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TOPIC:

EXPORT COMPLIANCE DURING THE VISA APPLICATION PROCESS: THE NEW I-129 FORM AND ITS IMPLICATIONS FOR HIGHER EDUCATION

INTRODUCTION:

The publication of the revised Form I-129, "Petition for a Nonimmigrant Worker," has sparked much discussion within the higher education community, and focused new attention on the issue of "deemed exports" – the legal concept that the release of certain controlled information or data to a foreign national employee within the United States is "deemed" an export to that employee's home country. Through the new Part 6 of the I-129, the United States Citizenship & Immigration Services ("USCIS") – for the first time – requires employers to certify their compliance with deemed export licensing requirements as part of the visa application process for certain nonimmigrant workers. As a legal matter, little has changed, as employers of nonimmigrant workers have long been subject to export control laws. Yet as a practical matter, this new part of the I-129 forces colleges and universities to address export compliance earlier in the hiring process, and will require increased cooperation between institutional officials across departments.

This NACUANOTE highlights the recent changes to the Form I-129, provides an overview of the export control regime that this new form invokes, addresses the issues that colleges and universities are most likely to face as a result of the new form, and suggests best practices to help institutions comply with the new form by the mandatory deadline of February 20, 2011.

DISCUSSION:

The New I-129 Form

Employers, including colleges and universities, use the Form I-129 "Petition for a Nonimmigrant Worker" to temporarily bring foreign national employees to the United States. The petition, once approved, usually facilitates the issuance of a nonimmigrant visa to the employee, who may then apply for admission to the United States and report to work [1]. Before the recent revisions, the I-129 did not require much more than the basic information about the employer/petitioner, the nature of the employment, and biographical data of the beneficiary – information directly connected to ensuring that the requirements of a particular nonimmigrant visa classification were met.

The new Part 6 of Form I-129, however, introduces export controls into the visa petition process for the first time. Specifically, beginning February 20, 2011, employers filing for workers in the H-1B, H-

(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.

These two deceptively simple statements now require college and university officials involved with visa petitions to understand the basics of U.S. export control law.

The Export Control System and "Deemed Exports" to Foreign Nationals

The U.S. export control system, which has existed in various forms since the Cold War, seeks to protect national security and maintain the economic competitiveness of the United States [2]. The current export control regime is rooted in two regulatory frameworks: the Export Administration Regulations [3] ("EAR") and the International Traffic in Arms Regulations [4] ("ITAR"). The Department of Commerce, Bureau of Industry and Security, administers the EAR, which regulate the export of "dual-use" (i.e. commercial and military) articles, software, and technology [5]. The Department of State administers the ITAR, which regulate the export of defense articles and technology [6].

This regime now finds its way into the visa petition process through Part 6 of Form I-129 and the notion of "deemed exports." As more fully explained below, the transfer of information, technology, or technical data covered by EAR or ITAR to a foreign national in the United States may be "deemed" an export to the foreign national's home country, just as if a physical shipment to that country had been made. As such, a license may be required before such a release may occur, which is precisely what Part 6 of the new I-129 is meant to highlight. Though the export control regime is complicated, college and university officials charged with filing visa applications will now need a general understanding of the EAR and ITAR, especially with respect to deemed exports.

The EAR

Determining whether an export license is required under the EAR to release technology or technical data to a foreign national essentially involves three questions:

(1) Is the technology or technical data "subject to the EAR," or does it fall under an exemption or license exception for publicly available technology, "educational information," or "fundamental research?"

(2) Does the "release" of such data constitute a "deemed export?"

(3) If the data or information to be released is subject to the EAR and no license exception or exclusion exists, does the foreign national's citizenship require that a license be obtained for such an export?

With respect to the first question, the technology or technical data released to the foreign national will only require a license under the EAR if such information is "subject to the EAR." [7] As noted above, the EAR control "dual-use" technologies, which "can be used both in military and other strategic uses (e.g., nuclear) and commercial applications." [8] Under the EAR, "technology" is defined as, "specific information necessary for the 'development,' 'production,' or 'use' of a product." [9] Such information may take the form of "technical data" as presented in "blueprints, plans, diagrams, models, formulae, tables, engineering designs and specifications, manuals and instructions written or recorded on other media or devices such as disk, tape, [or] read-only memories." [10] The particular technologies and technical data that are subject to the EAR are addressed in Part 734.2 and enumerated in Part 774 of the EAR, known as the Commerce Control List ("CCL") [11].

