

## Guide to Foreign Person “Deemed Export” Licenses

Employers that provide technology, software, and other export-controlled items to foreign person employees must comply with U.S. federal regulations – the International Traffic in Arms Regulations (“ITAR”), administered by the U.S. Department of State Directorate of Defense Trade Controls (“DDTC”) and the Export Administration Regulations (“EAR”), which the U.S. Department of Commerce Bureau of Industry and Security (“BIS”) controls – that regulate the export of those items.

That’s because releases of export-controlled items to foreign person employees are deemed to be equivalent to exporting those same commodities to the home country of the foreign person, regardless of where the release or transfer takes place. This concept, commonly referred to as the “deemed export” rule, is most often encountered in the context of an employer releasing export-controlled items, technology, or software to foreign person employees.

Deemed exports, including to company employees, require prior authorization from the agency exercising export control over the commodity being exported. In most cases, authorization will be via a license issued by BIS or DDTC.

We’ve prepared the following guide to assist employers in determining whether a deemed export license is needed for their foreign person employees, and to help them gather the information necessary to complete an export license submission should it be required. Naturally, if you need help deciding whether a deemed export license is required or would like assistance to file a deemed export license request, the Torres Law team is available to help.

### Definition of a “Foreign Person”

The ITAR defines “*Foreign Person*” in §120.16 as:

*“[...] any natural person who is not a lawful permanent resident as defined by 8 U.S.C. 1101(a)(20) or who is not a protected individual as defined by 8 U.S.C. 1324b(a)(3). It also means any foreign corporation, business association, partnership, trust, society or any other entity or group that is not incorporated or organized to do business in the United States, as well as international organizations, foreign governments and any agency or subdivision of foreign governments (e.g., diplomatic missions).”*

Similarly, the EAR defines “*Foreign Person*” in §772 of the EAR as:

*“Any natural person who is not a lawful permanent resident of the United States, citizen of the United States, or any other protected individual as defined by 8 U.S.C. 1324b(a)(3). It also means any corporation, business association, partnership, trust, society or any other entity or group that is not incorporated in the United States or organized to do business in the United*

*States, as well as international organizations, foreign governments and any agency or subdivision of a foreign government (e.g., diplomatic mission).”*

It is common to find the terms “foreign person” and “foreign national” to be used interchangeably when referring to the regulations. The EAR recognizes this by further stipulating in Part 722:

*“Foreign person” is synonymous with “foreign national,” as used in the EAR, and “foreign person” as used in the International Traffic in Arms Regulations (22 CFR 120.16). This definition does not apply to Part 760 of the EAR (Restrictive Trade Practices or Boycotts).”*

## **Documentation Required for a Deemed Export License**

Employers must have the following documentation available when filing deemed export license requests:

- The foreign-person employee’s HR records, including:
  - Job descriptions for all positions held during the employment term and the dates for each position;
  - A list of all direct supervisors during the employment term and the corresponding time period of supervision;
  - Any employment contracts and related documents (*i.e.*, non-disclosure agreements or similar);
  - Training records including the name and type of training, and date(s) training occurred; and,
  - Any other historical information regarding employment that you believe may be pertinent.
- Company Policy documents, including:
  - IT access controls;
  - Physical access controls for facility entry points and internal access points for any areas housing controlled technical data/technology;
  - Export control manuals and any export policies and procedures relating to technical data/technology transfer controls; and,
  - HR policies and procedures relating to due diligence practices for the hiring of non-U.S. persons.
- A facility map indicating the location of the foreign-person employee’s workspace(s). Include photographs of the area(s) where controlled technical data/technology is used or stored and the foreign-person employee’s workspace(s).
- Any export licenses previously granted pertaining to controlled technical data/technology accessed by the foreign employee.

## **Foreign Persons and Related Transfer Controls**

Employers must provide detailed information on foreign-person employees and their access rights:

- List the full legal names and nationalities of foreign person employees. If the foreign person employees hold passports or citizenship authorization to countries other than their country of nationality, list those countries for each employee.

- Will the foreign person employees have access to the manufacturing floor? If so, provide a detailed description of the type of access each foreign person employee would have on a day-to-day basis.
- Will the foreign person employees have access to any servers or other electronic storage locations containing technical data/technology (*i.e.*, technical drawings or manufacturing know-how documents)? If so, explain in detail.
- Will the foreign person employees be able to visually inspect export-controlled products or technical data/technology associated with export-controlled products as part of their job function or by access to area facilities? If so, explain in detail.
- Will the foreign person employees have access to printers where export-controlled drawings or technical information are printed? If so, explain in detail and indicate the printer locations on the facility map.
- List all export-controlled programs, projects, or platforms with which the foreign person employees will have contact.
- Will the foreign person employees have access to offices, conference rooms, or engineering work areas where discussions regarding export-controlled hardware or technical data may take place? If so, explain in detail and indicate the locations on the facility map.
- List any physical security measures in place to monitor unauthorized access to export-controlled technical data/technology, such as keyed locks, electronic card access doors, surveillance cameras, or similar devices. Indicate the location of these physical security measures on the facility map.
- Could the foreign person employees reasonably be segregated from receiving export-controlled hardware or technical data/technology and still perform their job duties? If so, describe how this may be implemented.

### **Information for Export License Submission**

Foreign person employee information required for the deemed export license request:

- Full legal name.
- Date and place of birth.
- All countries of citizenship and residence for the past five years.
- U.S. mailing address and physical address (if different).
- Any non-U.S. residences and mailing addresses.
- Passport/visa/work authorization or other proof of immigration status.
- Most recent I-94 information.
- Social Security Number (if applicable).
- Detailed description of technical data/technology to be released including copies of associated technical documents.
- Employees' salary (to determine the value of an ITAR license).
- The exact physical location(s) where the technology/technical data will be accessed by the foreign nationals.
- If the technical data/technology will be made available to the foreign person employees outside of the U.S., describe in detail the method of access, and list all possible countries where such access may be made available.

- Explain in detail all export-controlled products and programs to which the foreign employees will have access, and what benefit the employer intends to derive from the foreign employees in terms of product improvements, production line benefits, new technical processes, and other services. This information may include, but is not necessarily limited to:
  - i) The products involved;
  - ii) The manufacturing processes involved;
  - iii) Any technical designs, improvements, or other technical services the foreign employees may provide to the product design/production cycle;
  - iv) A description of the physical work environment (manufacturing or assembly area, design team, development or testing laboratory, etc.); and,
  - v) The type of interaction that will be required with internal personnel or third parties that have export-controlled technical data/technology knowledge, or where export-controlled technical data/technology would be offered, discussed, or released.
- Provide a detailed resume for each foreign national including, at a minimum:
  - i) Personal background information including place of birth and country(ies) of citizenship;
  - ii) Educational and vocational information including name and complete address of any college, university, or vocational schools(s) attended and degree or certification obtained, if any; or, if no college, university, or vocational school attended, provide the name and full address of high school, secondary, or technical school attended and degree or certification obtained, if any;
  - iii) Employment history for the last 10 years including employer name and complete address;
  - iv) Military service including dates and place of service, rank attained, and activities performed; and,
  - v) Any additional information the regulatory agency should consider in reviewing the application (*e.g.*, unique technical skills, etc.).
- Company points of contact for the license application.