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Submission to Australian Parliament's Joint Standing Committee on Migration

Inquiry into temporary business visas

15 February 2007

The Philippines Australia Union Link was formed in 1984 to promote and develop solidarity between the trade union and workers' movements of the two countries. PAUL is an association of Australian trade unions and trade union members which works with the Kilusang Mayo Uno Labor Center and its allied public sector unions in the Philippines – the Alliance of Concerned Teachers, Alliance of Health Workers and Confederation of Government Employees (COURAGE).

PAUL activities are done through the voluntary and unpaid service of its members.

PAUL makes this submission on the basis of study of the Temporary Business (Long Stay) 457 visas, and its experience in working with Filipinos who have come to Australia under the visa, and sought the assistance of Australian unions and PAUL. PAUL also relies and strongly supports the views of the Philippine-Australia Women's Association, based on their particular experience with Filipino nurses brought into Australia in recent years.

Terms of Reference

Inquiry into eligibility requirements and monitoring, enforcement and reporting arrangements for temporary business visas

1. Inquire into the adequacy of the current eligibility requirements (including English language proficiency) and the effectiveness of monitoring, enforcement and reporting arrangements for temporary business visas, particularly Temporary Business (Long Stay) 457 visas and Labour Agreements; and;
2. Identify areas where procedures can be improved.

(Adopted by the Joint Standing Committee on Migration on 6 December 2006)

RECOMMENDATIONS

1. While there are skill shortages in many sectors of the Australian economy, this is due mainly to a long term shortage of support in education and training in Australia, under the influence of the strategy of maintaining a federal budget surplus, privatisation of public sector enterprises which once trained the bulk of skilled workers, and direct cost cutting by major private sector corporations. Our primary recommendation is for the Australian government to significantly increase resources for training skilled workers in the TAFE and University sectors.
2. Where skilled workers are needed to be brought into Australia, they should continue to enter under the mainstream immigration program with general rights to obtain permanent residency and citizenship, and thus have equal rights and dignity in the workplace with other Australian workers, including the right to join a trade union.
3. Where skilled workers enter Australia under short-term visas such as category 457
    a. Their skills should be recognized properly and they should be employed on the same pay and conditions of fellow workers with the same skills.
    b. Employers who need to import these workers should establish a genuine training program for local residents to develop the skills which are in demand.
    c. The workers entering Australia under Visa 457 must not be forced into massive debt to acquire the Visa or the return airfare. These costs must be met by the employer and the employer must ensure no further debt is imposed by any labour recruiting agency in the source country.

d. A suitable portion of Australia's official development aid should be directed to source countries to assist them address the effects of the loss of skilled workers, such as doctors and nurses and engineers, and in recognition of the savings and benefits Australia derives from lessened costs for training these skilled workers.

e. Better arrangements must also be put in place for the families of these skilled workers to join the worker in Australia at the earliest possible time.

f. The short-term Visa program should not be a 'guestworker' program, but a genuine short-term visa for specific projects, and therefore the maximum term of the Visa should be one year.

4. The introduction of fines and other sanctions with substance for businesses that breach laws and undertakings in relation to the Temporary Business (Long Stay) 457 visas, including failure to report accurately and in a timely fashion on compliance by the business with these laws and undertakings;

5. The introduction of genuinely robust monitoring and investigative powers and capacity of the Department of Immigration, including –

   a. Unannounced site visits to which a business may not object;

   b. The capacity to source information from other Government Departments;

   c. Tighter rules on information provision and further sponsorship applications;

   d. Joint and priority investigation of breaches of Australian laws such as those related to employment relations, superannuation, occupational health and safety, workers compensation, taxation etc.

6. Fairer and more flexible arrangements for employee-visa holders, including -

   a. A capacity to move between sponsors and/or to seek employment in their field, especially where they have been a victim of an employer-sponsor who has not complied with law or undertakings;

   b. A requirement for an employer withdrawing sponsorship to give a reason and the opportunity for the employee to respond to the Department;

   c. A capacity to remain in Australia and seek employment whilst exercising legal rights such as action to recover unpaid wages and entitlements etc;

   d. The Commonwealth Government pays a worker's entitlements when a sponsor fails to keep its obligations, and then recovers from the business.

