

Subclass 457 Business (Long Stay) Visa Program

Overview of Reforms

Introduction

On 1 April 2009, the Minister for Immigration and Citizenship, Senator Chris Evans, announced seven key reforms to the subclass 457 Business (Long Stay) visa program.

The reforms are designed to enhance the integrity and the ability of the program to deliver the skills needed in the economy, as well as be responsive to changes in economic circumstances. The program will continue to provide industry with needed skills, while not undermining local training and employment opportunities or exploiting overseas workers.

The reforms respond to the subclass 457 Integrity Review conducted by Ms Barbara Deegan and the views of stakeholders on the Skilled Migration Consultative Panel.

Implementation of the reforms

Since the Minister's announcement on 1 April 2009, a number of the reforms have been progressively implemented. These changes include:

- From 14 April 2009 – increasing the minimum language requirement from an International English Language Testing System (IELTS) average score of 4.5 to 5 for certain nominated occupations and from 14 September 2009, requiring applicants to achieve a score of at least 5 in each of the four components of the IELTS test;
- From 15 May 2009 - the revision of a range of gazetted occupations available under standard business sponsorship to include occupations in the Australian Standard Classification of Occupations (ASCO) major groups 1 to 4 only. Employers who seek to employ subclass 457 visa holders in any occupation not included on the Legislative Instrument can now only do so through a labour agreement;
- From 27 June 2009 - the requirement for subclass 457 sponsors to attest to having a strong record of, or demonstrated commitment to, employing local labour and non-discriminatory employment practices;
- From 1 July 2009 - the indexation of the Minimum Salary Level (MSL) for all new and existing subclass 457 visa holders by 4.1 per cent; and
- From 1 July 2009 - the progressive introduction of a formal skills assessment for subclass 457 visa applicants in trade occupations and chefs to confirm that workers have the skills required to perform their intended work in Australia.

Changes to the Temporary Subclass 457 Business (Long Stay) visa program that come into effect on 14 September 2009

The new program operates within a framework established by the *Migration Legislation Amendment (Worker Protection) Act 2008*. The Worker Protection Act was passed by the Parliament, with bipartisan support, on 3 December 2008. The Worker Protection Act amends the *Migration Act 1958*, with effect from 14 September 2009.

The key elements of the framework established by the Worker Protection Act are:

- sponsorship obligations that are enforceable and automatically apply by law to approved sponsors;
- civil penalties (fines of up to \$33 000) for breaches of sponsorship obligations – an approved sponsor will be liable to a civil penalty if they fail to satisfy the sponsorship obligations that come into effect on 14 September 2009;
- the Department of Immigration and Citizenship (the department) may issue infringement notices in lieu of pursuing through the courts a civil penalty for failure to satisfy a sponsorship obligation
 - the infringement notice can be for a fine of up to \$6600 for a company, and \$1320 for an individual.
- continuation of the department's existing sanction and enforcement tools, which include
 - cancelling approval as a sponsor, and barring a sponsor from sponsoring more people or making future applications for approval as a sponsor;
 - requiring or enforcing a security bond;
 - ensuring that a person to whom a debt is owed in relation to a sponsorship obligation may apply to a court to recover that amount.
- a new monitoring regime to promote compliance with sponsorship obligations
 - this includes “inspector” powers equivalent to those held by Fair Work inspectors under the *Fair Work Act 2009*;
 - inspectors will have a right of entry to a sponsor's work premises to ensure that obligations are being complied with.
- changes to the responsibility for health costs;
- changes to the English language proficiency requirement for subclass 457 visa applicants;
- the development of training benchmarks to clarify the existing requirement on employers to demonstrate a commitment to training local labour; and
- improved information sharing arrangements, so that personal information about subclass 457 visa holders and approved sponsors can be disclosed to prescribed agencies of the Commonwealth or of a State or Territory.

Sponsorship obligations

From 14 September 2009, sponsors of subclass 457 visa holders must meet a number of sponsorship obligations. These include:

- an obligation to cooperate with inspectors;
- an obligation to ensure equivalent terms and conditions of employment;
- an obligation to pay travel costs to enable sponsored persons to leave Australia;
- an obligation to pay costs incurred by the Commonwealth to locate and remove unlawful non-citizens;
- an obligation to keep certain records;
- an obligation to provide records and information to the Minister;
- an obligation to provide information to the department when certain events occur;
- an obligation to ensure that the primary sponsored person works or participates in nominated occupation, program or activity; and
- an obligation not to recover certain costs from a primary sponsored person or a secondary sponsored person.

For further information on each of the sponsorship obligations, visit http://www.immi.gov.au/skilled/whats_new_457.htm

Market salary rates

On 6 September 2009, the Minister announced further details of the reforms to subclass 457 visa arrangements, including details of the requirement for overseas workers to be paid market salary rates from 14 September 2009. The move to market rates means that sponsored subclass 457 visa holders will benefit from the same terms and conditions of employment as are provided, or would be provided, to an Australian worker undertaking equivalent work in the same workplace at the same location.

