HONIGMAN

Business Immigration Alert

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Revised Form I-129 Requires Employers to Certify Compliance with Export Control Regulations

If you have questions regarding the information in this alert, please contact:

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On Tuesday, November 23, 2010, the United States Citizenship and Immigration Services (USCIS) published a revised Form I-129, Petition for a Nonimmigrant Worker. Employers are required to submit Form I-129 to the USCIS when sponsoring a foreign national for a nonimmigrant work classification in the United States (for example, H-1B or L-1 status). USCIS will accept previous editions of the form through December 22, 2010.

New Certification Requirements for Employers on the Release of Controlled Technology and Technical Data to Foreign Nationals

The revised Form I-129 now requires employers to certify in all H-1B, H-1B1, L-1 and O-1A petitions that the employer is compliant with the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) concerning the sharing of controlled technology and technical data with foreign nationals. The applicable section of the revised Form I-129 reads as follows:

Part 6. Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States

(For H-1B, H-1B1 Chile/Singapore, L-1, and O-1A petitions only. This section of the form is not required for all other classifications. See **Page 3** of the Instructions before completing this section.)

Check Box 1 or Box 2 as appropriate:

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 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.

The EAR and ITAR require employers to obtain authorization from the United States government before releasing controlled technology or technical data to foreign nationals in the United States. Under both the EAR and ITAR, release of controlled technology and technical data to a foreign national in the United States is deemed to be an export to the country or countries of nationality of the foreign national. Penalties for violations of the EAR and ITAR can be severe. Civil fines are up to $250,000 per violation or twice the amount of the underlying transaction for violations of the EAR and up to $500,000

per violation of the ITAR. Criminal penalties for willful violations of these laws can be up to $1 million per violation plus up to twenty years imprisonment. Other available penalties for violations of the EAR or ITAR include debarment from federal contracting and denial of export privileges.

While the EAR and ITAR apply to foreign nationals in the United States in all nonimmigrant classifications, the revised Form I-129 addresses foreign nationals that will be employed only in the H-1B, H-1B1, L-1, or O-1A nonimmigrant classifications.

Although employers have always been subject to the export control regulations, the revised Form I-129 requires employers to certify whether or not a license is required to release specific information to a foreign national in the United States. Employers may find it difficult to determine whether such licensing is required based on the EAR and ITAR. The information that is subject to control for release to foreign nationals is identified on the EAR Commerce Control List (CCL) and on the ITAR U.S. Munitions List (USML). The CCL is found at 15 CFR Part 774, Supp. 1 (**http://www.access.gpo.gov/bis/ear/ear_data.html#ccl**). The USML is found at 22 CFR 121.1 (**http://www.pmddtc.state.gov/regulations_laws/itar.html**).

Employers are advised to seek expert legal counsel to ensure compliance with the EAR and ITAR deemed export control licensing requirements. When executing the Form I-129, an employer must now certify on a case-by-case basis whether licensing is required in order to employ a particular foreign national in the United States.

Attorneys in Honigman's Export Compliance Practice Group have extensive expertise in advising companies from various industries on a wide range of export compliance issues, including: classifying technology and goods under the EAR and ITAR; preparing commodity jurisdiction and classification requests; assisting clients with the creation and implementation of export compliance programs; preparing applications for export licenses and ITAR registration; conducting internal investigations into potential violations of United States export laws and regulations; preparing voluntary disclosure reports to the Department of State and other government agencies; and defending clients in enforcement actions relating to violations of United States export laws.

Contact Us

If you have questions regarding the revised Form I-129 or other business immigration matters, please contact Carol A. Friend at cfriend@honigman.com (313.465.7374), Jamie T. McCoy at jmccoy@honigman.com (313.465.7458), or Meghan N. Covino at mcovino@honigman.com (313.465.7406).

If you have questions about EAR or ITAR compliance and requirements, please contact Lara Phillip at lara.phillip@honigman.com (313.465.7518).