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Editor & Publisher: Samuel M. Gilston • P.O. Box 5325, Rockville, MD 20848-5325 • Phone: 301.570.4544 Fax: 301.570.4545

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Contract Labor Firms and Clients Share Visa, Deemed Export Roles

Firms that provide foreign workers under contract to U.S. clients must share responsibility with their clients to assure compliance with deemed export licensing requirements, according to government officials. Officials of the Citizenship and Immigration Services (CIS) have told industry representatives that contractors who hire these workers are responsible for filing Form I-129 visa petitions for them and certifying they either won't allow access to controlled technology or will obtain an export license (see **WTTL**, Nov. 22, page 1). An April 8 Bureau of Industry and Security (BIS) advisory opinion, however, says the client is responsible for obtaining the license.

> Speakers at the American Conference Institute's annual export controls compliance forum in Washington May 24 said this dual responsibility requires cooperation between contractors and clients. Contractors need to know whether their workers will have access to controlled technology to complete the I-129, and clients need to know the nationality of workers to determine if a license is needed, they said.

BIS' advisory opinion was sent by Hillary Hess, director of the BIS regulatory policy division, to Aron Finkelstein, an attorney with Murthy Law Firm in Owings Mills, Md., who asked for the advice on behalf of staffing companies. Finkelstein asked whether it was correct to say the third-party client and not the staffing company is required to obtain deemed export authorization when the foreign national has access to controlled source code or technology. "You are correct that in the situation described in your letter, the third-party client is responsible for obtaining any required authorization from BIS for the deemed export of technology or source code subject to the EAR [Export Administration Regulations] to the foreign national, because the third-party client is making the release to the foreign national and is therefore the exporter," Hess wrote.

At the ACI conference, BIS Assistant Secretary for Export Administration Kevin Wolf said Form I-129 applicants can check Box 1 in Part 6 of the form, indicating that no license is needed, if the technology to which the foreign national will have access is eligible for a license exception. "If you don't need a license, you don't," he said. "You can check the first box," he advised.

Ex-USTR Schwab Says Time to Move Beyond Doha Round

Former U.S. Trade Representative (USTR) Susan Schwab says it is time for World Trade Organization (WTO) members to accept that the Doha Round can't be concluded successfully and to begin planning for what should happen next. For the round to drag on and members "to pretend that there will be a happy ending is actually a greater threat to the WTO and multilateral trading

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system than to acknowledge that the Doha Round is just not going to happen," Schwab told a Peterson Institute luncheon in Washington May 25. "Therefore, we need to figure out how to move on, doing the least possible damage along the way," she said, noting recommendations she made in an article she wrote for *Foreign Affairs* magazine called, "After Doha."

> Schwab's recommendations harken back to the Clinton administration's trade agenda, which officials of the George W. Bush administration lambasted when they came into office. She said the Clinton-era Information Technology Agreement (ITA) was "tremendously successful" and proposed updating it and following that model with other accords in such areas as trade facilitation, fisheries, medical devices, environmental goods and Mode 4 services.

Arvind Subramanian, a senior fellow at the Peterson Institute who spoke on the program, said the biggest problem with the round is China and the fear of other countries about China's dominance, its import penetration in key sectors and its exchange rate policy. Unless WTO members crack the central problem of China, there is not much chance for a new agenda, Subramanian asserted.

Schwab's talk and article reflect the pessimism that has surrounded the round for the past two months (see **WTTL**, May 2, page 1). In a presentation to Organization for Economic Cooperation and Development (OECD) ministers May 26, WTO Director General Pascal Lamy also conceded the round needs to change course. "We must now explore options for a way forward," Lamy advised the ministers in his prepared statement. He said one goal is to have something for trade ministers attending the WTO Ministerial in December to deliver on the Doha Round. "If not the full round, at least an early harvest of it," he said.

Exporters Want More Liberal U.S.-Content Rules for Ex-Im Bank

Draft legislation that would give the Export-Import Bank more flexibility to apply its domestic-content requirements to export financing deals doesn't go far enough to satisfy the business community and goes too far to be acceptable to U.S. unions, a May 24 House Financial Services Committee hearing revealed. A discussion draft of a bill to renew the bank's charter, to be titled, "Securing American Jobs Through Exports Act of 2011," would require Ex-Im to issue regulations providing guidance on the application of the rules and where it can be flexible.

