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**United States Department of State
and the Broadcasting Board of Governors
Office of Inspector General**

Review of Export Controls for Foreign Persons Employed at Companies and Universities

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SUMMARY

The September 11, 2001, attacks in the United States put the nation on guard against terrorist activities. One focus in the aftermath is on transfers of militarily sensitive technology worldwide, particularly diversions to countries and entities of concern. The Department of State (Department) registers and licenses U.S. companies and universities to participate in the export of defense articles and defense services on the U. S. Munitions List (USML). The Department's Bureau of Political-Military Affairs, Directorate of Defense Trade Controls (PM/DDTC) approves licenses for companies and universities that wish to grant foreign person visitors, employees, and researchers access to articles and services on the USML. The release of technical data subject to the International Traffic in Arms Regulation (ITAR)¹ to a foreign person is considered to be an export to the country or countries of which the foreign person is a national.²

Before a foreign person is allowed to work with USML technology or defense services, three actions are required. First, the foreign person must obtain a visa issued by the Bureau of Consular Affairs, and second, the company or university that wants to employ the foreign person must obtain an export license from PM/DDTC. Finally, when the foreign person enters the United States with a valid visa, the Department of Homeland Security must issue the foreign person an I-94 work permit. Overall, PM/DDTC's work is supported by outside agencies, including the Departments of Commerce, Defense, and Homeland Security. (For more background information, see Appendix A.)

In this report, the Office of Inspector General (OIG) addresses PM/DDTC's implementation of the ITAR pertaining to foreign persons in the United States and their access to items on the USML. OIG's objectives were to review: (1) the export control coordination that takes place for foreign persons involving PM/DDTC and the Department's Bureaus of Consular Affairs and Nonproliferation

¹ 22 CFR 120-130

² An export is defined in ITAR, 22 CFR 120.17. ITAR, Section 120.16 defines a foreign person to mean any natural person who is not a lawful permanent resident as defined by 8 U.S.C. 1101(a)(20). This report also uses the terms foreign visitor, employee, or researcher in the export control company.

and external agencies, including the Departments of Defense and Homeland Security; (2) PM/DDTC's implementation of export control laws and regulations, which are designed to ensure that companies and universities comply with export control requirements for foreign persons; and (3) company and university compliance with ITAR requirements for foreign persons.

OIG found that coordination takes place between PM/DDTC and other Department bureaus and other government agencies that support export controls over foreign persons employed by U.S. companies and universities. However, PM/DDTC needs to implement fully the planned improvements to its information management systems in support of the export control process. Consequently, PM/DDTC is not yet able to identify all foreign persons employed in the U.S. defense trade. OIG also found opportunities for improvements in PM/DDTC's export control outreach and compliance audit programs.

OIG found that the seven companies and one university it visited had established export control compliance programs, and most export control documents were up-to-date. However, 23 out of 26 companies OIG contacted had problems providing an accurate number of foreign persons employed. Additionally, OIG's review found that one company was allowing foreign persons to continue working after their visa had expired because their Department of Homeland Security I-94 work authorization and PM/DDTC export license had not expired.

OIG recommended that PM/DDTC :

- implement the improvements to its information management systems to ensure that foreign persons employed in the U.S. defense trade can be accurately identified;
- coordinate outreach initiatives with the Department of Commerce and increase the number of joint export control training sessions;
- develop PM/DDTC export control compliance policies and procedures; and
- implement export licensing policy and revisions to licensing information system guidelines, ensuring that the export license does not postdate the visa.

PM/DDTC provided comments on the report, which are included as Appendix B. A synopsis of PM/DDTC's response and OIG's analysis is provided after each recommendation in the report. PM/DDTC noted that OIG did a good job summarizing the numerous and complicated issues concerning export controls for foreign persons employed at companies and universities and agreed, or agreed in principle, with all of OIG's recommendations. PM/DDTC is implementing changes and continuing to modify its electronic licensing system to accurately identify foreign

persons, and it plans to continue working on educating the export community about defense trade controls as they relate to foreign national employment in the United States. PM/DDTC also provided technical revisions, which are incorporated throughout the report.

PURPOSE, SCOPE, AND METHODOLOGY

Section 1402 of the National Defense Authorization Act for FY 2000,³ Annual Report of Transfers of Militarily Sensitive Technology to Countries and Entities of Concern, requires the Inspectors General of the Departments of Commerce, Defense (DOD), Energy (DOE), and State to audit their respective agencies' adherence to U.S. government policies and procedures for the export of technologies and technical information to countries and entities of concern.⁴ This year's interagency review team consisted of OIG staff from the Department, Commerce, DOD, DOE, Department of Homeland Security (DHS) and the Central Intelligence Agency. In support of interagency review objectives, each OIG reviewed its agency-specific laws, policies, procedures, and export controls used in preventing any foreign persons in the United States from having unauthorized access to export-controlled technical data and services. Each issued its own agency report, and each contributed to an interagency report.

The audit work was performed throughout the U.S. defense export community. OIG interviewed officials and reviewed documents at PM/DDTC, including the Offices of Management, Policy, Licensing, and Compliance; the Department's Bureaus of Consular Affairs (CA), Economic and Business Affairs, and Nonproliferation (NP); other government agencies, including DHS; and selected companies and a university participating in the U.S. defense trade. OIG conducted site visits at seven companies (U.S. and foreign-owned) and one university to assess their practices for compliance with ITAR and their controls over foreign visitors, employees, and researchers. OIG selected eight sites from lists of 140 U.S. and foreign-owned companies and universities registered with PM/DDTC and identified as having large, medium, or small numbers of ITAR-licensed foreign employees or researchers. Selected documents OIG reviewed included visas and passports of foreign employees and researchers and company export licenses, technology control plans, and nondisclosure agreements. OIG's review of company and

³ Pub. L. No. 106-65

⁴ 22 U.S.C. 2778 note (2004). This report is the fifth in a series of mandated reviews scheduled for FYs 2000-07.

university export control compliance programs and employee documentation was not a certification of ITAR compliance, but an assessment of exporter practices used in an ITAR compliance program.

