



UPDATE Immigration

DECEMBER 2010

New USCIS Form in Town - Preparing for the Deemed Export Attestation on H-1B, H-1B1, L-1 and O-1 Petitions

Starting December 23, 2010, a new U.S. Citizenship and Immigration Services (USCIS) form will require employers sponsoring foreign national employees to certify one of the following: (1) that an export license is not required from the Department of Commerce or the Department of State for the work to be performed by the foreign national or (2) that a license is required but the employer will restrict the foreign national's access to the protected technology. The exact questions from the form are included below.

The requirement is based on the concern that foreign nationals who are in the U.S. in nonimmigrant status may have access to certain technologies that have been protected by the U.S. government from disclosure to nationals of certain countries. The government considers any kind of access by certain foreign nationals to such protected technology as a "deemed export," including when the foreign national either directly works on a technology that is protected or merely has any type of access to it. Employers should be careful to comply to avoid significant fines for export control violations, and special care may be necessary to ensure coordination between those who coordinate export control and those who coordinate immigration issues. Employers may want to consider taking some or all of the following steps, given the December 23 implementation date:

1. Identify the person best suited to make the determination regarding the export control licensing requirement at your company. Typically, this person is situated in the compliance department at large companies.
2. Provide this export control compliance professional with access to the specific USCIS questions and instructions, which are included below.
3. Develop a form and/or system of certification that will be followed at the initiation of each H-1B, H-1B1, L-1 and O-1 case. For instance, when completing questionnaires to initiate a new case, forward the information, along with the questions and instructions below, to the export control compliance professional to review. You may want to provide a specific tailored form for this process that contains the information the export control compliance professional will need to review in order to check one of the boxes below and to make the

certification for your file.

4. Require a written response from the export control compliance professional regarding the determination for the file, so that the immigration compliance professional will have the necessary information.

USCIS QUESTIONS AND INSTRUCTIONS

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:

Box 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

Box 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.

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

U.S. Export Controls on Release of Controlled Technology or Technical Data to Foreign Persons. The Export Administration Regulations (EAR) (15 CFR Parts 770-774) and the International Traffic in Arms Regulations (ITAR) (22 CFR Parts 120-130) require U.S. persons to seek and receive authorization from the U.S. Government before releasing to foreign persons in the United States controlled technology or technical data. Under both the EAR and the ITAR, release of controlled technology or technical data to foreign persons in the United States—even by an employer—is deemed to be an export to that person's country or countries of nationality. One implication of this rule is that a U.S. company must seek and receive a license from the U.S. Government before it releases controlled technology or technical data to its nonimmigrant workers employed as H-1B, L-1 or O-1A beneficiaries.

Requirement to Certify Compliance with U.S. Export Control Regulations. The U.S. Government requires each company or other entity 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. 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 petitioner must indicate whether or not a license is required on Page 6, Part 7 of Form I-

129.

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 persons. The technology and technical data that are, however, controlled for release to foreign persons are identified on the EAR's Commerce Control List (CCL) and the ITAR's U.S. Munitions List (USML). The CCL is found at 15 CFF Part 774, Supp. 1. See http://www.access.gpo.gov/bis/ear/ear_data.html#ccl. The USML is at 22 CFR 121.1. See http://www.pmddtc.state.gov/regulations_laws/itar.html. The EAR-controlled technology on the CCL generally pertains to that 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 generally pertains to that which is directly related to defense articles.

The U.S. Department of Commerce's Bureau of Industry and Security 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 of technical data controlled under the ITAR. Information about the EAR and how to apply for a license from BIS are at www.bis.doc.gov. Specific information about EAR's requirements pertaining to the release of controlled technology to foreign persons is at www.bis.doc.gov/deemedexports. Information about the ITAR and how to apply for a license from DDTC are at www.pmddtc.state.gov. Specific information about the ITAR's requirements pertaining to the release of controlled technical data is at http://www.pmddtc.state.gov/faqs/license_foreignpersons.html.

CONTACT US

If you have any questions on how to fulfill the new requirements, or need compliance assistance to determine whether a license is required, contact one of the members of our Immigration Group below. Robinson & Cole's Immigration Group has experienced attorneys who have assisted clients with a myriad of immigration issues.

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