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Re: OMB Control Number 1615-0009
Comments on Agency Information Collection Activities: Form I-129, Revision of an Existing Information Collection

TechAmerica is pleased to present the comments listed below in response to the Agency Information Collection Activities: Form I-129, Revision of an Existing Information Collection published by the U.S. Department of Homeland Security ("DHS"), U.S. Citizenship and Immigration Services ("USCIS") on February 8, 2010 (the "Notice").[1]

TechAmerica is the leading voice for the U.S. technology industry, which is the driving force behind productivity growth and jobs creation in the United States and the foundation of the global innovation economy. Representing approximately 1,500 member companies of all sizes from the public and commercial sectors of the economy, it is the industry's largest advocacy organization. TechAmerica members currently hold the vast majority of U.S. Department of Commerce Deemed Export Licenses.

As outlined below, we believe the proposed change described in the Notice would create significant new burdens on U.S. employers, while providing little practical utility to USCIS. Therefore, the Form I-129 must not include a Deemed Export Acknowledgement.

A. Background

The notice proposes a revision to USCIS, Form I-129, Petition for Nonimmigrant Worker.

1) Current USCIS Form I-129

"Form I-129 is used by an employer to petition USCIS for an alien to come as a nonimmigrant to the United States temporarily to perform services or labor or to receive training."[2] Specifically, through this

[1] 75 Fed. Reg. 6212 (Feb. 8, 2010).

[2] USCIS, Instructions for Form I-129, Petition for a Nonimmigrant Worker, OMB No. 1615-0009, 1 (Dec. 4, 2009).

form the employer may petition for fifteen (15) different types of visa classifications,[3] as well as an extension of stay or change of status for several others, including H-1B, L-1 and O. [4]

2) Revision to USCIS Form I-129

The proposed revision to Form I-129 requires a petition for two (2) additional types of visa classifications,[5] as well as one (1) additional classification for an extension of stay or change in status.[6] This is one of several proposed changes to Form I-129.

One such proposed change is the inclusion of a Deemed Export Acknowledgement. Under the proposed revision,

> Certain H-1B, L-1 and O-1A nonimmigrant beneficiaries must have a Deemed Export License issued by the U.S. Department of Commerce to be eligible for the employment being sought through the submission of a Form I-129. The petitioner must submit evidence that a review of the deemed export license requirements has been completed, as set forth in Title 15, Code of Federal Regulations (CFR), Export Administration Regulations (EAR) Part 734.2 the Deemed Export Rule as regulated by the U.S. Department of Commerce.[7]

3) Deemed Export License Process

Under the Export Administration Regulations ("EAR"), an export of technology or source code is "deemed" to take place when it is released to a foreign national within the United States.[8] An EAR deemed export license is required prior to a company transferring technologies to a foreign national employee in the United States, if such transfer would require an export license to the foreign national's home country.[9] Similar rules exist under the International Traffic in Arms Regulations ("ITAR") for technologies that are specifically designed, developed, modified, configured or adapted for military or space applications.

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[3] *Id.* (Classifications that require a petition are: H-1B; H-2A; H-2B; H-3; L-1; O-1; O-2; P-1; P-1S; P-2; P-2S; P-3; P3S; Q-1; R-1).

[4] *Id.* (Classifications that require a petition to request an extension of stay or change of status are: E-1; E-2; Free Trade Nonimmigrants; H-1B1; TN).

[5] USCIS, Instructions for Form I-129, Petition for a Nonimmigrant Work, OMB No. 1615-0009, 1 -2 (Jan. 27, 2010, Draft – Not for Production). Additional classifications that require a petition are: E-2 CNMI; H-1C. *Id.*

[6] *Id.* at 2 (Additional classification that requires a petition to request an extension of stay or change of status is: E-3).

[7] *Id.* at 4.

[8] EAR §734.2(b)(2)(ii).

[9] BIS, "Deemed Export" Questions and Answers, http://www.bis.doc.gov/deemedexports/deemedexportsfaqs.html (last visited Mar. 22, 2010).

Where a deemed export license is required, employers generally choose to file a deemed export license application prior to or concurrently with filing the USCIS Form I-129, after a foreign national has received an approved visa status, or even after a foreign national has begun employment depending upon the particular circumstances of employment and technology access. An employer may also file a Foreign National Review Request which, when approved, permits access to certain controlled processor technologies.[10]

In sum, a deemed export license is simply required prior to the release of controlled technologies to the foreign national.[11] A deemed export license is not required if such technology will not be released to the foreign national. To this end, a foreign national may commence employment with the company after receiving USCIS work authorization and may, if applicable, begin working with controlled technologies after receiving an approved deemed export license. If a foreign national's job duties change and/or there are changes to the company's technologies a deemed export license may be applied for at a later date, with the restriction being that the employer may not transfer controlled technologies until the license is obtained.

