



## **I. OVERVIEW**

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Hiring of foreign national employees may fall under the purview of specific federal export control laws. Regulations which govern export control include the Export Administration Regulations (EAR), which are administered by the Department of Commerce; and the International Traffic in Arms Regulations (ITAR), which are administered by the Department of State. The EAR controls dual-use and commercial items, and the ITAR controls items designed for military use, as well as certain types of technology and technical data.

At the University of Colorado Denver (CU Denver), compliance with export control requirements when hiring international employees involves a high degree of coordination between Human Resources, International Scholar and Student Services, and the Office of Regulatory Compliance/Export Control; the Office of University Counsel may also need to be consulted in certain situations. This document outlines compliance checkpoints for export control, as well as specific operational considerations when hiring international employees. This document is intended as guidance; specific questions should be directed to the Export Control Officer, [christine.ahearn@ucdenver.edu](mailto:christine.ahearn@ucdenver.edu).

## **II. COMPLIANCE CHECKPOINTS**

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### **A. I-129 Deemed Export Attestation.**

The “Petition for a Nonimmigrant Worker” (Form I-129), from the U.S. Citizenship and Immigration Services (USCIS), contains a section entitled *Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Nationals in the United States*; this section must be completed for H-1B, H-1B1, L-1, or O-1A visa types. In this section, the petitioner (i.e., CU Denver) must state whether the nonimmigrant worker will require an export license to conduct the proposed work duties. The potential export is considered a “deemed export”, which is the release of controlled information or technology to a foreign person in the United States. For export control purposes, the controlled information or technology is “deemed” to have been released to the prospective foreign national employee’s home country.

Although federal agencies conduct a review of visa applicants, they do not know the specifics of what proprietary information and export-controlled information a foreign national could access. Thus, the organization filing the petition is responsible for performing a deemed export review to determine if a “license” or authorization is needed from the Federal government before a foreign national employee can have access to the controlled information or technology.

CU Denver performs the deemed export when hiring new foreign national employees; this is done **before** the I-129 Petition is filed with USCIS by International Scholars and Student Services. The deemed export review includes review of the planned work as well as screening of the prospective employee’s background for any export control issues. If the deemed export review results in a determination that a

license is needed, the Office of Regulatory Compliance will submit a license application to the appropriate U.S. governmental agency. It can take time for a license request to be processed, so the deemed export review should occur as soon as practicable. No access to controlled materials may be given until the license has been received.

### **B. Bona Fide Full Time Employee Exemption (ITAR) and Technology and Software Unrestricted Exception (EAR).**

Both the ITAR and EAR contain a license exemption/exception for full-time employees. There are limitations to the exemption/exception, as they are specific to the item or information being released, require permanent residency in the U.S. throughout the period of performance, and may not be applicable depending upon the home country of the prospective employee. Additionally, the institution is required to keep documentation on file about how the exemption/exception's applicability was determined. To qualify for the exemption/exception, the organization must meet the following conditions:

1. The person must be a **full-time, regular employee**. Post-docs, students, and visiting researchers or scholars usually do not qualify.\*
2. The employee must have a permanent U.S. residence during his or her period of employment.
3. Citizenship requirements differ under the respective regulations:
  - a. Under the ITAR, the employee cannot be a foreign national of an embargoed country for the ITAR.
  - b. Under the EAR, the citizenship of the employee is more restrictive and depends on the classification of the items.
4. The organization must notify the employee in writing that the employee cannot transfer or re-export to other foreign nationals the technical data/technology without prior government approval.

*\*Note: For universities the bona fide full time employee is usually only applicable to H-1B visa holders. Most students (graduate and undergraduate) and a majority of post-docs do not qualify as employees under the regulations as their roles are primarily that of a trainee.*

### **III. OPERATIONAL CONSIDERATIONS**

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- **Advertising.** Standard language should be created for positions that require access to controlled technology. This may include creating language which makes it clear that a deemed export license may be required. Careful consideration should be given to positions that require access to classified data. Consult the Office of University Counsel and the Office of Regulatory Compliance for assistance in drafting language.
- **License.** A license may be required before an employee who is a foreign national can participate on a project or have access to certain technology or equipment. Coordination with the

International Scholars and Student Services and the Office of Regulatory Compliance is important when determining if a license is required.

- **Conditional offers.** Employment is conditioned on passing a background check or even receipt of an authorization to work in the United States. Similarly, an offer can be made conditional upon ensuring lawful access to controlled information through appropriate mechanisms, such as a license, if needed. It is important for hiring units to coordinate closely with human resources from the beginning of the hiring process when controlled technology or equipment is being utilized. Additionally, it may be necessary to work with general counsel or regulatory compliance to ensure compliance with laws.

Other considerations may arise on a case-specific basis. Contact the Office of Regulatory Compliance with questions or to request additional guidance.