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## **Export Controls and Immigration: New Visa Certification Requirements**

### **Background**

In the midst of the Administration's major export control reform initiative, the U.S. Citizenship and Immigration Services (USCIS) has added an export compliance certification to visa applications. This new provision applies to employers who intend to hire nonimmigrant or temporary foreign nationals and potentially impacts employers in all industry sectors. The petitioning employer must certify on the visa application that the employer has reviewed the export regulations and determined whether an export license is required for any technology or technical data that might be released during the course of employment. If government approval is necessary, the company must certify that they have procedures in place to prevent unauthorized access to the controlled technology until the appropriate authorization has been issued. The new certification requirement is effective February 20.

### **Export Controls and Immigration certification requirements**

#### *Export Controls – Foreign Nationals*

Under regulations issued by the both the Commerce Department (the Export Administration Regulations (EAR)) and the State Department (the International Traffic in Arms Regulations (ITAR)), the U.S controls the export of technology and technical data to foreign persons, even foreign persons located in the U.S. Technology provided to foreign nationals in the U.S. is "deemed" an export, and is therefore subject to control. This may not, though, invoke a licensing requirement, as much technology does not need a license. Most defense related technology, however, may be licensable. While the requirement to comply with export controls is not new, the mandate to certify export compliance in the affirmative on a visa petition is.

#### *Certification requirements*

The new certification requirement applies to license petitions for the following types of visas:

- H-1B (Workers in a specialty occupation)
- H-1B1 (Free Trade Agreement workers in a specialty occupation from Chile and Singapore)
- L-1 (Intracompany transferees in positions utilizing specialized knowledge and Intracompany transferees in managerial or executive positions)
- O-1A (Persons with extraordinary ability in sciences, education, business, or athletics).

The certification appears on the [I-129, Petition for a Nonimmigrant Worker](#) application under Part 6 (Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States). The certification requires the applicant to certify in the affirmative that they have reviewed both the EAR and the ITAR to determine if any technology or technical data to be released to the foreign employee during the course of employment requires a license. If the employer determines that a license is required from either the Department of Commerce or the Department of State, then the petitioner must also state that procedures are in place to prevent access by the foreign national to the technology until the petitioner has received the appropriate government authorization to release the data.

This new certification requirement results in part from the conclusions of a GAO study, [Department of Commerce Controls over Transfers of Technology to Foreign Nationals Need Improvement](#). The report found that because Commerce did not review all relevant visa and immigration data, it was likely missing opportunities to identify firms that should have applied for licenses for foreign national employees.

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