> "We support the most flexible content policy practicable, and view the proposed legislation as a step towards addressing the content issue," said Donna Alexander, chief executive officer of BAFT-IFSA, the banking trade association. Nonetheless, in her prepared testimony, she said the draft language does not go far enough. "Specifically, considering the weighted average of domestic content levels of goods and services involved in transactions supported by the ECAs [export credit agencies] of each OECD member country is a step in the right direction, but we respectfully submit that expanding that to non-OECD ECAs such as China and Brazil would be beneficial," she said (see **WTTL,** May 23, page 1).

Thea Lee, deputy chief of staff of the AFL-CIO, complained the draft does not take American jobs into consideration. "This could encourage the bank to set lower content guidelines so that American companies can obtain favorable financing for exports that contain little U.S. content and generate few American jobs," she told the committee in her prepared statement.

Court Allows Antidiscrimination Suit for National Security Firing

An employer cannot invoke national security as justification for firing someone unless it has a consistent policy applying to all employees, the Ninth Circuit Court has ruled in a decision overturning a lower court's granting of summary judgment dismissing an antidiscrimination suit against Raytheon. In *Hossein Zeinali v. Raytheon Company* (case no. 09-56283), the appellate

court reversed and remanded the case April 4 to the San Diego U.S. District Court, saying Zeinali had the right to sue Raytheon after he was denied a security clearance and fired, because the company had retained two other individuals after their security clearances were revoked.

> Zeinali, who is of Iranian descent, claimed Raytheon violated the California Fair Employment and Housing Act when it fired him after four years on the basis of his race and national origin after he was denied a security clearance by the Defense Department. Raytheon had argued the courts have no jurisdiction to decide discrimination cases involving national security.

The circuit court concluded "federal courts have jurisdiction over employment discrimination claims in which the plaintiff does not dispute the merits of the government's security clearance decision." It noted that records show that two non-Iranian engineers were able to retain their positions for over four years after having their clearances revoked. "Raytheon's failure to apply its purported security clearance requirement in an evenhanded manner gives rise to an inference that its requirement is pretext for discrimination," the court ruled.

In reaching its decision, the court examined its prior decisions in *Brazil v. U.S. Department of the Navy* in 1995 and *Dorfmont v. Brown* in 1990, plus the Supreme Court's ruling in 1988 in *Department of the Navy v. Egan*. "In the fifteen years following our decision in *Brazil*, we have not discussed the *Egan-Dorfmont-Brazil* line of cases in a precedential opinion," the court said, noting that Raytheon wanted it to take a broad view of these cases. "We have found no case in which a court has ever adopted a bright-line rule as broad as the one suggested by Raytheon. Raytheon's approach would essentially immunize government contractors from any liability in cases involving employees whose security clearances are revoked or denied," the court stated.

GOP Opposition to TAA Could Stall Trade Pacts

Just 10 days after administration officials warned that President Obama won't send free trade agreements (FTAs) with Colombia, Korea and Panama to Congress until there is a deal to renew Trade Adjustment Assistance (TAA), Senate Finance Committee hearings on the Panama and Korea pacts revealed the wide gap between Republicans and the administration on the program. At a May 25 hearing on the Panama FTA, Ranking Republican Orrin Hatch (R-Utah) called TAA an "unrelated spending program." In a heated discussion with Deputy USTR Miriam Sapiro, he asked her to "give me some illustration of some workers that are going to lose their jobs because of the Panamanian agreement. Tell me one job that will be lost."

> While Sapiro said TAA was more global than the specific FTAs on the table, Hatch was steadfast. "I don't understand the logic; it's driving me nuts," he said. "If you can show me where the jobs are, I imagine that this would go a lot better," he said.

Talking to reporters after the hearing, Hatch said the current TAA doesn't have the votes to pass Congress, but acknowledged, "there may be some way they can put a TAA together that will get them a majority of votes in both houses." The budget request for renewal of the program with the 2009 improvements is now $7.2 billion over the next 10 years, Hatch said. "That's a lot of money for a country that's broke," he added. At issue is the 2009 extension of the program, which expanded the pool of eligible workers and increased credit for health care benefits. Administration officials have carefully parsed their words to say they want a TAA renewal bill that is "consistent with the objectives of the 2009 program," which may mean it doesn't have to be exactly the same and there is some wiggle room for changes (see **WTTL**, May 23, page 4).

