

A Brief Guide to the New Export Control Compliance Section of Form I-129 – Release of Controlled Technology or Technical Data to Foreign Persons in the United States

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Introduction

On November 23, 2010, the United States 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”)¹ and the International Traffic in Arms Regulations (“ITAR”)² 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.³ Use of the new form became mandatory on December 23, 2010.⁴

¹ 15 C.F.R. Pts. 730-74 (2010). The EAR were issued to implement the Export Administration Act (“EAA”) of 1979, 50 U.S.C. §§ 2401-20 (2006). The EAA is not permanent legislation, and Congress sometimes has allowed the legislation to lapse. The EAR are currently maintained through the International Emergency Economic Powers Act, Exec. Order No. 13,222, 66 Fed. Reg. 44,205 (Aug. 22, 2001).

² 22 C.F.R. Parts 120-130 (2010).

³ The new I-129 form and its accompanying instructions may be accessed on the USCIS website at <http://www.uscis.gov/files/form/i-129.pdf>. A draft version of this form, dated February 8, 2010, and circulated for public comment earlier this year, also included an export control compliance section that asked petitioners to indicate whether or not an export license was required for the beneficiary. If an indication was made that no such license was required, petitioners were required to (1) state if the relevant technology was subject to the EAR; (2) provide the Export Control Classification Number for the technology; (3) indicate whether or not they had self-classified the technology; (4) state whether or not the U.S. Department of Commerce had classified the technology; and (5) provide the CCATS number for the technology. Unsurprisingly, given its cumbersome and overly complicated framework, this proposed section provoked significant negative commentary.

The new form requires petitioners to take additional steps to ensure that export compliance is properly evaluated and that their certifications are accurate. The form also creates a new challenge for immigration practitioners preparing and filing certain nonimmigrant petitions for their clients, since they are now required to delve into an extraneous body of law in order to provide this basic service effectively. Those responsible for completing Form I-129, whether they are attorneys or in-house personnel, should take immediate steps to consult with outside export control counsel or specialists within their organization to determine if an export license is needed, and to implement appropriate technology safeguards if necessary.

This article will analyze the new Part 6 of Form I-129, with a view to assisting immigration practitioners in providing guidance to their clients as to how they should approach the completion of this form when seeking H-1B, H-1B1, L-1, or O-1 status for an employee.⁵

See, e.g., AILA Comments on Form I-129 Revisions, available at AILA Infonet Doc. No. 10040960 (posted Apr. 9, 2010); NAFSA Comment Letter on Proposal To Include Deemed Export Attestation On Form I-129 (Apr. 5, 2010), available at http://www.nafsa.org/uploadedFiles/NAFSA_USCISFormI-129LtrFINAL040510.pdf.

⁴ Under an agreement between the USCIS and the Department of Commerce that was announced on December 22, 2010, petitioners need not answer Part 6 of Form I-129 until February 20, 2011. *See* Suspension of I-129 Export Control Questions, available at AILA Infonet Doc. No. 10122231 (posted Dec. 22, 2010). The State Department, which regulates the ITAR, was apparently not consulted, and it remains to see how this agency will react to this delay.

⁵ This is not intended to be an exhaustive or scholarly analysis of the subject of export control compliance for immigration practitioners. For such treatment, the reader is referred to Christopher F. Corr, *The Wall Still Stands! Complying With Export Controls on Technology Transfers in the Post-9/11 Era*, 25 Hous. J. Int'l L. 483 (2002-03); Harry L. Clark & Sanchita Jayram, *Intensified International Trade and Security Policies Can Present Challenges for Corporate Transactions*, 38 Cornell Int'l L.J. 391 (2005); Linda M. Weinberg & Lynn Van Buren, *The Impact of U.S.*

What does this new form require petitioners to do?

