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webinar

Export Control and Immigration

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Today's Speakers



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The New I-129 Petition for Nonimmigrant Worker Form

- Required since December 23, 2010
- Used for all nonimmigrant petitions
- Initial Employment or Extensions
- Filed with Vermont or California USCIS Service Centers
- Contains many new sections, including Part 6, “Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States”

Some Background Points

- First Time USCIS has inserted itself into Export Control Area, Even Though No Expertise/Jurisdiction
- Export Control Compliance Requirement Not New
- USCIS Intervention Probably Result of GAO Recommendations, Overall Heightened security consciousness
- Reality is that Few Positions will Require Export Licenses, but ALL Petitions must contain Certification

What Does Part 6 Say?

Check Box 1 or Box 2 as appropriate:

With respect to the technology of 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.

- Required only for H-1B, H-1B1 (Chile/Singapore), L-1 and O-1 Petitions
- Can leave blank until February 20, 2011
- USCIS Guidance should be forthcoming
- Form I-129S (Blanket Visa Application Form) does not contain this language

Completing Form I-129

- Certification made under penalty of perjury
- All statements in Form I-129 “true and correct to the best of [signer’s] knowledge”
- Civil and criminal penalties may be imposed on Petitioners and attorneys for knowing misrepresentations on Form I-129
- Important to Retain Documentation Supporting Export License Determination

Export Controls

- Federal regulations control what may be exported to countries outside the United States.
- They are:
 1. The Export Administration Regulations (EAR) and
 - *Commerce Department's Bureau of Industry and Security (BIS)*
 2. The International Traffic in Arms Regulations (ITAR)
 - *State Department's Directorate of Defense Trade Controls (DDTC)*
 3. Department of Energy and Nuclear Regulatory Commission Regulations on Nuclear-Related Exports

What is an Export License?

- An export license is the approval document issued by BIS or DDTTC that authorizes the recipient to proceed with the export specified on the license application
- An export license will not apply retroactively.

What is an Export License?

- 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 ITAR.
- If not clear which regulations apply, a Commodity Jurisdiction request may be filed with the DDTTC.

Deemed Exports to Foreign Persons

- What is a Deemed Export?
 - The release of controlled technology, technical data, and software source code to “foreign persons” in the United States.
- Who is Covered?
 - A “foreign person” is any natural person, including an employee of a U.S. organization, who is not a U.S. citizen, lawful permanent resident, or “protected individual” (refugee or asylee).

Deemed Exports to Foreign Persons

- U.S. organizations must apply for an export license if
 1. they intend to release controlled technology, technical data, or software source code to a foreign national in the United States; but only if
 2. the release of that specific technology, technical data, or software source code to the foreign national's home country would require an export license.

Deemed Exports to Foreign Persons

- What constitutes a release to a foreign person?
 - making the technology or technical data available for visual inspection,
 - providing instruction or guidance about the technology or technical data,
 - allowing access to a laptop, server or hard copy files where the data are stored
 - simply having a conversation about the technology or technical data.

Deemed Exports to Foreign Persons

- What determines whether the deemed export rules apply?
- Relatively few businesses and organizations are affected by the deemed export rules.
 - Only a small percentage work with controlled technology
 - Most types of technology are not controlled for export or release to foreign persons

Deemed Exports to Foreign Persons

- These controls DO NOT apply to:
 1. Technology that is publicly available (i.e., through the Internet, print publications, presentations at conferences, and other media),
 2. Basic research, or
 3. Ordinary business software, including software containing most forms of encryption.

Deemed Exports to Foreign Persons

- How to determine if your organization is affected?
 - Work with existing resources and tools
 - *In-house regulatory compliance officer*
 - *International sales and marketing*
 - *Manager of contracts with the federal government*
 - *Software vendors*
 - Determine the kind of software, technology, or technical data to which foreign persons might be exposed.
 - Determine whether that kind of software, technology, or technical data is controlled for export.

Export Administration Regulations (EAR)

- Apply to exports, including access by foreign nationals to technology, for “dual-use” items, i.e., those which may have both commercial and military or intelligence applications (ex. a sonar fish finder).
- Administered by the Commerce Department’s Bureau of Industry and Security (BIS).

Export Administration Regulations (EAR)

- The BIS maintains a very helpful website that provides an overview of the Department of Commerce's [export license requirements](#) and [deemed export controls](#).
- Controlled technologies are listed on the Commerce Control List (CCL), [15 C.F.R. Part 774](#).
- An alphabetical index to the CCL is available at <http://www.access.gpo.gov/bis/ear/pdf/indexccl.pdf>.

