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I. USCIS Issues Revised Form I-129, Petition for Nonimmigrant Worker, that Includes Questions Relating to Export Controls and "Deemed Exports"

On November 23, 2010, U.S. Citizenship and Immigration Services ("USCIS") issued a revised version of Form I-129, Petition for Nonimmigrant Worker, that includes a new section – Part 6 – related to export controls. Entitled "Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States," this new section requires employers to certify that they will not allow the sponsored foreign national ("FN") access to controlled technology or technical data (including source code and other software) in

the workplace unless the necessary export license is obtained. Use of the new Form became mandatory on December 23, 2010, but, due to inquiries received by USCIS, employers will not be required to complete Part 6 until at least February 20, 2011.

This new section of the Form I-129 requires prospective employers of nonimmigrants to address export control issues that traditionally have been the focus of the nonimmigrant visa process performed by the U.S. Department of State ("DOS") at its embassies or consulates abroad. Part 6 reflects the Commerce Department's "deemed export" rules that already are in place. These deemed export rules are contained in the Export Administration Regulations ("EAR") and the International Traffic in Arms Regulations ("ITAR"), which prohibit giving certain FNs access to controlled technology or technical data unless an export license is secured.

To complete Part 6, sponsoring employers must first familiarize themselves with the EAR and ITAR to determine if they use controlled technologies. If they do, then the sponsoring employers must assess if the sponsored FN will have access to that technology and, if so, whether an export license is required. If such a license is necessary, a sponsoring employer must certify in Part 6 that it will secure the necessary license before allowing the sponsored FN access to the technology.

Organizations that regularly deal with controlled technology generally have programs in place to control access. There are many organizations, however, that may use this technology inadvertently and not realize that an export license may be required. The consequences of noncompliance are serious. Violators are subject to civil fines of up to $500,000 per violation and criminal prosecution that can result in criminal penalties of up to $1 million and 10 years in prison. As a result, HR professionals who oversee their employer's immigration activities need to familiarize themselves with the "deemed export" rules so they can properly respond to Part 6 of the new Form I-129 petition.

II. USCIS Issues New M-274 Handbook for Form I-9 Compliance

On January 5, 2011, USCIS issued a revised version of Form M-274, Handbook for Employers. This handbook, which is available at www.uscis.gov/i-9, provides guidance to employers on how to complete Form I-9, Employment Eligibility Verification.

The new version of the Handbook for Employers provides additional guidance on how to handle the Form I-9 verification process for employees with Temporary Protected Status ("TPS") and J-1 and F-1 status, and in H-1B "cap gap" and "portability" situations, and for whom nonimmigrant extensions have been filed. It also expands USCIS guidance on electronic retention of Forms I-9, the use of E-Verify by all employers and federal contractors, and various other challenges that employers face in completing the Form I-9 verification process.

III. ICE Touts 2010 Worksite Enforcement Efforts

John Morton, Director of U.S. Immigration Customs Enforcement ("ICE"), and Janet Napolitano, Secretary of the Department of Homeland Security ("DHS"), announced "record breaking" worksite enforcement results for fiscal year 2010. Secretary Napolitano prefaced her announcement by noting that the Obama administration has fundamentally reformed worksite enforcement of the immigration laws by targeting employers. As part of this process, Secretary

Napolitano announced that the DHS has taken steps to strengthen the E-Verify system, reached a new agreement with the Justice Department that streamlines referrals of suspected E-Verify abuse and discrimination, and added a new photo identification tool to E-Verify for U.S. passports.

Since January 2009, ICE has audited over 3,200 employers, assessed more than $50 million in fines, and debarred 225 companies and individuals. This is more than the total number of audits and debarments that occurred during the entire previous administration. During 2010, ICE announced that it has conducted more than twice the number of Form I-9 audits performed in fiscal year 2009, and the number of fines imposed by ICE increased 600 percent over the previous year!

IV. DHS Issues Regulatory Agenda that Includes Plans for New Form I-9 Rules

On December 20, 2010, the DHS issued its fall 2010 regulatory agenda. See 75 Fed. Reg. 79788 (Dec. 20, 2010). For USCIS, the agenda includes two new Form I-9 rules plus a new electronic registration program for new H-1B petitions that are subject to the annual quota.

One of the new Form I-9 employment verification rules would confirm the requirements of the current Form I-9, prohibit acceptance of certain documents, and mandate that only valid documents are acceptable for the verification process. The DHS also announced that it expects to issue a new rule in May 2011 that will limit the current list of acceptable documents to more secure and fraud-resistant documents and add new protections to the Form I-9 verification process.

