in interest provided in *Black's Law Dictionary*.[23] Under this definition, a successor in interest is '[o]ne who follows another in the ownership or control of property", who "retains the same rights as the original owner, with no change in substance", and as "a corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of an earlier

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successorship when a music and entertainment company purchased another such company but did not show assumption of all the rights, duties and obligations of that company); *Matter of* [name redacted], File No. [redacted], SRC 06-202-51934 (AAO Apr. 3, 2008) (no successorship when an engineering firm acquired certain assets—customer lists and customer and supplier records—of a technology company but did not show assumption of all the rights, duties and obligations of that company). The AAO has, on at least two occasions, addressed the Hernandez immigration-related liabilities standard, and found that it should not be applied to determine successorship in interest. *See, e.g.*, *Matter of* [name redacted], File No. [redacted], LIN 06-246-51023 (AAO Oct. 23, 2007) (no successorship in interest when a company acquired only a "handful" of employees of another company and specifically noting that the Hernandez standard is not a binding authority); *Matter of* [name redacted], File No. [redacted], LIN 07-025-51371 (AAO Oct. 14, 2008) (no successorship in interest when a company acquired a significant portion of another company's business assets and 2,000 employees and dismissing the Hernandez standard as non-binding); *but see Matter of* [name redacted], File No. [redacted], SRC 04-206-52080 (AAO Mar. 6, 2007) (successorship does not require that "every asset, duty, and obligation of the [acquired] corporation" must be transferred to the acquiring entity, and continuation of immigration-related liabilities is relevant to a determination of successorship).

[20] The Neufeld Memo purports to supersede all previously issued policy guidance on successorship in interest and rewrites Section 22.2(b)(5) of the AFM. This rewritten section instructs USCIS officers on how to apply the successorship in interest doctrine to asset transactions where fewer than all of a predecessor's rights and liabilities have been acquired. The memorandum's provisions are not given retroactive effect, and apply only to petitions that are pending as of the date of the memorandum, or are filed subsequent to that date. Petitioners whose petitions were denied under the now obsolete successorship standard are invited to file "new, amended" [sic] petitions to seek consideration under the new standard. Neufeld Memo, *supra.* n. 1 at 4. The memorandum does not address situations where the underlying labor certification has expired under the terms of 20 CFR §656.30(b)(1). The memorandum does, however, specifically prohibit the filing of a motion to reopen a previous immigrant petition denial if the brief 30-day period for the filing of such a motion by 8 CFR §103.5(1)(i) has passed, despite the provision in this subsection that allows late filings in situations beyond the control of the petitioner. *Id.*

[21] *Id.* at 2. The first paragraph of the Neufeld Memo's section describing the rationale for the revised guidance provided appears to suggest, somewhat unconvincingly, that the revision in the USCIS' position has been impelled by changes in business practices and the emergence of "novel" scenarios. The reality of course is that all of the transactions described in the memorandum have existed, and have been utilized with regularity, for decades.

[22] *Id.* at 2-3.

[23] *Black's Law Dictionary* is apparently viewed by Mr. Neufeld as a controlling, if not quasi oracular, authority on a number of immigration matters, including the meaning of a "private" employer for purposes of the filing of Outstanding Researcher immigrant petitions. *See* N. Schorr, *It Makes You Want to Scream: Do Not Make a Fortress Out of the Dictionary: The USCIS is Not an Outstanding Researcher*, 15 Bender's Immigr. Bull. 797 (Jan. 15, 2010). One is indeed tempted to expostulate.

corporation."[24] These generalities of course say very little that will be of practical use to employers and employees (or their counsel) involved in a situation that requires a demonstration of successorship in interest; the text that follows, however, represents the conceptual core of the Neufeld Memo and sets out the factors that the USCIS will view as dispositive in determining whether or not immigrant petition successorship in interest exists.

A. The Three-Part Neufeld Memo Test

A tripartite test is offered to immigrant petition adjudicators to enable them to make a successorship in interest determination in a situation where the wholesale assumption of rights, duties, obligations, and assets has not occurred. Three conditions must be satisfied for a new employer to be accorded the status of successor in interest and thus to continue the immigrant process begun by the entity it has acquired or merged with. The first focuses on the job opportunity, the second on the petitioner(s), and the third on the transaction. The Neufeld Memo requires the following: (1) the job opportunity offered by the new employer must be the same as the job opportunity described in the underlying labor certification; (2) the new employer must establish immigrant petitioner eligibility in all respects, including providing evidence of the original employer's ability to pay the proffered wage; and (3) the new employer must describe and document the "transfer and assumption" of the ownership of the original employer to it.[25] Each of these conditions is analyzed below.

1) Job Opportunity Identity and Continuity

The Neufeld Memo requires that the job opportunity offered by the successor in interest must be the same as the job opportunity offered by the predecessor, and that this opportunity continue to remain valid and available from the initiation of the immigrant process to its conclusion.

a) Job Opportunity Identity

The DOL specifies that a labor certification involving a specific job offer is valid only for the specific job opportunity and for the area of employment described in the application form.[26] In conformity with this position, the Neufeld Memo requires identity between the job opportunity described in the labor certification on which the relevant immigrant petition is based and the job opportunity the aspiring successor in interest is offering to the petition beneficiary. The following guidance is provided in this regard:

The job offered in the successor-in-interest petition by the successor must remain *unchanged* with respect to the rate of pay, job description and job requirements specified on the labor certification.[27]

This triad is thus sacrosanct, and any change in these three items will eliminate the availability of successorship in interest. A practitioner representing a business entity that has acquired, or merged with, an entity that has obtained a labor certification for an employee and which wishes to continue the immigrant process on behalf of that employee should obtain a copy of the relevant certified Form ETA 9089 and compare carefully the information contained in that document with the particularities of the job opportunity that the business entity plans to offer the employee. Attention should be paid to the information presented in Section G, the "Wage Offer Information" section and Section H, the "Job Opportunity Information" section. Subsection H.11 of Form ETA 9089, the job duties description subsection, should be

[24] *Id.* at 3. The 2004 edition of the dictionary is cited, but language that is identical in most respects appears in editions of the dictionary as old as the 1968 edition, thus undercutting somewhat the USCIS' claim to be injecting modernity into the immigrant petition adjudication process. In fairness to the USCIS, it should be recognized that references to successorship in interest in the bodies of law and regulations governing the immigration process are, despite their common currency in the lexicon of business immigration, remarkable for their paucity. Two relatively permissive provisions exist in this respect: Section 214(c)(10), 8 USC §1184(c)(10), of the INA, which, as noted above, dispenses with the requirement for the filing of an H-1B petition in a merger/acquisition context if an acquiring entity "succeeds to the interests and obligations of the original petitioning employer and where the terms and conditions of employment remain the same but for the identity of the employer", and 8 CFR §274a.2(b)(1)(viii), which defines a "related, successor, or reorganized" employer that is not required to complete new I-9 forms *inter alia* as "[a]n employer who continues to employ some or all of a previous workforce in cases involving a corporate reorganization, merger, or sale of stock or assets." The DOL's 2002 Proposed Rule introducing the PERM labor certification process would have amended the definition of "employer" in the labor certification context to included "successors in interest." 67 Fed. Reg. 30498 (May 6, 2002). This would effectively have prevented an employee employed by a successor in interest from qualifying for a position to be certified on the basis of experience gained at a predecessor in interest. Fortunately, the expanded definition was not adopted in the final rule.

[25] Neufeld Memo, *supra* n. 1 at 3-4.

[26] 20 CFR §656.30(c)(2).

