July 29, 2010

Office of Management and Budget
USCIS Desk Officer
Regulatory Products Division, Clearance Office
United States Citizenship and Immigration Service
111 Massachusetts Avenue NW
Washington, D.C. 20529-2210

Subject: Form I-129 Petition for Nonimmigrant Workers (OMB Control No. 1615-0009)

Dear Sir/Madame:

As representatives of the higher education community, we write today in response to the June 30, 2010, Information Collection request regarding the revised USCIS Form I-129 (75FR.37822; OMB Control No. 1615-0009).

On April 9, 2010, the Association of American Universities (AAU) and the Council on Governmental Relations (COGR) jointly submitted comments on the previous USCIS proposal to add a “deemed export acknowledgment” question to the Form I-129. At that time, we noted the close working relationship that AAU and COGR have established with the responsible federal agencies to ensure that our universities are in full compliance with export control requirements. We also expressed a number of concerns about the appropriateness of USCIS’s use of the Form I-129 to collect this type of information as part of the visa process. NAFSA: Association of International Educators and the Association of Public and Land-grant Universities also submitted comments containing similar views on April 5, 2010 and April 9, 2010, respectively.

We appreciate that USCIS has responded to our previous comments by revising the deemed export acknowledgment and certification language to more accurately describe current export control regulations. However, in summarizing the comments received in the Supporting Statement, USCIS repeatedly responds that it has worked with the Department of Commerce’s (DOC) Bureau of Industry and Security (BIS) “to modify the Deemed Export Acknowledgment section of the Form, taking into account concerns raised by the commenters.” We do not believe that working with DOC/BIS to modify the previous language adequately responds to our concerns.

For this reason we are resubmitting the previous AAU and COGR comment letter, and encourage the USCIS to give further consideration to these concerns.

Our associations believe USCIS needs to fully respond to our original concerns outlined below:

- Given that USCIS has no regulatory authority or jurisdiction over the enforcement of export controls, we question the applicability and value of this information in determining eligibility of those pettioning for an H-1B visa. Therefore, we would like USCIS to provide additional clarity concerning how it plans to use this information. This is a significant concern that remains unaddressed by the USCIS despite the fact that it was raised by almost all those responding to the initial proposal;
• While most foreign nationals visiting our universities for research purposes on H-1B visas are unlikely to require a license because of the fundamental research exclusion from export controls, under this proposal our universities will still have to seek verification prior to their application for a visa. This concern is specifically discussed in the eighth paragraph of the attached letter;

• The evolving nature of research makes it very difficult to know in advance what technologies may be involved, and thus makes an upfront certification particularly difficult. This certification requirement will impose additional regulatory burdens and costs to U.S. research universities;

• As mentioned in our original comment letter, extensive coordination will be required among a number of university offices to ensure effective compliance with the new certification. As a result, USCIS’ burden estimate of 2.75 hours per response is unrealistically low and indicative of the agency’s lack of understanding concerning the operation of U.S. research universities; and

• We believe this proposal is ill-timed and should be delayed until the Administration’s current review of export controls is completed. We further urge the Administration to evaluate the value of this new requirement as a part of its current export control review.

We suggest that if USCIS feels that something must be added to the Form I-129 to address export control requirements, it consider the alternative of including a section for petitioners to attest that they have an export control compliance program in place and that appropriate licenses will be obtained before the foreign beneficiary is allowed access to any technology or technical data where a license is required. This will alleviate the burdens associated with the proposed case-by-case certification, and address some of the concerns noted above. However, we strongly believe that the requirement as proposed should be withdrawn for the reasons addressed in our previously submitted comments.

Sincerely,

Robert M. Berdahl
President
Association of American Universities

Anthony P. DeCrappeo
President
Council on Governmental Relations

Peter McPherson
President
Association of Public and Land-grant Universities

Marlene Johnson
Executive Director and CEO.
NAFSA: Association of International Educators

cc: Dr. John Holdren, Director, Office of Science and Technology Policy
Mr. Brian Nilsson, Director, Non-Proliferation Strategy, National Security Council
April 9, 2010

Stephen Tarragon
Deputy Chief
Regulatory Products Division Clearance Office
U.S. Citizenship and Immigration Services
Department of Homeland Security
111 Massachusetts Avenue, N.W. Suite 3008
Washington, D.C. 20529-2210

Re: OMB Control Number 1615-0009

Dear Mr. Tarragon:

We are responding on behalf of the Association of American Universities (AAU) and the Council on Governmental Relations (COGR) to the February 8, 2010 Federal Register notice concerning the United States Citizenship and Immigration Services’ (USCIS) proposal to add a “Deemed Export Acknowledgement” question to the Form I-129.

AAU represents 60 leading U.S. public and private research universities and is devoted to maintaining a strong national system of academic research and graduate education. COGR is an association of 182 U.S. research-intensive universities, affiliated hospitals, and research institutes that is specifically concerned with the impact of government regulations, policies, and practices on the performance of research conducted at its member institutions. We appreciate this opportunity to express our serious concerns about USCIS’ proposal to add a question to the Form I-129 filed by H-1B visa petitioners that requires them to state whether or not they will be required to have a deemed export control license. We believe the proposal does little or nothing to augment national security, is poorly timed, and reflects a lack of understanding of the nature and scope of existing deemed export requirements, particularly as they affect our member institutions. If enacted, the new requirement will result in substantial burdens on our members with, as noted, little or no benefit for national security.