1)Areas of inquiry
a) adequacy of the current eligibility requirements (including English language proficiency)

Eligibility [for sponsors and employees] under the 457 visa sub-class is flawed. The criteria in practice give employers strong powers over the employee-visa holder, and places the employee-visa holder at a disadvantage. Balance, fairness, clear guidelines and close monitoring are required.

Employer eligibility

The provisions for application for standard business sponsor status [regulation 120D for an Australian business; regulation 120DA for an overseas business] are too vague and general and are not subject to substantial counterchecks or verification. Simple declaration on Form 1196, and rudimentary documentation is sufficient to secure approval as a sponsor.

Safeguards and protections have been stripped away. Since 1 July 2001, there is –

- no need for labour market testing or to demonstrate an activity is key to the business;
- no requirement for employers to demonstrate a training benefit to Australian workers
- no requirement to have the sponsored person's credentials first vetted by Australian accrediting authorities

The criterion "competitiveness within sectors of the Australian economy" (regulation 120D (2) (a) (iv)) allows sponsorship where the aim is to employ overseas workers at a rate lower than the Australian market rate. If this criterion is the basis of the application, none of the other criteria beneficial to Australia need to be satisfied.

The employer's undertakings [page 9 of Form 1196] are limited to character, and examples of non-compliance are common. For example, Filipino nurses coming to Australia with a Temporary Business (Long Stay) 457 visas generally pay for their air fares, despite the first undertaking on the list. The weakness of the monitoring regime under Division 1.4A of PAMS 3 [see below] means that few employers may fear sanctions for breach of the undertakings. Even if breaches may be suspected or proven, the employer may still keep the right to sponsor further employees, with "counseling" the most severe sanction imposed (PAMS 3, Division 1.4A, 119.4, 119.5).

The validity of an employer's declarations in the application for standard business sponsor status will not be tested until 9 to 12 months after approval (PROCEDURES ADVICE MANUAL 3, [PAMS 3] Division 1.4A, 113(4)).

An employer who cannot provide evidence of meeting training undertakings, or who has been referred to another government agency for breach of Australian law can be deemed "satisfactory" at DIAC [

Department of Immigration and Citizenship] monitoring, and cannot be excluded from an application for further sponsorship [PAMS 3, division 1.4a, 119 (4), 119(5), 120(2)].

The expansive list of the specified occupations for the purpose of sponsorship under this visa [IMMI 06/036] allows employers great freedom in bringing a wide variety of workers into Australia without a requirement to meet higher qualifications standards for the 'skilled' workers that were meant to be covered by this visa.

EMPLOYEE ELIGIBILTY

Employee eligibility criteria make the employee dependant upon the sponsoring employer, and vulnerable to overbearing pressure from an employer.

The provisions mentioned in the previous section allowing such latitude to employers mean that very experienced and qualified workers may come into Australia without Australian recognition of their skills and qualifications. The worker has little capacity to move to a new employer if they suffer exploitation or duress in the sponsoring employer's workplace. Condition 457.223 (4) applies to the majority of workers under the Temporary Business (Long Stay) 457 visa subclass, and leads to the cancellation of their visa if the employer withdraws sponsorship, without an opportunity for the employee to argue that the withdrawal of sponsorship was unreasonable or unlawful.

There are cases where assessment framework for eligibility requirements lacks enough recognition of previous experience in their field of profession. For those who have been recruited, employed and sponsored by recruitment agencies who supply workers to various work places and several types of job category, they have experienced being forced to undertake jobs that they are not qualified to do and are not within their work experience from their countries of origin or other countries overseas where they worked before coming to Australia.

For example, the nurses sponsored by Health Service Pty [not its real name] (a supplier of Residence Care Officers [RCO] for various nursing homes in Sydney) have constantly forced its RCOs to undertake domestic work for aged people at their homes. These RCOs are Registered Nurses in the Philippines before they were recruited to work in Australia. One of the nurses interviewed had 8 years of experience in the Riyadh (Saudi Arabia) Military Hospital. The rest of the nurses have at least 5 years of experience working as a nurse in hospitals in the Philippines. Health Service Pty failed to recognize the qualifications and experiences of these registered nurses.