[27] Neufeld Memo, *supra* n.1 at 5 [emphasis added]. The Neufeld Memo does note that an increase in the wage offered "due to the passage of time" (i.e., unrelated to any promotion or performance reward) will not defeat a successorship in interest claim.

scrutinized. Any discrepancy between the information provided in this subsection and the description of the position the new employer wishes to offer the immigrant petition beneficiary may, given the Neufeld Memo's apparent insistence on absolute formal identity, be fatal to a successorship in interest argument. Subsections H.4 through H.10 of Form ETA 9089 should also be examined and compared with the educational, training, and experiential requirements imposed by the new employer for the offered position to determine if any difference exists. When reviewing a new or amended immigrant petition filed by a petitioner claiming to be a successor in interest to an entity that filed a labor certification application, the USCIS is likely to conduct a side-by-side comparison between the sections and subsections of Form ETA 9089 that contain the rate of pay and job description information and their analogous sections (i.e., subsections 6.9 and 6.3) in Form I-140, the immigrant petition form. Form I-140 of course contains no subsection that requires an account of the job requirements of the certified position, so any divergence between the requirements of the position described in the labor certification application and the position offered by the successor in interest, unless affirmatively disclosed by the petitioner, will have to be uncovered by the USCIS through an RFE.

The memorandum goes on to enlarge the number of immutable items to encompass any that might have affected the campaign to locate American workers for the relevant job opportunity:

A successor in interest claim will fail if the successor is requesting that USCIS accept *any* changes to the items specified on the labor certification that relate to the labor market test. In other words, USCIS ISOs should deny any successor claim where the successor is requesting changes to the labor certification that, if made at the time that the labor certification was filed with DOL, could have affected the number and type of available U.S. workers that applied for the job opportunity.[28]

USCIS officers are thus given complete discretion to determine counterfactually which changed items might have had any impact of the recruitment campaign upon which the labor certification is based. The only items in the labor certification application, apart from the already referred to rate of pay, job description, and job requirements, that could reasonably be seen to affect the number and type of available American workers are the job title subsection H.3 and the "Specific skills and other requirements" subsection H.14.

Although the Neufeld Memo does not include a job title among the items on a labor certification application that must remain unchanged, this is arguably an element of the labor certification application that could affect the availability of American workers and practitioners should review subsection H.3 of Form ETA 9089, the job title subsection, to see if there is a significant divergence between what is there and what the acquiring entity wishes to call the acquired employee. This is especially important, since the USCIS is likely to compare the title in this subsection to the title in subsection 6.1 of Form I-140. Some corporate organizations have developed their own, often idiosyncratic, appellations for persons holding positions within their organization, and there may exist a divergence between the title of the position described in the immigrant petition and the title the acquiring entity wishes to bestow on the beneficiary that suggests the performance of qualitatively different duties. Thus, if a Director of Administration at the acquired entity will be transformed into an Architect of Corporate Soul at the acquiring entity, the amended immigrant petition filed by the acquiring entity should contain abundant evidence that the only difference between the two positions is one of nomenclature. If a change in job title can be shown to amount to a distinction without a difference, the persuasiveness of the successorship argument should not be negatively affected.[29]

With respect to the specific skills required by the successor in interest of the beneficiary of the labor certification application, a significant disparity with the skills and other requirements indicated in subsection H.14 of Form ETA 9089 is a factor that could have affected the number and type of available U.S. workers that applied for the job. Again, since Form I-140 contains no subsection where the specific skills required for a position can be indicated, such a disparity will have to be volunteered by the aspiring successor in interest or drawn out by the USCIS through an RFE.

Although some practitioners will disagree, it will not be relevant to examine the new employer's past hiring practices with respect to the job opportunity that is at issue. If the new employer has previously hired in this position workers that have less education, training, or experience than that demanded in the certified labor

[28] *Id.* [emphasis added].

[29] *See* Freeman, *supra* n. 1 at 2-3 for a discussion of the relevance of a change in job title to the viability of a successorship in interest argument. In its recent guidance, the USCIS indicated that "[c]hanges in job title, and other ancillary changes such as a change in computer software used in the job are not in and of themselves disallowed." USCIS 1/22/2010 Guidance, *supra* n. 1 at 5.

certification application, and its actual minimum requirements for this position are thus less stringent than those imposed by the prior employer, this fact, bearing as it does solely on the test of the labor market, should not defeat a successorship in interest claim.[30]

The Neufeld Memo's prohibition on any changes in the rate of pay, job description and job requirements specified on the labor certification and the expansion of this prohibition to "any" changes that relate to the labor market test conducted by the prior employer (USCIS adjudicators are, as noted above, given free rein to determine when such a relation occurs) obviously open the door to unfriendly and overly technical USCIS analyses that will seize upon any variances, however minor, to deny a successorship in interest claim.

Although the Neufeld Memo's desire to preserve as inviolate the job opportunity described in the underlying labor certification is understandable and by no means illegitimate, it might be questioned whether or not the agency could have crafted a more liberal approach that would have enabled it to ensure the necessary integrity and at the same time achieve its stated purpose of allowing "flexibility" in the treatment of successorship in interest situations.

A more felicitous approach, and one better suited to correct the unwarranted rigidity of the Puleo Memo, would have been to allow petitioners to take advantage of one of the tests that already exist in other immigration-related contexts to establish linkage between two different job opportunities. The most obvious of these is the "same or similar occupational classification" test applied in immigrant petition/adjustment of status portability situations to allow adjustment of status applicants to move to new positions or employers and preserve their immigrant processes.[31] The USCIS could also have drawn on the DOL's definition of a "substantially comparable" job or position for purposes of determining a position's actual minimum requirements when the beneficiary has worked in a position different from the one to be certified for the employer filing the labor certification application.[32] Also available to the USCIS was the DOL's definition of a "related" occupation used in situations where the employer filing a labor certification application has had a layoff in the area of intended employment in the six months before the filing of the application.[33]

b) Job Opportunity Continuity

In addition to complete identity between the position described in the labor certification application and the position offered by the acquiring business entity, the second prong of the Neufeld Memo's test requires, in the interest once again of protecting the integrity of the immigrant process, continuity in the availability of the relevant job opportunity.[34] Any lapse in this availability between the date the labor certification application was filed and the date on which the beneficiary becomes a permanent resident will curtail the immigrant process and require it to be restarted. More specifically, the Neufeld Memo notes a pre-acquisition scenario in which the acquired entity ceases operations completely or partially, and a post-acquisition scenario in which the acquired company has a "substantial lapse" in its business operations.[35] To illustrate the latter scenario, an example is provided of an acquired restaurant being closed down for six months after its acquisition. In such a situation, the job opportunity was not available during the six-month hiatus and the immigrant process would have to be begun anew.[36] It is therefore important for a practitioner representing an acquiring entity that seeks to be considered an immigrant petition successor in interest to make sure that it can provide evidence in its amended immigrant petition of its immediate readiness to employ the beneficiary in the relevant job opportunity as soon as the acquisition closed.

As Angelo Paparelli and Ted Chiappari have pointed out, the job opportunity requirement is arguably of dubious legitimacy, since it appears to ignore the basic premise of employment-based immigration that the offer of permanent employment that underpins the entire process is a prospective one that need to be taken up until permanent residence is gained.[37]

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[30] *See* 20 CFR §656.17(i)(1) and (2).

[31] INA §204(j), 8 USC §1154(j).

[32] *See* 20 CFR §656.17(i)(5)(ii) (a substantially comparable job or position means a job or position requiring performance of the same job duties more than 50% of the time).

[33] *See* 20 CFR §656.17(k)(2) (a related occupation is any occupation that requires workers to perform a majority of the essential duties involved in the occupation for which certification is sought).

[34] Neufeld Memo, *supra* n. 1 at 6.

[35] *Id.* Although the point the USCIS wishes to make is more or less evident, the discussion in this section of the Neufeld Memo would have been more effective if the USCIS had addressed the commonplace situation of an acquired entity ceasing to exist as anything more than a shell after an acquisition and made it clear that such a situation would not require a reinitiation of the immigrant process.

