

Intel Corporation
Human Resources
Mail Stop RNB4-126
2200 Mission College Blvd.
Santa Clara, CA 95054
408-765-4756
408-765-6284 - fax



April 6, 2010

Stephen Tarragon
Deputy Chief
Regulatory Products Division Clearance Office
U.S. Citizenship and Immigration Services
Department of Homeland Security
111 Massachusetts Avenue, N.W., Suite 3008
Washington, DC 20529-2210

RE: OMB Control Number 1615-0009

Dear Mr. Tarragon:

As U.S. Immigration Operations Manager for Intel Corporation, I am responding to the February 8, 2010 Federal Register Notice regarding proposed revisions to U.S. Citizenship and Immigration Services (USCIS) Form I-129.

Intel is a technological leader in the semiconductor industry, having developed the semiconductor technology upon which the entire personal computer ("PC") industry has been built. Intel's research and development teams have developed products which have revolutionized the computer industry and have brought computers and PC enhancement products into the daily lives of Americans and people throughout the world. Intel's ongoing recruitment and employment of top research engineers to conduct ground-breaking semiconductor research has allowed Intel to maintain its leadership in the semiconductor industry and remain competitive in the global computer market.

Intel currently employs approximately 80,000 employees throughout the world. Its 2009 revenue was \$31 billion, and its 2009 net income was \$4.4 billion.

As a multinational U.S. corporation, Intel relies heavily on temporary nonimmigrant work visas to facilitate its global operations and to fill skills shortage positions within the U.S. Intel relies on a "Copy Exactly!" philosophy which requires that all our manufacturing facilities operate in an identical manner to ensure quality and product consistency. Intel relies on the L-1, and to a lesser extent on the H-3, nonimmigrant visas to bring employees of its subsidiaries abroad to the U.S. for temporary work and training assignments to transfer proprietary Company technology to the foreign sites. A continued effective use of the L-1 and H-3 visas allow Intel to continue to center its development efforts in the United States.

Intel seeks U.S. workers first for U.S. positions. The Company uses the H-1B visa (and to a lesser extent the O-1 visa), where necessary, to fill technical U.S. positions where skills shortages exist. Intel has historically been one of the top H-1B visa users, with Business Week reporting that Intel was the third largest user of H-1B visa numbers in fiscal year 2009. Consistent with the economy and greater availability of U.S. talent, Intel's April 1st H-1B cap filings for 2010 are only one quarter of what they were in 2009. Virtually 100% of Intel's H-1B employees work at an Intel site location and all Intel H-1B employees are controlled and supervised by Intel.

Being a technology company, Intel has rigorous export licensing processes. While Intel has several comments regarding the proposed I-129 form, the Company is most concerned about USCIS's proposal to add a "Deemed Export Acknowledgement" question.

Intel's remaining comments focus mainly on requests for information that are not probative of whether the Petitioner satisfies the statutory and regulatory requirements, but instead tend to convert USCIS, which is an adjudications agency, into an enforcement agency. Some requests for information would be more appropriately requested by ICE or CPB rather than USCIS in the course of adjudicating a petition for an immigration benefit.

Deemed Export Acknowledgement

USCIS is not the appropriate agency to request export license information

Any attempts by USCIS to condition approval of an H-1B petition on the existence of an export license would be *ultra vires*. A deemed export license is not required to be eligible for employment, but even if it were, USCIS is not the appropriate agency to question the existence or lack of an export license. The proposed instructions incorrectly state that an Export Administration Regulations ("EAR") deemed export license is required in some cases to "be eligible for employment being sought through the submission of a Form I-129." This is incorrect as the Department of Commerce explicitly states that the "EAR does not regulate employment matters."¹ USCIS should leave matters relating to export licensing to the Department of Commerce which is the agency charged with managing such issues.

Even in situations in which Intel is required by law to obtain an export license, USCIS should not require possession of an export license as a precondition to filing the I-129 petition. The petition instructions suggest that, if a deemed export license is required, it must be obtained prior to filing the petition. More specifically, the instructions state:

¹ See Deemed Export Questions and Answers, <http://www.bis.doc.gov/deemedexports/deemedexportsfaqs.html>.

