



Beth Peterson  
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# Oscar Winning Deemed Export Programs



## What is a Foreign National

- A Foreign National is someone who is NOT one of the following:
  - A U.S Citizen,
  - Someone who has been granted permanent residence, as demonstrated by the issuance of a permanent resident visa (i.e., "Green Card"); or
  - Someone who has been granted status as a "protected person" such as a refugee, asylee,
  - or someone qualified for amnesty.
- EAR: The latest acquired country of citizenship or permanent residence.
- ITAR: All citizenships including the country of birth.



## What is a Deemed Export?

- Release of “technology” or source code\* to a Foreign National in the U.S.
- This is "deemed" to be an export to the home country or countries of the foreign national and may require a license under the EAR.
- Deemed Re-exports may also require a license. The company that releases the U.S. technology is responsible for obtaining the license.

\*Publicly available Encryption source code requires notification to BIS.



## Deemed Re-Exports

- The transfer of controlled U.S. technology to a third-country national overseas (e.g. a Chinese citizen working in Germany).
- Foreign firms transferring U.S. controlled technology to a third country national must obtain the license.





## What is Considered Technology?

- “Technology” – is specific information necessary for the development, production, or use of a product. The information takes the form of “technical data” or “technical assistance”.
  - “Technical data” may take forms such as blueprints, plans, diagrams, models, formulae, tables, engineering designs and specifications, manuals and instructions written or recorded on other media or devices such as disk, tape, read-only memories.
  - “Technical assistance” may take forms such as instruction, skills training, working knowledge, or consulting services.



## What is “Use” Technology?

- “Use” technology is specific data required for:
  - Operation
  - Installation
  - Maintenance
  - Repair
  - Overhaul
  - AND Refurbishing
- The technology must be required to “replicate or improve the design of the controlled item being operated”.



## Encryption Technology

- Foreign Nationals can use encryption source and object code while in the U.S. without a license.
- Providing technical assistance (instruction, training, etc.) to a Foreign National is considered a deemed export subject to licensing.
- Encryption technology licensing is based on the following:
  - Encryption level (Restricted, Unrestricted, Mass Market)
  - Government or Military End User.
  - Country of Nationality.



## When is a License Required?

- Licenses are required for release of controlled technology or software to a foreign national only if a license is required for the export of such items to the home country.
- If a license exception can be used for the export of such items to the home country, it can also be applied to the deemed export to the foreign national.





# Country Chart – Part 738

## Commerce Country Chart

Reasons for Control

### Reason for Control

Countries	Chemical & Biological Weapons			Nuclear Nonproliferation		National Security		Missile Tech	Regional Stability		Firearms Convention	Crime Control			Anti-Terrorism	
	CB 1	CB 2	CB 3	NP 1	NP 2	NS 1	NS 2	MT 1	RS 1	RS 2	FC 1	CC 1	CC 2	CC 3	AT 1	AT 2
Burma	X	X	X	X		X	X	X	X	X		X		X		
Burundi	X	X		X		X	X	X	X	X		X		X		
Cambodia	X	X		X		X	X	X	X	X		X	X			
Cameroon	X	X		X		X	X	X	X	X		X		X		
Canada	X										X					
Cape Verde	X	X		X		X	X	X	X	X		X		X		
Central African Republic	X	X		X		X	X	X	X	X		X		X		
Chad	X	X		X		X	X	X	X	X		X		X		
Chile	X	X		X		X	X	X	X	X	X	X		X		
China	X	X	X	X		X	X	X	X	X		X		X		
Hong-Kong	X	X		X		X		X	X	X		X		X		
Taiwan	X	X	X	X		X	X	X	X	X		X		X		



# Country Chart – Part 738

**Commerce Country Chart**

**Reason for Control**

Degree of Concern

Countries	Chemical & Biological Weapons			Nuclear Nonproliferation		National Security		Missile Tech	Regional Stability		Firearms Convention	Crime Control			Anti-Terrorism	
	CB 1	CB 2	CB 3	NP 1	NP 2	NS 1	NS 2	MT 1	RS 1	RS 2	FC 1	CC 1	CC 2	CC 3	AT 1	AT 2
	Burma	X	X	X	X		X	X	X	X	X		X		X	
Burundi	X	X		X		X	X	X	X	X		X		X		
Cambodia	X	X		X		X	X	X	X	X		X	X			
Cameroon	X	X		X		X	X	X	X	X		X		X		
Canada	X										X					
Cape Verde	X	X		X		X	X	X	X	X		X		X		
Central African Republic	X	X		X		X	X	X	X	X		X		X		
Chad	X	X		X		X	X	X	X	X		X		X		
Chile	X	X		X		X	X	X	X	X	X	X		X		
China	X	X	X	X		X	X	X	X	X		X		X		
Hong Kong	X	X		X		X		X	X	X		X		X		
Taiwan	X	X	X	X		X	X	X	X	X		X		X		



Commerce Control List

Supplement No. 1 to Part 774 Category 5 - Telecommunications—page 11

*Controls:* SL and AT apply to entire entry. A license is required for all destinations, as specified in §742.13 of the EAR. Accordingly, a column specific to this control does not appear on the Commerce Country Chart (Supplement No. 1 to Part 738 of the EAR).

