

I-129 Deemed Export Attestation*

ASSOCIATION OF UNIVERSITY EXPORT CONTROL OFFICERS

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

(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.

(Above excerpted from Form I-129, Petition for a Nonimmigrant Worker (OMB No. 1615-0009; Expires 10/31/2013))

QUICK FACTS

Effective Date:
December 22, 2010

Impact:
All foreign national workers petitioning for visa categories H-1B, H1-B1 Chile/Singapore, L-1, and O-1A

WHAT IS THIS AND WHERE DID IT COME FROM?

This new attestation stems from the “deemed export rule” under the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR), which provides that the transfer, release, or disclosure of controlled technical data, technology or ITAR-controlled software to a citizen or national of a foreign country (“foreign person”), even in the United States, is deemed to be an export to that country. Under the EAR and ITAR, the U.S. government regulates the transfer of controlled technical data to foreign person employees. However, inclusion of the modified Part 6 of the I-129 application is the first time export control determinations have been an explicit part of the immigration application process as directed by U.S. Citizenship and Immigration Services (USCIS).

WHAT DOES THIS MEAN?

Educational institutions employing foreign persons must have compliance processes in place that enable cognizant campus offices, including potentially research compliance, human resources, legal, and others, to work together to determine whether a deemed export license is required under U.S. export control laws.

WHY DO INSTITUTIONS NEED TO BE WORRIED ABOUT IT?

Institutions – and the signatory of the I-129 personally – may be subject to criminal sanctions for false statements to the U.S. government if the I-129 form is completed inaccurately. Such criminal penalties would be in addition to penalties imposed under the EAR and the ITAR (e.g. up to \$1 million per violation, up to 20 years in jail, denial of export privileges, debarment from government contracts) for export violations.

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CHALLENGES

During the hiring process, an employer may not know the exact job duties for a particular beneficiary. Some job duties might require a deemed export license, while others may not. Many foreign persons employed at institutions (typically under the H-1B status) either don't conduct technology-related research or conduct only "fundamental research," which is not subject to EAR or ITAR license requirements. However, not all research qualifies as "fundamental research," and such efforts may require an export license for foreign person employees. Once employed, it may be necessary to track changes to a foreign person's job duties resulting in the need for an export license. Whether or not such changes would be considered "material" may also require additional review. Faculty and staff will need to work with the cognizant review office(s) when modifying a beneficiary's job duties to ensure compliance.

WHAT ARE INSTITUTIONS GOING TO DO?

Institutions are currently working on processes to enhance the job description section of their internal forms used to initiate the H-1B, H1-B1 Chile/Singapore, L-1, and/or O-1A visa process. Questions should be included to help departments describe the full range of expected activities for the foreign person employee. Institutions will need full engagement of their faculty and staff members during the hiring process to ensure all requisite information is received to make an appropriate deemed export determination.

SUGGESTED STEPS

- 1) Review current processes and initiate connections between the cognizant offices. These could include Human Resources, International Visa Processing, Export Control, Legal Counsel, etc.
- 2) Determine the volume of applicable visas processed annually as this will affect workload, certification approach, and resource allocation. If overwhelming, determine whether certain visa applications may be excluded from review or sign-off certification.
- 3) Develop a sign-off form to be completed by the cognizant review office. This form should contain questions that will assist with evaluating whether a license might be required (see suggestions below). Retain a copy of this completed form with the petition file.
- 4) Evaluate the need for a process that will allow the institution to track changes in a beneficiary's job duties.

SUGGESTED QUESTIONNAIRE CONTENT

- 1) Will the beneficiary be provided access to any Institution-owned technical data or technology that is considered proprietary or confidential to the Institution?
- 2) Will the beneficiary be provided access to any third party-owned technical data or technology that is considered proprietary or confidential to the third party owner? This includes U.S. government furnished technical data with dissemination controls or other restrictive markings, as well as ITAR-controlled software.
- 3) Will the beneficiary be provided access to equipment specifically designed or developed for military or space applications?
- 4) Will the beneficiary be involved in any research projects?

If so, will any of the research be sponsored, in whole or part, by either the Institution or an external sponsor, including the federal government?

If so, please provide the project identification number(s), if available.

If so, please describe in detail the research that will be performed, including whether the research results will be taught, published or otherwise shared with the interested public.

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