H-1B Visa Applications (Temporary Worker) and Export Certification

The H-1B temporary worker visa is an employment visa valid for up to six years in three-year increments. An H-1B visitor is a foreign national coming temporarily to perform services in a specialty occupation.

Effective December 22, 2010, the Department of Homeland Security revised the I-129 Petition for a Nonimmigrant Worker (work visa application) to require petitioners, including UCAR, to state whether an export license is required for the worker.

Export control regulations prohibit foreign nationals from working with, or receiving information about, specific technologies for reasons of national security or protection of trade. If foreign national’s work at NCAR involves such specified technologies, an export license from the Departments of State, Commerce, or Treasury may be required, unless the work qualifies for particular exemptions. The Department of Homeland Security now requires that UCAR report on the H-1B application whether a license is required and to certify that it has reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR).

Determining whether an export license is required can be a complex, technical process and the penalties for not obtaining a license when one is required are very substantial. The foreign national (beneficiary) or the host division (petitioner) must notify Human Resources (HR) that an H-1B visa is required. As part of the application procedures, the Lab/Program will be requested to complete an H-1B/1-129 Deemed Export Worksheet that contains an Export License Certification Form. The completed worksheet and signed form will be sent to the Export Compliance Coordinator (ECC) or Empowered Official (EO) for signature.

Once this determination has been made, the ECC/EO will sign and return the Certification form to the Immigration Specialist for completion of the visa application. The questionnaire portion will be kept in the Lab/Program for the required five-year records retention period. The H-1B visa application will not be filed until the signed Certification form has been completed.

If a license is required, the ECC or EO will start the process of obtaining one. More information can be found at: http://www2.fin.ucar.edu/ogc/export-compliance
H-1B VISA: DEEMED EXPORT WORKSHEET & COMPLIANCE CERTIFICATIONS

No visa petition will be filed until these documents have been received and a determination made by the Export Control Coordinator or Export Control Officer as to whether an export license is required.

Part I: H-1B VISA DEEMED EXPORT ADVISORY

Export Control Regulations\(^1\) (ECR) are federal laws that prohibit the unlicensed transfer to foreign nationals\(^2\) of U.S. goods, services and technologies that are subject to trade restrictions, or have proprietary, military, or economic applications. Pursuant to ECR, the Department of Homeland Security (DHS) requires employers (petitioners) sponsoring an H-1B nonimmigrant worker (beneficiary) and certain other foreign workers to certify their compliance with ECR “deemed export” rules regarding the transfer or disclosure, including visual and oral, of technology or technical data to a foreign entity in the United States.

The Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States, incorporated as Part 6 of United States Citizen and Immigration Services (USCIS) Form I-129, Petition for Nonimmigrant Worker, requires the employer to certify that it has reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) and determined that:

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

2. a license is required from the U.S. Department of Commerce 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 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.

The employer is also required to acknowledge that the USCIS has the authority to verify the information in the petition, including compliance with the deemed export requirement, through audits, on-site compliance reviews, and other ways of investigation.

Failure to comply with ECR can lead to civil penalties in an amount not to exceed the greater of $250,000 or an amount that is twice that of the transaction; criminal penalties of up to $1,000,000 per violation, prison terms up to 20 years, denial of export privileges, and debarment from U.S. government contracts.

\(^1\) Foreign Assets Controls (FAC), International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR).

\(^2\) Defined in EAR as, “Any individual who is not a U.S. citizen or lawful permanent resident of the U.S. (green card holder), any individual who is not a protected individual (e.g., asylum holder or refugee, any foreign corporation or other entity not incorporated or organized to do business in the U.S., or any foreign government.”
Part II: INSTRUCTIONS FOR COMPLETING THE WORKSHEET AND CERTIFICATION

The completed DEEMED EXPORT WORKSHEET (pages 3 and 4) is kept in the originating lab/program for 5 years.

The completed EXPORT LICENSE CERTIFICATION FORM (page 5) is sent to HR’s immigration specialist.

Due to the complex nature of the export compliance review process, petitioners should allow additional time for completion of their H-1B application. The petitioner can facilitate the process by providing as much detail as possible regarding the beneficiary’s position duties, and the technology and technical data (if any) to which s/he will have access, including names of any software the foreign national will use in the performance of her/his job duties, and the corresponding Export Control Classification Number (ECCN) from the CCL or Category from the USML.

Processing time for deemed export licenses can run anywhere from two to four months and longer in certain circumstances. During this time, it is the responsibility of the direct supervisor/ principal investigator(s), and sponsoring department to prevent the beneficiary’s access to any controlled technology or technical data until and unless UCAR receives the required license or other authorization to release such data.

In addition, it is incumbent upon the sponsoring department to notify the Immigration Specialist in Human Resources and the ECC (Export Compliance Coordinator) assigned to the Division/Program the visitor will reside in of any material changes to the H-1B employee’s job duties which would require filing an amended petition. This includes, but is not limited to: work location, types of technology used in performance of their job duties, and foreign travel.

