

## THE BASICS OF EXPORT CONTROL FOR IMMIGRATION PRACTITIONERS

by Tien-Li Loke Walsh \*

To work with controlled “dual-use” technologies in the United States, foreign nationals and the companies that employ them must comply with both U.S. export control and visa regulations. Employers must possess any required export licenses and the foreign national should hold the appropriate nonimmigrant visa classification. Current national security concerns fueled by congressional prompting appear to be triggering a wave of recent governmental investigation and enforcement actions. Government agencies are focusing on the activities of foreign nationals, and consequently, so-called “deemed” exports (defined below). Therefore, if you represent a company with foreign nationals that have access to “dual-use” technologies, there are several issues that could arise. First, new changes to Form I-129 (Petition for a Nonimmigrant Worker) require all H-1B, L-1 and O-1A petitioners to make a deemed export attestation, confirming whether or not a foreign national employee requires an export license. Sec-

ondly, visa issuance could be delayed when the foreign national applies for a nonimmigrant visa at a U.S. embassy or consulate. Third, the consular post may initiate (or request the Commerce Department to initiate) inquiries to determine if an employer is liable for an illegal technology transfer or failed to obtain the appropriate export license. Many companies are simply unaware of these “deemed export” requirements. The failure to make the right inquiries could therefore expose a company to civil and criminal penalties and sanctions. Although export controls and immigration appear to be two distinct areas of law, the company which is investigated and sanctioned as a result of its failure to comply with export licensing provisions for its foreign nationals may not be aware of the overlapping issues. Therefore, it is critical to advise your client of the potential export control issues and to refer them to an export control specialist to ensure compliance.

While all export control inquiries should be left to export compliance experts, it is important to at least have a basic familiarity with some of the terms and issues that arise in the export control context, particularly when petitioning for H-1B, L-1 or O-1A foreign national workers.

### WHAT IS A “DEEMED EXPORT?”

When a company releases controlled technology to a foreign national during the course of employment, a “deemed export” occurs. The “deemed export” rule presumes that any technology released to a foreign national in the United States will be exported to the foreign national’s home country. The reasoning behind the rule is that the uncontrolled release of technology to a foreign national in the United States could ultimately result in the dissemination of sensitive technologies and information to risky foreign governments, terrorist organizations or any other entities involved in activities contrary to our security and national interests. Once the technology is released, there is no way to “take it back.”

It is critical to understand that although counter-intuitive, export controls that relate to a physical export of the technology to a foreign country, would

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also apply to the release of the technology *in* the United States to a foreign national of that country, because it is considered an “export” under applicable regulations.

### **WHY IS THE “DEEMED EXPORT” ISSUE IMPORTANT NOW?**

Under the Export Administration Act of 1979 as amended and the implementing Export Administration Regulations (EAR), the Department of Commerce is authorized to require firms to seek licenses for export of “dual-use” technologies that pose national security or foreign policy concerns. As part of the Commerce Department’s Export Enforcement Program, the Bureau of Industry and Security (BIS) initiated a Visa Application Review Program in 1990. The program attempts to prevent the unauthorized access to controlled technology or technical data by aliens visiting the United States. Under this program, information on visa applications is reviewed to detect and prevent possible violations of the EAR.

The export control issue has recently become a concern to immigration practitioners because of changes made to the licensing criteria in 1997. Prior to 1997, an export license was required only if a company released technology to a foreign national whom the company knew or had reason to know would reexport the technology to a destination requiring a license. In 1997, the Department of Commerce removed the knowledge standard, determining that a mere release of technology to a foreign national was a so-called “deemed export.” Consequently, the number of foreign nationals requiring licenses has expanded dramatically. This factor together with the government’s focus on the activities of foreign nationals has brought the export control issue to the forefront of immigration practice.

Also, as mentioned above, the issue has become extremely relevant because all petitioners are required to make the deemed export attestation when filing an H-1B, L-1 or O-1A petition.

### **WHAT TECHNOLOGIES ARE COVERED BY THE EXPORT REGULATIONS?**

There are two primary sets of laws and regulations that govern exports to foreign nationals. The first set includes the export controls on “dual-use” technologies under the EAR. A controlled technology refers to a technology which requires licensing and is listed on the Commerce Control List (CCL),

including technologies associated with certain nuclear materials, facilities and equipment; chemicals, microorganisms and toxins; materials processing; electronics; computers; telecommunications and information security; lasers and sensors; navigation and avionics; marine systems; and propulsion systems and space vehicles. The second set of export controls relate to “munitions” technology under the Department of State’s International Traffic in Arms Regulations (ITAR). A controlled technology under the ITAR refers to a technology which requires licensing and is listed on the United States Munitions List (USML), including technologies related to weapons, satellites, night vision and other similar technologies.

