IADC Committee Newsletter

# EMPLOYMENT LAW

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## IN THIS ISSUE

*Mike Gladstone reports on revisions to immigration Form I-129 by the United States Citizenship and Immigration Services (USCIS).*

# Employers as Export Law Experts

## ABOUT THE AUTHOR

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## ABOUT THE COMMITTEE

The Employment Law Committee serves members who represent employers and their insurers. Committee members publish newsletters and Journal articles and present educational seminars for the IADC membership-at-large and mini-seminars for the committee's membership at the Annual and Midyear Meetings. The Committee presents significant opportunities for networking and business referrals. The goal of the Employment Law Committee is to build an active committee with projects that will attract and energize attorneys who practice employment law on a domestic and international basis.

Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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In November, 2010, USCIS revised the immigration Form I-129, which is the workhorse petition for employers seeking authority to hire foreign nationals. The revision added Part 6, which requires significant new affirmations from employers concerning their compliance with federal technology export control laws. Since February 20, 2011, employers seeking H-1B, H-1B1, L-1 or O-1A classification on behalf of an employee or potential employee must verify and affirm the new export law declaration in "Part 6" of Form I-129. Significant employment categories affected by the form revision are H-1B and L-1, which are the heavily used specialty occupation (H-1B) and intra-company transferee (L-1) categories.

The new affirmations are challenging because they require:

a) *certification* by the employer that, as to the technology or technical data which the foreign person will receive or have access to through the employment, it has *reviewed* the Export Administration Regulations (EAR) and International Traffic in Arms Regulations (ITAR), and *determined* that either,
b) no license is required from either the Dept. of Commerce of the Dept. of State to release the technology or technical data to the foreign person, or,
c) an export license is required for the release of the technology or technical data to the foreign person, and the employer promises that it will "prevent access" to the controlled technology or technical data by the foreign person until appropriately licensed to do so.

Heretofore, the immigration aspect of technology export-control was principally addressed by the U.S. Department of State during visa adjudication, and by DHS upon inspection of foreign nationals at the time of foreign national arrival and admission to the U.S. Companies affected by the EAR and ITAR have generally been aware of their status and addressed the immigration issues of employing foreign nationals on case by case basis. Publicity surrounding the State Department's updated "Technology Alert List", issued in August '02, and its immigration implications for businesses in affected industries has been, if not perfect, at least pervasive. With this change to the I-129, however, *all companies* petitioning for the listed categories must undertake a technology examination and make the EAR/ITAR determination related to the prospective foreign national employee to make the affirmation under penalty of perjury.

This is a substantial responsibility due to the daunting complexity of the EAR and ITAR, the penalties for an erroneous determination, and the specter of perjury. See, *U.S Technology Protection Issues in Litigation: Foreign National Corporate, Fact and Expert Witnesses,* IADC International Committee Newsletter, April 2008. The I-129 instructions for new Part 6 give little hint of the task ahead of employers investigating controlled technology issues for the first time, practically implying that making the required determination is just a matter of checking a couple of government websites. If only it were so simple. While the government concedes that most employers will not be required to obtain an export control license for the prospective employment, in many cases employers will incur substantial costs in time and/or legal expense to establish that no license is needed. EAR technology analysis is particularly complex, and the need for

licensing can turn on a variety of factors. In situations where an export license is required to employ the foreign national or ambiguity exists over the need for an export license, issues of delayed or make-work employment, benching, and refusal to hire with its potential for national origin discrimination claims all appear on the horizon. Where licenses are necessary, issues of adequate technology protection arise until the license is obtained.

Employers wishing to get ahead of the game relative to a likely H-1B or L-1, or O-1 filing should consider their technology ahead of time and review the licensing process before making a job offer in the first place. Information concerning the EAR and licensing may be found at http://www.access.gpo.gov/bis/ear/ear_data.html#ccl and www.bis.doc.gov/deemedexports , and for ITAR, http://www.pmddtc.state.gov/regulations_laws/itar.html, and http://www.pmddtc.state.gov/faqs/license_foreignpersons.html. Employers with any exposure to technology issues should make offers to foreign nationals contingent on visa issuance and successful necessary licensing. Affected employers should carefully consider business plans connected to foreign national employees and consider the options available to avoid the issue altogether, given the limited categories of non-immigrant visas affected by Part 6. Where the listed categories are the only practical employment options, employers should construct their CIS petitions and visa applications to reduce the risk of unexpected delay or denial.

Strategies where technologies are implicated by the EAR or ITAR include hiring a beneficiary initially for a position that does not require technology licensing, and then changing the technology exposure after employment occurs and the necessary licensing is in place. This also allows the employee's foreign passport data and Visa, amongst other documentation, to be supplied to DOC/DOS in conjunction with the employment license application. During planning the employer and counsel should consider whether the anticipated technology change is sufficiently 'significant' to require an amended H1B or L-1, and whether the initial job description is broad enough to avoid the necessity of later amendment.

For a position that implicates protected technology and requires a license, employers should be able to present a copy of an application for employment license filed with DOC/DOS, and a non-disclosure agreement and compliance plan in response to a government request for additional evidence. If the employer has none of these in place at the time of I-129 filing then it could have difficulty demonstrating convincingly how the employer will "prevent access" to the controlled technology/technical data until a license is obtained. Absence of these items could also prove a problem for visa issuance. Beneficiaries requiring an employment license must be prepared for their visa interviews with knowledge of the technology issue, their employer's access rules for their position, and applicable technology control compliance procedures at the employer. These beneficiaries should also be prepared for the broader personal questioning they will receive depending on their country of origin, the technology involved and their travels, to mention a few likely subjects.

The imposition of these affirmations on all employers requires determinations on issues many have never considered and makes immigration planning more important than ever where employment in technology related positions is concerned.

# PAST COMMITTEE NEWSLETTERS

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Michael H. Gladstone

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Jacqueline J. Harding

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