From 14 September 2009, employers are required to pay all new subclass 457 visa holders market salary rates, unless annual earnings of \$180 000 or more are proposed. Where there is an equivalent Australian in the workplace, the market salary rate will be determined by the industrial arrangements that apply to this worker.

Where there is no Australian performing equivalent work in the same workplace, the employer may demonstrate the market rate by reference to the applicable modern award or collective agreement. In absence of an award or collective agreement, the employer is to provide a range of evidence to substantiate the market salary rate. The evidence could include remuneration surveys, published earnings data or evidence of what employees performing equivalent work are paid in similar workplaces. The employer will have to satisfy the department that the proposed terms and conditions of employment were appropriate for that location and industry.

There are some transitional arrangements for current sponsors and current visa holders. These ensure that sponsors currently paying the existing MSL to Subclass 457 visa holders already in Australia have until 1 January 2010 to implement any pay increases for existing visa holders that will result from the introduction of market rates.

Until this time, sponsors must continue to pay existing visa holders a salary that is not less than the MSL set out in the relevant legislative instrument. This represents a temporary continuation of the existing arrangements as they apply to existing visa holders.

For more information on market rates, visit <http://www.immi.gov.au/skilled/457-market-salary-rates.htm>

Private health insurance

For all new subclass 457 visa applications, responsibility for health cover will be transferred from sponsors to employees.

From 14 September 2009, all subclass 457 visa applicants will be required to provide the department with evidence that they have adequate arrangements for health insurance for the period of their intended stay in Australia. This evidence will usually be in the form of a letter from their health insurer.

People who hold a subclass 457 visa which was granted before 14 September 2009 are not subject to the new requirements. For these visa holders, the sponsor retains responsibility for covering medical and hospital costs incurred for treatment received by the visa holder in a public hospital. Sponsors who fail to meet the relevant costs may be subject to administrative sanctions.

English language proficiency

There are some changes to the English language proficiency requirement for subclass 457 visa which will come into effect from 14 September 2009.

All primary subclass 457 visa applicants who are sponsored by a Standard Business Sponsor must demonstrate that they have English language proficiency that is equivalent to an IELTS test score of at least 5 in each of the four test components of speaking, reading, writing and listening. Prior to 14 September 2009, applicants required an average test score of at least 5 across the four test components.

If the nominated occupation for the visa applicant requires the applicant to hold a licence, registration or membership to perform in the occupation, and in order to obtain that licence, registration or membership the visa applicant is required to have an English language proficiency that is equivalent to an IELTS test score of more than 5 in each of the four test components, the visa applicant must have an English language proficiency of at least the standard required to be granted that licence, registration or membership.

This requirement affects all new subclass 457 visa applications from 14 September 2009, as well as visa applications which were made before but not decided by 14 September 2009.

Transitional arrangements

There are a number of arrangements that are in place to transition sponsors and visa holders to the new framework:

- Existing subclass 457 visa sponsors will have to satisfy sponsorship obligations from 14 September 2009;
- Existing subclass 457 visa holders will not be required to take out private health insurance until they seek a new visa. Until then the sponsor remains liable for costs incurred for treatment in a public hospital;
- Applications for subclass 457 visa sponsorship, nomination and visas made before but not finally determined by 14 September 2009 will be assessed under the new law. Refunds of nomination fees will be available where a nomination was approved before 14 September 2009 and did not identify an individual to work for the sponsor. As such, a nomination is not able to be used after 14 September 2009;
- Under transitional arrangements, employers will have until 1 January 2010 to implement any pay increases for existing subclass 457 visa holders resulting from the introduction of market salary rates;
- The change to IELTS will affect all new subclass 457 visa applications from 14 September 2009, as well as visa applications which were made before but not decided by 14 September 2009.

Visas affected by the new sponsorship framework

In addition to subclass 457 Business (Long Stay) visa, the enforceable sponsorship framework applies to the following visa subclasses:

411 Exchange Visa	415 Foreign Government Agency Visa
416 Special Program Visa	418 Educational Visa (repealed)
419 Visiting Academic Visa	420 Entertainment Visa
421 Sport Visa	423 Media & Film Visa
427 Domestic Worker (Executive) Visa	428 Religious Worker Visa
442 Occupational Trainee Visa	470 Professional Development Visa
488 Super yacht Crew Visa	

Although not affected by the enforceable sponsorship framework, a new subclass 406 Government Agreement visa has also been introduced as part of the reforms.

Further information

Further information on all aspects of the temporary skilled visa reforms is available on the Department of Immigration and Citizenship website at www.immi.gov.au or you can contact Stephen Reynolds at stephen.reynolds@aigroup.asn.au (tel: 03-9867 0221 or 0434 078 552).