At the Panama hearing, Finance Chairman Max Baucus (D-Mont.) said, "I don't know the sequence, I don't know which will come before the other, but they must move together. It's all or nothing." However, many Democratic senators want TAA to pass first and get signed into law before the FTAs go through their fast-track process. "We are unified in our belief that the first order of business, before we should consider any FTA, is securing a long-term TAA extension," said a May 23 letter to President Obama signed by 41 Senate Democrats.

Kazakhstan Taking Its Own Path toward WTO Accession

Kazakhstan's efforts to join the WTO won't interfere with Russia's goal of joining the international trade body this year, according to Kazakhstan's Minister of Economic Integration Affairs Zhanar Aitzhanova. She told reporters May 26 that Kazakhstan is making progress in its own bid to join the WTO and has reached an agreement in principle on trade in services with U.S. trade officials. "We have agreed in principle to our commitments which Kazakhstan will be implementing upon accession to the WTO" in 12 key service sectors, including telecom, transportation, energy and financial services, Aitzhanova said.

> Russia's long drive to WTO membership hit a bump in 2009 when Moscow said it wanted to join the WTO as part of a customs union with Kazakhstan and Belarus. It later dropped that plan (see **WTTL**, Sept. 27, 2010, page 4). "We are acceding, all three countries, to the WTO as separate entities, not as a customs union, but as sovereign states. We have separate accession negotiations," Aitzhanova said.

The three countries are working to harmonize commitments under the WTO accession process to make sure these commitments don't affect the customs union and vice versa, she explained. "This in its turn will make sure that the customs union be functioning in a continued way and will not be interrupted by accession of member states to the WTO," she noted. Aitzhanova wouldn't predict a date for completing her country's WTO accession. "We really hope that we'll be able to finalize, if everything goes smoothly as we do expect, in the course of next year, our accession," she said. Regarding the services agreement, Aitzhanova said, "We need to finalize our negotiations and to put all this technical work in the right order. On a number of issues, we still have work to be done, on both sides." The three former Soviet countries are also negotiating customs union regulations in sanitary and phytosanitary measures. "This is one of the major areas of interest for the U.S. government, because of your exports of meat and potential interest in also exporting dairy products to our market," she noted.

* * * Briefs * * *

EXPORT ENFORCEMENT: BIS May 19 revoked suspension of $2 million fine on UK's Balli Group and invoked acceleration clause, due to late payment of fine under terms of previous settlement agreement. "Evidence shows that rather than arranging its affairs to ensure compliance with its civil penalty payment obligations, Balli was focused instead on pursuing business opportunities and deals that were not consistent with meeting its obligations under the Settlement Agreement," BIS said (see **WTTL**, Feb. 15, 2010, page 1).

IRAN: In first petroleum-related sanctions under CISADA, State imposed sanctions May 24 on seven companies for their activities in support of Iran's energy sector: PCCI (Jersey/Iran), Royal Oyster Group (UAE), Speedy Ship (UAE/Iran), Tanker Pacific (Singapore), Ofer Brothers Group (Israel), Associated Shipbroking (Monaco) and Venezuela's state-owned oil company, Petróleos de Venezuela (PDVSA).

MEXICO: USTR May 26 signed telecom agreement with Mexico, permitting recognized U.S. laboratories to test telecommunications products for conformity with Mexican technical requirements, and vice versa.

EAA: Rep. Howard Berman (D-Calif.) introduced May 26 his long-awaited bill (H.R. 2004) to renew and update expired Export Administration Act (EAA) (see **WTTL**, Sept. 6, 2010, page 3). New bill reflects changes based on industry and administration comments.

AD/CVD: Sen. Ron Wyden (D-Ore.) introduced revised version of his ENFORCE bill to give agencies more powers to clamp down on AD/CVD circumvention (see **WTTL**, May 9, page 1).

BEEF HORMONES: To comply with Court of Appeals for Federal Circuit ruling that it failed to notify industry properly of extension of sanctions against EU in beef-hormone dispute, USTR in May 27 Federal Register said won't impose additional duties on EU imports (see **WTTL**, Oct. 18, page 3).

EX-IM BANK: Jose Velasco of El Paso, Texas, was sentenced May 26 to 70 months in jail and three years supervised release and fined $17.9 million in restitution and $17.9 million in forfeiture for defrauding Ex-Im Bank. Velasco pleaded guilty on Sept. 24, 2010, to wire fraud and conspiracy. He was conspirator to Ismael Garcia, who was sentenced to prison last month (see **WTTL**, April 25, page 4).