

THE TECHNOLOGY ALERT LIST, VISAS MANTIS AND EXPORT CONTROL: FREQUENTLY ASKED QUESTIONS

by Tien-Li Loke Walsh *

Since 9/11, numerous measures designed to enhance security and streamline visa processing have been implemented to identify and eliminate vulnerabilities in the visa processing system. Various government agencies, including the Department of Homeland Security, the Department of State, the Central Intelligence Agency, the Federal Bureau of Investigation, the National Security Agency and others have consulted in an extensive and ongoing review of visa issuing procedures. These efforts at data sharing have created increasingly sophisticated government databases. These recent initiatives, together with the introduction of mandatory visa interviews, intensified security check measures, and the recently updated and expanded Technology Alert List have resulted in unexpected and lengthy delays in visa issuance.¹ To further complicate matters, the focus on foreign nationals and their activities in the United States has generated significant government investigation and enforcement in the overlapping issues of export control, bringing these issues to the forefront of immigration practice. This article pro-

vides some general guidance to these emerging trends.

WHAT IS THE TECHNOLOGY ALERT LIST?

The Technology Alert List (TAL) was originally designed to help maintain technological superiority over the Warsaw Pact and was targeted at individuals from the Soviet Union and other Communist countries. In 1996, the TAL was revised to broaden its focus and reflect more accurately current laws restricting or prohibiting the export of goods and technologies. These laws are designed to further four important security objectives: (i) Stem the proliferation of weapons of mass destruction and missile delivery systems; (ii) Restrain the development of destabilizing conventional military capabilities in certain regions of the world; (iii) Prevent the transfer of arms and sensitive dual-use items to terrorist states; and (iv) Maintain U.S. advantages in certain militarily critical technologies.

The TAL is now designed to assist in efforts to prevent the transfer of sensitive technology or material, (*e.g.*, controlled nuclear or biotechnical information), from falling into the wrong hands and being used by hostile individuals or regimes. The increasing sophistication of off-the-shelf technology, dual-use technologies (*i.e.*, technologies with both commercial and military applications), allegations of insufficient information about controls on foreign students in the United States, recent tensions in the Middle East and the September 11 terrorist attacks combined to renew concern among law enforcement and intelligence communities that controlled U.S. origin goods and information are vulnerable to theft. In August 2002, the DOS significantly updated the TAL and issued a cable providing updated guidance to consular posts on the use of the TAL Visas Mantis security checks. The recently updated TAL, released in March 2003, consists of two parts.

The first part includes a "Critical Fields List" (CFL) of major fields of technology transfer concern, including those subject to export controls for nonproliferation reasons. The CFL is used to assist in the effort to prevent the transfer of sensitive tech-

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¹ While some of these issues may be relevant in the immigrant context, this article is written to address specific issues that arise where foreign nationals are employed in the United States in nonimmigrant classification.

nology or material, particularly dual-use technologies, from falling into the wrong hands and being used by hostile individuals or regimes.

The critical fields list which constitutes the TAL is as follows:

- **Conventional Munitions:** technologies associated with warhead and large caliber projectiles, reactive armor and warhead defeat systems, fusing, and arming systems, electronic countermeasures and systems, new or novel explosives and formulations, automated explosive detection methods and equipment;
- **Nuclear Technology:** technologies associated with the production and use of nuclear material for both peaceful and military applications, including enrichment of fissile material, reprocessing irradiated nuclear fuel to recover produced plutonium, production of heavy water for moderator material, plutonium, and tritium handling. Also, certain associated technologies related to nuclear physics and/or nuclear engineering, including materials, equipment or technology associated with power reactors, breeder and production reactors, fissile or special nuclear materials, uranium enrichment, including gaseous diffusion, centrifuge, aerodynamic, chemical, Electromagnetic Isotopic Separation (EMIS), Laser Isotope Separation (LIS), spent fuel reprocessing, plutonium, mixed oxide nuclear research Inertial Confinement Fusion (ICF), magnetic confinement fusion, laser fusion, high power lasers, plasma, nuclear fuel fabrication including Mixed Oxide (uranium-plutonium) fuels (MOX), heavy water production, tritium production and use, hardening technology;
- **Rocket Systems** (including ballistic missile systems, space launch vehicles and sounding rockets) and Unmanned Air Vehicles (UAV) (including cruise missiles, target drones, and reconnaissance drones): technologies associated with rocket systems and UAV systems—the technology needed to develop a satellite launch vehicle is virtually identical to that needed to build a ballistic missile;
- **Rocket System and Unmanned Air Vehicle (UAV) Subsystems:** Propulsion technologies include solid rocket motor stages, and liquid propellant engines. Other critical subsystems include re-entry vehicles, guidance sets, thrust vector controls and warhead safing, arming and fusing. Many of these technologies are dual-use and include liquid and solid rocket propulsion systems, missile propulsion and systems integration, individual rocket stages or staging/separation mechanism, aerospace thermal (such as super alloys) and high-performance structures, propulsion systems test facilities.
- **Navigation, Avionics and Flight Control Useable in Rocket Systems and Unmanned Air Vehicles (UAV):** These capabilities directly determine the delivery accuracy and lethality of both unguided and guided weapons. The long-term costs to design, build, and apply these technologies have been a limiting proliferation factor. Technologies include those associated with internal navigation systems, tracking and terminal homing devices, accelerometers and gyroscopes, rocket and UAV and flight control systems and global Positioning System (GPS);
- **Chemical, Biotechnology and Biomedical Engineering:** technology used to produce chemical and biological weapons is inherently dual-use. The same technologies that could be applied to develop and produce chemical and biological weapons are used widely by civilian research laboratories and industry; these technologies are relatively common in many countries. Advanced biotechnology has the potential to support biological weapons research. In the biological area, areas of interest in technologies associated with Aerobiology (study of microorganisms found in the air or in aerosol form), Biochemistry, Pharmacology, Immunology Virology Bacteriology, Mycology, Microbiology, Growth and culturing of microorganisms, Pathology (study of diseases), Toxicology, Study of toxins, Virulence factors, Genetic engineering, recombinant DNA technology, Identification of nucleic acid sequences associated with pathogenicity, Freeze-drying (lyophilization), Fermentation technology, Cross-filtration equipment, High “DOP-rated filters” (e.g., HEPA filters, ULPA filters), Microencapsulation, Aerosol sprayers and technology, aerosol and aerosolization technology, Spray or drum drying technology, Milling equipment or technology intended for the production of micron-sized particles, Technology for eliminating electrostatic charges of small particles, Flight training, Crop-dusting, aerosol dissemination, Unmanned aerial vehicle (UAV) technology, Fuses, detonators, and other munitions technology, Submunitions technology, Computer modeling of dissemination or contagion, Chemical ab-

sorption (nuclear-biological-chemical (NBC) protection). In the chemical area, includes Organo-phosphate chemistry, Neurochemistry, Chemical engineering, Chemical separation technology, Pesticide production technology, Pharmaceutical production technology, Chemical separation technology, Toxicology, Pharmacology, Neurology, Immunology, Detection of toxic chemical aerosols, Chemical absorption (Nuclear-Biological-Chemical (NBC) protection), Production of glass-lined steel reactors/vessels, pipes, flanges, and other equipment, Aerosol sprayers and technology, Flight training, Crop-dusting, aerosol dissemination, Unmanned Aerial Vehicle (UAV) technology, Fuses, detonators, and other munitions technology, Submunitions technology, Computer modeling of dissemination;