The Commerce Control List (CCL)

- What is the Commerce Control List?
 - Consists of ten categories of controlled items and related software and technologies (Google: “EAR Database”)
 - [Category 0 - Nuclear Materials, Facilities & Equipment \(and Miscellaneous Items\)](#)
 - [Category 1 - Materials, Chemicals, Microorganisms, and Toxins](#)
 - [Category 2 - Materials Processing](#)
 - [Category 3 - Electronics](#)
 - [Category 4 - Computers](#)
 - [Category 5 \(Part 1\) - Telecommunications](#)
 - [Category 5 \(Part 2\) - Information Security](#)
 - [Category 6 - Sensors and Lasers](#)
 - [Category 7 - Navigation and Avionics](#)
 - [Category 8 - Marine](#)
 - [Category 9 - Propulsion Systems, Space Vehicles and Related Equipment](#)

The Commerce Control List (CCL)

- Each category is subdivided as follows:
 - A. Systems, Equipment and Components
 - B. Test, Inspection and Production Equipment
 - C. Materials
 - D. Software
 - E. Technology

The Commerce Control List (CCL)

- Within each sub-category are Export Control Classification Numbers (ECCNs) that describe the technical characteristics of the item/technology and associated export restrictions
- Each category is subdivided as follows:
 - a. Systems, Equipment, and Components
 - b. Test, Inspection, and Production Equipment
 - c. Materials
 - d. Software
 - e. Technology

List of Items Controlled

Unit: \$ value
Related Controls: N/A
Related Definitions: N/A
Items:

The list of items controlled is contained in the ECCN heading.

3D101 “Software” specially designed or modified for the “use” of equipment controlled by 3A101.b.

License Requirements

Reason for Control: MT, AT

<i>Control(s)</i>	<i>Country Chart</i>
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MT applies to entire entry	MT Column 1
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AT applies to entire entry	AT Column 1
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License Exceptions

CIV: N/A
 TSR: N/A

List of Items Controlled

Unit: \$ value
Related Controls: N/A
Related Definitions: N/A
Items:

The list of items controlled is contained in the ECCN heading.

3D980 “Software” specially designed for the “development”, “production”, or “use” of items controlled by 3A980 and 3A981.

License Requirements

Reason for Control: CC, AT

<i>Control(s)</i>	<i>Country Chart</i>
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CC applies to entire entry	CC Column 1
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AT applies to entire entry	AT Column 1
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License Exceptions

CIV: N/A
 TSR: N/A

List of Items Controlled

Unit: \$ value
Related Controls: N/A
Related Definitions: N/A
Items:

The list of items controlled is contained in the ECCN heading.

3D991 “Software” specially designed for the “development”, “production”, or “use” of electronic devices or components controlled by 3A991, general purpose electronic equipment controlled by 3A992, or manufacturing and test equipment controlled by 3B991 and 3B992; or “software” specially designed for the “use” of equipment controlled by 3B001.g and .h.

License Requirements

Reason for Control: AT

<i>Control(s)</i>	<i>Country Chart</i>
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AT applies to entire entry	AT Column 1
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License Exceptions

CIV: N/A
TSR: N/A

List of Items Controlled

Unit: \$ value
Related Controls: N/A
Related Definitions: N/A
Items:

The list of items controlled is contained in the ECCN heading.

E. TECHNOLOGY

3E001 “Technology” according to the General Technology Note for the “development” or “production” of equipment or materials controlled by 3A (except 3A292, 3A980, 3A981, 3A991 3A992, or 3A999), 3B (except 3B991 or 3B992) or 3C (except 3C992).

License Requirements

Reason for Control: NS, MT, NP, AT

<i>Control(s)</i>	<i>Country Chart</i>
NS applies to “technology” for items controlled by 3A001, 3A002, 3B001, 3B002, or 3C001 to 3C006	NS Column 1
MT applies to “technology” for equipment controlled by 3A001 or 3A101 for MT reasons	MT Column 1
NP applies to “technology” for equipment controlled by 3A001, 3A201, or 3A225 to 3A233 for NP reasons	NP Column 1
AT applies to entire entry	AT Column 1

License Requirement Note: See §743.1 of the EAR for reporting requirements for exports under License Exceptions.

