

Licensing of Foreign Persons Employed by a U.S. Person – UPDATED

The Directorate of Defense Trade Controls (DDTC) has a long-standing policy to authorize the employment of a foreign person by a U.S. person on a DSP-5 through an exception to the requirement for a technical assistance agreement (TAA) in accordance with 22 CFR 124.1(a). In certain instances, DDTC required a TAA in addition to the DSP-5 to authorize the U.S. person to transfer certain levels of technical data and defense services. After close review, DDTC has determined this “double” licensing to be redundant. Therefore, all requests for the licensing of a foreign person employed by a U.S. person must be made through the use of a DSP-5 to cover all levels of requested technical data and defense services.

The DSP-5 authorizes the U.S. person to transfer technical data and perform limited defense services to the employee(s) on their products. The DSP-5 authorizes the foreign person to perform defense services on behalf of the employing U.S. person. The foreign person employed by a U.S. person does not have to reside in the U.S. to be considered an employee but may reside and perform the job duties outside the U.S. If the foreign person is a full time regular employee, directly paid, insured, hired/fired and/or promoted exclusively by the U.S. person the foreign person is “employed” by the U.S. person. The employing U.S. person is liable to ensure the employee’s compliance with U.S. export laws regardless of where the employee currently resides

Use of the DSP-5 permits DDTC to identify all requests for employment, determine technical areas in which the individual is employed, standardize application documentation, and, to the extent possible, standardize conditions of approval. In addition, standardization should assist industry in monitoring its foreign person employees.

For situations involving the transfer of classified technical data, a DSP-85 must be obtained in lieu of the DSP-5. The DSP-85 application package will require all the same information as the DSP-5 plus an executed DSP-83 required for the transmission of classified information.

Requests for a foreign person employee involving the transfer of manufacturing know-how related to a Significant Military Equipment (SME) defense article will require the execution of a DSP-83 by the foreign person and the U.S. person.

For export control purposes, the foreign person, once authorized by a DSP-5, is considered and treated as an employee of the U.S. person who obtained the authorization. As such, the foreign person employee may have contact with other entities, U.S. or foreign, so long as the presence of the foreign person employee is identified to the other party:

(1) If the foreign person employee will have direct interaction with another U.S. person, it is the employing party’s responsibility to notify the other U.S. person of the

foreign person's participation. The other U.S. person will be responsible for obtaining all required authorizations (e.g., tech data DSP-5) in order to transfer their technical data to the foreign person prior to interaction.

(2) If the foreign person employee will have direct interaction with another foreign person, the foreign person employee's country/countries of nationality must be identified in the TAA or MLA the employing U.S. person has with the foreign party but they do not have to be a signatory to the agreement.

A DSP-5 approved for foreign person employment will be valid only for a period of four years or until expiration of their authorized stay from Department of Homeland Security, U.S. Citizenship and Immigration Services, whichever is shorter. If the foreign person employee resides outside the U.S., the license will be valid for the standard validity of a license. In instances when the authorized stay is longer than four years, or the employee's employment continues beyond the approved validity, the applicant must apply for a renewal of the license.

Instructions for Completing a DSP-5 License Application

When completing a DSP-5 license application for foreign person employment, particular attention should be paid to satisfactory completion of Blocks 3, 10, 14, 18, 20 and 21. Failure to provide complete and sufficient information in these blocks, or to explain adequately why the information is not available, may result in the request being Returned Without Action. Guidance for completion of these blocks in license applications for employment of foreign persons follows:

Block 3. Country of Ultimate Destination. State in this block the foreign person's country/countries of nationality. The country/countries should match the individual's passport that was used to secure the U.S. work authorization, if required.

Block 10. Commodity. Describe the specific details of the USML technical data that will be provided by the applicant to the foreign person employee.

Block 14. Foreign End-User. State the complete address in the country that was entered in Block 3 where the individual maintains a residence or intends to return. If the address of the country in this block does not match the country identified in Block 3, an explanation should be provided. Also, the address should be complete; DDTC is unable to accept post office boxes or other general/imprecise addresses without explanation or justification.

Block 18. Name and Address of Foreign Intermediate Foreign Consignee. If the individual is a national of any country other than that stated in Block 3, identify in this block the country/countries and, if the individual maintains residency in the country or

Guidance as of 9/19/08

intends to return to that country, provide a complete address. DDTC is unable to accept post office boxes or other general/imprecise addresses without explanation or justification. If, at the time of this submission, the foreign national has not yet entered the United States, please so indicate.

Block 20. Specific Purpose for Which the Material is Required, Including Specific Program/End Use. State in this block: “For employment of a foreign person who will require access to technical data related to [name of program/commodity].”

