

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 access to technical data by a foreign person employee of 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 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 responsibilities outside the U.S. If the foreign person is a regular employee (i.e., paid, insured, hired/fired and/or promoted exclusively by the U.S. person) and not seconded, the foreign person is considered to be “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. DDTC recommends that only one DSP-5 be obtained for each foreign person employee to cover all activities.

A foreign person employee access authorization must be obtained for all foreign persons who require access to ITAR-controlled defense articles and/or technical data in the performance of their job responsibilities.¹ If a foreign person employee does not require access to ITAR-controlled defense articles and/or technical data, the employing company must ensure internal controls are in place to prevent unauthorized access. If a foreign person has access to ITAR-controlled defense articles and/or technical data without DDTC authorization, that is a violation and must be reported in accordance with 22 CFR 127.12.

Use of the DSP-5 permits DDTC to identify all requests for access, determine technical areas in which the individual is employed, standardize application documentation,

¹The ITAR imposes a license requirement for the export of U.S. defense articles and defense services to foreign persons. The ITAR does not, however, impose requirements on U.S. companies concerning the recruitment, selection, employment, promotion or retention of a foreign person. Federal law prohibits discrimination in hiring, firing, or recruitment/referral for a fee based on an individual’s citizenship status or national origin. See Section 274B of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b. Unless otherwise required to comply with law, regulation, executive order, government contract, or determination by the Attorney General of the United States, discrimination based on an individual’s citizenship status is unlawful. The Office of Special Counsel for Immigration-Related Unfair Employment Practices (Office of Special Counsel) in the Civil Rights Division of the United States Department of Justice enforces Section 274B of the INA. The Office of Special Counsel, located in Washington, D.C., has issued public guidance relating to non-discriminatory practices when complying with ITAR. For additional guidance, please contact the Office of Special Counsel at oscrcr@usdoj.gov, its employer hotline at 1-800-255-8155, or visit its website at www.justice.gov/crt/about/osc.

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 and requires the same documentation. As required for the transfer of classified, a DSP-83 must be executed by the applicant and the foreign person employee. DDTC may require the foreign government to execute the DSP-83 on a case-by-case basis. The executed DSP-83 does not have to accompany the license application. For foreign person employment authorizations, the Managing Director is exercising the authority under 22 CFR 126.3 to waive the requirement for the executed DSP-83 to be submitted prior to license issuance (22 CFR 123.10). Once executed, the applicant must maintain the original DSP-83 pursuant to 22 CFR 122.5.

The foreign person employee must execute a Non-Disclosure Agreement (NDA) in the attached format. The DDTC case number must be entered on the NDA prior to execution. The executed NDA must be maintained by the applicant pursuant to 22 CFR 122.5 and is not required for submission with the foreign person employment application.

The applicant must have in place internal company procedures to control the release of technical data to foreign persons and mechanisms in accordance with the conditions of approval and to prevent unauthorized access to defense articles and/or technical data. This document must be maintained by the applicant pursuant to 22 CFR 122.5 and is not required for submission with the foreign person employment application.

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. applicant. The executed DSP-83 does not have to accompany the license application. The applicant must maintain the executed DSP-83 per 22 CFR 122.5. The executed NDA is not an acceptable substitute for a DSP-83 when required. For foreign person employment authorizations, the Managing Director is exercising the authority under 22 CFR 126.3 to waive the requirement for the executed DSP-83 to be submitted prior to license issuance (22 CFR 123.10).

The foreign person, once authorized by a DSP-5/DSP-85, no longer requires additional authorization to work in the scope of the approved DSP-5/DSP-85 and 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. In all situations, it is the responsibility of the employing company to notify the other entities of the foreign person's participation.

- (1) If the foreign person employee will have direct interaction with and receive technical data from another U.S. person, the responsibility for obtaining all

- required authorizations may be taken by either the employing party or another U.S. person, as follows.
- a. The employing party may take responsibility for obtaining all required permissions from the other U.S. party for the transfer of the other U.S. party's technical data to, and have direct interaction with, the foreign employee. The employing company must certify that the technical data received is within the scope of the employing authorization regardless of source.
 - b. The other U.S. party may accept responsibility for obtaining all required authorizations in order to transfer their technical data to, and have direct interaction with the foreign person employee.
- (2) When the employing company and the other U.S. person are both signatories to the same ITAR 124 agreement no further authorization is required so long as the foreign person employee's participation is identified in the agreement. The foreign person employee must not be called out as a separate signatory or identified by name.
- (3) 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 agreement the employing U.S. person has with the foreign party; they do not have to be a signatory to the agreement.

A DSP-5/DSP-85 approved for foreign person employee access 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. This license will remain valid if the foreign person's work authorization has been renewed, or has been submitted for renewal, and there is no lapse in authorization. If the foreign person employee resides outside the U.S., the license will be valid for the standard validity of a license or upon termination of the foreign person's employment, whichever is shorter.

In instances when the authorized stay is longer than four years, there has been a lapse in authorization, or the employee's employment continues beyond the approved validity, the applicant must apply for a renewal of the license no later than 60 days prior to expiration of this license.

Instructions for Completing a DSP-5/DSP-85 License Application

When completing a DSP-5/DSP-85 license application for foreign person employee access, particular attention should be paid to satisfactory completion of the following blocks. 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 3/4. 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 used to secure the U.S. work authorization, if required.

Block 10/11. Commodity. Describe the specific details of the USML technical data that will be provided by the applicant to the foreign person employee.

Block 14/17. 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 18/19. 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 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 20/21. Specific Purpose for Which the Material is Required, Including Specific Program/End Use. State in this block: "For access by a foreign person employee who will require access to technical data related to [name of program/commodity]."

Block 21/20. 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 Applications

All applications for the access by a foreign person employee must include the following required documentation:

- 1) Proposed DSP-5/DSP-85 license application
- 2) Cover letter explaining the requirement and scope of access
- 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.)

Guidance as of 7/18/12

- 4) Resume
- 5) Job Description
- 6) Detailed description of technical data to be released and copies of technical data as necessary

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.

1. This authorization 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.

2. This authorization 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.

3. The parties to this authorization agree that the obligations contained in this authorization 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.

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 authorization.

5. The technical data or defense services exported from the United States in furtherance of this authorization 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 authorization unless the prior written approval of the Department of State has been obtained.

6. All provisions in this authorization which refer to the United States Government and the Department of State will remain binding on the parties after the termination of the authorization.

During my employment with [name of U.S. person], I am authorized to interact and participate in discussions with other U.S. and foreign person, 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.