

New Certification Requirement on Form I-129 Regarding Employer Compliance with Export Control Laws

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Practices: Immigration

Export control laws are federal regulations that govern what commodities can be exported overseas and what technology and technology data can be transmitted overseas and to foreign nationals on U.S. soil. Export control laws have been around for many years. However, in recent years, the federal government is using all the tools it has available to implement its export control laws, including holding U.S. corporations accountable for compliance with export control regulations and the release of controlled technology to foreign nationals.

CERTIFICATION PERTAINING TO THE RELEASE OF CONTROLLED TECHNOLOGY OR TECHNICAL DATA TO FOREIGN PERSONS IN THE UNITED STATES

For the first time, the U.S. Citizenship and Immigration Services (USCIS) will require employers filing H-1B, L-1, and O-1 petitions to certify that the employer: 1. has reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR), and 2. has made a determination as to whether or not an export control license is required to release any controlled technology or technical data to the sponsored foreign national. 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. Effective February 20, 2011, employers filing H-1B, L-1 or O-1 petitions must review the applicable regulations before signing the Form I-129, Petition for Nonimmigrant Worker (Form I-129), to ensure that they are in compliance with the regulations.

U.S. EXPORT CONTROLS ON RELEASE OF CONTROLLED TECHNOLOGY OR TECHNICAL DATA TO FOREIGN PERSONS

The Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) require companies and individuals to seek and receive authorization from the U.S. Government before releasing controlled technology or technical data to foreign nationals in the United States. Under both the EAR and the ITAR, release of controlled technology or technical data to foreign nationals anywhere in the world, including foreign nationals located in the United States, even by an employer, is deemed to be an export to that country or countries of nationality. One implication of this rule is that a U.S. company may be required to seek and receive a license from the U.S. Government before it releases controlled technology or technical data to its employees with foreign nationality, including its nonimmigrant workers employed as H-1B, L-1 or O-1 beneficiaries subject to this new USCIS certification requirement.

REQUIREMENT TO CERTIFY COMPLIANCE WITH U.S. EXPORT CONTROL REGULATIONS

The USCIS requires every employer to certify that it has reviewed the EAR and ITAR and determined whether it will require a U.S. Government export license to release controlled technology or technical data to the beneficiary. The EAR can be found at http://www.gpo.gov/bis/ear/ear_data.html, and the ITAR can be found at http://www.pmddtc.state.gov/regulations_laws/itar_official.html. If an export license is required, then the company or other entity must further certify that it will not release or otherwise provide access to controlled technology or technical data to the beneficiary until it has received from the U.S. Government the required authorization to do so. The specific language of the USCIS' Form I-129 states as follows:

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 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
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.

The petitioner must check one of the above boxes on Page 5, Part 6 of the Form I-129. An employer submitting the Form I-129 to the USCIS should make reasonable efforts to review the EAR and ITAR sufficient to permit the employer to make the proper certification. By signing the Form I-129, the employer certifies under penalty of perjury that the information provided on the form is true and correct. Consequently, any inaccuracy on the form can be deemed a misrepresentation which would be a violation of federal law and could ultimately result in the denial of the petition or revocation of the petition if the misrepresentation is discovered after the petition has already been approved.

CONTROLLED TECHNOLOGY AND TECHNICAL DATA

The licensing requirements described above will affect only a small percentage of petitioners because most types of technology are not controlled for export or release to foreign nationals. Also, even if certain types of technology are controlled, export or release of technology to particular nationalities may not require a license, or a license exception may apply so that it is not necessary to apply for a license. U.S. companies which are a subsidiary of foreign companies or have foreign subsidiaries or affiliates should particularly be aware that even if technology or technology data is received and/or derived from their parent companies, subsidiaries or affiliates overseas, once such technology or technology data are in the U.S., such technology or technology data will become subject to EAR or ITAR.

The technology and technical data that are controlled for release to foreign nationals are identified on the EAR's Commerce Control List (CCL) and the ITAR's U.S. Munitions List (USML). Visit http://www.access.gpo.gov/bis/ear/ear_data.html#ccl or http://www.pmddtc.state.gov/regulations_laws/itar.html for more information. The EAR-controlled technology on the CCL pertains to information which is for the

production, development, or use of what are generally known as “dual-use” items. The ITAR-controlled technical data on the USML pertains to information which is directly related to defense articles.

The U.S. Department of Commerce’s Bureau of Industry and Security (BIS) administers the CCL and is responsible for issuing licenses for the release to foreign persons of technology controlled under the EAR. The U.S. Department of State’s Directorate of defense Trade Controls (DDTC) administers the USML and is responsible for issuing licenses for the release to foreign persons on technical data controlled under the ITAR. Information about the EAR and how to apply for a license from BIS can be found at www.bis.doc.gov. Specific information about EAR’s requirements pertaining to the release of controlled technology to foreign persons is located at www.bis.doc.gov/deemedexports. All manufacturers, exporters, and brokers of defense articles, defense services or related technical data as defined on the USML are required to register with DDTC before applying for a license from DDTC. Information about the ITAR and how to apply for a license from DDTC can be found at www.pmdtc.gov. Specific information about the ITAR’s requirements pertaining to the release of controlled technical data is located at http://www.pmdtc.state.gov/faqs/license_foreignpersons.html.

If your company is not sure which agency administers your company’s technology or technical data, by submitting a commodity jurisdiction (“CJ”) request to DDTC, DDTC will determine whether your technology is subject to the export licensing authority of BIS or DDTC. In addition, BIS assists companies classifying technology and technical data against the CCL.

EMPLOYER RECOMMENDATIONS

The review and interpretation of the U.S. Export Control Regulations are extremely lengthy, complex and confusing. Employers are advised to contact legal counsel or an experienced consultant familiar with these regulations for help and guidance.

If employers do not already have export compliance programs in place at the company, they should develop written policies relating to the identification, maintenance and protection of controlled technology and technical data in their possession. Furthermore, employers should develop an export control compliance policy which permits efficient and accurate certifications for future nonimmigrant petitions submitted to the USCIS. Masuda Funai has attorneys who are experienced in this area and can work with employers to establish export compliance programs to ensure compliance with federal export control regulations.