

## Understanding the New Export Control Compliance Section of Form I-129: Release of Controlled Technology or Technical Data to Foreign Persons in the United States

December 8, 2010

On November 23, the U.S. Citizenship and Immigration Services (USCIS) published a revised version of Form I-129, Petition for Nonimmigrant Worker, that includes a new Part 6, *Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States*. This new section requires petitioners that seek to employ certain nonimmigrant workers to review the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) and make a certification as to whether the foreign worker will have access in the workplace to technology and technical data (including source code and other software) for which an export license is required and, if applicable, to confirm that the petitioner will prevent such access until an export license or other authorization is obtained.

The new form is effective now, but petitioners may continue using the former version of the form (which does not include any reference to export license requirements) until December 23 of this year. The new form requires petitioners to take additional steps to ensure that export compliance is properly evaluated and that their certifications are accurate.

Those responsible for completing Form I-129 should take immediate steps to consult with an in-house expert or outside export control counsel to determine if an export license is needed, and to implement appropriate technology safeguards.

The new Form I-129 and its accompanying instructions may be accessed on the USCIS website using this link:

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=f56e4154d7b3d010VgnVCM10000048f3d6a1RCRD>.

### Frequently Asked Questions

#### ***What does this new form require me to do?***

Part 6 of the new Form I-129 requires petitioners to certify that (1) they have reviewed both the EAR and the ITAR and (2) they have determined either that an export license is not required for the beneficiary of the petition to have access to the petitioner's technology or technical data, or that such a license is required. In the latter case, petitioners must state that they will prevent the petition beneficiary from having access to the controlled technology or technical data until an export license or other appropriate authorization is obtained.

Part 6 of the new Form I-129 is reproduced here:

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**Part 6. Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States**

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(For H-1B, H-1B1 Chile/Singapore, L-1, and O-1A petitions only. This section of the form is not required for all other classifications. See Page 3 of the Instructions before completing this section.)

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 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.

***What are the EAR and the ITAR?***

Both the EAR and the ITAR treat the release of controlled technology and technical data to foreign nationals while they are in the United States as an export to their country of nationality. Under the EAR, the Commerce Department's Bureau of Industry and Security (BIS) regulates exports, including access by foreign nationals to technology, for "dual use" items, i.e., those which may have both commercial and military applications (one example of such an item is a sonar fish finder). Depending on the specific technology, and an employee's country of nationality, an export license may be required **before** a U.S. employer is authorized to release it to a foreign national employee. Controlled technologies are listed on the Commerce Control List (CCL). The CCL is organized by 10 categories of controlled items and related technologies, and by Export Control Classification Numbers (ECCNs) that describe the technical characteristics of the item or technology and any concomitant export restrictions. The complete CCL is available at [http://www.access.gpo.gov/bis/ear/ear\\_data.html](http://www.access.gpo.gov/bis/ear/ear_data.html). An alphabetical index to the CCL is available at <http://www.access.gpo.gov/bis/ear/pdf/indexccl.pdf>.

Under the ITAR, the State Department's Directorate of Defense Trade Controls (DDTC) regulates exports of defense articles and related technology, which are covered by the United States Munitions List. A commercial item that is specifically modified for a military or space application may be subject to the ITAR. The ITAR and the Munitions List are available at [http://www.pmdtc.state.gov/regulations\\_laws/itar\\_official.html](http://www.pmdtc.state.gov/regulations_laws/itar_official.html).

The overwhelming majority of technologies and technical data with which I-129 petition beneficiaries are likely to be involved will be ones that are subject to the EAR rather than the ITAR. If it is not clear which regulations apply, a Commodity Jurisdiction request may be filed with the DDTC.

***What is an export license and why do I need one?***

An export license is the approval document issued by BIS or DDTC authorizing the recipient to proceed with the export specified on the license application. An export license will not apply retroactively. Under the "deemed export rule," organizations in the United States must apply for an export license if (1) they intend to release or allow the release of controlled technology or technical data to a foreign national in the United States and (2) the release of this technology or technical data to the foreign national's home country would require an export license. A release in this context could include making the technology or technical data available for visual inspection, providing instruction or guidance about the technology or technical data, allowing access to a server on which the data is stored, or simply having a conversation about the technology or technical data.

