



## INDUSTRIAL SECURITY

# LETTER

Industrial Security letters are issued periodically to inform cleared Contractors, User Agencies and DoD Activities of developments relating to industrial security. The contents of these letters are for information and clarification of existing policy and requirements. Suggestions for Industrial Security Letters are appreciated and should be submitted to the local Defense Security Service cognizant industrial security office. Articles and ideas contributed will become the property of DSS. Inquiries concerning specific information in Industrial Security Letters should be addressed to the cognizant DSS industrial security office.

**ISL 2009-02**

**June 06, 2009**

The NISPOM paragraph to which each article pertains is indicated in ( ).

### **1. (2-102) Eligibility of Companies Organized and Existing Under the Laws of U.S. Territories for Facility Clearances.**

Q. NISPOM paragraph 2-102b. stipulates that a company must be organized and existing under the laws of any of the fifty states, the District of Columbia, or Puerto Rico, and be located in the United States or its territorial areas in order to be eligible for a facility clearance. What about companies that are organized and existing under the laws of other U.S. Territories?

A. The Department of Defense (DoD) examined the basis for this requirement, which has been DoD policy since 1974. Based on this review, the Department will not automatically exclude companies organized and existing under the laws of any of the organized United States territories (currently Guam, the Northern Marianas Islands, Puerto Rico and the U.S. Virgin Islands) from consideration for facility clearances. For purposes of NISPOM paragraph 2-102b., the Defense Security Service (DSS) will process companies organized and existing under the laws of organized United States territories for a facility clearance, provided the company is also located in the United States or its Territorial Areas and is otherwise eligible for a facility clearance.

## **2. (2-205) Pre-employment Clearance Action**

In accordance with NISPOM paragraph 2-200a., contractor employees may be processed for a personnel security clearance (PCL) when access to classified information is essential for the performance of tasks or services related to the fulfillment of a classified contract. NISPOM 2-205 allows for submission of a PCL application prior to employment so long as a written commitment, indicating that employment must commence within 30 days of the granting of eligibility for the PCL, has been made to a prospective employee and the prospective employee has accepted that employment offer in writing. The prospective employee's PCL must be related to the fulfillment of a classified contract or other legitimate government requirement. The prospective employee must commence employment within 30 days of the granting of the eligibility, as annotated in JPAS, that permits the employee to perform the tasks or services associated with the contract or Government requirement for which the individual was hired.

As an example, if the duties of a specific contract on which the prospective employee is to perform require a final TOP SECRET (TS) eligibility, the contractor may defer the starting date of employment until the final TS eligibility has been granted, even if the prospective employee has an interim eligibility at any level or a final SECRET eligibility. Similarly, if the prospective employee requires a final SECRET eligibility in order to perform on a specific contract, the contractor may defer the starting date of employment until 30 days after the final SECRET eligibility is granted. If final eligibility is not required to perform on a contract, and the employee can perform the duties associated with the contract with an interim eligibility, then the employee must be on board within 30 days of the granting of the interim eligibility.

When a prospective employee has interim eligibility reflected in JPAS, but has not commenced employment, DSS may request documentation, such as the DD Form 254, from the contractor that supports the contractor's determination that the individual cannot perform tasks or services without a final eligibility determination.

## **3. (2-300c.) Negotiating an Acceptable FOCI mitigation measure**

Q: NISPOM paragraph 2-300c. states that an existing FCL shall be invalidated if the contractor is unable or unwilling to negotiate an acceptable FOCI mitigation measure. How does DSS determine that the contractor is unable or unwilling?

A: Ideally, the contractor will have an acceptable mitigation agreement in place prior to completion of the transaction (e.g., when the foreign interest assumes ownership of the cleared U.S. company). If there is not an acceptable measure in place when the transaction is completed, DSS must decide whether or not to invalidate the existing FCL. The critical determinant in this decision is the status of the FOCI mitigation when the transaction closes. As a general rule, DSS will invalidate the existing FCL at the completion of the transaction unless DSS determines that the contractor has submitted an acceptable FOCI action plan in accordance with paragraph 2-303.

Invalidation of the FCL renders a contractor ineligible to bid on new classified contracts or to receive new classified material except for information necessary for completion of essential contracts as determined by the government contracting activity (GCA).