

# Hiring Certain Foreign Nationals May Trigger Violations of Federal Export-Control Regulations

by Sonseere H. Goldenberg, Esq. - Thursday, March 05, 2020



No Human Resources manager would knowingly hire someone engaged in international espionage, sabotage or illegal activities. Yet, simply hiring a foreign national H-1B or Student who hails from one of the countries on the government's list can indirectly have that effect.

The foreign national's country of citizenship may subject the company to severe fines and penalties under export laws and regulations if the employee has access to sensitive or controlled technology. An employer bringing in an IT employee to work only in the U.S. may violate export regulations simply by releasing access to restricted software or technology to the employee.

Employers may logically assume that if all the work is done within the U.S. and no product, service, or technology is exported from the U.S., that compliance with export-control laws is not necessary. However, a broad range of federal regulations governs the export of controlled technology, with the U.S. Departments of Commerce, State, and Defense all having jurisdiction in such matters to some degree. These regulations could prevent you from placing foreign nationals from certain countries in jobs having access to controlled technology, even though these workers have valid work authorization.

## What kind of technology is covered?

The relevant regulations are the [International Traffic in Arms Regulations \(ITAR\)](#) and the [Export Administration Regulations \(EAR\)](#). Though these regulations cover defense-related technology, companies may use technology developed and used for national defense in a wide range of civilian applications. This technology is referred to as dual-use technology. Unfortunately,

companies using this type of technology for civilian applications may be required to obtain an export license for each foreign national having access to the information.

A “deemed export,” or release, occurs when a person working in the U.S. for a U.S. company has access to controlled technology. A business does not usually have to obtain a license for “U.S. Persons.” A U.S. Person is a U.S. citizen or national, lawful permanent resident (someone holding a green card), asylee, refugee, and temporary residents under specific amnesty provisions of the Immigration Reform and Control Act of 1986 (IRCA). However, many other foreign-national applicants with valid employment authorization may not be able to work with, or on, certain technology. Foreign nationals with valid employment authorization include H-1B employees, those waiting to receive green cards, Deferred Action for Childhood Arrivals (DACA) holders, students and OPT students, and employees from designated countries for which the government has provided Temporary Protected Status (TPS).

## **What about screening applicants up-front and anti-discrimination laws?**

Employers must develop an intake and interview procedure that does not run afoul of national-origin discrimination laws. This is no easy task because the employer’s offending practice does not have to have discriminatory intent. Employers can either:

- Hire applicants, complete the I-9 process, and then determine if an export control license is necessary; or
- Screen all applicants in a nondiscriminatory manner before making an offer for a position that may require an export control license.

For most employers, the second option works best. However, only an individual who has been properly trained in your export control policies and procedures should screen applicants. The export control personnel must inform the job applicants that he or she is asking these questions solely for ITAR/EAR purposes and treat all job applicants for this position in the same manner. Employers should clearly document and follow their hiring, screening, and verification policies.

## **Bottom Line**

Any employer hiring foreign workers may be both criminally liable (with possible fines in the millions of dollars and up to 20 years in prison) and civilly liable (with fines of a minimum of \$250,000 for the release of controlled technology to nationals of certain countries). Whether a company needs a license for an employee depends upon the technology and the employee’s nationality.

If your company hires foreign workers, be sure to review these issues with legal counsel experienced in such matters.

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