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# Nonimmigrant Visa Petitions and Compliance with Deemed Export Controls

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# Agenda

- The Nonimmigrant Visa Petition Process and the New Form I-129 Employer Certification Requirement
- Overview of Deemed Export Rules

## New Form I-129 Employer Certification Requirement

- Effective February 20, 2011, employers seeking U.S. work authorization for foreign national employees in three of the most commonly used nonimmigrant visa categories must provide a certification concerning compliance with U.S. export controls applicable to so-called “deemed exports” – i.e., releases of technology to foreign nationals in the United States.

## New Form I-129 Employer Certification Requirement

- The export control compliance certification will be required on the latest version of USCIS Form I-129 for employers submitting the following types of visa petitions:
  - H-1B and H-1B1 Chile/Singapore petitions for Professionals in a Specialty Occupation
  - L-1 petitions for Intracompany Transferees
  - O-1A petitions for Foreign Nationals of Extraordinary Ability in the Sciences, Education, Business or Athletics

**I-129, Petition for a  
Nonimmigrant Worker**

Department of Homeland Security  
U.S. Citizenship and Immigration Services

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**Part 6. Certification Regarding the Release of Controlled Technology or Technical Data to Foreign  
Persons in the United States**

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(For H-1B, H-1B1 Chile/Singapore, L-1, and O-1A petitions only. This section of the form is not required for all other classifications. See Page 3 of the Instructions before completing this section.)

**Check Box 1 or Box 2 as appropriate:**

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:

1. A license is not required from either U.S. Department of Commerce or the U.S. Department of State to release such technology or technical data to the foreign person; or
2. 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 by the beneficiary until and unless the petitioner has received the required license or other authorization to release it to the beneficiary.



Form I-129 (Rev. 01/19/11)Y

# New Form I-129 Employer Certification Requirement

- Exempt from the requirement are petitions filed for employees in the following nonimmigrant visa categories: TN (NAFTA Professional), E-1/E-2 (Treaty Trader/Treaty Investor), E-3 (Australian Specialty Occupation Worker), (H-2B Temporary Worker), H-3 (Trainee), P (Artist, Entertainer, Athlete), and R-1 (Religious Worker).
- In the absence of guidance from USCIS, Employers filing petitions on behalf of foreign workers in these categories should leave Section 6 blank.
- State Department and US Customs and Border Protection have not indicated whether the new deemed certification will be applied to applicants for visas or admission to the United States under an approved Blanket L-1 petition. Form I-129S, the form used for such applications, has not been amended to incorporate the new certification requirement.

# New Form I-129 Employer Certification Requirement

- Has this new certification been prompted by a change in the export control laws?
  - No, controls on the release of controlled technology and data have been in place for many years and employers of nonimmigrant workers in the United States who are exposed to such technology have been required for some time to obtain export licenses, where appropriate.
  - While no explanation for the timing of this requirement was provided in the proposed rule, it likely is a result of heightened concerns relating to national security.
  - The certification does not change the substantive export control compliance requirements applying to deemed exports to foreign nationals
    - Rather, it frontloads the compliance obligations and involves HR
- What are the deemed export rules and to whom do they apply?

# U.S. Export Controls

- Export Administration Regulations (**EAR**) regulate export and reexport of “dual-use” items administered by the U.S. Commerce Department’s Bureau of Industry and Security (BIS).
  - In general, goods, software, and technology that may have both civilian and military applications but have not been specifically designed or modified for military applications
- International Traffic in Arms Regulations (**ITAR**) regulate export and reexport of “defense articles” and “defense services” administered by the U.S. State Department’s Directorate of Defense Trade Controls (DDTC).
  - In general, goods, software, technical data, and related services designated on the U.S. Munitions List or otherwise specifically designed or modified for military applications
- An item is subject to either the EAR or the ITAR but not both



## What Constitutes an “Export”?

- Physical and electronic transfers outside the United States
- Technology/technical data transfers to foreign nationals *in the United States* – “Deemed Exports”
- *Note: No sale is required for an “export” to occur*



## What is a “Deemed” Export?

- Release of technology or source code (EAR) or technical data (ITAR) to a foreign national in the United States is *deemed* to be an export to the foreign national’s home country.
- Foreign national in the United States may be:
  - Visiting customer, partner, or affiliate; or
  - Employee of U.S. company



## Who Is a “Foreign National”?

- *Not* U.S. citizen
- *Not* Permanent Resident (“Green Card” holder)
- *Not* “Protected Individual” (including a refugee or asylee), as defined under 8 U.S.C. 1324b(a)(3)



## EAR: What Is Technology?

- Specific information necessary for the “development,” “production” or “use” of a product that may take the form of technical data or technical assistance:
  - “Development” and “production” are broadly defined and include any stage prior to serial production and any production stage.
  - “Use” is more narrowly defined as technology for the (i) operation, (ii) installation (including on-site installation), (iii) maintenance (checking), (iv) repair, (v) overhaul and (vi) refurbishing (all 6 elements must be met for the technology to be considered “use” technology).



