Migration Law – Visas & Sponsorship – Some Common Issues

Paul Cutler

Introduction

Immigration is a hot political topic and has been since Federation. The I*mmigration Restriction Act* was one of the Acts passed by the fledgling Commonwealth Government in 1901. That Act comprised of 19 sections and was some 5 pages long. The current version of the *Migration Act* 1958 has 507 sections runs to almost 900 pages. It is accompanied by 2000 pages of regulations and a small mountain of policy to assist with interpretation.

Even a superficial gloss over of this large amount of information would be impossible in the time allowed for this presentation. Consequently, I will focus on a few principles relating to visas, paying particular attention to the work rights attached to them. I have two objectives - first, to provide some practical information about rights and liabilities that might arise if you choose to employ someone who is not a citizen or permanent resident. Secondly, to provide an overview of what would be involved in assisting someone to obtain a working visa.

However, before I do that, it will be instructive to look at some general principles relating to visas.

Visas – A General Overview

Anyone who is not an Australian citizen is required to have a visa to enter and remain in Australia. Those who do have a visa are "lawful non-citizens" and those without a current valid visa are "unlawful non-citizens"[1].

(a) Unlawful non-citizens

The most common way of becoming unlawful is to simply overstay the term of the visa. There are others, including failing to leave after a visa is cancelled. Once someone is unlawful, there are a number of serious consequences:

1. unlawful non-citizens are subject to mandatory detention[2];

2. generally, unlawful non-citizens are not able to apply for another onshore visa. In other words apart from leaving Australia there is usually no way to become lawful;

3. unlawful non-citizens are able to voluntarily leave Australia if they choose to. Any unlawful non-citizen who presents at a departure port may be subject to an "exit interview", but they will not be prevented from leaving;

4. having been unlawful on departure generally means that the person will be subject to an exclusion period (usually three years) before they are able to make a valid visa application to return to Australia.

As a result of the above, apart from assisting their departure there is usually very little that can be done to assist the unlawful non-citizen.

1 Sections 13 and 14 Migration Act.
2 Division 7 (commencing at section 188) Migration Act

(b) Lawful non-citizens

On the other hand, lawful non-citizens are often able to apply for another visa. This will typically happen when a visitor is offered employment, or marries an Australian or when an overseas student graduates. Most visas have time of application and time of decision requirements that need to be met. These requirements often include where the visa applicant is located at each of those times. If it is possible to make an onshore application, the applicant will often want to stay in Australia while their visa application is processed. This may result in the grant of a bridging visa.

While there are five different types of bridging visas, the one most commonly encountered is bridging visa A ("BVA"). If a lawful non-citizen makes an application for "visa #2" while they are the holder of "visa #1", there is a possibility that a decision on visa #2 might not be given until after the expiry date of visa #1. In those circumstances a BVA will automatically come into existence to bridge that period between the expiry of visa #1 and the decision (hopefully a grant) on visa #2. A BVA is effectively an extension of visa #1 and any terms or conditions which attach to visa #1 will continue.

There are two common limitations on onshore applications:

(a) the "no further stay condition" (condition 8503); and
(b) the "Section 48 bar".

Although there appears to be no rigid scientific method in allocating it, condition 8503 appears to be imposed on the visas of citizens of various countries that statistically have poor immigration compliance. It is very difficult to have 8503 waived and anyone with that condition on their visa will have to leave Australia to make any further visa applications.

Section 48 of the *Migration Act* prevents multiple unsuccessful onshore visa applications. Once an onshore application has been refused, the visa applicant must leave Australia if they wish to apply for another visa. Section 48 does not prevent any review rights relating to the first refusal from being finalised.

There are also two other things to remember about visa applications. First, only one member of the family unit (a defined term) needs to satisfy the primary requirements for a visa. The rest of the family, provided they meet the secondary criterion, will then be granted the same visa. The second principle is "one fails, all fails". So, if any member of the family unit doesn't meet the secondary criterion (often a health issue), then no family members, including the primary applicant, will receive a visa.

Some Common Visas And Working Conditions

It is not an uncommon occurrence for someone who is not an Australian citizen or permanent resident to apply for a job. In fact as at 31 December 2012 there were 1,130,290 temporary visa holders in Australia[3]. These included:

- 401,940 visitors
- 242,210 overseas students
- 38,210 graduate skilled visa holders

3 Temporary entrants and New Zealand citizens in Australia as at 31 December 2012 - http://www.immi.gov.au/media/statistics/pdf/temp-entrants-newzealand-dec12.pdf

- 162,480 working holiday makers
- 157,110 subclass 457 visa holders

In addition, there are over 600,000 New Zealand citizens in Australia.