License Exceptions

CIV: N/A
TSR: Yes, except N/A for MT, and “technology” specially designed for the “development” or “production” of: (a) Traveling Wave Tube Amplifiers described in [3A001.b.8](#), having operating frequencies exceeding 19 Ghz; and (b) solar cells, coverglass-interconnect-cells or covered-interconnect-cells (CIC) assemblies, solar arrays and/or solar panels, which are “space qualified,” having a minimum average efficiency exceeding 20% but less than 31% described in [3A001.e.4](#).

List of Items Controlled

Unit: N/A
Related Controls: 1.) See also [3E101](#) and [3E201](#). 2.) “Technology” according to the General Technology Note for the “development” or “production” of the following commodities is under the export licensing authority of the Department of State, Directorate of Defense Trade Controls (22CFR part 121): (a) When operating at frequencies higher than 31.8 GHz and “space qualified”: helix tubes (traveling wave tubes (TWT)) defined in [3A001.b.1.a.4.c](#); microwave solid state amplifiers defined in [3A001.b.4.b](#); or traveling wave tube amplifiers (TWTA) defined in [3A001.b.8](#); (b) “Space qualified” solar cells, coverglass-interconnect-cells or covered-interconnect-cells (CIC) assemblies, solar arrays, and/or solar panels, with a minimum average efficiency of 31% or greater at an operating temperature of 301°K (28°C) under simulated ‘AM0’ illumination with an irradiance of 1,367 Watts per square meter (W/m²), and associated solar concentrators, power

Navigating the EAR

- If the software, technology, or technical data is listed on the CCL, the list will identify what specific items are controlled for export.
- Locate the reason(s) for control:
 - CB – Chemical and Biological Weapons
 - NP – Nuclear Nonproliferation
 - NS – National Security
 - MT – Missile Technology
 - RS – Regional Security
 - FC – Firearms Convention
 - CC – Crime Control
 - AT – Anti-Terrorism

Navigating the EAR

- Access the [Commerce Country Chart](#).
 - The columns in the Chart are the reasons for control, and the rows are the various countries.
 - If there is an X in the box that corresponds to the country of the foreign person's nationality and the reason for control, an export license is generally required to release the software, technology, or technical data to a national of that country.
 - The BIS looks to the foreign national's most recently acquired citizenship or most recent country of permanent residence.

Country Chart

Commerce Country Chart

Reason for Control

Countries	Chemical & Biological Weapons			Nuclear Nonproliferation		National Security		Missile Tech	Regional Stability		Firearms Convention	Crime Control			Anti-Terrorism	
	CB	CB	CB	NP	NP	NS	NS	MT	RS	RS	FC	CC	CC	CC	AT	AT
	1	2	3	1	2	1	2	1	1	2	1	1	2	3	1	2
Afghanistan	X	X	X	X		X	X	X	X	X		X		X		
Albania ^{2,3}	X	X		X		X	X	X	X							
Algeria	X	X		X		X	X	X	X	X		X		X		
Andorra	X	X		X		X	X	X	X	X		X		X		
Angola	X	X		X		X	X	X	X	X		X		X		
Antigua & Barbuda	X	X		X		X	X	X	X	X	X	X		X		
Argentina	X					X	X	X	X	X	X	X		X		
Armenia	X	X	X	X		X	X	X	X	X		X	X			
Aruba	X	X		X		X	X	X	X	X		X		X		
Australia ³	X					X		X	X							
Austria ^{3,4}	X					X		X	X			X		X		
Azerbaijan	X	X	X	X		X	X	X	X	X		X	X			
Bahamas, The	X	X		X		X	X	X	X	X	X	X		X		
Bahrain	X	X	X	X		X	X	X	X	X		X		X		

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Navigating the EAR

- Determine whether any license exception may apply. The license exceptions are listed in [15 C.F.R. Part 740](#).
- **If the technology is subject to the EAR and does not fall within a license exception, an export license application must be filed with the BIS.**
- An application for an export license typically takes between 2 and 4 months to process.

Applying for a License under the EAR

- Information on the application process is available at <http://www.bis.doc.gov/licensing/applying4lic.htm>.
- If the application is approved, a license number and expiration date will be issued.
- A BIS-issued license is usually valid for two years.

Encryption Controls and Deemed Exports

- [Category 5 \(Part 2\)](#) of the CCL sets forth the encryption controls.
- Most companies do not need a deemed export license for their foreign national employees to work with company software
- Most forms of encryption are covered by a license exception ENC or are classified in ECCNs 5D992 or 5E992 which are controlled only for antiterrorism purposes.