The following example illustrates this point: A semiconductor company seeking to employ a Chinese foreign national could determine, either pre- or post-offer, that the company will require a deemed export license prior to transferring a subset of its technologies to the individual (typically only a subset of technologies requires a deemed export license, though this is dependent on the company and the foreign national's home country). After offer acceptance, the company prepares and files the Form I-129 petition on behalf of the foreign national and concurrently files the deemed export license application. In this example, the Chinese foreign national could begin working prior to receipt of the deemed export license and the employer would take steps to ensure that controlled technology is not released until receipt of an approved license. Moreover, the foreign national could work in the company for the duration of their employment without a deemed export license – as long as the employer does not transfer controlled technologies to the foreign national.

In fact, many companies have invested a large amount of resources (including man hours, IT costs, and outside consultant or legal fees) to establish Technology Control Plans that ensure controlled technologies are only released to foreign nationals that have a deemed export license.

4) Effect of Revision to USCIS Form I-129 – Part 7 on Deemed Export Process

Under the proposed USCIS revision, a company would be required to apply for and receive an approved Department of Commerce ("DOC") deemed export license prior to submitting a Form I-129.[12] This proposal is a substantial change in both the export license and the visa application process in that it dictates the timing of these license applications, rather than permitting employers to determine the best

[10] EAR §740.5. A Foreign National Review ("FNR"), submitted to BIS for approval, may be used in lieu of a deemed export license for certain microprocessor technology that will be transferred to a foreign national with a home country listed in EAR Country Group D-1; except North Korea. *Id.* As of March 22, 2010, the countries listed in Country Group D-1 are: Armenia, Azerbaijan, Belarus, Burma, Cambodia, China, Georgia, Iraq, Kazakhstan, North Korea, Kyrgyzstan, Laos, Libya, Macau, Moldova, Mongolia, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, and Vietnam. EAR §740, Supplement No. 1.

[11] *See supra* note 9.

[12] *See supra* note 5.

time to apply for licenses as appropriate for the company's processes, technology control procedures and controlled technology environment. More detailed comments are provided in Section B.

B. Comments

The Notice requested comment on any (or all) of four (4) evaluation criterion. We provide comment on each below.

1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility

The proposed new instructions do not aid USCIS' evaluation of an employment visa application; rather, the proposed requirement for employers to first obtain a deemed export license prior to submitting an application adds a redundant and unnecessary step to the process. The Instructions for Form I-129 set forth the requirements to petition for an H-1B, L-1 and O-1A nonimmigrant beneficiary.[13] If these requirements are not met then the petition may be denied. For example, in order to apply for an H-1B classification the petition must be filed with:

1. Evidence that a labor condition application has been filed with the U.S. Department of Labor;
2. Evidence showing that the proposed employment qualifies as a specialty occupation;
3. Evidence showing that the alien has the required degree…
4. A copy of any required license or other official permission to practice the occupation in the State of intended employment; and
5. A copy of any written contract between you and the alien or a summary of the terms of the oral agreement under which the alien will be employed.[14]

The petition requirements for an L-1 and O-1A are similar to those of the H-1B above.[15] Nowhere amongst these requirements is there a mention of denying a petition for export control related reasons. The proposed revision appears to be an ill-advised approach to promote compliance with the EAR, but there are other less arduous avenues. Currently, there are approximately 1,000 deemed export license applications filed per year.[16] Given that total the total number of Form I-129s filed per year is in excess 100,000, less than one percent (1%) of such filings implicate export control regulations.[17] There are other means of policing non-compliance with the EAR that would not affect the other ninety-nine percent (99%) of visa applicants.

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[13] *See supra* note 2.

[14] *Id.* at 3.

[15] *Id.* at 7-8.

[16] *See supra* note 20.

[17] *See supra* note 21.

The Visas Mantis program, for example, is a consular check that may be initiated when a visa applicant works in a field identified on the Technology Alert List. The check includes a government determination as to whether the individual requires an export license, among other things.[18]

Further, DOC'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.[19] The proposed change to Form I-129 would clearly create a redundancy with a function already performed by a government agency. To this end, the collection of the information is not necessary for the performance of USCIS' evaluation on whether to approve a petition.