- **Remote Sensing, Imaging, and Reconnaissance:** satellite and aircraft remote sensing technologies are inherently dual-use; increasingly sophisticated technologies can be used for civilian imagery projects or for military and intelligence reconnaissance activities. Drones and remotely piloted vehicles also augment satellite capabilities. Key-word associated technologies include, Remote sensing satellites, High resolution multi-spectral, electro-optical and radar data/imagery, Imagery instruments, cameras, optics, and synthetic aperture radar systems, Ground receiving stations and data/image processing systems, Photogrammetry, Imagery data and information products, Piloted aircraft, Unmanned Air Vehicles (UAV), Remotely-piloted vehicles; and drones;
- **Advanced Computer/Microelectronic Technology:** advanced computers and software play a useful (but not necessarily critical) role in the development and deployment of missiles and missile systems, and in the development and production of nuclear weapons. Advanced computer capabilities are also used in over-the-horizon targeting airborne early warning targeting, Electronic Countermeasures (ECM) processors. These technologies are associated with Supercomputing, hybrid computing, Speech processing/recognition systems, Neural networks, Data fusion, Quantum wells, resonant tunneling, Superconductivity, Advance optoelectronics, Acoustic wave devices, Superconducting electron devices, Flash discharge type x-ray systems, Fre-

quency synthesizers, Microcomputer compensated crystal oscillators;

- **Materials Technology:** the metallic, ceramic, and composite materials are primarily related to structural functions in aircraft, spacecraft, missiles, undersea vehicles, and propulsion devices. Polymers provide seals and sealants for containment of identified fluids and lubricants for various vehicles and devices. High density graphite is used in missile nosetips, jet vanes, and nozzle throats. Selected specialty materials (*i.e.*, stealth and the performance of these materials) provide critical capabilities that exploit electromagnetic absorption, magnetic, or superconductivity characteristics. These technologies are associated with advanced metals and alloys, Non-composite ceramic materials, Ceramic, cermet, organic and carbon materials, Polymeric materials, Synthetics fluids, Hot isostatic, Densifications, Intermetallic, Organometals, Liquid and solid lubricant, Magnetic metals and superconductive conductors;
- **Information Security:** Technologies associated with cryptography and cryptographic systems to ensure secrecy for communications, video, data and related software;
- **Laser and Directed Energy Systems Technology:** Lasers have critical military applications, including incorporation in guided ordinance such as laser guided bombs and ranging devices. Directed energy technologies are used to generate electromagnetic radiation or particle beams and to project that energy on a specific target. Kinetic energy technologies are those used to impart a high velocity to a mass and direct it to a target. Directed energy and kinetic energy technologies have potential utility in countering missiles and other applications. Look for technologies associated with Atomic Vapor Laser Isotope Separation (AVLIS), Molecular Laser Isotope Separation (MLIS), High Energy Lasers (HEL) (*i.e.*, laser welders), Low Energy Lasers (LEL), Semiconductor lasers, Free electron lasers, Directed Energy (DE) systems, Kinetic Energy (KE) systems, Particle beam, beam rider, electromagnetic guns, Optoelectronics/electro-optics (Europe), Optical tracking (*i.e.*, target designators), High energy density, High-speed pulse generation, pulsed power, Hypersonic and/or hypervelocity, Magnetohydrodynamics;
- **Sensors and Sensor Technology:** Sensors provide real-time information and data, and could

provide a significant military advantage in a conflict. Marine acoustics is critical in anti-submarine warfare; gravity meters are essential for missile launch calibration. Includes technologies associated with Marine acoustics, Optical sensors, Night vision devices, image intensification devices, Gravity meters, High speed photographic equipment, Magnetometers;

- **Marine Technology:** Marine technologies are often associated with submarines and other deep submersible vessels; propulsion systems designed for undersea use and navigation and quieting systems are associated with reducing detectability and enhancing operations survivability. Includes technologies connected with Submarines and submersibles, Undersea robots, Marine propulsion systems, Signature recognition, Acoustic and non-acoustic detection, Acoustic, wake, radar and magnetic signature reduction, Magnetohydrodynamics, Stirling engines and other air independent propulsion systems;
- **Robotics:** Technologies associated with Artificial intelligence, Automation, Computer-controlled machine tools, Pattern recognition technologies;
- **Urban Planning:** Expertise in construction or design of systems or technologies necessary to sustain modern urban societies. (PLEASE NOTE: Urban Planning may not fall under the purview of INA §212(a)(3)(a), U.S. technology transfer laws, or any other U.S. law or regulation. However, Urban Planning is a special interest item and posts are requested to refer such visa application requests to CA/VO/L/C for further review.) Technologies/skills include Architecture, Civil engineering, Community development, Environmental planning, Geography, Housing, Landscape architecture, Land use and comprehensive planning, and Urban design.

The second part of the TAL includes the DOS list of designated State Sponsors of Terrorism, currently identified as Cuba, Iran, Iraq, Libya, North Korea, Sudan and Syria (“Terrible 7”).²

² Some consular officials now refer to the list as the “T-6” countries, since Iraq is under “U.S. control,” but Iraqi nationals applying for U.S. visas will still undergo extensive security checks.

WHERE CAN I FIND THE TAL?

The 2003 version of the TAL can be found as part of a Department of State cable, “Using the Technology Alert List: (UNCLAS STATE 147566).³

HOW DOES THE TAL IMPACT FOREIGN NATIONALS?

INA §212(a)(3)(a) renders aliens inadmissible where there is reason to believe they are seeking to enter the United States to violate or evade U.S. laws prohibiting the export of goods, technology, or sensitive information from the United States. Therefore, when a foreign national applies for a nonimmigrant visa at a U.S. consulate or embassy, the post may examine whether an applicant is involved in any dual-use technologies that may fall within a critical field listed on the TAL. If the applicant’s planned activities raise questions of possible ineligibility under INA §212(a)(3)(A), consular officers must submit a security advisory opinion (SAO) in the form of a Visas Mantis check.

HOW CAN I TELL IF MY CLIENT IS SUBJECT TO THE TAL?

The DOS cable “Using the Technology Alert List,” mentioned above, is designed to provide guidance in determining whether a visa applicant’s planned activities in the United States fall under the purview of INA §212(a)(3)(A).

While restrictions on the export of controlled goods and technologies applies to scientific and technical visitors from all countries, the cable reminds posts that technology transfer SAOs are not mandatory for all scientific and technical visitors seeking to engage in one of the critical fields. The cable advises consular officers to determine whether an applicant proposes to engage in advanced (doctoral, postdoctoral, or research scholar) research or studies, or business activity involving any of the scientific/technical fields listed in the Critical Fields List. According to the cable, information in the public domain (*e.g.*, widely available to the public), and information presented in an academic course generally is not controlled for U.S. technology transfer control purposes. If the applicant’s planned activities

³ See “State Dept. Updates Guidance on Technology Alert Checks,” *posted on* AILA InfoNet at Doc. No. 03030449 (Mar. 4, 2003).

raise questions of possible ineligibility under INA §212(a)(3)(A), consular officers must submit an SAO in the form of a Visas Mantis check. The cable instructs officers to request an SAO if in doubt and to only issue the visa if 212(a)(3)(A) “clearly does not apply.”

Applicants from the “Terrible 7” countries seeking to engage in one of the critical fields warrant special scrutiny and a Visas Mantis check is mandatory.

In comparison to the previous version, the updated TAL includes a vastly expanded list of associated technologies within each critical field, which details virtually every potential “dual use” application. For example, the new TAL includes a Chemical, Biotechnology and Biomedical Engineering critical field—an all-encompassing list that includes almost every possible associated technology or skill involving chemistry, biochemistry, immunology, microbiology, pharmacology, genetic engineering, and chemical engineering to name a few. With such an all-inclusive list, nearly every research scientist, physician or academic, or engineer involved in any of these fields in commercial research laboratories, educational institutions and universities, or private industry may be subject to a TAL Mantis check by a consular post erring on the side of caution.

As further indication of the all-encompassing nature of the TAL, the updated list also adds a new field to the TAL—Urban Planning (expertise in construction or design of systems or technologies necessary to sustain modern urban societies)—indicating the government’s “special” interest in skills and technologies associated with architecture, civil engineering, community development, environmental planning, geography, housing, landscape architecture, land use and comprehensive planning, and urban design.

