

Of Export Controls And Foreign Workers

Law360, New York (March 4, 2011) -- As of Feb. 20, 2011, employers seeking to sponsor foreign nationals for employment are required to certify compliance with applicable export control regulations in connection with the contemplated employment. The U.S. Department of Homeland Security, Citizenship and Immigration Services (USCIS) has issued a revised application form (Form I-129, Petition for a Nonimmigrant Worker) that includes new attestations relating to export license requirements.

Employers petitioning for workers in H-1B (specialty occupation professionals), H-1B1 (free-trade specialty occupation professionals from Singapore or Chile), L-1 (intracompany transferees) and O-1A (aliens of extraordinary ability) status must comply with the new requirements.

The petitioning employer will need to assess whether the foreign national will have access to technology or technical data controlled under the Export Administration Regulations (EAR) or the International Traffic in Arms Regulations (ITAR) and certify that 1) an export license is not required for the release of petitioner's technology to the beneficiary; or 2) if an export license is required, that the beneficiary will not have access to such technology until the petitioner obtains the required license from the U.S. Department of Commerce and/or the U.S. Department of State.

Part 6 of the new Form I-129 reads as follows:

"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 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."

Deemed Exports and License Requirements

Pursuant to U.S. export laws administered by Commerce and the State Department's Directorate of Defense Trade Controls, the transfer of technology to foreign nationals under certain circumstances (including transfers wholly within the U.S.) may be considered an "export" even if the technology never leaves the U.S. or is transferred via electronic means.

In these "deemed export" cases, if an export license would be required to transfer the technology or technical data to an end user in the country of nationality of the foreign person, an export license is required for a deemed export to that foreign national.

Technology is considered "released" for export when it is 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.

In order for an employer to certify that an export license is not required to release technology or technical data to the foreign national, the employer must have previously reviewed the Commerce Control List and the U.S. Munitions List, or have appropriately concluded by an export review that its technology or technical data does not appear on either list.

Also, employers must classify not only their own proprietary technology and technical data, but also that of third parties, such as customers or vendors, which the foreign employee has access to in the course of job performance. This may require obtaining export information from such third parties or, if not available, obtaining further classification guidance or rulings from Commerce Department or the U.S. Department of Defense.

Enforcement Issues

The USCIS has not yet issued any guidance as to how it will verify employers' new attestations. Pursuant to new "data-mining" procedures involving the USCIS, we can expect that information will be shared with the Bureau of Industry and Security and the Office of Export Enforcement for verification.

The USCIS may intend to verify these representations itself during on-site audits. In late 2010, the Obama administration announced the creation of an “Export Enforcement Coordination Center” within the U.S. Department of Homeland Security. The purpose is to combine enforcement resources from executive departments and other federal agencies to enhance information-sharing about suspected violators of U.S. immigration-related laws, and to coordinate efforts to investigate and penalize known violators.

The new certification will constitute a statement to the U.S. government affirming review of and compliance with the deemed export rule under penalty of perjury. False or incorrect statements could also create a basis for the U.S. government to impose civil or and/or criminal penalties for export violations if the employer fails to comply with the deemed export rule and licensing requirements.

Recommendations for Employers

Often, human resources and export compliance/intellectual property functions are located in different departments within an organization. Employers dealing in sensitive technical data will need to integrate certain export compliance and human resources functions, particularly relating to the employment of foreign nationals. Employers should do the following in order to ensure compliance with this new requirement:

1. Set up a mechanism for identifying those positions that involve access to technology and/or technical data that is controlled for export purposes.
2. Incorporate appropriate language in offer letters making the offer contingent upon the ability to obtain any required export licenses.
3. Set up internal training and education on the deemed export requirements for all personnel involved with immigration matters.

Conclusion

Although many employers are not generally concerned with U.S. export law compliance, all employers sponsoring foreign nationals must now review the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) prior to executing a petition in support of a foreign national employee. Failure to do so can have serious ramifications for employers.

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