

Vol. 30, No. 46

November 22, 2010

New Visa Form Requires Deemed Export Review

Employers petitioning the government for work visas for foreign employees will have to conduct a deemed export review of the technology to which those workers will have access and certify that they either don't need a license or have one, under new visa requirements that go into effect Dec. 22. The new rules are part of a revised I-129 petition form the Department of Homeland Security's Citizenship and Immigration Services (CIS) has issued for companies applying for H-1B, H-1B1, L-1 and O-1A visas for nonimmigrant foreign employees.

CIS admitted that completing the form will require more than one million hours of work for the 364,000 petitions it receives annually and cost filers more than \$133 million based on a labor cost of \$10 an hour, plus the \$320 application fee.

The new form requires an applicant to check one of two boxes regarding controlled technology or technical data. Box 1 says: "A license is not required from either the U.S. Department of Commerce or U.S. Department of State to release such technology or technical data to the foreign person." Box 2 says: "A license is required from the U.S. Department of Commerce and/or U.S. Department of State to release such technology or technical data to the beneficiary 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 to release it to the beneficiary." The petitioner must certify that it has "reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR)" to determine the need for a license.

"It's going to be a nightmare for the immigration bar," said Steven Brotherton, a partner with Fragomen, Del Rey, Bernsen & Loewy in San Francisco. He said it will be hard for law firms to advise clients on what they will need to do to make the certification required on the form. The requirements will force more firms to seek commodity classifications from the Bureau of Industry and Security (BIS), he suggested. "BIS was not expecting this," Brotherton told WTTL. "I think the biggest challenge will come with the BIS deemed export staff," he said. "I don't think they are staffed to handle much more volume," Brotherton added.

Brady Backs Administration's Tough Stand on Korean Deal

Rep. Kevin Brady (R-Texas), who is slated to become chairman of the House Ways and Means Committee's trade subcommittee when the 112th Congress convenes in January, says he supports the decision of U.S. negotiators to reject Korean offers to fix the pending U.S.-Korea Free



Trade Agreement (FTA) during talks in Seoul Nov. 11 (see **WTTL**, Nov. 15, page 3). “I think the president was right to insist on a better resolution of these two issues [beef and autos]. It was to his credit,” Brady told **WTTL** in an exclusive interview. Brady also said he will push for votes during the current lame-duck on the extension of several trade preference programs and a second Miscellaneous Tariff Bill (MTB). Brady said he doesn’t expect the earmark debate to prevent passage of the new MTB. “The current House voted pretty strongly on that issue earlier, so it did clear the way for the second tranche to come through,” he said. The following is Part 1 of our extensive interview. Part 2, in which he discusses China legislation in the next Congress and the role of new GOP members, will appear in our Nov. 29 issue.

WTTL: There are several trade laws that will expire at the end of this year, including the Generalized System of Preferences, the Andean Trade Preferences Act and provisions of Trade Adjustment Assistance. Do you think Congress will act on these laws during the lame-duck session and before it recesses?

BRADY: I should hope so. I think it is important from a certainty standpoint that these programs be extended not just for a few months but for a long enough period for business to have certainty to plan for that. The preference programs, you can’t turn them on and off and expect the same results. I am still pushing for a multi-year extension of the preference programs. I know the staffs of Mr. Camp and Misters Grassley and Baucus and Levin are working on that.

WTTL: Do you think these would all move together in one bill?

BRADY: I don’t know how many vehicles will actually move forward in this lame duck, so I don’t know. I guess there will not be many vehicles.

WTTL: Wouldn’t the Republicans like to wait until next year so they can put their own mark on these bills?

BRADY: It’s true, but I think business certainty is a major part of it.

WTTL: What do you think Congress will do with a new, second Miscellaneous Tariff Bill in the lame-duck sessions?

BRADY: It’s doable but not easy. The House work is done and the Senate is working on it. Of course, there are USTR objections to provisions that have raised some uncertainty. I hope it would get finished and out the door before we leave.

WTTL: Will this get tied up again in the battle over earmarks?

BRADY: It should not. The current House voted pretty strongly on that issue earlier, so it did clear the way for the second tranche to come through.

