High-Tech Industries Face New Immigration and Visa Rules

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The U.S. Government's focus on security priorities and the creation of three separate immigration agencies under the new Department of Homeland Security presents new pitfalls for U.S. companies that employ non-U.S. persons in the United States, host visiting non-U.S. personnel in the United States for short-term assignments, or merely attempt to negotiate with non-U.S. persons visiting the United States. As a result of their never-ending search for talent, high-tech industries have become the largest employers of non-U.S. professionals in the United States, and are most likely to be affected by these changes.

Export Controls Apply to Non-U.S. Persons in the United States

U.S. managers must consider export control regulations before disclosing technical information to non-U.S. scientists or engineers. For national security and foreign policy reasons, the U.S. federal government restricts the export of certain information, products and services. Under a long-standing policy known as the "Deemed Export Rule ," disclosures of technology to non-U.S. persons in the United States are subject to the same export restrictions and licensing requirements as would apply if the technology were actually sent to the person's home country. The Deemed Export Rule does not apply to U.S. citizens, permanent resident aliens ("green card" holders), and persons who have asylum status.

Export licensing requirements do not apply to all technologies accessed by non-U.S. persons. The impact of the Deemed Export Rule varies according to the citizenship of the non-U.S. person and the type of technology in question. Employers must determine whether the technologies exposed to a non-U.S. person will implicate any federal export control regulations. Deemed export issues may be resolved by implementing internal restrictions on the dissemination of technical data or by obtaining an export license authorizing the proposed disclosure.

The Technology Alert List Indicates Areas of Special Concern

The U.S. Department of State (DOS) now requires that visa applicants be checked against the "Technology Alert List ," or "TAL." The TAL is a watch list of scientific/technology professions that present heightened security risks. When an individual applies for a visa, he or she may be asked questions on educational background, work history and exposure to security risk items. The DOS

will then check the information against the TAL to determine whether a more comprehensive background investigation is warranted.

If such an investigation is required, the DOS will then run checks in various CIA, FBI and Department of Homeland Security databases. This process can result in significant delays, lasting 60 days or more prior to visa issuance. If a visa application is initially denied on security grounds, it is extremely difficult to obtain a reversal.

Mandatory Interviews Slow Visa Issuance Processing

Until recently, visa applicants from many countries could obtain visas to enter the United States without personal interviews at U.S. consulates or embassies in their home countries.

As of August 1, 2003, the DOS began to interview, and fingerprint, all visa applicants . While this new security system is intended to inhibit the movement of terrorists, it will also cause extensive delays in the processing of all visa applications. So far, the DOS has indicated that there has been no additional funding to implement this more intensive "all-interview" system.

Companies sending an employee with a U.S. work visa outside the United States on business should ensure that the employee's visa is current, to enable him or her to reenter the United States. If the visa is expired, the visa renewal process may delay the employee's return to the United States and travel may not be advisable.

New Requirements Affect Business Travelers Who Travel to the United States without Visas

The DOS has announced that beginning October 1, 2003, travelers using the Visa Waiver Program must have a machine-readable passport . Any traveler without a machine-readable passport will need to obtain a visa before coming to the United States.

Under the Visa Waiver Program, citizens of certain countries can enter the United States for business or tourism for 90 days without a visa. The countries are (in alphabetical order): Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom.

This new requirement, together with the new mandatory visa interview system, will cause significant delays in visa issuance, as many individuals who previously traveled without a visa may now need one if they cannot first obtain a machine readable passport.

Transit Without Visa Program Suspended

Effective August 2, 2003, the Department of Homeland Security (DHS) announced the suspension of the Transit Without Visa (TWOV) Program . The TWOV program and a second related program permitted persons who would ordinarily need a visa to enter the United States to transit through the United States without a visa if they were en route to another non-U.S. destination. Under these programs an international passenger could transit through one or two U.S. airports en route to their non-U.S. destination. According to a Department of State Cable, in 2002 approximately 380,000

persons arrived in the United States without a visa under the TWOV program. Clearly, the United States is a major point of transit for employees of international companies who may be visiting one or multiple non-U.S. sites without stopping in the United States except to change planes.

New System Will Track International Visitors

The DHS has announced the new U.S. Visitor and Immigration Status Indication Technology ("US VISIT") system , which will track persons entering and departing the United States. US VISIT is scheduled to be implemented at all international airports and seaports in the United States by the end of 2003. Each entrant will be photographed, fingerprinted, and checked against lists of persons who should be denied entry for terrorist connections, criminal violations, or past visa violations. Upon departure, this information will be verified.

The U.S. Government has stated that these procedures will not significantly increase delays in entering the country. However, this may be unrealistic, since the DHS Immigration Inspection staff is already short-staffed, and the support technology and logistics have not yet been worked out.

Technology companies relying on visiting non-U.S. persons must consider these security requirements, which may require new procedures, regulatory review, and time.

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