[36] *Id.*

[37] Paparelli & Chiappari, *supra* n. 1 at 1479.

2) Establishment of Petition Approval Eligibility in All Respects

The second task required of an aspiring immigrant petition successor in interest is to establish that it meets all applicable requirements for immigrant petition approval and that the entity it has acquired also met such requirements. The real point of this section of the Neufeld Memo is to advise a successor in interest that it will have to assume responsibility for showing that not only it, but also the entity to whose interest it has succeeded, meet, or met, all of the requirements for immigrant petition approvability. The memorandum notes in this regard:

> The successor bears the burden of proof to establish eligibility in all respects, including the provision of required evidence from the predecessor entity, such as evidence of the predecessor ability to pay the proffered wage, as of the date of filing of the labor certification with DOL[.][38]

The most noteworthy aspect of this condition of successorship in interest is the requirement that the acquiring entity provide evidence of the acquired entity's ability to pay the proffered wage continuously from the date the labor certification application was filed until the date of the acquisition.[39] This will require a petitioner filing an amended immigrant petition to establish that it is a successor in interest to an entity that it has acquired to provide evidence of the acquired entity's financial wherewithal for the relevant time span in the form of copies of the entity's *Annual Report*, federal tax returns, audited financial statements, or, if appropriate, profit/loss statements, bank account records, or personnel records.[40] The difficulty involved in this archival function will depend on the degree of orderliness with which the acquired entity has maintained its financial records, but any pre-acquisition due diligence process conducted with the appropriate level of thoroughness should (but will not necessarily) have already uncovered and digested the relevant financial materials. If the primary documentation prescribed by regulation to document ability to pay does not suffice to make the necessary case, the petitioner should remember that it has available to it all of the other means of establishing ability to pay that have been sanctioned by the USCIS. These include the net income test, the net current assets test, the actual payment test, and various combinations of these tests.[41]

3) Full Description and Documentation of the Transfer and Assumption of Ownership

The preceding two sections of the Neufeld Memo do little to advance the policy of flexibility averred earlier in the document, and their only effect is arguably to introduce (or make explicit) further restrictions in the already rigid regime for immigrant petition successorship in interest. The next section, which sets out the third prong of the tripartite test for successorship in interest, does ease significantly, however, the difficulties faced by acquiring entities

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[38] Neufeld Memo, *supra* n. 1 at 5.

[39] This requirement marks a retreat from the more liberal approach adopted on occasion by the AAO to successor in interest ability to pay determinations. In an unpublished 2004 decision, the AAO allowed a predecessor and a successor in interest to share the burden of establishing ability to pay, and found that ability to pay the proffered wage could be established by aggregating the revenues of the two entities. *See Matter of X* [name redacted], File No. [redacted] SRC [redacted] (AAO Jan. 27, 2004), *discussed in* R. Wada & A. J. Vazquez-Azpiri, *Proving Ability to Pay: Working with the Yates Ability to Pay Memo*, 11 Bender's Immigr. Bull. 753-763 (Jul. 15, 2006) [hereinafter Wada] at 757-58. The requirement of continuous ability to pay also arguably ignores the AAO precedent decision of *Matter of Sonegawa*, 12 I&N Dec. 612 (AAO 1967) (excusing a petitioner's uncharacteristically unprofitable year and allowing ability to pay to be established in light of a historical track record of profitability and the expectations of increasing business and profits), but is consistent with current AAO practice, which is to deny immigrant petitions where any gap exists in a petitioner's ability to pay the proffered wage. *See, e.g.*, *Matter of X* [name redacted], File No. [redacted] EAC 06-008-51555 (AAO May 11, 2009), *discussed in* 14 Bender's Immigr. Bull. 1572 (Dec. 15, 2009).

[40] *See* 8 CFR §204.5(g)(2). The Neufeld Memo offers the following simplistic illustration: an architectural firm obtains a labor certification for an architect it intends to employ. The firm then becomes "insolvent" and is acquired by another firm that files a successor in interest immigrant petition based on this labor certification. This second firm would not qualify as a successor in interest, since it could not establish the acquired firm's ability to pay the proffered salary from the date of the filing of the labor certification application. If the acquired firm had remained "solvent", however, successorship in interest could have been established. Neufeld Memo, *supra* n. 1 at 7. Since a demonstration of ability to pay requires much more than showing simple solvency, and the majority of situations encountered by practitioners will involve entities that are patently solvent but otherwise not able to show ability to pay, a less uncomplicated fact pattern might perhaps have been helpful.

[41] Memorandum from William R. Yates, Associate Director, Domestic Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2),* File No. HQOPRD 90/16.45 (May.4, 2004), *available at* AILA Infonet Doc. No. 04051262 (*posted* May 12, 2004); *see also* Wada, *supra* n. 39 at 755-56.

that wish to be considered successors in interest for immigrant petition purposes.

The third duty of aspiring successors in interest is to describe fully and document the transfer (to them) and (their) assumption of the ownership of the entity that initiated the relevant immigrant process. The Neufeld Memo sets out, by way of illustration rather than limitation, certain materials that may be provided by the petitioner in a successor in interest situation to document the appropriate transfer and assumption of ownership.[42] The memorandum then prescribes two basic conditions for immigrant petition successorship in interest:

a) Acquisition of Assets and Essential Rights and Obligations

First, the successor must, in addition to purchasing the predecessor's "assets" (without an indication of how many of these assets should be purchased), also acquire the predecessor's "essential rights and obligations…necessary to carry on the business in the same manner[.]"[43] The notable aspect of this language is of course the departure from the "all of the rights, duties, obligations, and assets" standard of the Puleo Memo; under this new standard, only those ancillary rights and obligations that are essential and necessary to the carrying on of the predecessor's business in the same manner need be acquired. Precisely what manner of rights and obligations may be considered essential and necessary in this respect is apparently left to the judgment of the petitioner seeking to be a successor in interest, and, of course, to the USCIS officer adjudicating the immigrant petition. Thus, in preparing a new or amended immigrant petition that seeks to qualify an acquiring entity as a successor in interest, practitioners should carefully identify which rights and obligations have been acquired by the putative successor in interest from the predecessor and decide what it is about these rights and obligations that makes them both essential and necessary to carry on the predecessor's business in the same manner.

For example, if the basic asset acquired is a certain product line, the successor will have to show that, in addition to buying this product line, it also took over all the means required to develop and sell this product line. Such means would include, for example, licensing rights, intellectual property protections, financing arrangements, supplier contracts, and marketing agreements with third parties.

b) Continuation of Same Type of Business/Substantially Same Manner of Control

Second, the Neufeld Memo requires (as does the Puleo Memo) that the acquiring entity continue to operate the "same" type of business as the predecessor, and also demands that the "manner" in which the acquiring entity controls and carries out the business of the acquired entity remain "substantially the same" as it was before the acquisition.[44] This fairly broad standard is not one that many acquiring entities are likely to find difficult to meet, but every immigrant petition that attempts to establish successorship in interest should certainly contain an explanation of how the successor operates the same type of business as the predecessor and how there is no substantial difference in the manner in which the two entities carry out their respective businesses. As far as the required identity in the type of business carried out is concerned, an affinity between the products or services offered by the two entities should suffice. Thus, if United Parcel Services were to acquire a FedEx in-house division developing a certain package tracking software product, the "same type of business" requirement would clearly be met, as it would if Verizon were to acquire a certain telephony device product division from Sprint. The harder cases will of course be those that involve situations where there is no such clear affinity. For example, if Hilton Hotels were to acquire the customer research department of Geico (an acquisition that could make perfect sense from a purely business perspective), an attempt to establish successorship in interest might be problematic, since the acquiring and acquired entities, although clearly commercial organizations, do not operate the same type of business.