Part III: H-1B DEEMED EXPORT WORKSHEET

This worksheet must be completed by the beneficiary’s direct supervisor/project principal investigator(s). Note that because the H-1B must be sponsored by a single department, the sponsoring department is responsible for reviewing all projects and programs under which the H-1B nonimmigrant employee will be funded, including those housed in other departments.

Section A. Beneficiary Information

Beneficiary’s name: __________________________
Country of citizenship: _______________________
Country of legal permanent residency: ___________
Country of most recent residency: _______________
Foreign institution/entity affiliation (if any): __________
Applicant proposed hire date: _________________

Section B. Sponsor Information

Name of sponsor (supervisor/PI): _______________________
Name of sponsoring lab/division: _______________________

________________________________________________
________________________________________________
________________________________________________
________________________________________________
________________________________________________
________________________________________________

May 2015
1) An export license from the Department of Commerce may be required for foreign nationals who are working on projects involving controlled commercial and ‘dual-use’ items (Dual use describes commodities, information, software and technology that have both commercial and military or proliferation applications. Note: items with purely commercial uses are also subject to EAR). Do the Beneficiary’s work duties involve the use or disclosure of any items contained on the **Commerce Control List**?

- No – Proceed to Question 2
- Yes –  

*If yes, for each controlled item attach a detailed description including technical specifications and your best determination of the item’s Export Control Classification Number (ECCN).*

2) An export license from the Department of State may be required for foreign nationals who are working on projects that involve equipment, materials, software, or technical data designed or modified for a military use or for use in outer space; or which could reasonably be used in the development of weapons of mass destruction. Does the intended work of the Beneficiary involve the use or disclosure of any items contained on the **United States Munitions List**?

- No – Proceed to Question 3
- Yes –  

*If yes, for each controlled item attach a detailed description including technical specifications and your best determination of the item’s USML category and sub-category under which it falls.*

3) Do you know, or have any reason to believe that the items, information, equipment, material, software, technology or technical data to be shared with the Beneficiary will support the design, development, production, stockpiling, or use of nuclear explosive devices, chemical or biological weapons, or missiles?

- No – Proceed to Question 4
- Yes – Contact ECC and Export Compliance Manager  

4) Were any of the items, equipment, software, technology or technical data to be shared, transmitted or transferred to the Beneficiary developed under a sponsored agreement or government contract that imposed publication restrictions for proprietary reasons (other than limited sponsor pre-publication review to insure intellectual property or patent rights), or pursuant to specific U.S. Government access and dissemination controls?

- No – Proceed to Question 5
- Yes – Contact ECC and Export Compliance Manager  

5) Will the Beneficiary be provided with items, equipment, software, technology or technical data, or other materials that were disclosed to UCAR from an external sponsor, vendor, collaborator or other third party under a material transfer, confidentiality or other non-disclosure agreement that restricts publication or transfer of the items?

- No – Proceed to next page
- Yes – Contact ECC and Export Compliance Manager  

H-1B/I-129 Export License Certification Form

The Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) require U.S. persons to seek and receive authorization from the U.S. government before releasing to foreign persons in the United States controlled technology or technical data. Under both the EAR and the ITAR, release of controlled technology or technical data to foreign persons in the United States—even by an employer—is deemed to be an export to the person's country or countries of nationality. One implication of this rule is that a U.S. company must seek and receive a license from the U.S. Government before it releases controlled technology or technical data to its nonimmigrant workers.

The U.S. government requires UCAR to certify that it has reviewed the EAR and ITAR and determined whether it will require a U.S. government export license to release controlled technology or technical data to the prospective employee. If an export license is required, UCAR must further certify that it will not release or otherwise provide access to controlled technology or technical data to the prospective employee until it has received from the U.S. government the required authorization to do so. UCAR must indicate whether or not a license is required on Part 6 of Form I-129.

The determination made below will be transferred to the I-129 H-1B application. Please note that each lab/division/program is responsible for the accuracy and recordkeeping regarding this export control review. The original signed version of this form will be kept in the H-1B visa file in Human Resources and is used for the sole purpose of completing form I-129.

Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States. Check Box 1 or Box 2 as appropriate:

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 Regulation (ITAR) and has determined that:

☐ 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

☐ 2. A license is required from the U.S. Department of Commerce 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 technology or technical data by the beneficiary until and unless the petition has received the required license or other authorization to release it to the beneficiary.

Once employed, it may be necessary to track changes to a foreign person’s job duties, which could result in the need for an export license at a later time. Staff will need to ensure compliance when modifying an employee’s job duties.

This form applies to the following H-1B applicant: __________________________________________

Division Administrator Name (print) __________________________ Signatures __________________________ Date ____________
Or Supervisor/Host __________________________

EO or ECC Name (print) __________________________ Signatures __________________________ Date ____________

UCAR Export Contacts: https://www2.fin.ucar.edu/ogc/office-general-counsel/office-general-counsel/export-contacts