*Note:* This licensing requirement does not supersede, nor does it implement, construe or limit the scope of any criminal statute, including, but not limited to the Omnibus Safe Streets Act of 1968, as amended.

*Note:* These items are subject to the United Nations Security Council arms embargo against Rwanda described in §746.8 of the EAR.

**License Exceptions:**

CIV: N/A  
TSR: N/A

**List of Items Controlled**

*Unit:* \$ value  
*Related Controls:* N/A  
*Related Definitions:* N/A  
*Items:*

a. "Software" primarily useful for the surreptitious interception of wire, oral, and electronic communications.

b. "Software" primarily useful for the "development", "production", or "use" of equipment controlled by 5A980.

5D991 "Software" specially designed or modified for the "development", "production", or "use" of equipment controlled by 5A991 and 5B991, and dynamic adaptive routing software as described in the List of Items Controlled.

**License Requirements:**

Export Administration Regulations

*Reason for Control:* AT

*Control(s)* Country Chart

AT applies to entire entry AT Column 1

**License Exceptions:**

CIV: N/A  
TSR: N/A

**List of Items Controlled**

*Unit:* \$ value  
*Related Controls:* N/A  
*Related Definitions:* N/A  
*Items:*

a. "Software", other than in machine-executable form, specially designed for "dynamic adaptive routing".

b. [RESERVED]

**E. TECHNOLOGY**

**5E001** "Technology", (see List of Items Controlled).

**License Requirements:**

*Reason for Control:* NS, AT

*Control(s)* Country Chart

NS applies to entire entry NS Column 1

AT applies to entire entry AT Column 1

**License Requirement Notes:** See §743.1 of the EAR for reporting requirements for exports under License Exceptions.

**License Exceptions:**

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## Deemed Export vs. Technology Export

- Deemed export – the release of controlled technology to a Foreign National while in the U.S.
  - Specific to an individual.
- Technology export—the actual shipment or transmission of U.S. controlled technology to a company in a foreign country.
  - Specific to the country and (end user) company.



## Common Methods of “Release”

- Release can occur via:
  - Visual inspection
  - Conversation
  - Working Knowledge
  - Demonstration of Repair
- Methods include:
  - Telephone conferences
  - Email and Fax
  - Training Sessions
  - Company Intranet





## Every Day Situations – Deemed Export

- Formation of a joint venture or merger with a foreign company.
- Foreign affiliate employees permitted access to company's intranet.
- Vendors permitted access to technology in course of providing goods or services.
- Collaboration among U.S. employees and foreign affiliate employees.
- Foreign nationals employed by a customer are receiving training on your technology.



## Visitors, Trade Shows, Conferences

- Office/Facility Tours – You have decided to give a tour to a Foreign National who is a prospective customer. The tour inadvertently passes through the engineering area where blueprints and other technical documents are on display.
- Trade Shows – You're attending a trade show frequented by Foreign Nationals from countries to which your product would commonly require an export license. In discussing your product you reveal proprietary information not covered in your sales literature.



## Licenses for Deemed Exports

- In FY2007, BIS approved 88% of deemed export licenses submitted.
  - 12% of the applications were returned without action.
  - Less than 1% were denied.
- Almost 60% of the licenses were for Chinese Foreign Nationals.
  - 13% from Russia
  - 6% from India
  - 3% from Iran
- It took BIS about 40 days on average to process a deemed export license in 2007.





