

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-1B1, L-1, and O-1A nonimmigrant categories will have to certify, under penalty of perjury, that they have reviewed the Export Administration Regulations and the International Traffic in Arms

Regulations, and that with respect to the technology or technical data that the employer will be releasing to the employee:

(1) 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

(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 to the higher education setting. For example, the EAR does not control publicly available technology, “educational information,” or “fundamental research,” which is defined as “basic and applied research in science and engineering, the results of which are published or shared broadly within the scientific community.” [12] As long as the information to be released to the foreign national meets one of these exemptions – and it often will in the higher education context – it will not be subject to the EAR, and no license will be required.

If, however, the technology in question is subject to the EAR, the second inquiry is whether releasing that information to a foreign national would constitute an export, or more appropriately, a “deemed export.” The EAR define an export as “an actual shipment or transmission of items subject to EAR out of the United States, *or release of technology or software subject to the EAR to a foreign national in the United States.*” [13] This latter element is known as the deemed export rule, because “such a release is deemed to be an export to the home country or countries of the foreign national.” [14] The key word here is “release,” which the EAR define as “[v]isual inspection by foreign nationals of U.S.-origin equipment and facilities,” “[o]ral exchanges of information in the United States or abroad,” or “[t]he application to situations abroad of personal knowledge or technical experience acquired in the United States.” [15]

Finally, if the technology or technical data being exported to the foreign national is covered by the EAR, the third question to ask is whether the foreign national’s citizenship requires that a license be issued before such a release may occur. Part 738 of the EAR includes a supplement called the Commerce Country Chart, which lists all of the countries in the world and the reason for control of certain exports, including technology and technical data, to those countries [16]. Using this chart, one can determine whether a license is required to export technology or technical data to a foreign national from a certain country.

The ITAR

Under the ITAR, which control defense-related articles, services and data, an export occurs by, among other things, “[d]isclosing (including oral or visual disclosure) or transferring technical data to a foreign person, whether in the United States or abroad.” [17] The ITAR defines technical data as “[i]nformation . . . which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles” and includes “information in the form of blueprints, drawings, photographs, plans, instructions or documentation.” [18] The technical data covered by the ITAR is enumerated in the U.S. Munitions List (“USML”) [19]. Due to the limited exemptions available, a license must be obtained, in most cases, to export a USML-listed defense article or technology [20].

As this summary suggests, the body of law governing export controls is complex, and compliance requires a diligent review process. The new I-129 makes this requirement more apparent than ever.

The Effect on Colleges and Universities: Update or Create a Review Process

As noted in the introduction, the addition of Part 6 to the new I-129 does little to change the legal

obligations of employers. Those employing foreign nationals have long been subject to export control laws, and they remain so. Moreover, even the instructions to Form I-129 note that “[t]he licensing requirements described above will affect only a small percentage of petitioners because most types of technology are not controlled for export or release to foreign persons.” [21] Instead, Part 6 will have the primary effect of encouraging employers to examine their export control procedures earlier in the hiring process. The Part 6 certification merely highlights the importance of the review process that already should be taking place within employing entities and, where such a process is nonexistent, compels its creation. As a result, many colleges and universities may find that they need to address deficiencies or implement new institutional practices throughout multiple departments. A discussion of the issues that institutions may face, and best practices for addressing those issues, follows below.

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 departments will have to be involved in the process and their participation will have to be adequately documented. Whereas the preparing entity may have relieved the hiring department of any further obligations under the prior process, Part 6 will require more communication between the two, and may also require coordination with the institution’s export control office.

However, as noted above, in the majority of cases, colleges and universities will not need a license to release the relevant technology or data. Even if a review of the regulations reveals that a license is required, this should not significantly delay the preparation of the visa petition. The petitioner can apply for a license after filing Form I-129 and checking off box 2 of Part 6. The increase in time will depend on how efficiently these new practices can be performed, and should decrease as the practices become more routine and streamlined.

Best Practices

Colleges and universities would benefit from implementing the following best practices:

Review current export control compliance campus-wide.

The primary step that colleges and universities will have to take to adapt to the new Part 6 of Form I-129 is to review their current export control policies. Where and how is this function handled? At the departmental, General Counsel, or other level? At some schools, creation of an export control office or officer may be necessary. At others, Part 6 will require the creation or enhancement of an interdepartmental process to ensure compliance.

Institutions should review policies to ensure that they account for proper classification, protection, and storage of controlled technology or information; a method for determining what positions need, or are permitted, access to controlled technologies; and a system for responsibly gathering nationality information for employees that may be exposed to controlled information.

Open up channels of communication between the hiring department, export control personnel, and

the office preparing the Form I-129.

In general, the I-129 is likely prepared by Human Resources, the international program or student office, or outside counsel, while export control functions often reside elsewhere, in the departments or in the General Counsel's office. In order to best use the expertise of these separate entities, institutions must create open channels of communication. Each school will have to determine when and where the process should begin and how information should travel through these departments to facilitate the review process and minimize delays between the time a hiring decision is made and visa petitioning process ends. Once avenues of communication are mapped out, institutions should create a questionnaire to facilitate the flow of information.