The aforementioned Filipino nurses want to become registered nurses in New South Wales. They need to be registered in order that they could be employed in hospitals and avoid exploitation.

The Nursing College in Burwood, NSW is offering assessment so they meet the requirements of registration, but each nurse has to pay $7,000. They do not have this amount of money because their salary rate as RCO at Health Service Pty is very low and they are not given enough hours of work even though they status is full-time and works for 38 hours per week. Their earnings are not enough to cover payments for accommodation rent, water, electricity, transportation, food, financial support for their family left behind in the Philippines and payment for their debts incurred to process their visas, cost of airfare, medical examination, etc.

b) Effectiveness of monitoring arrangements

The monitoring arrangements for employers under Division 1.4A of PAMS 3 for the implementation of the powers under the *Migration Act 1958* (Cth) [ss137B, 140J, 140K, 140L] and the Migration Regulations 1994 [Regs 1.20H, 1.20HA, 1.20HB] are limited and circumscribed as to subject matter, have no powers of investigation or compulsion, provide loopholes and opportunities for employers to delay monitoring processes, provides weak protections for a worker facing exploitation, unlawful treatment and victimization, and only has provision for cancellation of the business sponsor status [no criminal or financial penalties].

On the other hand, a worker found not to comply with the very strict conditions of their Temporary Business (Long Stay) 457 visa, faces very strict and onerous compliance regulations under the Act and Regulations, can suffer deprivation of liberty in immigration detention with little notice and limited appeal rights, financial penalties and imposts related to exercise of appeal rights, or detention.

Complaints from the employee or a third party are a basis for priority site visits or re-scheduled monitoring in the monitoring procedures under Division 1.4A of PAMS 3. A worker is unlikely to raise complaints due to the imbalances in the eligibility, monitoring and compliance arrangements.

The monitoring procedures fail their own description [112.1] –

> One of the key principles underpinning the 457 program is to provide business with streamlined arrangements to enable the quick transfer of key personnel. This is, however, backed by robust monitoring measures to ensure the integrity of the program. The measures are aimed at ensuring that business sponsors comply with their sponsorship obligations, and 457 visa holders comply with their visa conditions.

The monitoring procedures are very far from robust, and this fact clearly calls into question "the integrity of the program". 'Streamlined arrangements' for employers mean that employers are not monitored in any adequate fashion, and the balance is tipped sharply in favour of the employer and against the employee and fairness in the employment relation.

What monitoring there is begins 6 to 12 months after business sponsorship has been approved (PAMS 3, Division 1.4A, 113.4). The means is Department of Immigration Form 1110 self-completed by the business sponsor. If a business fails to return form 1110 within the 28 days allowed to them, they are given a further 28 days notice in a request for the completed form. If they return an incomplete form, they the Department will grant a further 14 days to supply the needed information (114.6). Further 14 days periods are granted as each missing piece of information is requested (114.6).

Contrast this with the position of the sponsored overseas worker. Immediately the sponsoring business withdraws sponsorship [no reason is required], the employee's visa is deemed to be cancelled and they are subject to the threat of immigration detention as an unlawful non-citizen. A business is required to advise the Department within 5 days if they dispense with the services of the employee.

The self-reporting of the business in Form 1110 will be accepted at face value, as the Department's monitoring procedures are weak and ineffectual, unannounced site visits virtually impossible, and the inability of the Department to investigate any breaches covered by other government agencies [see below].

A business can easily satisfy the self-reporting in Form 1110 with a sliver of actual information For example, a mere 2 Pay As You Go (PAYG) payment summaries will usually be sufficient evidence of payment of salary and wages (119.2), and evidence of employment of "in-house trainers" (with no evidence of actual trainings) will be sufficient evidence of meeting training undertakings (119.3)

There are no search powers under the legislation and implementing provisions (115.1). The agreement of the business to allow Departmental staff to visit is purely voluntary (115.1), and Departmental officer must seek the cooperation of the business before a site business. The business has a right to refuse a visit (115.3). Unannounced site visits are not to occur except in special and exceptional circumstances, and then only with the approval of a senior

officer of the Department (115.4). Contrast this with the virtually unfettered powers of the Department's Compliance section in pursuing sponsored workers against whom allegations may have been made.