More latitude is allowed with respect to the manner in which the acquiring entity controls and carries out its business, since only substantial identity with the manner in which the acquired entity controls and carries out (or controlled and carried out) its business is required. To show such substantial identity, the successor could, for example, present evidence of its corporate hierarchical structure (including its board of directors led by a Chairman, the Chief Executive Officer, Directors of various divisions, junior executives such as Vice Presidents, Managers, and so on) and show that the acquired entity also had this fairly typical hierarchy. If the asset acquired is a division or department of another company, the acquiring entity should show that the hierarchy that

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[42] The Neufeld Memo itemizes sales contracts, mortgage closing statements, Form 10-K Annual Reports, audited financial statements, real property and business license transfer documentation, copies of financial instruments used to execute the ownership transfer, and newspaper articles and other media reports as materials that may be used to document a transfer of ownership. Neufeld Memo, *supra* n. 1 at 7.

[43] *Id.* at 8.

[44] *Id.*

existed within this division or department will remain substantially the same. Although the specific individuals discharging the functions within this hierarchy may be different, it will be enough if the acquiring entity can show that the basic chain of command within the division or department will remain substantially identical.

c) No Need to Acquire Unrelated Liabilities

Emphasizing its departure from the totality standard of the Puleo Memo, the Neufeld Memo states that successorship in interest may be established without an assumption of all of the liabilities of the acquired entity. Specifically, the memorandum notes that a failure to acquire liabilities unrelated to the job opportunity at issue will not prevent successorship in interest from being established. The example of an acquiring entity's failure to acquire an acquired entity's liability for sexual harassment or other tort litigation is provided to illustrate the principle.[45] This of course comports with the reality of most business transactions, in which the entire point of structuring the acquisition as an asset purchase is to avoid taking on certain undesirable liabilities of the target company.

At this point in the Neufeld Memo, an example of a transaction involving less than a complete acquisition of assets but nonetheless enabling the acquiring company to qualify as a successor in interest would have been welcome. No such example is provided; instead, the memorandum takes a digressive tack and offers an example of a clearly non-qualifying situation that most practitioners are not often likely to come across and does not even involve an acquisition. In this situation, Company A obtains a labor certification for a computer systems analyst and then enters into a contract with Company B for the services of the beneficiary of the labor certification. Under this agreement, the beneficiary would perform the duties described in the labor certification at Company B. Company B is not a successor in interest in this situation, since Company A has not transferred its ownership to Company B and Company A's business interests are not carried out and controlled in the same manner by Company B.[46] The memorandum goes on to observe that, if Company A had sold its computer software development unit (including the certified position) to Company B, a successor in interest relationship could exist between Company B and Company A.[47]

B. Partial Acquisitions and Spin-Offs

One of the most meaningful departures from the USCIS' previous standard for immigrant successorship in interest occurs in the Neufeld Memo's next subsection, entitled "Transfers in Whole or in Part."[48] In this subsection, the memorandum acknowledges that some corporate transactions involve the acquisition of only a part of a corporate organization, and states that successorship in interest can nonetheless be established in such a partial acquisition or "spin off" situation. Three basic conditions are prescribed in this respect: first, the acquired part, or operational division, of the relevant corporate organization must be a "clearly defined unit" of the organization; second, the unit must be transferred "as a whole" to the successor entity; third, the job offered to the immigrant petition beneficiary must be "located" within the unit transferred to, or acquired by, the successor entity.[49]

Two examples are provided by the memorandum to illustrate valid successorship in interest in a partial acquisition or spin-off situation: the sale of a manufacturing division of a chemical wholesale corporation, when such a division utilizes plant and equipment, management, accounting, and operational structures that are "readily divisible" from the general structure of the corporation, to another entity engaged in chemical manufacturing, and the sale of a branch office of a bank to another "entity engaged in the provision of banking services as a member organization in the banking industry" (i.e., a bank).[50] The Neufeld Memo also observes that a situation in which a company sells a patented chemical formula to

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[45] *Id*.

[46] *Id.* One might be forgiven for concluding that this particular example was chosen to convey the USCIS' traditionally jaundiced view of the activities of computer consulting companies—the agency's bêtes noires—rather than to provide any useful guidance to immigration practitioners. The most recent example of this animadversion is the January 8, 2010, memorandum from Mr. Neufeld himself, Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, *Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements*, File No. HQ 70/6.2.8 AD 10-24 (Jan. 8, 2010), *available at* AILA Infonet Doc. No. 10011363 (*posted* Jan. 13, 2010).

[47] Neufeld Memo, *supra* n. 1 at 8.

[48] *Id.* at 8-9. The subsection is introduced, curiously, with an enumeration of various "organizational structures" adopted by business entities (general partnerships, limited partnerships, limited liability partnerships, limited liability companies, regular "C" corporations, and Subchapter "S" corporations). It is not clear what the USCIS was hoping to achieve through this enumeration, and the subsequent discussion is in no way illuminated by it. It could thus be concluded that this listing amounts to little more than an empty sciolism.

[49] *Id.* at 9.

[50] *Id.*

another company, enabling the buying company to manufacture a product using this chemical formula, would not support a finding of successorship in interest, since no transfer of a clearly defined business unit has occurred; all that has transpired is in this situation is the sale of manufacturing rights without the accompanying sale of other related assets within the relevant business unit.[51]

Practitioners should pay considerable attention to this subsection, since such partial acquisitions or spin-offs are the types of transactions that occur most frequently in today's business environment and are therefore the most likely to be encountered and to involve an application of the successorship in interest analysis. Such an analysis will require practitioners to engage in a tripartite microanalysis within the overall three-pronged macroanalysis demanded by the Neufeld Memo. Specifically, practitioners will have to establish to their satisfaction (and, subsequently, that of the USCIS) that (1) the portion of the predecessor entity acquired by the petitioner constitutes a clearly defined unit within the predecessor; (2) the unit is being transferred as a whole to the successor; (3) the job offered to the petition beneficiary is located within the transferred unit, and was located within that unit before the acquisition. Each of these factors is discussed below.

1) Clearly Defined Unit

As noted above, the Neufeld Memo requires that, in a partial acquisition or spin-off situation, the portion of the target corporate organization that is being acquired or spun off constitute a clearly defined unit within that organization. Such clarity of definition can be demonstrated by showing that the portion, division, team, department, or other faction, although lacking a separate corporate identity, effectively operated as a freestanding entity and exercised a degree of autonomy in its operations. The argument that the acquired portion was a clearly defined unit acquires particular conviction if it can be shown that the target corporation recognized it as such before, and independently of, the acquisition. In this respect, any documentation (such as Security and Exchange Commission ("SEC") filings, marketing material, website content, organizational charts, and product literature) prepared by the corporate organization to describe its business that identifies the acquired portion as a discrete entity that operated with self-sufficiency or was otherwise left to its own devices within the organization will be especially effective in supporting the argument that a clearly defined unit has been acquired. For example, if Traditional Fashions were to acquire the polo shirt product line of Preppy Clothing, evidence that this product line was developed, administered and marketed by a specific team of tailors and other employees within Traditional Fashions that had its own discrete identity (as demonstrated, by example, by advertisements marketing the company's polo shirts without reference to any of the company's other products), hierarchy (ranging from Master Tailor to Apprentice Tailor), and even manufacturing and business premises within the overall corporate organization, would be very helpful in meeting the "clearly defined unit" requirement.

