
State Department Issues Clarified Foreign National Deemed Export Licensing Guidance

by Thomas M. deButts and Michael J. Noonan

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 Traffic in Arms Regulations (ITAR). On March 2, 2009, DDTC posted to its website revised guidelines implementing DDTC policy for the licensing of foreign persons under the ITAR. These revised guidelines updated earlier issued guidelines from September 2008 that provided previously unstated explanations of DDTC policy, and 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.

DSP-5 Licenses Only

A key issue for U.S. employers of foreign nationals is DDTC's determination to authorize employment of a foreign national only through a Form DSP-5 export license, and to eliminate the requirement of an additional Technical Assistance Agreement (TAA). All requests for licensing of a foreign national must be made using the DSP-5 process. Employers should be explicit in describing the level of required technical data and defense services, including specific regulatory citation where appropriate. In addition, DDTC recommends only one DSP-5 for each employee, so care should be taken in drafting the DSP-5 application to fully address the scope of technical data and defense services that are, or may be, required of the position and its foreign national occupant.

Recent Clarifications

The March revisions to the September 2008 policy guidance restate DDTC's determination to utilize the DSP-5 license for foreign nationals. Some of the important additions in the March guidelines include the

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 positions do not require such access.

In addition, the revision states that 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. Further, a revised Non-Disclosure Agreement must be signed by the foreign national employee. One final important addition in the revised guidance is a strong directive that once a foreign national is authorized by DSP-5, it is the responsibility of the employing company to notify other entities, U.S. and foreign, with which that 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 a 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. Incidental or unintended access by a foreign national is a violation of the ITAR and may subject the U.S. person to penalties.
- 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 DSP-5 license must execute a Non-Disclosure Agreement (NDA), which must be maintained on file by the employer. A sample is provided in the guidelines, and the NDA should mirror that sample.
- Upon issuance of a DSP-5 license by 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 DDTC in conjunction with the license. The foreign national may have contact with other entities, U.S. or foreign, provided the U.S. person employer makes known the presence of the foreign national employee to the other entities. In the context of TAAs between the U.S. person employer and foreign parties, the foreign national employee need not be a named party to the agreement, but must be identified in the TAA.
- Foreign national licenses will be authorized by 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 should ensure that they follow closely the new DDTC guidance to ensure that their licensing activities are not disrupted.

For further information, please contact:

Thomas M. deButts
Washington, DC
+1.202.663.8872
debutts@pillsburylaw.com

Stephan E. Becker
Washington, DC
+1.202.663.8277
stephan.becker@pillsburylaw.com

Christopher R. Wall
Washington, DC
+1.202.663.9250
cwall@pillsburylaw.com

Nancy A. Fischer
Washington, DC
+1.202.663.8965
nancy.fischer@pillsburylaw.com

Joshua D. Fitzhugh
Washington, DC
+1.202.663.8416
joshua.fitzhugh@pillsburylaw.com

Michael J. Noonan
Washington, DC
+1.202.663.8007
michael.noonan@pillsburylaw.com

This publication is issued periodically to keep Pillsbury Winthrop Shaw Pittman LLP clients and other interested parties informed of current legal developments that may affect or otherwise be of interest to them. The comments contained herein do not constitute legal opinion and should not be regarded as a substitute for legal advice.

© 2009 Pillsbury Winthrop Shaw Pittman LLP. All Rights Reserved.