# I-9 Eligibility to Work

- Not all I-9 Documents confirm Nationality
- § 1606.3 of Title 29: The national security exception.
- It is legal to deny employment to any individual who does not fulfill the national security requirements stated in section 703(g) of title VII.1

LISTS OF ACCEPTABLE DOCUMENTS				
LIST A	OR	LIST B	AND	LIST C
Documents that Establish Both Identity and Employment Eligibility		Documents that Establish Identity		Documents that Establish Employment Eligibility
1. U.S. Passport (unexpired or expired)		1. Driver's license or ID card issued by a state or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address		1. U.S. social security card issued by the Social Security Administration (other than a card stating it is not valid for employment)
2. Certificate of U.S. Citizenship (INS Form N-560 or N-561)		2. ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address		2. Certification of Birth Abroad issued by the Department of State (Form FS-545 or Form DS-1350)
3. Certificate of Naturalization (INS Form N-550 or N-570)		3. School ID card with a photograph		3. Original or certified copy of a birth certificate issued by a state, county, municipal authority or outlying possession of the United States bearing an official seal
4. Unexpired foreign passport, with I-551 stamp or attached INS Form I-94 indicating unexpired employment authorization		4. Voter's registration card		4. Native American tribal document
5. Permanent Resident Card or Alien Registration Receipt Card with photograph (INS Form I-151 or I-551)		5. U.S. Military card or draft record		5. U.S. Citizen ID Card (INS Form I-197)
6. Unexpired Temporary Resident Card (INS Form I-688)		6. Military dependent's ID card		6. ID Card for use of Resident Citizen in the United States (INS Form I-179)
7. Unexpired Employment Authorization Card (INS Form I-688A)		7. U.S. Coast Guard Merchant Mariner Card		7. Unexpired employment authorization document issued by the INS (other than those listed under List A)
8. Unexpired Reentry Permit (INS Form I-327)		8. Native American tribal document		
9. Unexpired Refugee Travel Document (INS Form I-571)		9. Driver's license issued by a Canadian government authority		
10. Unexpired Employment Authorization Document issued by the INS which contains a photograph (INS Form I-688B)		For persons under age 18 who are unable to present a document listed above:		
		10. School record or report card		
		11. Clinic, doctor or hospital record		
		12. Day-care or nursery school record		



## National Security Exception

- Equal opportunity employer.
  - Title 7, Section 703 of Civil Rights Act
- National Security exception (Title 29, section 1606.3 of the CFR) will apply for employment in certain technical positions.
- Deemed export license application process involves identifying the nationality of the individual.



## **Dual Citizenship/ Permanent Resident**

- As a general principle, a Foreign National's most recently obtained citizenship governs the licensing requirement.
- A Foreign National's most recent Permanent Residency is also viewed as the EAR residency
- If an Indian Foreign National becomes a citizen or permanent resident of the U.K. but retains Indian citizenship, the most recent citizenship is with the U.K. and releases of technology would be viewed as releases to the U.K.



## Penalties & Violations

- Administrative penalties up to \$250,000 per violation.
- Criminal penalties of up to \$1 million per violation and up to 20 years in prison.
- Denial or restriction of export privileges.
- Bad public relations.
- Under the Immigration and Naturalization Act a Foreign National can be rendered inadmissible or deportable if he or she is found to have circumvented regulations or is in breach of export control laws.



## Violation Examples

- The Violation: On 21 occasions between 1996 and 2000, Fujitsu Network Communications, Inc. failed to obtain the required BIS licenses.
  - Release of controlled technology to foreign nationals from the PRC and Ukraine employed by the firm in the U.S.
  - The employees were conducting research on the development and manufacturing of commercial digital fiber optic transmission and broadband switching equipment, software, and technology controlled for national security reasons.
- The Penalty: \$125,000 administrative penalty.
- Mitigating Circumstance: Fujitsu voluntarily self-disclosed the violations and cooperated fully with the investigation.



## Deemed Export Program

- Training for all employees.
- Hiring & employment policy.
  - HR notifies compliance manager when a foreign national engineer leaves the company.
  - Candidate Questionnaire.
  - Technology Control Plan.
- Denied party screening.
- Firewalls around sensitive technology.
- Physical access points are monitored.



# Deemed Export Questionnaire

The following questions are being asked to determine whether you are subject to these regulations and, if so, to assess your country of chargeability for export control purposes. This information will be used for export control evaluation purposes only. The decision whether or not to file or pursue an export license application is at \_\_\_\_\_ sole election.

1. ARE YOU ONE OF THE FOLLOWING:

- Citizen or National of the United States.
- Lawful Permanent Resident.
- Person granted Refugee status.
- Person granted Asylum.
- Temporary Resident (granted under Amnesty or Special Agricultural Worker provisions. The term "Temporary Resident" does not include persons in nonimmigrant status such as H-1B, L-1, F-1, etc)?

**Yes**        **STOP.** If "Yes", do not answer any of the following questions. Please proceed directly to Signature Section on the bottom of this document.

**No**        If "No", please proceed and complete Questions 2 and 3, below.

2. **HAVE YOU EVER ACQUIRED CITIZENSHIP, NATIONALITY, OR PERMANENT RESIDENT STATUS IN A COUNTRY OTHER THAN YOUR PLACE OF BIRTH?**

**Yes**        If "Yes," please provide details (country(s), type of status, date of acquisition):



## Obtaining Export Licenses

- Your company should determine whether to proceed with License Application or not based on:
  - Likelihood of approval.
  - Availability of candidate during application period.
  - Cost.





