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Technology Exports: Uncertainty Around Form I-129 Persists

By Thaddeus McBride, Mark L. Jensen and Corey Phelps

Beginning on February 20, 2011, the U.S. Bureau of Citizenship and Immigration Services ("CIS") assumed a role in the U.S. Government's increasing regulation of technology exports. The new role for CIS relates to the transfer of controlled technology or source code, sometimes referred to as "deemed exports," to non-U.S. nationals.

Questions exist regarding how information collected by CIS in its role may be used by the two principal U.S. agencies involved in administering and enforcing U.S. export controls, the U.S. Department of Commerce, Bureau of Industry and Security ("BIS") and the U.S. Department of State, Directorate of Defense Trade Controls ("DDTC"). In this uncertain environment, many employers are struggling to identify their vulnerabilities and develop efficient ways to comply with the new requirements.

The focus of uncertainty is the CIS Form I-129, the "Petition for a Nonimmigrant Worker." Although in use for some time, the I-129 was amended in November 2010 to include a new Part 6 that requires that employers take special measures in hiring a non-U.S. worker under the H-1B (Specialty Occupations), H-1B1 (Chile/Singapore), L-1 (Intracompany Transferee), or O-1 (Extraordinary Ability or Achievement) categories. The employer must certify that the employer has (i) reviewed the Export Administration Regulations ("EAR") and International Traffic in Arms Regulations ("ITAR"), and (ii) determined that any release of technology to the non-U.S. worker either does not require an export license or that the worker will be screened from that technology until appropriate authorization is obtained.

To date, BIS, CIS, and DDTC have issued only limited guidance about the use of the I-129. For example, in March 2011, the Ombudsman's office of CIS indicated that the agency did not plan to follow-up with employers about the information – regardless of the content of that information – provided by the employer in Part 6. Similarly, a BIS representative has indicated that employers who do not know whether controlled data or technology will be shared with the non-U.S. employee should make their best guess in Part 6 with, as necessary, an explanation in Part 9 of the I-129. (This advice may be cold comfort for many employers since there is no indication that an employer who makes its best guess will have a safe harbor or other protection

from liability if the guess is wrong.) In addition, *ad hoc* guidance obtained from the agencies about how to complete the I-129 has been inconsistent. Uncertainty thus persists as to how data collected from the form will be shared with BIS and/or DDTC, and what consequences may result from certifications.

This nebulous state of affairs appears to be a result of the difficulty of implementing the cross-agency and cross-departmental aspects of the new requirement. CIS, which previously had virtually no role in export controls, seems to have been charged with, at the least, collecting data on technology exports for BIS and DDTC. Yet it is not clear that BIS or DDTC necessarily have the resources to analyze or act upon data that CIS is gathering.

Employers of course are experiencing a similar challenge. Human Resources personnel may be turning to immigration counsel to address highly fact-specific questions about export compliance. Senior managers are being asked to certify as to export control issues that they may not have even known they had.

To deal with these challenges, employers need to plan ahead for any hires of non-U.S. persons. Employers have to determine whether they have controlled technology or source code, and then determine whether a license is required for sharing any such data with non-U.S. employees. This involves classifying goods, materials, software, and all related technical data that the employer may manufacture or otherwise handle. Employers should identify which, if any, of their business sectors may deal with controlled technology, then prioritize review of those sectors to determine whether an export authorization may be required for a non-U.S. employee to join that sector.

It is possible to manage compliance with Part 6 of the I-129 as part of an overall trade controls compliance effort. This involves monitoring guidance from the various government agencies involved in implementation of and enforcing the new requirements of the I-129. More important, however, is for employers to understand the technology and items they have access to and use. Such oversight is the best way to avoid the problems and uncertainties being caused in these early days of Part 6 of the I-129.

Authored by:

Thaddeus McBride
202) 469-4976
tmcbride@sheppardmullin.com

and

Mark Jensen
(202) 469-4979
mjensen@sheppardmullin.com

and

Corey Phelps
(202) 469-4981
cphelps@sheppardmullin.com