Yale University

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On behalf of Yale University, I am writing to submit comments on the Federal Register notice concerning the U.S. Citizenship and Immigration Service's (USCIS) proposal to modify Form I-129, Petition for Nonimmigrant Worker, by adding a "Deemed Export Acknowledgement" section.

As a major research institution, Yale conducts research and teaches courses that may involve controlled technology. In addition, we enroll and employ foreign scientists, engineers and students who are encouraged to fully participate in the research enterprise. Although most of our activities are exempt from export control regulations because the information involved is publicly available or in the public domain, is considered fundamental research, or is taught as part of a listed catalogue course, we have worked with the federal government, including the Departments of Commerce, State and Treasury, to make our researchers aware of current regulations. In addition, we have structured our research to comply with deemed export requirements and provide active support programs to our faculty, staff and students to ensure compliance with regard to international shipments and travel.

We have appreciated the Administration's efforts to ensure that the nation's export control regulations both protect national security and ensure that the world's best talent is able to participate openly in the fundamental research that is vital to our nation's long-term security and prosperity. That said, we have serious concerns with the USCIS proposed amendment to Form I-129. As drafted, this modification would result in a substantial burden for Yale without either a discernible improvement in either export control compliance or national security. Moreover, Form I-129 is an inappropriate vehicle to track or enforce export control regulations and the proposed modification would distort the underlying purpose of the petition.

The USCIS proposal would add a new deemed export license acknowledgment to Form I-129, requiring Yale to demonstrate that a review of the deemed export license requirements has been completed. If a deemed export license is required, a copy of the Department of Commerce approved license would have to be supplied along with Form I-129. If a deemed export license is not required, Yale would have to indicate whether the technology the foreign worker will have access to is subject to Export Administration Regulations (EAR) and provide the

appropriate export control classification number or confirm that the information has been "self-classified" or that it has been classified as not requiring a license.

The questions about deemed export licensing requirements are a complex, substantive area of law – and distinct from immigration law. As you well know, Form I-129 is an all-purpose petition for work authorization that Yale uses for H-1B and O-1A visas. Its contents are designed to help determine if an employer is in compliance with the terms and conditions of the visa being sought, including occupation, location and wage. For that reason, Form I-129 is completed by Yale's Office of International Students and Scholars (OISS), which has primary responsibility for securing immigration status for temporary and permanent foreign teaching and research faculty. While all parts of Yale must comply with export control requirements, OISS specializes in DOL and USCIS compliance in preparing H-1B petitions. They do not have the expertise necessary to determine if an individual would require a deemed export license.

The primary responsibility for compliance with export control regulations resides with the Division of International Agreements and Export Control Licensing in Yale's Office of Grants and Contracts. In consultation with other offices, they determine whether an export license is required for the shipment of items, software technology and information outside the U.S. or the disclosure or transfer of controlled tangible items, software, technology or information to foreign nationals. To make this judgment, they must collect information to decide whether the item, software, technology or information is proprietary or disclosure restricted and therefore possibly export controlled.

As alluded to above, most of the research at Yale is carefully designed to come under the fundamental research exclusion (FRE), and therefore, the technology utilized is not subject to the EAR. Part of the design requires that no confidential export controlled information is received as part of the research enterprise. Any export controlled information resulting from the research enterprise, such as research results, would be exempt under the FRE. Accordingly, neither the information used in research nor the information resulting from the research needs to be analyzed for Export Control Classification Numbers (ECCNs). Yet, the proposed amendment to Form I-129 requests ECCNs for technology even if it is not subject to the EAR. This change would effectively alter the export control compliance regime of many universities, and require an elaborate and time-consuming ECCN analysis of all laboratories employing foreign nationals, despite the FRE rendering this exercise unnecessary as a matter of export control compliance.

In the unlikely event that the technology was known and a license was required, Yale probably would be unable to identify the need for a license at the time of the petition because the license is required before the technology is released to the foreign national – not before he or she even arrives on campus. In fact, it is rare that decisions concerning the technology that will be used during an employee's tenure are made prior to employment. In addition, new employees often use a wide variety of the technologies available in a laboratory and many of the activities that qualify as deemed exports could not be identified as envisioned at the time of petition. For example, visual inspections of equipment or facilities may be considered deemed exports. If the new requirements were to be implemented as proposed, the task of acquiring the deemed licensing information would be prohibitively complicated, costly and time consuming, requiring Yale to screen all technology in each prospective employee's potential area of operation. For these reasons, we are concerned that the proposed modification reflects a lack of

understanding of the way research is conducted and the processes used to ensure compliance with the law.

Currently, Yale employs a total of 532 H-1B and 18 O-1A visa holders, and we file approximately 400 petitions annually. We would be required to make assumptions about the nature of the research and the use of technology for the duration of the stay for each of these prospective employees. Despite this additional effort, the need for an export license should have no bearing on whether the employer is in compliance with the terms and conditions of the visa and it should have no bearing on whether a foreign national is granted a visa. That said, it is unclear how USCIS would employ or respond to the proposed data elements, including whether the petitioner could be denied based on whether a license would be required. This omission is troubling.

Finally, we are confused by the timing of the proposed modification to Form I-129 given that the President announced a broad-based interagency process to review the overall export control system last August. This effort is working in parallel the Department of Commerce's Emerging Technology and Research Advisory Committee, which was established in 2008 to advise BIS on technical questions that affect export controls on dual-use research and development and other emerging technology activities, including those related to deemed exports. These efforts could yield recommendations that impact current policies and procedures of DHS and other federal agencies. As such, it is odd that this one modification would be considered in isolation from the slate of recommendations expected from the reviews currently underway.

In conclusion, we question the timeliness, appropriateness and the value of the USCIS proposal and reiterate our concerns regarding the significant burden that would be imposed on the University. We urge you to withdraw this proposed modification.

We appreciate the opportunity to express our views.

Sincerely,

/s/

Dorothy K. Robinson