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ADVISORY ON EXPORT CONTROL ATTESTATION ON FORM I-129

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Any employer who files a Form I-129 petition to the U.S. Citizenship & Immigration Services (USCIS) on or after February 20, 2011 to classify a foreign national worker for an H-1B, H-1B1, L-1, or O-1 visa will be required to make an attestation about its compliance with U.S. export control laws.K This article provides a brief overview of the new USCIS attestation, why it is required, and provides suggestions on reviewing export compliance practices and seeking specialized legal counsel if necessary.K

Export Control Attestation on Form I-129

The I-129 now requires petitioners to certify that they have (1) reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR), and (2) have made a determination as to whether or not an export control license is required to release any controlled technology or technical data to the foreign national.K If an export license is required to be obtained before such release, the employer must attest that the worker will not be exposed to covered technologies without first obtaining an export license covering the foreign worker.K

Each employer must be sure to make an accurate representation on Form I-129 as the form is signed under penalty of perjury.K Here is the exact language from Part 6 of the Form I-129:

> *With respect to the technology or technical data the petitioner will release or otherwise provide access to the beneficiary, the petitioner certifies that it has reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms regulations (ITAR) and has determined that:*

> *?KKKKK A license is not required from either the U.S. Department of Commerce or the U.S. Department of State to release such technology or technical data to the foreign person; or*
>
> *?KKKKKK A license is required from the U.S. Department of Commerce and/or the U.S. Department of State to release such technology or technical data to the beneficiary and the petitioner will prevent access to the controlled technology or technical data to the beneficiary until and unless the petitioner has received the required license or other authorization to release it to the beneficiary.*

The petitioner must check one of the above boxes on the form.K Although Form I-129 refers to two sets of regulations, other export controls may be relevant in some circumstances.K

Technology and Technical Data

TTechnologyУ and Ttechnical dataУ that are controlled for release to foreign persons are identified on the EAR Commerce Control List (CCL) and the ITAR U.S. Munitions List (USML). KThe Department of Commerce Bureau of Industry and Security (BIS) administers the EAR. KThe Department of State Directorate of Defense Trade Controls (DDTC) administers the ITAR.

The EAR uses the term TtechnologyУ to refer to information for the development, production or use of Tdual-useУ products or software, meaning technology that could be used for both military and commercial purposes. TTechnologyУ that is required for the development, production or use of items on the EARXs CCL may be subject to export licensing and other restrictions, depending on the nature of the technology, the destination, the end-user and end-use.

An export of controlled technology or technical data can occur when it is disclosed to or transferred to a foreign person, whether in the United States or abroad. Specifically, section 734.2(b)(2)(ii) of the EAR (15 CFR ¤734.2(b)(2)(ii)) states that an export of technology to a foreign national in the United States is Tdeemed to be an export to the home country or countries of the foreign national.У KThis is commonly referred to as the Tdeemed exportУ rule.

While the ITAR does not use the phrase Tdeemed exports,У the ITAR contains a

similar concept. KSection 120.17(a)(3) of the ITAR (22 CFR ¤120.17(a)(3)) states that an export occurs when Ttechnical dataУ is disclosed (including oral or visual disclosure) or transferred to a foreign person in the United States. Therefore, if an export license is required to export EAR controlled technology or ITAR controlled technical data to a certain country, an export license or other authorization will be required to disclose or transfer such technology to a foreign national of that country who is located in the United States.

Reviewing the EAR and ITAR

Information about the EAR and how to apply for a deemed export license from the Bureau of Industry and Security (BIS) can be found at:

http://www.bis.doc.gov/.K

Information about EAR's requirements pertaining to the release of controlled technology to foreign persons is at:

www.bis.doc.gov/deemedexports.

An online copy of the EAR can be found at:

http://www.gpo.gov/bis/ear/ear_data.html.

The documents found there include the Commerce Country Chart (Part 738 Supplement 1), and The Commerce Control List itself (Part 774 P Categories 0 to 9 listing Nuclear Materials, Facilities & Equipment; Materials, Chemicals, Microorganisms, and Toxins; Materials Processing; Electronics; Computers; Telecommunications; Information Security; Sensors and Lasers; Navigation and Avionics; Marine; Propulsion Systems, Space Vehicles and Related Equipment).

Information about the technologies covered by the ITAR, and how to apply for an export license from Directorate of Defense Trade Controls (DDTC) can be found at:

http://www.pmdtc.state.gov/.

Information about the ITAR's requirements pertaining to the release of controlled technical data can be found at:

http://www.pmddtc.state.gov/faqs/license_foreignpersons.html.

In addition to the BIS and DDTC links above, the BIS web site has a series of six training modules called "Essentials of Export Controls" at:

http://www.bis.doc.gov/seminarsandtraining/essentials_of_export_ctrls.htm.K

The training modules can also be downloaded as a PDF at:

http://www.bis.doc.gov/seminarsandtraining/training-modules/essentials_of_export_controls_modules_1_6.pdf.

Some Broad Exemptions from Licensure Requirements

The EAR and the ITAR do not require employers obtain export licenses for TtechnologyУ or Ttechnical dataУ that are Tpublicly availableУ or in the Tpublic domain,У regardless of content. KBureau of Industry and Security officials have acknowledged this as a very important factor for employers to consider, because much of the technology and technical data that businesses and organizations work with is actually publicly available.