2) Transfer as a Whole

The Neufeld Memo requires that the clearly defined unit be transferred "as a whole" to the entity seeking to be considered a successor in interest. At the risk of laboring the obvious, this means simply that the totality of the unit should be acquired by the entity seeking to be a successor, and that no residue of the unit should remain with the target organization. Thus, if a certain technological product line is acquired, the company that previously developed, marketed, and sold the product should no longer do so. It will of course sometimes be difficult to quantify the transfer of the unit in its entirety; for example, if the unit at the acquired corporate organization comprises a team of twenty software engineers, and only nineteen of these join the acquiring entity, does this mean that something less than a transfer of the unit "as a whole" has occurred, and that successorship in interest is thus defeated? Given the apparent state of mind of many USCIS adjudicators, it is hard to say, and no confidence can be had that such absurd results will not occur (although this might perhaps be unfair to the USCIS). It is to be hoped that common sense will prevail at the Service Centers and that the spirit of the Neufeld Memo will be observed.

3) Job Location Within Unit

The final requirement for establishing successorship in interest in a partial acquisition or spin off situation is to show that the job offered by the aspiring successor in interest to the immigrant petition beneficiary continues to be located within the unit in which the beneficiary worked before the acquisition. Such continuity should not be difficult to establish, and can be documented simply by providing the necessary information in a company support letter and supplementing this with a hierarchical or organizational chart that identifies the beneficiary's situation within the relevant unit and shows that he or she is still a member of the team.

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[51] *Id.*

C. Successorship Situations that Do Not Require the Filing of an Amended I-140 Immigrant Petition

The Neufeld Memo outlines certain situations in which an acquiring entity need not file an amended petition to establish its status as a successor in interest and thus to preserve the immigrant process begun by the entity it acquired.

1) Immigrant Petition/Adjustment of Status Portability Situations

The beneficiary of an immigrant petition may be eligible to benefit from the protection of the statutory immigrant petition/adjustment of status portability mechanism and have the remaining validity of this petition ensured because his or her adjustment of status application has been pending for 180 days or longer and the job offered to the beneficiary by the acquiring employer/successor in interest is in the same or a similar occupational classification as the job described in the underlying immigrant petition filed by the acquired entity/predecessor in interest.[52] In such a situation, the memorandum exempts successors in interest from having to file amended immigrant petitions to ensure the continuation of the acquired employee's immigrant process. Even though an amended immigrant petition may not be required, successors in interest should (as should all entities employing adjustment of status applicants under the immigrant petition/adjustment of status portability mechanism) take certain steps to ensure the propriety of the exercise of this mechanism. Most obviously, the successor in interest should compare the job offered in the beneficiary's immigrant petition to the job that it has offered the beneficiary to determine if the necessary identity or similarity in occupational classification exists. If the immigrant petition filed by the acquired entity for the beneficiary has not yet been approved, the practitioner representing the successor in interest should study this immigrant petition to determine if it was approvable when it was filed.[53] The practitioner should also make arrangements to receive any communications issued by the USCIS (including a Request for Evidence ("RFE") and a Notice of Intent to Deny) that require action be taken to prevent a denial of the petition. Once the successor in interest is satisfied that the requirements for immigrant petition/adjustment of status portability have been met, the communications to the USCIS mandated by the INS' 2001 Cronin memorandum on the issue should be sent to the relevant Service Center.[54]

2) Immigrant Petitions that Do Not Require Labor Certifications

Arguably the most ill-considered section of the Neufeld Memo is the one discussing the availability of the immigrant petition successorship in interest mechanism for petitions that are not based on labor certifications. This section begins by clumsily observing that successor in interest determinations are "principally" relevant to the continuing validity of labor certifications.[55] While this may be true, principality does not connote exclusivity, and an inference may be drawn that the issue of successorship in interest should not be limited to labor certification-based immigrant petitions. As discussed below, the memorandum goes to render the mechanism expressly inapplicable to any immigrant petition that is not based on a labor certification, however.

a) EB-1 Extraordinary Ability and EB-2 National Interest Waiver Petitions

The Neufeld Memo notes that

> [s]uccessor-in-interest petitions are not required to reaffirm the validity of the initial petition for petitions that are filed requesting visa preference categories that do not require a labor certification, such as the EB-1 Alien of Extraordinary Ability and the EB-2 National Interest waiver (Non-NIW [national interest waiver] Physician cases).[56]

A corporate organization that has acquired a petitioner that has obtained approval of an immigrant petition under INA §203(b)(1) or §203(b)(2)(B) for one of its employees need not take any action in order to preserve the validity of this immigrant process other than to offer the beneficiary a job in his or her area of

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[52] INA §204(j), 8 USC §1154(j).

[53] *See* Memorandum from Michael Aytes, Acting Director of Domestic Operations, *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)*, File No. HQPRD 70/6.2.8-P (December 27, 2005), *available at* AILA Infonet Doc. No 06092763 (*posted* Sept. 27, 2006) at 2.

[54] Memorandum from M. Cronin, *Initial Guidance for Processing H-1B Petitions as Affected by the American Competitiveness in the Twenty-First Century Act (Public Law 106-313) and Related Legislation (Public Law 106-311 and (Public Law106-396)* (June 19, 2001), *available at* AILA Infonet Doc. No. 01062031 (*posted* June 20, 2001) (requiring that both the beneficiary and the new employer send correspondence to the USCIS to notify the agency of the fact that immigrant petition/adjustment portability is being invoked and to establish eligibility for such portability); *see also* Pelta, *supra* n. 4 at 57-58.

[55] Neufeld Memo, *supra* n. 1 at 10.

[56] *Id.*

expertise, and appears to be insulated from any USCIS inquiry into its viability as a petitioner, including its ability to pay the proffered wage. Of course, if the petition remains pending, the acquiring entity should ensure that it has made arrangements to receive, and respond to, any communication (including, importantly, an RFE) sent by the USCIS that pertains to the petition.

The unstated rationale for this determination is, in all likelihood, that petitioners play a non-essential role in the processing of petitions of these types and can be dispensed with altogether, since beneficiaries of such petitions can petition on their own behalf under both of these categories.[57] The wisdom of such a conclusion is open to question, and there is a certain element of unfairness in denying a petitioning organization the availability of the successor in interest mechanism just because an employee could have filed a self-petition.

b) EB-1 Outstanding Researcher/Professor and Multinational Manager/Executive Petitions

After making the successorship in interest mechanism unnecessary for EB-1 Extraordinary Ability petitions and EB-2 petitions requesting a national interest waiver, the memorandum goes on to make it impermissible for entities that succeed to the interests of petitioners that have filed immigrant petitions under the remaining EB-1 categories, the Multinational Executive or Manager category and the Outstanding Professor or Researcher category. The memorandum notes in this regard:

> An employer seeking to classify the alien as an EB-1 Multinational Executive or Manager or EB-1 Outstanding Professor or Researcher, must file a new I-140 petition and establish the alien's eligibility under the requested category's specific eligibility requirements.[58]

Precisely why the USCIS should find it necessary to foreclose the availability of the highly useful mechanism of immigrant petition successorship in interest to United States entities that wish to benefit from the services of the highly qualified persons that are the typical beneficiaries of such petitions is not clear, nor is its specific insistence that the beneficiary's qualification for these categories be re-established. Given the memorandum's stated purpose of endowing the immigrant petition process with flexibility, this verges on the inexplicable.[59] The fact that this provision signifies a departure from a more liberal agency approach previously applied to these situations, at least as far as outstanding researchers are concerned, makes it all the more problematic and objectionable. In an April, 2007, AILA liaison meeting, the USCIS' Nebraska Service Center was asked if a company that had acquired a company that had obtained approval of certain immigrant petitions for outstanding researchers, and was a successor in interest to that company, would have to file amended immigrant petitions for the beneficiaries of these petitions, and, if such petitions were required, if the acquiring company would have once again to establish the outstanding nature of the beneficiaries' accomplishments. The USCIS responded with a generosity of spirit that has apparently eluded the drafters of the Neufeld Memo:

> As a successor-in-interest, the new company would have to file successor petitions. However, there should be no need to provide documentation to re-establish that the researcher is outstanding.[60]

Given the unpredictable and mutable standards that govern the adjudication of EB-1 immigrant petitions, having to re-establish the immigrant petition beneficiary's qualification as an Outstanding Professor or Researcher or a Multinational Executive or Manager will often be a daunting endeavor, and the fact that the petition filed by the predecessor in interest may have been approved offers no guarantee that the new petition required of the successor in interest will also be approved.[61] Certainly, reaffirming the

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[57] *See* INA §203(b)(1)(A), 8 USC §1153(b)(1)(A) and §203(b)(2)(B), 8 USC §1153(b)(2)(B).