OIG performed the review from July 2003 to January 2004 in accordance with quality standards for inspections.

PREVIOUS OIG REPORTS

In March 2000, the interagency OIG team and each OIG issued reports on export licensing for foreign nationals from countries and entities of concern.⁵ OIG's review found that PM/DDTC did not systematically track foreign nationals that were listed on export licenses, nor could they provide a universe of foreign nationals licensed by their office. PM/DDTC's monitoring of ITAR-controlled commodities relied heavily on self-monitoring by U.S. contractors, supplemented by a few selected PM/DDTC domestic compliance reviews. OIG recommended that PM/DDTC take steps to improve its oversight ability with such measures as database improvements and more domestic compliance reviews.

⁵*Department of State Controls Over the Transfer of Military Sensitive Technologies to Foreign Nationals From Countries and Entities of Concern* (Report No. 00-CI-008, Mar. 2000) and *Interagency Review of the Export Licensing Process for Foreign National Visitors* (Report No. D-2000-109, Mar. 2000).

FINDINGS

ADEQUATE GOVERNMENT AGENCY COORDINATION TAKES PLACE

OIG assessed the coordination that takes place between PM/DDTC and CA and NP and with such external agencies as DOD and DHS and found that adequate coordination takes place among them. This coordination was often indirect; for example, CA's visa process and NP's review of export licenses are independent processes that support PM/DDTC. In addition, DOD coordinates export licenses and compliance cases, and DHS is an integral part of the ITAR compliance program.

PM/DDTC and the Bureau of Consular Affairs

The Bureau of Consular Affairs (CA) is responsible for issuing U.S. visas that allow foreign persons entry into the United States. According to CA officials, the visa process serves as the first line of defense against unauthorized entry and supports a major component of PM/DDTC's export controls; it halts the unauthorized access of foreign persons to ITAR-controlled technical data and defense services when it denies their entry into the United States.

Foreign Person Work Visas

The CA visa process includes eight categories of work visas, and OIG found that foreign persons employed in the U.S. defense trade primarily use four of them: H1-B, Temporary Workers in Specialized Occupations; E-1, Treaty Trader; L-1, Intra-Company Transfer; and F-1, Student visas. CA officials told OIG that in the post-9/11 environment, the number of work-related visas issued is down, and refusals are up. (See Table 1 for the rise in the rate of refusals for work visa categories.)

Table 1: Visa Issuances/Refusals for FY 2001 and FY 2003

Visa Classification	Reference	No. Issued In FY 2001	No. Issued in FY 2003	Refusals in 2001	Refusals in 2003
H1-B	Temporary Workers in Specialized Occupations	161,643	107,196	20,664	25,104
E-1	Treaty Traders	9,309	7,590	927	1,201
L-1	Intra-Company Transfers	59,384	57,245	3,060	9,702
F-1	Students	293,357	215,694	112,310	117,009
Total		523,693	387,725	136,961	153,016

Source: OIG's review of CA data.

The tools CA uses in the visa application screening process are the Consular Lookout and Support System, Technology Alert List, and security advisory opinion (SAO). CA also enlists the support of NP and other government agencies, such as the Federal Bureau of Investigation (FBI).

CA's initial review of a visa application includes a screening of the applicant's name against the Consular Lookout and Support System, a database of eight million named individuals of concern to the United States. The FBI provided over seven million of those named in the system. If a lookout "hit" or potential reason for denial is detected during the visa application process, the adjudicating consular officer generates an SAO, which is forwarded to U.S. law enforcement, intelligence, and nonproliferation agencies. SAOs for foreign persons seeking access to technology transfer are governed by the Visas Mantis program.

CA and the Bureau of Nonproliferation

The Bureau of Nonproliferation (NP) leads U.S. efforts in preventing the spread of nuclear, chemical, and biological weapons and their missile delivery systems. NP created the Technology Alert List, a keyword and phrase reference list, as a means of supporting the U.S. nonproliferation initiatives. CA consular officers consult the list in the visa application screening process, specifically for visa applicants expressing an intent to work in the U.S. defense trade. Positive matches, or “hits” with the Technology Alert List result in a consular officer’s initiating an SAO on a visa applicant.

NP’s Office of Chemical, Biological, and Missile Nonproliferation is the primary office that reviews and makes recommendations on questionable visa applications. NP officials receive an estimated 10,000 SAOs from CA per year and stated that for the SAOs they review, the temporary workers in specialized occupations visa is the most common type. NP officials said their Offices of Chemical, Biological, and Missile Nonproliferation; Export Controls and Conventional Arms Nonproliferation Policy; and Regional Affairs occasionally refer SAO cases to PM/DDTC for verification. This occurs in cases in which an export license is mentioned in the visa application. NP officials estimated that about 20 cases are referred to PM/DDTC annually.

CA and Other Government Agencies

The FBI provides law enforcement screening for visa applicants through a memorandum of agreement between the FBI and CA. At CA’s request, the FBI’s Record Information Dissemination Center conducts Visas Mantis SAO namechecks. The FBI database is searched using the foreign person’s name and place and date of birth. The database is capable of verifying information as provided on the visa application as well as checking an applicant’s name phonetically. According to FBI records, approximately 85 percent of visa namechecks produce a “no-hit” response. If the namecheck results in a positive “hit,” the request is elevated to a manual search of FBI records. This second-level search usually results in the overall percentage of “no-hits” increasing to 95 percent. The FBI prepares reports for each namecheck conducted and provides them to CA as an SAO, which recommends approval or disapproval of a visa applicant’s entry into the United States.

CA’s visa application process culminates with a foreign person’s visa being issued or denied. Visa no-hits and denials support PM/DDTC’s export controls process.

PM/DDTC and the Bureau of Nonproliferation

NP reviews export licenses for PM/DDTC with a similar level of review as that used to review CA Visas Mantis SAOs. NP's Offices of Chemical, Biological, and Missile Nonproliferation; Export Controls and Conventional Arms Nonproliferation Policy; and Regional Affairs all review PM/DDTC export licenses and recommend approval, conditional approval, or disapproval of an applicant's license, including those for company and university foreign employees and researchers. Additionally, PM/DDTC coordinates export license and export compliance cases with DOD and DHS. (See the next section for details on PM/DDTC export controls coordination.)

