

BPE Global Hot Topic – March 2016

H-1B Visa Cap Season and Export Compliance



Are you prepared?

April 1st is rapidly approaching, and if you are an HR Immigration specialist, you probably are feeling just as exhausted as a tax preparer by now. Yes, it is H-1B Visa cap season! If you are an export compliance practitioner, you may however be wondering exactly what H1-B Visa cap season is and why you should care.

Throughout the year, as an export practitioner, you should already have in place a process for reviewing foreign national hires, but you may not have noticed that for some reason there is a huge increase in volume of reviews in the months of February and March, if you are lucky. If you are unlucky, you'll see a huge spike the first week or so of April. Well, that my friends is your HR team working hard to retain key talent. Last year, United States Citizenship and Immigration Services ("USCIS") closed the cap, after receiving 223,000 H-1B petitions in the first seven days of April!

The "H1B cap" is a congressionally mandated maximum number of petitions that USCIS can accept in a year. As of now, the H-1B cap number for fiscal year 2017 is 65,000 for regular H1B, and 20,000 for U.S. Master's Degrees, and April 1st is the earliest petition filing date for FY 2017.

As part of the H-1B process that your HR department is addressing, one of the documents that is required to be submitted is the USCIS form I-129. Although this form had an export control certification section added as "Part 6" back in 2011, we still get panicked calls from clients (and potential clients) asking what this "new requirement" is, and asking for assistance in proper completion of the form.

With this in mind, we recommend that you become familiar with the I-129 form, and ensure that it is incorporated in your deemed export foreign national hire review process, as part of the review coordinated between the export compliance and human resources functions.

For those of you unfamiliar with the concept of a deemed export, the deemed export rule states that an export of technology or source code (except encryption source code) is "deemed" to take place when it is released to a foreign national within the United States. See [§734.2\(b\)\(2\)\(ii\)](#) of the Export Administration Regulations (EAR) and the BIS website [Deemed Export FAQs](#) for detail.

The key steps to doing a Deemed Export determination is to have a qualified person:

- 1) Identify the product/technology
- 2) Classify the product/technology and



Renee Roe – Director
BPE Global
139 Pierce Street
San Francisco, CA 94117
T – 1-408-340-0995
renee@bpeglobal.com
www.bpeglobal.com

3) Determine the applicable controls by looking at the Commerce Control List (CCL) ECCN including related controls, licensing/license exceptions available and the applicable country chart.

For purposes of this article we presume that your company is familiar with the concept of deemed exports, and knows how to approach a deemed export determination, and we are delving further into the nuances of the I-129 process.

Following is an extract of the first page of the I-129 form, and the licensing certification in Part 6.



Petition for a Nonimmigrant Worker

Department of Homeland Security
U.S. Citizenship and Immigration Services

USCIS
Form I-129
OMB No. 1615-0009
Expires 10/31/2016

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

(This section of the form is required only for H-1B, H-1B1 Chile/Singapore, L-1, and O-1A petitions. It is not required for any other classifications. Please review the Form I-129 General Filing Instructions before completing this section.)

Select Item Number 1. or Item Number 2. as appropriate. DO NOT select both boxes.

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 the 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.

Although in the export compliance function, you would not (and should not) be preparing the I-129 form, you do need to be aware that in helping the human resources function to properly complete Part 6, the information provided is deemed to be completed, true and correct in multiple sections, shown below.



Part 7. Declaration, Signature, and Contact Information of Petitioner or Authorized Signatory (Read the information on penalties in the instructions before completing this section.)

Copies of any documents submitted are exact photocopies of unaltered, original documents, and I understand that, as the petitioner, I may be required to submit original documents to U.S. Citizenship and Immigration Services (USCIS) at a later date.

I authorize the release of any information from my records, or from the petitioning organization's records that USCIS needs to determine eligibility for the immigration benefit sought. I recognize the authority of USCIS to conduct audits of this petition using publicly available open source information. I also recognize that any supporting evidence submitted in support of this petition may be verified by USCIS through any means determined appropriate by USCIS, including but not limited to, on-site compliance reviews.

If filing this petition on behalf of an organization, I certify that I am authorized to do so by the organization.

I certify, under penalty of perjury, that I have reviewed this petition and that all of the information contained in the petition, including all responses to specific questions, and in the supporting documents, is complete, true, and correct.

1. Name and Title of Authorized Signatory

Family Name (last name)

Given Name (first name)

Title

Preparer's Declaration

By my signature, I certify, swear, or affirm, under penalty of perjury, that I prepared this petition on behalf of, at the request of, and with the express consent of the petitioner or authorized signatory. The petitioner has reviewed this completed petition as prepared by me and informed me that all of the information in the form and in the supporting documents, is complete, true, and correct.

5. Signature and Date

Signature of Preparer

Date of Signature

(mm/dd/yyyy)

So, as a matter of process and required recordkeeping, the export compliance function needs to be able to document how it was determined that an export license was, or was not, required from the U.S. Department of Commerce or U.S. Department of State, to release technology or technical data to the foreign person.

When we ask companies to go back and identify who is completing Part 6 of the I-129, the export licensing certification for controlled technology or technical data, we are often surprised to find the person completing this section has absolutely no idea what they are certifying. They often are just guessing no export license is required, along with completing the many other parts of the form that need to be completed, and preparing the required back up documentation.

This is why it is important when developing or updating your deemed export process, to include specifically who owns what part of the process between restricted party screening, deemed export screening and licensing requirements, and completion of the I-129. It may ultimately be that the export compliance function is interacting both with their HR department and an external immigration attorney or consultant. These three parties need to have clear roles and responsibilities, along with a documented process, and recordkeeping requirements.



Renee Roe – Director
BPE Global
139 Pierce Street
San Francisco, CA 94117
T – 1-408-340-0995
renee@bpeglobal.com
www.bpeglobal.com

Addressing this today may make April a little easier for all parties involved, whether this year, or going forward. Your call to action is to dust off your deemed export procedures and sit down with your HR team to discuss the visa process “as-is” state, with the goal to ensure all foreign national hires are properly processed including those that come up as “cap cases” in April. If you have any questions, or need help with your procedures, BPE Global is here to help!

BPE Global is a global trade consulting and training firm. Renee Roe is a Director at BPE Global. You can reach Renee by email at renee@bpeglobal.com.