Monitoring focuses on undertakings given in Form 1196 [page 9]. These relate to the truthfulness of information already given. Whilst undertakings are given in relation to complying with applicable laws relating to workplace relations, superannuation and taxation, the Department will not investigate, or encourage compliance with these laws. Instead the Department will refer concerns to the responsible Government agency in the hope that agency will encourage compliance, "if they desire" (119.1).

In practice, significant undertakings are more honoured in the breach. For example, in PAWA's experience all Filipino nurses (interviewed by PAWA) coming to Australia to work as Residential Care Officers pay their own air fares, despite the first undertaking in the list in Form 1196 being "ensure that the cost of return travel by a sponsored person is met". Contracts put the responsibility for these costs on the employee, and as these contractual arrangements "are not a matter for DIMA consideration" (119.5), the Department is bound to allow employer avoidance of this undertaking. Similarly, with the undertaking to pay for all medical or hospital expenses of an employee, and costs of detention and deportation, this contractually can be transferred to the employee's responsibility.

This weakness in respect to Form 1196 undertakings undermines the credibility of both the undertakings and the process in place to monitor compliance with these undertakings.

Contractual arrangements between a visa holder and the sponsoring business are not a matter for the Department's consideration (119.2). Monitoring is finalised as satisfactory if the Department is unable to determine whether a sponsor's actions breach undertakings. For example, if the Department has strong grounds to suspect that an employer is breaching laws on workplace relations, minimum salary levels, occupational health and safety, taxation, superannuation and provision of health care, whilst waiting for other Government agencies to decide if they want to "encourage compliance", the Department of Immigration will finalized monitoring as 'satisfactory' (119.4).

Even where monitoring has not been finalised, no delay is allowed for the approval of a new sponsorship application of that business (119.5).

A business with an unsatisfactory monitoring outcome in the first instance will be counseled and re-scheduled for repeat monitoring in 6 to 12 months. Sanctions will only be considered if the later round of monitoring shows the employer has not rectified problems previously identified (120.2). New problems identified in the later round of monitoring may be accorded the same 6 to 12 months of time before re-scheduled monitoring will take place.

Most sponsors are monitored only once or twice during the sponsorship period (120.1). Monitoring will only increase to once a year after monitoring raises concerns. If no concerns arise from the self-completed and uninvestigated Form 1110, no additional monitoring will arise.

If a business's sponsorship application is "marginally acceptable" this will not of itself lead to priority or a higher level of monitoring. The same applies if a business sponsor is a new business with no proven track record, has been the subject of adverse third party-reports or DEWR concern, or has failed to complete and return Form 1110. No extra monitoring activity is required, just a 'priority' for a site visit which cannot be unannounced, must be negotiated with the business, and is entirely voluntary on the business' part (113.2).

No special monitoring arrangements [apart from a priority for the toothless site visits] are required for industries of concern (119.3).

The monitoring provisions are silent on complaints from a sponsored employee. These are not 'third party' reports. The silence of the provisions reinforces the powerlessness of the sponsored employees, and contribute to the extreme difficulty such employees face if they have the courage to report employers who break laws and breach undertakings.

The weakness of the monitoring provisions allows business sponsors who are not doing the right thing to drag out the period of monitoring through any referral and possible investigation, to processes on possible sanctions [including appeal rights] to 2 or more years. Sponsored employees can only agree to suffer the injustices for this period. If an employee decides against this, and leaves the employer's service, they lose any income, their visa and any right to work in Australia. They could only remain in Australia if they find a new sponsor within 28 days who is prepared to take them on.

As most sponsored employees are heavily in debt to pay for recruiter's fees, air travel and basic costs in Australia before their wages are paid, the decision to leave employment at a sponsoring business is extremely difficult. The heavy dependence on a sponsor means that most sponsored employees will suffer injustice and unlawful and unfair treatment rather than complain.

