

February 18, 2011

## Revised Form I-129 Form Requires Petitioners Certify Compliance with Export Controls Regarding the Release of Technology or Technical Data to Foreign Person Beneficiaries

### Fact Sheet

The U.S. Citizenship and Immigration Services (USCIS) published on November 23, 2010 a revised Form I-129, the Petition for a Nonimmigrant Worker. Part 6 of the form requires a petitioner seeking H-1B, H-1B1, L-1 or O-1A visas to certify that it has reviewed U.S. export control regulations and determined that: (a) a license is not required to release technology to the beneficiary; or (b) if an export license is required, it will not release controlled technology to the foreign worker until it has received a license or other authorization to do so.

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

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(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 requirement to make the certification before a petitioner may submit the form to USCIS becomes mandatory on February 20, 2011. For additional information about the revised form and petitions for nonimmigrant worker visas, see <http://www.uscis.gov>

### I. Background on Technology Export Controls

The [Export Administration Regulations \(EAR\)](#) and the [International Traffic in Arms Regulations \(ITAR\)](#) impose licensing requirements on the export, reexport, and in-country transfer of a wide variety of items that are controlled for national security, foreign policy, and other reasons. The requirements include an obligation for U.S. persons, including corporate employers, to seek and receive a U.S. Government license before releasing in the United States to foreign persons, including foreign person employees, from certain countries various types of technology controlled by these regulations. This obligation is often informally referred to by the Commerce Department as the “deemed export” rule because releases of controlled technology to foreign persons in the United States are “deemed” to be an export to the person’s country or countries of nationality.

To know whether such a license is required, one must first determine if the technology to be released to the foreign person is (a) controlled by either the EAR or the ITAR and (b), if so, whether the EAR or the ITAR requires a license to export or otherwise release it to the foreign person's country or countries of nationality.

The Commerce Department's [Bureau of Industry of Security \(BIS\)](#), which administers the EAR, has published guidance at this [link](#) to help persons in the United States determine if the EAR requires a license to release technology in the United States to foreign persons and, if so, how to apply for such a license. The State Department's [Directorate of Defense Trade Controls \(DDTC\)](#), which administers the ITAR, has published guidance at this [link](#) to help persons in the United States determine if the ITAR requires a license to release technology – or “technical data” – in the United States to foreign persons and, if so, how to apply for such a license.

Although the Obama Administration plans to harmonize the Government's various export control regulations and hopes to create a single export control system, both the ITAR and the EAR need to be taken into account until this work is completed because they control different types of technology and technical data, have different licensing requirements, and define foreign persons differently. As described in more detail on the BIS and DDTC websites,

- The EAR generally controls on its [Commerce Control List \(CCL\)](#) “dual use” technology that has both commercial and significant military applications. The ITAR generally controls on its [U.S. Munitions List \(USML\)](#) “technical data” that is directly related to defense articles or commercial satellites or spacecraft.
- The EAR's licensing requirements vary depending upon the reasons (e.g., national security or foreign policy) why a technology is controlled. The ITAR's licensing requirements generally apply equally worldwide and have a larger list of countries to which USML-controlled technical data may not be exported.
- BIS requires the use of its SNAP-R system to file an application for a license to release technology subject to the EAR to foreign person in the United States. DDTC requires the use of its D-TRADE system to file an application for a license to release USML-controlled technical data to foreign persons in the United States.
- BIS looks to a foreign person's most recent country of citizenship or nationality when determining the licensing requirements for technology subject to the EAR that are or are not applicable to the foreign person. DDTC requires that all foreign persons, regardless of nationality, in the United States be licensed prior to disclosure, whether oral or visual, to USML-controlled technical data.

## **II. “Published” Technology and “Publicly Available” Technical Data and are Not Subject to the EAR or the ITAR**

The EAR and the ITAR do not control, respectively, “technology” or “technical data” the regulations define as “publicly available” or in the “public domain.” Thus, the EAR and the ITAR do not require licenses to export such publicly available or public domain information, regardless of content. If the only technology or technical data the petitioner/employer would release to the foreign person beneficiary at issue in the petition falls within the scope of these definitions, then the petitioner should check the first box in Part 6 of the I-129 form because a license will not be required from either the BIS or DDTC to release the technology or technical data to the foreign person. The following is a summary of these provisions with citations to the relevant EAR and ITAR provisions. They are a guide to help petitioners navigate the relevant provisions of the EAR and the ITAR. They are not a substitute for reviewing the potentially relevant provisions of the EAR or the ITAR.

### **A. EAR**

According to EAR section 734.3(b)(3), “technology,” as defined in the EAR, is “publicly available,” and thus not subject to the EAR, it is

1. “already published or will be published,” as described in EAR section 734.7;
2. “Arise[s] during, or result from, fundamental research,” as described in EAR section 734.8;
3. Is “educational,” as described in EAR section 734.9; or
4. Is “included in certain patent applications,” as described in EAR section 734.10.

### **B. ITAR**

According to ITAR section 120.10(a)(5), information otherwise within the scope of the ITAR’s definition of “technical data” is not subject to the ITAR if it is:

1. “information in the public domain as defined in [ITAR] § 120.11;”
2. “information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities;” or
3. “basic marketing information on function or purpose or general system descriptions of defense articles.”

If information that is otherwise within the definitions of EAR-controlled technology or ITAR-controlled technical data is not within the scope of any of these provisions, then one must review the applicable regulations to determine whether its release to the foreign person beneficiary requires a license.

### **III. Contact Information**

If you have questions about this notice or the affected export regulations contact the following:

For Export Administration Regulations:  
Department of Commerce, Bureau of Industry and Security  
[www.bis.doc.gov](http://www.bis.doc.gov)  
202-482-4811 or 949-660-0144

For the International Traffic in Arms Regulations:  
Department of State, Directorate of Defense Trade Controls  
[www.pmdtc.state.gov](http://www.pmdtc.state.gov)  
202-663-1282