Despite the guidance, it appears that the cable fails to provide both consular officers and attorneys with clear direction as to when a Mantis SAO is required. In fact, it seems to signal a bureaucratic shift towards initiating TAL SAO requests for all cases unless posts are absolutely sure the applicant will not be engaged in any of the technologies or skills listed on the TAL.⁴ In response to concern and criti-

cism about the lack of clear guidance about the TAL, the DOS confirmed that the TAL guidance has been significantly revised and shared with the field via cable on October 1, 2003, but it remains classified.⁵ Despite this general guidance, anecdotal and other reports continue to indicate that there have been delays and a marked increase in the number of TAL security checks initiated by consular posts in China,⁶ India, Israel, Pakistan, and Russia because of concerns that applicants are involved in activities with “dual use” applications.⁷

Visas Mantis requests because they lacked clear guidance on determining Visas Mantis cases and feedback on whether they were applying checks appropriately and providing enough data in their Visas Mantis requests. According to the officials, additional information and feedback from Washington regarding these issues could help expedite Visas Mantis cases. Consular officials also mentioned that they would like the guidance to be simplified – for example, by expressing some scientific terms in more comprehensive language. Several officials also mentioned that they had only a limited understanding of the Visas Mantis process, including how long the process takes. They told the GAO they would like to have better information on how long a Visas Mantis check is taking, so that they can accurately inform the applicant of the expected wait. See “Border Security: Improvements Needed To Reduce Time Taken to Adjudicate Visas for Science Students and Scholars,” Report to the Chairman and Ranking Minority Member, Committee on Science, House of Representatives (Feb. 2004) by the United States General Accounting Office, at 16 (hereinafter “The GAO Report (“Improvements Needed To Reduce Time Taken to Adjudicate Visas for Science Students and Scholars.”))

⁵ The classified additional guidance was issued after the GAO visited some of these posts. However, consular officials at some posts told the GAO that although it was an improvement, the updated guidance is still confusing to apply, particularly for junior officers without a scientific background. *Id.* at 17.

⁶ According to the FBI, Mantis SAO’s are the most difficult to resolve because of the predominance of requests from China and commonality of Asian names. The majority of Chinese Mantis cases, are however, cleared within 120 days. Comments of Vincent Beirne, Deputy Chief, Advisory Opinion Division, Visa Office, Department of State at Technology Alert List & Export Control panel, 16th Annual AILA California Chapters Conference, San Diego, Nov. 2003.

⁷ Between April and June 2003, the GAO reviewed approximately 5,000 SAO’s; basing its sample on 71 of the 2,888 Visas Mantis SAO’s. The GAO based its report, entitled, “Improvements Needed To Reduce Time Taken to Adjudicate Visas for Science Students and Scholars” in part, by observing visa operations and analyzing data obtained at seven consular posts in three countries – China, India and Russia. These countries were chosen because they are a major source of science students (F-1) and scholars (J-1) visiting the United States. *Id.* at 2. Interestingly, the Top 4 countries for foreign students and exchange visitors in FY 2003 are South Korea (34,697 F-1’s issued; 8,119 denied; 14,218 J-1’s issued; 1,507 refused); China (mainland and Taiwan) (31,322 F-1’s issued; 22,995 refused; 10,171 J-1’s

⁴ A recently released GAO Report, which specifically examined the impact of security advisory opinions on science students and scholars, found that many consular officials expressed concern that they could be contributing to the time it takes to process

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IF YOUR CLIENT HAS A POSSIBLE TAL ISSUE, WHAT SHOULD YOU TELL HIM OR HER?

Based on the all-inclusive nature of the TAL, it has become virtually impossible to predict if a foreign national will be subjected to a Visas Mantis security check. Although the TAL specifically states that information in the public domain or academic courses are not controlled by the TAL, the cable fails to provide any objective criteria to make these determinations. Indeed, anecdotal evidence supports the mounting belief that many officers are simply not prepared to make the judgment call in this “zero tolerance” environment and are initiating security checks for any applicants with a scientific or research background, simply to err on the side of caution. This is particularly daunting news for anyone involved in the scientific and technical fields, particularly researchers, professors, and engineers.

It has, therefore, become difficult to provide any definitive guidance to clients except to warn them of the risks involved when applying for a nonimmigrant visa. If a Visas Mantis check is initiated, they will be subjected to significant delays of three to six months or longer. Based on the uncertainty, it may simply become necessary to warn some of your clients who do not have visas that any international travel is inadvisable. This is particularly relevant where an applicant is from a Muslim country or from a “Terrible 7” country or from a country of “concern” (such as China or Russia). Similarly, if your client is applying at a border post in Canada or Mexico, he cannot reenter the United States while a TAL security check is pending because of changes to the “automatic revalidation” rule.⁸ Thus, this is a

issued; 7,003 refused); Japan (25,962 F-1’s issued; 1,387 refused; 11,377 J-1 issued; 305 refused); India (20,320 F-1’s issued; 17,973 refused; 5,311 J-1 visas issued; 1,718 refused). *Id.* at 9. Of the 2,888 Visas Mantis cases identified during the sample time frame between April and June 2003, a total of 57 posts sent one or more Mantis SAO’s to Washington. China accounted for 1762 SAO’s (Shanghai sent 701; Beijing sent 600; Guangzhou sent 197; Chengdu sent 74; Shenyang sent 23; and Hong Kong sent 67 requests); Russia accounted for 567 SAO’s (Moscow sent 505; St. Petersburg sent 37; Yekaterinburg sent 24; and Vladivostok sent 1 request). *See* The GAO Report (“Improvements Needed To Reduce Time Taken to Adjudicate Visas for Science Students and Scholars”) *supra* note 4 at Appendix II at 31.

⁸ On April 1, 2002, the DOS amended the provision for automatic revalidation of expired visas for nonimmigrant aliens returning from short visits to “contiguous territories or adjacent islands. This provision previously allowed aliens who

difficult and unpredictable decision for many applicants who simply cannot afford to remain outside the United States for any prolonged periods of time.

In addition, it may be prudent to advise an employer to take the precautionary step of submitting documentation to the Department of Commerce to determine if the technology involved requires export control licensing. If the technology is not classified as “sensitive” technology and does not require an export license, it could help to avoid the initiation of an SAO.

IF YOUR CLIENT HAS A POSSIBLE TAL ISSUE, WHAT KIND OF DOCUMENTS SHOULD HE OR SHE BRING TO THE CONSULAR POST?

Applicants involved in any activities that have potential “dual use” applications should bring as much of the following documentation to a nonimmigrant interview:

- A letter from their employer, detailing the nature of the work and specific job duties, project descriptions and information distinguishing how the work has no possible military applications;
- Complete resumes and lists of publications of the applicant;
- Recommendation letters from U.S. sources;

who traveled outside of the United States for fewer than 30 days to reenter the United States with an unexpired I-94 card, even if their visa had expired. Amended in 2 ways, the automatic revalidation provision is no longer applicable to aliens who apply for *new* visas at a consular post and are *refused* during visits to contiguous territories or adjacent islands; and secondly, the ability to re-enter the United States without a valid visa is no longer available to aliens who are nationals of the “Terrible 7” countries, regardless of whether they apply for a nonimmigrant visa at a border post. *See* “Further Instructions on Change to 41.112(d) Regarding Automatic Extension of Visas,” *posted on* AILA InfoNet at Doc. No. 02061947 (June 19, 2002). However, in some limited situations, an applicant may be able to re-enter the United States if they have a valid nonimmigrant visa and a valid I-94 card. For example, if an applicant has previously been issued a visa in the same classification and is applying for a “renewal” while the visa is still valid (DOS rules allow visa applicants to apply within 60 days of visa expiration), the applicant could return to the U.S. with the initial current visa. However, if an officer cancels the initial visa, the applicant cannot return to the United States. There are reports that some applicants have successfully returned to the United States in visitor status, but this option leaves much to chance at the port-of-entry.

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- Documentation to show that the information is in the public domain;
- Documentation to show that the information is found in academic courses;
- Documentation to show that the Department of Commerce determined that the technology involved is not a “sensitive” technology and an export license is not required.

