

Licensing Guidelines Revised for Foreign Nationals Employed by ITAR-Registered Corporations

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Foreign nationals (other than U.S. permanent residents and protected individuals) must be licensed by the U.S. Department of State, Directorate of Defense Trade Controls (DDTC) before receiving access to technical data controlled for export under the International Tariff in Arms Regulations (ITAR), according to revised guidelines published in March 2009 by the DDTC. These revised guidelines are of critical importance to any ITAR-registered corporation that employs, or is considering employing, a foreign national in a position requiring access to ITAR-controlled technical data or defense services.

U.S. employers of foreign nationals must be cognizant of DDTC's determination to authorize employment of a foreign national only through a Form DSP-5 Export License, eliminating the requirement of an additional Technical Assistance Agreement (TAA). Now, all requests for licensing of a foreign national must be made using the DSP-5 process. Accordingly, employers need to be explicit in describing the level of required technical data and defense services. Additionally, DDTC recommends only one DSP-5 for each employee, so careful drafting of the DSP-5 application to fully address the scope of technical data and defense services that are, or may be, required of the position to be held by the foreign national is extremely important.

These new revisions to DDTC's policy guidance restate its determination to utilize the DSP-5 license for foreign nationals. Some of the important additions in the guidelines include DDTC's strong recommendation that only one application for a DSP-5 be submitted for each foreign national requiring "access to ITAR-controlled defense articles and/or technical data in the performance of their job responsibilities" as well as a reiteration of the need to prevent unauthorized access to ITAR-controlled defense articles and technical data by foreign national employees whose position does not require such access. The applicant must have a document that provides internal company procedures for controlling the release of technical data to foreign persons and for preventing unauthorized access to defense articles. Furthermore, a Non-Disclosure Agreement must be signed by the foreign national employee. Once the foreign national is licensed by DSP-5, it is the responsibility of the employing company to notify other entities, U.S. and foreign, with which the employee will have contact or exchange technical data, of the foreign person's participation.

Summary of the Guidelines

The DSP-5 license will authorize the transfer of technical data and the performance of defense services to the employee on behalf of the employing U.S. person. It will also authorize the foreign person to perform defense services on behalf of the U.S. employer. Note that foreign national employees of a U.S. person located outside of the U. S. are considered to be "employed" by the U.S. person, and the DSP-5 requirement is applicable.

A DSP-5 license must be obtained for all foreign person employees of the U.S. person who require access to technical data or defense services. Foreign national employees who do not require such access must be segregated from all ITAR-controlled technical data, and internal policies and controls must be in place to prevent any unauthorized access.

Foreign national employees of U.S. persons that require access to classified technical data must submit a Form DSP-85 export license application in lieu of the Form DSP-5.

All foreign nationals employed by a U.S. person and licensed under a

Upon issuance of a DSP-5 license by the DDTC authorizing transfer of ITAR-controlled technical data and defense services to the foreign national employee, the foreign national will be treated by DDTC as an employee of the U.S. person. However, the foreign national's access to technology will be limited by the scope of the approved DSP-5 and any provisos issued by the DDTC in conjunction with the license. If the foreign national is expected to have contact with other entities, U.S. or foreign, the U.S. employer must make known the presence of the foreign national employee to the other entities. In the context of a Technical Assistance Agreement (TAA) between the U.S. employer and foreign parties, the foreign national employee must be identified in the TAA.

Foreign national licenses will be authorized by the DDTC according to the standard four year duration of a DSP-5 license, or the remaining period of stay authorized by the U.S. Citizenship and Immigration Services, whichever is shorter.

Companies employing foreign nationals who require access to ITAR-controlled technical information must ensure that they follow the new DDTC guidance. Incidental or unintended access by a foreign national is a violation of the ITAR and may subject the U.S. person to substantial penalties.

DSP-5 license must execute a Non-Disclosure Agreement (NDA), which must be maintained in the records of the employer. A sample is provided in the guidelines.

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