

New Linkages Between Nonimmigrant Work Permits and Export Controls Require Careful Assessment Of Compliance Obligations

The ongoing Export Control Reform initiative includes a new tool for export control enforcement linked to nonimmigrant work permits.

The U.S. Citizenship and Immigration Services (“USCIS”) has released a new Form I-129, “Petition for a Nonimmigrant Worker,” which went fully into effect on February 20, 2011. The petitions are used to support highly skilled foreign workers on temporary work visas (H-1B, H-1B1, L-1, and O-1A). The form includes a new Part 6, “Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States.” Companies need to proceed cautiously in responding to this requirement.

Briefly stated, Part 6 requires each petitioner to certify that it has reviewed the Export Administration Regulations (“EAR”) and the International Traffic in Arms Regulations (“ITAR”) and determined whether an export license is required to release technology to the visa beneficiaries. (Domestic release of export controlled technology to foreign nationals is “deemed” to be an export, just as if the technology were actually shipped abroad, and in most cases will require a license from the State Department (ITAR) or the Commerce Department’s Bureau of Industry & Security (EAR).) Part 7 of Form I-129, however, also includes a provision authorizing the release of any information from the petitioning organization’s records that USCIS needs to determine eligibility for the benefit being sought. It also recognizes that USCIS may verify any evidence submitted through any means USCIS deems appropriate, including onsite compliance reviews.

Separately, Executive Order 13558, November 9, 2010, established the Export Enforcement Coordination Center (“the Center”) within Immigration and Customs Enforcement (“ICE”). The Center, which is in the process of being organized, is intended to coordinate enforcement efforts and minimize enforcement conflicts across the federal government. Departments and agencies will be required to coordinate their efforts to investigate and prosecute violations of U.S. export control laws, and to share intelligence and law enforcement information related to these efforts to the maximum extent possible. The Center will include representatives from the Departments of State, Treasury, Defense, Justice, Commerce, Energy, Homeland Security, and the Director of National Intelligence. Each representative agency will be able to tap the authorities, expertise, and information resources of the other, significantly improving the efficiency of the broader effort. It is expected that information obtained by USCIS in the context of work permits will be available to law enforcement through the Center.

By requiring petitioners to assess the need for an export license before taking on a new foreign worker, the new Form I-129 asks questions that compliance officers have asked for years. Companies that discover the need for a license only after exposing foreign workers to export-controlled information are subject to sanctions, and “guessing wrong” on a certification can expose a company to potential enforcement actions.

Therefore, companies that seek to benefit from these visa programs need to examine their operations critically in light of their obligations under the EAR and ITAR. To understand their liability, companies must know whether their products and technology are export-controlled, even if they are not exporters. Companies that have not properly classified their product lines and areas of research and development or that do not have an existing and robust export compliance program are plainly at risk. In all cases, it is prudent to do an export compliance assessment before opening the company and its employees to potential exposure through the I-129 process. EAR and ITAR violations can result in civil and criminal penalties and expose a company to potential debarment as an exporter and government contractor.

Kaye Scholer's National Security Group advises clients on compliance with U.S. export controls and trade sanctions, the Foreign Corrupt Practices Act, and U.S. laws and regulations governing foreign acquisitions of U.S. defense and national security contractors. For a copy of the new Form I-129, or to obtain additional information, please do not hesitate to contact any member of the National Security Group.

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