
The Intersection of Immigration and Export Control

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U.S. Export Control Overview

What Are Export Controls?

- Ensure exports are consistent with national security and foreign policy objectives
- “Export” includes the release of technical data to Foreign Persons, *whether in the U.S. or abroad (“Deemed Exports”)*
- Controls extend to commercial, “dual-use,” and military goods, software and technical data

Export Control Regulations

- **Export Administration Regulations (“EAR”)**
 - Administered by U.S. Department of Commerce, Bureau of Industry and Security (“BIS”)
 - Purely civil or “dual-use” items
- **International Traffic in Arms Regulations (“ITAR”)**
 - Administered by U.S. Department of State, Directorate of Defense Trade Controls (“DDTC”)
 - Items specifically designed or modified for a military or space application
- **OFAC sanction regulations**
 - Administered by U.S. Department of Treasury, Office of Foreign Assets Control (“OFAC”)
 - Targeted at countries and/or individuals
 - Country examples include Cuba, Iran, Sudan

“Deemed Exports”

- Transfer of technology to a foreign person
 - “release of technology or source code subject to the EAR to a foreign national” (EAR 15 CFR 734.2)
 - “disclosure of technical data to... [or] performing a defense service on behalf of... a foreign person...” (ITAR 22 CFR 120.17(4) and (5))
- “Deemed” to be an export to the foreign person’s “home country”

Who Is a Foreign Person?

- Any person who is not:
 - Citizens or Nationals of the U.S.;
 - Lawful Permanent Residents (Green Card Holder);
 - Persons granted Asylum;
 - Persons granted Refugee status;
 - Temporary Residents granted amnesty

- *Tip*: Persons with a visa (H-1B, etc) are considered foreign persons

Deemed Export Implications

- U.S. government authorization (“License”) may be required prior to export
- License approval takes time (2 - 4+ months) and denial is possible
- Significant civil and criminal penalties
 - Civil penalties up to \$500,000 per violation
 - Criminal penalties up to \$1,000,000 per violation and 10 years in prison
 - Denial of export privileges
 - Debarment from U.S. government contracts

EAR – What Is Controlled?

- Review Commerce Control List (“CCL”)
- Common technology controls:
 - semiconductors
 - telecommunications
 - high speed computers
 - non-ITAR aerospace
 - materials
 - manufacturing equipment
- China accounts for 60% of EAR deemed export licenses (Russia, Iran also significant)

EAR Country Hierarchy

Highest
Controls

- “Terrorist Supporting States”
 - Cuba, Iran, North Korea, Sudan, Syria (“T-5”)

- “Countries of Concern”
 - Former Soviet Republics (Russia, Ukraine), China, Vietnam, etc.

- “Friendly Countries”
 - All others (former “Free World”)

Lowest
Controls

EAR – Licensing Exercise

1. Review Commerce Control List

Category 5 – Telecommunications

Export Control Classification Number (“ECCN”) 5A991

Reason for Control: Anti-Terrorism (“AT”)

AT applies to entire entry

b. Telecommunication transmission equipment and systems. . .having any of the following characteristics, functions or features:

b.1. Employing digital techniques, including digital processing of analog signals, and designed to operate at . . . a “total digital transfer rate” exceeding 90 Mbit/s

Note: ECCN 5E991 controls technology for the development, production or use of ECCN 5A991 items, with AT Reasons for Control. AT items are controlled for Cuba, Iran, North Korea, Sudan and Syria.

2. Determine Foreign Person’s Home Country

3. Identify License Requirement: Apply Reasons for Control against Home Country ¹¹

ITAR – What Is Controlled?

