

LEGAL UPDATE

January 2011 By: Colleen L. Caden and Jeffrey C. Johnson

EXPORT ATTESTATION FOR FORM I-129

This legal update includes background information regarding the attestation on the United States Citizenship and Immigration Service's (USCIS) nonimmigrant visa application (Form I-129) regarding export control compliance.

USCIS AND CERTIFICATION REGARDING EXPORT CONTROL

The USCIS released a new Form I-129 that became effective on December 23, 2010. The form contains a new attestation that reads:

“With respect to 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 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 petition has received the required license or other authorization to release it to the beneficiary.”

Effective February 20, 2011 all employers filing a Form I-129 on behalf of applicants for H-1B, L-1 and O-1 visas must respond to this attestation.

OVERVIEW OF EXPORT CONTROLS & COMPLIANCE WITH USCIS

The “deemed export” rule is an export of technology or source code . . . that is deemed to take place when it is released to a foreign national within the United States. By way of example, a deemed export includes: technology released for export when it is available to a foreign national for visual inspection; when there is a conversation about the technology; or when technology is made available by practice or application. Broadly speaking, the EAR is concerned with “dual use” technologies or those that have both commercial and military or proliferation applications. The ITAR focuses on dedicated military articles or technology. Items not subject to the EAR include most publicly available technologies and software.

A relatively small percentage of U.S. exports require a license. In the government’s view, the definition of technology is quite broad and may include any information that is proprietary and is useful to how the company conducts business. Technology that may require an export license includes electronics, computers, sensors and lasers and materials processing, among other categories. To make a determination as to whether technology is subject to export control licensing requires an analysis of the technology against the export control statutes as well as the foreign nationals who may have access to the technology.

With regard to the export attestation on the USCIS Form I-129, a license may be required based on what the technology is, the nationality of the recipient (i.e., where the technology is being

“deemed” exported), who the end-user is or what the end-use of the item will be. Therefore, in completing the Form I-129 attestation, the employer must determine:

- What is it exporting? If the information the company is releasing requires a license from the Department of Commerce it will be determined based on a review and analysis of the Export Control Classification Number (ECCN) and the Commerce Control List (CCL).
- Where is it exporting to? More specifically, is the foreign national a citizen of a country to which the export of the applicable technology requires a license? Generally, technology exported to embargoed countries and those countries designated as supporting terrorist activities such as Cuba, Iran, Libya, North Korea, Sudan or Syria requires a license.
- Who will receive the item? Certain individuals and organizations are prohibited from receiving specified U.S. technology exports, and others may only receive exports if the technology has been licensed.

Pryor Cashman advises clients on export control issues including whether the company’s technology is subject to export control licensing, advising on

the screening for export control issues in recruitment and hiring as well as with assisting clients and their employees during export control inquiries from U.S. government agencies such as the Federal Bureau of Investigation’s Counterintelligence Department.

CONCLUSION

If your organization requires a license to release technology or technical information to a foreign national employee, we would be pleased to discuss this further with you.

The foregoing is merely a discussion of export attestation for Form I-129. If you would like to learn more about this topic or how Pryor Cashman LLP can serve your legal needs, please contact Colleen Caden at (212) 326-0147, ccaden@pryorcashman.dom or Jeffrey Johnson at (212) 326-0118, jjohnson@pryorcashman.com.

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Colleen Caden joined Pryor Cashman in 2009. She works with a diverse client base including Fortune 100 and 500 companies and represents clients in the professional sports, consumer products, financial services, media, consulting, higher education and health care industries.

Ms. Caden has experience in all aspects of immigration and nationality law and ensuring compliance with immigration laws, U.S. Department of Labor regulations and the U.S. Citizenship and Immigration Services programs. She has extensive experience advising clients on:

- The development and implementation of immigration programs and policies
- Strategic planning of long-term and short-term immigration needs to meet their unique circumstances and needs
- Immigration issues related to changing corporate structure

Ms. Caden also has a wealth of experience in preparing temporary visa petitions and applications for permanent residence. She also regularly speaks on U.S. business immigration issues.

While at Brooklyn Law School, Colleen served as Articles Editor of The Journal of Law and Policy and was Vice President of the Moot Court Honor Society.



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Jeffrey Johnson is a partner specializing in the transactional aspects of technology and intellectual property exploitation (patents, trade secrets, trademarks and copyright) including, in particular, all aspects of mergers and acquisitions, joint ventures, strategic alliances, private placements and licensing in the biotech, entertainment, Internet, pharmaceutical, software and telecommunications industries.

Jeffrey typically focuses on transactional matters principally involving intellectual property or goods and services the value of which is largely attributable to intellectual property. He has represented, among others:

- A public biotechnology company negotiating and documenting numerous strategic alliances, research and development collaborations, co-promotion agreements, patent and know-how licenses, and other agreements relating to the development and exploitation of the company's core technologies
- A public telecommunications company in connection with a strategic reorganization to maximize the value of its patent portfolio and licensed rights
- A private equity fund in connection with the acquisition and disposition of patent portfolios
- A pharmaceutical company's bioinformatics group negotiating and documenting numerous strategic alliances, software development agreements and software licenses, as well as the group's form agreements for the provision of bioinformatics services and the licensing of genomic and proteomic databases
- A technology-transfer company in connection with the sale of a portfolio of patents governing web-enabled software updating, active desktop and offline browsing
- A Korean cell phone manufacturer in connection with the negotiation and documentation of a hand-set supply agreement with large, U.S.-based cell phone service provider
- A telecommunications company in connection with its sponsored research agreements with various U.S. and foreign educational institutions
- A health services company in connection with the purchase of an information management business including a large, proprietary prescription drug database
- A European-based public company in connection with the negotiation and documentation of a strategic alliance providing for the joint development and commercialization of an ASP-based software application useful for the on-line calculation, reporting and remittance of sales tax obligations
- A public pharmaceutical company in connection with the disposition of certain patent portfolios and related clinical data and know-how useful in connection with small molecule anti-genomic therapeutics and small molecule anti-bacterial therapeutics
- A privately held company in connection with the sale of a portfolio of patents governing "Web 2.0" search methodologies
- A public biotechnology company in connection with the negotiation and documentation of agreements providing for the further clinical development and commercialization of a Phase I pharmaceutical compound in collaboration with a Fortune 100 pharmaceutical company, including a license agreement, a co-promotion agreement and a manufacturing and supply agreement

Jeffrey has been an invited speaker and panelist at a variety of public and private events.