The BIS website provides a very helpful overview of the Department of Commerce's export license requirements, available at <http://www.bis.doc.gov/licensing/exportingbasics.htm>.

If a deemed export to the beneficiary of a nonimmigrant petition is anticipated, the petitioner must apply for, and receive, an export license. If the technology is subject to the EAR, an export license application must be filed with the BIS. If the application is approved, a license number and expiration date will be issued for use on export documents. A BIS-issued license is usually valid for two years. Information on the application process is available at <http://www.bis.doc.gov/licensing/applying4lic.htm>. An application for an export license typically takes between two to four months to process. If the technology is governed by the ITAR, a DSP-5 export license application must be filed with the DDTTC. A license application may be filed only by an organization that has registered with the DDTTC. Information about the registration and application processes is available at [http://www.pmdtcc.state.gov/documents/ddtcc\\_getting\\_started.pdf](http://www.pmdtcc.state.gov/documents/ddtcc_getting_started.pdf).

### ***Has Form I-129 been revised because of a change in the law?***

No. The limitations on the release of controlled technologies and technical data to nonimmigrants in the United States have existed for many years, and organizations seeking to employ nonimmigrants who may be involved with such technologies or technical data have been required to obtain export licenses. This is the first time that the USCIS has involved itself in the export license application process, however, and the first time that nonimmigrant petitioners have been required to make certifications regarding compliance with this process in their petitions.

### ***What does "certify" mean?***

Before an I-129 petition may be filed, an authorized representative of the petitioner must certify under penalty of perjury that the petition and the evidence submitted with it are true and correct to the best of that person's knowledge. An attorney or other person preparing the petition on behalf of the petitioner must make a similar certification. Civil and criminal penalties may be imposed on both petitioners and their representatives or attorneys for misrepresentations made on Form I-129. Petitioners and their representatives or attorneys should thus make sure that any information provided in Part 6 with regard to the petitioner's review of the EAR and the ITAR and the need for an export license is accurate in every respect.

### ***Does Part 6 apply to all nonimmigrants I want to hire?***

Although the export license certification requirement applies to all nonimmigrants in the United States or seeking to enter the country, Part 6 of the new Form I-129 specifically states that this section should be completed only for four classes of nonimmigrant petitions: (1) H-1B petitions for specialty occupation workers, aliens working on cooperative research and development projects administered by the U.S. Department of Defense, and fashion models; (2) H-1B1 Free Trade petitions for specialty occupation workers who are nationals of Singapore or Chile; (3) L-1 intracompany transferee petitions; and (4) O-1 alien of extraordinary ability petitions.

Petitions filed for the following classes of nonimmigrant workers are thus exempted from the export license certification provisions of Form I-129: Trade NAFTA Canadian and Mexican nationals; E-1 Treaty Trader employees; E-2 Treaty Investor employees; Australian E-3 specialty occupation workers; H-2B temporary nonagricultural workers; H-3 nonimmigrant trainees or special education exchange visitors; P-1 internationally recognized athletes, athletic teams, and entertainment companies that have been internationally recognized for their performance; P-2 artists and entertainers performing under a reciprocal exchange program; P-3 artists or entertainers performing, teaching, or coaching under a commercial or noncommercial culturally unique program; and R-1 religious workers. Petitioners filing petitions to classify a foreign national under any of these nonimmigrant categories should simply leave Part 6 of Form I-129 blank.

The State Department has not yet indicated whether it plans to implement the export license certification requirement in L-1 intracompany transferee visa applications filed at a United States consulate under a Blanket L-1 petition. Such applications are filed on Form I-129S, Nonimmigrant Petition Based on Blanket L Petition, and not Form I-129. The new version of Form I-129S, dated November 23, 2010, which is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=058d4154d7b3d010VgnVCM10000048f3d6a1RCRD>, requires no export control certifications. Similarly, it is not clear how or if United States Customs and Border Protection will implement this requirement in Blanket L-1 admission applications (also submitted on Form I-129S) filed at United States ports of entry by Canadian nationals.