If one of these people presents at your office or your client's premises seeking work, questions may arise as to whether they are entitled to work and if there are any conditions attaching to their employment. It may be that you (or a client) are requested to assist a non-citizen to apply for a working visa by sponsoring them. This usually means an application for either a subclass 457 temporary (4 year) working visa or an application under the Employer Nomination Scheme ("ENS") for permanent residence.

I have set out in the table below a summary of the usual work rights which attach to some commonly encountered visas. The Department of Immigration and Citizenship ("DIAC") has an online system (called Visa Entitlement Verification Online, VEVO) where it is possible for employers to check the work rights which attach to a particular visa. There is no excuse for not knowing the work status of any particular employee.

Visa	**Work Rights**
Permanent Residents	Permanent residents have unrestricted work rights.
Visitors	Visitors are not allowed to work, however, here are some very narrow exceptions for voluntary work and also highly specialised very short term work which could not be done by an Australian[4].
Students	Generally students are allowed to work 20 hours/week during term and have unlimited work rights when their course is not in session.
Students (spouses and dependants)	The same conditions apply to dependent family members, except that family members of Masters and Doctoral students can work unlimited hours.
Graduate Skilled	Overseas students who want to accumulate some work experience or improve their English are permitted to remain in Australia for up to 18 months after graduation. There are no work restrictions.
Working Holiday Visa Holders	Permitted to do work of any kind but it is limited to 6 months with any one employer. These visas are generally only valid for 1 year, but if visa holders complete 3 months of "specified work" (basically horticultural and harvest jobs) in regional Australian and then they are entitled to a second 12 month visa.
Provisional Spouse Visa Holders	Spouse visas are usually provisional for 2 years before they become permanent. Holders of the provisional visa have unrestricted work rights.
457 Visa Holders	The 457 visa holder is only permitted to work for the sponsor who nominated them and are only allowed to work in their nominated occupation.
457 Visa Holders (spouses and dependants)	Spouses of 457 visa holders have no work restrictions.

4 On 23 March 2013 a new subclass 400 Temporary Work (Short Stay Actvity) Visa was introduced to allow highly specialised short term (up to 6 weeks) work.

New Zealand Citizens	Unlimited work rights.

Employer Sanctions (Sections 245AA to AK)

We know from the DIAC website that:

> "*Illegal workers are a significant problem within Australia. They deny Australians the opportunity to gain employment, and can lead to the exploitation of non-Citizens. Engagement of Illegal workers undermines Australia's efforts to build a strong, secure and fair economy*."

There are an estimated 50,000 people illegally working in Australia. These people are either:

(a) unlawful non-citizens (no visa at all); or
(b) visa holders working in breach of their visa conditions (i.e. working when they have no right to, or working in excess of their allowed hours).

So what are the consequences of employing an illegal worker? Since 19 August 2007 it has been a criminal offence under the *Migration Act*[5] for a person to knowingly or recklessly employ an illegal worker or to refer an illegal worker for employment at another business. There are increased penalties where an illegal worker is being exploited through slavery, forced labour or sexual servitude.

Despite the political fanfare in 2007 about the crackdown on employers of illegal workers, by 2010 there had been no convictions under the new legislation[6]. This is despite there being ten investigations of what appeared to be deliberate and systematic use of illegal workers which involved unsafe work practices, underpayment, and tax & welfare fraud. Only four of these matters were referred to the DPP and only one case was unsuccessfully prosecuted (even though there was one guilty plea). As a result of these difficulties a review was commissioned to examine whether the provisions were an effective deterrent and educational tool. The Howells Review found that the provisions were neither. It recommended amendments that would include a civil penalty with a strict liability provision and the introduction of a system of infringement notices. As a result the *Migration Amendment (Reform of Employer Sanctions) Bill* 2012 was introduced to Parliament in September 2012 and to date has not been passed into law.

However, in the preparation of this paper, I decided to research the more recent annual reports of the Commonwealth DPP to see if there have been any subsequent convictions. The 2011 Report recounts the story of two Thai girls who were brought to Canberra by a "sponsor" to work in her brothel.

One of the girls knew she would be working in the sex industry before she arrived in Australia, the other did not. Neither girl had a visa with work entitlements. Their passports and return air tickets were taken off them and both were effectively imprisoned in a Canberra unit. They were not given a key to the unit and both were compelled to work in a brothel for 6 days a week. The money they made was used to pay off a debt allegedly owing to their sponsor. The end result of this appalling situation was that after an eight day trial

5 Sections 245AA and following of the *Migration Act*
6 One of the practical problems is that although the sanctions are directed at employers, the best source of information is the illegally working employee. It is also an offence under s235 Migration Act to work in breach of visa conditions.

in the ACT Supreme Court the sponsor was found guilty of intentionally possessing a slave (under 270.3(1)(a) of the *Criminal Code*) and attempting to pervert the course of justice. She also became the first person to be convicted for allowing someone to work in breach of their visa conditions and of allowing a non-citizen to work.

