I-129, Foreign Persons & University Best Practices

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&

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I-129 “PETITION FOR A NONIMMIGRANT WORKER”
• Effective 2011, the Department of Homeland Security updated Form I-129 to require that employers provide an export license determination in order to employ certain nonimmigrant workers, including individuals in H-1B and O-1 status.
New I-129 Form: **Effective 2-20-11**

- I-129: “Petition for Nonimmigrant Worker” to temporarily bring foreign national employees to the United States.

- New Part 6 of the I-129 form imposes new controls into the visa petition process for – H-1B, H1B1, L-1 and O-1A nonimmigrant categories
• Employers filing for workers in the H-1B, H1B1, L-1 and O-1A nonimmigrant categories will have to certify under penalty of perjury, that they have reviewed the export regulations:
  – **STATE DEPARTMENT**: International Traffic In Arms Regulations (ITAR)
  – **COMMERCE**: Export Administration Regulations (EAR)
  – **TREASURY**: Office of Foreign Assets Control (OFAC)
What’s your Responsibility?

• Declare whether or not an export license is required with respect to the technology or technical data that the employer will be releasing to the employee

• Employers have two options & must make an export license determination

• **Understand the Export Regulations!**
License Determination

- **Option 1**: A license is *not required* from either the U.S. Department of Commerce or the U.S. Department of State to release such technology or technical data to the foreign person; or

- **Option 2**: A license *is required* from the U.S. Department of State and/or the U.S. Department of State to release such technology or technical data to the beneficiary and the petitioner will prevent access to the controlled technical 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.
What’s Your Responsibility?

**Option 1**
- Pass “GO” – proceed with research as “fundamental research”

**Option 2**
- Prepare a Technology Control Plan to safeguard unauthorized access to controlled information, hardware to Foreign Person
- Prepare a license or a “Bonafide Exemption Memo” or a “Letter of Assurance” – Exemption Letter
EAR or ITAR

EXPORT LICENSE DETERMINATION
PI says it’s Fundamental Research . . .

• FRE is “basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly within the scientific community . . .”

• Is it always OPTION 1?

• What type of technology is involved?

• Are you working with 3rd parties?

• Co-mingling research results with 3rd party export controlled information?
• Your institution should have a procedure in place to determine whether a license is required or other exemption.

• What’s required?
  – Export classification determination
  – Determine who has jurisdiction?
    • Commerce or State?
    • Restricted Party Screening?
      – OFAC (Office of Foreign Assets Control) is always a player.
Which set of Regulations Apply?

• If your project is controlled by the State Department, there will be more restrictions that will apply than Commerce controlled projects.

• How do you determine whether it is Commerce controlled
  – EAR – Export Administration Regulations) or controlled by the

• State Department:
  – ITAR – International Traffic In Arms Regulations)

• Sometimes it’s not so easy to determine
What do the Regulations Control? -- Dual Use Items

• The EAR (Export Administration Regulations) Commerce Control List (BIS):
  – Controls technologies and goods that have dual-use: both military and civil application.
Sensitive Technologies with Dual-Use Applications

**Commerce Control List Categories**

0 = Nuclear materials, facilities and equipment (and miscellaneous items)
1 = Materials, Chemicals, Microorganisms and Toxins
2 = Materials Processing
3 = Electronics
4 = Computers
5 = Telecommunications and Information Security
6 = Sensors and Lasers
7 = Navigation and Avionics
8 = Marine
9 = Propulsion Systems, Space Vehicles, and Related Equipment
• The ITAR (International Traffic in Arms Regulations) controls commodities and technologies that have *predominant military use or space application.*
Adapted or Modified

• Also includes items that started out as having civil application but were later adapted or modified for military application.
• “See-through” rule.
**USML Categories (The ITAR)**

<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
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<tbody>
<tr>
<td>I</td>
<td>Firearms, Close Assault Weapons and Combat Shotguns</td>
</tr>
<tr>
<td>II</td>
<td>Guns and Armament</td>
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<tr>
<td>III</td>
<td>Ammunition/Ordnance</td>
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<tr>
<td>IV</td>
<td>Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs and Mines</td>
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<tr>
<td>V</td>
<td>Explosives and Energetic Materials, Propellants, Incendiary Agents and Their Constituents</td>
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<tr>
<td>VI</td>
<td>Vessels of War and Special Naval Equipment</td>
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<td>VII</td>
<td>Tanks and Military Vehicles</td>
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<tr>
<td>VIII</td>
<td>Aircraft and Associated Equipment</td>
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<tr>
<td>IX</td>
<td>Military Training Equipment and Training</td>
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<tr>
<td>X</td>
<td>Protective Personnel Equipment and Shelters</td>
</tr>
<tr>
<td>XI</td>
<td>Military Electronics</td>
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<tr>
<td>XII</td>
<td>Fire Control, Range Finder, Optical and Guidance and Control Equipment</td>
</tr>
<tr>
<td>XIII</td>
<td>Auxiliary Military Equipment</td>
</tr>
<tr>
<td>XIV</td>
<td>Toxicological Agents, Including Chemical Agents, Biological Agents, and Associated Equipment</td>
</tr>
<tr>
<td>XV</td>
<td><strong>Spacecraft Systems and Associated Equipment</strong></td>
</tr>
<tr>
<td>XVI</td>
<td>Nuclear Weapons, Design and Testing Related Items</td>
</tr>
<tr>
<td>XVII</td>
<td>Classified Articles, Technical Data and Defense Services Not Otherwise Enumerated</td>
</tr>
<tr>
<td>XVIII</td>
<td>Directed Energy Weapons</td>
</tr>
<tr>
<td>XX</td>
<td>Submersible Vessels, Oceanographic and Assoc. Equipment</td>
</tr>
<tr>
<td>XXI</td>
<td>Miscellaneous Articles (Software, components, etc.)</td>
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</table>
Example of Sensitive Emerging Technologies on Campus