PM/DDTC IMPLEMENTATION OF EXPORT CONTROL LAWS AND REGULATIONS FOR FOREIGN PERSONS

PM/DDTC's implementation of export control laws and regulations are designed to ensure that companies and universities comply with export control requirements for foreign employees and researchers. In carrying out this responsibility PM/DDTC registers, licenses, and has compliance policies for companies and universities who request an export license for their foreign employees and researchers. OIG found that PM/DDTC has not yet fully implemented planned improvements in export control processes and that it could improve its outreach and compliance programs as they relate to foreign person employees.

All Foreign Persons in the U.S. Defense Trade Cannot Be Identified

PM/DDTC's registration, licensing, and compliance policies and procedures are its primary means of controlling the export of USML technical data and defense services. Those policies and procedures focus on the companies and universities that participate in the U.S. defense trade. According to PM/DDTC officials, a company's or university's export license may contain export authorization for one or more foreign employees. PM/DDTC officials explained that they have no way of knowing the total number of foreign persons in the U.S. defense trade because one license can be obtained for many foreign employees. PM/DDTC officials also told OIG that the PM/DDTC licensing database contains information on all 50,000 licenses PM/DDTC issues annually, including specific information on each appli-

cant. Although the licensing database contains information on foreign employees, it is not designed to provide reports on the number of foreign persons on the licenses in the database.

When OIG asked about the number of foreign persons employed in the U.S. defense trade, PM/DDTC Licensing and Compliance officials explained that PM/DDTC has approximately 4,500 companies, universities, and brokers registered to participate in the U.S. defense trade. Of those registrants, not all have applied for export licenses. It is from that universe of registrants and ITAR license holders that OIG asked PM/DDTC to provide the number of foreign persons employed by a given company or university authorized to participate in the U.S. defense trade.

PM/DDTC's licensing database identified 140 companies and universities that have licenses containing the keywords and commodity codes related to foreign persons. PM/DDTC officials said that, based upon the limited capabilities of the database, approximately 761 foreign persons are authorized to participate in the U.S. defense trade.⁶

In providing OIG with data on the number of foreign persons, PM/DDTC officials acknowledged that some query results should be on target, while others might have the wrong commodity code and give inaccurate information. OIG noted that the need to improve the licensing information management system was a finding and recommendation in a March 2000 OIG report.⁷ That recommendation was closed by OIG when PM/DDTC reported that it had established a computer coding capability to track foreign nationals from countries of concern, whose U.S. defense industry employment had been authorized by a munitions license. OIG has found in this review that PM/DDTC needs to make additional improvements to its information systems to track foreign persons.

⁶PM/DDTC officials said that the 761 represented keyword search hits (foreign, national, etc. in the licensing database. They cautioned OIG that those 761 licenses may or may not include one or more foreign person(s) employed by a PM/DDTC registered and licensed company or university. Commodity codes used included those for technical data.

⁷*Department of State Controls Over the Transfer of Military Sensitive Technologies to Foreign Nationals From Countries and Entities of Concern* (Report No. 00-CI-008, March 2000). Recommendation 1: "DTC should improve its tracking capabilities for foreign nationals on export munitions licenses to prevent the transfer of sensitive data to countries of concern. PM/DDTC should use its existing database to track foreign nationals listed on export munitions licenses, including, at a minimum, the name and nationality of the individual."

One improvement that PM/DDTC is piloting with 16 companies is called D-Trade. PM/DDTC currently processes most export licenses manually; D-Trade is an information system designed to process export licenses electronically. PM/DDTC officials said that to remedy their inability to accurately identify foreign employees, they planned to upgrade the D-Trade system in FY 2004 to include new and expanded data fields for information on foreign persons. A planned addition to the data fields that captures the purpose of an export license is a selection titled “foreign national employment.” Additional data fields include information on all the countries where a foreign employee is a national, the entire address of the foreign residence, specific details on the USML technical data that will be provided by the applicant to the foreign employee, and the specific purpose for which the USML material is required (including specific program and end use).

Recommendation 1: The Bureau of Political-Military Affairs, Directorate of Defense Trade Controls should implement revisions to D-Trade information management systems to ensure that all foreign persons employed in the U.S. defense trade can be accurately identified.

PM/DDTC agreed with this recommendation and has implemented changes to the D-Trade electronic licensing system’s DSP-5 export license application. DSP-5 data fields have been modified to capture foreign national employment codes for every USML category. Additionally, PM/DDTC is continuing to make enhancements to D-Trade to include modifications for capturing foreign national employment codes on technical assistance agreement export license applications. OIG considers this recommendation resolved and will close it when PM/DDTC provides examples of the foreign national employment code integration on both DSP-5 and technical assistance agreement export licenses.

ITAR Compliance - PM/DDTC’s Integrated Export Controls Process for Foreign Persons

PM/DDTC’s structure for implementing U.S. export controls is divided among four offices: Management, Policy, Licensing, and Compliance. The primary office responsible for ensuring that companies and universities comply with export control laws and regulations concerning foreign persons is the Compliance Office. OIG found that the Compliance Office has no specific programs or procedures solely used for tracking foreign persons and for ensuring that they do not have unauthorized access to sensitive military instruments, technical data, or defense services. Compliance officials rely, however, on the export control licensing, outreach,

voluntary disclosure, and U.S. administrative and criminal penal processes to enforce ITAR compliance. Those processes are used to screen, identify, educate, and monitor companies and universities that have foreign persons exposed to ITAR-regulated technical data and defense services.

Licensing as a Component of ITAR Compliance

OIG found that the two primary types of license used by companies and universities are technical assistance agreements and DSP-5s (Application/License for Permanent Export of Unclassified Defense Articles and Related Unclassified Technical Data). PM/DDTC's Licensing officials said that technical assistance agreements are primarily issued for the export of defense services. They explained that a detailed discussion on technical data about defense services during plant visits, for example, must be licensed through a technical assistance agreement. An export control exposure lasting longer than a plant visit and more in-depth and permanent in terms of technology transfer would require a DSP-5.

