



September 10, 2010

Mr. Charles Shotwell
Office of Defense Trade Controls Policy
U.S. Department of State
SA-1, 12th Floor
Washington, DC 20522-0112

Docket Number: 2010-19833

Regarding: Regulatory Change - Dual Nationals and Third-Country Nationals
Employed by End-Users

Dear Mr. Shotwell:

Thank you for providing the opportunity for industry to comment on the proposed regulatory changes for dual and third-country nationals. The Aerospace Industries Association (AIA) and our member companies share the Obama Administration's goal of more appropriate treatment of dual and third-country nationals and greatly appreciate the time and efforts deployed by DDTC to address this longstanding problem. However concerns and questions have been raised by our members and we believe further clarification and changes are needed to the proposed regulations in order to achieve the desired objective.

Employee Definition:

Sec. 126.18(c) does not address what constitutes a "bona fide, regular employee." The use of undefined terms such as "bona fide" and "regular employee" appears to exclude personnel previously described as contract employees, who are working full time at the direction of the foreign consignee or end user. This would compel companies to separately license individuals, thus increasing the licensing burden without commensurate enhancement to national security.

This exclusion also contradicts DDTC's current practice of permitting retransfers to contract employees, conditioned upon the foreign signatory agreeing to take legal responsibility for the employee's actions and prohibiting release to the parent employer. Indeed, the Guidelines for Preparing Electronic Agreements expressly recognize the prevalence of contract employee use by foreign end users by providing a mechanism for obtaining coverage of these employees within the scope of the agreement. See Guideline for Preparing Electronic Agreements (Revision 2.0), Section 3.9.

To resolve this issue AIA recommends replacing the phrase “. . . bona fide, regular employees, directly employed by. . . ” with the phrase “. . . permanent and temporary employees of (including contract employees).”

Substantive Contacts:

The screening process stipulated by 126.18(c)(2) imposes a significant due diligence burden on foreign companies. It also fails to take into account the privacy laws in foreign countries and prohibitions re requesting, collecting, using and disclosing data about employees’ substantive contacts with proscribed countries or persons outside of the workplace. The final rule should embody clarification of the “substantive contact” as limited to specific criteria associated with receipt of ITAR controlled technical data or defense services.

Many AIA member companies, and members of our sister aerospace organizations in Europe, are engaged in legitimate commercial trade with countries listed in Part 126.1 of the ITAR. Without guidance as to what constitutes due diligence or suggested guidance for screening for substantive contact, it is unclear whether all company employees who travel/speak to people from 126.1 countries, and have both a commercial trade and defense trade portfolio, would be considered a higher risk of diversion. Further guidance on the due diligence standards for screening for substantive contact is suggested, either within the final rule, or as published website guidance.

Additionally, from proposed Section 126.18(c)(2), do “agents and nationals of such countries” include family, friends and relatives in 126.1 countries? Further clarification also needs to be given to what constitutes “continued allegiance.” Is continued allegiance defined by citizenship(s) held? Certain activities? For example, to demonstrate that an employee no longer has allegiance to his country of origin that is proscribed in 126.1, must he/she renounce such citizenship to demonstrate severed allegiance to such country?

Screening records mandated in the proposed regulations are to be made available to DDTC or its agents upon request. As stated earlier, sharing this information with DDTC may be inconsistent with a country’s privacy and human rights laws. It is highly likely that obtaining and disseminating this information to the U.S. government could subject foreign companies to legal action in their own domain.

Existing Bi-Lateral Agreements:

Negotiated agreements with Canada, Australia, The Netherlands, and JSF partner countries codified with the diplomatic Exchange of Letters need to remain in effect within the ITAR. The current proposal is unclear whether these agreements would continue.

Impact on Current Authorizations:

AIA recommends the insertion of a statement “grandfathering” existing approved authorizations that include approval of the clause in 124.16. The final rule should also

include a clause that State Department will use its discretion to apply the rule change by operation of law to all currently approved or pending authorization without further amendment requirement by the U.S. applicant.

Defense Services Definition:

Section 126.18(a) appears to exempt only transfers of ITAR-controlled defense articles and technical data, but not defense services. AIA recommends adding the term “defense services” to further clarify and remove doubt that the exemption applies to hardware, technical data and defense services. Also, the Department should clarify whether this exemption applies equally to classified and unclassified technical data.

Re-Transfer of Defense Articles:

The proposed rule states that transfer of defense articles must take place completely “within the physical territories of the country where the end-user is located or the consignee operates...” The final rule should also clarify that re-transfers back to the United States are permissible without any further DTC authorization.

Thank you for your consideration of our comments. AIA shares the Obama Administration’s goal of appropriate treatment of dual and third country nationals. AIA looks forward to continuing an open and productive dialogue.

Best regards,

A handwritten signature in black ink, appearing to read "Remy Nathan". The signature is fluid and cursive, with the first name "Remy" and last name "Nathan" clearly distinguishable.

Remy Nathan

Assistant Vice President, International Affairs
Aerospace Industries Association