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Agencies Issue Guidance on Visa Certifications

After a two-month delay, companies must now certify whether or not foreign workers for whom they are seeking nonimmigrant visas need a “deemed export” license to have access to controlled technology. To help petitioners comply with the new requirement on visa petition Form I-129, the Bureau of Industry and Security (BIS) and State’s Directorate of Defense Trade Controls (DDTC) published a fact sheet on the BIS website Feb. 18, providing basic guidance on the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR). The four-page fact sheet mostly offers a synopsis of the EAR and ITAR.

As of Feb. 20, companies petitioning for H-1B, H-1B1, L-1 or O-1A visas for their employees must use a revised Form I-129, the Petition for a Nonimmigrant Worker, certifying that they have “reviewed U.S. export control regulations and determined that: (a) a license is not required to release technology to the beneficiary; or (b) if an export license is required, it will not release controlled technology to the foreign worker until it has received a license or other authorization to do so” (see **WTTL**, Nov. 22, page 1).

The agencies say export control reform plans may change this guidance, but for now firms need to follow the current regulations. “Although the Obama Administration plans to harmonize the Government’s various export control regulations and hopes to create a single export control system, both the ITAR and the EAR need to be taken into account until this work is completed because they control different types of technology and technical data, have different licensing requirements, and define foreign persons differently,” the joint fact sheet states.

The fact sheet addresses controls on software or data already published or publicly available. “The EAR and the ITAR do not control, respectively, ‘technology’ or ‘technical data’ the regulations define as ‘publicly available’ or in the ‘public domain,’” it says. “If the only technology or technical data the petitioner/employer would release to the foreign person beneficiary at issue in the petition falls within the scope of these definitions, then the petitioner should check the first box in Part 6 of the I-129 form because a license will not be required from either the BIS or DDTC to release the technology or technical data to the foreign person,” it adds.

ITA Seeks Comments on NME Wages in Antidumping Cases

The International Trade Administration (ITA) is continuing to struggle to come up with a methodology to calculate wages in surrogate countries when investigating antidumping cases



against nonmarket economies (NME). After the Court of Appeals for the Federal Circuit (CAFC) threw out the agency's old methodology in a May 2010 decision involving furniture imports from China, ITA developed a revised interim procedure in July 2010 and revised it again in October. In the Feb. 18 Federal Register, ITA asked for public comments on how best to calculate wages in NME cases (see **WTTL**, May 17, 2010, page 1).

To compound ITA's problems, the Court of International Trade (CIT) Feb. 9 rejected the ITA's use of "bookend" countries to find an average surrogate wage in a challenge filed by the American Furniture Manufacturers Committee for Legal Trade against the ITA's remand ruling from the CAFC decision. CIT Chief Judge Donald Pogue remanded the case to ITA.

"Certainly Commerce does not have to achieve mathematical perfection in its choice of countries to act as bookends for its initial selection, but Commerce must explain why it selected two countries with GNIs [gross national income] that are lower than China's to use as bookends," Pogue wrote. He quoted a previous ruling saying the explanation must rest "upon principles that are rational, neutral, and in accord with the agency's proper understanding of its authority."

In its call for comments on its interim methodology, ITA noted that since implementing its industry-specific wage rate methodology, "the Department has encountered a number of methodological and practical challenges that must be considered in evaluating whether this methodology should be adopted for the longer term." ITA said it prefers using multiple data points when evaluating labor data, because of the large variance in wage rates. "However, relying on industry-specific data necessarily constrains the amount of available data," the agency said. In addition, it noted that "the interim method is a significant endeavor that requires screening hundreds of data points in each case," which may not make it feasible given the statutory deadlines for completing cases.

Currently, ITA uses earnings or wage data from "Chapter 5B: Wages in Manufacturing" of the International Labor Organization (ILO) Yearbook of Labor Statistics. Chapter 5B compares two types of compensation: (1) direct wages and salaries and (2) earnings data, which include wages plus bonuses and gratuities. "The Department prefers 'earnings' data, when available, since it more accurately reflects the full remuneration received by workers," ITA said.

But due to concerns that Chapter 5B may undercount the NME producer's labor costs, ITA said it is considering the use of alternative data sources in NME cases. "The Department proposes relying on labor and wage data that include all costs incurred by the producer related to labor including wages, benefits, housing, training, etc. One example of such a data source is 'Chapter 6A: Labor Cost in Manufacturing' from the ILO Yearbook of Labor Statistics," it said.