***Are citizens or nationals of certain countries disproportionately affected by the export license requirement?***

Each of the technologies listed on the CCL is subject to controls only for exports to certain countries. Consequently, only citizens or nationals of those countries must be covered by an export license to access lawfully a particular controlled technology. The ECCN for each controlled technology specifies the reasons for control (e.g., Anti-Terrorism (AT), Nuclear Nonproliferation (NP)); the EAR's "Country Chart" identifies which reasons for control are applicable to each listed country. The Country Chart is available at <http://www.access.gpo.gov/bis/ear/pdf/738spir.pdf>. The BIS will impose the highest scrutiny on applications for citizens or nationals of the "T-4" countries designated as state sponsors of terrorism (Cuba, Iran, Sudan, and Syria). Depending on the technology involved, applications for nationals of certain other countries of concern (including China, Russia, the former Soviet republics, and Israel) will receive the next highest level of scrutiny. Export licenses for technologies subject to the ITAR are routinely denied for citizens or nationals of T-4 nations.

In processing export licenses for technologies subject to the EAR, the BIS will look to the foreign national's most recently acquired citizenship or most recent country of permanent residence. In processing export licenses for technologies subject to the ITAR, the DDTTC will look to the foreign national's most restrictive country of citizenship or nationality.

***Does this mean that I cannot hire a foreign national if he or she will be exposed to a controlled technology?***

No. Petitioners filing a nonimmigrant petition for H-1B, H-1B1, L-1, or O-1 status for a beneficiary who will be exposed to controlled technology can make a hiring decision contingent on obtaining petition approval and the issuance of an export license, or take precautions that a new hire will be shielded from controlled technology until an export license is issued. A decision not to employ a candidate for employment on the sole basis that he or she may need an export license will not by itself expose an employer to a discrimination penalty under the Immigration and Reform Control Act. If Box 2 in Part 6 of Form I-129 is checked, it is not expected that the USCIS will issue a request for evidence to confirm that an export license application has been filed before approving the petition.

To avoid an inadvertent export violation, it is advisable to implement a "technology control plan" and provide appropriate workplace training to ensure that access to controlled technology in all formats and media is properly restricted. No mechanism has been established by the USCIS to police the shielding arrangement; however, petitioners may be required to demonstrate compliance with such arrangements in the event of a site visit by the USCIS's Office of Fraud Detection and National Security. It is also possible that the USCIS may contact the BIS's Office of Export Enforcement (OEE) to request verification of the accuracy of the certifications on Form I-129.

***What should I do if my organization clearly does not use any controlled technology of any sort?***

All petitioners filing I-129 petitions for H-1B, H-1B1, L-1, and O-1 nonimmigrants must complete Part 6 of the form, regardless of the type of business in which they are engaged. Petitioners that are certain they

do not use controlled technology need only comply with the instructions in Part 6 and make the appropriate declarations. Thus, a primary school filing an H-1B petition for a kindergarten teacher would not be required to review both the EAR and the ITAR and determine whether an export license is required; neither would a film studio filing an O-1 petition for a Shakespearean actor or a seminary seeking H-1B status for a theologian. On the other hand, petitioners that are filing petitions for beneficiaries serving in positions to which export control considerations are not clearly inapplicable—however confident they are that no release of a controlled technology or source code will occur—should consult both the EAR and ITAR before making the appropriate declarations in Part 6.

***What should I do to make sure that I complete this section of the form accurately?***

The petitioner must first identify the technologies and technical data to which the beneficiary will have access in the workplace. Next, the petitioner should review the EAR, and, if necessary, the ITAR (for companies working with defense articles or defense services), in order to make an accurate representation concerning the need for an export license. For technologies subject to the EAR, it will be necessary to determine whether the technology is covered by the CCL and, if so, to identify the correct ECCN. The ECCN will identify the reasons for control, and the Country List will indicate whether the technology requires a license based on the petition beneficiary's country of citizenship or nationality. For some petitioners, this will be a more complicated exercise than for others and should be entrusted only to someone who fully understands the legal standards governing the export control process.

The central challenge posed by the need to complete Part 6 of the new Form I-129 is of course the fact that the persons generally responsible for completing this form on behalf of petitioners—human resources managers, immigration specialists, recruitment coordinators, and the like—have historically not been involved in making export license determinations and must now either educate themselves about this discipline or seek the guidance of persons with the appropriate expertise. Since use of the new Form I-129 will become mandatory on December 23, 2010, organizations that anticipate filing petitions for H-1B, H-1B1, L-1, or O-1 workers on or after this date should take immediate steps to establish internal procedures that will ensure that Part 6 of this form is completed accurately.