"If a deemed export license is required, provide a copy of the U.S. Department of Commerce approved license and document the license number."

If USCIS refuses to accept an I-129 until a deemed export license is obtained, it will have a significant negative impact on Intel's ability to hire necessary talent for skills shortage positions. Such a requirement would dictate the timing of the license application, rather than permitting Intel to determine the best time to apply for licenses as appropriate for our processes, technology control procedures and controlled technology environment.

This requirement would surely result in new employees in OPT status falling out of status while Intel seeks an export license prior to filing petition. In the best case scenario, these individuals would be ineligible to change status in the U.S. and their ability to contribute to Intel would be delayed. In the worst case scenario, the U.S. will lose engineers with critical technical skills to competing economies.

This requirement would render Intel and other technical U.S. companies unable to hire engineers with rare skills where the H-1B cap is reached before the export license is issued and the petition can be filed.

Finally, even if it were legitimate for USCIS to inquire about export licenses, USCIS should not require possession of an export license prior to filing a consular notification H-1B (i.e., one that does not change a foreign national's status but requires "activation" of H-1B status through obtaining a visa at a Consulate and entering in H-1B status). Even where a change or extension of stay is requested, USCIS should, at worst, deny the request for the change or extension of stay but approve the underlying petition, similar to how it handles approval of H-1B petitions without granting a change of status where an I-612 J-1 waiver approval is not available.

USCIS should not be able to ask for this information, and if they do, at best it should be included in the data collection section since the possession of an export license has no relevance to the adjudication of the I-129.

Deemed Export Acknowledgement does not include all technologies

The proposed Deemed Export Acknowledgement is incomplete as it is not inclusive of all export control regulations. Specifically, the proposal only covers technologies subject to the Export Administration Regulations ("EAR"). It does not address compliance with the International Traffic in Arms Regulations ("ITAR"), which covers technologies that are specifically designed, modified, configured, or adapted for military or space applications.

Obtaining this information pre-I-129 filing is overly burdensome

On a practical level, the proposed Deemed Export Acknowledgement will require substantial coordination between the Human Resources and Export Control functions before an I-129 can be filed. We anticipate that the collection of necessary information will take between .5 and 4.5 hours depending on the beneficiary's proposed job duties and work with multiple business units. The coordination will mainly involve identifying relevant Export Control Classification Numbers which do not require a deemed export license for the subject individual.

Deemed Export Acknowledgement is redundant

The proposed I-129 is not only a buckshot approach that will have relevance to few applicants, but is also redundant of more targeted programs such as Visas Mantis and the U.S. Department of Commerce Visa Application Review Program.

As you may know, the Visas Mantis program is a consular initiated check that may be initiated when a visa applicant works in a field identified on the Technology Alert List. Once initiated, the check may result in delays while a formal government review is completed. The check includes a government determination as to whether the individual requires an export license, among other things.

The U.S. Department of Commerce's Visa Application Review Program reviews applications to "detect and prevent possible violations of the EAR" by foreign nationals and makes recommendations on whether to deny visas for deemed export reasons. The proposed change to Form I-129 would create a redundancy with a function already performed by a government agency.

Efforts to capture export license information are premature as system being updated

The Obama administration and Secretary of Defense Robert Gates are currently working on plans to "dramatically reform our nation's outdated export control system." Secretary Gates is expected to outline the proposed changes in the coming weeks, which may impact the EAR's deemed export requirements. Given the possible changes it would be inappropriate to implement an I-129 Deemed Export Acknowledgement when the export control regulations may change in the near future.

Comments on Other Miscellaneous Provisions

Contact information for third party placement²

² See proposed I-129 form, page 5, part 6.

The proposed form asks for the phone number and contact name at a third party site where an H-1B worker is placed. While, as explained above, Intel almost never has occasion to place H-1B or L-1 workers at a third party location, it is troubling that USCIS might reach out to someone who is not employed by the Petitioner, as such a person would not have specific information regarding the Petitioner's employment of and control over the Beneficiary. Furthermore, these questions are duplicative of those found on page 5, Part 5, number 5 and 6.

