

# Form I-129: Understanding the ITAR/ EAR Export Control Regulations Regarding the Release of Controlled Technology or Technical Data

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Effective February 20, 2011, U.S. employers of certain foreign persons must certify compliance with the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) on Form I-129. This article discusses what the law requires and what your business needs to do today to comply.

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## Introduction

The Citizenship and Immigration Services (CIS) has recently implemented a revised Form I-129 (“Petition for A Non-Immigrant Worker”), which contains a new employer certification regarding the release of export controlled technology.

Beginning February 20, 2011, Part 6 of the new Form I-129, “Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States”, must be completed for all new petitions. In order to ensure compliance with new Form I-129, employers will need to verify whether they have export controlled technical data at their U.S. facilities; and, if so, the employer will need to either obtain a license for both existing foreign national employees and employees applying for new work visas, or ensure that controlled data is not released to these employees without the required licenses.

- ***Practice Point:*** Not all non-immigrant visa employee petitions are subject to the new certification requirement. Only H-1B, H-1B1, L-1, and O-1A petitions require the certification.

In light of the export control certification requirement, employers of foreign workers will need to exercise extra due diligence to ensure compliance with the new rules.

## What Does New Form I-129 Require?

U.S. export control laws protect the national security of the United States by, among other things, requiring U.S. persons to obtain governmental approval prior to releasing any controlled technology or technical data to foreign nationals.

In this regard, Part 6 of new Form I-129 requires the petitioning employer to certify as follows:

“With respect to the technology or technical data the petitioner will release or otherwise provide access to the beneficiary, the petitioner certifies that it

has reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) and has determined that:

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.”

- ***Practice Point:*** Not all foreign national employees are subject to the export control regulations. In addition to U.S. citizens, lawful permanent residents (*i.e.*, "green card" holders), asylees and refugees are considered U.S. persons not subject to export controls.

## What Are the EAR and ITAR Regulations?

The Export Administration Regulations (EAR), 15 C.F.R. 730-774, and the International Traffic in Arms Regulations (ITAR), 22 C.F.R. 120-130, govern what technologies may be exported from the United States. The controls are designed to restrict access to “dual use” (*i.e.*, having both commercial and military applications) technology or software to countries or persons that might use such items contrary to the national interests of the United States. The controls are specifically designed to stem the proliferation of nuclear and weapon technologies, and to limit the military and terrorism support capabilities of certain proscribed countries.

## What Is Controlled “Technology” and “Technical Data”?

"Technology" and "technical data" that are controlled for release to non-U.S. persons are identified on the EAR Commerce Control List (CCL), 15 C.F.R. 730- 774 Supplement 1, and the ITAR U.S. Munitions List (USML), 22 C.F.R. 121.

Under the EAR, "technology" refers to information required for the development, production or use of “dual-use” products or software.

Likewise, under the ITAR, "technical data" is used to describe the information required to manufacture, use or train persons on the use or production of the articles included on the USML.

Examples of controlled technology include computers, telecommunications and information security technology, GPS technology, lasers and sensors, navigation and avionics systems, marine equipment, aerospace and propulsion equipment, nanotechnology, biotechnology and high-performance computing capabilities.

Ultimately, the determination of whether technology or technical data is controlled resides with the Bureau of Industry and Security (BIS), with respect to articles listed on the CCL, and with the Directorate of Defense Trade Controls, United States Department of State (DDTC), with respect to articles listed on the USML.

- ***Practice Point:*** Even innocuous looking technologies without obvious military applications can be subject to export control. Indeed, a surprising number of items (including ball bearings, stainless steel valves, life jackets, and scuba masks and fins) constitutes controlled technologies. A proper EAR and ITAR evaluation is therefore required of all your company’s technologies and technical data.

## When Does An “Export” Occur?

Under the “Deemed Export Rule”, there can be an “export” without anything leaving the United States. According to section 734.2(b)(2)(ii) of EAR:

“An export of technology or source code (except encryption source code) is “deemed” to take place when it is *released* to a foreign national within the United States.”

In turn, under section 734.2(b)(3) of the EAR, technology (including source code) is “released” when it is available to foreign nationals for visual inspection (such as reading technical specifications, plans, blueprints, etc.); when technology is exchanged orally; or when technology is made available by practice of application under the guidance of persons with knowledge of the technology.

- ***Practice Point:*** For export control purposes, “export” means more than just to ship something overseas. The “Deemed Export Rule” requires companies to seek and receive authorization from the U.S. government before releasing controlled technology or technical data to foreign persons within the United States, as such a release is deemed to be an “export” to that person’s country of nationality. Further, an employer who directly or indirectly provides its foreign national employees access to controlled technology or technical data would be deemed to have exported that technology or technical data, and such deemed export could be subject to a licensing requirement under the export control laws.

## How Can A Deemed Export Occur?

A deemed export can occur through a variety of ways. For example, controlled U.S. technology may be released to foreign national employees involved in certain research, development and manufacturing activities; or to foreign students or scholars conducting

research. Likewise, a foreign national employee can access restricted technology through his/her employer's unsecured company computer; by reviewing unsecured drawings and engineering designs or notes; or simply through observation.

## What Are The Penalties For Noncompliance?

An employer who knowingly makes a false statement or conceals a material fact to the U.S. government is subject not only to a denial of the visa petition, but also to civil and criminal penalties. Further, failing to obtain an export license when required can subject the employer to export enforcement action by the BIS and DDTC, or criminal prosecution by the U.S. Department of Justice. In addition to civil fines amounting to \$500,000 per violation, criminal penalties can also be imposed, including fines of up to \$1 million and/or 10 years imprisonment per violation.

- ***Practice Point:*** All employers filing Form I-129 for applicable nonimmigrant workers will be required to certify compliance with the EAR and ITAR. The new certification requirement will likely affect only a small percentage of petitions because most technology is not controlled for export or release to foreign persons. Nevertheless, companies inexperienced with federal export regulations should begin to develop comprehensive export control policies and procedures governing all their goods and services. This may require additional personnel training, new record keeping policies, and other internal controls to ensure that access to restricted data is secured and that appropriate licenses are applied for and obtained.

## Conclusion

While the export license requirements provided for in the EAR and ITAR have been in existence for many years, this is the first time that employers of foreign nationals are being asked to certify their compliance with the export restrictions and licensing regulations.

It is imperative that employers who employ foreign nationals on work visas in the U.S. develop an internal export control compliance program, which should be designed to ensure that access to restricted technologies is secured, and that any release of controlled technologies is authorized.

**If you would like additional information, please contact:**

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