[58] Neufeld Memo, *supra* n. 1 at 10.

[59] *See* A. Paparelli, *USCIS Puts Silent Kibosh on Successorship in Interest for High Achieving Immigrants*, *available at* http://blogs.ilw.com/angelopaparelli/2009/09/immigration-agency-puts-kibosh-on-successorship-in-interest-for-multinational-managers-and-executive.html (Sep. 10, 2009).

[60] Minutes of April 12, 2007, AILA Liaison Meeting at NSC *available at* AILA Infonet Doc. No. 07060161 (*posted* June 1, 2007), at 6.

[61] Although the outcome of a refiled Outstanding Professor or Researcher immigrant petition will generally hinge to some degree on whatever subjective adjudication standards *du jour* prevail at the relevant Service Center, the substantive approvability of a Multinational Executive and Manager immigrant petition may have been objectively affected by the relevant corporate transaction, given the statutory requirement at INA §203(b)(1)(C), which requires that the multinational executive or manager be seeking to enter the United States to serve for the "same employer or to a subsidiary or affiliate thereof[.]" *See* Paparelli & Chiappari, *supra* n. 1 at 1480; A. Paparelli, D. Buffenstein & R. Banta, *Evading the Slings and Arrows of Outrageous Fortune: the Immigration Consequences of Mergers, Acquisitions and Other Business Changes*, 93-11 Immigr. Briefings (Nov. 1993) at 13-17 (arguing that immigrant eligibility as a Multinational Executive or Manager is lost when a successor in interest acquires a United States

beneficiary's credentials under either of these EB-1 categories may be a far more exacting task than establishing successorship in interest, and one that is more likely to result in failure. It is therefore to be hoped that the USCIS will revisit this provision of the Neufeld Memo to mitigate its harshness and make it less inconsistent with the progressive thrust of this document.

D. Changes in Petitioner Name and/or Change in Employment Location

In an arguably extraneous subsection whose applicability falls outside the sphere of successorship in interest, the Neufeld Memo notes that immigrant petitions need not be filed to reflect a change in the name of the petitioner or a change in the location of the beneficiary's job. With respect to a change in the petitioner's name, the memorandum makes the filing of an amended immigrant petition unnecessary to notify the USCIS of "[a] legal change in the name of the petitioning employer so long as the ownership and legal business structure of the petitioning employer remain the same."[62] This suggests that an entity that renames itself and also changes its formal constitution or, possibly, place of incorporation, would have to file an amended immigrant petition. As far as changes in the beneficiary's job location are concerned, an amended immigrant petition is not required if the new location is within the "area of intended employment" indicated on the relevant Form ETA 9089 labor certification application.[63]

IV. Representing Clients in Immigrant Petition Successorship in Interest Situations

Let us now turn to an examination of how immigration practitioners should handle situations in which their clients have acquired another entity and wish to preserve the immigrant process embarked upon by that entity for an employee who will, as a result of this acquisition, become an employee of the client.

By way of prefatory discussion, it should be observed that, much as we would like the situation to be otherwise, the current practical reality of most corporate transactions is that the role of an immigration attorney in such transactions will be a decidedly minor one, if it exists at all. Although the issues surrounding successorship in interest are best addressed as part of the pre-closing due diligence process, it not be unusual for such an attorney not even to become aware of the transaction until it has closed and the real players in the deal have departed the scene. This remains the case despite the often significant foreign national employee populations in many companies, especially in the technology sector, the fact that such employees are frequently the very assets the acquiring entity most covets, and the valiant efforts of a number of immigration practitioners to bring to the attention of dealmakers and deal stewards (most notably, corporate attorneys) the importance of proper consideration of immigration law issues in a merger and acquisition context.[64] Much unfortunately remains to be done in this last respect, and many practitioners can attest to the fact that a common reaction of corporate attorneys—even those who market themselves as specialists in viewing transactions from every possible angle and experts in uncovering any conceivable issue that might problematize a deal—when informed that the statuses and immigrant processes of the foreign national employees of the target company are material issues that deserve at least some recognition will be one of unfeigned incomprehension.[65]

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employer but not its overseas parent, affiliate, or subsidiary from where the qualifying employment took place).

[62] Neufeld Memo, *supra* n. 1 at 11.

[63] *See* 20 CFR §656.3. An area of intended employment is defined by the DOL in geographical terms as the area within normal commuting distance of the place of intended employment. If the place of intended employment is within a Metropolitan Statistical Area ("MSA") or a Primary Metropolitan Statistical Area ("PMSA") any other place within the same MSA or PMSA will be deemed to be within normal commuting distance of the place of intended employment. Places outside the relevant MSA or PMSA may be considered to be within normal commuting distance, however. A listing of all MSAs may be accessed at the U.S. Census Bureau's website at http://www.census.gov/population/www/metroareas/metrodef.html.

[64] Substantial discourse on the subject has occurred over the past decade. The reader is referred to the works of Angelo Paparelli, the unrivalled hierophant in this area, for an understanding of the need to address immigration issues effectively in a transactional context. *See, e.g.*, A. Paparelli, *Assuage Therapy—Enticing M&A Lawyers to Help with Immigration Successorship* (Jun. 2008), *available at* http://www.abil.com/articles/Articles%20-%20Assuage%20Therapy%20-%20Paparelli.pdf; A. Paparelli, A. Tafapolsky, T. Chiappari, S. Cohen & S. Yale-Loehr, *It Ain't Over Till It's Over: Immigration Strategies in Mergers, Acquisitions and Other Corporate Changes*, 5 Bender's Immigr. Bull. 789 (Oct. 1, 2000); A. Paparelli, A. Tafapolsky, T. Chiappari, S. Cohen & S. Yale-Loehr, *It Ain't Over Till It's Over: Immigration Strategies in Mergers, Acquisitions and Other Corporate Changes Part 2*, 5 Bender's Immigr. Bull. 849 (Oct. 15, 2000).

[65] One could waste a considerable amount of time speculating why this is the case. Any number of reasons suggest themselves, including a blinkered outlook, simple traditionalism, and the ingrained disdain of many corporate attorneys towards any matters involving immigration.

Leaving aside all of this, it should be clear by now that the immigration practitioner has a key role to play in any corporate transaction that involves the acquisition of a foreign national employee population, and that, in particular, his or her services will be crucial in ensuring the survival of the immigrant process underway for members of that population. Fortunately, the Neufeld Memo says nothing about the timing of the actions required to preserve this process and does not mandate that the immigrant petitions necessary for such preservation be filed immediately upon the closing of an acquisition or even within a stated period following the closing. Thus, even if the immigration practitioner is not notified of a corporate transaction until the event is a *fait accompli*, he or she will have some time to survey the situation, decide what needs to be done, assemble the materials necessary for any USCIS filings, and file any petitions that may be required.[66]

The following is a suggested approach for practitioners who represent a corporate entity that has acquired another entity amongst whose employee population are foreign nationals whose immigrant processes have been started.