Finally, the proposed instructions incorrectly state that an EAR deemed export license is required in some cases to "be eligible for employment being sought through the submission of a Form I-129."[20] There is simply no circumstance today where a deemed export license is required in order to obtain a visa. In fact, the DOC explicitly states that the "EAR does not regulate employment matters."[21] The EAR regulates the release of technology to foreign nationals, and does not regulate who may be employed in a particular job position.

Accordingly, the proposed collection of information is not necessary to the proper functioning of USCIS and has no practical utility to the agency.

2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used

The Notice estimates that an average respondent will take 2.75 hours to complete a response to the revised Form I-129.[22] Although this may be an estimate of the average time to manually complete the form, it does not take into account the added time that will be required to obtain the information prior to filling out the form.

The revised Form I-129 – Part 7 limits its applicability to three (3) of the seventeen (17) visa types, yet it is only relevant to an even more limited sector of companies.[23] Most companies filing H-1B, L-1 and O-1A petitions do not work with controlled technologies that require deemed export licenses. For instance, H-1B petitions may be filed by hospitals and clothing companies; L-1 petitions by retail stores (management) and international marketing firms; and O-1As for top level individuals, including acclaimed neurosurgeons. These companies, as well as many others, would be entirely unfamiliar with the EAR. In fact, it is likely that only a small subset of companies in the United States work with

[18] 9 FAM §40.31 Notes (Sept. 30, 2009).

[19] BIS, Export Enforcement, http://www.bis.doc.gov/complianceandenforcement/index.htm (last visited Mar. 22, 2010).

[20] *See supra* note 5, at 4.

[21] *See supra* note 9.

[22] *See supra* note 1.

[23] USCIS, Form I-129, Petition for a Nonimmigrant Worker, OMB No. 1615-0009, 6 (Jan. 27, 2010, Draft – Not for Production).

technologies that require EAR deemed export licenses – BIS only receives approximately 900 to 1000 deemed export licenses per year,[24] while over 100,000 H-1B, L-1 and O-1A petitions are filed annually (these numbers are, of course, dependent on economic conditions).[25]

Further, universities file similar petitions and generally work with technologies that are not subject to the EAR due to certain "publicly available" (i.e. fundamental research) exceptions.

However, in order to complete the Deemed Export Acknowledgement, an employer unfamiliar with the EAR would need to: a) take time and money to educate itself and/or receive advice through outside counsel or consultants regarding the EAR; b) determine if its technologies may be subject to the EAR and if applicable, the respective ECCN(s); c) if uncertain, file a commodity classification request with BIS which takes approximately fourteen (14) to sixty (60) days or more to process;[26] and d) if a deemed export license is required, file an export license application with BIS which can take approximately ninety (90) days or more for the agency to process.[27]

If after this long process, the company obtains an approved export license, only then would it be able submit a Form I-129 for their intended foreign national employee. Having overcome one hurdle, the company would then be presented with the next obstacle of actually obtaining an H-1B, L-1 or O-1A visa for their intended foreign national employee. Clearly this process would have a negative implication for companies that obtain deemed export licenses, with foreign nationals preferring companies (likely non-U.S. companies, if the foreign national wishes to work in the same or similar space) that would not have to go through this long process to obtain his/her work authorization. Thus, in cases where a deemed export license is or may be required, the employer will bear a significant burden to prepare an application and wait for agency review before it can submit a visa application. In fact, given the strict limit on the number of H-1B visas, the proposed new instructions risk the discriminatory effect of denying the opportunity to apply for this type of visa to anyone who may need a deemed export license.

This uncertain and prolonged time lapse is critically important to companies filing H-1B petitions. The H-1B "cap" permits the issuance of 65,000 H-1B visas per year.[28] The cap also sets out a time frame of

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[24] The Export Practitioner, *200 Firms May Benefit from Proposed ICT Exception, BIS Officials Estimate*, Vol. 22, No. 8 (Nov. 2008) (citing Bernie Kritzer, Director of the BIS Office of Exporter Services, statement on Oct. 27, 2008).

[25] In addition to the 65,000 cap, there are an additional 20,000 petitions for foreign nationals with advanced degrees, as well as exempt cases. USCIS, Cap Count for H-1B, H02B, and Certain H-3 Nonimmigrants for Fiscal Year 2010, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=138b6138f898d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=13ad2f8b69583210VgnVCM100000082ca60aRCRD (last visited Mar. 22, 2010).

[26] EAR §750.2(a).

[27] EAR §750.4(a). Additionally, EAR §748.1(d) requires that all export license applications be filed via BIS' Simplified Network Application Processing System ("SNAP-R"). If a company has not previously filed a BIS export license application, they will also have to register for a SNAP-R account prior to submitting the deemed export license application adding more time to the process.

