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New Visa Petition Attestation by Employers: U.S. Export Controls

December 2, 2010

On November 23, 2010 USCIS released a new version of Form I-129, Petition for a Nonimmigrant Worker. It includes a new attestation requirement for employers regarding export control licensing. Employers wishing to sponsor nonimmigrant workers in H-1B, L-1 and O-1A status will be required to certify that they have reviewed the designated regulations and determined whether they will require a license to release controlled technology or technical data to the beneficiary. Although the new form went into effect on November 23rd, employers are not required to begin using it for 30 days, or beginning December 22nd at the latest.

To be clear, the license requirement itself is not new. Under the Export Administrative Regulations (EAR) and the International Traffic in Arms Regulations (ITAR), employers already are required to seek U.S. Government authorization before exporting controlled technology or technical data to foreign nationals. When the foreign national recipient is present in the United States, the release of the controlled technology or technical data is simply “deemed” an export. What is new is requiring employers to certify, at the time they file a petition for nonimmigrant worker, that they will be in compliance with the EAR and ITAR.

This new requirement has found its way onto the new Form I-129 because of a 2002 U.S. General Accounting Office (GAO) study. The GAO conducted the study because there was a concern that the Department of Commerce’s export control system was vulnerable and that certain foreign countries could greatly improve their militaries through access to U.S. civilian technology. The study found two weaknesses with the system. First, that while foreign nationals who entered the U.S. from abroad were appropriately screened for export licensing by the Department of State, foreign nationals who applied for a change of status in the U.S. were not. Second, that there was no effective monitoring system to confirm whether employers were complying with the conditions of the deemed export licenses. The study recommended the use of USCIS (then INS) data to identify those who would require deemed export licensing and were falling through the cracks.

The practical impact going forward is that employers will have to review both the EAR and ITAR to determine whether what they create, develop, sell, or use is controlled and, if so, whether the foreign national they hired to work with this controlled technology is a national of a country which requires a license to gain access. There are two kinds of technology that are subject to export control. These are dual-use items, items that have both commercial and military application, and items which are related directly to defense. Dual-use items are identified on the EAR's Commerce Control List, while the defense items are identified on ITAR's U.S. For Munitions List. However, even if an item is subject to export control, an employer will only be required to obtain a license to release that item if the foreign national is from a country that the regulations designate as subject to the license requirement.

Therefore, as export controls are demanded of a relatively small business segment, there will be few employers who will, in fact, need to obtain a license. It should be noted that the licensing burden seems to fall particularly hard on the software industry for Chinese and Indian nationals. All employers wishing to hire nonimmigrant workers in H-1B, L-1 or O-1A status will have to review the regulations at the time they make the petition.

The Immigration Group at Proskauer looks forward to working with our clients on this new attestation. We offer to new and existing clients the capability to review your export control compliance program, and to assist you in obtaining licenses as needed. Please contact an attorney in the Proskauer Immigration Group if you have any questions.