A. Step 1: Identify the Form Taken by the Transaction

The first task for the immigration practitioner will be to identify the form that the relevant corporate transaction has taken. Corporate transactions come in many guises and the immigration practitioner should work with the client's corporate attorneys to understand clearly what particular shape the final transaction took. Most importantly and basically, it should be determined if the transaction was a stock deal or an asset deal. If the transaction fell into the former category, the acquiring entity will, as noted above, simply have purchased the outstanding stock (i.e., shares) of the target entity, effectively absorbing the latter into itself. In such a situation, a successor-in-interest argument need not be made, since the acquiring entity is not an entity that is existentially separable from the acquired entity. The filing of amended immigrant petitions will be required, however, since the Neufeld Memo dispenses with the need for such petitions only where "the ownership and legal business structure of the petitioning employer remains [sic] the same."[67] Such amended petitions will not have to comply with the Neufeld Memo's three-part test, but will have to show an identity in job opportunity and a location of the new opportunity in the same area of intended employment.

The Neufeld Memo itemizes the types of materials that should be reviewed to determine what kind of business transaction has occurred:

- A contract of sale for the acquisition of the predecessor;
- Mortgage closing statements;
- An SEC Form 10-K for the successor entity;
- Audited financial statements of the predecessor and successor for the year in which the transfer occurred;
- Documentation of the transfer of real property and business licenses from the predecessor to the successor;
- Copies of the financial instruments used to execute the transfer of ownership; and
- Newspaper articles or other media reports announcing the merger and acquisition of the predecessor[68]

The first six of these documents are likely to be drafted in terms that are not readily intelligible to the layperson and their usefulness in attempting to describe a transaction to the USCIS will be generally be limited, unless some form of explanatory commentary by the immigration practitioner is provided.[69] Newspaper articles and other media reports will often contain simple and understandable accounts of the relevant transaction, however, and their use in an immigrant petition claiming successorship in interest is encouraged.

If the transaction involved the acquisition of the assets, rather than the stock, of the target company, the practitioner should assess to what extent immigrant petition successorship in interest can be demonstrated with reference to the ternary approach mandated by the Neufeld Memo, as discussed below.

B. Step 2: Identify and Assess the Quality of the Acquired Assets, Rights and Obligations

It will be crucial, for purposes of making a successful immigrant petition successor in interest argument, that the practitioner representing the

[66] There will of course occur situations where the immigration practitioner is provided with all of the materials necessary for the preparation of new or amended immigrant petitions well in advance of the projected closing of the relevant transaction. In such situations, the filing of immigrant petitions before the closing is not recommended, given the frequency with which corporate deals fail, often at the last moment, to be consummated. T. Straub, *Reasons for Frequent Failure in Mergers and Acquisitions--a Comprehensive Analysis* (DUV Gabler 2007).

[67] Neufeld Memo, *supra* n. 1 at 11.

[68] *Id.* at 7.

[69] To its credit, the SEC has for some time required that "plain English" be used in disclosure documents filed with it. *See A Plain English Handbook* (1998), *available at* http://www.sec.gov/pdf/handbook.pdf.

aspiring successor understand clearly what assets, rights, and obligations his or her client has acquired, why these rights and obligations may be said to be essential, and how they are necessary to the continued running of the acquired business in the same manner. This will require practitioners to engage in the type of analysis described above, and will involve extensive dialogue and collaboration with the persons with the relevant knowledge.

C. Step 3: Identify Which Employees of the Acquired Entity Have Begun the Immigrant Process and Determine Which Stage in the Process Each Employee Has Reached

Once practitioners have gained a clear understanding of the nature of the relevant corporate acquisition, they should turn their attention to the former employees of the acquired entity to ascertain if the acquired entity started the immigrant process for them, and, if it did, which stage in this process each employee has reached. Each such employee whose immigrant process is underway will find himself or herself in one of the following situations: (1) a labor certification application has been filed but has not yet been certified; (2) a labor certification application has been certified but an immigrant petition has not yet been filed; (3) an immigrant petition has been filed and is either pending or has been approved; (4) the employee has filed an adjustment of status application. The steps that practitioners should take to ensure the continuity of the immigrant process of a former employee of the acquired entity will vary according to the specific stage that has been reached in this process.

1) Labor Certification Application Filed and Still Pending

The DOL's regulations prohibit the amendment of pending labor certification applications, and its 1992 agreement with the INS relieve it of having to address requested amendments caused by employer changes. [70] It will therefore not be fruitful to approach this agency with a successor in interest claim after the acquisition of an entity that has filed such an application. Instead, the better practice is simply to wait until the application is certified and then submit an immigrant petition that makes the successor in interest case.

It should be noted that the DOL has expressed a readiness to address successorship in interest issues when an acquisition occurred between the conclusion of the recruitment period and the submission of the labor certification application. Thus, if the recruitment was conducted under a pre-acquisition employer name and the application filed under a different, post-acquisition, name, the DOL will allow the employer to demonstrate in a response to an audit that it is a successor in interest to the employer that conducted the relevant recruitment.[71] The standard for such a demonstration is fulfillment of a fairly permissive "totality of the circumstances" test and an apparent requirement that only assets and liabilities with respect to the application's job opportunity need to be assumed.[72]

2) Labor Certification Obtained But Immigrant Petition Not Filed

If the acquired entity obtained a labor certification for one of its employees but had not yet filed an immigrant petition on the basis of this labor certification when it was acquired, the acquiring entity will have to file a new immigrant petition to preserve the immigrant process of that employee. A new petition of this type must be filed before the 180-day validity period of the underlying labor certification has expired.[73]

The Neufeld Memo requires such new petitions to be "supported" by the following materials:

- Documentation to establish the qualifying transfer of the ownership of the predecessor to the successor;
- Documentation from an authorized official of the successor which evidences the transfer of ownership of the predecessor, the organizational structure of the predecessor prior to the transfer, and the current organizational structure of the successor; and the job title, job location, rate of pay, job description and job requirements for the permanent job opportunity for the alien beneficiary;
- Documentation to demonstrate that the alien beneficiary possesses the requisite minimum education, licensure and work experience requirements specified on the labor certification;
- The original approved labor certification; and
- Documentation to establish the ability to pay the proffered wage by the predecessor and the successor.[74]

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[70] 20 CFR §656.11(b).

[71] *See* DOL Round 10 PERM FAQs (5/9/2007), *available at* AILA Infonet Doc. No. 07051160 (*posted* May 11, 2007).

[72] *Id.* Of course, this will require the DOL to issue a second audit notice, since the discrepancy between the employer name on Form ETA 9089 and the employer name in the relevant recruitment initiatives will not become apparent until the application is audited and a response provided.

[73] Neufeld Memo, *supra* n. 1 at 11.

[74] *Id.*

Considerable care should be exercised in preparing the first two sets of documentation, since they will be largely dispositive of the success or failure of a successorship in interest claim. Perhaps the most effective counsel that can be offered in this respect is that primary documents, such as acquisition agreements, tax statements, government filings, and other documents that typically result from a corporate transaction and might contain material that advances the successor in interest argument should not be allowed to speak for themselves and should be accompanied by commentary from the practitioner preparing the immigrant petition. Such corporate materials are often drafted in terms that make crystalline sense only to corporate attorneys and their inclusion in a petition without some form of explication for the benefit of the adjudicating USCIS officer is likely to result in the issuance of an RFE or something even worse. The requirement that documentation from "an authorized official" of the aspiring successor be provided presents practitioners with an opportunity to draft a perspicuous summary of the underlying transaction for review and signature by the relevant authorized official. Such a summary, in addition to describing the transaction in terms the USCIS will understand, should contain an argument that traces the relevant sections of the Neufeld Memo in order to establish that the petitioner is a successor in interest according to the provisions of the memorandum. It will be especially effective in this respect to follow the memorandum's tripartite analysis and offer three separate arguments set out in different sections to establish that job opportunity identity exists, that eligibility in all respects (including the predecessor's ability to pay) also exists, and that the transfer and assumption of the ownership of the predecessor has been fully described and documented.