PM/DDTC officials explained that the licensing process contains a number of checks and limitations on both companies and universities applying for export licenses and their foreign person employees. Those checks and limitations include, but are not limited to, ensuring that:

- Appropriate limits are placed on the duration of the export license;
- The designated export (empowered) official is knowledgeable about ITAR;⁸
- The license application is screened against the PM/DDTC Watch List, which lists export control violators, whether persons, companies, or international groups; and
- Provisos to the license, such as a technology control plans, nondisclosure statements, and other conditions for the approval of an export license, are implemented.

⁸ITAR, Section 120.45 defines "empowered official" and describes the qualifications, authority, and duties. They include: being a U.S. person (permanent resident alien or U.S. citizen); employed by the applicant or subsidiary; legally empowered in writing by the applicant (company or university) to sign license applications; knowledgeable about export control statutes and regulations, criminal liability, civil liability and administrative penalties for violating the Arms Export Control Act and ITAR; and authorized to inquire into any aspect of a proposed export, verify the legality of a transaction, and refuse to sign any license application without prejudice.

PM/DDTC Licensing officials said that foreign national export license holders are tracked through the time limitations placed on the license. However, as noted previously, PM/DDTC does not track foreign persons; rather, it is the companies and universities that monitor them. Compliance officials informed OIG that the Licensing Office refers ITAR violations to them for investigation, including expired registrations and licenses and other infractions discovered during the licensing or license renewal process.

Outreach as a Component of ITAR Compliance

PM/DDTC formed a Policy Office during a January 2003 realignment. The Policy Office is responsible for various PM/DDTC functions, including outreach initiatives. Policy officials informed OIG that their office is developing formal outreach and public affairs programs. The public affairs program will include a call center to provide answers to basic ITAR and licensing questions, including those related to foreign persons. Additionally, an outreach program educates exporters on basic and advanced export control procedures and processes.

Policy officials told OIG that their office uses the Society for International Affairs and its export control conferences as the primary forum for PM/DDTC outreach efforts. The Society holds four educational conferences per year, and attendance is approximately 400 people per conference, primarily company export control officials. PM/DDTC Licensing and Compliance officers conduct training sessions at those conferences. PM/DDTC Policy officials explained that an advanced Society conference covers export control violations and ITAR exemptions. According to Policy officials, foreign person employment is not a dedicated conference subject area for the Society and would only be discussed in the context of who needs an export license.

PM/DDTC Policy officials told OIG that they also do outreach with individual companies and provided OIG with a schedule that included 16 outreach sessions in 2003 and one planned for 2004. The outreach schedule indicates that of the 16 sessions for 2003, three were for law firms or associations; three were for associations concerned with export controls, such as the Society for International Affairs; three were requested by large companies both inside and outside the D.C. area; two were to an international audience, such as the 5th International Export Controls Conference; two were for other government agencies, such as the Department of Commerce, Bureau of Industry and Security; and one each was conducted at the

state level, for university researchers and a foreign embassy. PM/DDTC also declined 11 outreach invitations for various reasons, including scheduling conflicts and staff shortages. Policy officials said that in the future, it would be using contractors to perform some of their office functions, including outreach.

The company and university empowered officials and export control staffs OIG visited agreed that both U.S. export licensing agencies, PM/DDTC and the Department of Commerce, Bureau of Industry and Security, provide excellent individual training programs. They agreed that in the future, more joint training would be beneficial to the export community. They said that this was true particularly for staff members new to export controls, because joint sessions would provide a forum to compare, contrast, and resolve differences between the licensing and compliance processes and procedures.

Recommendation 2: The Bureau of Political-Military Affairs, Directorate of Defense Trade Controls should coordinate outreach initiatives with the Department of Commerce, Bureau of Industry and Security and strive to increase the number of jointly sponsored training sessions for the U.S. export control community.

PM/DDTC agreed with the thrust of this recommendation and continues to look for outreach opportunities and to work on educating the export community about defense trade controls as they relate to foreign national employment in the United States. PM/DDTC suggested, however, that those outreach efforts would not necessarily have to be joint PM/DDTC-Commerce activities. OIG considers this recommendation resolved and will close it upon review of outreach plans incorporating foreign national employment in the United States.

ITAR Compliance and Audit Programs

OIG reviewed Compliance Office procedures and processes for conducting compliance audits, investigations, and reviews and noting trends in voluntary disclosure of export violations, with an emphasis on export controls for foreign persons. OIG found that PM/DDTC has a substantive compliance program but needs to develop policy for an Office of Compliance audit program.

To assess the compliance audit program, OIG examined PM/DDTC audit policy and processes. Compliance officials explained that the closest thing to an export controls compliance audit plan would be the *Guidelines for DTC Registered*

Exporters/Manufacturers Compliance Program, posted for industry use on their web site (www.pmdtc.org). That guide addresses self-audits by a company in the Internal Monitoring section. Additionally, PM/DDTC officials provided OIG with selected sections of its draft Compliance and Enforcement Branch, Office of Defense Trade Controls, *Compliance Quick Reference* (Nov. 2003). The draft quick reference also addressed company self-audits and PM/DDTC-directed audits as part of an in-depth examination of a compliance program.

PM/DDTC uses company self-audits to determine if a company's internal controls for exports are adequate. Compliance program audits are conducted either by a company's own internal auditors or by company-selected external auditors. Typically, audits are part of a company's own initiatives to address specific or general export control concerns, or they are directed by PM/DDTC as remedial administrative action. An example of a company-initiated audit to address a specific concern is when the company discovers that an ITAR violation has occurred and conducts or has an audit conducted to determine the extent of the violation and what corrective action should be taken. Those audit results are typically used in a voluntary disclosure of the ITAR violation to PM/DDTC. OIG reviewed 45 ITAR violation cases closed by the Compliance Office in FY 2003 and found that U.S. companies had conducted 11 audits, and two of those audits were directed by PM/DDTC.

