Outline and Citations from Jonathan Adams, Fragomen, Del Rey, Bernsen & Loewy for June 24, 2004 ilw.com teleconference.

I. What's Your Specialty? - Solutions for Evolving Occupations, Education Mismatches and Workers without Sheepskins

H-B Purposes:
The basic requirements:
Does the position require a theoretical and practical application of a body of highly specialized knowledge?
Does the foreign national have a related degree?

***See generally* 8 C.F.R. § 214.2(h)(4)(iii)(C) (discussing the qualifications necessary for a beneficiary to perform services in a specialty occupation).**

(1) Degree equivalencies for foreign degrees

- Evaluation of educational credentials by a reliable credentials evaluation service, which specializes in evaluating foreign educational credentials (read the evaluation for obvious problems, e.g., a three year degree from an Indian University that is "equated" to a full U.S. degree as opposed to many U.K. three year degrees that often do equate)
- Evaluation of a combination of educational credentials
- Letter from an authority eligible to grant college-level credit at an accredited university, which has a program for granting such credit (usually mistakenly, but effectively used in supporting an expert's credentials.)
- College level equivalency exams

(2) Experiential equivalency

- 3-1 rule (progressive and related experience)
- Recognition of expertise by at least two recognized authorities in the same field
- Others as listed in 8 CFR section 214.2 (h)(4)(iii)(D)

***See* "AAU Discusses Qualifications for Professionals," reported in 65 Interpreter Releases 566 (May 27, 1988) (discussing three checklists issued by the Administrative Appeals Unit concerning professional qualifications for H-1 and third preference petitions for historical perspective.)**

***See* Transcript of Nebraska Service Center (NSC) Liaison Teleconference with AILA (Apr. 14, 2003) for a discussion on NSC's analysis of credentialing services.**

***See* Operations Instructions of the INS (OI) section 214.2(h)(4)(iii)(C)**

(3) Tips on relating the degree/establishing that the position is a "specialty occupation"

- Help relate the course work – university websites regarding a particular degree often have excellent supporting documentation

- Be careful not to too broadly define the potential related degrees or you will be arguing that there is no related degree requirement
- Job postings – ideally external, but may also use internal
- Detailed job descriptions – seems obvious, but is critical to focus on this
- Department of Labor resources – Occupational Outlook Handbook (OOH) and Dictionary of Occupational Titles (DOT)
- Industry data
- Expert opinion letters
    - List writer's qualifications
    - Experience in rendering his/her opinions

(4) Difficult positions

- Analysts in general – case-by-case basis
- Potentially unrelated degrees to IT positions – Mechanical or Industrial engineering
- Undefined manager positions
- Positions in new industries

***See* Transcript of Nebraska Service Center (NSC) Liaison Teleconference with AILA (Apr. 14, 2003) for a discussion on IT cases for programmer analysts and specialty occupation.**

***See* generally "Court Grants Professional Status to Company Vice President," reported in 66 Interpreter Releases 772 (July 17, 1989).**

Permanent residence purposes:
Distinguish between equivalencies listed on an ETA 750 A Form from the H-1B definition – key to the Immigrant Visa Petition is how the employer defined the "or equivalent" and did the foreign national satisfy the listed requirements.

***See Matter of Powerfood, Inc.*, A75 307 414 (AAO June 30, 1997) (distinguishing between equivalencies listed on an Application for Alien Employment Certification and equivalencies required in an H-1B petition).**

Differences amongst Service Centers – NSC most likely to look behind evaluation and does not hold by Efran Hernandez definition of a degree.

***See* Letter from Efren Hernandez III, INS Director of Business and Trade Services in response to a query from Aron Finkelstein (Jan. 7, 2003) (indicating that a "foreign equivalent degree" need not be in the form of a single degree and indicating that "progressive experience in the specialty" may be accrued in the U.S. or abroad).**

Three-year degrees do not equate to a "degree" unless a subsequent university combined additional education and confirmed a single degree. Institute of Chartered Accountants of India combined with a three-year degree may be problematic, although have been successfully documented.

***See Matter of Divine, Inc.*, A96 146 274 (AAO July 17, 2003) (holding that when determining whether a beneficiary has the equivalent of an advanced degree, an equivalent credential should be a baccalaureate degree, not a professional membership but note footnote (1)).**

***See generally Matter of [name not provided]*, A76 457 589 (AAO Aug. 30, 1999), reported in 77 Interpreter Releases 211 (Feb. 14, 2000) (regarding the equivalency formula).**

II. Succeeding at Successorship: Service Center Compliance Strategies for Corporate Makeovers

Information flow with client

- Try getting the details of any planned transactions prior to completion to educate the client on immigration related ramifications and perhaps even alter the terms of the deal to meet immigration related needs
- If working with HR, be sure to have General Counsel's office or outside counsel's involvement (and vice versa)
- Unfortunately, we usually learn about the transaction after completion

Historical perspective

- Much of the "law" in this area is derived from policy memoranda and response letters from the Immigration Service to specific letters from attorneys. Attorneys must note that as in all cases of legal research and when relying on this type of information that policy memoranda or response letters are not binding. Further, as the Immigration Service position on these issues changes, be wary of not conducting comprehensive research and relying on out of date (for example, H-1B related successor issues prior to the Visa Waiver Permanent Program Act of 2000, known as the corporate reorganization rule) policy memoranda or response letters.