- Applies to:
 - Traditional military items
 - Space articles, including commercial communication satellites
 - Any component specifically designed, adapted, configured or otherwise modified for above items
- Controls extend to technical data required for the design of a military or space article
- Commercial good that is specifically modified for a military or space application may be subject to ITAR

ITAR Licensing Determination

- Export license required to transfer ITAR technical data to foreign person employee
- Home Country: all countries of citizenship or nationality considered
- Policy of denial: Cuba, Iran, North Korea, Sudan, Syria, China, others

Home Country

- EAR – Last in time acquired citizenship or permanent residence
- ITAR – Look to most restrictive country of citizenship or nationality
- Loss or renunciation of home country status
 - Reversion under EAR
 - Factor to consider under ITAR

Exemption or Exception

- Information that is “publicly available” (EAR) or in “public domain” (ITAR)
- Open meetings, conferences, libraries, patents
- “Fundamental research”
- License “exception” under EAR



Recent Cases

Recent Cases

March 2007: ITT - \$100 million

Violations included transfers of ITAR technical data to foreign contractors for production of night vision components

November 2007: Lam Research - \$27,500

Violations included transfers of EAR controlled semiconductor technology to one Chinese and one Russian foreign national employee

May 2008: 3DSP - \$31,500

Transfers of 802.11 wireless technology to Chinese foreign national with ties to a Restricted Party

August 2008: Ingersoll Machine Tools - \$126,000

Transfer of controlled machine tool technology to Italian and Indian foreign national employees

Recent Cases (cont'd)

August 2008: AMD - \$11,000

Transfer of controlled semiconductor technology to Iranian national employee

August 2008: RINC - \$83,000

Transfer of controlled echosounder technology to French and U.K. foreign national employees

September 2008: University of Tennessee Professor

Convicted for transfer of controlled technology to Chinese foreign national student, awaiting criminal sentencing

October 2008: Maxim - \$192,000

Transfer of controlled encryption technology to Iranian foreign national employee; transfer of electronics technology to Chinese foreign national employee



Employment and Immigration Law Considerations

Employment Considerations

■ Hiring

- Identify foreign persons
- Balance discrimination concerns
- Determine whether a license is required
- Factor in likelihood/timing of license approval and potential for unacceptable restrictions

■ Deployment

- No license, no access
- H-1B Benching Rule
- Work-Arounds consistent with visa status?

Initial Sorting Question for Immigration and Export Control

“Are you a U.S. citizen, U.S. national, lawful permanent resident, lawful temporary resident, asylee, or refugee? (The term “lawful temporary resident” refers to aliens granted temporary resident status under amnesty programs, not to aliens holding short-term visas such as the H-1B, B, J, or F.) YES / NO”

Applicants should be instructed to answer only “Yes” or “No” to the entire question, and not to identify their specific category.

For candidates who answer “no,” the employer must obtain information about the person’s country of citizenship, permanent address in his or her home country, passport number and country of issuance, visa type and date and place of issuance, and most recent I-94 number and date. The candidate’s résumé and list of publications must also be submitted with a license application.

Citizenship Status Discrimination

- Employment discrimination based on protected individual status (8 USC 1324b)

- Limited to class of “protected individuals” (e.g., preferring a U.S. citizen over a Lawful Permanent Resident)

- Exceptions
 - To comply with law, regulation, or executive order
 - Req’d by federal, state, or local government contract
 - Essential to do business with agency or department of federal, state or local government

National Origin Discrimination

- Employment discrimination based on “national origin” including place of birth (42 USC 2000e-2)
- National security exception (42 USC 2000e-2(g))
 - Position or access to premises where duties performed is subject to “any requirement imposed in interest of the national security...”, and
 - Individual has not fulfilled or has ceased to fulfill such requirement

Candidate Review

- Appropriate line of inquiry
 - Is the candidate a “protected individual” yes/no?
 - If “yes”, no further inquiry is permissible
 - If “no”, may inquire as to visa status, citizenship, place of birth, place of permanent residency, etc.
- Conduct review pre-offer or post-offer?
- Require proof of protected individual status?
- Restricted party screening for employees?

