

# NEW REPORTING REQUIREMENTS ON FORM I-129 FOR EXPORT OF CONTROLLED TECHNOLOGIES OR DATA

*Immigration Alert*  
February 7, 2011

Beginning February 20, 2011, U.S. Citizenship and Immigration Services (USCIS) will require employers sponsoring foreign national employees for L-1, H-1B, and O-1A status to certify their company is in compliance with export control laws governing the release of “technology” or “technical data” to foreign persons. The Export Administration Control Regulations (EAR) Commerce Control List (CCL) and the International Traffic in Arms Regulations (ITAR) U.S. Munitions List (USML) define and name the technology and technical data that are controlled for release to foreign persons.

The U.S. Department of Commerce has jurisdiction over the EAR. Its Bureau of Industry and Security administers the CCL and is responsible for issuing licenses for the release of technology controlled under the EAR to foreign persons. The U.S. Department of State has jurisdiction over the ITAR. Its Directorate of Defense Trade Controls (DDTC) administers the USML and is responsible for issuing licenses for the release of technical data controlled under the ITAR to foreign persons.

EAR-controlled technology on the CCL generally covers technology that is dual-use in nature. Dual-use technology can have both commercial and military applications. Even if a particular technology is developed or used by a U.S. employer for commercial purposes only, the technology could still be subject to export control under EAR. ITAR-controlled technical data on the USML is usually directly related to defense articles. U.S. manufacturers of technical data covered under the USML are required to register with the DDTC even if they do not export these items.

Before releasing controlled technology or technical data to foreign persons (non-U.S. citizens and non-U.S. permanent residents (“green card holders”)), EAR and ITAR require U.S. employers to apply for and receive authorization from the Department of Commerce and/or Department of State, depending on which rules apply to the particular situation. Kindly note: No special consideration is given to the status of a foreign person as an employee or a long-standing customer. Furthermore, because the release of controlled technology or technical data to foreign persons on U.S. soil, even by an employer, is deemed to be an export to the foreign person’s country, employers must be very cautious.

## **Attorneys**

Lance Madden

## **Practices & Industries**

Immigration

## NEW REPORTING REQUIREMENTS ON FORM I-129 FOR EXPORT OF CONTROLLED TECHNOLOGIES OR DATA

In an effort to better identify U.S. employers who should be obtaining deemed export licenses from either the Department of Commerce or Department of State, USCIS's Form I-129, Petition for Nonimmigrant Worker, has been revised to include the following language:

*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:*

*- A license is not required from either the U.S. Department of Commerce or U.S. Department of State to release such technology or technical data to the foreign person or*

*- A license is required from the U.S. Department of Commerce and/or 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. (emphasis added)*

As a result, U.S. employers must first identify controlled technology and technical data (what is controlled and to which countries) and then determine whether the foreign national's job requires or would permit access to controlled technology or technical data, by any means. In the event of an audit, employers must be prepared to show why the technology and/or technical data was not subject to export control, that access was restricted, or that any necessary licenses were obtained.

Hodgson Russ recommends that all U.S. companies who employ foreign nationals in H-1B, L-1, and/or O-1 visa status review their procedures for determining whether they require an export license in order to comply with EAR and ITAR requirements. We also recommend that employers contact our office if they require assistance in determining whether they are subject to the licensing requirements of EAR or ITAR.