- Pre-1990 to late 90s: Assumption of all rights, duties, obligations, etc. of prior entity

***See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (BIA 1986) (utilizes the assumption of "rights, duties, obligations, etc." standard (which can be reconciled with the assumption of immigration liabilities standard)).**

- Late 90's through 9/11/01 series of interpretations that the then INS advised was not really a change in policy, but rather, a confirmation of policy – all prior memos statements made by the Immigration Service presumed the assumption of immigration liabilities (e.g., LCA, I-9, permanent labor certification and all statements made in prior petitions) and not, for example, tort or environmental liabilities as in the classic corporate law sense. This made sense in light of the inefficiencies of the Service having to readjudicate or receive countless new petitions/applications in the face of constant merger, acquisition and reorganization activity.

***See* Letter from Efren Hernandez III, INS Director of Business and Trade Services in response to a query from J. Douglass Donenefeld (Oct. 17, 2001) (discussing the INS**

position that a "company is a successor in interest when it has taken on all of the immigration-related liabilities of the company it has acquired, merged, etc.").

***See* Letter from Efren Hernandez III, INS Director of Business and Trade Services in response to a query from Martha Schoonover (June 7, 2001) (explicitly stating that assumption of liabilities "does not refer to non-immigration related obligations and liabilities…").**

***See* Letter from Efren Hernandez III, INS Director of Business and Trade Services in response to a query from Steven M. Ladik (Mar. 22, 2001) (advising that it has always been the Service's position that assumption of liabilities refers only to immigration liabilities).**

***See* Letter from Efren Hernandez, INS Acting Director of Business and Trade Services in response to a query from Leslie T. DiTrani (Feb. 4, 2000) (suggesting that even prior to the Visa Waver Permanent Act of 2000, amended H-1B petitions need not be filed in successor situations (subject to still meeting the Labor Department requirements for amended LCAs).**

***See* Letter from Jacquelyn A. Bednarz, INS Chief of Adjudications, Nonimmigrant Branch in response to a query from Mark N. Bravin (Sept. 10, 1993) (recognizing the concept of successor-in-interest, but not being specific as to the assumption of liabilities issue).**

***See generally* Memorandum written by James A. Puleo, INS Acting Executive Commissioner, "Amendments of Labor Certifications in I-140 Petitions" (Dec. 1993) (This remains a very commonly referenced Memo by the service in the context of adjudications).**

- Seems to be surviving the post-9/11 redefining of regulatory/statutory interpretation
- Bolstered by H-1B corporate reorganization law of 2000 (in Visa Waiver Permanent Program Act)

Scenarios (in order of preference)

- Assume all assets and liabilities of an *entity*
- Assume substantially all assets and liabilities of an *entity*
- Assume all assets of an entity
- All of the above, but rather than an entity, division within an entity
- All immigration liabilities of an entity, then you detail the nexus between the two entities (e.g., division of one entity to another).

Tips for approaching the analysis

- View the case from the employee perspective – as Efran Hernandez once logically stated in a letter, (to paraphrase) if the employee wakes up the day after the transaction and everything about his/her job is the same, successor-in-interest should be considered as a possibility.
- Different Service Centers may have different results (as usual). The CSC and VSC, seem to be more experienced in analyzing corporate transactions owing to the frequency in which they adjudicate these types of cases. The CSC from the dot.com days focused on

ability to pay and has positioned the issue as "assumes all of the rights, duties, obligations and assets of the original employer and *continues to operate the same type of business as the original employer*." This has successfully been reconciled with the "assuming the immigration liabilities" rule.

- The petitioner might not want to be deemed a successor in interest for ANY purpose (immigration requirements for individual employees sometimes suffer at the expense of "big picture" concerns – public relations, implied liabilities, inability or no desire to see a case through to completion). Remember that our goal of achieving the best result for the foreign national might not be what is best for the petitioner.

Documenting the case (in order of preference)

- Contracts
- SEC filings
- Letters of intent
- Press releases
- Website announcements
- Internal e-mail communication
- As a general rule, the larger the entity, the less documentation that is usually required

Must also consider

- Potential need to update Public Access Files
- Assuming I-9s
- Ability of client to sustain statements made in prior entity's filings (perhaps note this in the contract or agreement of sale)
- New entity's ability to pay

See generally **State Department Cable: "Removal of New Petition Requirement for Certain H-1B Applicants" (Jan. 25, 2002) (providing guidance to consular officers regarding H-1B applicants affected by a transaction covered under the Visa Waiver Permanent Act.)**

See **"Taiwan Post Advises on Successor Documentation" letter from David J. Juras, [then] Acting Chief, Immigrant Visa Unit to Nancy-Jo Merrit, March 17, 2000. (This has been the approach many consulates take).**

See generally **"INS Discusses L-1 Issues When One Company is Buying Another," reported in 70 Interpreter Releases 355 (Mar. 22, 1993).**

See generally **"Evading the Slings and Arrows of Outrageous Fortune," by Angelo A. Paparelli, Daryl R. Buffenstein, and Robert E. Banta (Immigration Briefing) (discussing the immigration consequences of mergers, acquisitions, and other corporate changes).**