Therefore, under both the EAR and the ITAR, the deemed export rule applies to technology and sometimes software, transfers to a foreign national, if the technology or software to which the foreign national is exposed relates to the development, production or use of items controlled under either the EAR or the ITAR.

Some technologies do not require any authorization because they are already in the “public domain.” This means that the information is “publicly available” and generally accessible to the public. These generally include, but are not limited to the following:

- patent applications that are open for public inspection;
- publicly available technology and software (other than software and technology controlled as encryption items) that is already published or will be published;
- information available through subscriptions which are available without restriction;
- information available at libraries open to the public;
- information available through unlimited distribution at a conference, meeting, seminar, trade show or exhibition;
- information that arises during or as a result of fundamental research where the resulting information is ordinarily published and shared broadly in the scientific community; or
- technology that is educational.

## **IS SOFTWARE CONSIDERED A “TECHNOLOGY” AND IS IT SIMILARLY CONTROLLED?**

The EAR definitions distinguish between software and technology. Software is one of the groups within each of the categories of items listed on the CCL, and if it is delineated on the CCL, it is considered a controlled technology subject to licensing.

## **WHAT TECHNOLOGIES ARE CONSIDERED “FUNDAMENTAL RESEARCH?”**

“Fundamental research” is basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly within the scientific community. It is distinguished from proprietary research and from industrial development, design, production, and product utilizations, the results of which ordinarily are restricted for proprietary and/or specific national security reasons. Normally, the results of “fundamental research” are published in scientific literature, thus making it publicly available. Research which is intended for publication, whether it is ever accepted by scientific journals or not, is considered to be “fundamental research.” A large segment of academic research is considered “fundamental research.” Since any information, technological or otherwise, that is publicly available is not subject to the EAR (except for encryption object code and source code in electronic form or media) and thus does not require a license, “fundamental research” is not subject to the EAR and does not require a license.

In certain situations, a university may have several departments that are conducting research under contract with private corporations. Some of this research is referred to as controlled “development” technology. Many researchers, including visiting faculty, post-graduate fellows, and research assistants are foreign nationals working on controlled “development” technology research. In these situations, one must look at the research and the contract terms for release of the results of the research. If there are no conditions placed on the research, and it is the intent of the research team to publish its findings in scientific literature, then it is considered “fundamental research,” and no license is required. If the contract requires that the private corporation review the findings of the research team with the intent of controlling what results are to be released in open literature, then the research is considered proprietary, and a license is required. This analysis

examining whether it is “fundamental research” or “proprietary research” also applies to situations where universities conduct research under U.S. government sponsorship. However, some government contracts may subject the university to separate restrictions on dissemination such as security classification.

Additionally, you must be wary of subsequent applications filed by graduating students or post-doctoral researchers entering private industry. While a U.S. university would not need a “deemed export” license to allow a Chinese graduate student to engage in technological research if the results of that research are to be published in a professional journal, a U.S. firm that hired the same Chinese national to engage in proprietary research to develop a new commercial product may have to secure a license. Thus, when that Chinese individual files a change-of-status application to another nonimmigrant classification, an export license may be required.

## **WHAT IS CONSIDERED A RELEASE OF TECHNOLOGY?**

Generally, a release of technology is defined as including:

- Transfers of controlled information including technical data, to persons and entities outside the United States;
- Shipment of controlled physical items, such as scientific equipment, that require export licenses from the U.S. to a foreign country;
- Visual inspection of U.S.-origin technology by a foreign national;
- Oral exchange of information in the United States or abroad;
- Verbal, written, electronic, and/or visual disclosures of controlled scientific and technical information related to export controlled items to foreign nationals;
- Application to situations abroad of personal knowledge or technical expertise acquired in the United States.

## **CAN A MERE INSPECTION OR DISCUSSION OF TECHNOLOGY BE CONSIDERED A RELEASE OF TECHNOLOGY?**

Yes, under both ITAR and the EAR definitions, a mere inspection or discussion of technology can result in a transfer of technology, thus resulting in export control regulation violations. Other actions such

as exposure to controlled technology, including internal company research material, staff meetings, telephone calls, emails and other forms of communication are also considered a release of technology potentially requiring a license.

