

WSGR ALERT

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EXPORT CONTROL CERTIFICATION REQUIRED FOR COMPANIES THAT HIRE AND SEEK VISAS FOR CERTAIN FOREIGN NATIONAL EMPLOYEES

Beginning on December 23, 2010, companies petitioning for certain non-immigrant visas to employ foreign persons in the United States will, when completing a Petition for a Nonimmigrant Worker – Form I-129, be required to certify whether or not an export license is required for that foreign person to perform his or her job at the company. This newly added certification (shown below) ensures that the petitioning company is complying with export control laws relating to the release of technology or technical data for the development, production, or use of U.S.-origin items to that foreign person (“deemed export laws”). This is the first time that the visa petition process has required an export-control-related certification. Making an inaccurate or false certification to a U.S. government entity can carry stiff penalties.

Relevant U.S. Export Control Laws

The two primary sets of U.S. export control laws—the Export Administration Regulations (EAR), which control all commercial items such as software, medical devices, semiconductors, and computers, and the International Traffic in Arms Regulations (ITAR), which control items specifically designed, developed, configured, adapted, or modified for a defense or intelligence application—have jurisdiction over almost all exports of U.S.-origin goods, software, and technologies. This jurisdiction includes the release of technology or technical data for the development, production, or use of U.S.-origin items to foreign persons in the United States (a “deemed export”). As a general rule, a deemed export license is required for the release of technology or software to a foreign person if the export or transfer of that software or technology would require a license for export to the foreign person’s country of citizenship.

Technology, which includes technical data, is broadly defined under the EAR and ITAR. It generally covers the specific information necessary for the “development,” “production,” or “use” of a product. Examples of technology include, but are not limited to, blueprints, manuals, drawings, instructions, and plans. It also covers information that may be relayed in employee technical meetings, emails, and other common interactions within a U.S. company.

New Requirement on Form I-129

The addition of the export licensing certification on the Form I-129 now makes export controls an important piece of the visa petition process. The new certification is limited to petitions for H-1B, H-1B1, L-1, or O-1 visas. These are the most popular visa types for highly skilled, foreign national employees who may even hold advanced degrees from U.S. educational institutions. The certification is as follows:

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.

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Export Control Certification . . .

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Hence, prior to petitioning for the issuance of certain visas, companies must review both the EAR and ITAR to determine how the software or technology that the foreign person will need to access to perform his or her job is controlled under the EAR or the ITAR, and whether a license is required prior to disclosure to the foreign person. It is important to recognize that while the new certification is limited to certain visa petitions, the laws governing deemed exports apply to technology transfers to any foreign persons in the United States, including, for example, employees, visitors, and potential customers, regardless of the type of visa.

Conclusion

The new Form I-129 certification does not represent a change in the export control laws, but certainly increases compliance requirements. Failure to obtain a deemed export license, even inadvertently, can lead to significant administrative fines and penalties. Further, falsely certifying that an export license is not required may lead to a criminal action against the company, certifying individual, or both.

While all companies that hire foreign persons must comply with this new certification and the export control laws, companies hiring non-U.S. nationals from Cuba, Iran, North Korea, Sudan, Syria, Russia, China, and India, as well as those dealing with sensitive software and technologies, will be some of the hardest hit by the requirements. Licenses are most frequently required for persons from these countries and/or for technologies that are more sensitive or cutting edge.

Wilson Sonsini Goodrich & Rosati's export control and economic sanctions practice would be pleased to help your company understand and comply with the new I-129 certification; determine whether a deemed export license is required, as well as classify products, software, and technologies for export control purposes; and provide guidance on implementing policies and procedures for compliance with both new and existing legal and regulatory requirements. For further information, please contact Josephine Aiello LeBeau, Melissa Mannino, or Joshua Holzer in the firm's export controls and economic sanctions practice.



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