- RoboFly. Aerodynamic unmanned flight vehicles, especially the size of an insect, is a highly sought after technology by military agencies around the world, including the U.S.

- Development of “a flying robot weighing less than a paperclip that could be used in search, rescue, monitoring and reconnaissance” could have dual-use or have . . .

- Potential military application: Technology can start out being developed for a civil application (toys or other scientific use) but can later become modified or adapted for DARPA, Army, Navy, DOD under a sponsored research project and be transformed into an item for the military which the government may wish to control for national security reasons.
Consequences of non-compliance can be severe

WHAT ARE THE CONSEQUENCES OF NON-COMPLIANCE?
The Roth Case

• The project was not awarded to the University as “Fundamental Research.”

• Instead, the contract contained publication restrictions and access restrictions to the project by Foreign Persons.

• Statement of Work required use of University:
  • - Plasma Lab
  • - Graduate students – unauthorized foreign persons → license or government authority required

• Dr. Roth assured the Air Force he would not have any foreign persons work on the project . . .

• Fundamental Research does not apply when publication or access restrictions pertain to your research or research results.
Universities in the Media

• University of Tennessee Professor Found Guilty on 18 Counts of Export Violations

J. Reece Roth

Jurors found University of Tennessee professor emeritus J. Reece Roth guilty of 18 charges involving the Arms Export Control Act this morning.

Jurors in U.S. District Court deliberated nearly eight hours starting Tuesday before announcing their verdict.

Roth was accused of allowing foreign national graduate students access to information on a U.S. Air Force defense project.

Assistant U.S. Attorney Will Mackie said that the case already has resulted in tighter restrictions by universities across the country, including UT, on the handling of defense research.

"National security issues are matters that should be everyone's concern, even among those in an academic setting," Mackie said. "Everyone has a responsibility to be careful in what they are doing."

What Went Wrong?

Dr. Roth allowed foreign national students to have unauthorized access to export controlled information.

Dr. Roth did not follow UT advice:

• He continued to assert that the work he was performing was fundamental research and not subject to export control regulations.
• He traveled to China with export controlled information even when advised against it.
Consequences of non-compliance can result in negative publicity, penalties, fines or imprisonment.

Violations can range from $250,000 to $1 million per violation.

Export regulations are federal regulations that apply whether you are an employee or not.
Consequences of Non-Compliance

• Civil and criminal penalties can range from the following:
  – **Office of Foreign Assets Control (OFAC)**
    • Criminal penalties - $50,000 to $10,000,000 fines
    • Civil penalties – up to $250,000 or twice the amount of each underlying transaction
    • Imprisonment for up to 10 – 30 years
    • Forfeiture of goods
  – **Department of Commerce (EAR)**
    • Criminal penalties - $50,000 to $1,000,000 or five times the value of the export (whichever is greater)
    • Civil penalties - $11,000 per violation or up to $120,000 if violations involve items controlled for national security reasons
    • Imprisonment for up to 5 – 10 years.
    • Denial of export privileges
    • Forfeiture of goods
  – **International Traffic in Arms Regulations (ITAR)**
    • Civil penalties up to $500,000 per violation.
    • Criminal penalties up to $1,000,000 per violation.
    • Imprisonment not exceeding ten years
University Best Practices

HOW DO YOU COMPLY?
Where do you start?

• How do you figure out what type of technologies your Foreign Person will access?
  – Research your PI’s area of research.
  – Review some of their white papers.
  – Who are the sponsors that fund your PI’s research projects?
    • DARPA
    • NASA
    • Nuclear Regulatory
    • Department of Energy
    • Army

• Does your PI develop “Sensitive or Controlled Technologies”?
Summary of Best Practices

• Develop a Questionnaire that works for you and your particular circumstances to help you make an export determination
• Develop a link to your website
• Partner with other campus process owners
  – International Scholar Services – folks involved in the visa process
  – Human Resources – identify non-immigrant visa applicants
  – Get export control sign-off
• Develop an expertise in the export regulations!
Tips

• Make sure your Int’l Student Office informs you of the visa deadlines. The turn around can be as short as 1-3 days!