## What Is *Not* Technology Subject to the EAR?

- Publicly available technology
  - Generally accessible/available to the interested public
  - Published in periodicals, books, print, electronic, and other media forms
  - Readily available at libraries (public or university)
  - Release at open conferences, meetings, trade shows, and other gatherings
- Patent information available at any patent office
- Fundamental research
  - Resulting information is ordinarily published and shared broadly in the scientific community
- Educational information
  - Released by instruction in catalog courses and associated teaching laboratories of academic institutions

# When Is a Deemed Export License Required under the EAR?

- In most instances, a license is required for the deemed export of technology (or source code) subject to the EAR if the technology requires a license to the home country of the foreign national in question.
  - Export Control Classification (i.e., whether controlled on the Commerce Control List or EAR99)
  - Foreign national's home country (under current BIS policy, a foreign national's most recently established citizenship or permanent residency)
- License Exceptions



## ITAR: What Is Technical Data?

- Information required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles, including information in the form of blue prints, drawings, photographs, plans, instructions or documentation.
  - No concept of “development,” “production,” or “use”; information related to a defense article is generally ITAR-controlled technical data
  - Narrow exclusions: certain basic marketing and “public domain” information

## When Is a Deemed Export License Required under the ITAR?

- Technical data subject to the ITAR generally requires a license for release to any foreign national
- For licensing purposes, “home country” is broadly interpreted by DDTC (including all citizenships and/or all countries of permanent residence)
- *Note: Mere potential unrestricted access to ITAR-controlled technical data by a foreign national is considered, as a matter of DDTC’s practice, to be a deemed export (even if the technical data is not actually accessed)*



## Summary: Is a Deemed Export License Required?

- ITAR or EAR?
- If ITAR, a DDTC license required
- If EAR, a BIS license may be required, depending on:
  - Classification of technology (or source code)
  - Home country of the foreign national
  - Availability of a License Exception

# Enforcement and Penalties for Deemed Export Control Violations

- Increased enforcement of deemed export control rules in recent years; multiple administrative and criminal enforcement cases involving transfers of technology to foreign nationals in the United States
- Penalties for violations can be severe, including:
  - EAR:
    - Civil penalties of up to the greater of \$250,000 or twice the amount of the transaction per violation;
    - Criminal penalties of up to \$1,000,000 per violation and/or, if a natural person, imprisonment for up to 20 years; and/or
    - Denial of export privileges
  - ITAR:
    - Civil penalties of up to \$500,000 per violation ;
    - Criminal penalty of up to \$1,000,000 per violation and/or, if a natural person, imprisonment for up to 10 years; and/or
    - Debarment



## Penalties under the Immigration Regulations

- Certification made under penalty of perjury that the petition is true and correct to the best of the employer's knowledge
  - Penalty: fines and imprisonment up to five years
- Certain violations of the H1-B regulations may result in:
  - civil and criminal penalties (up to \$35,000)
  - payment of back wages to aggrieved workers
  - bar the employer from filing immigrant (green card) or non-immigrant petitions for up to three years
- Knowing submission of false statements to the federal government: Criminal sanctions of \$10,000 and imprisonment up to 5 years

# Paul McNulty's Essential Ingredients of Corporate Compliance

**Leadership**

**Risk Assessment**

**Standards and Controls**

**Training and Communication**

**Monitoring, Auditing and Response**

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# TCP and I-129 Certification

- I-129 Certification:
  - No license under either the EAR or the ITAR is required; or
  - License is required and “the petitioner will prevent access to the controlled technology or technical data by the beneficiary” until and unless a deemed export license is required
- Function of a TCP is two-fold:
  - Ensures no unauthorized access to/release of controlled technology/technical data
  - Required as part of foreign national employee license application
- A TCP typically includes the following elements:
  - Physical security procedures
  - Information security procedures
  - Personnel screening
  - Non-disclosure agreements
  - Training



# Thank you.

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