

January 17, 2012

MEMORANDUM

To: Human Resource Directors
Legal Affairs Designees

From: Frederick P. Schaffer 
General Counsel and Senior Vice Chancellor for Legal Affairs

Gillian Small 
Vice Chancellor for Research

Re: Compliance with Export Control Regulations

As many of you are aware, a new version of the U.S. Customs and Immigration Services' Form I-129 (Petition for a Nonimmigrant Worker) went into effect in February 2011. Part 6 of the new Form I-129 requires that when filing petitions for certain nonimmigrant work visas (H-1B, H-1B1 Chile/Singapore, L-1 and O-1A), a CUNY official must *certify under penalty of perjury* that the foreign national's employment will comply with the export control regulations promulgated by the U.S. Department of Commerce and the U.S. Department of State.

We recognize that many of you are not familiar with the federal export control laws and are not in a position to certify compliance with them. Accordingly, the Office of the Vice Chancellor for Research, the Office of General Counsel and others are working to develop a compliance program, including education and training, for persons whose work may be affected by them. Because the full program may take several months to implement, this memo provides you with a very brief summary of the export control laws and the interim process CUNY will use to comply with the USCIS regulation.

I. Export Control Regulations

In performing advanced scientific and other types of research, faculty at CUNY may use or develop certain materials, software, equipment or technology that could have a military use or dual civilian and military uses. For national security reasons, the Government monitors the export of these items. It requires CUNY to obtain a license from the Department of State or the Department of Commerce prior to exporting items that are contained on lists published by the Departments of State and Commerce. For similar reasons, the Office of Foreign Assets Control (OFAC) at the Department of Treasury restricts (or bans) Americans from doing business (including research collaboration) with certain regimes and persons (including terrorists, international narcotics traffickers and those engaged in activities related to the proliferation of weapons of mass destruction).

The export control laws apply both to exports abroad and “deemed exports.”

- Exports Abroad - Under the export control laws, it does not matter how an item is transported outside of the United States for it to be considered an export. For example, an item can be sent by regular mail or hand-carried on an airplane. A set of schematics can be sent via facsimile to a foreign destination, software can be uploaded to or downloaded from an Internet site, or information about technology can be transmitted via e-mail or during a telephone conversation. An item is also considered an export even if it is leaving the United States temporarily, if it is leaving the United States but is not for sale (e.g., a gift), or if it is going to a wholly-owned U.S. subsidiary in a foreign country. Even a foreign-origin item exported from the United States, transmitted or transshipped through the United States, or being returned from the United States to its foreign country of origin is considered an export.
- Deemed Exports - The new Form I-129 certification applies to a special class of exports, what are known as “*deemed exports*.” A “deemed export” occurs when certain technology, source code or technical data is “released” to a foreign national *in the United States*. (It is “deemed” to be an export to the home country of the foreign national.) Technology or technical data is “released” for export when it is available to foreign nationals for visual inspection (such as reading technical specifications, plans, blueprints, etc.); when technical data is exchanged orally; or when technology is made available by practice or application under the guidance of persons with knowledge of the technology.

A large part of the research performed at CUNY is exempt from the export control laws and accordingly does not need a license. To determine whether a research project qualifies for an exemption, it is necessary to look at many factors, including whether the research involves company proprietary information or restrictions on publishing the results of the research.

CUNY is legally responsible for determining whether an export or deemed export requires a license, and for obtaining the license where necessary. Violations of the export control laws carry *significant civil and/or criminal penalties* and could severely damage CUNY’s research mission. (In 2009, a professor at the University of Tennessee was sentenced to four years’ imprisonment for violating the export control laws.)

II. Process for Completing the I-129 Certification

Briefly, the new Form I-129 certification requires CUNY, as petitioner, to certify that it has reviewed the export control regulations and has determined either:

(1) A license is not required from either the Department of Commerce or the Department of State to release technology or technical data to the visa beneficiary in the United States; or

(2) A license is required from U.S. Department of Commerce and/or U.S. Department of State to release such technology or technical data to the visa beneficiary in the United States and that CUNY will prevent the visa beneficiary from having access to the controlled technology or technical data until CUNY has received the required license or other authorization to release it. Note: CUNY does not have to obtain the license prior to the foreign worker coming to CUNY.

As stated above, a large part of the research done at CUNY is exempt from the export control laws. But determining whether or not research is exempt requires an understanding of the research and the export control regulations.

Step 1 – Whenever an I-129 visa is sought, a person (or persons) with knowledge of the research that the visa beneficiary will perform at CUNY must complete an I-129 export control questionnaire and submit an electronic or hard copy to the campus person who is responsible for the Form I-129 petition process (“Form I-129 processor”).

Step 2 –If all of the answers in Part B of the questionnaire are “no,” the Form I-129 Processor can check “Box 1” in Part 6 of the Form I-129, indicating that a license is not required. The petition can then be filed in accordance with campus procedures.

Step 3 – If any answer to the questions in Part B is “yes,” the Form I-129 processor will send an electronic copy of the questionnaire to the Director of Research Compliance in the Office of the Vice Chancellor for Research (OVCR).*

Step 4 –The OVCR will review the questionnaire. If the OVCR determines that a license is not necessary, it will authorize the Form I-129 processor to check Box 1 in Part 6, indicating that a license is not required.

Step 5 - If the OVCR determines that a license is necessary, it will authorize the Form I-129 processor to check Box 2 in Part 6, indicating that a license is necessary. The OVCR will work with the campus and others as needed to develop a written plan, describing how the campus will prevent the visa beneficiary from gaining access to the controlled technology or technical data until a license is received.

Step 6 – Working with the Office of General Counsel, the OVCR will obtain an export control license.

Record retention - Both the campus and OVCR should maintain copies of all records relating to the I-129 process.

Attachment:

Export Control Form I-129 Questionnaire

c: Marcia Isaacson
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