In PAUL's experience, employees who have raised complaints about unlawful employer actions and breaches of undertakings have been harassed and pressured through –

- denial of shifts and salary payments;
- threatening comments, face to face, or through phone messages and texts messages on mobile on phones;
- threats to end sponsorship and report the employee to DIMA for deportation
- threats of violence
- phone calls to dependent family members designed to get these family members to apply pressure on the employee to remain silent;
- pressure and threats to friends and colleagues of the employee who are also sponsored by the same employer;
- eviction from accommodation provided by the employer.

c) effectiveness of enforcement arrangements

Enforcement of compliance is skewed in favour of the employer and to the detriment of the employee-visa holder. The inequalities discussed in the previous section on monitoring have as an inevitable result inequalities in the regime of enforcement.

The sanctions available to the Department of Immigration against the employer are set out in section 140L of the *Migration Act 1958* –

> **140L.** The actions the Minister may (or must) take under section 140J or 140K in relation to a person (the ***sponsor***) are:
>
> (a) canceling the approval of the sponsor for specified kinds of temporary visas (however described);
>
> (b) cancelling the approval of the sponsor for all temporary visas;
>
> (c) barring the sponsor, for a specified period, from sponsoring more people under the terms of one or more existing specified approvals for temporary visas;
>
> (d) barring the sponsor, for a specified period, from sponsoring more people under the terms of all existing approvals for temporary visas;

(e) barring the sponsor, for a specified period, from making future applications for approval as a sponsor for specified kinds of temporary visa (however described) for which sponsorship is a criterion;

(f) barring the sponsor, for a specified period, from making future applications for approval as a sponsor for all temporary visas for which sponsorship is a criterion;

(g) barring the sponsor, for a specified period, from nominating a person or activity in relation to a temporary visa where the sponsor would otherwise be entitled to make the nomination under the regulations.

These sanctions only may arise after the ineffectual monitoring processes described above have been completed. It is open to an erring business sponsor to use all the delaying tactics and loopholes in the monitoring procedures to delay any consideration of the imposition of such sanctions for a period of 2 or more years.

The sanctions do not include fines, or powers to direct the business to make good any financial loss suffered by the employee due to the employer's breach of migration law, including undertakings to comply with Australian laws on employment relations, health and safety, taxation, superannuation etc.

Whilst the erring employer may finally be barred for a period from sponsoring future overseas-sourced employees, they may keep moneys gained in the circumstances of breach, and their capacity to continue in business and derive incomes and profits will only be impacted to the extent that they may not utilize overseas-sourced employees for the period of any bar under the *Migration Act 1958*.

The employee-visa holder may not only loose any entitlements and any hoped-for future income, they may loose very considerable savings and real estate/properties to pay their loans and debts incurred to secure a visa and the possibility of employment in Australia.

The employee may be in the situation where they have been recruited by an employer-sponsor that has had a further sponsorship application approved despite active concerns about very serious breaches in accordance with PAMS 3, division 1.4a, 119 (4), 119(5), 120(2). Finally these concerns result in a bar under s140L of the *Migration Act 1958*, and the sponsored employee finds that their visa is no longer valid as their sponsor has been barred. So through no fault of their own, the employee-visa holder finds themselves without a legal right to remain in Australia, no employer, no income, and with the threat of immigration detention.

The employee's only hope of remaining in Australia is finding a new sponsor within 28 days – a very hard task as no information on which businesses are approved sponsors is available publicly. Moreover, the employee is out of their country, is likely to be burdened by debt, and may face the situation where the erring employer will not or can not pay entitlements owing to the employee, including the cost of return travel to their country of origin. If detained and deported, the costs incurred may become a debt to the Commonwealth.

Through no fault of their own, the employee faces severe sanctions including deprivation of any capacity to work and earn an income, deprivation of a visa and the associated rights, and practical exclusion from legal remedies due to tight time frames they have to leave Australia [and the related compliance regime] and their lack of income and other financial resources. These imbalances mean enforcement arrangements are inutile and discriminatory.

4) effectiveness of reporting arrangements.

This subject is treated above, especially under the review of monitoring arrangements. The reporting arrangements related to the employer's compliance with the relevant law and their own undertakings are weak and ineffectual. Those related to the employee-visa holder are strict, and may lead to the strong enforcement regime related to compliance and deportation.