Compliance officials informed OIG that they currently do not perform audits. However, recognizing the need for direct monitoring by their office, Compliance officials explained that there are staffing authorizations contained in the FY 2005 PM/DDTC Performance Plan for two former Customs agents. When hired, those agents would be tasked with developing policies and procedures for conducting export compliance audits. Additionally, an outreach team comprised of those agents and augmented by other Compliance Office staff would conduct reviews and special projects, including such areas as why some companies never file voluntary disclosures. OIG believes that those planned compliance enforcement initiatives and procedures for their implementation should be incorporated into PM/DDTC compliance policy, such as the draft *Compliance Quick Reference*.

Recommendation 3: The Bureau of Political-Military Affairs, Directorate of Defense Trade Controls should develop export control policies and procedures for an Office of Compliance audit program.

- All 53 cases were coordinated with DHS, 34 coordinated with DOD/DTSA, (b) (2)(b) (2)(b) (2)(b) (2)(b) (2)(b) (2)(b) (2)(b) (2)(b) (2) and
- Forty-five cases were closed administratively, requiring various levels of corrective action.

The most frequent corrective actions taken included: additional export control training (27 cases); disciplinary action (23 cases); new or revised export control plans or compliance procedures (18 cases); and new or amended technical assistance agreements or DSP-5 submissions (15 cases).

OIG's review of voluntary disclosure cases indicates that foreign persons have had unauthorized access to technical data or defense services. However, OIG could not address the seriousness of those problems owing to the lack of trend data and the fact that PM/DDTC cannot yet identify the total number of foreign persons on USML licenses. OIG addressed this deficiency in recommendation one.

EXPORT CONTROL COMPLIANCE BY COMPANIES AND UNIVERSITIES WITH FOREIGN EMPLOYEES

The effectiveness of PM/DDTC's ITAR compliance procedures and processes for foreign persons depends on the export control compliance programs established by companies and universities involved in the U.S. defense trade. OIG visited seven companies and one university to determine whether they complied with ITAR by obtaining export licenses for foreign employees when required. OIG found that each had established export control compliance programs; however, at one site visited, the visa for a foreign employee had expired, and that individual was still working in an ITAR-controlled area. OIG also found that six of the companies and the university visited had problems providing an accurate number of foreign persons employed, but also found that several company compliance programs had processes in place that could be beneficial for use throughout the export control community.

Visa as an Export Control Document Questioned

At the eight sites visited, OIG reviewed the export control and employment documents of 167 foreign employees. Six of the eight sites visited had foreign employees with active ITAR licenses, and two sites did not have any ITAR-licensed foreign persons.¹¹ OIG reviewed the records of 49 foreign persons that were ITAR-licensed. None of the sites that OIG visited had outdated PM/DDTC export control registrations or licenses. Additionally, none of the export control records for foreign persons OIG sampled were from countries of concern to the United States.¹² OIG found a total of six outdated visas and 12 outdated passports. Of those, three of the expired visas and six of the expired passports were for foreign persons with export control licenses. All of the exporters that had foreign employees with an expired visa or passport stated they would update expired documents immediately, with one exception.

OIG found that at one company, officials did not intend to update export control documentation for one of its foreign employees. This situation highlighted a conflict in the implementation of visa, export license, and work authorization policies that needs to be addressed by the Department and DHS.

The company's export control officials informed OIG that an employee's work authorization document is the I-94: Arrival/Departure Record, issued by DHS. As long as its expiration date is within a month or two of the foreign person's visa expiration date and the export license is current through the I-94 expiration date, the company believes the employee is authorized (by DHS) to continue working in an ITAR export-controlled area. The company's export control officials provided OIG with a legal position from their immigration counsel stating, in part, that an unexpired I-94 is an identity and employment eligibility document that will often indicate an expiration date that differs from that of the visa. The document also cites

...DOS regulations at 22 CFR Section 41.112 (a): Significance of period of validity of visa. The period of validity of a nonimmigrant visa is the period during which the alien may use it in making application for admission. The

¹¹ OIG's discussion on problems companies had identifying the number of foreign persons employed resulted in visits to two companies with no ITAR-licensed foreign employees. Because those sites initially reported they had foreign person employees and subsequently changed those numbers, OIG validated the number of foreign employees and the existence of an ITAR compliance program with site visits.

¹² While restrictions on the export of goods and controlled technology apply to nationals of all countries, special scrutiny is required for applicants from countries on the list of state sponsors of terrorism: Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria.

period of visa validity has no relation to the period of time the immigration authorities at a port of entry may authorize the alien to stay in the United States.

Additionally cited was

...DHS regulations at 8 CFR Section 274a.2(b)(1)(v)(A): The following documents, so long as they appear to relate to the individual presenting the document, are acceptable to evidence both identity and employment eligibility: . . . (5) In the case of a nonimmigrant alien authorized to work for a specific employer incident to status, an unexpired foreign passport with an Arrival-Departure Record, Form I-94, bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, so long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the Form I-94.

OIG's review criteria for valid, up-to-date, export control documentation for a foreign employee included: a current visa, passport, export license (DSP-5), technology control plan, and nondisclosure agreement. OIG's criteria also included the company or university having up-to-date ITAR registrations and export control licenses for foreign employees and researchers, as provided by PM/DDTC. Additionally, PM/DDTC officials referred OIG to their web site and the posted *Guidelines for Completion of an Electronic Form DSP-5 Application*. Those guidelines include *Supplementary Instructions/Guidelines for Completing Applications for Foreign National Employment in the United States*, which states:

A DSP-5 must be approved by PM/DDTC prior to any foreign national being given access to ITAR controlled technical data. The applications, if approved, will be valid only for a period equal to the dat[e] of the foreign national's work visa or the standard validity of a license (i.e., four years), whichever is lesser. In instances when the work visa is longer than four years, applicant may apply for a renewal of the license.