Controls Hinder Exports, Small Firms Complain

The complexity of U.S. export controls and the lack of responsiveness by government regulators to exporter questions keep many small- and medium-size enterprises (SMEs) from exporting, industry complained in comments to BIS. The agency had published a call for comments in October 2010, asking SMEs to tell it how export controls, particularly the EAR, affect their export business and what improvements could be made to the rules to make them more user-friendly (see **WTTL**, Oct. 11, 2010, page 4). Most comments found two patches of common ground: the regulations need to be streamlined and clarified, and BIS needs to do more outreach to small businesses, letting them know what the EAR involves and how to comply.

According to the recently released comments the agency received, SMEs said they are trying to understand and comply with export regulations, but most don't have enough resources to investigate and implement compliance programs thoroughly. The comments from 12 SMEs and trade organizations said many of them have reached out for exporting assistance, while others said they have given up trying. Others are exporting anyway or decided against exporting to foreign customers. The comment from Rohrbach Cosasco Systems, Inc., a producer of corrosion

monitoring equipment in Santa Fe Springs, Calif., summed it up. “Speaking as a small exporter, I simply don’t know where to begin in suggesting how you could make your system user-friendly from my perspective,” wrote CEO Brent Ford. “You must first appreciate that we neither have nor can we afford a squadron of lawyers, engineers, and IT personnel to wade through the regulations and specifications to understand them in the first instance, and then develop comprehensive systems to ensure we comply in the second instance,” he continued.

The Small Business Exporters Association (SBEA), the international trade arm of the National Small Business Association (NSBA), cited the cost of compliance. “These onerous regulations are costly to administer, they delay shipments causing financial distress, and put domestic manufacturers at a competitive disadvantage against their foreign counterparts. According to a recent survey conducted by SBEA and the NSBA, nearly half of small-business respondents said they would consider exporting their goods or services if the most significant challenges and barriers were addressed,” it declared.

Most of the comments had specific recommendations for BIS. R.O.V. Technologies, Inc., in Brattleboro, Vt., which produces underwater cameras and inspection systems for the nuclear power industry, told BIS the “the main obstacle to small and medium enterprises understanding and complying with the EAR is simply having the awareness that the EAR exists.” It recommended that “promotion and education as key areas for BIS focus on.”

A few comments acknowledged the Obama administration’s ongoing export control reform plan. For example, Aptima in Woburn, Mass., applauded the effort. “We commend the recent plans we have read about that would ‘create narrower and more consistent rules for defense, technology and aerospace products’ and ‘improve enforcement and coordination between agencies and departments’.” The idea of a single licensing agency and unified, simplified regulations that appropriately protects technologies, products and services that are truly key to national security “is appealing on numerous fronts,” it said.

U.S. Delegation Escapes Injury in New Zealand Earthquake

A delegation of current and past American officials and lawmakers, including former U.S. Trade Representatives Clayton Yeutter and Susan Schwab, escaped injury Feb. 22 when a 6.5 magnitude earthquake struck Christchurch, New Zealand. The two ex-trade officials were part of a group participating in the 4th Pacific Partnership Forum in the city and were at a luncheon when the earthquake hit. Eight members of Congress, including House Foreign Affairs Asia subcommittee chairman Don Manzullo (R-Ill.), Ways and Means trade subcommittee chairman Kevin Brady (R-Texas) and Reps. Dan Lundgren (R-Calif.), Rick Larsen (D-Wash.), Eni Faleomavaega (D-American Samoa), Joe Crowley (D-N.Y.), Gregory Meeks (D-N.Y.) and Gregorio Sablan (D-Northern Mariana Islands), had left Christchurch earlier in the morning.

“Yesterday, the delegates from both countries embarked on a clever program innovation and split into eight groups for smaller more focused luncheon meetings hosted at various venues around Christchurch,” said a blog by Ernest Bower, a senior adviser and director with the Center for Strategic and International Studies, who participated in the program. “At my lunch venue, an architecturally compelling 100 year old bed-and-breakfast off Latimer Square, the chandelier shattered on the table and the walls threw pictures, plaster and bricks as the structure shook violently,” he wrote. “We were lucky to escape,” Bower reported.