Part 6 of the new I-129 form 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, Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States, provides as follows:

(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 either 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 are federal regulations that control what may be exported to countries outside the United States. They also control the release of controlled technology and technical data to "foreign

Export Controls and Sanctions on Employment, 35 Pub. Cont. L.J. 537 (2005-06); Sandra F. Sperino, *Complying With Export Laws Without Importing Discrimination Liability: An Attempt to Integrate Employment Discrimination Laws and the Deemed Export Rules*, 52 St. Louis L.J. 375 (2007-08).

persons" while they are in the United States.⁶ Such a release is considered an export to the foreign persons' countries of nationality and is unlawful without an export license.⁷ 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 (the classic example of such an item being a sonar fish finder). Depending on the specific technology involved, and an employee's country of citizenship, an export license may be required before a United States employer is authorized to release the technology to a foreign national employee. Controlled technologies are listed on the Commerce Control List ("CCL").⁸ The CCL is organized by ten categories of controlled items and related technologies, and by Export Control Classification Numbers ("ECCNs") that describe the technical characteristics of the item/technology and concomitant export restrictions.⁹

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.¹⁰ 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.¹¹

Technology that is publicly available (i.e., has been released to the general public on the Internet, through print publications, presentations at conferences, and

⁶ 15 C.F.R. § 734.2(b)(2)(ii); 22 C.F.R. § 120.16. A "foreign person" is any natural person who is not a lawful permanent resident as defined by U.S.C. § 1101(a)(20) or who is not a protected individual as defined by 8 U.S.C. § 1324b(a)(3).

⁷ 15 C.F.R. § 734.2(b)(2)(ii); 22 C.F.R. § 120.17(a).

⁸ 15 C.F.R. § 736.2(b)(1)-(3) at Part 774, supp. 1.

⁹ The complete CCL is available at 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>.

¹⁰ The ITAR and the Munitions List are available at http://www.pmdtcc.state.gov/regulations_laws/itar_official.html.

¹¹ Information about this process is available at http://www.pmdtcc.state.gov/commodity_jurisdiction/index.html.

other media) is not covered by either the EAR or the ITAR.

What is an export license and why does an employer need one?

An export license is the approval document issued by BIS or DDTC that authorizes 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.¹² 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.¹³

If a deemed export to the beneficiary of a nonimmigrant petition is anticipated, the petitioner must apply for, and receive, an export license. As noted above, 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.¹⁴ An application for an export license typically takes between 2 and 4 months to process. If the technology is governed by the ITAR, a DSP-5 export license application must be filed with the DDTC. A license application may only be filed by an organization that has registered with the DDTC.¹⁵

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

¹² 15 C.F.R. § 734.2(b)(2)(ii); 22 C.F.R. § 120.17(a).

¹³ The BIS maintains a very helpful website that provides an overview of the Department of Commerce's export license requirements at: <http://www.bis.doc.gov/licensing/exportingbasics.htm>, available at AILA Infonet (No Doc. No. provided) (posted Feb. 18, 2010).

¹⁴ Information on the application process is available at <http://www.bis.doc.gov/licensing/applying4lic.htm>.

¹⁵ Information about the registration and application processes is available at http://www.pmdtc.state.gov/documents/ddtc_getting_started.pdf.

organizations seeking to employ nonimmigrants that may be involved with such technologies or technical data have for some time 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. No explanation has been offered of why the USCIS has chosen this particular time to make export control compliance part of the nonimmigrant petition process, although the heightened security consciousness increasingly exhibited by the agency seems a simple and wholly plausible explanation.

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 this 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 attorneys for misrepresentations made on Form I-129.¹⁶ Petitioners and 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 a petitioner wishes 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 only be completed 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:

¹⁶ See 8 C.F.R. § 1003.102(c) (providing for disciplinary sanctions for attorneys that knowingly or with reckless disregard make a false statement or material fact or law); see generally *Matter of Anil Shah*, 24 I. & N. Dec. 282 (BIA 2007).

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 who have been internationally recognized for their performance, P-2 artists and entertainers performing under a reciprocal exchange program, and P-3 artists or entertainers performing, teaching, or coaching under a commercial or non-commercial culturally unique program; and R-1 religious workers. Although the USCIS has offered no guidance on this issue, 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-129.¹⁷ The new version of Form I-129S dated 11/23/2010 requires no export control certifications.¹⁸ Similarly, it is not clear how or if the United States Customs and Border Protection agency 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.¹⁹

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

specified 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 (examples of such reasons include "Anti-Terrorism (AT)" and "Nuclear Nonproliferation (NP)"). The EAR's Country Chart identifies the reasons for control that are applicable to each listed country.²⁰ 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).²¹ 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, as well as for citizens of "proscribed destinations", such as Libya, Venezuela and China.

