



Telecon Recap: Export Controls Requirements on Form I-129: A Conversation with the Commerce Department

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Overview

In December 2010, USCIS introduced a new data collection requirement in Part 6 of its Form I-129, Petition for A Nonimmigrant Worker, for certain categories of H, L, and O visas to be effective February 20, 2011. Petitioners are required to make a certification regarding the release of controlled technology or technical data subject to the Export Administration Regulations (EAR) or the International Traffic in Arms Regulations (ITAR) to foreign persons in the United States.

Under the EAR and the ITAR, an export license may be required if a petitioner releases certain controlled technology or technical data to a proposed foreign national beneficiary. USCIS added this data collection requirement to address concerns raised in Government Accountability Office (formerly General Accounting Office) reports regarding export controls and the release of technology to foreign nationals.

On March 24, 2011, the Citizenship and Immigration Services Ombudsman's Office (Ombudsman's Office) hosted a public teleconference regarding this new data collection requirement and interviewed two U.S. Department of Commerce Bureau of Industry and Security (BIS) officials, Bernie Kritzer, Director of Exporter Services, and Steve Hall, Senior Policy Analyst in the Office of Exporter Services.

Mr. Kritzer provided a brief overview of the Commerce Department's export controls requirements, as summarized below.

The majority of dual-use items exported do not require a license from the U.S. Government. However, items going to a sanctioned country and certain sensitive goods and technologies destined for a range of countries may require a license to be exported.

Those items and technologies having a "dual-use" application (both military and commercial applications) may require a license from BIS. Under the EAR, a "deemed" export may occur when technology or source code subject to the EAR is "released" to a foreign national in the United States. Release may occur through a conversation or oral inspection.

A license may be required from BIS for such release. Before submitting a deemed export license application, an exporter should determine whether the technology to be released to the foreign national actually requires a license. The Commerce Control List (CCL) maintained by BIS and set forth in the EAR is a list of dual-use items subject to the jurisdiction of BIS. Items that are subject to the EAR but not specifically listed on the CCL are identified as "EAR99." Deemed export licensing requirements generally apply to exports of CCL items.

Many items with military applications are controlled by the U.S. Department of State, Directorate of Defense Trade Controls (DDTC). For military items, the list can be found on the International Traffic in Arms Regulations (ITAR), maintained by the DDTC.

Questions and Answers

Where Can I Go for Additional Information on Export Controls?

Commerce Department – Commerce's website, www.bis.doc.gov, provides frequently asked questions, how to apply for a license, and other information that may be helpful, including specific information on deemed export licenses.

State Department – The relevant State Department office that addresses export controls is the Office of Defense Trade Controls, which can be found at www.pmdtc.state.gov.

How Can I Determine if I Need A Deemed Export Controls License?

Mr. Kritzer shared that it is important to review the job description, what technology the employer will release to the foreign national and to consult with an attorney/compliance officer as to whether a license may be required. If you still have questions, the Commerce Department is available to assist. Their website, www.bis.doc.gov, has step-by-step instructions on how to apply for a license or commodity classification. In addition, BIS has export control counselors who provide guidance and can be reached at 202-482-4811 or 949-660-0144.

How Do I Apply for an Export Controls License with Commerce?

A prospective exporter must first obtain authorization to file a license or submit other work products on the Commerce online export licensing system. The relevant information should be sent to snapr@bis.doc.gov or fax it to 202-219-9182 or 949-660-9347. There is no fee to register online and to obtain a license from BIS.

How Long Does It Take for the Commerce Department to Get Back to Me?

For a deemed export license, the average time is approximately 40 days, depending upon the completeness of the application, the background check of the end user, and the previous record. You can call the Commerce phone lines, if you do not receive a response within 40 days.

If I Certify to USCIS in Box 6 of Form I-129 As to Whether I Need an Export Controls License, Will Commerce Receive That Information?

USCIS and the Commerce Department are currently in discussions on that process.

What Are Best Practices While I Am Waiting to Obtain a License?

Commerce includes the attributes of good compliance on its website, www.bis.doc.gov. Specific best practices could include: (1) establishing effective firewalls through electronic and physical means; (2) keeping good records; (3) instructing people who work with the foreign national that he or she should not have access to certain controlled technology or data until they receive U.S. Government authorization; and (4) maintaining weekly reports that the company has confirmed that the person does not have access to the controlled technology or data.

Do I Need A License for Each Foreign National I Employ?

Commerce requires a separate license for each foreign national to whom the controlled technology or data will be released. Each application is subject to a background review of the bona fides of the foreign national candidate to be released the controlled U.S. technology or data.

Does the Petitioner Need A License Regardless of the Foreign National's Country of Citizenship?

For Commerce, Mr. Kritzer explained that the determination as to whether an export controls license is required is based on both the Commerce Control List and the home country of the foreign national. For each transaction, the petitioner or other party releasing the controlled technology needs to review the Commerce Control List (Part 774) and the Commerce Country Chart (Supplement 1 to Part 738).

Is An Information Technology Consulting Company that Places Foreign Nationals on Client Projects Subject to BIS' Export Controls License Requirements, If It Does Not Plan to Release Controlled Technology or Data?

The organization or entity that actually releases the controlled technology to the foreign national in the United States needs to obtain the required export license. However, as part of the certification process, the petitioner needs to conduct due diligence as to whether a license is required and, if so, what steps it will take to ensure that the foreign national will not have access to the technology or data until the license is obtained.