To be Tpublicly availableУ and/or Tpublic domain,У the relevant technology and/or technical data must not be encryption technology, and must meet one of the four criteria below:

> 1. The technology and/or technical data is already published, or will be published, in periodicals, books, print, electronic, or any other media available for general distribution to any member of the public or to a community of persons interested in the subject matter, such as those in a scientific or engineering discipline, either free or at a price that does not exceed the cost of reproduction and distribution;
>
> Or:
>
> The technology and/or technical data is readily available at libraries open to the public or at university libraries;
>
> Or:
>
> For computer software, the software technology and/or technical data is available for general distribution either for free or at a price that does not exceed the cost of reproduction and distribution, or it is available to the public by being:
>
> > (A) Sold from stock at retail selling points, without restriction, by means of:

(1) Over the counter transactions;

(2) Mail order transactions; or

(3) Telephone call transactions; and

(B) Designed for installation by the user without further substantial support by the supplier.

2. The relevant technology and/or technical data arises during, or results from original, fundamental research (e.g. in academic research, or certain private-industry research occupations).

The EAR defines original, fundamental research as, Tbasic and applied research in science and engineering, where the resulting information is ordinarily published and shared broadly within the scientific community. Such research can be distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary reasons or specific national security reasonsУ as defined in the EAR;

3. The relevant technology and/or technical data is educational in nature, and is released by instruction in catalog courses and associated teaching laboratories of academic institutions; or

4. The relevant technology and/or technical data is included in certain patent applications, which are described in greater detail in the EAR.

Please note that these provisions do *not* cover software or equipment that is used for encryption purposes. A foreign workerXs access to encryption technology and/or technical data, in both software and/or hardware form, may prompt an export license requirement.

Finally, the ITAR and EAR provide exemptions to an employerXs Tdeemed exportУ licensure requirements for:

- Permanent residents of the United States (i.*e.*,Tgreen cardУ holders)
- U.S. citizens who are Tdual citizensУ of another country (*e.g.*, U.S./U.K.)

- Certain categories of asylum seekers

K

Individuals who meet these standards need not be considered by employers in reviewing their export compliance.

Export License Requirements are Person- and Country-specific

CCL technologies are subject to controls only for exports to certain countries. Therefore, only citizens or nationals of those specific countries must be covered by an export license to access controlled technology or technologies. Each Export Control Classification Number (ECCN) provides the reasons for control (e.g., Anti-Terrorism (AT), Nuclear Nonproliferation (NP)) of a particular controlled technology.K The EAR includes a TCountry ChartУ that identifies the reasons for control specific to each listed country. The Country Chart is available at http://www.access.gpo.gov/bis/ear/pdf/738spir.pdf.

Applications for citizens or nationals of the ТТ-4У countries designated as state sponsors of terrorism (Cuba, Iran, Sudan, and Syria) are subjected to the highest level of review and such applications are routinely denied.K Applications for nationals of certain other countries of concern (including China, Russia, the former Soviet republics, and Israel) will receive the next highest level of review.

The relevant citizenship or permanent residency for BIS licensing purposes is that most recently acquired by the foreign national.K The DDTC, on the other hand, will consider all of a foreign nationalXs countries of citizenship or permanent residence and will use the country governed by the greatest number of restrictions.

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Information and Analysis Needed to Make an Accurate Attestation

We recommend that in cases where the technology or technical data may be subject to EAR or ITA, the employer:

1. Determine the country of citizenship of the foreign worker.K
2. Compile a list of all technology or technical data that the foreign worker

will use or be exposed to in the job such as chemicals, high speed computers, software source code, telecommunications equipment, etc.
3. Check these items against the EAR Commerce Control List, the ITAR U.S. Munitions List and the controlling regulations to determine whether a license is needed or not based on the classification of the technology or technical data, the nationality of the foreign worker, the end use of the technology or technical data, and any available exceptions to licensure.

As noted above, U.S. law prohibits the Texportу of controlled technology and technical data to certain foreign nationals located within the United States without a license to do so. U.S. law treats as an export the release of controlled technology or technical data to a foreign national working in the United States, even if the company does not engage in any other exporting activities.

Technology or source code is considered Treleasedу for export when it is made available to foreign nationals for visual inspection (such as reading technical specifications, plans, blueprints, etc.), when technology is exchanged orally, or when technology is made available by practice or application under the guidance of persons with knowledge of the technology. Such exports of controlled technology or technical data must be authorized through an export license issued by the appropriate government agency before release to the nonimmigrant foreign national.

Therefore, to properly complete the new I-129 form, an employer must first classify the technology or technical data that will be released to or be accessed by a prospective foreign national employee to determine whether an export license may be required to be obtained from BIS or DDTC before releasing such technology or technical data to the foreign national.

Expert Assistance

Export licensing determinations can be complex, and legal issues arising under export control rules are independent of the new attestation requirement on Form I-129 and have existed since World War II.K If an employer has already determined that it is subject to export control license requirements, it should seek the advice of legal counsel specializing in export controls for guidance on how to obtain the necessary licenses.

If an employer chooses not to seek expert assistance, the company should be aware that in addition to the penalties for making a false attestation on the

Form I-129, an employer can also face severe criminal penalties and fines for violating the EAR or ITAR.

Contact: Cyrus D. Mehta, Esq or Myriam Jaidi, Esq at Cyrus D. Mehta & Associates, PLLC, at 212-425-0555 or info@cyrusmehta.com

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