OIG views the differences between the two positions as an interagency coordination issue between the Department and DHS. PM/DDTC's standard expiration period for an export license is four years. On September 29, 2002, a *Memorandum of Understanding Between the Secretaries of State and Homeland Security Concerning Implementation of Section 428 of the Homeland Security Act of 2002*¹³ was signed. The Department's summary of the memorandum states that:

¹³Section 428 of the Homeland Security Act of 2002 (Pub.L.No. 107-296)

[DHS] will have final decision-making responsibilities over policy areas that include classification, admissibility and documentation; place of visa application; discontinuing granting visas to nationals of a country not accepting aliens; personal appearance; visa validity periods and multiple entry visas; the Visa Waiver Program; notices of visa denials; and processing of persons from state sponsors of terrorism.¹⁴

OIG believes that the provision in the memorandum of agreement that DHS is the final decision-making authority over a visa's validity period and PM/DDTC's policy, as articulated in DSP-5 guidelines, to align the expiration of the export license with the relevant visa's expiration date provide a solution for the visa versus I-94 date discrepancy.

Recommendation 4: The Bureau of Political-Military Affairs, Directorate of Defense Trade Controls should coordinate with the Department of Homeland Security planned changes to export control documentation that will match license expiration dates with visa expiration dates.

PM/DDTC had no substantive disagreement with the recommendation; however, PM/DDTC does not know the DHS authorized length of stay for a foreign national employee at the time the export license is issued. As a matter of practice, PM/DDTC will add a proviso that pegs the validity of the export license to the DHS period of authorized stay in the United States, for participation by a foreign person employee in ITAR-controlled activity. OIG considers this recommendation resolved and will close it when OIG receives examples of export licenses for foreign persons that include these provisos. Additionally, in response to PM/DDTC's suggestion that OIG consult with CA on this issue, OIG will provide CA a copy of this report for its consideration, and has referred the issue to the DHS OIG for consideration within DHS.

¹⁴ Statement by Department's J. Adam Ereli, Deputy Spokesman, *U.S. Department of State, Homeland Security Reach Agreement on Visa Oversight Rules* (Release No. 2003/983, Sept. 29, 2003).

Problems Reporting Accurate Numbers of Foreign Persons Employed

Before selecting companies to visit, from PM/DDTC's list, OIG contacted universities and companies and requested the number of foreign persons they employed and where and in what capacity. Of 26 contacts from PM/DDTC's list, OIG received 23 responses. After OIG selected the companies it intended to visit, six of the seven companies and the one university changed the number of foreign persons employed they had originally reported to OIG. OIG believes however, that PM/DDTC's full implementation of D-Trade, to include the participation of all PM/DDTC registrants with active licenses, will have the added benefit of ensuring that companies maintain accurate data on foreign persons employed.

Export Control Compliance Programs Established at All Sites Visited

OIG used PM/DDTC's *Guidelines for DTC Registered Exporters/Manufacturers Compliance Program* in reviewing the policies and processes used by the selected university and companies participating in the U.S. defense trade. OIG found that policies and processes were established and that export control documentation on its selected sample of foreign employees appeared to be in compliance with ITAR recordkeeping requirements.¹⁵

OIG found that all exporters visited had established export control compliance programs, and those programs differed according to the operational needs of the site. Examples of those differences that OIG believes significantly enhance a compliance program were the use of:

- An automated export tracking system, used by project managers to monitor each foreign person and the ITAR-licensed technical data and services to which that person was exposed;

¹⁵ ITAR, Section 122.5(a) and (b), Maintenance of records by registrants states: "A person who is required to register must maintain records concerning the manufacture, acquisition and disposition of defense articles; the provision of defense services. . . . All such records must be maintained for a period of five years from the expiration of the license or other approval. . . . Records maintained under this section shall be available at all times for inspection and copying by the Director, Office of Defense Trade Controls or a person designated. . . ." OIG made no expert assessments of ITAR compliance.

- An automated export controls training and testing system that provided:
 - ITAR basic and refresher training;
 - testing of foreign employees', co-workers', and project managers' knowledge of the training materials and scoring them on their competence;
 - immediate remedial training and retesting for anyone who failed the initial testing;
 - instantaneous automated record of those taking initial and annual refresher ITAR training; and
 - the requirement and validation that ITAR training was completed before issuance of controlled access badges for all site employees, including foreign persons;
- An automated export licensing tracking system that notified foreign employees and project managers when export control documents, including a visa, passport, and export license, were about to expire;
- Controlled access and color-coded badges that easily identified both foreign employees and visitors and automatically restricted their access to work areas; and
- A site visitor request form used by all plant employees that wished to sponsor a site visit by any person, U.S. or foreign.

Those visit request forms were completed with enough personal information about the prospective visitor for project managers, export control officials, and security personnel to make informed visitor authorization determinations. Upon arrival for a site visit, foreign visitors were also randomly required to prove their country affiliation and U.S. immigration status.

LIST OF RECOMMENDATIONS

Recommendation 1: The Bureau of Political-Military Affairs, Directorate of Defense Trade Controls should implement revisions to D-Trade information management systems to ensure that all foreign persons employed in the U.S. defense trade can be accurately identified.

Recommendation 2: The Bureau of Political-Military Affairs, Directorate of Defense Trade Controls should coordinate outreach initiatives with the Department of Commerce, Bureau of Industry and Security and strive to increase the number of jointly sponsored training sessions for the U.S. export control community.

Recommendation 3: The Bureau of Political-Military Affairs, Directorate of Defense Trade Controls should develop export control policies and procedures for an Office of Compliance audit program.

Recommendation 4: The Bureau of Political-Military Affairs, Directorate of Defense Trade Controls should coordinate with the Department of Homeland Security planned changes to export control documentation that will match license expiration dates with visa expiration dates.

ABBREVIATIONS

CA	Bureau of Consular Affairs
DHS	Department of Homeland Security
DOD	Department of Defense
DOE	Department of Energy
FBI	Federal Bureau of Investigation
INA	Immigration and Nationality Act
ITAR	International Traffic in Arms Regulation
OIG	Office of Inspector General
NP	Bureau of Nonproliferation
PM/DDTC	Bureau of Political-Military Affairs, Directorate of Defense Trade Controls
SAO	Security Advisory Opinion
USML	U.S. Munitions List

APPENDIX A

ADDITIONAL INFORMATION ON EXPORT CONTROL REGULATIONS AS THEY RELATE TO FOREIGN PERSON EMPLOYEES

The United States has established controls for the export of defense commodities and technologies for national security, foreign policy, or nonproliferation purposes and has established penalties for violating those controls under the authority of Sections 38 and 39 of the Arms Export Control Act of 1976, as amended.¹ The Act empowers the Secretary of State to control the export of items included on the USML and designate defense articles and services to be included in the future. The Department's implementation policy for the Act is the ITAR, which contains the USML. The USML consists of 21 categories and identifies defense articles, services, and related technical data that may be exported, as well as the conditions under which those items may be exported. PM/DDTC is the proponent for the ITAR. PM/DDTC's Licensing and Compliance Offices implement ITAR registration, licensing, and compliance provisions, including those for companies and universities with foreign person employees and researchers.

