Guide for the Internal UB Form: USCIS I-129 Deemed Export Attestation

A Deemed Export Attestation (Section 6 of the USCIS I-129 Form) is now required to complete H-1B and O-1 visa applications. Use this guide to assess the responses to the internal UB form for this process. A Deemed Exports FAQ can be found on the H-1B visa section of the International Student and Scholar Services website.

Visa Applicant’s Country of Citizenship or Residence

What if the person needing the visa is from a country identified as a State Sponsor of Terrorism (SST) or as a restricted country?

Citizenship or residence in a country named by the Department of State as a State Sponsor of Terrorism (Cuba, Iran, Sudan, Syria as of 7-28-11) is a red flag: SST. Review the State Department designation for SST status and all applicable OFAC (Treasury) and EAR (Commerce) restrictions in this situation. (Figure 1)

There are other countries to which restrictions (sanctions and embargoes) apply but not designated as a SST. The Country Notes section of the Restricted Party Screening from Visual Compliance will alert for restrictions from among the following lists in relation to the foreign national’s country:

- Countries with restricted entities under EAR Part 746 Embargoes & Other Special Controls and Part 744 Supplement 4 for the Entity List
- ITAR Prohibited Countries
- OFAC Sanctions
- Denied Persons List
  A list of individuals and entities denied export privileges by OFAC (Commerce).

For both SST countries and restricted countries, the conditions under which a foreign national can receive payments or stipends must be reviewed. In most cases payment is allowed but special conditions may apply.

High risk areas of research

Some research areas are inherently high risk in terms of potential deemed export violations. Satellite and space technology are two of these. Other areas where there is an actual or potential military application also require careful review.

1 http://wings.buffalo.edu/intlservices/h1b.html
Access to Controlled Technology/Technical Data

1. Is all the information and technology utilized in the research project or that the visa applicant will be teaching in the public domain? Yes or No

2. Are we are able to and intend to freely publish the results of the research? SUNY Publication Policy Yes or No

3. Are you aware of any restrictions on the applicant as to participation in any aspect of teaching, research or use of technology or items as a researcher or medical resident? SUNY Policy on Foreign Nationals in Research Yes or No

A No to question 1 or 2 or a Yes to 3 is a red flag. It could mean that export controls apply to the research or work, either by consent or de facto. SUNY policy requires that we are able to freely publish research results and that we cannot accept restrictions to access or participation based upon citizenship or country of origin. Adherence to the SUNY Policies ensures that the research remains within the Fundamental Research Exclusion (FRE). Accepting publication restrictions or voluntarily excluding foreign nationals in a particular area of the research per a “handshake agreement” between PI and sponsor violates the FRE.

The FRE, however, does not negate the need to comply with deemed export regulations. At times fundamental research is conducted when controlled data, information or technology is included in some aspect of the project. The controlled material must be secured from foreign nationals via a Technology Control Plan until and unless a license is obtained: Research Foundation Technology Control Plan. The license application would be to the appropriate federal agency to determine whether the foreign national can work with the information or technology.

4. Will the applicant be provided access to any third-party owned technical data or technology that is considered proprietary or confidential to the third-party owner? Yes or No

A Yes answer requires follow-up as to whether the third-party item is subject to export controls. The need to share controlled data or technology is normally detected at the contract negotiation stage but it is possible that in the absence of a funded research agreement a provider could send something controlled to a university without notification. So it is necessary to double check and ask. Moreover, if the provider is not a U.S. university or contractor they may be uninformed about U.S. export control laws. Verification that the third-party material is not controlled is necessary in any case.

5. Will the research involve any crypto-graphical source code that UB is developing or acquiring as a research tool? Yes or No

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2 Public Domain - in libraries, academic papers and journals, shared at conferences or seminars, patentable.
3 http://www.research.buffalo.edu/ovpr/policies/publica.cfm
In general, commercial encryption is controlled by EAR and military encryption by ITAR. Encryption itself is a kind of control, like non-publication or barring foreign nationals. However, encryption controls are complex and a Yes answer merits consultation with BIS-Commerce (EAR) and/or DDTC-State (ITAR) for accurate determination as to whether controls apply.

6. Will the applicant be provided access to any technology or technical information on the Commerce Control List\(^4\) in the Export Administration Regulations (EAR) of the U.S. Department of Commerce? Yes or No  

An overview of Commerce Department controls.

7. Will the applicant have access to any “defense articles” that are currently listed on the U.S. Department of State Munitions List\(^5\) (USML on International Traffic in Arms Regulations - ITAR)? Yes or No  

An introduction to this list.

Follow-up is always required for a Yes answer to question 6 or 7. See Figure 2.

<table>
<thead>
<tr>
<th>Restricted Party Screening (RPS) – to be completed by OVPR or other designated person.</th>
<th>Date of Screening</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Is the visa applicant identified on any federal government restricted party list? If so, specify.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Name / title / office of person who conducted RPS if not Sponsored Projects Services:</td>
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</tbody>
</table>

Presence on a restricted party list, federal or other, is a serious matter and the visa process cannot proceed until and unless this issue is fully investigated and the matter is resolved.

When conducting Restricted Party Screening, the country of citizenship (and residence if different) must be entered into the exact search. This brings out the Country Notes section of the screening. Country Notes display which restrictions apply to the applicant’s country. A red flag occurs when there is proximity between the restriction and the foreign national’s scope of work – for example, nuclear physics with someone from Pakistan or India. However, there should be no deemed export issues if determined by the preceding review that no controls apply to any information or technology used by the foreign national.

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\(^4\) [http://www.gpo.gov/bis/ear/ear_data.html](http://www.gpo.gov/bis/ear/ear_data.html)  
\(^5\) [http://www.access.gpo.gov/nara/cfr/waisidx_01/22cfr121_01.html](http://www.access.gpo.gov/nara/cfr/waisidx_01/22cfr121_01.html)