The 457 Visa

What if an employer decides to employ a lawful non-citizen and assist them to get a working visa? This decision will often have its origin in the temporary employment of a student or working holiday maker. The employer likes the person and resolves to have them stay on in the business.

This will usually involve an application for the temporary four year working visa, better known as the subclass 457 visa. This visa has been the subject of controversy over the years since it was introduced by the Howard government. As with many policy issues there is a balance to be had between the demands of the labour market and the protection of jobs for Australians. There is also the need to maintain the integrity of the system and to ensure that overseas workers are not exploited.

There was a major reform of the 457 visa which occurred in 2009 and, at the time of writing this paper (March 2013), further changes to take effect from 1 July 2013 have been announced[7]. Amongst other things the changes are meant to prevent the employment of overseas workers when there is no genuine labour shortage or where the nominated position does not fit within the scope of the activities of the nominating business.

So, what is involved in helping someone get a 457 visa? There are effectively three steps:

Step 1: The Employer must be approved as a Sponsor

To be approved as a sponsor, the employer must show that:

- it is an actively and lawfully operating business (not necessarily in Australia);
- no adverse information is known about it (or its directors); and
- it meets training benchmarks.

There are two training benchmarks (called "Benchmark A" and "Benchmark B") and employers can choose which one they want to meet. Benchmark A requires 2% of payroll to be contributed to an industry training fund that operates in the same industry as the sponsoring business. The other option, Benchmark B, requires the employer to demonstrate that in the previous year they have spent the equivalent of 1% of payroll in the provision of training to employees who are citizens or permanent residents. The benchmarks must be met each year during the course of the sponsorship.

Step 2: Employer nominates a Skilled Worker

Nomination is the process of identifying an eligible occupation within the business to be filled by the overseas worker. Apart from identifying the prospective employee and specifying where they will be working the following requirements must be met:

7 See Minister O'Connor's press release dated 23 February 2013 - http://www.minister.immi.gov.au/media/bo/2013/bo193683.htm and also the information available on the DIAC website - http://www.immi.gov.au/skilled/strengthening-integrity-457-program.htm

- there must be a direct employment relationship with the sponsor (although there are some corporate group exceptions);

- there is a list of occupations[8] which are eligible for nomination. The proposed position must be on that list and reference is made to the ANZSCO[9] dictionary for the skills required for each of those occupations;

- there is a requirement that the proposed employment be on:

    - equivalent terms and conditions to those which an Australian would receive in the same job; and

    - that a market rate of salary is paid. In respect of this requirement there is a $51,400 lower threshold and there are also exemptions above $180,000 (although this figure will increase in July 2013).

In practice it is often the terms of employment which cause smaller employers the most concern.

Once a nomination is approved it is valid for twelve months.

Step 3: The Visa Application

Although there can be no visa application unless there is a valid nomination by an approved sponsor, in practice the documents for all three steps are lodged at the same time.

The requirements for the visa application are:

- the applicant must have the required skills and experience to do the nominated occupation (including meeting any registration or licensing requirements);

- there is an English language proficiency requirement (which doesn't apply if the gross base salary exceeds $92,000 or the applicant holds a passport from Canada, Ireland, USA, UK or New Zealand). The requirement is that the applicant must obtain a score of 5 in each of the four components of an IELTS English test;

- to have and maintain health insurance (this must be arranged prior to visa grant and there are reciprocal arrangements with some countries); and

- chest x-rays and other health examinations are usually not required but this may depend on where the applicant has lived and their intended activities in Australia.

8 The Consolidated Sponsored Occupations List - http://www.immi.gov.au/skilled/_pdf/sol-schedule1-2.pdf

9 Available on the ABS website - http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/1220.0Search0First%20Edition,%20Revision%201

The visa applicant's spouse and children can be included in the application, provided that the sponsor agrees.

Routes to Permanent Residence

I do not wish to discuss permanent residence in any detail but, you should be aware of the Employer Nomination Scheme ("ENS"). In many respects the requirements for ENS are similar to those for 457. Once again the process involves both a nomination and visa application. There are more rigorous health and character checks amd a closer examination of the applicant's skills and experience. The good news is that if a worker has held a 457 for two years and the employer wishes to assist them to achieve permanent residence then, the skill requirement is satisfied by reason of the employment.

There is no requirement that 457 be a precursor to ENS but, it is currently the most popular route to permanent residence in Australia's skilled migration program. It is also in alignment with government policy of having high employment rates for new migrants (which is 100% under ENS as employment is a visa requirement).

Conclusion

By the very nature of the topic, this paper cannot be more than an overview. However, I hope that it has helped in assisting you to recognise those who have work rights, the consequences of employing people without (or with inadequate) work rights and provided some idea of the process of applying for the most common working visa, the 457.

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