The release of technical data subject to the ITAR to a foreign person is considered an export to the country or countries of which the foreign person is a national.² For the purposes of OIG's review, PM/DDTC-controlled exports involve the transfer of any USML sensitive technology, technical data, or defense service to foreign persons working at U.S. companies and universities. It is the responsibility of that U.S. company or university to submit an export license application to PM/DDTC for review. Application for the export license is made using Form DSP-

¹ 22 U.S.C. 2778 and 2779

² An export is defined in ITAR, 22 CFR 120.17. ITAR, Section 120.16 defines a foreign person to mean any natural person who is not a lawful permanent resident as defined by 8 U.S.C. 1101(a)(20).

5: Application for License for Permanent Export or a technical assistance agreement.³ In addition to obtaining a license for a foreign person employee, the company or university is responsible for ensuring that the employee is only exposed to technical data and defense services specified in the ITAR license.⁴ According to PM/DDTC officials, approximately 50,000 export licenses are issued annually, and the number of foreign persons working in the United States reflects the demands for the skills of foreign persons by U.S. industry. PM/DDTC officials estimate that 5,400 technical assistance agreements and 29,600 DSP-5s are submitted annually by industry, including those for foreign person employees.⁵

Foreign persons wishing to work or conduct research in the United States must have an offer of employment or a university sponsor to obtain a visa. The company or university forwards sponsorship materials to the applicants, who then submit the materials and a visa application to a U.S. consular officer in their country of residence. Consular officers use the Consular Lookout and Support System⁶ and the Technology Alert List⁷ databases as initial clearance tools. When a Consular Lookout and Support System or Technology Alert List “hit” or potential reason for denial is exposed during the visa application process, the adjudicating consular officer generates an SAO, which is forwarded to U.S. law enforcement, intelligence, and nonproliferation agencies.

An SAO is required for any applicant who the consular officer knows, or has reason to believe, is ineligible, or who was previously found ineligible, for a visa under one of the following security grounds:

³ ITAR, Section 120.20 defines a license. Section 120.28 includes Form DSP-5, an application for a license for permanent export of unclassified defense articles and related technical data. Section 120.22 defines a technical assistance agreement as an agreement for the performance of a defense service or the disclosure of technical data. PM/DDTC approves export licenses for up to four years.

⁴ ITAR, Section 127.1 defines violations, including any person who is granted a license or other approval . . . is responsible for the acts of employees, agents, and all authorized persons to whom possession of the licensed defense article or technical data has been entrusted.

⁵ Figures represent an average of DSP-05 and technical assistance agreement applications received by PM/DDTC for FY 2000 through 2003.

⁶ Consular Lookout and Support System is a worldwide namecheck database maintained by CA that contains more than eight million entries. The FBI provided 7.5 million of those names in 2003.

⁷ The Technology Alert List supports the nonproliferation of weapons of mass destruction and the nontransfer of U.S.-held technologies.

- All applicants who may be subject to the Immigration and Nationality Act (INA), Section 212(a)(3)(A)⁸ for activities related to espionage, sabotage, the prohibited export of sensitive technology, other illegal activities, or efforts to overthrow the U.S. government;
- All applicants who may be subject to INA 212(a)(3)(B)⁹ for engaging, or planning to engage, in terrorist activities;
- All applicants who may be ineligible under INA 212(a)(3)(C)¹⁰ for foreign policy reasons;
- An applicant who is of a nationality or category subject to country-specific clearance requirements; this includes countries subject to presidential proclamations under INA 212(f), which suspends entry into the United States of specified nationality groups;¹¹ and
- An applicant who falls under the purview of INA 212 (a)(3)(i)(II),¹² involving fields on the Technology Alert List.

There are six major types of SAOs; however, OIG's review focused on Visas Mantis SAOs, as they are the ones that pertain to technology transfers. The Visas Mantis SAO clearance procedure was developed as a result of U.S. law enforcement and intelligence community concerns that U.S.-produced goods and information were vulnerable to theft. The SAO process culminates with CA receiving all coordinated agency opinions, including recommendations to either approve or deny an applicant's visa to travel to the United States. When an applicant receives all appropriate clearances, CA issues a nonimmigrant visa.

The final step in the export control process is when the company submits an export license application to PM/DDTC for a foreign person employee, and PM/DDTC then approves or denies the application. If an export license is approved, a company or university foreign employee or researcher may have access to USML technical data and defense services.

⁸ 8 U.S.C. 1182.

⁹ See footnote 8.

¹⁰ See footnote 8.

¹¹ Designated countries not recognized by the United States or with which the United States has no diplomatic relations, or on which the Department has imposed an SAO requirement for political, security, or foreign policy reasons can be found in 9 FAM 502.2.

¹² See footnote 8.

APPENDIX B

PM/DDTC COMMENTS



United States Department of State

Washington, D.C. 20520

www.state.gov

APR 5 2004

MEMORANDUM

SENSITIVE BUT UNCLASSIFIED
(UNCLASSIFIED when separated from attachments)

TO: OIG – Anne W. Patterson, Deputy Inspector General

FROM: PM – Lincoln P. Bloomfield, Jr. *LB*

SUBJECT: Draft Report AUD/PR-04-XX, “Review of Export Controls for Foreign Persons Employed at Companies and Universities, March 2004”

I appreciate the opportunity to comment on the subject report. PM believes that the OIG audit team has done a very good job in summarizing the numerous and complicated issues, even though some of the details about export controls for foreign persons at companies and universities may not be accurately reflected.

