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Licensing Requirement Looms Over Foreign Worker Hires

Employers may need to limit access to export-controlled technology

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Effective in February, the United States Citizenship and Immigration Service ("USCIS") began to require every employer filing visa petitions for temporary workers in certain categories to certify that the employer has reviewed export control laws and will obtain any technology export licenses required before giving those workers access. This rule applies to probably the most widely used form of temporary worker visa, the H-1B, as well as to L-1 and O-1 visas. It also applies regardless of the industry in which the employer operates or the type of work the employee does.

While it may come as a surprise to employers who have not had the license requirement called to their attention so bluntly before, the underlying rule is not new. This "deemed export" rule has long provided that when technology is released to a foreign national *within* the United States, the release constitutes an "export" for purposes of the Export Administration Regulations (EAR) administered by the U.S. Department of Commerce. A similar provision governs releases to foreign persons under the International Traffic in Arms Regulations (ITAR) administered by the Department of State. Hence, even a temporary foreign worker whose visa was obtained before the new USCIS certification requirement came into effect could not (and still cannot) be exposed to export-controlled technology in the course of his or her job unless the employer first obtains an export license.

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Potential Criminal Penalties

What is new is the use of Form I-129, the visa petition for a temporary worker, as a compliance mechanism for the "deemed export" regulation. The new certification question on the form does more than just bring the prohibition on unlicensed release of technology to the attention of employers who might not have known of it, or add to the paperwork burden associated with the petition. As many readers will be aware, such petitions are submitted under penalty of false statement. This means that enforcement agencies can pursue potential criminal penalties against violators on the basis of the immigration submission and not just for the export violation itself.

Moreover, the question on Form I-129 does not ask an employer merely to describe present facts, but to undertake a promise of future action. That is, if it appears the visa beneficiary will have access to export-controlled technology, the employer must promise not to release it to him or her until the employer acquires the appropriate license or authorization. Again, this is not necessarily a greater substantive obligation than the law previously imposed, but the express representation that the employer will meet that obligation appears to create an additional avenue for enforcement by interested agencies.

Ironically, the risks and burdens of compliance with the new certification requirement may fall more heavily on employers who do *not* use export-controlled technology in their businesses than on those who do. Presumably, most employers in industries where such technologies are relatively common are familiar with the EAR and ITAR, and have already adopted best practices for identifying export-controlled technology and screening foreign nationals from it until proper licenses are in place.


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There should be little marginal burden in expanding their existing compliance effort to ensure that they can provide the requested new USCIS certification accurately. The same may not be true for employers who have only just had the deemed export prohibitions brought to their attention or who have a less than thorough familiarity with the EAR and ITAR – especially if they do not "export" goods in the traditional sense. For this latter group, the new certification procedure in visa petitions may well represent the first time they have taken the opportunity to review their technology and determine if it is subject to export control.

Technology Review Needed

Such a review will be necessary before almost any employer can make the required certification, however, because the range of technologies that are export-controlled is vast, not easily summarized, and not always obvious. Even outside of industries such as arms manufacturing or nuclear energy, in which one would expect there to be controls, there are many "dual-use" technologies that have peaceful or strategically unre-

markable uses but are still subject to export regulations because of their more sinister potential in other applications. Common but by no means exhaustive examples include certain radiological, telecommunications and navigation equipment, as well as some computer security technologies, industrial chemicals and medical goods and techniques that have applications in the development of or defense against biological weapons.

The range of job functions that can carry "deemed export" access to such technologies is similarly wide and sometimes unexpected. The engineer helping to develop a new refining process for a militarily important chemical or a manufacturing technique for a material with aerospace applications is an obvious candidate, but what about the medical resident who conducts infectious disease research in addition to her patient care duties, or the IT worker who has incidental access to all of the data stored on his employer's computing network, including sensitive blueprints? Just as controlled technologies may turn up in unexpected industries, exposure to those technologies may lurk in job functions seemingly distant from the technologies in question.

As this year's H-1B visa season gets under way, then, compliance with the new certification requirement will clearly require many employers using temporary foreign workers to take a closer look than they have before at their potential exposure under "deemed export" regulations. Caution and careful review – especially for those new to export control regulations – will be called for in every H-1B, L-1 and O-1 petition. ■