V. ICE Announces Opening of Employment Compliance Inspection Center

On January 20, 2011, Director Morton announced that ICE planned to intensify its crackdown on employers by establishing a new audit office, known as the "Employment Compliance Inspection Center," that will enhance its ability to review Forms I-9 for larger organizations. In the past, ICE has been criticized for focusing its worksite enforcement activities on smaller and mid-size businesses. Director Morton indicated that this new center would be staffed with specialists who would be able to review large numbers of Forms I-9 from organizations. According to Director Morton, the purpose of the new center is to provide support for regional immigration offices conducting large audits. In this regard, Director Morton emphasized that ICE would no longer be "limited by the size of a company."

In concert, the recent actions announced by the DHS and ICE provide additional motivation for organizations to include worksite enforcement and other immigration issues in their risk management and compliance programs.

VI. Supreme Court Hears Oral Arguments in *Whiting*

On December 8, 2010, the U.S. Supreme Court heard oral arguments in *Chamber of Commerce v. Whiting*, Docket No. 09-115. In this litigation, the U.S. Chamber of Commerce and several other business groups argue that the Legal Arizona Workers Act is "pre-empted" by federal law, which makes the use of E-Verify voluntary, except in limited instances.

As the national debate on immigration has intensified, states have enacted a record number of laws, ordinances, and resolutions that address immigration issues. In 2010, 46 state legislatures and the District of Columbia enacted over 200 immigration-related laws and adopted 138 immigration-related resolutions. An additional 10 bills were passed by state legislatures but vetoed by the governors. The Supreme Court's decision in *Whiting* is expected this spring and, hopefully, will better define the role of the states in regulating immigration.

VII. DOS and CBP Implement Tougher Blanket L-1B Visa Application and Travel Requirements for L-1 Employees

The L-1 nonimmigrant classification for intra-company transferees remains under intense scrutiny by USCIS in the adjudication process. This scrutiny has now extended to L-1B blanket visa petitions filed with U.S. embassies and consulates abroad, and to border inspections conducted by U.S. Customs and Border Protection ("CBP"). On January 11, 2011, the DOS issued new guidance to consular officers on how to interpret the term "specialized knowledge" when adjudicating blanket L-1B visa petitions for professionals. In this "guidance," the DOS adopted the myopic construction of "specialized knowledge" that USCIS has been using to deny an increasing number of L-1B petitions filed in this country. This guidance suggests that it may become even more difficult to secure L-1B approvals for those professionals who utilize the blanket L process to avoid the USCIS.

Recently, CBP also has intensified its efforts to force all blanket L-1 travelers to carry a copy of the approved blanket L petition and Form I-129S, Certificate of Eligibility for Intra-Company Transferee, issued by the U.S. embassy or consulate. New L-1 nonimmigrants should be admitted for three years, as long as the blanket petition is valid at the time of admission, their passports are valid for the three-year period, and they are otherwise admissible. If the L-1 nonimmigrant's passport expires prior to the three-year period, then he or she should be admitted only until the expiration date of the passport.

The recent actions by CBP underscore the importance for all L-1 nonimmigrants to carry the required documentation when they travel and to make sure that their passports are valid through the period they intend to remain in the United States.

VIII. CBP Expands Global Entry Pilot to Mexican Nationals

On December 23, 2010, CBP announced that it was expanding its Global Entry Pilot program ("GEPP") to include eligible Mexican nationals. The GEPP is an international "trusted traveler" program. Prior to this announcement, it was limited to American citizens, U.S. nationals, lawful U.S. permanent residents, and certain citizens of the Netherlands. Effective December 29, 2010, the GEPP has been expanded to include qualified nationals of Mexico. Applications for the GEPP are available at www.globalentry.gov.

IX. January 14, 2011 H-1B Cap Count

As of January 14, 2011, USCIS has confirmed the filing of approximately 60,700 H-1B cap-subject petitions for fiscal year 2011. USCIS also reported the filing of approximately 20,000 of the additional 20,000 H-1B cases reserved for holders of advanced U.S. degrees. This leaves room for approximately 4,300 new H-1B approvals under the 2011 "Regular" Cap quota, and no

H-1B approvals under the 2011 "Masters" Cap quota. USCIS will continue to accept all eligible H-1B cases until a sufficient number of H-1B and H-1B1 petitions have been received to reach the statutory limits.

X. DOS Issues February 2011 Visa Bulletin

The DOS recently issued its Visa Bulletin for February 2011. The Bulletin determines who can apply for permanent residence and when. The cutoff dates for family-based immigration continue to show huge backlogs and regressions. The cutoff dates for the Employment-Based Third Preference are as follows: April 1, 2005, for all chargeability, including the Philippines and Dominican Republic; January 1, 2004, for China; July 8, 2003, for Mexico; and February 22, 2002, for India. The cut-off dates for the Employment-Based Second Preference are as follows: Current for all chargeability, including Mexico, the Dominican Republic, and the Philippines; May 8, 2006, for India; and July 1, 2006, for China. The monthly Visa Bulletin is available at http://travel.state.gov/visa/bulletin/bulletin_1360.html.

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