



February 23, 2013

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Re: Request for an Advisory Opinion

Dear [REDACTED]:

This letter responds to your January 23, 2013 request for an advisory opinion on Export Administration Regulations (EAR) licensing requirements for deemed reexports to third-country national and certain dual national (Canadian citizens with second citizenships acquired later in time) "regular employees" in Canada who have received positive security assessment evaluations under the Canadian Government/Controlled Goods Program's (CGP's) Enhanced Security Strategy (ESS). You note that, under Section 126.18 of the International Traffic in Arms Regulations (ITAR) a foreign employer who is itself an authorized consignee or end user may allow a dual or third country national who is a *bona fide* "regular employee" (as defined in Section 120.39 of the ITAR) to have access to unclassified defense articles (including technical data) without prior written approval if:

(a) the employer has in place a process as set forth in Section 126.18(c) of the ITAR to screen its employees for substantive contacts with restricted or prohibited countries listed in Section 126.1 of the ITAR and to have its employees execute a Non-Disclosure Agreement providing assurances that the employee will not transfer any defense articles to persons or entities unless specifically authorized by the employer; and

(b) the employer determines through that process that the employee does not have substantive contacts with a restricted or prohibited country listed in Section 126.1 of the ITAR.

You further note that, based on public statements by U.S. and Canadian government officials, a Canadian company registered under the Controlled Goods Program can meet the ITAR's screening requirement if a regular employee residing in Canada receives a positive

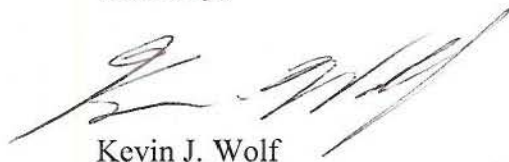


security assessment evaluation through the Controlled Goods Program's Enhanced Security Strategy (ESS). You seek guidance on whether such a positive security assessment evaluation would allow the employee (a third country national or dual citizen of Canada and another country, where the individual obtains Canadian citizenship at birth and subsequently acquires a second citizenship) to be considered a Canadian national under the Export Administration Regulations (EAR).

Section 734.2(b)(5) of the EAR states: "Any release of technology or source code subject to the EAR to a foreign national of another country is a deemed reexport to the home country or countries of the foreign national. However, this deemed reexport definition does not apply to persons lawfully admitted for permanent residence." In a notice published in the *Federal Register* on May 31, 2006 (71 FR 30843), BIS stated that its deemed export licensing requirement is based on a foreign national's most recent country of citizenship or permanent residency. However, BIS indicated that this approach would be applied in a flexible manner to address "concerns that may arise in instances where a foreign national maintains dual citizenship or multiple permanent residence relationships." 71 FR 30843. In situations where the "status of a foreign national is not certain," BIS recommended that exporters consult BIS for guidance. BIS may assist such exporters in determining "where the stronger ties lie, based on the facts of the specific case." BIS would review the foreign national's "country, family, professional, financial, and employment ties." *Id.* Similarly, BIS has indicated in its website guidance that the "most recent country" approach reflects a "general policy" or "principle" ("Deemed Export" FAQs, Answers to Questions 6 and 11), not the dispositive criterion for determining the home country or countries of a foreign national for purposes of Section 734.2(b)(5) of the EAR.

Based on the facts set forth in your request, BIS deems the foreign national regular employees of CGP-registered companies to be Canadian nationals for purposes of Section 734.2(b)(5). Specifically, you have described situations in which a third country national or dual citizen regular employee is residing in Canada with a Canadian employment history that includes a positive security assessment under the CGP sufficient to satisfy the provisions of Section 126.18 of the ITAR. Consistent with BIS's policy that BIS may look at the facts of a specific case to determine home country in such situations and ITAR section 126.18(c)(1), BIS deems those who have a positive security assessment evaluation under the CGP's ESS to be Canadian nationals under the EAR.

Sincerely,



Kevin J. Wolf