Both the employer and the foreign national should be prepared for inquiries from a consular post about whether the employer secured export licenses or committed any violations of existing licenses. Further information about export control requirements is covered later in this article.

WHAT HAPPENS IF A CONSULAR POST INITIATES A TAL MANTIS SECURITY CHECK?

If a consular post initiates a security check based on the TAL, the officer will submit a SAO in the form of a Visas Mantis and transmit the request by cable simultaneously to the Visa Office (VO) at the DOS, the FBI and interested agencies.⁹ After the

⁹ See Testimony of Janice L. Jacobs, Deputy Assistant Secretary of State for Visa Services, *The Conflict Between Science and Security in Visa Policy: Status and Next Steps* before the House of Representatives Science Committee, Feb. 25, 2004 at <http://travel.state.gov/testimony10.html>. When an SAO is submitted in a TAL case, consular officers are instructed to gather and report as much information as possible about the applicant’s background, proposed activities, and travel plans. The effectiveness of the name check (and the turnaround time) is directly related to the completeness of the information in the SAO. For example: what are the applicant’s research or business interests? What is his current position and where does he work? What is the address and phone number of the company(ies) he intends to visit? Who is his point of contact? What are the specifics of his advanced (doctoral, postdoctoral or research scholar) research or studies, or business in the United States? Who is funding the travel or education? Will he be returning to work in a country that sponsors terrorism or to an entity that is under sanctions? How, and where, does the applicant plan to use the goods or knowledge acquired? Consular officers are instructed to encourage TAL applicants to provide supporting documentation from their home organizations. For example, complete résumés and complete lists of publications of the applicant and, if accompanying the applicant, the spouse; project descriptions; annual reports; and letters of recommendation from a U.S. source or from abroad can be useful in helping to flesh out an applicant’s real motives for travel. The cable instructs posts that such documents should be described in the SAO and held until the case has been closed. DOS encourages consular officers to provide as much information and details as possible in the SAO. See “State Dept. Updates Guidance on Technology Alert Checks,” *supra* note 3.

FBI name check unit runs the names of the subjects of SAO’s through their name check system, the responses are uploaded onto a CD containing updated clearance information, which the VO receives twice a week.¹⁰ The CD is an historical record of more than 500,000 responses provided to DOS by the FBI.¹¹ The information from the CD is uploaded into the DOS’ own FBI Response database, as well as into an automated system known as VISTA, which is the VO’s tracking system for SAO’s.¹² Unfortunately, for various technological reasons, VISTA does not always capture all of the clearance information.¹³ Therefore, if analysts do not find an updated response to a case in VISTA that is due, they must check the FBI Response database to see if in fact, the FBI has cleared the case, because the DOS does not complete processing of the visa until they have the FBI response.¹⁴ In some cases, it can delay a case by a week or longer between the time the FBI responds to a clearance request and when the VO analyst is able to send out the clearance response to the post.¹⁵

The other clearing agencies are given 15 working days to respond to SAO’s, but notify the VO when they need additional time to clear a specific case.¹⁶ Additionally, the VO may have a clearance from the FBI, but may be waiting for another clearing agency to complete a review of a specific case.¹⁷ One of the agencies may also ask a consular post to obtain more information from an applicant, which can also take time and delay a final response to post.¹⁸ At other times, the VO must wait to receive a report from another clearing agency that may contain derogatory information pertaining to the applicant.¹⁹ According to the DOS, waiting for highly classified reports through appropriate channels can be another reason for delay in responding to a consular post.²⁰ Once

¹⁰ See Testimony of Janice L. Jacobs, (Feb. 25, 2004), *supra* note 9.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

the DOS receives all agency responses pertaining to the applicant, it summarizes them and prepares a response to the consular posts.²¹ A cable is then transmitted to the post which indicates that DOS does or does not have an objection to issuing the visa, or that more information is needed.²²

HOW CAN I FIND OUT THE STATUS OF A VISAS MANTIS SECURITY CHECK?

There is currently no procedure in place that allows an applicant or counsel to check on the status of a Visas Mantis check. However, the DOS has internal systems in place to regularly check their databases for overdue cases and has reminded consular posts to follow up after 60 days. If a Mantis clearance has been pending for over 60 days, counsel may either call the Public Information office at (202) 663-1246 or email legalnet@state.gov.²³

HOW LONG DOES THE VISAS MANTIS SECURITY CHECK TAKE?

When initially implemented, TAL-based SAO requests routinely took three to six months or longer for clearance. However, The DOS reports that the average processing times for Mantis checks is approximately 30 days unless a government agency places a processing hold on the check. At any given moment, DOS has approximately 1,500 to 2,000 Mantis checks pending from the interagency review process.²⁴ Consular posts may not issue the visa until

²¹ See The GAO Report (“Improvements Needed To Reduce Time Taken to Adjudicate Visas for Science Students and Scholars”) *supra* note 4 at 8.

²² *Id.* at 8.

²³ Unfortunately, the SAO Problem Resolution Unit is now only available for internal use and practitioners have been advised not to use the saoinquiries@state.gov email address to follow up on overdue cases. VO has also changed the phone number. See “DOS Email for Security Advisory Opinion Inquiries Changed,” *posted on AILA InfoNet at Doc. 04031167* (Mar. 12, 2004); “DOS Changes Phone Number for Security Advisory Opinion Inquiries,” *posted on AILA InfoNet at Doc. 04031263* (Mar. 15, 2004).

²⁴ See Statement of Janice L. Jacobs, Deputy Assistant Secretary for Visa Services, Department of State before the Committee on House Small Business On “The Visa Approval Backlog and its Impact on American Small Business,” Jun. 4, 2003 at www.travel.state.gov/testimony3.html. According to DOS, in fiscal year 2002, of the 6.2 million nonimmigrant and immigrant visas issued (out of a total of 9 million processed), approximately 144,000 underwent some type of security clearance. *Id.*

they receive an affirmative response from all participating agencies.

If a determination is made that the technology involved presents a security risk, the applicant may be permanently barred under INA §212(a)(3)(A), which is nonwaiverable.

CAN I REQUEST AN EXPEDITE OF THE VISAS MANTIS SECURITY CHECK?

According to the DOS, they now have procedures for expediting individual cases when appropriate.²⁵ When an expedited clearance is needed, DOS faxes such requests to the FBI, which routinely responds in a timely manner.²⁶ Anecdotal evidence concerning the successful use of congressional pressure to speed up the procedure is spotty and may in fact antagonize a consular post.

IF THE VISA IS ISSUED, FOR HOW LONG IS IT VALID?

In October 2003, after extensive interagency consultation, the DOS agreed to extend the validity of the Visas Mantis clearance to one year. Based on this guidance, posts will no longer need to seek an additional Mantis clearance within a 12-month period after initial clearance has been given provided certain conditions are met, including that the applicant must be returning to a program or activity and will perform the same duties/functions at the same facility or organization that was the basis of the original Mantis authorization.²⁷ According to this guidance, consular officers may issue visas to applicants who have received Mantis clearance according to the applicant’s reciprocity table, but in no case, for longer than 12 months.²⁸ Visas for Chinese and

²⁵ *Id.* Prior to this testimony, the DOS has always maintained that there are no procedures in place to expedite a Mantis SAO. The author is not yet aware of the specific procedures available to request an expedite, but suspects that it is initiated by the post. In some instances, U.S. government sponsoring agencies can request a “pre-clearance” and facilitate the Visas Mantis check for participants in a given program in the long term by providing to the law enforcement/intelligence community a program description that may satisfy concerns regarding the planned activities for visa applicants visiting the U.S. as participants in such programs. See “Mantises, Donkeys, and Other State Dept. Species,” in 79 *Interpreter Releases* 623-626 (Apr. 29, 2002).

²⁶ *Id.*

²⁷ See “Mantis Clearances Valid For 12 Months,” *posted on AILA InfoNet at Doc. No. 03121143* (Dec. 11, 2003).