Concerns Raised about Proposed Changes to FTZ Rules

Changes Commerce has proposed for rules governing foreign trade zones (FTZ) could reduce the program’s flexibility and encourage companies to move overseas rather than set up operations in zones, complain people involved in the FTZ program. “When proposed regs come

out and you do a word count and it doubles what you had before, you know it requires a pretty good look,” said Ron DeBarr, president of the Northeast Ohio Trade & Economic Consortium, a grantee for a Northeast Ohio FTZ. Because the rules were last amended in 1991, they “definitely need clarifying, so that is going to add to the word count,” he said (see **WTTL**, Jan. 10, page 4). FTZs “are already highly regulated,” he said. “At the end of the day, we want to see something to come out that is a little more user friendly; not so intimidating for a company that wants to use it,” he told the Washington International Trade Association (WITA) Feb. 17 .

While the proposed rules are still being examined, they “appear to make it more difficult to do bold things; to do exporting, for example, from the United States because of some preconditions,” said Lewis Leibowitz, a partner with Hogans & Lovells and incoming chairman of the National Association of Foreign Trade Zones (NAFTZ). Those conditions involve goods subject to antidumping and countervailing duty orders, Section 337 intellectual property cases, inverted tariffs and scrap and waste. “We’re troubled by that,” Leibowitz told WITA. Unless companies can do in zones what they can do overseas, they will build their plants overseas, “because the hassle to get the approval is too great,” he said.

* * * Briefs * * *

LIBYA: Treasury’s Financial Crimes Enforcement Network (FinCEN) stopped short Feb. 24 of freezing assets of Libyan leader Gadhafi and his cohorts, but issued advisory to U.S. financial institutions “to take reasonable risk-based steps with respect to the potential increased movement of assets that may be related to the situation in Libya.” It reminded U.S. financial institutions that they are required “to apply enhanced scrutiny for private banking accounts held by or on behalf of senior foreign political figures and to monitor transactions that could potentially represent misappropriated or diverted state assets, proceeds of bribery or other illegal payments, or other public corruption proceeds.”

COLOMBIA: Senate Finance Committee Chairman Max Baucus (D-Mont.) showed Feb. 25 that Democrats are starting to build support for likely deal President Obama will reach with Colombia to move U.S.-Colombia FTA toward congressional approval. In speech in Bogota, Baucus noted progress Colombia is making in improving human and labor rights, two issues that have blocked Democratic backing for pact. “We ought to begin by recognizing the progress that Colombia has made in strengthening labor rights,” Baucus said in his prepared text. “Colombia has also taken significant steps to protect labor union members from violence,” he said, citing lower murder rate among union members than general population. “President Santos is building on this progress by launching new initiatives,” Baucus said.

OFAC: Aon International Energy, Inc., agreed to pay \$36,000 civil fine to settle OFAC charge that it violated Iranian Transactions Regulations, agency reported Jan. 31, saying firm’s actions were “part of a pattern of reckless, but not egregious, conduct.” Houston-based company, subsidiary of Aon Corporation, did not voluntarily disclose alleged violations. OFAC said “Aon Energy had facilitated the placement of coverage and the payment of premiums for facultative retrocession reinsurance that reinsured construction risks associated with a petroleum project on Kharg Island in Iran.” Treasury sources say OFAC had 28 open investigations pending at end of 2010 involving reinsurance and more settlements are coming. Case shows OFAC’s expectation that reinsurers writing facultative policies have greater burden of knowledge than proportional reinsurers. The policy “puts responsibility where knowledge lies,” a source told **WTTL**.

POLYVINYL ALCOHOL: ITC made final determination Feb. 23 on 4-2 vote that imports of dumped polyvinyl alcohol (PVA) from Taiwan are injuring U.S. industry. PVA assets of original petitioner in case in 2004, Celanese Chemicals, were acquired in 2009 by Sekisuki Chemicals America (SCA), subsidiary of Japan’s Sekisuki. SCA announced increase in prices for PVA in November 2010.

ITAR: DDTC proposed revisions of ITAR in Feb. 24 Federal Register to require electronic payment of registration fees. It also proposed new definitions for “foreign ownership” and “foreign control.” “The collection of electronic payments will simplify the collection and verification of payments, eliminate the need to manually process and collect returned payments, and eliminate the possibility of lost payments,” it said.

BLUE LANTERN: DDTC initiated record 774 post-shipment checks of defense exports in fiscal 2009, which ended Sept. 30, 2009, agency reports. Of 649 cases closed, 87 (13%) were found “unfavorable.” Main reasons for unfavorable findings were: refusal to cooperate (36%), derogatory information/foreign party deemed unreliable (30%), indications of diversion or unauthorized retransfer or reexport (13%), unable to confirm order or receipt of goods by end-user (10%), party violated terms of license or agreement (9%).