3) Immigrant Petition Filed and Still Pending or Approved

If the acquired entity has already filed an immigrant petition for an employee that will be employed by the acquiring entity, the acquiring entity should, regardless of whether or not this petition is pending or has been approved, file an amended immigrant petition to notify the USCIS of its acquisition of the petitioner. The Neufeld Memo requires that the following materials be included in such a petition:

- Documentation, such as a copy of the Form 1-797 approval or receipt notice, that provides the previously filed 1-140 petition's receipt number, and the petitioner's name and address;
- A statement that provides the alien beneficiary's name, date of birth, and alien registration number (if any);
- Documentation to establish the ability to pay the proffered wage by the predecessor and the successor;
- Documentation to establish the qualifying transfer of ownership of the predecessor to the successor; and
- Documentation from an authorized official of the successor evidencing the transfer of ownership of the predecessor, the organizational structure of the predecessor prior to the transfer, and the current organizational structure of the successor; and the job title, job location, rate of pay, job description and job requirements for the permanent job opportunity for the alien beneficiary.[75]

The fact that the labor certification underlying the approved or pending immigrant petition may have expired does not present an issue and will not cause the amended immigrant petition to be denied or rejected.[76]

The caveats set out above with respect to the materials to be provided in support of new immigrant petitions and the need to present the successorship in interest argument in the appropriate form also apply to the filing of amended immigrant petitions.

4) Adjustment of Status Application Filed and Pending

If the immigrant petition beneficiary has filed an adjustment of status application that remains pending, the practitioner should determine whether or not the benefit of immigrant petition/adjustment of status portability is available. If the beneficiary's adjustment of status application has been pending for 180 days or

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[75] *Id.* at 12. The memorandum does not indicate that a copy of the certified labor certification application must also be provided, but this will obviously be a critical component of the amended immigrant petition filing. The USCIS' recent guidance of the filing of Forms I-140 indicates, that, in a situation where an amended immigrant petition is being filed on the basis of a labor certification that has already been submitted to the USCIS, "a brightly colored piece of paper" indicating "in large bold font" that the labor certification has been submitted be should be placed directly under the petition, together with the receipt number of the previously filed petition. 1/22/2010 Guidance, *supra* n. 1 at 2.

[76] Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, *Revisions to Adjudicators Field Manual (AFM). Chapter 22.2(b) General Form I-140 Issues*, File No. HQ 70/6.2 AD 07-26 (Sep. 14, 2009), *available at* AILA Infonet Doc. No. 09110465 (*posted* Nov. 4, 2009). The USCIS' recent guidance also makes it clear that the beneficiary's retention of the priority date established in a previously filed and approved immigrant petition is not affected by an amended petition claiming successorship in interest. 1/22/2010 Guidance, *supra* n. 1 at 4.

longer and it appears that the job described in the relevant immigrant petition is in the same or a similar occupational classification as the job offered by the acquiring entity, the issue of successorship in interest becomes irrelevant and no amended immigrant petition need be filed, as long as the necessary steps to establish immigrant petition/adjustment of status portability are taken.[77] If portability of this type appears not to be available because either or both of these requirements are not met, an amended immigrant petition should be filed on order to establish the acquiring entity's successorship in interest.

The timing of a beneficiary's eligibility for immigrant petition/adjustment of status portability raises an interesting question. What should a practitioner do if the requisite 180 day post-filing period had not elapsed at the time the acquisition closed, but will have elapsed at some point shortly after this close? The conservative approach would be to look at immigrant petition/adjustment portability eligibility as of the date of the closing of the transaction and file an amended immigrant petition for any beneficiary that was not eligible on this date. Considering the hazards involved in filing an amended immigrant petition seeking to establish successorship in interest, such an approach may invite objections from both the petitioner and the beneficiary, particularly if the 180-day mark has been reached by the time the practitioner has been made aware of the transaction and has assembled the materials necessary to support the amended petition.

D. Step 4: Request Consolidated Processing of Multiple Successor in Interest Immigrant Petitions

Recognizing that an acquisition or merger may result in a significant number of foreign national employees moving from one employer to another, the Neufeld Memo allows the presentation of "consolidated" evidence by a single petitioner to provide the description and documentation of the transfer and assumption of the ownership of the predecessor by the successor in interest required by the third prong of the memorandum's test.[78] Practitioners that represent an acquiring entity that wishes to continue the immigrant process begun by the acquired entity for its employees may present a single set of materials that are probative of this transfer and assumption to cover multiple immigrant petitions that are based on the same successor in interest argument and have all such petitions adjudicated at a single Service Center and at the same time. Thus, in the example given in the memorandum, one Form 10-K *Annual Report* could be submitted to serve as evidence of this transfer and assumption for twenty amended petitions resulting from the same transaction.[79] As noted above, however, it is not recommended that a primary document that has not been prepared for immigration law compliance purposes be used as the sole evidence in this respect.

To take advantage of the consolidated processing mechanism, practitioners should telephone the USCIS' National Call Center at the National Customer Service Center ("NCSC"). It remains within the discretion of the Director of the Service Center with jurisdiction over the relevant immigrant petitions to grant or refuse the request for consolidated processing.[80]

V. Conclusion

The current state of immigrant petition successorship in interest is undoubtedly more favorable to employers and practitioners alike than the situation that prevailed before the appearance of the Neufeld Memo. The memorandum, although clearly deficient in a number of respects, will represent, if its provisions are followed, an important advance for businesses that wish to employ foreign nationals without causing them to sacrifice their immigrant processes, and its arrival should be welcomed.[81] The patently unworkable acquisition of all assets and liabilities standard for successorship in interest has been eliminated and replaced with a demanding, but not infeasible, three-part test that practitioners who like to understand thoroughly their clients' businesses should enjoy getting to grips with. The task required of practitioners representing aspiring successors in interest will be exacting and will involve intensive consultation and collaboration with the relevant decision-makers within the entity to ensure that a successorship in interest can be successfully mounted. Persons in certain quarters within the successor's organization will have to be prevailed upon to tailor

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[77] *See* Pelta, *supra* n. 4 at 57-58.

[78] Neufeld Memo, *supra* n. 1 at 12-13.

[79] *Id.*

[80] *Id. See also* SCOPS/AILA Teleconference Call (Oct. 8, 2009), *available at* AILA Infonet Doc. No. 09102224 (*posted* Oct. 22, 2009). Requests for consolidated processing should be responded to within 30 days. If a response is not forthcoming within this period, practitioners should send an e-mail message to, as appropriate, the Nebraska Service Center at ncscfollowup.nsc@dhs.gov or the Texas Service Center at tsc.ncscfollowup@dhs.gov. *See also* 1/22/2010 Guidance, *supra* n. 1 at 5.

[81] Our festive mood should be tempered by the USCIS' position, articulated in *Matter of Iizumi*, 22 I&N 169 (Assoc. Comm'r 1998), that its memoranda and other pronouncements that fall short of regulatory rulemaking are "merely opinions" and may be ignored if the agency so chooses.

the job opportunity offered to the foreign national, if necessary, to ensure that identity with the position described in the labor certification is maintained. Access to the financial documentation of the predecessor (an entity that may no longer exist) will also have to be obtained to establish its past ability to pay the proffered wage and to show that this ability was continuously maintained. Finally, extensive dialogue with the successor's corporate attorneys will be required to understand the structure of the deal and with the in-house architects of the transaction to determine precisely what assets have been acquired from the predecessor and whether or not the essential rights and obligations attendant to these assets have also been acquired. We are of course at a very early stage in this process, but, as the norms governing immigrant petition successorship in interest mature and a coherent picture emerges from the Service Centers and the AAO of what is required to make a persuasive successorship case, our skills in asking the right questions of our clients and preparing the appropriate documentation for the USCIS will be honed accordingly.

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