ALERTS AND UPDATES

Export Control Compliance for Employers and Other Immigration Law Updates

December 20, 2010

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New Export Control Compliance and Certification Requirements for Employers Who Seek to Hire Certain Nonimmigrants

Beginning on December 23, 2010, companies sponsoring foreign nationals for certain employment-based nonimmigrant visas will be required to certify that they have complied with the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR). Although businesses and universities objected to this requirement during the notice-and-comment period established by U.S. Citizenship and Immigration Services (USCIS), the certification requirement was made part of the new I-129 Nonimmigrant Visa Petition, which will supersede all previous editions of the form, as of December 23, 2010.

The certification requirement mandates that employers comply with U.S. export controls applicable to "deemed exports"—*i.e.*, releases of technology to foreign nationals in the United States. Employers wishing to hire foreign nationals under H-1B and H-1B1 Chile/Singapore petitions for professionals in a specialty occupation; L-1 petitions for intracompany transfers of executives, managers and specialized knowledge professionals; and O-1A petitions for foreign nationals of extraordinary ability in the sciences, education, business or athletics may want to ensure they have adequate internal controls to enable them to assess compliance with deemed export controls and provide accurate representations concerning such compliance at the time of filing the visa petition.

Virtually all exports of technical data and technology from the United States are subject to EAR or ITAR. The EAR controls commercial items, such as software, computers, semiconductors and medical devices found on the Commerce Control List, while the ITAR controls defense-related items, technology and services, which are designated on the U.S. Munitions List.

The latest version of Form I-129 will require the employer to select one of the two options listed below when making the certification:

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.

All companies that hire foreign nationals will be required to make the above certifications, but companies hiring non-U.S. nationals from China, Cuba, India, Iran, North Korea, Russia, Sudan, and Syria, as well as all companies handling sensitive software or technologies are likely to be most impacted by the deemed export laws.

In practical terms, this indicates that employers should identify controlled technology and technical data (what is controlled and to which countries) and determine whether the job requires, or would permit access to, controlled technology or technical data by any means. In the event of an audit, employers should be prepared to show why the technology was not subject to export controls, that access was restricted, or that any necessary licenses were obtained. It is likely that business, legal, compliance and human resources teams will need to be involved in these reviews and petitions. While relatively few dual-use items controlled by EAR require an export license, certain types of items may require licenses to nationals from countries of particular concern. ITAR-controlled items in most instances will require a license for export to foreign nationals.

In effect, the revised Form I-129 appears to impose on petitioning companies an affirmative obligation to conduct a self-assessment on whether any of their technology or technical data would be subject to EAR / ITAR and, if so, whether a license is required before the foreign person covered by the application has access to that technology or technical data. Companies should consider carefully reviewing their export-control compliance procedures to ensure that they are in compliance with U.S. export-control laws before making the new certifications.

Current H-1B Visa Count

On December 10, 2010, the USCIS released its most recent count of H-1B petitions filed for Fiscal Year 2011. Out of 65,000 regular cap H-1B visas, 52,400 petitions have been filed, and out of an available 20,000 H-1B Master's Exemption visas, 19,100 have been filed. In Fiscal Year 2010, the cap was reached in mid-December 2009. A continuation of the filing volume for the past several months indicates that the total H-1B allocation might not be exhausted until after the holiday season. Nonetheless, employers may want to act quickly whenever a candidate for H-1B sponsorship has been identified. H-1B demand can vary greatly, as shown by an unusual one-week spike in USCIS receipts in mid-August 2010. In addition, December university graduates may create an increase in demand, as well as those F-1 students whose Optional Practical Training (OPT) employment authorization will be expiring in 2011.

Current PERM Processing Times

The U.S. Department of Labor (DOL) has updated its estimated processing times for PERM applications. As of November 30, 2010, DOL is processing non-audited PERM cases to completion that were filed in November 2010, and is processing audited cases that were filed in November 2008. The DOL is currently processing cases in which standard appeals were filed in May 2008.

Visa News from the U.S. Department of State

- The U.S. Department of State has announced that the U.S. Embassy in New Delhi and the Consulates General in Mumbai, Chennai, Kolkata and Hyderabad will now accept visa applications from across India, regardless of the applicant's city of residence.

- The U.S. Embassy in Mexico recently announced that beginning on January 10, 2011, most applicants at the embassy will go to Applicant Service Centers prior to their consular interview to have their biometric information collected and reviewed by a consular officer prior to the interview.

- Applicants also will pay only one application fee, covering the appointment, application and courier fees. The current application fee will remain the same at $140 USD for a tourist application, $150 USD for petition-based cases (including temporary worker cases) and $390 USD for treaty-trader and investor cases. Applicants at the U.S. Consulates in Ciudad Juarez, Monterrey and Nuevo Laredo will no longer be required to pay the $26 USD surcharge.

January 2011 *Visa Bulletin* Released

The U.S. Department of State has released its January 2011 *Visa Bulletin*, which summarizes the availability of immigrant numbers during January. Consular officers are required to report to the Department of State documentarily qualified applicants for numerically limited visas; the USCIS in the Department of Homeland Security reports applicants for adjustment of status.

Immigrant visas have significantly retrogressed for family sponsored preference categories (FB-1 to FB-3), effective with the January 2011 *Visa Bulletin*. The level of demand for visa numbers in the family sponsored preference categories was very low from early 2009 through September 2010. Accordingly, the cut-off dates for most family preference categories were advanced at a rapid pace, in an apparent attempt to generate demand so the annual numerical limits could be fully utilized. As a result of the accelerated level of demand over the last few months, the State Department has retrogressed most of the worldwide cut-off dates, effective January 1, 2011. For example, the family sponsored preference 2A category (spouse and children of lawful permanent residents) for most countries retrogressed from August 1, 2010, to January 1, 2008. The family sponsored 2B category for most countries retrogressed from June 1, 2005, to April 15, 2003, in the January 2011 *Visa Bulletin*.

According to the State Department, it is unlikely these categories will recover for some time, since demand for family sponsored preference categories does not appear to be subsiding.

For employment-based immigrant visas, there has been no change to the priority dates. All EB-1 priority dates remain current, and EB-2 priority dates are current for foreign nationals from all countries, except China and India. The priority date cut-off for Chinese nationals in January is June 22, 2006 (advanced by two weeks from December 2010), and the priority date cut-off for Indian nationals in January is May 8, 2006 (no movement). There is a continued backlog for foreign nationals from all countries in the EB-3 category, most notably:

China: December 15, 2003 (forward movement of one week)
India: February 1, 2002 (forward movement of one week)
Mexico: April 15, 2003 (forward movement of nine-and-one-half months)
Philippines: March 22, 2005 (forward movement of one month)
Rest of the World: March 22, 2005 (forward movement of one month)

For Further Information

If you have any questions about this *Alert*, please contact any of the attorneys in our Employment, Labor, Benefits and Immigration Practice Group or the attorney in the firm with whom you are regularly in contact.