



Immigration Update

April 2009

>>457 Visa - "Benefit to Australia" Policy Guidelines



A key element of the 457 Visa program is that the processing of applications should remain responsive to prevailing economic conditions. As a result of the current economic conditions and rising unemployment, the

Department of Immigration & Citizenship (DIAC) recently released new policy guidelines to case officers assessing Business Sponsorship applications. These guidelines aim to ensure that by approving an application to bring an overseas employee into the country there will be a "Benefit to Australia", as opposed to the sponsoring business only.

A "Benefit to Australia" may be demonstrated in one of four ways

- Through creation or maintenance of employment for Australian Citizens or Permanent Residents
- Through expansion of Australian trade in goods or services
- Through the improvement of Australian business links with international markets
- Through the development of competitiveness within sectors of the Australian economy

The "Benefit to Australia" criterion has always been a part of the 457 Visa requirements. However, while the Australian economy was booming and unemployment levels were low, DIAC assessors

tended not to require much detail as to how the criterion would be met. The new guidelines mean that any future 457 Business Sponsorship applications have to be accompanied by detailed submissions and supporting documentation on the issue of "Benefit to Australia". Applications that do not clearly show such benefit are likely to be refused.

In relation to any Visa applications that might be made under existing Sponsorships, DIAC will also assess whether those applications would directly result in a "Benefit to Australia" and they will also require additional supporting material.

Recent experience with applications indicates that the new policy guidelines are being applied quite strictly.

Case Officers assessing applications are requesting quite detailed evidence and information from sponsors on a range of issues that relate to company staffing, employee salary rates, company training efforts, etc. The focus of this is to ensure that, in a time of rising local unemployment levels, companies are not attempting to substitute "cheap" overseas labour for Australian labour.

The more detailed assessment processes are already having the effect of slowing down processing times.

Our Immigration team can advise and assist you in preparing comprehensive and complete submissions to support Business Sponsorship applications.

>>457 Worker Protection Legislation



As foreshadowed in a previous newsletter, the Government has enacted legislation to make provisions for a more structured and formalised set of sponsorship obligations,

together with additional measures to expand powers to investigate and monitor employer non-compliance with the 457 Visa scheme.

The new legislation received assent on 18 December 2008 and the Migration Legislation Amendment (Worker Protection) Act, together with the Regulations to be made subject to it, will take effect later in the year.

The key elements of the legislation are:

- The introduction of a new framework under which sponsors would be compelled by law to comply with sponsorship obligations.
- Enabling specially appointed officers with investigative powers to enter and search workplaces to determine whether employers are complying with their sponsorship obligations. The proposed powers would be

similar to the powers of workplace inspectors under the Workplace Relations Act 1996.

- Employers who provide false or misleading information could face penalties of up to 10 years imprisonment or a fine of up to \$110,000, or both.
- Administrative sanctions including the cancellation or suspension of an employers' entitlement to sponsor 457 visa workers will remain.
- Enabling DIAC to publish the names of employers found to be in breach of their obligations where non-compliances have not been remedied or for repeat offenders.
- Allowing DIAC to share with, and receive information from other government agencies where that is currently not possible. This includes the Australian Taxation Office in relation to whether a visa holder is being paid the correct amount.

>>Regulating Migration Advice

Under section 316 of the Migration Act 1958, Migration Agents are required to be registered and their work is governed by a Code of Conduct that forms part of the Migration Agents Regulations 1998.

The body charged with regulating the migration advice profession is the Migration Agents Registration Authority (MARA) and until recently

MARA's functions have been carried out by the Migration Institute of Australia under a statutory self-regulation arrangement. From 1 July 2009, responsibility for the MARA function will be transferred to a new Office of Migration Agents Registration Authority, a discrete office attached to the Department of Immigration and Citizenship.

>>Employer Nomination Scheme Visas



Perhaps the most commonly used option for employees on 457 visas to move from temporary status to Permanent Resident status in Australia is the Employer Nomination Scheme (ENS) Visa.

At C&G we are noticing an upsurge in interest in the ENS Visa, probably as a result of uncertainties in the Australian labour market brought about by the global recession.

ENS applications are a two-stage process, involving an application by the nominating company for approval of the nominated position and a visa application by the nominee. The nature of the work to be done in the nominated position must be highly skilled, the position must provide for a minimum of three years full-time employment and the nominating company must have had and continue to have an adequate training record for existing employees. The nominee must also be engaged in accordance with applicable Australian standards for wages and working conditions.

The nomination and visa applications can be lodged separately. Once the nomination is approved it remains valid for six months.

Visa applicants must normally be under 45 years of age and meet any relevant English Language requirements. Applications can be made that do not comply with these requirements on the basis of "exceptional grounds", but this involves the preparation of detailed submissions and arguments in support of the application and even then does not guarantee success.

Visa applicants in Australia on 457 Visas have three options open to them in relation to satisfying the skills component of ENS visa requirements:

1. on the basis of being a highly paid senior executive (minimum base salary \$165,000pa)
2. on the basis that they have been assessed as having acceptable qualifications by the relevant Australian skills assessing authority
3. on the basis of having been employed full-time in Australia in the relevant occupation for two years prior to the application, with at least one year with the nominating employer in the nominated occupation

It is Option 3 above that is relevant to most 457 visa holders as it means that the applicant does not have to go through the often difficult and uncertain skills assessment process.

Current processing times for a fully complete ENS application can be as little as two months.

Our Immigration Team can advise and assist you in relation to the ENS applications and the most appropriate option in your situation.

>>Draft 457 Sponsorship Obligations Regulations

Subsequent to the enactment of the overarching legislation, the Government released a draft of the Regulations that will relate specifically to the sponsorship obligations.

The key features are:

- Sponsors must co-operate with inspectors – this obligation continues for 5 years after the sponsorship ends
- Sponsors must pay a minimum salary level
- Sponsors must pay costs incurred by the Commonwealth, including costs incurred in locating and removing any visa holder (and family members) to a limit of \$10,000
- Sponsor must pay travel costs to enable a sponsored person to leave Australia if requested to do so in writing by the visa holder
- Sponsor must keep records (generally required to keep records for 5 years)
- Sponsor must provide records and information to the Minister

- Sponsor has an obligation to provide information to DIAC – must notify of cessation of employment, changes in business structure/ownership, bankruptcy, etc

Interestingly, the draft Regulations do not refer to any requirement for employers to provide health care for the visa holder.

The draft Regulations also outline the circumstances in which a sponsor may be barred, or a sponsor's approval may be cancelled, and the criteria that must be considered in determining whether take this action.

Once the new Act and Regulations come into effect, 457 sponsors will need to ensure that they are fully conversant with the detailed requirements and have in place comprehensive and clear record keeping arrangements.

The Immigration Team at Coleman & Greig would be happy to provide advice and assistance in this area to ensure your compliance.

For more information in relation to these issues, please contact either:



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