Do You Hire H-1B Skilled Workers?

Understanding the Export Control Rules That Apply

By Beth Moskow-Schnoll and Tejal Mehta

The burden on employers that sponsor skilled, nonimmigrant foreign workers, including universities and colleges, grew substantially on February 20, 2011. That was the effective date for revisions to Form I-129—used to petition the U.S. Citizenship and Immigration Services (USCIS) on behalf of H-1B, H-1BI Chile Singapore, L-1, and O-1A workers.

What Does the New Version of the Form I-129 Require?

The form now includes a new Part 6, *Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States*. This new Part 6 requires employers filing for workers in the specified nonimmigrant categories to certify, under penalty of perjury, that they have reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR).

It also requires the employer to determine whether a license is required from either the U.S. Department of Commerce or the U.S. Department of State to release technology or technical data to the foreign worker. If a license is required, the petitioner must prevent access to the controlled technology or technical data until the employee has received the required license or other authorization.

As a legal matter, little has changed, as employers of nonimmigrant workers have long been subject to export control laws. But as a practical matter, these revisions force employers - colleges and universities, in particular - to address export compliance much earlier in the hiring process and will require increased cooperation between institutional officials across departments.

What's behind the new requirement?

When most people think of "exports," they think of tangible shipments of goods, such as computer hardware or semiconductor chips, from the United States to another country. But the EAR and ITAR treat the release of controlled technology and technical data to a foreign worker *in the United States* as an export to that worker's country of nationality. This is known as the "deemed export rule." The rationale behind the rule is that a foreign national who is given technology or information can share it when he or she returns home. Therefore, employers must obtain export control licenses *before* controlled technology and technical data are released to foreign nationals in the United States.

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Although the deemed export rule is not new, this is the first time that USCIS has asked employers to certify compliance. In order to be able to sign the certification truthfully, employers need to determine what technology or technical data the foreign worker may be exposed to and whether a license is needed for release of that technology or technical data. The good news is that relatively small numbers of exports require licenses.

Nonetheless, all employers charged with filing visa applications – including college and university officials - need a general understanding of the EAR and ITAR, especially with respect to deemed exports. If a university research project involves controlled technologies, the university may be required to obtain an export license before foreign researchers or students –even if located on a U.S. university campus – may participate in research involving equipment, chemicals or technologies subject to EAR or ITAR.

Export Controls: The Basics

The current export control regime is rooted in three regulatory frameworks: the EAR,

ITAR, and the regulations of the Office of Foreign Assets Control ("OFAC"). The EAR covers items, equipment, materials and other technologies with both commercial and military applications. These "dual-use" technologies include chemicals, satellites, software, and computers. The particular technologies and technical data that are subject to the EAR are addressed in the Commerce Control List (CCL).

The ITAR controls defense-related articles, services and data, and controlled technologies of an inherently military nature. The technical data covered by the ITAR is enumerated in the U.S. Munitions List (USML).

Finally, OFAC enforces economic and trade sanctions against foreign countries, terrorists, international narcotics traffickers, and those engaged in the proliferation of weapons of mass destruction. Not surprisingly, the countries that are the most heavily sanctioned include Cuba, Iran, North Korea, and Sudan.

How Do Employers Know if an Export License is Needed?

Employers need to review the USML and the CCL in order to classify the technology and technical data that will be accessible to the foreign national, or appropriately conclude that the technology or technical data does not appear on either list. This may require obtaining export classification information from third parties or even obtaining export classification guidance or rulings from the government.

If the data or information to be released is subject to the EAR and/or ITAR and no license exception or exclusion exists, the employer also must determine whether the foreign national's citizenship requires that a license be obtained for such an export. Using the Commerce Country Chart contained in the EAR, one can determine whether a license is required to export technology or technical data to a foreign national from specific delineated countries.

The good news is that broad exemptions from the export regulations exist. Most importantly for employers in academia, no license is required for fundamental research. Fundamental research is "basic and applied research in science and engineering, the results of which are published or shared broadly within the scientific community." University research will not be deemed to qualify as **fundamental research** if:

1) the university accepts any restrictions on the publication of the information resulting from the research, other than limited prepublication reviews by research sponsors to prevent inadvertent divulging of proprietary information provided to the researcher by the sponsor or to insure that the publication will not compromise patent rights of the sponsor; or

2) the research is federally funded and specific access and dissemination controls regarding the resulting information have been accepted by the university or the researcher.

The EAR also does not control information in the public domain. No license is required to export or transfer information and research results that are generally available to the interested public through, among other channels, libraries, bookstores, newsstands, websites accessible to the public, ortrade shows, meetings, and seminars in the United States that are open to the public.

As long as the information to be released to the foreign national meets one of these exemptions – and it often will in the higher education context – it will not be subject to the export regulations, and no license will be required.

Penalties for False Certification

The new Certification is considered a statement to the U.S. government made under penalty of perjury. If the government determines that a statement on a Form I-129 is false, it could expose the company to civil fines ranging from $250,000 to $500,000 for failure to comply with deemed export licensing requirements. A false statement to the government also may subject an employer to criminal penalties of up to $1 million and 20 years imprisonment. Therefore, compliance should be a top priority.

Next Steps: Update or Create an Export Compliance Process

As a result of the new certification requirement, employers need to address deficiencies in their export compliance programs and/or implement new institutional practices in departments throughout their campuses.

Colleges and universities would benefit from implementing the following best practices:

Open avenues of communication between the various offices involved in the visa and/or export control process, including Human Resources, International Visa Processing, Export Control, and Legal Counsel.
Enhance the job description section of internal forms used to initiate the H-1B, H1-B1 Chile/Singapore, L-1, and/or O-1A visa process.

Create a questionnaire to facilitate and document the review and certification process. Include questions that will elicit a description of the full range of expected activities for the employee in question.

Implement a process that will allow the institution to track changes in a beneficiary's job duties.

Consider revising offer letters to make the offer contingent upon the ability to obtain any required deemed export licenses.

Provide internal training and education on deemed export requirements for all personnel involved with visa applications and those who will supervise foreign nationals.

Colleges and universities are now under increased pressure to review their export compliance procedures and guarantee their effectiveness. While the majority of I-129 petitions will not involve controlled technology or data, it is mandatory for all employers submitting I-129 petitions to complete Part 6. The penalties for noncompliance could be significant. All personnel involved in the hiring of foreign nationals on college and university campuses should harmonize their efforts and establish procedures that result in the information necessary to complete the I-129 form. While this will initially appear to be a daunting task, the establishment of standard operating procedures and communication channels should simplify the process over time.

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