²⁸ *Id.*

Russian Mantis applicants can only be issued single-entry visas valid for three months.²⁹

It also appears that many NIV applicants who are subjected to a Mantis security check are now considered “persons of interest” when they arrive in the United States. There have been several anecdotal reports that the FBI has made follow-up visits to universities, as well as private companies to check up on such individuals to ensure that they are in full compliance with the terms of their nonimmigrant status.

WILL THE VISA REVALIDATION UNIT REISSUE A VISA REQUIRING A VISAS MANTIS SAO?

According to the DOS, Mantis applicants may subsequently submit a revalidation application to the Visa Revalidation unit during the 12 months validity period. Realistically, this option will soon no longer be available because the requirement for use of biometric identifiers in visas by October 26, 2004 will ultimately end the visa revalidation program.³⁰

WHAT IS THE STATE DEPARTMENT DOING TO IMPROVE THE VISAS MANTIS SAO PROCESS?

The DOS acknowledges that backlogs occurred based on the overburdened system, which required extensive cooperation between multiple government agencies not yet equipped to cope with the Mantis procedures. As part of the efforts to streamline Mantis procedures, the DOS created a special Mantis team of five full-time employees in

²⁹ See “DOS Answers to AILA Questions” (Mar. 4, 2004), to be released on AILA InfoNet. *Id.*

³⁰ Section 303 of the Border Security Act mandates the use of biometric identifiers in all U.S. visas by October 26, 2004. A biometric or biometric identifier is an objective measurement of a physical characteristic or personal behavior trait of an individual, which when captured in a database, can be used to verify identity or check against other entries in a database. Some examples of features that can be measured for these purposes include the face, fingerprints, hand geometry, handwriting, iris, retina and voice. Although DOS has not issued guidance, it is likely to stop receiving visa revalidation applications in summer of 2004 to allow the 10 to 12 weeks to process any remaining applications by October 26, 2004. Despite suggestions to evaluate the option of using Application Support Center-type facilities to capture the photographs and fingerprints, it is unlikely that DHS will have capacity to take on the additional obligations on behalf of the DOS.

the Visa Office, exclusively dedicated to technology transfer cases.³¹

Based on the widespread problems encountered by participating government agencies in performing the various security checks, including Visas Mantis, Visas Condor and NCIC checks, DOS has made major changes in its use of automation by developing a cable-less SAO process called the SAO Improvement Project (SAO IP).³² DOS will spend approxi-

³¹ See Testimony by Janice L. Jacobs (Feb. 25, 2004), *supra* note 9. The Visa Office also periodically sends the FBI spreadsheets of unresolved cases “on-hold” which they work through to provide VO with a response. The VO with Non Proliferation Bureau (NP Bureau) input, will soon begin sending to the field, a quarterly Mantis report to provide additional feedback. The Bureau of Consular Affairs also recently funded the travel of an officer from the NP Bureau to attend a consular conference in China, the largest source country for Mantis cables. The officer met with consular officers from all China posts and discussed in detail the purpose of the Mantis program, what consular officers should look for, how to decide whether a case should be a Mantis or not, and what information to provide in the cable. *Id.*

³² *Id.* In addition, DOS has also established a quality-control procedure with the (NP Bureau) to provide VO with feedback for posts regarding the information contained in Visas Mantis cables. The NP Bureau has started identifying cables that they have found well-prepared and contain all of the pertinent information NP analysts need to make an informed recommendation on visa eligibility. The NP Bureau also points out cables that do not contain sufficient information on which to reach a recommendation. It also calls to attention cables that have been submitted for applicants whose purpose of travel to the U.S. did not fall within the purview of the TAL. In all instances, NP’s comments are passed on to the relevant post as a means of providing feedback and guidance to the post’s officers. See The GAO Report (“Improvements Needed To Reduce Time Taken to Adjudicate Visas for Science Students and Scholars”) *supra* note 4 at 44.

It is also providing expanded briefings on the Visas Mantis process to new consular officers at the National Foreign Affairs Training Center, including 12-15 hours of training devoted to the processing of SAO’s, including Mantis. During this training, the Non-Proliferation (NP) Bureau, which reviews Mantis cases in the Department, briefs on the proliferation threat and the importance of the Mantis screening process. *Id.* at 25; see also Testimony by Janice L. Jacobs (Feb. 25, 2004), *supra* note 9.

Finally, DOS is also monitoring resource needs at posts. To alleviate staffing concerns, temporary adjudicating officers are sent to the posts as needed. DOS will also add an additional 80 officers in 2004. However, the decision to add these new officers was made before the August 2003 Personal Appearance Waiver (PAW) policy and thus it is unknown if there are enough resources for the task at hand. See The GAO Report (“Improvements Needed To Reduce Time Taken to Adjudicate Visas for Science Students and Scholars”), *supra* note 4 at 24. Add to this the implementation of the biometric visa program by October 26, 2004 which will undoubtedly overwhelm existing consular resources.

mately \$1 million to eliminate telegrams from overseas consular posts as the vehicle for disseminating cases to federal government agencies in the security advisory opinion process.³³ The program will use real-time data-sharing, allowing for seamless electronic data transmission from posts, eliminating virtually all manual manipulation of data.³⁴ The other agencies will no longer receive a telegram (which is prone to cable formatting errors), but a reliable data transmission through an interoperable network that begins with the Consular Consolidated Database (CCD), which is expected to improve data integrity, accountability of responses in specific cases and statistical reporting.³⁵ It hopes that posts will be able to forward cases to intelligence and law enforcement agencies as quickly as possible and eliminate any time period that a case awaits processing by administrative staff. DOS began field testing this pilot project in November 2003 for nonimmigrant visas in Riyadh and Kuwait; and for immigrant visas in December 2003 in Naples.³⁶ The pilot has since been concluded and the software approved for worldwide use – the DOS began to release the SAO IP software to posts in late January 2004 and expects full implementation of the program to take place as 2004 progresses.³⁷

The SAO IP will operate through an interagency network known as the Open Source Information System (OSIS), which will provide interoperable data transmission.³⁸ However, the FBI's systems are currently not interoperable with the DOS system.³⁹ The FBI is still working on connectivity to OSIS in order to make full use of SAO IP.⁴⁰ In the meantime, the Visa Office is still sending case specific informa-

tion to the FBI via cable.⁴¹ Once the FBI establishes connectivity to OSIS, they will receive all SAO requests electronically directly from posts.⁴²

I'M AN IMMIGRATION ATTORNEY, WHY SHOULD I BE CONCERNED ABOUT EXPORT CONTROLS?

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, visa issuance could be delayed when the foreign national applies for a nonimmigrant visa at a U.S. embassy or consulate. Secondly, 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.

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 ex-

³³ See Testimony by Janice L. Jacobs, (Feb. 25, 2004), *supra* note 9.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ See “DOS Answers AILA Questions,” (Mar. 4, 2004), to be published on AILA InfoNet.

³⁸ See Janice L. Jacobs testimony, (Feb. 25, 2004), *supra* note 9.

³⁹ The FBI is however, working on automating its files and setting up a common database between the field offices and headquarters. They have set up a tracking system for all SAO's, including Mantis cases and established new procedures to deal with name check files that cannot be located within a certain amount of time. See The GAO Report (“Improvements Needed To Reduce Time Taken to Adjudicate Visas for Science Students and Scholars”), *supra* note 4 at 22-23.

⁴⁰ See Testimony by Janice L. Jacobs, (Feb. 25, 2004), *supra* note 9.

⁴¹ *Id.*

⁴² *Id.*

port” rule presumes that any technology released to a foreign national in the United States will be exported to the foreign national’s home country.⁴³ 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 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.⁴⁴

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 re-

quiring a license.⁴⁵ 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.”⁴⁶ 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.