## Export License Application Requirements:

- Multipurpose Form BXA-748P.
- Letter of explanation.
- Resume.
- Applications must include the following:
  - The exact project location, how and in what form the technology or software will be used.
  - A description of the type of technology based on the type of product the firm designs, develops, fabricates, manufactures, or produces.
  - A description of the job and why access to the technology is required.
  - The applicant's technology control plan.



## **License Renewals & Extensions:**

- Both the license renewal application and a written request for extension must be received by BIS at least 45 days prior to the expiration of the existing license to receive the automatic six-month extension.
- Deemed export license validity periods will be tied to a foreign national's visa expiration date if that expiration date extends beyond the standard two-year license validity period.



## Deemed Export Best Practices

- People
  - Train Sales, Engineering and HR.
  - Identify country of nationality for all employees & consultants.
  - Screen all employees, customers, suppliers, consultants and representatives against the RPL.
  - Carefully adhere to basic employment rules in interviewing and hiring foreign nationals.
  - HR must be aware of the Title VII issues regarding questions relating to national origin.





## Deemed Export Best Practices

- People
  - Make export compliance a condition for employment or engagement.
  - If position/job requires license, monitor compliance, duties and immigration status (e.g. Green Card Renewal).
  - Review – Go through the Visas with HR





## Deemed Export Best Practices

- Systems
  - Maintain effective security controls of company intranet, servers and databases.
- Facilities
  - Physical access controls to all areas where technology is developed and discussed.
  - Electronic and physical surveillance.





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## Exercises





## Exercise #1

- You want to hire an employee that will have access to U.S. technology that would require a license from BIS for foreign nationals from India. The individual has a dual citizenship of the U.S. and India. Is a license required?
- No, the U.S. citizenship under the EAR does not require a license for deemed exports.
- Under ITAR, the individual could require a license.



## Exercise #2

- An Chinese foreign national who is on sabbatical from a Chinese company that is on the Entity List wants to work with your firm in our executive training program where we will discuss proprietary technology which is not controlled to China. You will have had an ongoing exchange of executives and scientists from this organization for years. Is a license required?





## Answer

- Yes, you are required to apply for a deemed export license. Any export which includes transfers of technology to foreign nationals requires a license to organizations on the Entity List. Because the Chinese foreign national is still employed by the organization that is on the Entity List, a technology transfer to him or her is considered a technology transfer to the employer organization.



## Exercise #3

- You e-mail blueprints to an employee of your US supplier, with whom you have a non-disclosure agreement in place. Do you require a license?
  
- Answer: Maybe. Even with an NDA, you are required to inquire on the nationality of the receivers of your controlled tech data to determine if you need a license.



## Exercise #4

- You bring in a dual national, Honduras and more recently Hungary, to view engineering plans for a machine with an ECCN of 2B001, which requires a license for Honduras. Do you require the license?
- Answer: No. Release of controlled technology to that individual would be treated as if the individual was in Hungary which does not require a license. The more recent citizenship holds precedence.



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## **Questions & Answers**



## Additional Deemed Export Materials

- [www.bpeglobal.com](http://www.bpeglobal.com)
  - Login: BPEDE
  - Password: exp0rt

A screenshot of the BPE website. The header features the BPE logo on the left and a search bar with a 'Go' button on the right. Below the header is a navigation menu with links for Home, About Us, Services, Training, News, Insights & Reports, Contact Us, and Sign In. The main content area is titled 'Oscar Winning Deemed Export Programs' and includes a thank-you message, a section for 'Training Presentation - with Exercises' with a link to 'Oscar Winning Deemed Export Programs', a 'Deemed Exports' section with links to 'BPE Deemed Export checklist' and 'Mergers, Acquisitions and Divestitures', and a 'Glossary' section with a link to 'BPE Glossary'. At the bottom, there is contact information and a 'Terms of Use' link.

**BPE** Search:

Home About Us Services Training News Insights & Reports Contact Us Sign In

### Oscar Winning Deemed Export Programs

Thank you for your participation in this BPE training course. The following are assessorial materials to support your learning experience.

**Training Presentation - with Exercises**

- [Oscar Winning Deemed Export Programs](#)

**Deemed Exports**

- [BPE Deemed Export checklist](#)
- [Mergers, Acquisitions and Divestitures](#)

**Glossary**

- [BPE Glossary](#)

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ENABLING COMPANIES TO  
SUCCEED GLOBALLY THROUGH  
CONSULTING AND TRAINING