### **WHAT IF A FOREIGN NATIONAL HAS SERVER ACCESS AT THE WORKPLACE?**

In reality, computer networks exist in every business workplace, providing countless opportunities for deemed export violations to occur. Both technical personnel and information technology support personnel may require export licenses if they have unrestricted access to controlled data. Employers with foreign national employees that have significant amounts of controlled technical data stored on their computer systems must separate controlled technology within the server network or face violations. You must insist that your clients consider options including password protection for individual documents, protected databases, secure subnets and other computer security options, as well as a designated compliance specialist who is responsible for granting access to restricted servers.

### **DOES THE COMPANY HAVE FOREIGN NATIONAL COMPUTER SUPPORT PERSONNEL WITH “MASTER ACCESS?”**

Many companies grant “master” access to IT support staff over computer systems containing controlled technical data to enable them to maintain and troubleshoot systems, implement access controls and conduct backup and recovery functions. However, export control regulations do not make any distinctions between individuals working in the technical field and those who provide support functions. The issue is not whether an individual accessed the controlled technology, but whether the individual simply had access. Merely having access to the entire system creates the possibility that the IT support personnel could visually inspect the data and thus subject the company to a “deemed export” violation. This issue is further complicated when companies outsource IT support, creating additional risks of export violations.

### **DO “DEEMED EXPORT” REGULATIONS APPLY TO ALL FOREIGN NATIONALS?**

A foreign national is defined as any person who is not a U.S. citizen, lawful permanent resident, political asylee, refugee, or another member of a lim-

ited class of “protected individuals.” Therefore, any foreign nationals employed under E, F, H, J, L, or O nonimmigrant visa classification are considered foreign nationals for purposes of the “deemed export” rule and may require a license.

### **HOW ARE DUAL-NATIONALS OR INDIVIDUALS WHO ARE PERMANENT RESIDENTS OF ONE COUNTRY BUT CITIZENS OF ANOTHER TREATED?**

As noted above, if the individual is a U.S. citizen (either through birth or naturalization), or a permanent resident of the United States or a member of a “protected class,” the “deemed export” rule does not apply. For individuals who are citizens of more than one country, or have citizenship in one foreign country and permanent residence in another, the Department of Commerce generally considers the last permanent resident status or citizenship obtained by such an individual as his or her nationality. For example, if a citizen of Pakistan subsequently obtained “landed immigrant” status in Canada (similar to U.S. permanent residence), he would be considered a Canadian national for purposes of the deemed export rule.

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The increasing sophistication of technology has completely changed the world in which we live. An export is no longer just a shipment of physical goods, but now includes all sorts of technologies and services. At the same time, the number of foreign nationals in the U.S. workforce will continue to rise as statistics reflect an increasing number of foreign graduate students, post-doctoral fellows, and researchers in the United States, combined with a decline in the number of U.S. graduates in the scientific, engineering and hi-tech fields. As government agencies continue to monitor the activities of foreign nationals by implementing increasingly sophisticated security measures to address national security concerns, enforcement to abate the unlawful transfer of sensitive technologies will undoubtedly increase. Anecdotal reports are already surfacing from virtually every industry from commercial businesses to academic institutions concerning monitoring and requests for information on H-1B foreign nationals, inquiries about particular projects on which the individuals are working, spot checks of worksites, including interviews with employers and licensing checks and an increase in audits by a host of government agencies including the BIS, DHS, CBP, ICE, and the FBI, to name a few. These develop-

ments signal a shift in government priorities and immigration practitioners can be sure that these issues will affect their clients, particularly as statistics show that the number of U.S. students graduating in technology, engineering and scientific fields continues to decline. This will only increase the reliance of U.S. companies and universities to focus on hiring foreign nationals in the workforce.

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#### Additional Resources

- Council of Governmental Relations Brochure: Export Controls and Universities – information and Case Studies available at [www.cogr.edu/viewDoc.cfm?DocID=151612](http://www.cogr.edu/viewDoc.cfm?DocID=151612)
- <http://www.bis.doc.gov/>
- [http://www.pmddtc.state.gov/regulations\\_laws/itar\\_official.html](http://www.pmddtc.state.gov/regulations_laws/itar_official.html)
- <http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx>
- <http://exportcontrol.org/index.aspx>