Block 21. Name and Address of Consignor in the United States. If the foreign person has already entered the U.S., state in this block the complete address of the U.S. residence. DDTC is unable to accept post office boxes or other general/imprecise addresses. If, at the time of this submission, the foreign person has not yet entered the U.S., please so indicate in the letter of explanation.

Supporting Documentation Required for DSP-5s

All applications for the employment of a foreign person must include the following documentation:

- 1) Proposed DSP-5 license application
- 2) Cover letter explaining the requirement and scope of employment
- 3) Copy of the individual’s passport and work authorization Department of Homeland Security, U.S. Citizenship and Immigration Services, (when residing in the U.S.)
- 4) Resume
- 5) Job Description
- 6) Detailed description of technical data to be released and copies of technical data as necessary
- 7) Non-Disclosure Agreement (NDA) (see attached)
- 8) Technology Control Plan (TCP) (see sample at Tab 10 to Appendix A of the “Guidelines for Preparing Agreements”)
- 9) Executed DSP-83 for DSP-85 applications and applications involving the transfer of SME manufacturing know-how

Attachments:

Required Non-Disclosure Agreement (NDA) – Access to ITAR-Controlled Defense Articles by Foreign Person Employees

REQUIRED – Non-Disclosure Agreement (NDA)

Below is the NDA that is required to be signed by all foreign person employees. This NDA is intended to address ITAR requirements only. Any intellectual property or business arrangements required by the employing U.S. person must be the subject of a separate NDA.

Non-Disclosure Agreement – Access to ITAR-Controlled Defense Articles by Foreign Person Employees

I, [name of foreign person], acknowledge and understand that any technical data related to a defense article covered by the U.S. Munitions List to which I have access per authorization by the U.S. Department of State, Directorate of Defense Trade Controls (DDTC) under [state relevant export license/authorization number**] and disclosed to me in my employment by [name of U.S. person] is subject to the export controls of the International Traffic in Arms Regulations (ITAR) (Title 22, Code of Federal Regulations, Parts 120-130), particularly the 22 CFR 124.8 clauses.

22 CFR 124.8(1) “This agreement shall not enter into force, and shall not be amended or extended, without the prior written approval of the Department of State of the U.S. Government.”

22 CFR 124.8(2) “This agreement is subject to all United States laws and regulations relating to exports and to all administrative acts of the U.S. Government pursuant to such laws and regulations.”

22 CFR 124.8(3) “The parties to this agreement agree that the obligations contained in this agreement shall not affect the performance of any obligations created by prior contracts or subcontracts which the parties may have individually or collectively with the U.S. Government.”

22 CFR 124.8(4) “No liability will be incurred by or attributed to the U.S. Government in connection with any possible infringement or privately owned patent or proprietary rights, either domestic or foreign, by reason of the U.S. Government’s approval of this agreement.”

22 CFR 124.8(5) “The technical data or defense services exported from the United States in furtherance of this agreement and any defense article which may be produced or manufactured from such technical data or defense service may not be transferred to a person in a third country or to a national of a third country except as specifically authorized in this agreement unless the prior written approval of the Department of State has been obtained.”

22 CFR 124.8(6) “All provisions in this agreement which refer to the United States Government and the Department of State will remain binding on the parties after the termination of the agreement.”

Guidance as of 9/19/08

During my employment with **[name of U.S. person]**, I will be considered and treated as a U.S. person for the purposes of the ITAR. As such, I am authorized to interact and participate in discussions with other U.S. and foreign persons, and disclose technical data as necessary, while performing my job duties covered under DDTC **[case number]**. It will be the responsibility of my employer, **[name of U.S. person]**, to notify other U.S. and foreign persons of my status as a foreign national employee prior to my interaction.

I also acknowledge and understand that should I inadvertently receive technical data or defense articles for which I have not been granted access authorization by DDTC, or if I inadvertently export technical data or defense articles received during my employment to an unauthorized recipient, I will report such unauthorized transfer and acknowledge the transfer to be a violation of U.S. Government regulations.

In furtherance of the above, I hereby certify that all defense articles, including related technical data, to which I have access will not be used for any purpose other than that authorized by DDTC and will not be further exported, transferred, disclosed via any means (e.g., oral disclosure, electronic, visual access, facsimile message, telephone) whether in its original form, modified, or incorporated in any other form, to any other foreign person or any foreign country without the prior written approval of DDTC.

Signature – Foreign Person (Employee)

Date

Signature – U.S Person (Employer)

Date

Please leave sufficient space to enter the DDTC case number once approval is received.