[28] USCIS, H-1B Fiscal Year (FY) 2011 Cap Season, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=4b7cdd1d5fd37210VgnVCM100000082ca60aRCRD&vgnextchannel=73566811264a3210VgnVCM100000b92ca60aRCRD (last visited Apr. 1, 2010).

filing such petitions beginning April 1, in order for the foreign national to begin employment on October 1, of that same year.[29] Last year the H-1B cap was not reached until December 21, 2009,[30] but prior to the recent economic downturn, in 2007-2008, the 65,000 quota was reached mere days after the April 1 filing date.[31] As companies begin to recover from the recession it becomes all the more imperative that companies don't miss the opportunity to submit H-1B petitions by the earliest April 1 filing date. This additional burden of the collection of information far exceeds the estimated amount and could severely impact already strapped companies.

3) Enhance the quality, utility, and clarity of the information to be collected

A) Portability Issues

Further complicating matters for H-1B visas is the issue of the portability of H-1B visas. Under the current regulations, an H-1B holder may begin working for a new H-1B employer as soon as the new employer files an H-1B petition on behalf of the foreign national.[32] This proposed revision would create significant delays and uncertainty as to an H-1B holder's status. The lapse in time could lead both H-1B holders, and other foreign nationals already in the United States, to fall out of status.

B) Later Determinations that a Deemed Export License is Required

The Notice, and proposed Form I-129 and related proposed instructions, also fail to mention what would happen to a foreign national who receives an H-1B visa, without having filed for an export license, and finds herself in a position that the company later determines that an export license is required. The form does not address considerations for:

- technology changes in the workplace where a foreign national did not initially require an export license but later requires one; and

- whether subsequently requiring a license would require an amended petition.

C) Acknowledgement does not Address ITAR

Yet another unanswered question is why Part 7 is limited to EAR deemed export licenses. The proposed revision pertains exclusively to deemed export licenses related to "dual-use" technologies, subject to the EAR. Generally speaking, the most sensitive of U.S. technologies are subject to the ITAR which is administered by the U.S. Department of State, Directorate of Defense Trade Controls ("DDTC").[33] If the

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[29] *Id.*

[30] *See* Posting of Happy Schools Blog, When H1B Quota Cap was Reached 2005 to 2010 http://www.happyschoolsblog.com/when-h1b-quota-cap-reached-2005-to-2009/ (last visited Mar. 22, 2010).

[31] In 2007, the H-1B quota cap was reached on April 2, 2007. In 2008, the H-1B quota cap was reached on April 7, 2008. *See id.*

[32] *See* Immihelp.com, H-1B Visa Portability, http://www.immihelp.com/visas/h1b/portability.html (last visited Mar. 22, 2010).

[33] 22 C.F.R. §§ 120-130.

proposed revision is intended to enhance the quality, utility and clarity of the information collected, why does it not address potential access to the most sensitive technologies. Instead of enhancing the quality, utility, and clarity of the information to be collected, the proposed revision establishes a significant loophole.

4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses

One unintended consequence of the revision, is that the ninety-nine (99%) of visa applicants that may be unfamiliar with the EAR could barrage BIS with questions. Not only will this increase BIS' immediate workload, but this would lead to the filing of many, possibly unnecessary, commodity classification requests and deemed export license applications, only to have the agency inform the applicants that a deemed export license is not required. Therefore, this revision would not minimize the burden of the collection of information and, in fact, would have the opposite effect of increasing the burden on petition applicants and on BIS.

Additionally, the Obama Administration and Secretary of Defense, Robert Gates, are currently working on plans to "dramatically reform our nation's outdated export control system." [34] 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 a Form I-129 Deemed Export Acknowledgement when the export control regulations may change in the near future.

C. Recommendation

The time, and related costs, associated with this revision would create a significant undue burden on U.S. companies and universities, far in excess of the anticipated time suggested in the Notice. Moreover, it would not enhance the quality, utility and clarity of the information collected by USCIS, as it is information more appropriately directed at BIS. Finally, as noted, there are already existing processes in place to monitor visa applications for potential export control issues.

Based on the foregoing, any new Form I-129 must exclude the Deemed Export Acknowledgement.

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[34] William Matthews, *U.S. Export-Control Reform Gains Momentum*, Defense News, Jan. 28, 2010, http://www.defensenews.com/story.php?i=4475940 (quoting Robert Gates, Secretary of Defense, statement on Jan. 27, 2010).