It is also important to note that broad exemptions from the EAR exist, many of which are applicable

Issues that Colleges and Universities are Most Likely to Face

Burdens will fall differently depending on the nature and size of institutions.

The new deemed export attestation in Part 6 must be completed by all petitioners, for all H-1B, H-1B1, L-1, and O-1A petitions, regardless of the nature of the petitioner's institution or the duties to be performed by the foreign national beneficiary. This may impose additional burdens, depending on the type of petitioning institution.

For example, a major research university that is petitioning for a researcher in nanotechnology will likely already have in place an export control office responsible for ensuring compliance with export control laws. Such a university will likely be able to use the expertise and knowledge of that office to complete Part 6 for all university positions, with relatively little additional burden. At the same time, a small liberal arts college petitioning for a professor in Latin American studies must also complete Part 6. Though this institution may not have a dedicated export control office, it would also be exceedingly rare that its employees would handle technology or information subject to the EAR or ITAR. Thus, such institutions may find it sufficient to train a few key personnel to spot the rare situations that would warrant outside export counsel. The burden may actually fall most heavily on mid-sized institutions with robust science and engineering programs, where export control is a real concern and compliance responsibilities may be dispersed throughout the institution. These institutions may find it necessary to establish a dedicated office or officer for export controls.

No matter the size or nature of the institution, a discussion involving the General Counsel and the official that prepares the visa petition must occur to determine who will review the necessary regulations, document the process, and execute the certification.

What if we cannot predict, at the time of filing, whether the employee will be exposed to controlled information or technology? What if, after filing and approval of a petition, things change and the beneficiary will require a license in order to access controlled technology or technical data?

The deemed export certification requires information at one moment in time: the filing of the petition. Government officials have indicated that an amended petition need not be filed when circumstances change such that a petitioner must secure a license to release technology or technical data to a foreign national [22]. If this occurs, the petitioner must comply with existing export control laws, but would not have to inform USCIS of the change. However, such a change should be addressed at the time a petition for extension of stay is filed. As noted above, Part 6, at its core, appears to be an attempt to encourage employers to think about the deemed export issue early and often – but it is not itself a substitute for a license application.

If a license is necessary, do I need to obtain the license before submitting the I-129?

While the version of Form I-129 initially proposed indicated that a deemed export license, if required, must be obtained before the form could be submitted to USCIS, the current version expressly avoids this timing issue. If, after a review of the export control laws, it is determined that a license is necessary, the petitioner certifies that it "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."

USCIS may, through audits and worksite inspections, ensure proper completion of Part 6.

One notable consequence of including export control law in the nonimmigrant visa process is that, through on-site fraud or audit investigations, USCIS may verify the information that provided the basis for an institution's response to Part 6. This would be in line with DHS's increased attention to verifying the information provided in visa petitions generally. Conceivably, DHS could report an employer whose export control processes are deficient – or who has provided incorrect information – to the Department of Commerce or State. Failure to comply with export control laws can lead to significant penalties and fines – up to $500,000 per violation in civil fines and $1,000,000 per criminal

violation. Though such fines are rare, they provide strong incentive for institutions to ensure that their I-129 certifications are accurate.

How will Part 6 affect the time it takes to prepare and file a petition?

Part 6 will add to the time and effort involved in preparing a temporary nonimmigrant visa petition, to varying degrees based on the size and type of institution petitioning. Additional university

might be required for any deemed exports of information or technology. This questionnaire would

Regulations

- Export Administration Regulations (15 C.F.R. §§ 730-774)
- International Traffic in Arms Regulations (22 C.F.R. §§ 120-130)

Web Sites

- U.S. Citizenship and Immigration Services: I-129 Petition for a Nonimmigrant Worker
- Bureau of Industry and Security, U.S. Department of Commerce: "Deemed Exports" Page
- Bureau of Industry and Security, U.S. Department of Commerce: Exporting Basics