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Homeland Security Creates I-9 Audit Fusion Center

Soon, the Department of Homeland Security (DHS) will announce the creation of an I-9 Audit Fusion Center. This center will be staffed by approximately 20 forensic auditors who will assist local DHS offices executing I-9 audits for large employers. With the creation of this new center, employers can expect DHS to ramp up enforcement and conduct I-9 audits of larger employers. It is more important than ever for employers to ensure their I-9s are in good order, provide I-9 training for employees handling I-9 completion and compliance, and, for those larger employers, to ensure that there is a consistent company-wide policy in place for the treatment of I-9s and the increased possibility of an I-9 audit.

The USCIS Nonimmigrant Petition and Export Control Compliance

Effective December 22, 2010, employers submitting certain Form I-129 petitions for a nonimmigrant classification (for H Temporary Worker, L Intracompany Transferee and O Extraordinary Ability visa petition approvals) must certify compliance with deemed export rules.

What is a "Deemed Export"?

U.S. export control laws apply to the shipment of products or technical data from the United States to another country. Under these laws, the sharing of technology or source code with a foreign national may also be considered a "export." This sharing is an "deemed export" even if the foreign national is an employee, working for that employer within the United States, because the sharing of the knowledge is "deemed" an export to the foreign national employee's home country.

What is an Employer's Obligation in Certifying a Deemed Export on the Form I-129?

The employer must indicate on its Form I-129 that it has reviewed the applicable export regulations (called the Export Administration Regulations ("EAR") and the International Traffic in Arms Regulations ("ITAR")) and has made a determination as to the applicability of those regulations with respect to the foreign national employee who is the beneficiary of the employer's I-129 petition. Specifically, the employer must check one of the following boxes:

- A license is not required from either the U.S. Department of Commerce or U.S. Department of State to release such technology or technical data to the foreign person; or
- A license is required from the U.S. Department of Commerce or 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.

To accurately complete this section of the Form I-129, the employer's signator will need to consult with the company officials responsible for export compliance at the very outset of initiating an H or L or O nonimmigrant petition on behalf of a foreign national.

What Challenges Does this Present to Employers?

For many employers, this requirement will pose some significant challenges. For example, at the start of hiring a new engineer or software developer, an employer may not know the exact types of projects on which the new hire will work. Some projects might require a deemed export license, while other projects and technologies might not. Furthermore, how the technology is used and for whom it is being developed will also impact the employer's export control obligations. Development for civilian uses is governed under a separate export control regulation (EAR) compared with development for government defense purposes (ITAR). Because of these intricacies, employers should rely on the expertise of their export control specialists in determining how to respond to the question posed on the I-129.

What are the Penalties for Failing to Complete the Certification Correctly?

An employer's certification on the Form I-129's export control question is considered a statement made to the U.S. government. Therefore, inaccuracies may be treated as a false statement to the government and could subject the employer to criminal penalties/sanctions. Furthermore, for immigration purposes, if the government determines that the statement was false on the Form I-129 it could deny the petition or revoke a previously-approved petition, and leave that foreign national employee without status or work authorization. In light of these penalties, employers must accurately and carefully assess the applicability of this new deemed export reporting obligation.

Visa Processing in India Now More Convenient

The U.S. Department of State has made the visa application process more convenient for Indian nationals and anyone else applying for a U.S. visa at a U.S. embassy or consulate in India. Effective immediately, the U.S. Embassy in New Delhi and the U.S. Consulates in Mumbai, Chennai, Kolkata and Hyderabad now accept visa applications from applicants regardless of their home address or city of residence. Applicants may chose to apply at any one of these U.S. visa issuing facilities regardless of where they reside in India.

December 2010 Visa Bulletin -- Little Movement in EB-2 and EB-3

The U.S. State Department (DOS)'s December Visa Bulletin reflects very little movement in the permanent resident or "green card" Employment Second Preference (EB2) and Third Preference (EB3) categories. The EB2 "all chargeability" category remains current, while the cutoff date for EB2 China advances only one week to June 8, 2006. The cutoff date for EB2 India shows no movement and remains at May 8, 2006. The EB3 all-chargeability date advances one month to February 22, 2005, and EB3 China date advances two weeks to December 8, 2003. The cutoff date for EB-3 India shows no movement and remains at January 22, 2002. The Employment First Preference category remains current across-the-board.

H-1B Numbers are Steadily Moving Toward the Annual Cap

As of November 19, 2010, USCIS had received 48,977 cap subject H-1B petitions, and 17,836 H-1B petitions in the advanced U.S. degree category. The quota is 65,000 for "regular" H-1B petitions, and 20,000 for those with advanced degrees from U.S. schools. Over the last two months, USCIS has received approximately 1500 new petitions per week.

New USCIS Filing Fees Effective November 23, 2010

USCIS has published a new "Fee Schedule" to incorporate all of the filing fee changes effective November 23, 2010. The new fees can be located at USCIS's website here. While most filing fees have increased, some filing fees have decreased slightly. Some key changes include:

- I-907 Request for Premium Processing increases from $1,000 to $1,225
- I-129 Petition for Nonimmigrant Workers (H, L, O, etc.) increases from $320 to $325
- I-539 Application to Extend Nonimmigrant Status decreases from $300 to $290
- I-140 Immigrant Petition for Alien Worker increases from $475 to $580
- I-485 Application to Register Permanent Residence or Adjust Status for most applicants increases from $1,010 to $1,070
- I-765 Application for Employment Authorization increases from $340 to $380
- I-131 Application for Advance Parole Document increases from $300 to $360
- I-90 Application to Replace Permanent Resident Card increases from $290 to $365