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New Export Control Certifications Required for Temporary Workers — Now is the Time to Begin Preparing H-1B Petitions for FY 2012

On November 28, 2010, the U.S. Citizenship and Immigration Services (USCIS) published revised Form I-129, Petition for Nonimmigrant Worker. An important new requirement on the revised form has just become effective (February 20, 2011). Now, employers petitioning for visas for foreign workers in several common work-authorized categories have to certify their company's compliance with U.S. Export Control rules. Because this new requirement differs from the process followed by many human resources managers who are often involved in preparing visa applications, the new certification requirement has the potential to slow down preparation of new H-1B petitions which should be filed by April 1, 2011. Proper advance planning for this new requirement is important to avoid costly delays.

Form I-129 is the form used to hire the most common categories of foreign temporary workers. The new form requires companies seeking to employ foreign nationals in these categories to

review U.S. Export Control regulations, and

certify that either:

a license is not required to release technology to the foreign national worker,
or

a license is required, but the company will not release controlled technology to the foreign worker until it has received a license to do so.

Although the form's certification is new, the Export Control rules have been in place for decades. These require U.S. employers to receive government

approval before releasing certain technology or technical data to foreign persons. The release of controlled technology or technical data to foreign workers is deemed to be an export to that person's country of nationality. The new certification on Form I-129 is intended to remind employers of their obligations under the rules and to enforce these controls through the immigration process.

This new certification requirement is effective for all H-1B, H-1B1, L-1 and O-1A petitions filed on or after February 20, 2011.

Now is the Time to Start Your H-1B Petitions for October 2011 Start Dates

Congress has limited the annual number of new H-1B petitions to 65,000, with limited exemptions from the cap for certain employers and prospective workers. The allocation of H-1B numbers for fiscal year 2011 was exhausted on January 26, 2011. In some prior years, all H-1B numbers have been taken in the first week – or even on the first day – of the application period.

The new fiscal year (2012) begins October 1, 2011. Six months prior, on April 1, 2011, employers may file new H-1B petitions for foreign national workers with an October 1 start date.

Recent USCIS rulings and policy changes, and the improving economy, have made it likely that H-1B numbers will be exhausted sooner than last year, making H-1B visas unavailable much earlier than last year.

Any employer subject to the H-1B cap and planning to hire a worker in H-1B classification beginning October 1, 2011, should plan to file its petition on behalf of that worker on the first available filing date, April 1, 2011, to maximize the chance of having its petition accepted.

What This Means to You

Preparation of the H-1B petition is a time-consuming process, now compounded by the new Export Control certification required for Form I-129. Employers seeking to pursue visas for temporary workers should be sure to start the process for H-1B petitions immediately.

Contact Info

Should you have any questions about these immigration matters, please contact your Husch Blackwell attorney.

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