Immigration Update

CIS ANNOUNCES IMPORTANT CHANGES TO FORM I-129
11.18.2010

The United States Citizenship and Immigration Service ("CIS") has announced that a new version of the Form I-129 (Petition for a Nonimmigrant Worker) will be released on Nov. 23, 2010. While not yet published publically, our attorneys have reviewed an unofficial version of the form expected to be published next week. This form is used to file petitions for E, H, L, TN, O and P visa holders. However, the substantive changes to the new version of the form to be released next week only affects H-1B, H-1B1 (Chile/Singapore), L-1 and O-1A petitions. The primary substantive change to the form is that it will now include a section specifically related to the release of controlled technology or technical data to foreign national employees. This section regarding U.S. export controls will require the petitioning employer to attest to the following:

"With respect to the technology or technical data the petitioner will release or otherwise provide access to the beneficiary, the petitioner certifies that it has reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) and has determined that:

1. A license is not required from either U.S. Department of Commerce or the U.S. Department of State to release such technology or technical data to the foreign person; or,
2. A license is required from either U.S. Department of Commerce 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 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."

While U.S. employers have always been technically liable for export control violations, the new questions on the form I-129 increase a company's exposure as they will be required to certify compliance on this form. It is contemplated that the additional language is added to remind companies to double-check their EAR and ITAR compliance procedures, in hope of decreasing violations of the "Deemed Export" rule.

A "deemed export" is not a physical transfer of technology or source code, but occurs when a foreign national within the US is given access to the sensitive technology, via visual access, orally exchange of information or when the technology is made available in practice or application under the guidance of personnel with specific knowledge of the technology. Both ITAR and EAR have similarly-worded provisions regarding the release of sensitive technology and source codes to foreign nationals.

Moore & Van Allen recommends that all U.S. companies who employ foreign nationals on H-1B, L-1 and/or O-1 visas review their internal procedures to make certain that foreign national employees' access to restricted technologies complies with ITAR and EAR requirements. If a US company that employs foreign nationals in the specific visa categories does not have appropriate written policies and procedures in place, we recommend that you develop and implement written policies and procedures at this time to prevent access

to restricted technologies by unauthorized foreign national employees. If a company is unsure if the "Deemed Export" rule applies to them, it should immediately conduct a review of it products and technology to determine if they are controlled by the EAR or the ITAR regulations.

If you employ a foreign national on an H, L or O visa who would require a technology export license from the Department of State or Department of Commerce to fulfill their job duties, please contact a member of the MVA Immigration Group to ensure that their future immigration fillings properly note this requirement.