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.⁴⁷ A controlled technology refers to a technology which requires licensing and is listed on the Commerce Control List (CCL),⁴⁸ 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).⁴⁹ 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

⁴³ See Department of Bureau of Industry and Security “Deemed Export” Questions and Answers at www.bis.doc.gov/DeemedExports/DeemedExportsFAQs.html.

⁴⁴ See www.bis.doc.gov/Enforcement/eeprogrm.htm. Each year, the program results in a number of recommendations to refuse issuance of visas being forwarded to the State Department.

⁴⁵ See R. C. Thomsen II and A.D. Paytas, “Export Licensing Requirements for Hiring Foreign Nationals,” in *Professionals: A Matter of Degree*, 78, (4th ed.), American Immigration Lawyers Association, 2003 at 78.

⁴⁶ *Id.* at 78.

⁴⁷ See 15 CFR §730 to 774; See Department of Bureau of Industry and Security “Deemed Export” Questions and Answers at www.bis.doc.gov/DeemedExports/DeemedExportsFAQs.html.

⁴⁸ See 15 CFR §774.

⁴⁹ See 22 CFR §120. Other government departments and agencies have regulatory jurisdiction over certain types of technologies, exports and reexports and are not subject to the EAR or the ITAR. For example, technology related to the production of special nuclear materials falls under the jurisdiction of the Department of Energy. See also www.bis.doc.gov/About/reslinks.htm for the full list of U.S. government departments and agencies with export control responsibilities.

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 “publicly available.” These include patent applications that are open for public inspection, publicly available technology and software (other than software and technology controlled as encryption items) that are already published or will be published; technology that arises during or as a result of fundamental research; or technology that is educational.⁵⁰

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.⁵¹

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.⁵² 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.⁵³ 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.”⁵⁴ 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.⁵⁵

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.⁵⁶ 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.⁵⁷ This analysis examining whether it is “fundamental research” or “proprietary research” also applies to situations where universities conduct research under U.S. government sponsorship.⁵⁸ However, some government contracts may subject the university to separate restrictions on dissemination such as security classification.⁵⁹

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

⁵⁰ See Department of Bureau of Industry and Security “Deemed Export” Questions and Answers at www.bis.doc.gov/DeemedExports/DeemedExportsFAQs.html.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

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?

Under the EAR, a release of technology is defined as including:

- the visual inspection of U.S.-origin technology by a foreign national;
- the oral exchange of information in the United States or abroad; or
- the application to situations abroad of personal knowledge or technical expertise acquired in the United States⁶⁰

Under the ITAR, a release of technology is defined as “disclosing (including oral or visual disclosure) ITAR-controlled technical data to a foreign national in the United States.”⁶¹

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.⁶² 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.⁶³

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

⁶⁰ See 15 CFR §734.2(b)(3);

⁶¹ See 22 CFR §120.17(4).

⁶² See A. DeBusk and D. Fisher-Owens, “Legal Action Center Practice Advisory: Export Licensing Requirements for Foreign Nationals,” July 17, 2003, American Immigration Law Foundation available at www.aifl.org.

⁶³ *Id.*

personnel may require export licenses if they have unrestricted access to controlled data.⁶⁴ 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.⁶⁵ 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.⁶⁶

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.⁶⁷ 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.⁶⁸

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 limited class of “protected individuals.”⁶⁹ Therefore,

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See 8 USC 1324b(a)(3); See Department of Bureau of Industry and Security “Deemed Export” Questions and Answers at www.bis.doc.gov/DeemedExports/DeemedExports-FAQs.html.

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.⁷⁰ 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.

WHAT KIND OF QUESTIONS SHOULD I ASK THE EMPLOYER AND FOREIGN NATIONAL?

Who is Being Hired?

Employers must screen their potential candidates by asking for detailed background and biographical information, including complete educational and employment history and all professional and academic affiliations. Unexplained gaps in employment history may lead to potential delays in license processing.

Additionally, certain individuals are prohibited from participating in export transactions unless authorized under an export control license pursuant to the ITAR or the EAR. Financial transactions with such individuals (*e.g.*, paying a salary) are restricted by another set of laws and regulations administered by the Treasury Department’s Office of Foreign Assets Control (OFAC). There are publicly available lists of these people published by various govern-

⁷⁰ See Department of Bureau of Industry and Security “Deemed Export” Questions and Answers at www.bis.doc.gov/DeemedExports/DeemedExportsFAQs.html.

ment agencies, and which must be consulted prior to allowing the individual to commence employment or services. There is strict liability for anyone who hires a restricted person without the appropriate license.⁷¹

What is the Nationality/Permanent Resident Status of the Individual?

The nationality of the foreign national and his permanent residence status is important to determine if the individual is exempt from licensing requirements or subject to the most extensive export license requirements.

What is the Technology to be Released?

This factor is important to assist in making a determination of whether the technology is controlled by the EAR or the ITAR. It is also important to determine how the technology is classified under both the EAR and the ITAR.

Has the Company Consulted with Export Control Counsel?

It is also critical to determine if the company’s General Counsel has consulted with export control counsel to evaluate its technology and if so, has it been classified as “sensitive” or not. If the company

⁷¹ Some organizations and individuals are barred from receiving U.S. exports, while others may only receive items if they receive a license. Additionally, some technologies that may not usually require licensing, may require a license based simply on their listing on another of the EAR lists. See www.bis.doc.gov/ComplianceAndEnforcement/index.htm. These include:

Entity List: is a list of organizations identified by BIS as engaging in activities related to the proliferation of weapons of mass destruction.

Specially Designated Nationals and Blocked Persons: is a list that designates individuals and organizations designated as representing restricted countries or countries involved in terrorism and narcotics trafficking. This list is maintained by OFAC.

Unverified List: is a list of companies that BIS was unable to complete an end-use check. A company must check this list before exporting an item.

Denied Persons List: is a list of firms whose export privileges have been denied. A company cannot export or re-export to anyone on this list.

State Department Debarred List should also be consulted prior to exporting an item.

See also R. P. Kuver and D.C. Horne, “Recent Changes Regarding Export License Control,” *Bender’s Immigration Bulletin*, Aug. 15, 2003 at 1331.

is a new start-up company, it should consult with an export control specialist and initiate the process to have its technology classified by the Department of Commerce.

It is also important to ask the following additional questions:

- What country is the technology being shipped to?
- Who will receive the item, i.e. who is the end-user?
- What will the end-user do with the item?
- What activities are the end-users involved with?

HOW DO I KNOW IF I NEED AN EXPORT LICENSE?

Very generally, once you have all the requisite background information about the foreign national, you must determine if the technology is controlled based on a listing on the EAR's CCL or the ITAR's Munitions List. If it involves an ITAR technology, a license is required for nearly all foreign nationals, with very limited exceptions.⁷² If the technology is EAR controlled, the first step is to classify the product by determining its Export Control Classification Number (ECCN) on the CCL. Generally, the licensing requirement is determined by the combination of the level of technology involved and the foreign national's nationality or country of permanent residence. Certain highly-sensitive technologies, such as nuclear and missile technology is heavily restricted and virtually all foreign nationals require a license.⁷³ In general, other less-sensitive EAR-controlled technology do not require a license for many foreign nationals from certain countries considered to be "close allies of the U.S.," such as Australia, Japan and members of the European Union.⁷⁴

Thus, if the technology is a controlled technology under the EAR or ITAR, the company must consider whether it must apply for an export license if it intends to transfer the technology to a foreign national, even if in the United States.

It should be emphasized that although the deemed export rule may be triggered, this does not necessarily mean that a license is required. For ex-

ample the technology may be eligible for one of the license exceptions under the EAR or exemptions under the ITAR.

What if you represent a company that will probably hire subcontractors, and possibly foreign nationals in another country, to develop and produce a commercial item?