We have attached some specific comments and preliminary responses to the recommendations for your consideration. I would note here, however, that in several places the draft report discusses the relationship between the expiration of visas and the authorized length of stay for foreign nationals visiting the United States. As this issue is not within PM’s immediate purview, the OIG may wish to consult with the Bureau of Consular Affairs.

Attachments:

- Tab 1 – Draft OIG Audit Report
- Tab 2 – PM Comments on Draft Audit Report
- Tab 3 – PM Responses to OIG Audit Recommendations
- Tab 4 – Form DSP- Instructions/Guidelines
- Tab 5 – Commodity Code Classification List

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PM Responses to OIG Audit Recommendations

Recommendation 1: *The Bureau of Political-Military Affairs, Directorate of Defense Trade Controls should implement revisions to D-Trade information management systems to ensure that all foreign persons employed in the U.S. defense trade can be accurately identified.*

PM agrees with Recommendation #1 and has already included, through the D-Trade electronic licensing system, the expanded data collection and data fields described in the audit report. (D-Trade was made available to all U.S. persons required to register with the Department per the Arms Export Control Act and the International Traffic in Arms Regulations (ITAR) on January 15, 2004.) As noted in the report, ITAR-controlled foreign national employment is licensed via submission to and approval by State using the Form DSP-5 (Application/License for Permanent Export of Unclassified Defense Articles and Related Unclassified Technical Data.). The instructions and guidelines for completing the Form DSP-5 detail the requirements for industry submission regarding this activity. A copy of those instructions/guidelines, as posted on the DDTC Internet website, is attached for reference.

We are pleased to report that this initiative has even been taken a step farther. At present, industry completion of the “Commodity Code” portion of Block 11 on the Form DSP-5 is requested but not required, because to date the codes have largely been an internal DDTC research tool and the code listing has lacked the specificity to capture many items (new weapons systems and subsystems). DDTC has launched an interagency initiative to upgrade and greatly expand the commodity code listing. A prototype was recently shared with relevant USG agencies for review and comment. As the attachment demonstrates, this project envisions a “foreign national employment” code for every U.S. Munitions List (USML) category. Once interagency review has been completed, industry completion of the Commodity Code portion of Block 11 will be made mandatory. When “foreign national employment” entry is made, it will serve as an additional flag and tracking aid for that activity and, because the new commodity code listing is specifically linked to USML categories and subcategories, will provide a direct association between the foreign national employment and specific export commodities or transactions.

The report also correctly noted that certain types of foreign national activity is authorized through the use of a Technical Assistance Agreement (TAA). The current TAA form in D-Trade is undergoing extensive revision. When that effort and the interagency review of the commodity code listing have been completed, industry completion of the relevant commodity code, including “foreign national employment,” will be made mandatory for D-Trade TAA submissions.

Recommendation 2: *The Bureau of Political-Military Affairs, Directorate of Defense Trade Controls should coordinate outreach initiatives with the Department of Commerce, Bureau of Industry and Security and strive to increase the number of jointly sponsored training sessions for the U.S. export control community.*

PM agrees with the thrust of Recommendation #2, and we are always looking for outreach opportunities within our budgetary and human resource constraints. We suggest that the efforts would not necessarily have to be joint Commerce/BIS-State/DDTC activities since the two organizations have separate and distinct missions and operations. Rather, DDTC has a specific outreach function established in its Policy Office to organize outreach, and we would rely on its coordination with the Licensing and Compliance offices to work on educating the export community about defense trade controls as they relate to foreign national employment in the U.S.

Recommendation 3: *The Bureau of Political-Military Affairs, Directorate of Defense Trade Controls should develop and publish export control policies and procedures for an Office of Compliance audit program.*

While PM disagrees with the recommendation as currently written (i.e., the proposed requirement that that DTCC publish audit policies and procedures), we do believe that as the new compliance inspection team begins operating there is a need to create operational procedures and protocols for this group’s execution of on-site visits regarding specific compliance issues. DDTC’s Compliance Office has recently hired two contractors for this work and has already conducted its first on-site visit. Developing internal policies and protocols for this work is one of the group’s first priorities. It is important to note that these on-site inspections are not full audits of a company’s compliance program but rather targeted visits based on specific issues identified developed through a variety of means. The language in the audit report, however, appears to suggest that

DTCC should publish specific audit policies and procedures to be used by companies or used by DTCC to conduct formal audits. As noted by the report, DTCC already publishes guidelines for companies on the essential elements of a compliance program, which specifically addresses the issue of foreign nationals, internal controls, and self-audits. Shifting this audit responsibility-either audit design or audit fieldwork-to DTCC is not practical and is at odds with the regulatory structure of the Arms Export Control Act, which places responsibility and liability with exporters for their compliance with the regulations. Moreover, we suggest that audit plans must be specifically tailored to each company's business operations - a task that defies such a one-size-fits-all, top-down approach.

Recommendation 4: *The Bureau of Political-Military Affairs, Directorate of Defense Trade Controls should coordinate with the Department of Homeland Security planned changes to export control documentation that will match license expiration dates with visa expiration dates.*

There is no substantive disagreement but, in the case of foreign national employment in the U.S., the DDTC guidelines already align the expiration dates of the export license and the visa. An export license with the "standard" four-year validity is to be granted only when the visa validity is four years or greater.

PM also recognizes that the authorized stay of a foreign national employee in the U.S. - which is often not known to DDTC at the time the export license is issued - may override the validity of that employee's visa. As indicated in the draft report, there is still interagency debate outside PM areas of responsibility and authority regarding admission and the authorized stay of foreign nationals. For this reason, we suggest that the OIG bring these issues to the attention of the Bureau of Consular Affairs. In the meantime, to ensure ITAR-controlled activity by foreign nationals employed in the United States is not inadvertently being authorized while such nationals' status is uncertain or not official authorized by the Department of Homeland Security, DDTC will, as a matter of practice and as appropriate, add a proviso that pegs the validity of the export license to the period of authorized stay in the U.S. for participation in the ITAR-controlled activity. Upon conclusion of interagency debate and decisions, DDTC is prepared to further adjust the export licensing process and relevant guidelines.

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