

Opinion

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Big Changes to the Visa Process

U.S. Citizenship and Immigration Services will publish changes to the I-129 form in the *Federal Register* on Nov. 23.

This form is used to petition for a foreign national to come to the United States temporarily for services, work, or to receive training under a visa such as a H-1B. These changes will mandate that an employer indicate whether the sponsored foreign national will require a deemed export license for the job. This new form can be used after it's published, but will become mandatory as of Dec. 23.

The revised I-129 form requires a deemed export acknowledgement. Under the most recent proposed revisions, the petitioner will have to indicate if a license is required from the Commerce or State departments to transfer technology to the beneficiary. If a deemed export license is required, the petitioner agrees to prevent access to controlled technology until the required government license or authorization has been received.

A deemed export is the transfer of technology to a foreign national while located in the United States. According to Export Administration Regulations (EAR), technology is defined as the information to develop, produce or use a certain item. A transfer of technology can take place in the form of providing technical data or assistance. For instance, sending an e-mail with controlled technical information to a foreign national while here in the United States is a deemed export.

Whether the deemed export requires a license is determined the same way one determines whether a license is required to export technology to the foreign national's home country. Companies must classify items and technology for export purposes, but many forget to classify technologies that reside here in the United States. This could cause problems if the company has not gone through the exercise of classifying all technologies regardless of whether they are controlled by EAR regulations.

What does this mean for your company? If your company applies for visas on behalf of foreign nationals, you will want to:

- Clearly identify each department or company location that has access to or uses controlled technologies and provide this list to your human resources department.
- Integrate a new question based on the I-129 in your job requisition form on whether a deemed export license could be required for the job.
- Establish a process to proactively communicate with your human resources or immigration law department so they understand whether a license would be required so they can fill out the I-129 form appropriately.

If you outsource the immigration application process to a third party, you will want to provide a definitive statement regarding whether a deemed export license is required for the foreign national.

If your company already applies for deemed export licenses, you are already aware it is a lengthy process to get the license and the visa. However this new requirement on the I-129 form puts pressure on all companies that want to hire foreign nationals. If your company uses technologies not subject to the EAR (publicly available, fundamental research, etc.) for the production, development, use and/or disposal of controlled items, you should be able to document why the technology is exempt from the EAR or other U.S. government agency controls in case of an audit.

In summary, don't let the new I-129 form requirements cause your visa applications to come to a grinding halt come Dec. 22. Ensure there is a proactive human resource and export control process in place to provide deemed export licensing requirements for visa applications. And be sure to pass this on to your human resource department to raise their awareness.

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[Back](#)

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- Subscribe Online
- Renew Subscription
- Modify Subscription
- Subscriber Help
- Media Kit Request
- About Us
- Privacy Policy
- Copyright Policy
- [Sitemap](#)

Week in Review

- Intermediary
- Compliance
- Service Providers
- Shippers
- Corporate Appointments
- Service Announcements

International News

- Asia
- Europe
- South America
- Africa
- Middle East
- Australia & Oceania
- Central America

Regional News

- East Coast
- Gulf Coast
- MidWest
- Canada
- Caribbean
- Mexico
- California/Pacific
- Florida/Caribbean Connection