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Changes to Immigration Application Form Requires Employer Attestations about Export Controls & Technology Provided to Foreign National Workers

Starting in December, the U.S. Citizenship and Immigration Service (CIS, formerly INS) will require employers who are sponsoring foreign national workers for certain work visas to certify that they have made an export licensing determination regarding each employee sponsored. More specifically, employers will have to certify that they have evaluated the applicable regulations and have determined whether the employee will require an export license in order to perform the job.

As a practical matter, this will impose new burdens and greater risk on companies that sponsor foreign nationals for work visas. Under the export regulations, the release of technical information to a foreign national is deemed an “export” to that person’s country of origin. That remains true even if the foreign national is lawfully employed by the company. Compliance with this “deemed export rule” can be complex; and at the very least, it requires the company to identify the technical information the employee will receive or have access to and to understand what export controls apply to that information.

At a minimum, the company representatives that review and sign immigration paperwork, a task that traditionally falls within the duties of human resources personnel, will need to verify that the company has, in fact, determined whether a license would be required under the Department of Commerce and Department of State regulations regarding the release of controlled technology or technical data to foreign nationals. More broadly, the new certification provisions will require close cooperation between Human Resources and export compliance personnel, and the operational groups seeking to hire foreign nationals.

The certification requirement is found in the new version of the [Form I-129 Petition for Nonimmigrant Worker](#), the application form used to sponsor most types of work visa status for foreign national workers in the United States. The new form was released earlier this month by the USCIS and will be required for all filings after December 21, 2010. Advanced drafts of the new form reveal significant changes, including more specific questions about whether a beneficiary has ever held J-1 status as an exchange visitor and whether the employee will work off-site at a location not owned or controlled by the employer. Both questions fall within the jurisdiction of CIS review when considering the employment status of a foreign national worker. A new section of the form reaches beyond traditional review by the CIS and requires that the employer also certify its compliance with Department of Commerce and Department of State regulations regarding technology licensing.

The certification is quite detailed. After December 21, 2010, each employer wishing to sponsor foreign workers for authorized work visa status will have to certify that it has reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) in relation to the job duties to be performed by the foreign national employee and the technical data and/or technology to which that employee will be exposed. The employer must further certify that it has determined that an export license is not required from the either U.S. Department of Commerce or the U.S. Department of State to release such technology or technical data to the foreign national; **OR**, that a license is required, and that the employer will prevent access to the controlled technology or technical data by the beneficiary until and unless the employer has received the required license or authorization.

The I-129 also requires the employer to certify (“under penalty of perjury”) that all information provided with the visa package is true and correct, and to authorize on-site audits and compliance reviews. By adding the certification as to EAR and ITAR compliance, the CIS will now have the authority to audit a company’s export control compliance program under the rubric of verifying the information submitted on the Form I-129.

Greenberg Traurig has experienced, nationally-recognized teams working every day in both Business Immigration & Compliance and Export Controls for international clients and clients hiring foreign workers. These groups routinely work together to advise clients on best-practices and provide training on export controls licensing and immigration compliance. If your organization sponsors foreign workers for employment in the U.S., careful review of your compliance protocols and immigration practices is needed, and training may be advisable before this new form is required in December.

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