This is often referred to as a "deemed re-export" situation, where there is a transfer of controlled U.S. technology to a third-country national overseas.⁷⁵ For example, a U.S. exporter transfers its controlled proprietary technology to a firm in country A. The firm in country A, in turn, employs an individual from country B who is not a permanent resident of country A, nor of the United States, and who will need the controlled proprietary technology to perform his or her assigned duties. If the U.S. exporter intends to transfer the controlled technology to the country B national who is now an employee of the country A firm, the U.S. exporter is responsible for obtaining any required deemed export license, as if it were transferring the technology to country B. If the country A firm intends to transfer the controlled technology that it received from the United States to the country B national, then the country A firm is responsible for obtaining any required deemed re-export license.

HOW DO YOU APPLY FOR A LICENSE?

If a license is required, a company must submit a license application to release the controlled technology to the foreign national from the appropriate government agency, namely the Department of Commerce or the Department of State. The Department of Commerce's Bureau of Industry and Security (BIS) is primarily responsible for enforcing the EAR and processes all export license applications. For military items under the ITAR, licensing is typically handled by the Department of State's Directorate of Defense Trade Controls (DDTC) through a Technical Assistance Agreement (TAA), which is an agreement between the company releasing the controlled technical data and the foreign national. The TAA includes the restrictions on the release and disclosure of the technical data and imposes limits on the use and re-transfer of the information. TAAs are

⁷² See "Legal Action Center Practice Advisory: Export Licensing Requirements for Foreign Nationals," *supra* note 62; see also www.bis.doc.gov/licensing/facts1.htm

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See Department of Bureau of Industry and Security "Deemed Export" Questions and Answers at www.bis.doc.gov/DeemedExports/DeemedExportsFAQs.html.

subject to very specific regulatory requirements and must contain certain clauses mandated by the ITAR. Subsequent amendments to the scope of technology must also receive pre-authorization from the DDTC.

Export license applications for dual-use technologies may be reviewed by other government agencies apart from the Commerce and State departments, but also the Defense, Energy and Justice departments and the Central Intelligence Agency.

WHAT DOCUMENTS DOES A COMPANY SUBMIT AS PART OF THE EXPORT LICENSE APPLICATION?

In addition to the standardized forms, a company must submit a letter detailing the types of technology the foreign national will have access to (*e.g.*, information about project location, type of technology, scope of technology, form in which technology will be employed, uses for which the technology will be employed, technical scope, foreign availability of comparable technology abroad). It must also submit biographical information (including name, date and place of birth, nationality, address, passport number), and a current resume (with job description) for the foreign national.⁷⁶ Any gaps in employment history should be explained or will lead to further inquiries about the foreign national and delays in the licensing process.

WHEN SHOULD A COMPANY APPLY FOR A LICENSE?

Export license applications should be submitted as early as possible during the hiring and visa issuing process to avoid costly delays. This is particularly important if the foreign national is or will be in H-1B classification as delays in issuance of the license could expose an employer to benching violations as the foreign national cannot commence

⁷⁶ Ironically, Department of Commerce officials have stated that they consider evidence of the foreign national's intent to remain in the United States in assessing deemed export license applications. For example, they affirmed that they consider the presence of family members in the United States or a stated intention to apply for permanent residency in the United States as a factor in granting a license. See "Export Controls: Department of Commerce Controls Over Transfers of Technology to Foreign Nationals Need Improvement," Report to the Chairman, Subcommittee on Government Reform, House of Representatives (Sep. 2002) by the United States General Accounting Office, at 6 (hereinafter, the "GAO Report" ("Export Controls")).

working until the license is secured. Conversely, if the foreign national commences employment prior to the license being granted, the company could be liable for export control violations.

HOW LONG DOES IT TAKE TO OBTAIN A LICENSE?

The Department of Commerce attempts to process license applications within 60 days, although in practice, processing usually takes about 90 days or longer, particularly if the application involves a foreign national from an embargoed country (Iran, Cuba, Libya, Sudan), a designated terrorist country but not subject to full embargoes (North Korea and Syria) or a country of proliferation concern such as India, China, Pakistan and Israel. Anecdotal reports confirm that processing for these "countries of concern" can take up to a year.

The Department of State takes approximately 60 to 90 days or longer to process deemed export license applications.

FOR HOW LONG ARE EXPORT LICENSES VALID?

Deemed export licenses are generally valid for two years and comprise almost 10 percent of all export licenses approved by the Department of Commerce.⁷⁷

WHAT HAPPENS IF AN EXPORT LICENSE APPLICATION IS DENIED?

An average of three to five percent of export license applications are denied.⁷⁸ Unfortunately, there

⁷⁷ *Id.* at 2.

⁷⁸ In fiscal year 2001, the Department of Commerce approved 822 deemed export license applications and rejected 3. Most of the approved licenses allowed foreign nationals from countries of concern to work with advance computer, electronic or telecommunication and information security technologies in the United States. China accounted for 73% of licenses approved in fiscal year 2001. About 44% of these involved electronic technologies, including semiconductor technology. Russia, Iran, India, Syria, Israel, Iraq and Pakistan accounted for another 14%, collectively. The Commerce Department also returned 98 applications without action. In over 70% of these cases, Commerce informed the applicant that a license was not required or returned a duplicate application. In the remaining cases, the application was returned because it did not include all necessary data or the applicant requested its return. *Id.* at 9.

is little recourse if an application is denied. There is an administrative appeal procedure administered by the Under Secretary of Commerce for Industry and Security, which rarely overturns the decisions of its own agency.

WHAT HAPPENS AFTER AN EXPORT LICENSE IS ISSUED?

The Commerce and State departments issue licenses subject to restrictions that are set forth in the license document. The Commerce Department refers to these restrictions as “riders and conditions,” while the State Department refers to them as “limitations and provisos.”⁷⁹ At times, these restrictions are so burdensome that the foreign national is essentially prohibited from performing the job for which he was hired. Licenses issued by the Commerce Department increasingly contain the use of “standard” restrictions, which have nothing to do with the intended technology transfer. Standard restrictions include the following items:⁸⁰

- No access to the ITAR technical data or classified information
- Maintain records of green cards issued to foreign nationals
- New application if new access to controlled technology
- Use of encryption products, but not technology permitted
- Must inform foreign nationals of all license conditions
- Must establish procedures to ensure compliance with license conditions, monitored by Commerce Department

WHAT AFFIRMATIVE STEPS CAN A COMPANY TAKE TO ENSURE COMPLIANCE?

Although a company is not required to perform in-depth background checks of potential nonimmigrant hires, it would be prudent to exercise due diligence by implementing standard candidate reviewing procedures during the hiring process.

⁷⁹ See “Export Licensing Requirements for Hiring Foreign Nationals,” *supra* note 62 at 81.

⁸⁰ *Id.*

In addition, a company should implement an internal compliance program which should include at minimum, the following procedures⁸¹:

- A corporate export control compliance policy
- An explanation of the deemed export rule
- An assignment of supervisory responsibility
- A new employee indoctrination briefing
- A new employee nondisclosure statement
- An intracompany transfer procedure
- A termination of employment briefing

The key to an effective compliance procedure is the ability to gather information to assist with compliance of export control rules in a non-discriminatory way, but also in an efficient manner keeping in mind that there are timing issues associated with the filing of a nonimmigrant petition and possible delays in the visa issuance process. This requires extensive coordination between at minimum, immigration counsel, human resources and export compliance specialists in order to avoid duplicating efforts. All hires should complete comprehensive questionnaires detailing biographic information, employment history, educational history and professional affiliations, which can be used by all those involved in the export screening and immigration process.

The implementation of systematic internal checks and compliance processes may prove to be a mitigating factor in future audit or enforcement situations.

HOW CAN A COMPANY REQUEST SUCH DETAILED INFORMATION WHEN HIRING – DOESN'T THIS VIOLATE EMPLOYMENT DISCRIMINATION LAWS?

A company must be careful that it has not violated applicable local, state, and federal employment discrimination laws in its efforts to comply with export control regulations. Therefore, when advertising job opportunities and making hiring decisions, a company must ensure that eligibility to receive deemed exports of controlled technology is listed among the conditions of employment, particularly for key technical and IT job listings. To avoid any employment discrimination violations, a company should make it clear on all forms that any information relating to an applicant's nationality or citizen-

⁸¹ *Id.*

ship is solely for export control compliance purposes and will not be used to unfairly discriminate during the hiring process.

