

The New Export Control Attestation Requirement on Form I-129

Q: Where is the export control question on the new Form I-129 and what does it say?

Part 6 of the new version of Form I-129 states:

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:

* A license is not required from either the U.S. Department of Commerce or the 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 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 to the beneficiary until and unless the petitioner has received the required license or other authorization to release it to the beneficiary.

The petitioner must check one of the above boxes on the form.

Q: What is controlled “technology” and “technical data”?

“Technology” and “technical data” that are controlled for release to foreign persons are identified on the Export Administration Regulations (EAR) Commerce Control List (CCL) and the International Traffic in Arms Regulations (ITAR) U.S. Munitions List (USML). The Department of Commerce Bureau of Industry and Security (BIS) administers the EAR. The Department of State Directorate of Defense Trade Controls (DDTC) administers the ITAR. The EAR uses the term “technology” to refer to information for the development, production or use of “dual-use” products or software.

“Technology” that is required for the development, production or use of items on the EAR’s CCL may be subject to export licensing and other restrictions, depending on the nature of the technology, the destination, the end-user and end-use. An export of controlled technology or technical data can occur when it is disclosed to or transferred to a foreign person, whether in the United States or abroad.

Specifically, section 734.2(b)(2)(ii) of the EAR (15 CFR §734.2(b)(2)(ii)) states that an export of technology to a foreign national in the United States is “deemed to be an export to the home country or countries of the foreign national.” This is commonly referred to as the “deemed export” rule.

While the ITAR does not use the phrase “deemed exports,” the ITAR contains a similar concept. Section 120.17(a)(3) of the ITAR (22 CFR §120.17(a)(3)) states that an export occurs when “technical data” is disclosed (including oral or visual disclosure) or transferred to a foreign person in the United States.

Therefore, if an export license is required to export EAR controlled technology or ITAR controlled technical data to a certain country, an export license or other authorization will be required to disclose or transfer such technology to a foreign national of that country located in the United States.

Q: Where can I find the applicable regulations?

BIS is responsible for issuing “deemed export” licenses for the release to foreign persons of EAR controlled technology. DDTC is responsible for issuing export licenses and authorizations for the release of ITAR controlled technical data to foreign nationals in the United States.

Information about the EAR and how to apply for a deemed export license from BIS can be found at www.bis.doc.gov. Information about EAR’s requirements pertaining to the release of controlled technology to foreign persons is at www.bis.doc.gov/deemedexports.

Information about the ITAR and how to apply for an export license from DDTC can be found at www.pmdtc.state.gov. Information about the ITAR’s requirements pertaining to the release of controlled technical data can be found at:

http://www.pmdtc.state.gov/faqs/license_foreignpersons.html.

Q: Why is this issue relevant to a visa petition on behalf of a nonimmigrant foreign national?

As noted above, U.S. law prohibits the “export” of controlled technology and technical data to certain foreign nationals located within the United States without a license to do so. U.S. law treats as an export the release of controlled technology or technical data to a foreign national working in the United States, even if the company does not engage in any other exporting activities.

Technology or source code is considered “released” for export when it is made available to foreign nationals for visual inspection (such as reading technical specifications, plans, blueprints, etc.), when technology is exchanged orally, or when technology is made available by practice or application under the guidance of persons with knowledge of the technology. Such exports of controlled technology or technical data must be authorized through an export license issued by the appropriate government agency before release to the nonimmigrant foreign national.

Therefore, to properly complete the new I-129 form, an employer must first classify the technology or technical data that will be released to or be accessed by a prospective foreign national employee to determine whether an export license may be required to be obtained from BIS or DDTC before releasing such technology or technical data to the foreign national.

Q: To what visa classifications does the new attestation apply?

H-1B, H-1B1, L-1, and O-1A.

For more information please feel free to contact us at:

David H. Nachman, Esq.
NACHMAN & ASSOCIATES, P.C.
Immigration and Nationality Attorneys
VISASERVE PLAZA
487 Goffle Road
Ridgewood, New Jersey 07450

Phone (201) 670-0006 (x100)

Facsimile (201) 670-0009

WE ALSO HAVE NEW YORK OFFICES LOCATED AT 7 WEST 36TH STREET, 14TH FLOOR, NEW YORK, N.Y. 10018 (NEAR FIFTH AVENUE).

FOR INFORMATION ABOUT OUR OFFICES IN MONTREAL AND TORONTO, CANADA AND
OUTBOUND IMMIGRATION OPTIONS TO CANADA PLEASE E-MAIL US AT
INFO@VISASERVE.COM.

YOU CAN ALSO VISIT US ON THE WORLD WIDE WEB AT WWW.VISASERVE.COM.