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Immigration Alert

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New Form I-129 Requires Immediate Employer Attention to "Deemed Export" Issues

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Last week, U.S. Citizenship and Immigration Services (CIS) released a revised version of Form I-129, Petition for a Nonimmigrant Worker. This new version of the form—used for H-1B, L-1, and O-1A workers—has many changes, but perhaps the most significant is that CIS now requires employers to certify their compliance with the U.S. Department of Commerce's "deemed export" rules, which govern the release of controlled technology to foreign persons. Employers will be required to use the new Form I-129 starting December 23, 2010.

The instructions for the Form I-129 provide a limited explanation of the requirements pertaining to deemed export licensing requirements. (For more information regarding the "deemed export" rule, see the Commerce Department's FAQs). Employers who have not previously classified their technology on the U.S. export control lists and implemented an Export Management System (EMS) will have to get up to speed quickly in order to comply with the new certification.

What Does the Certification Look Like?

Part 6 of the revised Form I-129 has two parts relating to deemed export.

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.

Under U.S. export laws administered by the Department of Commerce and the Department of State, Directorate of Defense Trade Controls, transfer of technology to foreign persons under certain circumstances (including transfer wholly within the United States) may be considered an "export" even if the technology never leaves the United

States, or is transferred via electronic means—hence the term “deemed” export. In these cases, if an export license would be required to transfer the technology or technical data to an end user in the country of nationality of the foreign person, an export license is required for a deemed export to that foreign person. In order for an employer to certify that an export license is not required to release technology or technical data to the foreign person, the employer must have previously reviewed the Commerce Control List and the U.S. Munitions List, or have appropriately concluded by an export review that its technology or technical data does not appear on either list. Also, employers must classify not only their own proprietary technology and technical data, but also that of third parties, such as customers or vendors, which the foreign person employee has access to in the course of job performance. This may require obtaining export information from such third parties or, if not available, obtaining further classification guidance or rulings from the Commerce Department or Defense Department, as applicable. Any of these efforts could be time consuming.

What Should Employers Do?

By December 23rd, employers need to be prepared to accurately respond to the certification on the Form I-129. Old versions of the Form I-129 will not be accepted after December 22, 2010. Often, export compliance and human resources functions are in different departments with different reporting structures. In order to accurately certify on the new Form I-129, employers should be integrating certain export compliance and human resources functions, particularly relating to foreign person employees that include at a minimum: (a) a mechanism for identifying those positions that involve access to technology and/or technical data that is controlled for export purposes; (b) incorporation of appropriate language in offer letters making the offer contingent upon the ability to obtain any required export licenses; and (c) internal training and education on the deemed export requirements for all personnel involved with visa applications.

Existing EMS programs should be reviewed and updated to incorporate the personnel issues and, if not already part of the EMS, to ensure that a deemed export licensing analysis is being performed each time. Trade compliance personnel and human resources professionals should be working closely with managers and business units to review requisitions for new hires in combination with these requirements.

What Are the Consequences?

We have no enforcement guidance yet on how CIS plans to verify a petitioner’s certification that no export license is required for the foreign person (Box No. 1) or a petitioner’s certification that it will prevent access to controlled technology or technical data until and unless the required authorization is received (Box No. 2). It can be expected that information will be shared with the Bureau of Industry and Security and the Office of Export Enforcement for verification. CIS may itself be verifying these representations during on-site audits. On November 9, 2010, the Obama Administration announced the creation of an “Export Enforcement Coordination Center” within the Department of Homeland Security. The purpose is to unite enforcement resources from seven executive departments and other federal agencies to enhance information-sharing about suspected violators of U.S. export controls and to coordinate efforts to investigate and penalize known violators.

In either case, the new certification will constitute a statement to the U.S. Government affirming review of and compliance with the deemed export rule under penalty of perjury. False or incorrect statements could also create a basis for the U.S. Government to impose civil or and/or criminal penalties for export violations by virtue of the failure to comply with the deemed export rule and the licensing requirements.

Mintz Levin attorneys have significant experience with U.S. export control laws and regulations and related compliance issues, including all export classification and licensing matters relating to both commercial or “dual-use” items, as well as defense industry articles. Our day-to-day advice to clients ranges from assistance with export classifications and deemed and regular export license applications, to advocacy with relevant government agencies on policy issues. We also have created and helped implement effective, integrated, and practical compliance processes that fit our clients’ business structures and needs, and we regularly conduct internal export compliance audits for companies.

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