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 DDTC will look to the foreign national's most restrictive country of citizenship or nationality.²² To illustrate this, a Syrian citizen who moved to Canada and became a citizen of that country would be considered a Canadian for EAR purposes, and a Syrian for ITAR purposes.

Does this mean that petitioners cannot hire a foreign national if he/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. If Box 2 in Part 6 of Form I-129 is checked, it is not expected that the USCIS will issue a request for

¹⁷ 8 C.F.R. § 214.2(l)(5)(ii)(A).

¹⁸ The new version of Form I-129S is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=058d4154d7b3d010VgnVCM10000048f3d6a1RCRD>. It is likely that, once interested members of Congress become aware of this apparent oversight, the fact will be communicated to Secretary Clinton, who can be expected to take swift and vigorous action on the subject. This is what ensued when Senators Grassley, Coburn, Inhofe, and Vitter alerted Mrs. Clinton to the failure of United States consulates to collect, or even ask for, the "border security" fees mandated by Section 402 of Public Law 11-230. See Senate Members Express Concern Over Collection of H-1B/L-1 Border Security Fee, available at AILA Infonet Doc. No. 10112260 (posted Nov. 22, 2010).

¹⁹ 8 C.F.R. § 214.2(l)(5)(ii)(C).

²⁰ The Country Chart is available at <http://www.access.gpo.gov/bis/ear/pdf/738spir.pdf>.

²¹ North Korea was previously designated a state sponsor of terrorism, but was removed from the list of such sponsors by President George W. Bush in 2008. See Helene Cooper, *U.S. Declares North Korea Off Terror List*, N.Y. Times, Oct. 12, 2008.

²² U.S. Department of Commerce, "Revisions and Clarification of Deemed Export Related Regulatory Requirements," 71 Fed. Reg. 30840, 30841 (May 31, 2006).

evidence to confirm that an export license application has been filed before approving the petition.

A decision not to employ a candidate for employment on the sole basis that he or she may need an export license should not by itself expose an employer to a discrimination penalty under the Immigration and Reform Control Act, which prohibits discrimination based on national origin or citizenship.²³ According to the former Department of Justice Special Counsel for Immigration-Related Unfair Employment Practices, questions posed to candidates for employment about that are designed solely to determine the need for an export license may not be *per se* unlawful, but could give rise to liability for national origin discrimination under Title VII of the 1964 Civil Rights Act.²⁴

To avoid an inadvertent export violation, it is advisable to implement a technology control plan and provide appropriate workplace training to the persons involved in dealing with export control matters to ensure that access to controlled technology in all formats and media is properly restricted. Immigration practitioners will generally not be the best equipped to advise petitioners on such restrictions, and should seek guidance from specialists in this area. Typical measures would include making sure that the relevant information is stored in a password-protected database, preventing the beneficiary from having access to certain parts of the workplace, ensuring that all persons working on the relevant technology are aware of the identity of the beneficiary and the prohibition on discussing the technology with him or her.

No mechanism has yet been established by USCIS to police the shielding arrangement. Petitioners may be required to demonstrate compliance with such arrangements in the event of a site visit by USCIS's

Office of Fraud Detection and National Security, however.²⁵ It is also possible that the USCIS may contact the BIS' Office of Export Enforcement ("OEE") to request verification of the accuracy of the certifications on Form I-129, and to make sure that the appropriate access prevention is indeed occurring.

An H-1B petitioner may not place the petition beneficiary in an unpaid and inactive status until the relevant export license is obtained. Such a practice would constitute "benching", and would expose the petitioner to a back wage assessment and other penalties.²⁶

What should I do if a petitioner's 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. Guidance on this issue should be forthcoming from the USCIS, but petitioners that are certain they do not use controlled technology should arguably not need to review the EAR and the ITAR in order to 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 should not be required to review both the EAR and the ITAR and determine whether or not 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. Petitioners that are filing petitions for beneficiaries serving in positions to which export control considerations are not clearly inapplicable should, however confident they are that no release of a controlled technology or source code will occur, consult both the EAR and ITAR before making the appropriate declarations in Part 6.

