



February 2011 Immigration Update

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Human Resource (HR) Tips of the Month.

Employers Filing H-1B, H-1B1, L-1 or O-1A Petitions Should Have Export Control Compliance Protocols in Place: As was stated in our Immigration Update last month, as of February 20, 2011 the latest version of Form I-129 released by U.S. Citizenship and Immigration Services (USCIS) requires employers that file petitions for H-1B (specialty occupation filings), H-1B1 (fast-track specialty occupation filings for Chilean and Singaporean nationals), L-1 (intracompany transfer filings) or O-1A (filings for foreign nationals of extraordinary ability in the sciences, education, business or athletics) cases to complete the new Part 6 of the form which contains a certification regarding the release of controlled technology or technical data to foreign persons employed in the United States.

The certification contained in Part 6 requires employers to certify compliance with respect to U.S. "deemed export" laws. Each employer/petitioner must certify that, with respect to the technology or technical data that the petitioner will release to the beneficiary/employee, or to which the petitioner will otherwise provide such beneficiary/employee with access, it has reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) and has determined that either: (i) a license is not required from either the U.S. Department of Commerce or the U.S. Department of State to release such technology or technical data to the foreign person; or (ii) a license is required from the U.S. Department of Commerce and/or the U.S. Department of State to release such technology or technical data to the foreign person, and the petitioner will prevent access to the controlled technology or technical data by the beneficiary until and unless the petitioner has received the required license or other authorization.

Employers are encouraged to have export control compliance protocols in place when making the certification contained in Part 6 of Form I-129 because of the serious penalties that exist. Penalties under the EAR include fines of up to \$250,000 per violation (or twice the transaction amount for civil violations), \$1 million for companies and individuals for criminal violations, and/or up to 20 years of imprisonment for individuals. The ITARs have their own civil and criminal penalties which are similarly serious as well. Penalties for incorrect certifications are also built into the Form I-129 itself. Part 7 of the Form I-129 calls for the employer to certify, under penalty of perjury, that the information in the petition is true and correct to the best of the employer's knowledge. At a minimum, employers should be prepared to demonstrate whether technology that is used or developed, or that is otherwise accessible, is subject to the EAR or the ITAR, and, if so, how such technology is classified under such regulations. Employers should also be able to demonstrate and document for each affected employee that, among other things, there has been an export control compliance review when the employee is hired and while

such employee is employed, that there is a plan to prevent access to controlled technology or technical data by the employee until and unless the employer has received the required license or other authorization, and, where applicable, that there is appropriate training in place with respect to such export control compliance protocols.

Employers Should Continue to be Mindful of Ongoing Enforcement Actions and Audits: U.S.

Immigration and Customs Enforcement (ICE) continues to use I-9 audits as part of its enforcement strategy. Evidence of this is the recent I-9 audit by ICE of Chipotle Mexican Grill Inc., a publicly-traded company which owns or operates approximately 1,100 restaurants and employs about 25,000 people, which audit triggered the dismissal of hundreds of employees. For further details regarding the Chipotle case, see http://www.huffingtonpost.com/2011/02/08/chipotle-immigration-raid_n_820295.html

Additional Immigration Updates and Alerts.

H-1B Cap Reached for FY2011; Look Ahead to File Again on April 1, 2011 for FY2012. As of January 26, 2011, USCIS announced that it had received a sufficient number of petitions to reach the statutory cap for FY2011. With the cap having been reached for this fiscal year, employers should look ahead to the next opportunity to file petitions for new H-1B cases on April 1, 2011. Such petitions under the statutory cap for FY2012 will be for employment commencing no earlier than October 1, 2011.

USCIS has Released a Revised M-274 (Handbook for Employers). Effective January 5, 2011, USCIS released its revised Handbook for Employers which is known as publication M-274. This Handbook aids employers with Form I-9 and the employment eligibility verification process. The Handbook contains updated information about applicable regulations, including those relating to the electronic storage and retention of Forms I-9. The Handbook has new visual aids for completing Form I-9, contains examples of new USCIS documents, and provides expanded guidance regarding the employment eligibility of various persons, the porting of employees to H-1B and H-2A status, and on extensions of stay by those with temporary employment authorization. The revised M-274 can be found at <http://www.uscis.gov/files/form/m-274.pdf>.

For more information about this topic, please contact the author or any member of the Williams Mullen Immigration Team.

Please note:

This newsletter contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not meant to be and should not be construed as legal advice. Readers with particular needs on specific issues should retain the services of competent counsel. For more information, please visit our website at www.williamsmullen.com or contact William J. Benos, 804.420.6402 or bbenos@williamsmullen.com. For mailing list inquiries or to be removed from this mailing list, please contact Margaux Sprinkel at msprinkel@williamsmullen.com or 804.420.6315.

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