A STEP BY STEP GUIDE TO 457 VISAS & ILLEGAL WORKERS

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VISA ISSUES

Accessing the global labour market when skills shortages exist in Australia is a privilege that requires forward planning by employers and comes with sponsorship obligations. The 457 visa program is the mechanism employers must use to employ non-Australian workers.

Use of the 457 program is strictly regulated by the Department of Immigration & Citizenship (DIAC), with access to the 457 program restricted to approved employers known as "sponsors". To gain approval and comply with the 457 program requirements involves management planning and revision of standard human resources policies and procedures. It is difficult for smaller employers – especially those without dedicated human resources personnel – to meet the requirements of the 457 program easily.

Recruitment consultants play an important part in helping employers access international labour markets but to save time, expense and frustration, consultants need to know that:

- **Size matters** – In general, the larger and more sophisticated the employer, the more likely the employer is to be able to meet the requirements to become an approved sponsor.
- **Start-ups can experience difficulties** – DIAC looks at a company's trading history in determining whether to grant sponsorship status. Additional financial information is required for a start-up company to obtain sponsorship approval. As a start-up, your client should take advice about its prospects of success in the sponsorship application before commencing an international recruitment campaign.
- **Training** – Sponsors must demonstrate that they have a commitment to training Australian workers before sponsorship approval is granted. Commitment is demonstrated by either spending one percent of their gross payroll on training Australian workers or make a contribution to a relevant industry-training fund to the value of two percent of gross payroll in the 12 months before applying for sponsorship status. Meeting one of the two training benchmark is an ongoing obligation once sponsorship status is obtained. Resources must be devoted to documenting training undertaken and expenditure on training. Small to medium sized businesses may struggle to meet this requirement. Some contractors can also be included in the assessment of gross payroll which can make it unviable for some employers to meet a training benchmark.
- **The position must be "skilled"** – Only some positions are considered skilled under the 457 program. If the position the employer seeks to nominate is not considered "skilled", the employer will

have to negotiate a Labour Agreement with DIAC - which is a long and expensive process. Your client should take advice about whether the position to be filled falls within the 457 program before instructing you to undertake overseas recruiting.

- **Salary benchmarking** – Since 2009, employers have had to show that 457 visa holders are receiving the same terms and conditions of employment that an Australian worker would receive in the same position and based in the same location before the position can be approved. A 457 position can be benchmarked by comparison with Australian workers in equivalent positions in the company. If your client does not employ Australians in equivalent positions, then your employer client may ask for your advice on this issue. Ensure that salary benchmarking is considered when the recruitment brief is put together. Benchmarking is not required for positions earning $250,000 or more annually.
- **Salary threshold** – There is a minimum salary threshold that a 457 position must exceed, in addition to salary benchmarking. This is called the Temporary Skilled Migration Income Threshold or "TSMIT". TSMIT is indexed annually on 1 July. The current TSMIT is $53,900. This is a crucial factor in the recruitment brief.
- **Labour market testing** – A new requirement, employers must now show at the nomination stage that they have attempted to fill the position with an Australian worker before applying for a 457 visa for a non-Australian worker. This is commonly done by advertising the position in Australia. Obviously local advertising and candidate identification should be undertaken and documented before considering international candidates.
- **Health and character of visa applicant and dependent family** – Often health conditions or criminal convictions will not be relevant or important to an employer, but they will be critical to the success of a visa application. The health and character requirements apply not only to the direct employee but also to dependent family members included in the 457

visa application. It is important to canvass health and character issues with candidates before an offer of employment is made to avoid delay, the distress of visa refusal or the imposition of a health undertaking on the employer. There are countless examples of candidates who have resigned from their position to take up an offer of employment in Australia, only to find that their visa application fails on health or character grounds.

- Skills & English language assessment – Some visa applicants will require a skills and/or English language assessment. These can take some time, depending on where the candidate is located. Forward planning in this regard is important.

ILLEGAL WORKERS

DIAC figures show that there are more than 500,000 non-citizens in Australia each year holding a temporary visa with permission to work. All of these temporary visas carry conditional permission to work. For example:

- Most student visa holders may work no more than 40 hours in any fortnight during the academic term
- Working Holiday visas holders can work for one employer for no more than six months; and
- Primary 457 visa holders can only work for their sponsor in a position nominated at the time of application (there is no such restriction on secondary 457 visa holders).

If temporary visa holders work beyond the scope of their permission to work, they are in breach of their work-related visa condition. Working in breach of visa conditions makes workers and their employers liable to penalties.

In addition, it is estimated that there are presently about 100,000 people working in Australia who hold no visa at all. Without a visa, these workers have no permission to be in Australia or to work. Again, both the work and employer are liable to penalties if detected.

For the purposes of this article "illegal worker" is the term used to describe both workers working in breach of their permission to work conditions on a valid visa and those non-Australians who work while holding no visa at all.

With more than 600,000 non-Australian workers in the workforce with conditional or no permission to work, the issue of checking visa holders' permission to work should be foremost in employers and recruiters' minds.

The Howells Review on illegal workers reported to the Federal Government in 2011 and concluded that the employer sanctions legislation in place at that time was not effective and further amendments to the legislation should be made.

The most recent amendment made in response to the Howell Review recommendations came into effect on 1 June 2013. The amendment introduces new provisions that apply to executive officers of companies that employ illegal workers and impose civil and, in some cases, criminal liability on executive officers. Executive officers are defined to include company directors, chief executive officers, chief financial officers and company secretaries. The other group targeted in the amendment is recruiters, who can now be personally liable for referring an illegal worker.

The provisions provide a statutory defence for recruiters who can show that they undertook reasonable steps at reasonable times before the referral. Recruiters need to address this issue immediately by reviewing their permission-to-work checking procedures for all candidates. All recruiters should be registered to use DIAC's free 24-hour online visa checking service known as "VEVO", as a VEVO search is specifically mentioned as being a reasonable step for the purposes of the statutory defence. It is important that recruiters have sufficient understanding of the Australian immigration system to interpret the VEVO search results and training should be provided to recruiters without this knowledge.

There will also be contractual ramifications for recruiters as a result of the legislative change. Executive officers of companies, in a bid to protect themselves by relying on the statutory defences available to them in the new legislation, will want to place responsibility on recruiters for ensuring that candidates referred to their companies have appropriate permission to work. DIAC is recommending to employers that they include a provision in their service contracts with recruiters placing responsibility on recruiters to check candidates' permission to work. You should expect to be approached about this issue by your clients in the near future.

If you have any concerns about the new provision affecting recruiters you should seek advice from a professional. Only registered migration agents are able to give advice in relation to immigration issues in Australia. A complete list of registered migration agents can be found on the website of the Office of the Migration Agents Registration Authority at www.mara.gov.au. ■

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