INQUIRY INTO TEMPORARY BUSINESS VISAS

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MAINTAINING INTEGRITY IN A COMERICALLY DRIVEN 457 POLICY

As a migration agent, an email is received from offshore recruiting agencies or private labour organisations at least once a week seeking cooperation for assisting their clients find employment opportunities in Australia.

This strong interest from overseas labour companies suggests that there is a strong supply of potential skilled temporary workers. The restriction for these overseas labour companies has always been the question of demand and commercial realities. Most of these overseas labour companies come from non-English speaking countries or countries where English is a second language.

Commercial factors and considerations in Australia dictate the demand to meet this supply, as Australian companies in the main would prefer to recruit from the local market and do not see the overriding benefit of a foreign worker. Yet there must be something driving Australian companies to go to the expense and trouble of applying to sponsor an overseas worker.

With Australian labour hire companies becoming more active in marketing and recruiting for temporary business entrants, the demand has grown. With this growth, the quality, calibre and nature of each applicant has been generally less targeted to meet the specific requirements of both the Australian company and the 457 policy.

There are many companies in Australia who recruit overseas temporary business applicants, and for many different reasons. Some times the reason is a particular applicant has skills, including language skills, or networking ability that can assist the Australian company expand into overseas markets. Some times the Australian company is looking to recruit someone who has advanced expertise in a particular skills set or for training purposes. In many cases, there is a shortage or skills. In some cases, the employer has something more unacceptable or sinister in mind.

There is no one true justification for sponsoring a particular employee and nor should there be. The regulatory criteria should be flexible enough to allow Australian employers to meet any justifiable need, as long as the applicant meets standards acceptable to Australian standards and minimum eligibility requirements.

ELIGIBILITY REQUIREMENTS

The current regulations and policy concerning 457 visas are not fundamentally flawed. They are in essence designed to allow flexibility while ensuring a certain measure of skill and expertise. One very successful mechanism to ensure this mix of skill and expertise is a financial one. With the setting of minimum salary levels for each applicant, the policy not only ensures that the employer is meeting relevant Australian employment standards and salary levels, but also that the employee is a commercially viable skilled employee. This is a very important feature of the program, and integrity measures for the 457 visa must focus on this feature.

If the 457 visa policy is effectively enforced, unskilled labour will be less attractive to Australian employers at Gazzetted salaries which are set for skilled labour.

These salaries should be modified by Gazzette notice more effectively to ensure that each industry is attracting the right type of skilled employee according to industry supply and demand factors. This would allow the Department to ensure industry by industry that the gazzetted salaries are set at levels appropriate to encourage skilled workers and not unskilled workers. Regional 457 visas should also be adapted to such an approach.

It would not be unusual for 457 visa holders, to end up doing a less skilled activity than they have been nominated for. But in strengthening the integrity of the salary level and by controlling the gazzetted salary level more effectively, the Department could make such conduct commercially unfeasible for unscrupulous employers.

Lower salary thresholds or misrepresented salary levels encourages "visa purchasing", where a visa applicant is prepared to pay the employer or the overseas labour hire company substantial amounts of money in order to "buy" their 4 year visa. In order to discourage these practices, greater integrity in checking the true salary amount is required.

The commercial realities of the 457 visa compels the employer to consider the labour market. While not placing a direct obligation on an Employer to go through the expensive, long and often unnecessary or sham[1] process of formal labour market testing, the employer must weigh up the commercial benefits of the nomination.

The employer should be encouraged to employ Australians by the very reason that it is easier and less expensive. It is only where the skills are not available in Australia or there is a particular skill or experience or ability held by a particular applicant which is suited to the employees requirements, then the employee should have a flexibility in its decision making and should not be discouraged from engaging overseas temporary workers.

The difficulty and crucial aspect of this policy is monitoring and compliance. A failure to properly monitor the program will lead to abuse of the system. While punishing employers for non compliance or abuse of the system is essential, more can be done to ensure effective monitoring.

The salary of the employee should be the starting point. Care should be taken to ensure that the take home pay is not reduced by other charges by the employer or labour hire companies. Any such costs, benefits or allowances should be excluded and monitored to discourage practices where salary received are not a true salary in the sense that it is artificially inflated or has to be adjusted outside the taxation system.

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[1] The phrase Sham is used in the context of where an employer has already decided on engaging a particular employee from overseas, and any process of labour market testing would be unlikely to change the employers mind.

If the unscupulous employer is able to artificially reduce the gazetted salary, the employer is allowed to make unskilled labour under the 457 visa a viable commercial option or take away a job that would have been carried out by an Australian employee.

Monitoring and integrity measures should focus on what is at the heart of the sponsorship mechanism. The basic elements of the transaction are effectively the payment of salary for the undertaking of work. Monitoring policies should be adapted to focus on ensuring that the right money is paid, and secondly, to ensure that the work nominated is being undertaken. In relation to ensuring payment, a more detailed analysis of the money trail should be undertaken, rather then just a superficial review. Monitoring should be implemented so that there is some degree of certainty that the salary paid is the true salary without deductions or set off.

ENGLISH LANGUAGE REQUIREMENTS

There has been much discussion about problems associated with English language proficiency for 457 visa holders in the work place.

There are a large amount of 457 visa holders who do not have functional English, or in some cases, no English language ability all.

It is a simple commercial reality that an employer would not employ a person that they could not effectively communicate with or could not undertake their nominated task effectively. Such an idea would be commercial unfeasible. The only instance where this could possible occur is where the visa holder is engaged to do unskilled labour, however, if the 457 program is effectively administered and monitored, this should not happen. If there are some instances of this occurring, those issues should fixed rather than restricting other parts of the program which are beneficial.

The simple or commercial reason why employers employ applicants who do not speak English well or at all is because they are commercial beneficial to the employer in one way or another.

In such cases, one would find that the employees are usually engaged in positions where utilisation of their foreign language skill, together with their skill and experience is the reason for the appointment. These skills can be relevant to network development, exporting, or market expansion into overseas markets as examples. Most applicants who cannot speak English are engaged in such positions. They have existing skill sets and networks in overseas markets which are then utilized by the Australian company. It is without doubt that such opportunities are highly beneficial to Australia.

Obviously though, there are circumstances where English language ability may be required or indeed essential. In such cases, there should be a discretion with the Department to consider whether the Australian company has demonstrated compliance or a rational plan to deal with issues such as occupational health and safety.

CONCLUSION.

The policy behind the 457 is underpinned by a very Australian saying "a fair days pay for a fair days work". By ensuring that the commercial arrangements between the employee and employer are consistent with this policy then there are no major flaws in the current policy for 457 visas. What is required is more flexibility in the gazzetted wage for each industry – ensuring that the minimum wage for each industry is adjusted to make it more attractive for employees to engage Australian workers in preference to overseas workers, whilst recognising that there are skills shortages in some industries, and recognising the employer often knows best about its own requirements or development strategies.

As to English language requirements, employees should be able to meet basic occupational health and safety standards in all cases and a discretion should be retained by the Department in this regard. However, the employer should be able to make its own decisions as to who is appropriate for a task and these decisions should be dictated by commercial realities faced by the employer. If a particular employee, with little or no English skills is able to develop a new market for a company or increase profitibility for the employer, then it should not matter whether that employee speaks English or not, as long as they can do their job properly and safely.