

DEEMED EXPORT CONTROL ISSUES | FREQUENTLY ASKED QUESTIONS

Export control regulations have been in existence in the United States for decades. Effective February 20, 2011, USCIS requires an employer filing a H-1B, L-1, or O-1 Form I-129 nonimmigrant visa petition to certify that it has conducted an analysis of export control regulations in relation to the offered position, and has determined whether an export license is required for that foreign national. If a license is required for the position, the employer must certify that it will restrict the foreign national's job duties until the license is granted.

1. What is “export control”?

“Export control” generally refers to a number of federal laws governing the shipment, transfer, or transmission of sensitive items, information, technology, software to foreign nationals or entities.

2. What is a foreign national or entity?

- An individual who is not a U.S. permanent resident or citizen, or a protected person (refugee, asylee),
- Corporate entity that is not incorporated / authorized to do business in the U.S., or
- Foreign government.

3. What counts as an “export”?

- Physical exports: movement of physical items across U.S. borders.
- Deemed exports: access to controlled technology, information etc. by a foreign national (no movement across U.S. border required). Deemed exports are of particular concern to companies working with controlled technologies who sponsor foreign workers for nonimmigrant visas.
- Re-exports: release of controlled technology, information etc. to foreign national/entity of Country A, which is then subsequently release to foreign national/entity of Country B

4. What are the questions to ask in analyzing whether a deemed export might occur?

- Does the company develop any technology which might be covered under a federal export control regime?
- Is the company hiring a foreign national?
- If a foreign national, which country or countries is this person from?
- What technology/information will be released on the job?

5. What does it mean to “release” technology or information to a foreign national on the job?

Technology or information is “released” when:

- it is made available to foreign nationals for visual inspection (such as reading technical specifications, plans, blueprints, etc.);
- it is exchanged verbally; or
- it is made available by practice or application under the guidance of people who know the technology.

6. Are there exceptions to the export control license requirement?

There are several exceptions, but they are limited to specific circumstances, including but not limited to: information already in the public domain, or information used to further fundamental research.

7. What if a license is required for a particular foreign national?

The employer must register with the relevant regulatory agency (typically Department of Commerce, State, or Treasury) and apply for an export license for that foreign national.

8. How does the federal government enforce export control laws?

Enforcement actions can be initiated by federal agencies (typically Department of Commerce, State, or Treasury) due to a report by a competitor or disgruntled employee or ex-employee, or media reports. With the addition of export control questions to the USCIS Form I-129, it is possible that future enforcement actions may be initiated based on a USCIS site visit relating to the underlying H/L/O visa petition. In addition, Department of State may initiate an investigation based on a foreign national's consular visa stamp application based on an approved visa petition.

9. What are the penalties?

There are both civil and criminal penalties, which can be quite significant. Department of Commerce and Treasury civil penalties can involve fines of up to \$250,000, criminal penalties can be up to 20 years imprisonment. Department of State civil penalties can involve fines of up to \$500,000, criminal penalties can be up to 10 years imprisonment.

10. What if we must terminate a foreign employee who is subject to export control licensure, and cannot obtain one?

The Company has two options: (1) restrict the employee's role to one that does not require licensure and ensure that s/he is not exposed to restricted technologies/information; or (2) terminate employment or rescind the offer of employment. It would be prudent to advise a foreign national hired to work in a role that may require export control licensure of these two possibilities, or to otherwise incorporate in offer letters that export compliance is required for all foreign national hires .

11. Who is responsible for determining if a license is required or not?

Each company should first check to see how export compliance is currently being handled internally. This is not a new requirement but one that has been in existence for decades. Therefore, it is possible that this analysis is already being handled as part of the hiring process, either internally by a compliance department, or with outside assistance. If your company has not set up an export compliance practice or process, this should be undertaken immediately. We can refer your company to outside counsel as this is beyond the scope of immigration practice.