The follow-up questions to whether the employee will work "off-site" assume that employment will be under a third-party contract. There are several situations where the off-site work may be unrelated to a third party contract (e.g., physicians working at a hospital, employees who work remotely from home, etc.).

While we are of the opinion that these questions are inappropriately enforcement- rather than benefit-minded, if USCIS nevertheless feels compelled to make such inquiries, USCIS should ask targeted follow-up questions as opposed to presuming the existence of a third-party contract.

USCIS also requests the address where the employee will work in this section, which is duplicative of page 4, Part 5, number 4. As the form is already thirty-five (35) pages long, eliminating duplicative questions would be appreciated.

Trade agreement supplement³

USCIS specifically asks whether this is the sixth consecutive request for an H-1B1 extension. The purpose of this question is unclear. Although every third extension requires a new 2-year LCA, the law does not limit the number of one-year extensions. Since this visa is only issued on an annual basis, the relevance of this question is not apparent.

H-3 questions⁴

USCIS proposes to ask whether an H-3 beneficiary's training is "an effort to overcome a labor shortage". While Intel does not use the H-3 in this manner, this is not part of the regulatory criteria and is irrelevant. H-3s cannot perform work except that which is incidental to the training and a request for such information is captured in sub-question "c". A better approach would be to ask the Petitioner to explain what "incidental" means in the context of the specific training offered, whether that portion of the training is "necessary" and why.

³ See page 10, section 1(f).

⁴ See page 16, section 4, 1(e).

Request for itinerary for off-site work⁵

The proposed form asks whether a copy of an itinerary for off-site work is attached. As mentioned above, Intel almost never places its nonimmigrant workers at non-Intel locations. Nevertheless, for companies that do make such placements, USCIS should recognize that itineraries are not always relevant to off-site placements. A petition should not be prejudiced if the answer is "no." The instructions, rather than the form itself, should list an itinerary as one of several documents useful to explaining the nature of an offsite placement.

L-1 visa information⁶

The proposed I-129 form requests the beneficiary's job duties for the three years prior to filing the petition/admission to the U.S. This request is overly inclusive and may be irrelevant to a particular L-1 determination. The regulations only require that the employee have worked abroad for one year out of the three years prior to requesting an L-1 and that the beneficiary have acted in a specialized knowledge or managerial capacity abroad. This specialized knowledge or managerial capacity need not have been exhibited during the three year period immediately preceding application for initial L-1 status. For example, a long-time employee of a foreign subsidiary may have obtained the specialized knowledge relevant to an upcoming temporary work assignment five years ago and not within the most recent three years.

Fraud prevention fee⁷

The proposed wording assumes that the \$500 fraud prevention fee must be paid for every petition. That is not the case as it does not apply to extensions. Rather than asking a question on the form about this fee, its applicability should be explained in the instructions to the form.

O-1/P-1⁸

The proposed form requires the O-1/P-1 sponsor to acknowledge responsibility for return travel home if the beneficiary is dismissed early. Intel does not use the P-1 visa category and uses the O-1 category in limited circumstances. This question should not be part of the form as it is already a regulatory requirement. Whether or not a Petitioner signs an acknowledgement, the Petitioner is required to comply. Including this acknowledgement

⁵ See page 19, Part D.

⁶ See page 21, Section 1, #6.

⁷ See page 23, Section 3.

⁸ See page 25 Section 2.

here is also inconsistent with treatment of H-1Bs, as H-1B regulations also require that the Petitioner pay for return travel home, but the H Classification Supplement does not require a similar signed acknowledgment.

Conclusion

Nonimmigrants represent a proportionally small number of employees working and training in the U.S. for Intel but are nevertheless a very important part of Intel's ability to function and remain competitive both in the U.S. and global markets. We appreciate the ability to submit comments on the proposed I-129 Form and hope that the Company's concerns and suggested improvements be incorporated into the final version. Please contact me (408.765.1681) or Intel's outside legal counsel (Sandra N. Sheridan: 602.266.1825) with any questions or if we can be of assistance.

Very Truly Yours,

A handwritten signature in cursive script that reads "Margie Jones".

Margie Jones
U.S. Immigration Operations Manager