In recent years, AAU and COGR have worked closely with the responsible federal agencies, including the Departments of Commerce and State, to ensure that our universities are in full compliance with deemed export control requirements and to improve these export control policies. During the Bush Administration, for example, we worked closely with the Department of Commerce’s Bureau of Industry and Security (BIS) to review and begin the process for reforming the nation’s deemed export control policies. As part of our efforts, we provided input to BIS as it empanelled the Deemed Export Advisory Committee (DEAC) and provided specific recommendations to that Committee for improving deemed export control policies. The Department of Commerce since has established an Emerging Technology and Research Advisory Committee (ETRAC) in furtherance of the DEAC recommendations and is currently examining deemed export control policies.

Given our longstanding interest in the deemed export control issue, and our engagement with the present and past Administrations on this issue, we were quite pleased when President Obama announced on August 13 plans to review the nation’s export control policies. According to the White House statement on that occasion, “the President extended the authority of the Department of Commerce-administered export controls. In addition the President directed the NEC/NSC to launch a broad-based interagency process for reviewing the overall export control system.” In his January 2010 State of the Union Address, President Obama reiterated the importance of reforming the nation’s export control systems so that they are consistent with national security needs while not compromising national economic objectives.

Given the current reviews of export control policies and, specifically, deemed export control policies by the Administration, USCIS’ proposal to amend the Form I-129 to address deemed exports seems both ill-timed and
premature. From our perspective, the addition of this new question to the Form I-129 is inappropriate at any time but particularly now, when the Administration is seriously considering changing current export control policies.

We also question the appropriateness of USCIS’ usage of the Form I-129 for the collection of this type of information. After all, the purpose of the Form I-129 is for an employer to petition for a foreign worker to come to the U.S. temporarily to perform services, not to collect information concerning deemed export licenses. We do not understand how USCIS plans to use this information or how it is appropriate or necessary for the visa process. We also question USCIS’ authority in this area, given that the Export Administration Act of 1979 and subsequent extensions of the Act by Presidential executive order clearly grant the Department of Commerce regulatory authority over dual use exports. Indeed, USCIS has no responsibility for export control enforcement or compliance. Thus, we do not believe that USCIS is the appropriate agency or that the Form I-129 is the appropriate mechanism to collect information concerning the need for deemed export licenses, and we do not understand USCIS’ need or rationale for soliciting this information. Our understanding is that under the Visa Mantis program the State Department already provides extra screening of visa applicants who are seeking to study or work in certain fields that are deemed to have national security implications. The proposed change to Form I-129 therefore appears redundant and unnecessary.

The proposal also overlooks the fact that most research conducted by foreign nationals at our member institutions is fundamental research, which is excluded from export control requirements. Whether or not technology is subject to the EAR is irrelevant if a foreign national is performing fundamental research. Because of the fundamental research exclusion, there would likely be very few instances where deemed export control licenses would be required for foreign nationals employed at our universities on H-1Bs. However, to ensure our compliance with this new requirement, we would have to do significant additional review for I-129 submissions to confirm that this was indeed the case, an exercise that would be above and beyond what we already do to ensure compliance with the existing Department of Commerce deemed export rules.

The inclusion of the “Deemed Export Acknowledgment” would therefore make filling out the Form I-129 and the H1-B application process much more complicated for H-1B visa petitioners and their university employers. Officials from our universities’ international affairs and human resources offices typically complete and file the Form I-129 for potential H-1B visa employees. However, to respond correctly to a such a narrow question concerning deemed exports licenses, other university officials from the office of sponsored programs and technology licensing, campus compliance officers, and sponsoring faculty would have to become intimately involved in the petition to hire temporary employees. This would dramatically increase the time it takes university staff to complete the Form I-129, and could have an impact on overall processing time for H-1B visa applications, and discourage further international scientists from working in the United States.

We further believe that in a research environment, it is unrealistic to expect that export-control issues and technologies connected to a particular line of research will remain static from the time the Form I-129 is completed to the end of the overall visa application process. We are not readily able to predict where scientific inquiry will take our researchers, and many of the actual technologies involved in conducting their research may change during the course of the research project as findings and discoveries progress. Thus, it would be easy for a university inadvertently to respond to this question in a way that would turn out to be inaccurate. This, too, reduces the value of this information to USCIS, and it demonstrates, in our view, a lack of understanding of the nature of research and the research process at our member institutions.

For these reasons, we question the appropriateness and value of this proposal to our nation’s security, the authority of USCIS to request and collect this information and the unnecessary potential costs it would impose on our institutions. We urge you to withdraw the proposed new requirement.

Sincerely,

Robert M. Berdahl
President
Association of American Universities

Anthony DeCrappeo
President
Council on Governmental Relations