



## IMMIGRATION

### IMMIGRATION & EXPORT CONTROLS

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#### Employers of Foreign Nationals Now Required to Certify Deemed Export Control Compliance

It is essential that U.S. employers ensure that an employee who is a foreign national and who is exposed to company technology is not a “deemed export.” An illegal export of regulated technology is “deemed” to take place when it is “released” to an alien in the U.S. who is a national from a restricted country. The applicable regulations provide a technical definition of “release.” Very generally, however, technology and technical data is “released” to a foreign national when he or she visually inspects, orally exchanges information, or otherwise obtains personal knowledge regarding regulated technology or technical data.

Effective February 20, 2011, the U.S. Citizenship and Immigration Services (USCIS) has added two new attestation requirements to Form I-129. Applicable to H-1B, H-1B1, L and O-1A visas, Part 6 of the amended Form I-129 requires a petitioning employer to certify that it has reviewed the federal regulations related to the release of controlled technology or technical data and determined whether a license is required to release such technology or data to the nonimmigrant worker applicant. This release of controlled technology or technical data to a foreign national is referred to as a “deemed export.” The International Traffic in Arms Regulations (ITAR), which regulate munitions-related technology, and the Export Administration Regulations (EAR), which regulate “dual use” items, identify the specific technology and technical data which, if released to a foreign national, may be deemed an export in violation of export controls.<sup>1</sup>

Many employers may find that the products, technology and technical data subject to the EAR are not used by the petitioning company and thus the regulations do not apply.<sup>2</sup> However, as the technology used in the development and manufacture of products in the United States continues to evolve, employers may find that they need to examine the regulations in greater detail to be sure the release of technological and technical data to their nonimmigrant workers does not require a license. Generally, controlled technology includes the specific information necessary for the development, production or use of many of the products covered by the regulations. Technical data, like blueprints or manuals, is the physical form technology typically takes. Accordingly, employers may find that some of the technology related to their “dual use” products (products that may be used for both commercial and military purposes), including certain metal alloys, pipes, valves, electronics and telecommunications equipment, may be regulated by the EAR.

#### Procedure for Determining Whether Licensure is Required

The EARs include specific steps to determine whether licensure is required for the exportation of items subject to the EAR. This EAR procedure, generally applicable to all exports, can be refined to apply specifically to deemed exports and the regulated technology and technical data. Generally, there are three important questions an employer needs to answer:

- 1. What is the item?** Since regulated technology and technical data is often related to specific products, the first question to ask is whether the item or items to be released to a foreign national are subject to the EAR. Specifically, an employer needs to determine whether the products released to the foreign national, along with its related technology and technical data, are described and classified on the EAR Commerce Control List. Many of the item descriptions included on the Commerce Control List include rather technical specifications. An employer may determine an item’s classification under the EAR on its own, with the assistance of counsel, or make a formal request for the United States Bureau of Industry and Security (BIS), the agency responsible for the administration of the EAR, to classify the item.
- 2. What is the foreign worker’s citizenship?** Under the deemed export rule, the country of which the foreign national is a citizen is considered the country of ultimate destination. All countries, including Canada and the United Kingdom, are regulated in some way, as indicated on the EAR Country Chart. Embargoed countries, such as Cuba, Iran, North Korea, Iraq and Rwanda, are highly regulated and in almost all instances the release of technology or technical data to citizens of these countries will require a license (and may be outright prohibited).
- 3. Who is the foreign worker and with what organizations is he or she associated?** The EAR names a number of specific people and organizations to whom, for a number of reasons, an employer may not release regulated technology or technical data. An employer must know the foreign national’s name, and the organizations for which he or she has worked or with which he or she is associated, to determine if those names are included among those listed on the EAR Entity List.

With these three questions answered, an employer can proceed to use the step-by-step analysis provided by the EAR to determine whether a license is required to release technology or technical data to its nonimmigrant workers. The analysis recommended under the EAR, along with the Commerce Control Chart, the Country Chart, the Entity List and the various other applicable regulations, may be found at:

[http://www.access.gpo.gov/bis/ear/ear\\_data.html](http://www.access.gpo.gov/bis/ear/ear_data.html)

It is important to note that even though a product, and the technology and technical data related to those products, is subject to the EAR, a license may not necessarily be required. There are a number of ways a product or technology may qualify for a licensure exception. For example, a product or technology that is publicly available, even if that product or technology is specifically subject to the EAR, is excepted from the otherwise applicable licensure requirements of the EAR.

### **Procedure for Obtaining a Deemed Export License**

Once an employer has decided that a license is required to release technology or technical data to its nonimmigrant worker, it must apply for that license. Deemed export license applications are submitted to the Bureau of Export Administration (BEA). Relatively speaking, the process required to obtain a deemed export license is simpler than that required for the export of a product to a foreign country. Deemed export license applications need to include (1) Form BXA-748P (the general export license application), (2) a Letter of Explanation, and (3) the resume of the foreign national visa applicant. The application itself requires basic information regarding the employer and the nonimmigrant worker, along with specific information regarding how the controlled technology or technical data would be used by the foreign national employee. The Letter of Explanation requires more specific information regarding the use of the controlled technology in the workplace and requires the employer to propose a specific internal technology control plan. Finally, a complete and accurate employee resume is required so the BEA can assess the risk that controlled technology or technical data would be diverted to unauthorized uses or users.

The BEA has provided helpful guidelines to assist employers in applying for a deemed export license. The guidelines can be found at:

<http://www.bis.doc.gov/deemedexports/foreignnationals.pdf>

Dickinson Wright's export control experts can assist you in (1) determining whether licensure is required and (2) obtaining a deemed export license if one is required.

While the deemed export requirements are not new, the inclusion of the new attestation requirement on Form I-129 signal the federal government's increased emphasis on the enforcement of the regulations. Therefore, before making a deemed export attestation on Form I-129, it is imperative that an employer examines both the ITAR and the EAR to ensure it does not violate them by releasing controlled technology or technical data to its foreign national workers without first obtaining a license.

FOR MORE INFORMATION, PLEASE CONTACT:



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<sup>1</sup> Since clients that are in the business of making military-related products are likely already aware of the requirements of the ITAR, this Client Alert primarily addresses only the EAR. Information regarding the regulations under the ITAR can be accessed at: <http://www.pmdtcc.state.gov/>

<sup>2</sup> In a presentation to the members of the American Immigration Lawyer's Association, Kevin Wolf, Assistant Secretary for Export Administration, noted that deemed export control licensing requirements "will affect only a very small percentage of I-129 petitioners because most types of technology are not generally controlled for export or release to foreign persons."