2) Areas where procedures can be improved

Improvements may be made in the areas of fairness and equity, stronger investigative powers into sponsor breaches of law and undertakings, and policy directions towards an effective overseas worker program for areas of genuine labour shortage in Australia.

A cause of the shortcomings in the Temporary Business (Long Stay) 457 visas is policy failure over the past decade in inter-related fields –

- a failure to identify and respond to genuine labour shortages in specific sectors and regions
- a failure of workforce planning and skills training in important trades and professions, including nursing, allied health professionals and workers [including residential care officers], information technology, and metal, mining and construction trades etc.
- a failure to look to the enhancement of migration law and visa classes to allow timely and flexible solutions where the traditional 'skilled migration categories have proven ineffective [e.g. nursing].
- A failure to oversight and police businesses that breach law and undertakings in relation to temporary business entrants;
- A failure to promote more suitable skilled migration and visa sub-classes in potential source countries such as the Philippines.

These policy failures saw the Temporary Business (Long Stay) 457 visas becoming a cover of convenience to seemingly addresses some aspects of the above policy failure. However, the visa sub-class is not designed for the expanded role it is now playing. The sub-class is easily abused by businesses and individuals seeking quick profits at the expense of the aspirant employee-visa holder. One can also see that subclass 457 could be used for human trafficking and slavery. Monitoring and enforcement provisions are ineffectual and skewed heavily in favour of the erring employer.

3) The following improvements are recommended –

1. While there are skill shortages in many sectors of the Australian economy, this is due mainly to a long term shortage of support in education and training in Australia, under the influence of the strategy of maintaining a federal budget surplus, privatisation of public sector enterprises which once trained the bulk of skilled workers, and direct cost cutting by major private sector corporations. Our primary recommendation is for the Australian government to significantly increase resources for training skilled workers in the TAFE and University sectors.
2. Where skilled workers are needed to be brought into Australia, they should continue to enter under the mainstream immigration program with general rights to obtain permanent residency and citizenship, and thus have equal rights and dignity in the workplace with other Australian workers, including the right to join a trade union.
3. Where skilled workers enter Australia under short-term visas such as category 457

a. Their skills should be recognized properly and they should be employed on the same pay and conditions of fellow workers with the same skills.

b. Employers who need to import these workers should establish a genuine training program for local residents to develop the skills which are in demand.

c. The workers entering Australia under Visa 457 must not be forced into massive debt to acquire the Visa or the return airfare. These costs must be met by the employer and the employer must ensure no further debt is imposed by any labour recruiting agency in the source country.

d. A suitable portion of Australia's official development aid should be directed to source countries to assist them address the effects of the loss of skilled workers, such as doctors and nurses and engineers, and in recognition of the savings and benefits Australia derives from lessened costs for training these skilled workers.

e. Better arrangements must also be put in place for the families of these skilled workers to join the worker in Australia at the earliest possible time.

f. The short-term Visa program should not be a 'guestworker' program, but a genuine short-term visa for specific projects, and therefore the maximum term of the Visa should be one year.

4. The introduction of fines and other sanctions with substance for businesses that breach laws and undertakings in relation to the Temporary Business (Long Stay) 457 visas, including failure to report accurately and in a timely fashion on compliance by the business with these laws and undertakings;

5. The introduction of genuinely robust monitoring and investigative powers and capacity of the Department of Immigration, including –

    a. Unannounced site visits to which a business may not object;

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    c. Tighter rules on information provision and further sponsorship applications;

    d. Joint and priority investigation of breaches of Australian laws such as those related to employment relations, superannuation, occupational health and safety, workers compensation, taxation etc.

6. Fairer and more flexible arrangements for employee-visa holders, including -

    a. A capacity to move between sponsors and/or to seek employment in their field, especially where they have been a victim of an employer-sponsor who has not complied with law or undertakings;

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    c. A capacity to remain in Australia and seek employment whilst exercising legal rights such as action to recover unpaid wages and entitlements etc;

    d. The Commonwealth Government pays a worker's entitlements when a sponsor fails to keep its obligations, and then recovers from the business.