Persons who sign Form I-129 assume responsibility for the accuracy of all statements contained in the form and must take appropriate measures to ensure compliance with the new regulation. Before executing the form, they should consult with outside counsel or those within the organization who have the necessary expertise. In most cases, whether or not it is determined that an export license is needed, it would be prudent to obtain a written explanation of how the determination was made, since such a document would be helpful in the event of an investigation or other enforcement action.

Organizations that already have in-house export control compliance officers, or that work with outside legal counsel in this area, should develop procedures to obtain, early in the process, the information necessary for the completion of such forms. It may also be helpful to compile a list of positions within your organization that are likely to involve exposure to controlled technology or technical data, so that the required steps may be taken as soon as a foreign national candidate for one of these positions is identified. When a foreign national candidate who may require H-1B, H-1B1, L-1, or O-1 sponsorship is identified, the specific technologies and technical data to which he or she will or may be exposed must be identified and the possible need for an export license must be analyzed correctly. This determination should then be communicated to the person who will complete and sign Form I-129.

For smaller organizations without an export control compliance department, the task of completing the new Form I-129 will require involvement by someone (who may or may not be the person signing the petition) with the necessary export control expertise to determine the need for an export license.

### ***What happens if I make a mistake in this section of the form?***

It is unclear how aggressively the USCIS will investigate errors in the completion of this form. As noted above, a knowingly false statement or concealment of a material fact on Form I-129 may result in the imposition of civil and criminal penalties, as well as denial of the nonimmigrant petition.

Petitioners that fail to assess properly the need for an export license, or that do not obtain a license where one is required, face additional exposure. In the event of an export violation, statements made under oath in Part 6 of Form I-129, either that a license is not required or that the petitioner will prevent unauthorized access to the controlled technology by the petition beneficiary, could become evidence in an export enforcement action by the BIS or DDTC, or in a criminal prosecution by the Justice Department. The penalties that may be imposed for failing to obtain an export license required for the release of controlled technology to a foreign national include civil fines of up to \$500,000 per violation, criminal penalties of up to \$1,000,000 per violation and up to 10 years in prison, a denial of export privileges, and debarment from U.S. government contracts.

### ***Can't I just leave this to my immigration attorney?***

Given the complexity of the analysis required by Part 6 of this form, the relative unfamiliarity of many immigration attorneys with export control matters, and the potential liability for errors, it is risky to leave this responsibility to an immigration attorney who does not have the necessary export compliance expertise. You should discuss with your immigration attorney his or her experience handling export control matters, and decide whether you will need to involve additional counsel with expertise in this area of law.

### ***What happens if the scope of an employee's duties changes so that he or she is now exposed to a controlled technology or technical data?***

The USCIS has not yet provided guidance with respect to whether any action is required by a petitioner where a petition beneficiary's duties change to include exposure to controlled technology or technical *data* after the Form I-129 is filed. If the beneficiary is employed under a petition filed on the earlier version of Form I-129, which required no certification regarding export control compliance, it is advisable to file a new petition with the new form and make the appropriate certification. If the beneficiary is employed under a petition filed on the new version of Form I-129 and a certification was made that an export license was not required, it may be advisable to file an amended petition that has a different box checked in Part 6. In any event, the employer should promptly determine whether an export license is required, and take steps to ensure that the foreign national does not obtain access to the controlled technology until an export license is granted.

### **How This Affects You**

The relatively brief window of time before December 23, 2010, when the new Form I-129 must be used, means that organizations that anticipate filing H-1B, H-1B1, L-1, or O-1 petitions on or after this date should take action immediately to develop a process that enables them to perform the relevant export control analysis and complete Part 6 of Form I-129 accurately. Morgan Lewis would be glad to assist you in establishing an effective program to ensure compliance with this new certification requirement.

We will continue to monitor this situation and update you with any new information. For more information, or if you have any questions regarding the issues discussed in this Immigration Alert, please contact us. For questions regarding nonimmigrant petition matters, you may contact any of the following attorneys:

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