WTTL: On the U.S.-Korean Free Trade Agreement, last week it sounded like Rep. Camp was taking a harder line than you have been taking. It sounded like there was a little division between you and him.

BRADY: Absolutely not. He reflects the views of House Republicans on both beef and autos that the requested changes to the original agreement are reasonable ones. So much of what happens in South Korea often times occurs throughout the Asia-Pacific region. I know they are both negotiating in good faith. We think Korea needs to be at the table here. I am still hopeful that the agreement will be substantive and achieve the vote for passage. It is critical that those last two remaining items be resolved. I say that because the original agreement was very solid for the United States. Very solid.

WTTL: Does it matter if it is done now or can it wait for the new year?

BRADY: I think the clock is ticking now from both the standpoint of looking at next year and the agreements with Colombia, Panama and South Korea. It’s been too long. We need to get them passed. Clearly, it would help the president in pursuing a large trade agreement. Also, I think it is important to send a signal to the rest of the world that America is serious about trade again. There’s real doubt about our leadership and will and that’s important.

WTTL: It would seem the U.S. needs this agreement to send a signal to the TransPacific Partnership negotiators. If they don’t see this deal, why would they make a deal with the U.S. on a TPP?

BRADY: Yes, I think it is critical to that. I think it is critical too to both TPP and Doha that our trading partners understand that we want meaningful agreements, but we don’t want them so badly that we’ll accept a bad agreement.

WTTL: I think that was one reason why U.S. negotiators may have been at a disadvantage last week, because the Koreans knew the U.S. wanted a deal for the president, so they could take a harder line.

BRADY: No, I think the president was right to insist on a better resolution of these two issues. It was to his credit. I am still hopeful that in the next couple of weeks that this can be resolved.

Report Warns about Aviation Technology Transfer to China

Research and development deals that Boeing, Airbus and other aircraft firms have with Chinese aviation companies could allow the transfer of sensitive technology to China's military, warns the latest annual report from the U.S.-China Economic and Security Review Commission. Although the report, released Nov. 17, stops short of suggesting any violation of U.S. or European Union (EU) export controls, it says "Advances made in China's commercial aviation industry directly benefit its military aviation manufacturing capabilities."

"One important technological advance transferred from the commercial to the military sector is composite materials," it notes. "A possible example of this pathway is the decade-long joint venture among two U.S. firms, Boeing and Hexcel Corporation, and the Aviation Industry Corporation of China to produce composite materials in China," the report says.

"The problem is the very, very sophisticated R&D that's going on between Boeing, Airbus and Chinese companies," Commission Chairman Daniel Slane told reporters. "Is R&D a way around export controls," he asked. "We are not arguing in here that violations of export control laws have taken place," said Commission Vice Chairman Carolyn Bartholomew. She said the report makes no recommendations to change export control laws. "What we were really trying to do is to raise awareness of the fact that there is crossover between what is happening in China's domestic aviation industry and [military industry]. They are one in the same," she said.

Agencies Still Debate Five-Axis Machine Tool Controls

Over a year after the Bureau of Industry and Security (BIS) acknowledged that five-axis machine tools are widely available, especially in China, government agencies are still debating whether these tools should be controlled for export. At a meeting of BIS' Materials Processing Equipment Technical Advisory Committee (MPETAC) Nov. 17, the committee agreed to resubmit a proposal to decontrol these tools. While such a proposal is likely to face continued opposition from State and Defense, one State official told the MPETAC the department is "inviting creative thinking" on ways to reduce the impact of controls on manufacturers.

George Loh, the committee's designated BIS officer, said BIS has proposed decontrol of these tools several times in the last couple of years but has not gotten agreement from other departments. A BIS report issued in July 2009 said these machines were becoming more available in China and other controlled countries (see **WTTL**, July 27, 2009, page 2).

