

To: Our Clients and Friends

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I-129 Form Amended to Require Certification by Petitioner of Compliance with U.S. Export Controls

As of February 20, 2011, the I-129 *Petition for a Non-Immigrant Worker* form for the first time requires companies that desire to sponsor a foreign national for temporary work in the United States to attest to compliance with U.S. export regulations. Although this does not create any new compliance obligations, the required certification has raised awareness about export compliance with regards to the licensing of non-U.S. persons.

The I-129 at Part 6 requires a petitioner to certify, under penalty of perjury, (a) that it has reviewed U.S. export control regulations, namely the International Traffic in Arms Regulations ("ITAR") and the Export Administration Regulations ("EAR") and (b) that: (1) a license is not required to release technology to the foreign person; or (2) if an export license is required, the petitioner will not release controlled technology to the foreign person until it has received a license or other authorization to do so. The I-129 certification requirements apply to temporary foreign workers who seek visas for the following categories:

- **H-1B** – Temporary entry of non-immigrant professionals in a specialty occupation
- **H-1B1** – Temporary entry of non-immigrant professionals from Chile and Singapore
- **L-1** – Temporary entry of non-immigrant professionals for intra-company transfers
- **O-1A** – Temporary entry of non-immigrant professionals of extraordinary abilities

Background

Under the "deemed export rule" in the EAR, a transfer of technology or source code is "deemed" to be an export to the home country or countries of the foreign national. Similarly, the ITAR, in its definition of "export" states that the act of disclosing or transferring technical data to... a foreign person, whether in the United States or abroad, constitutes an export. In order to know whether a license is required to release information to the potential foreign employee, the petitioner must first determine if any such information constitutes technology under the jurisdiction of the EAR, which controls the export of commercial and dual-use technology, or technical data under the ITAR, which controls the export of defense articles and related technical data and defense services. Finally, a determination must be made as to whether the applicable export regulations require a license to export or otherwise release it to the foreign person's country or countries of nationality.

Employment of foreign workers who are temporary or contract employees from a staffing agency presents additional challenges for both the contracting company and the staffing agency, as the staffing agency may not be aware of their employee's access to controlled technology or technical data in the course of their employment. Therefore a staffing agency needs to work closely with the contracting company to ensure the staffing agency has all the information and certifications it needs in order to certify compliance in Part 6 of I-129.

Depending on the nature of your business and what the employee will be doing, the employee may not have access to any information that would require a license under either the EAR or ITAR. For many companies, the amended I-129 form may place a new regulatory hurdle for employing foreign workers, but one that can be overcome with appropriate internal controls to manage access to controlled technology or technical data. An effective export compliance program should ensure that a company has the policies and procedures in place to determine the export jurisdiction of all of its products and related information, including any such information from third party suppliers. Managing export compliance requires active engagement from all functional areas of a company, including human resources, procurement, subcontracting, etc, to ensure they all understand the unique role they play in a company's compliance program. Existing internal controls should be reassessed periodically to ensure they continue to meet the requirements of U.S. export regulations.

Prepared by: Susan M.C. Kovarovics
(202) 508-6132
susan.kovarovics@bryancave.com

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Bryan Cave LLP International Trade Client Service Group

Los Angeles

Evan Y. Chuck, Partner, CSG Leader
David Stepp, Partner
Nicole Simonian, Partner
Andrew Klungness, Partner
Michael Zara, Associate
Jackson Pai, Associate
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Washington

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Fred Bartelsmeyer, Partner

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(admitted in Mexico)
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London

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Dr. Michael Leue, Partner
Dr. Staffan Wegdell, Counsel

Paris

Joseph Smallhoover, Partner
Jilali Maazooz, Partner

*Non-legal professionals

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