

PERSPECTIVES

Export Licensing Controls and Foreign National Workers

By Jeff Ross and Eric Foley (Ross & Associates)

Many benefits are often cited for those companies seeking to hire foreign national workers: cost, technological expertise, etc. The disadvantages of hiring foreign national workers, however, are rarely publicized. One such disadvantage is caused by the federal government's export licensing controls, specifically the "deemed export" rule. To monitor the export of U.S. technology to foreign countries, the Department of Commerce is charged with enforcing the Export Administration Regulations (EAR). Most of the materials exported from the U.S. fall under the EAR 99 category, meaning that they are low-tech consumer goods that can be freely exported. Some exports, however, are considered to be dual-use in that they have both civilian and military applications. In order to prevent sensitive technologies from falling into the hands of our competitors and enemies, exports such as these are placed on the Commerce Control List. Such items cannot be exported to certain countries without a license.

These export licensing controls can have adverse implications for American firms that employ foreign nationals. This is because it is not necessary for an item or knowledge of technology to be directly shipped to another country for it to be exported. Whenever knowledge of technology is released to a foreign national, it is deemed to have been exported to that worker's country of citizenship.

Under the "deemed export" rule, oral exchange, visual inspection, or any practice or application under guidance of those with knowledge of the technology is considered a "release". (Technology is specific information necessary for development, production, or use of a product.) American companies must ensure that they are properly licensed to allow their foreign national workers access to sensitive technologies, lest they face large fines.

"When do I Need a License?"

An export license is unnecessary if the worker in question is a citizen, a permanent resident of the U.S.

or a "protected person" (refugees and asylum holders). The first step in determining whether a license is needed for a "deemed export" is to find an Export Control Classification Number (ECCN) for the technology in question. The ECCN is comprised of 5 characters, the first of which designates one of ten categories.

For example, "0" designates Nuclear materials, "3" signifies electronics, "4" denotes computers, and "7" equals navigation and avionics. This first number is followed by a letter that subdivides that category into five product groups, such as material, software, and technology. The three numbers that follow further differentiate the technology.

Determining the ECCN for a technology can be done in several ways. The exporter can search for the

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specific export in the index of the Commerce Control List (CCL). If the export cannot be found in the CCL index, a classification request can be submitted to the Bureau of Industry and Security using a BXA 748P form or it can be done online through the Simplified Network Application Process (SNAP).

Once an ECCN has been found for the technology in question, it must then be cross-referenced with the Commerce Country Chart (CCC).

Under an item's ECCN entry, its reason for control is given; for example, CC=crime control, AT=anti-terror, NS=national security. The CCC table has columns that correspond to each of these reasons for control. If the country in question has an "x" in the column corresponding to the control for a specific export, then an export license must first be obtained before exporting that technology from the United States.

How to File for a License

When filing for a "deemed export" license, a BXA-748P form must be submitted to the Bureau of Industry and Security. This form documents all the basic details of the export: the technology that is being exported, its purpose, a technical description, the end-user, and country of origin.

In addition to this form, the BXA requests that a letter of explanation and a resume for the foreign national be submitted. The letter of explanation should identify all the parties to the transaction, where the technology or software will be used, the type of technology or software, the use for that software, and also a detailed plan to prevent unauthorized foreign nationals from gaining access to this technology or software. The resume should include personal background information, educational and employment history, military or defense industry service in the country of citizenship, and any special skills or circumstances that would particularly qualify the foreign national to be trusted with this "deemed export".¹

Also, although the BXA handles the majority of deemed export licenses, it is not the only government agency with purview over export licensing.

The State Department's Directorate of Defense Trade Controls the licensing of defense articles, such as weapons technology and ammunitions; if a foreign national is employed in the defense industry it may be necessary to obtain licensing from the Department of State, which is a separate licensing and application process from the BXA. Similarly, the licensing of nuclear technology is under the aegis of both the Nuclear Regulatory Commission and the Department of Energy.

Other federal agencies with export licensing responsibilities include the DEA, FDA, EPA and the Treasury Department.

Those who are unsure of which agency they should apply for a license from may submit a Commodity Jurisdiction Request to the State Department, although this will only clarify whether a license should be applied for from the BXA or the State Department; it does not rule out a licensing requirement from the other aforementioned agencies.

Although the "deemed export" rule has been in effect for years, the government has begun to more vigorously prosecute licensing violations in the aftermath of September Eleventh.

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The criminal penalties can be up to ten years in prison and a \$1 million dollar fine for a willful violation of the ERA.²

Complying with the "deemed export" rule can be a daunting task. The complexity and ambiguity of the licensing process combined with the seriousness of possible fines make for a situation that could benefit from legal expertise.

¹ *Guidelines for Preparing Export License Applications Involving Foreign Nationals*. Office of Chemical and Biological Controls and Treaty Compliance, Bureau of Export Administration

² Code of Federal Regulations 764.3

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