Loh also reported on a Wassenaar Arrangement "experts" group meeting in September where several proposals that the regime might consider in 2011 were discussed. One subject that was reviewed was a proposal from the U.S. to control Coordinated Measuring Machine (CMM) probes. The experts found it difficult to identify characteristics or parameters, such as repeatability, speed or resolution, to use to control the technology, Loh reported. Also discussed for the 2011 review were potential new controls on materials with high alloy content. Ball and roller bearings under Export Control Classification Number (ECCN) 2A001 have been decontrolled except those that have special materials, specifically monel or beryllium, or have performance better than ISO class 4, which is about an ABEC 7, another industry standard. Monel is an alloy with high nickel content. The discussion focused on "should we control other materials with high nickel content and how high?" Loh said.

New Ambassador says Colombia FTA Back in Spotlight

New leadership in Colombia and Republican control of the House could bring a new look at the U.S.-Colombia Free Trade Agreement (FTA), contends Colombia's new ambassador to the U.S.,

Gabriel Silva. He says, however, that Bogota has not yet received any indication of what it must do to get the FTA passed through Congress and political opposition. "We haven't received any list," he told reporters Nov. 18. One of the major hurdles to approval of the pact has been Colombia's record on labor and human rights. Silva claims there is new momentum in this area. He cites the removal of his country from the International Labor Organization "watch list" earlier this year. In addition, the country's new vice president, Angelino Garzón, is a former union leader and former General Secretary of the Central Union of Workers.

Silva says the failure of negotiators to agree on changes to the U.S.-Korea FTA in Seoul has also put the Colombia and Panama FTAs back in the spotlight. There have been many diplomatic photo ops recently, if not specific discussions on the next steps forward. Colombia President Juan Manuel Santos met with President Obama during the UN General Assembly meeting in New York, and Deputy Secretary of State James Steinberg went to Bogota with a delegation October 25-28.

"The Colombia of today is different than the Colombia when we started negotiating. A fresh look is required, as to what the FTA means now, which is different from what it meant 10 years ago," Silva says. Unlike public opinion about free trade in the U.S., there is wide support in Colombia for the agreement as seen in the election of Santos in July and recent poll numbers, he notes. "There is a mandate for free trade and open markets," Silva argues.

Judge Objects to Multiple Remands of Trade Cases

Multiple remands of the same case from the Court of International Trade (CIT) to federal agencies, especially the International Trade Administration (ITA), are a "silly step" and a "waste of time," argued CIT Judge Jane Restani at the CIT's 16th Judicial Conference Nov. 18. Restani, who served as the court's chief judge for seven years until the end of September when Judge Donald Pogue took the post, said she would prefer to issue final judgments and let the parties take the case to the Court of Appeals for the Federal Circuit if they want.

"The Justice Department insisted that at the final point when there is nothing left, the court could only do one thing – that is, send it [the case] back to the agency to do what the court wants it to do," she said. "I don't know why we have to go through that last step," she added. "It should not go back for this last silly step... I think it's a waste of time," Restani opined. ITA attorney Mark Barnett defended remands, saying many remands require recalculation of antidumping and countervailing duty rates, which the court shouldn't have to do.

Other hot topics at the CIT conference included new standards for seeking CIT injunctions to stay the liquidation of duties during litigation, continued objection to ITA's 15-day rule for sending liquidation instructions to Customs and Border Protection (CBP) and how CIT judge expect parties to argue their cases. Jeffrey Sajdak, a CBP attorney, also emphasized CBP's push to collect unpaid duties from sureties and importers who have claimed to have gone out of business but operate under new names. CBP in the last two years has stepped up its suits against sureties to collect duties and interest, he said. "One thing that seems to have come out is this thinking that perhaps surety bonds are capped at the bond amount. CBP disagrees with that assumption," he said. In 2008, CBP reported \$613 million in uncollected duties.

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EXPORT ENFORCEMENT: Xe Services, formerly known as Blackwater Worldwide, has hired Wendy Wysong of Clifford Chance to serve as outside special compliance officer under consent agreement firm signed with State Department in August to resolve alleged ITAR violations (see WTTL, Sept. 13, page 4).

ACTA: Negotiators in Tokyo Nov. 15 announced that they have agreed on final text of Anti-Counterfeiting Trade Agreement (ACTA) after resolving last outstanding issues. USTR's office has posted text on its website. After legal verification of text, proposed agreement will be submitted to participating countries.