Callers also had the opportunity to ask Msrs. Kritzer and Hall questions, many of which are included below. Individuals should also consult the State Department's DDTC, www.pmdtc.state.gov, for additional information.

For IT Consulting Firms, Which Entity Should Obtain the Export Controls License?

Mr. Kritzer explained that the party releasing controlled technology should obtain the license.

What If the Company Failed to Obtain An Export Controls License, But Now Realizes That One Is Required?

The company should submit a voluntary self -disclosure to Commerce or State disclosing that it did not obtain the license. Penalties may range from a warning letter to a denial of export privileges or debarment in the case of ITAR violations.

What If It Is Not Yet Known If The Prospective Employee Will Have Access to Controlled Technology or Data?

Mr. Kritzer suggested that the petitioner make the best educated determination when completing Form I-129 Part 6 and explain this determination in Part 9 of the form.

How Do I Obtain an Export Controls Classification Number and Determine Whether a License is Required?

Review the 10 categories in the Commerce Control List and determine where the item would be categorized. Then, check the Commerce Country Chart in Supplement 1 to part 738 of the EAR to determine if a license is required for exports to the home country of the foreign national. Commerce will review and determine whether you have categorized the item correctly. Call 202-482-4811 or 949-660-0144 for more information.

Does the New I-129 Part 6 Requirement Apply to Employees Who Are Already in the United States on Hs, Ls, or Os?

The new USCIS requirement on Form I-129, Part 6, took effect on February 20, 2011 and, therefore, only applies to petitions filed on or after that date. However, petitioners and employers of foreign nationals continue to be subject to existing export controls laws and regulations administered by the Departments of Commerce and State.

Will USCIS Issue Requests for Evidence (RFEs) Regarding Form I-129 Part 6 on Export Controls?

The Ombudsman's Office understands that USCIS will only issue RFEs if petitioners do not complete Part 6 of Form I-129. However, USCIS does not plan to ask follow-up questions based on the answer provided in Part 6.

Will There Be A Set of Frequently Asked Questions (FAQs) Regarding the New Requirement on USCIS' form?

Mr. Kritzer explained that Commerce has one set of FAQs on its website at www.bis.doc.gov. Currently, USCIS is developing a set of FAQs regarding the new Form I-129 Part 6.

Will There Be Review of F1 Visa Holders Who Are On Optional Practical Training (OPT) in Conjunction with the New USCIS Requirement on Export Controls?

The question in Form I-129 Part 6 solely pertains to Hs, Ls, and Os. However, petitioners continue to be subject to existing export controls laws and regulations administered by the Departments of Commerce

This page was last reviewed / modified on May 3, 2011.



How Is It Working For You? The CIS Ombudsman's Community Call-In Teleconference Series

The Office of the CIS Ombudsman is hosting teleconferences to discuss your interactions with U.S. Citizenship and Immigration Services (USCIS). Join us to share your comments, thoughts, and suggestions as well as any issues of concern.

Upcoming Teleconference

Export Controls Requirements on Form I-129: A Conversation with the Commerce Department

March 24, 2011, 2:00 – 3:00 p.m. EDT

The Ombudsman's Office invites you to participate in a public teleconference on the new USCIS requirement on Form I-129 that asks certain petitioners to certify whether an export controls license is required for the release of controlled technology or technical data to a beneficiary. The Ombudsman's Office will interview Commerce Department officials on when an export controls license is required and will moderate a question and answer session between teleconference participants and the Commerce Department officials.

How to Participate

To participate in these calls, please RSVP to cisombudsman.publicaffairs@dhs.gov specifying which call you would like to join. Participants will receive a return e-mail with the call-in information.

Teleconference procedures

1. To ensure your participation, we encourage you to RSVP 48 hours before the call.
2. Please send us your questions and issues related to the teleconference topics ahead of the call.

If you are unable to participate in these calls, please visit our Web page at www.dhs.gov/cisombudsman for upcoming teleconference dates. Also, if you have a topic of interest for a future call, please send it to cisombudsman.publicaffairs@dhs.gov.

Teleconference Recaps

- [FOIA: How Is It Working For You?](#)

Questions and Answers from Teleconferences

Links may go to www.uscis.gov.

- [Fee Waivers: How are They Working for You?](#)
- [USCIS Website Redesign: How is It Working for You?](#)
- [Change of Address: How is It Working for You?](#)
- [I-601 Waivers: How are They Working for You?](#)
- [Refugee Processing: How is It Working for You?](#)
- [USCIS Adoptions Petition Processing: How is It Working for You? \(PDF, 6 pages - 63 KB\)](#)
- [USCIS Refunds: How is the Process Working for You?](#)
- [The K3 Visa Family Unification Process: How is It Working for You?](#)
- [N-648 Medical Waivers - How are They Working for You?](#)
- [Questions and Answers on The New Naturalization Test](#)
- [USCIS Receipting Delay - How Does this Affect You?](#)
- [Temporary Worker Visas](#)
- [E-Verify in Arizona - How is It Working for Your Business?](#)
- [Visas for Nurses: How Does This Impact Your Medical Facility?](#)
- [USCIS Summer 2007 Application Surge: How is It Affecting You Now?](#)
- [CIS Ombudsman's 2008 Annual Report: Your Questions and Comments](#)
- [U Visa: One Year After the Interim Final Rule](#)