• Whenever possible, allow enough time for review and processing.
Issues to Consider

- PI’s expertise in export control awareness may differ
- Quality of Info you obtain will differ from one PI to another
- Tips, remember the PI may not know what “export control” means or what is
  - “Technical Data” or
  - “Technical Assistance” or what constitutes an
- “Export” . . .

- Will Foreign Person have access to 3rd party export controlled information, items, software or technology?
- What type of project will the FP be involved in?
- Where is the funding coming from?
I-129 Export Review Process

• PI completes Questionnaire and submits to International Scholar Services

• Your questionnaire and your process will need to be tailored for your university, depending on
  – Resources
  – Volume
  – Areas of Risk
What works for you?

**Caltech**
- Caltech Export office reviews detailed Statement of Work and makes a export license determination – **All questionnaires**
- Export Officer submits license determination & approval to International Scholar Services
- Scholar Services proceeds with visa application

**UofA**
- Export Office reviews only if PI checks “yes” to any of the questions
- Same
- Same
How can your Researcher help?

• Have PI complete the “Export Compliance Questionnaire” for your university

• Describe the Foreign Person’s job description and area of research or expertise.

• Review the Beneficiary and PI’s publications, weblinks, emerging technologies
  – Current information provided for petition is sometimes not enough
Resources & Outreach

• Provide Outreach – Get the Word Out about new process change.
• Provide resources regarding the new process.
  – Website is a good way to do this!
• Make sure your campus folks know that it is a Homeland Security Requirement and not yet another hurdle you have created
• PI’s will not like the new requirement
• Be prepared to explain the regulations
Create a I-29 Resource Page

https://researchadministration.caltech.edu/export/export

Office of Research Administration
Office of Sponsored Research
Export Compliance
Policies and Procedures Related to Export Compliance
I-129
Recordkeeping
International Shipments
Travel
Forms
Education & Training
Laws & Regulations
Country Sanctions and Embargoes
Prohibited/Restricted Party Lists
Glossary
Links

I-129 Export Questionnaire

Effective 2011, the Department of Homeland Security updated Form I-129 to require that employers provide an export license determination in order to employ certain nonimmigrant workers, including individuals in H-1B and O-1 status.

International Scholar Services will request sponsoring faculty members, grant managers, or administrators to complete the I-129 Export Compliance Questionnaire. The completed questionnaire should be returned to Export Compliance and copied to International Scholar Services.

The Caltech Export Compliance office will review the information and determine whether an export license is required in order for Caltech to employ the beneficiary. Once the determination is made, International Scholar Services will submit a Form I-129 to the U.S. Citizenship and Immigration Service.

Please contact Export Compliance Export Compliance if you have any questions about how to complete the I-129 Export Compliance Questionnaire.

Please let International Scholar Services know if there will be any delays with the completion of the questionnaire.

Resources: "I-129 Deemed Export Attestation" by the Association of University of Export Control Officers
Getting it Right!

• Gather the Facts!
• Verify the Facts!
• Remember you are signing off on a Federal Form
• This is hard copy attestation under penalty of perjury that the Foreign Person will not need an export license
• What if something changes?
  – Ask PI that if there is a scope change, PI must let you know
<table>
<thead>
<tr>
<th>PART C: PROJECT INFORMATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Please describe the work and/or activities to be performed by the beneficiary. Please provide as much information as possible to help understand the tasks to be performed. You may also attach a pdf of the Statement of Work to this form.</td>
</tr>
<tr>
<td>2. Please describe the type of Technology or areas of research that the beneficiary will work on. (Provide publication, website or other information that provides supporting information about the the area of research.)</td>
</tr>
<tr>
<td>3. Is the beneficiary fabricating or developing an instrument or hardware? □ No □ Yes</td>
</tr>
<tr>
<td>If the individual will be fabricating or developing an instrument or hardware, please provide a brief paragraph on the item’s purpose and its role in the project:</td>
</tr>
<tr>
<td>4. Will the area of research be for military application? □ No □ Yes</td>
</tr>
<tr>
<td>If yes, please describe the items or technology to be specifically designed, modified or adapted for military application.</td>
</tr>
<tr>
<td>5. Will the area of research be for space flight application? □ No □ Yes</td>
</tr>
</tbody>
</table>
U of A Questionnaire (handout)

- Name of Applicant: ____________________________________________
  Citizenship:___________________
- 1. Will the applicant have access to ITAR controlled data, technology, materials, information, software, or equipment? ___Yes ___No
- 2. Will the applicant have access to EAR controlled technology or encryption software code? ___Yes ___No
- 3. Will the applicant be involved in a project that has a technology control plan in place? ___Yes ___No
- 4. Will the applicant be involved with a project that:
  a. Has restrictions on the release of certain project information? ___Yes ___No
  b. Has publication or access and dissemination restrictions? ___Yes ___No
  c. Has a military connotation or end-use? ___Yes ___No
  d. Is sponsored by a defense agency? ___Yes
What’s your campus like?

DISCUSSION
What’s your Campus Terrain?

- What is your campus like?
- Do you accept restrictions?
- Who are your sponsors?
- What are your areas of research?
- Do you have an export compliance official?
- Do you have an export control program?
- Do you file for export licenses?
Questions
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