Restricted Party Screening

- “Restricted Party” Lists Include (among others):
 - DOC Entity and Denied Parties
 - OFAC Specially Designated Nationals, Terrorists and Narcotic Traffickers
 - DOS Debarred Parties Lists
- Typical Questions
 - Do we need to Screen?
 - When and Who to Screen?
- Legal Considerations
 - Fair Credit Reporting Act (15 U.S.C. § 1681 et. seq.) and related Consumer Protection Laws
 - Pre-Screen Notice
 - Opportunity to Respond to Hits

Decision to License

- Reasons for not proceeding with export license application:
 - Will take too long (background issues, time critical project)
 - Candidate subject to policy of denial (e.g., ITAR license for Chinese national)
 - Prospect for unacceptable conditions on grant of license
 - Company unable to support technology control plan
 - Other equally qualified candidate

Job Offer

- If pre-offer review, company may elect not to proceed with offer
- Offer letter
 - Provide for export control contingency language
 - Do not bind company to submit a license
- Provide for maintenance of licensing authorization as condition of employment

Initial Deployment

- Contingency plan if deployment prior to grant of license
- Technology Control Plan – “Briefing Certificate”
 - For foreign person employees with export licenses
 - For foreign person employees without export licenses and access to workplace technology would require a license
- Manager, foreign person, co-workers to acknowledge access restrictions and license conditions

Workplace Changes

- Change in job, workplace technologies
- Change in location or facility
- Change in foreign person status

Third Party Considerations

■ Visitors

- Advance notice of foreign person visits
- Front desk sign in process
- Hosting responsibilities

■ Contractors/Collaborators

- “No foreign person” provision?
- Require prior notice and identification of foreign persons?
- Indemnification and contract provisions

Visa Applications: Mantis Security Advisory Opinions

- Consular involvement from INA 212(a)(3)(A)(i)
- Mantis SAOs are often taking at least three months
 - Expedite requests may be only for medical emergencies, humanitarian concerns or significant U.S. government interests, and even then DOS has the resources to handle only a small number of such requests.

Visas Mantis: Technology Alert List (9 FAM 40.31, Exhibit 1)

TAL has expansive Critical Fields list of technologies

(last published version)

- Conventional Munitions
- Nuclear Technology
- Rocket Systems
- Rocket System and Unmanned Air Vehicle Subsystems
- Navigation, Avionics and Flight Control
- Chemical, Biotechnology, and Biomedical Engineering
- Urban Planning
- Remote Sensing, Imaging and Reconnaissance
- Advanced Computer/Microelectronic Technology
- Materials Technology
- Information Security
- Laser and Directed Energy Systems
- Sensors and Sensor Technology
- Marine Technology
- Robotics

What Are Risk Factors?

- Nature of the company's technology
- Nature of the work/visit in the U.S.
- Mandatory for North Korea, Sudan, Cuba, Iran, Syria
- Likely for China, India, Russia, Israel and countries with large Muslim populations
- Discretionary for other nationalities
- Biographical red flags (employment, military, organizations, travel)

Strategies to Reduce the Likelihood of SAOs

- Provide details – uncertainty leads to SAOs. Details about:
 - The technology that will be released to the FN
 - Point out if the technology is not of the Critical Fields list or is part of the public domain or taught in academic courses
 - Nature of the work/visit
 - The FN's biography
- Consider company meeting with the Consulate if volume justifies it to explain company's technology and its export control program
- Nevertheless, SAOs often are unavoidable

The Impact of an SAO

- During the lengthy SAO, applicants are inadmissible unless they have an unexpired visa that matches their current status (most do not)
- Visa revalidation rule for visiting Mexico or Canada for less than 30 days does not apply
- If the applicant is in a third country, it is possible the person will not be able to remain in that country until the SAO is completed
- If the person works remotely, consider tax implications

Company Policy Considerations

- Consider requiring manager or immigration-team approval before an employee leaves the U.S. to apply for a visa.
- Does discriminating against letting employees who would be at high risk of an SAO apply for a visa give rise to employment-discrimination disparate impact concerns?
- Consider Legalnet@state.gov inquiries after 90 days, but routine response is, “The case is undergoing administrative processing. We are not able to predict when this process will be completed. Your client will be notified if additional information is required or when further action on the case is possible.”