License Exception ENC

- Applies to items classified in ECCNs 5A002.a.1, a.2, a.5, a.6 or a.9; related systems, equipment and components classified under ECCN 5B002; and equivalent or related software and technology classified under ECCNs 5D002 or 5E002.
- These items do not require a license for foreign national employees, contractors or interns of a U.S. company or its subsidiaries if the items are for internal company use.
- While in the United States, foreign nationals may use any type of encryption source code and object code covered by License Exception ENC.

License Exception ENC

- License Exception ENC does not apply to:
 - Nationals of Cuba, Iran, North Korea, Sudan, and Syria (the countries listed in Country Group E:1 in [Supplement No. 1 to Part 740 of the EAR](#)) or
 - employees of a foreign firm working at a U.S. company (these foreign nationals are not "employees" of the U.S. company)

International Traffic in Arms Regulations (ITAR)

- Apply to exports of defense articles and related technology.
 - A commercial item that is specifically modified for a military or space application may be subject to the ITAR.
- Administered by the State Department's Directorate of Defense Trade Controls (DDTC).
- Controlled items and technologies are listed on the United States Munitions List, [22 C.F.R. Part 121](#).

International Traffic in Arms Regulations (ITAR)

- If the technical data to which a foreign national might be exposed is governed by the ITAR, a DSP-5 export license application must be filed with the DDTTC.
- The DDTTC looks to the foreign national's most restrictive country of citizenship or nationality.
- A license application may only be filed by an organization that has registered with the DDTTC.
- Information about the registration and application processes is available at http://www.pmddtc.state.gov/documents/ddtc_getting_started.pdf.

FAQs: What if I find my organization may have committed a deemed export violation in the past?

- If you find a violation or potential violation, consider making a voluntary disclosure to the relevant agency.
 - Can mitigate the penalties imposed
 - Must be combined with effective corrective action
 - May be a good idea to consult with export compliance counsel before submission

Establishing an Effective Compliance Program

- Organizations that export large amounts on a regular basis should have a formal compliance program.
- Other organizations should designate at least one person to be familiar with the export control laws and ensure that they are followed, perform risk assessment, receive training, and serve as a contact for employees who have export control questions.
 - This person should consult outside export compliance counsel if he or she has any questions.

Establishing an Effective Compliance Program

- All organizations should have procedures for promptly and properly dealing with any violation that is discovered and taking corrective actions.
- Immigration practitioners will generally not be the best equipped to advise petitioners on export control restrictions and compliance. Petitioners should seek guidance from export control specialists.

Compliance: The Technology Control Plan

- Implement a technology control plan to ensure that access to controlled technology in all formats and media is properly restricted – both physically and electronically.

Compliance: The Technology Control Plan

- Typical measures include:
 - storing the relevant information in a password-protected database,
 - preventing the beneficiary from having access to certain physical areas of the workplace, and
 - ensuring that all persons working on the relevant technology are aware of the identity of the beneficiary and the prohibition on discussing or otherwise releasing the technology with him or her.

The Hiring Process: Avoiding a Discrimination Claim

- Two varieties: citizenship status, national origin discrimination
- Citizenship status: only “protected individuals” (US citizens, permanent residents, refugees, asylees)
- H-1B, H-1B1, L-1, and O-1 nonimmigrants will by definition NOT be protected individuals
- Exceptions: (1) to comply with law, regulation, or executive order; (2) required by federal, state, or local government contract; (3) essential to do business with agency or department of federal, state, or local government
- National origin: anyone, based on place of birth
- Exception: national security – “any requirement imposed in interest of the national security”

The Hiring Process: Speaking to the Candidate

- May ask: “Are you a U.S. citizen, U.S. national, lawful permanent resident, asylee or refugee?”
- If affirmative answer, do not need any more information – export license will not be required
- Ask Question of All Candidates
- If negative answer, may ask questions to determine need for export license (e.g. country of birth, country of citizenship, passport number, permanent address, immigration documentation, etc.)
- Candidate should be told that questions are being asked solely for export license purposes

The Hiring Process: Making a Job Offer

- May decide not to make offer on basis of export license issue
- Include export control contingency in offer letter
- Include maintenance of valid export license as condition of continuing employment
- Once employee is on board, stay on top of changes in employee's citizenship/country of residence