What should a petitioner do to make sure that it completes this section of the form accurately?

²³ 8 USC § 1324b (a)(1). IRCA prohibits "unfair immigration-related employment practices" or "discrimination based on national origin or citizenship status" by employers and offers protections to all citizens, permanent residents, and work-authorized nonimmigrants. Discrimination based on citizenship status is exempt from IRCA coverage when: (i) the discrimination is required in order to comply with a law, regulation, or executive order; (ii) the discrimination is required by a federal, state, or local government contract between the employer and the government; or (iii) the Attorney General determines that it is essential for the employer to do business with the "federal, state, or local government". 8 USC § 1324b (a)(2)(c).

²⁴ Letter from William Ho-Gonzalez, Special Counsel for Immigration-Related Unfair Employment Practices to [redacted], June 2, 1994, reproduced in A. Fragomen, C. Shannon & D. Montalvo, *Immigration Employment Compliance Handbook* 2010-2100 (West 2010) at 956-58.

²⁵ See Office of Fraud Detection and National Security Fact Sheet, available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=0353f8e5492ec110VgnVCM1000004718190aRCRD&vgnnextchannel=2af29c7755cb9010VgnVCM10000045f3d6a1RCRD>; see also *Types of USCIS Visits*, available at AILA Infonet Doc. No. 09112060 (posted Nov. 20, 2009).

²⁶ 8 U.S.C. §1182(n)(C)(vii). For new employees, the prohibition on benching does not apply until 30 days after the beneficiary is admitted to the United States under the petition, or 60 days after he/she becomes eligible to work, if he or she is already in the United States when the petition is approved.

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 became 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 by now already have taken steps to establish internal procedures that ensure that Part 6 of this form is completed accurately.

Persons who sign I-129 forms 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 their organization that have the necessary expertise. Given the liability assumed by the person executing Form I-129, it would be prudent for him or her to obtain a written explanation of how the determination was made whether or not an export license is needed, 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 be helpful in this respect for a petitioner to compile a list of positions within its 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 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 a petitioner makes a mistake in this section of this form?

It is unclear how aggressively the USCIS will investigate and prosecute errors in the completion of this form. As noted above, a knowingly false statement or concealment of a material fact on Form I-29 may result in the imposition of civil and criminal penalties, as well as denial of the nonimmigrant petition, but errors that do not meet this knowing standard should not be subject to these penalties.

Petitioners who fail to assess properly the need for an export license, and then 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 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 ten years in prison, a denial of export privileges, and debarment from U.S. government contracts.²⁷ A knowingly false certification could also be punished criminally under the False Statements Act.²⁸

Can't a petitioner just leave this to its immigration attorney?

Many petitioners routinely entrust the completion of Form I-129 to immigration counsel. Since the form has hitherto required only information that is factual in nature, this task has generally been accepted without

²⁷ 15 C.F.R. § 764.3.

²⁸ 18 U.S.C. § 1001.

reluctance by immigration practitioners. 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, immigration attorneys without the necessary export compliance expertise will necessarily be troubled by having to perform this function. Immigration attorneys that do not have experience handling export control matters may thus decide 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 or not any action is required by a petitioner where the scope of a petition beneficiary's duties changes 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 would be 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 would also 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.

Conclusion

The publication of this new form will inevitably cause immigration practitioners to overhaul the manner in which they prepare I-129 forms. It is crucial for practitioners that anticipate filing H-1B, H-1B1, L-1, or O-1 petitions, as well as the organizations that will be petitioning for such statuses, to develop a process that enables them to perform the relevant export control analysis and complete Part 6 of Form I-129 accurately. Such an exercise will necessarily require the participation of not only practitioners who are experts in the nonimmigrant petition process, but also other attorneys with expertise in export compliance and licensing procedures.

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