



## Companies Applying for Non-Immigrant Worker Visas Are Now Required to Certify Compliance With the Deemed Export Rule: Do You Know What You Are Certifying To?

US Citizenship and Immigration Services (CIS) has promulgated a new Form I-129, Petition for Nonimmigrant Worker, including a new requirement for certification of compliance with US export control laws and regulations. While the new Form I-129 officially replaces the legacy Form I-129 effective November 23, 2010, CIS will continue to accept applications on the legacy Form I-129 filed on or before December 22, 2010. Effective as of December 23, 2010, US employers seeking to sponsor foreign nationals on H-1B, H-1B1 (Chile/Singapore), L-1 and O-1A visas will be required to use the new Form I-129 and attest to compliance with US laws and regulations governing exports of controlled technology and technical data.

### New Certification

The new certification is intended to increase compliance with US export controls by companies sponsoring foreign national employees. Companies unfamiliar with the law or lacking basic compliance programs may find the certification confusing. Failure to comply with US export controls will increase a company's exposure to violations (and related penalties) due to false or fraudulent certifications.

Part 6 of the new Form I-129 contains the export

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controls compliance certification and requires petitioners for the visa types noted above to attest 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 US Department of Commerce or the US Department of State to release such technology or technical data to the foreign person; or
2. A license is required from the US Department of Commerce or the US 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.

### Deemed Export Rules

To comply with the new certification requirement, petitioners must understand and comply with the deemed export rules. Under both the EAR and the ITAR, the release of controlled technology or technical data (or software source code) to a foreign person in the United States – including to foreign person employees – is “deemed” to be an export to that person’s country or countries of nationality. Depending on the technology or technical data involved and the nationality or nationalities of the foreign person employee, a license or other authorization from the US Department of Commerce’s Bureau of Industry and Security (BIS) or the US Department of State’s Directorate of Defense Trade Controls (DDTC) could be required prior to granting access to the foreign national employee to the technology or technical data.

BIS administers the EAR, which applies to so-called “dual-use” items. This includes purely commercial items and items that have both commercial and military applications, and related technology (including technical data). Controlled items and technology are listed in the

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Commerce Control List at Part 774 Supplement No. 1 of the EAR. DDTC, on the other hand, controls military items and related technical data, including items listed on the US Munitions List at Section 121 of the ITAR. To complete the Form I-129 certification, companies must first ascertain whether or not their technology or technical data is controlled, and if so, by which agency, and then determine the company's licensing obligations, if any.

The deemed export rule encompasses a variety of common business transactions. Controlled technology and technical data can take such forms as blueprints, plans, photographs, instructions, diagrams, models, formulae, tables, engineering designs and specifications, manuals, or technical assistance (such as instruction or skills training), and can be produced in-house or received from customers or potential customers in the form of manufacturing instructions, product specifications or requests for proposals.

In common business settings there are many opportunities for the release of controlled technology or technical data. Release can occur through visual inspection (e.g. through work in a manufacturing facility or a plant tour), oral or electronic exchanges (e.g. email, fax or telephone conversations), or through access to electronic systems where technology or technical data is stored. It is thus critical that companies with controlled technology or technical data have adequate compliance programs in place to control access to such items, and, where necessary, to obtain export or deemed export authorization.

While complying with the deemed export rules is not a new requirement, the new Form I-129's deemed export certification has raised US companies' awareness of their obligations to comply with US export control laws and the potential for violations for failing to comply. It is imperative that US-based companies not delay addressing gaps in compliance programs until preparing to sponsor a foreign national employee. To do so could cause significant delays in obtaining a BIS or DDTC license, which ordinarily requires about two to three weeks. Moreover, classifying technology or technical data and determining licensing obligations under the ITAR or EAR – which must be done prior to certification on the new I-129 – can be complicated and time-consuming, particularly if an official agency determination is required.

Squire Sanders lawyers assist clients to develop solutions to complex export controls and employment-related immigration issues. We frequently design and

implement new export controls compliance programs and audit, evaluate and update existing compliance programs. Squire Sanders' global immigration law practice offers comprehensive advice and tailored immigration solutions to a large number of clients, including Fortune 500 companies, multinationals and start-ups. For more information about this alert please contact your primary Squire Sanders contact.



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