Create a questionnaire to facilitate and document the review and certification process.

The individual who signs Form I-129 is certifying to the accuracy of the information provided, including the Part 6 deemed export attestation. That person needs reliable information about the type of work in which the prospective employee will be engaged, and the technology or data to which that employee will be exposed. The best way to do this is to create a questionnaire or sign-off form to be completed by the appropriate college or university official, which would determine whether a license might be required for any deemed exports of information or technology. This questionnaire would also create a record evidencing that the review process was completed, which would be invaluable if USCIS, the Department of Commerce or the Department of State ever conducted an audit to ensure the accuracy of the information provided in Part 6. Examples of such questionnaires can be found in the "Resources" section of this Note, below.

Periodically provide training programs.

Since the export control office and preparing entity have, at most schools, never had to interact to the degree now being requested, it would be prudent for the offices to jointly undergo periodic training to ensure that each understands the process and is aware of any new developments.

Internal audits.

It would also be advantageous to conduct internal audits to adjudge the efficiency and effectiveness of the process implemented to facilitate the completion of Part 6 of Form I-129. The audit should focus on whether appropriate export control review and documentation is taking place prior to completion of Part 6, and whether any mistakes or failures of communication are taking place in the process.

CONCLUSION:

At a time when the U.S. export control regime is receiving more attention than ever, colleges and universities are under increased pressure, through Part 6 of Form I-129, to review their export compliance procedures and ensure their effectiveness. While the majority of petitions will not involve controlled technology or data, Part 6 is still mandatory. All personnel involved, from the export control office, to the General Counsel, to institutional research offices, should coordinate their efforts and establish procedures that result in the accurate, reliable information necessary to complete the I-129 form. While this will take time and effort initially, the establishment of standard operating procedures and communication channels should streamline the process over time.

FOOTNOTES:

FN1. See 8 C.F.R. § 214.1. Alternatively, a worker already in the United States may use this petition to change status to a work-authorized category, and begin employment.

FN2. The system was created through the *Arms Export Control Act of 1968* and the *Export Administration Act of 1979*.

FN3. 15 C.F.R. §§ 730-772.

FN4. 22 C.F.R. §§ 120-130.

FN5. 15 C.F.R. § 730.3.

FN6. 22 C.F.R. §§ 120.1(a), 120.2.

FN7. 15 C.F.R. § 734.2(a).

FN8. 15 C.F.R. § 730.3.

FN9. 15 C.F.R. § 772.1.

FN10. *Id.*

FN11. 15 C.F.R. § 774.

FN12. See 15 C.F.R. §734.7-734.11 and Supplement 1 to 15 C.F.R. §734. A full treatment of the “publicly available,” “fundamental research,” and “educational information” exceptions is beyond the scope of this NACUANOTE, but additional resources on these topics can be found at NACUA’s [Export Controls Resource Page](#).

FN13. 15 C.F.R. §734.2(b)(1) (emphasis added).

FN14. 15 C.F.R. §734.2(b)(2)(ii).

FN15. 15 C.F.R. § 734.2(b)(3).

FN16. 15 C.F.R. § 738, Supplement No. 1.

FN17. 22 C.F.R. § 120.17(a)(4).

FN18. 22 C.F.R. § 120.10(a).

FN19. 22 C.F.R. § 121.

FN20. See 22 C.F.R. §§ 123.16, 125.4. It should also be noted that the State Department, in administering the ITAR, considers *all* prior countries of citizenship, including country of birth, when determining a foreign person’s nationality. The Commerce Department, by contrast, generally

considers only the foreign person's most recent country of citizenship.

FN21. See Instructions for Form I-129, Petition for a Nonimmigrant Worker, *available at:* <http://www.uscis.gov/files/form/i-129instr.pdf>.

FN22. As inferred from the statements of Kevin Wolf, Assistant Secretary for Export Administration, U.S. Department of Commerce, Bureau of Industry and Security, during a January 13, 2011 webinar on the subject of deemed exports and the new Form I-129. Mr. Wolf also stated that Commerce is developing a set of FAQs on the I-129 to be released soon.

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RESOURCES:

[NACUA Export Control Resource Page](#)

Statutes

- [Arms Export Control Act of 1968](#), 22 U.S.C § 2778
- [Export Administration Act of 1979](#), 50 U.S.C. App. § 2401 *et seq.*

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](#)
- Stanford University: [Export Controls Page](#)
- Johns Hopkins University: [I-129 Export Control Certification Information Page](#)

Questionnaires

- Johns Hopkins University: [Visa Request Export Review Supplement](#)
- SUNY: [Deemed Export FAQs and I-129 Request Form](#)
- Yale University: [H1-B Application Deemed Export Control Form](#)
- Northwestern University: [H1-B Deemed Export Control Form](#)

Other

- Association of University Export Control Officers: [I-129 Deemed Export Information Sheet](#)
- Council on Government Relations Brochure: [Export Controls and Universities – Information and Case Studies \(2004\)](#)

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