I-129 Petitions Now Require Employers to Make "Deemed Export" Certifications When Sponsoring Nonimmigrant Foreign Nationals for Certain Temporary Work Visas

For more information regarding the "deemed export" rules or for assistance in analyzing these new I-129 certifications, please contact:

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As of February 20, 2011, any employer who files a Form I-129 Petition for a Nonimmigrant Worker (an "I-129") seeking an **H-1B, H-1B1, L-1 or O-1A** temporary work visa must certify that it will comply with the "deemed export" rules under federal export control law.

Part 6 of the I-129 now requires the petitioning employer to certify that it has reviewed the Export Administration Regulations (the "EAR") and the International Traffic in Arms Regulations (the "ITAR") and has determined that either:

1. An export license is not required to release any export controlled technology or technical data to the sponsored worker; or

2. An export license is required to release any export controlled technology or technical data to the sponsored worker and the employer will prevent the sponsored worker from having access to such technology or technical data unless and until the employer acquires the applicable export license.

The EAR and the ITAR are designed to protect the national security interests of the United States by regulating the export of certain items and technology. Violations of the EAR and the ITAR carry severe civil and criminal penalties, including fines of up to $1 million per violation, up to 10 years in prison, loss of export privileges and debarment from federal government contracts.

The EAR and the ITAR require a license prior to the export of certain items, services, technology, software and data described on the Commerce Control List (in the case of the EAR) or described on the U.S. Munitions List or otherwise designed, developed, configured, adapted or modified for military applications (in the case of the ITAR). Under the EAR and the ITAR, an export is "deemed" to occur when such items, services, technology, software or data are disclosed to or accessible by an individual within the United States and such individual is not a U.S. citizen or permanent U.S. resident. It is this "deemed export" rule that is at the heart of the new I-129 certifications.

The initial determination that a petitioning employer must make prior to making the I-129 certifications is whether any of the technology or technical data to which the sponsored worker will have access while in the United States is regulated under the EAR or the ITAR. This requires an in-depth understanding of the technologies and technical data utilized or produced by the employer in its business and a working knowledge of the numerous categories of items, services, technology, software and data controlled by the applicable regulations. In making this determination, the employer should

first consult with its export compliance department and/or legal counsel.

If the sponsored worker will have access to technology or technical data that is controlled under the EAR or the ITAR, then the employer will need to either apply for and obtain an export license prior to releasing or granting access to the controlled technology or technical data, or take affirmative protective measures to ensure that such controlled technology and technical data is not released to or accessible by the sponsored worker. Such affirmative protective measures may include restricting the sponsored worker's access to certain areas of the employer's facilities through the use of physical and other barriers (e.g., use of restricted-access areas, keypads, locked doors, password-protected computer systems, etc.).

The decision on how to properly certify under Part 6 of the I-129 may be a complicated one and, as such, should not be made by an employer without first consulting with its export compliance department and/or legal counsel.