WHAT SHOULD I DO IF A COMPANY I REPRESENT HAS VIOLATED EXPORT CONTROL REGULATIONS?

The need for companies to implement internal compliance procedures is critical in the current enforcement “conscious” environment. If a company you represent has only just become aware of the rule, you must recommend that it consult with an export control specialist to determine the classification of the technology and whether it is sensitive. If the technology is sensitive, then the export control expert must assess the potential exposure and consider recommending voluntary disclosure.

A company should also immediately resolve the situation by taking affirmative steps such as restricting the foreign national’s access to controlled technologies. The existence of internal compliance procedures or the act of voluntary disclosure can act as a mitigating factor in the event of a “deemed export” violation.”⁸² However, a voluntary disclosure may not remove the possibility of criminal, civil, or administrative penalties being imposed. Moreover, if you represent a company that has internal compliance procedures, make sure it regularly updates the classification of its products/technology and does not become complacent or disregard or fail to comply with the licensing requirements.

⁸² In February 2004, the BIS issued penalty guidance for Settlement of Administrative Enforcement cases under the EAR. Under the new guidance, BIS considers each settlement offer in light of the facts and circumstances of each case, relevant precedent and the appropriate level of penalty and deterrent effect. It identifies both general factors, such as the destination of the export and degree of the willfulness involved in violations, and specific mitigating and aggravating factors that BIS typically takes into account in determining an appropriate penalty. Under the guidance, voluntary self-disclosure of violations are given “great weight” as a mitigating factor, and are typically considered in deciding whether violations should be addressed by a warning letter, rather than a penalty. Aggravating factors that receive “great weight” include a deliberate effort to hide or conceal violations and a serious disregard for export compliance responsibilities. See “BIS Issues Guidance for Settlement of Administrative Enforcement Cases,” at www.bis.doc.gov/news/2004/AdminCasePenaltyGuide.htm; 69 Fed. Reg. 7867 (Feb. 20, 2004) amending 15 CFR Parts 764 and 766.

WHAT ARE THE PENALTIES FOR NON-COMPLIANCE?

There are civil, criminal, and administrative penalties, including fines, denial of export privileges and even imprisonment for non-compliance with export control regulations.⁸³ Enforcement of the EAR falls under the BIS jurisdiction, while the DDTC is charged with enforcement and compliance of ITAR. In addition, a foreign national may also be rendered inadmissible under INA §212(a)(3)(A)(i)(II) for any export control violations.

Unfortunately, the Department of Commerce has already increased its efforts at enforcement and started to penalize companies for violations of the “deemed export rule.” Total civil penalties imposed by BIS practically doubled from 2001 to 2002, increasing from \$2.5 million to \$5.2 million.⁸⁴

⁸³ Penalties for violations of the EAR can include:

Criminal:

“Willful violations:

Corporation – a fine of up to the greater of \$1,000,000 or five times the value of the exports for each violation;

Individual – a fine of up to \$250,000 or imprisonment for up to ten years, or both, for each violation;

“Knowing violations:”

Corporation – a fine of up to the greater of \$50,000 or five times the value of the exports for each violation;

Individual – a fine of up to the greater of \$50,000 or five times the value of the exports or imprisonment for up to five years, or both for each violation.

Administrative:

For each violation of the EAR, any or all of the following may be imposed:

- the denial of export privileges;
- the exclusion from practice, and/or
- the imposition of a fine of up to \$12,000 for each violation, except that the fine for violations involving items controlled for national security reasons is up to \$120,000 for each violation.

See www.bis.doc.gov/Enforcement/eeprogrm.htm; see also 22 CFR §127 for ITAR penalties.

⁸⁴ See Department of Commerce Bureau of Industry and Security Annual Report for Fiscal Year 2002 at 12 available at www.bis.doc.gov/News/2003/AnnualReport/index.htm.

WHAT LIES AHEAD: IS THIS REALLY AN IMMIGRATION ISSUE?

The release of the GAO Report on Export Controls in September 2002 is likely to serve as an impetus for increasing scrutiny of existing procedures and implementation of new procedures.⁸⁵ The GAO Report found several vulnerabilities in the Department of Commerce's deemed export control system, including the lack of a screening process for change-of-status applications submitted to CIS from foreign nationals already in the United States.⁸⁶ According to the report, in fiscal year 2001, approximately 15,000 individuals from countries of concern changed their immigration status to obtain jobs that could have involved controlled technology.⁸⁷ The GAO Report further noted that the number of foreign workers authorized to enter the United States using specialty employment visas was far larger than the number of deemed export license applications received by the Commerce Department in fiscal year 1999.⁸⁸

In addition, the report found that in fiscal year 2001, the Commerce Department screened approximately 54,000 visa applications submitted by foreign nationals abroad.⁸⁹ Commerce Department analysts consulted Commerce's enforcement databases, DOD comments on rejected license applications, and other sources of information to detect linkages between foreign entities of concern and visa applicants. From these applications, it developed 160 potential cases for follow-up by enforcement staff in the eight field offices.⁹⁰ However, the Commerce Department could not readily track the disposition of the 160 referred cases because it does not have a system or mechanism for its field enforcement staff to report the results of their reviews back to headquarters.⁹¹ As a result, its analysts at headquarters

⁸⁵ See GAO Report ("Export Controls"), *supra* note 76.

⁸⁶ *Id.*

⁸⁷ *Id.* at 3.

⁸⁸ *Id.* at 5.

⁸⁹ *Id.* at 12.

⁹⁰ The BIS conducts investigations of potential violations through its Office of Export Enforcement (OEE), which has field offices in Los Angeles, San Jose, New York, Washington, Boston, Miami, Dallas and Chicago. Additional offices are planned for Seattle and Houston. See Bureau of Industry and Security Annual Report for Fiscal Year 2002, *supra* note 84 at 12.

⁹¹ See GAO Report, ("Export Controls") *supra* note 76 at 13.

could not determine if their screening methods were effecting in targeting potential deemed export cases.⁹² The GAO Report identified another weakness concerning the lack of an effective monitoring program to determine if companies comply with license conditions, finding that Commerce Department staff do not regularly visit firms to determine whether licensing conditions are implemented.⁹³

The GAO Report made some of the following recommendations, which will likely be implemented in the future:⁹⁴

- The Commerce Department should use all existing U.S. immigration data to identify foreign nationals who could be subject to deemed export licensing requirements;
- The Commerce Department should work closely with CIS to explore ways of referring change-of-status applications involving employment that might result in access to sensitive technology;
- The Commerce Department should work with the departments of Defense, State and Energy to develop a risk-based program for monitoring compliance with deemed export licenses.

* * * *

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

⁹² *Id.*; According to the report, the Department of Commerce plans to install a new computerized database by the end of 2002 that would correct this problem by allowing headquarters staff to track the disposition of cases referred to field enforcement staff. *Id.* Interestingly, in contrast to the lack of monitoring in the United States, the Department of Commerce employs on-site visits overseas to verify that exported dual-use items are used in compliance with license conditions. During fiscal years 1997 through 2001, the department scheduled more than 3,500 post-shipment verification visits in more than 90 countries, including almost 900 in China. *Id.* at 15. These checks are conducted by Export Enforcement attachés. During fiscal year 2002, Export Enforcement had attachés in Beijing, China and Moscow, Russia. At the end of fiscal year 2002, additional attachés were posted to Abu Dhabi, United Arab Emirates and Cairo, Egypt. During fiscal year 2003, it hopes to post attachés in Singapore, New Delhi, India and Shanghai, China. See BIS Annual Report for Fiscal Year 2002, *supra* note 84 at 12.

⁹³ See GAO Report, *supra* note 76 at 17.

⁹⁴ *Id.*

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 BIS, CIS, CBP, FBI, to name a few. These developments 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.