

EXPLANATORY STATEMENT

Migration Regulations 1994

**SPECIFICATION OF OCCUPATIONS FOR NOMINATIONS IN RELATION TO
SUBCLASS 457 (BUSINESS (LONG STAY)) FOR POSITIONS OTHER THAN IN THE
BUSINESS OF THE NOMINATOR**

(SUB-SUBPARAGRAPHS 2.72(10)(d)(ii)(B), 2.72(10)(d)(iii)(B), 2.72(10)(e)(ii)(B) AND
2.72(10)(e)(iii)(B), SUBREGULATION 2.86(2B) AND
SUBPARAGRAPH 457.223(4)(ba)(iv))

1. This Instrument is made under sub-subparagraphs 2.72(10)(d)(ii)(B), 2.72(10)(d)(iii)(B), 2.72(10)(e)(ii)(B), 2.72(10)(e)(iii)(B) of Division 2.17 of Part 2A and subregulation 2.86(2B) of Division 2.19 of Part 2A of the *Migration Regulations 1994* ('the Regulations'), and subparagraph 457.223(4)(ba)(iv) of Schedule 2 to the Regulations.
2. Item (1) revokes Instrument number IMMI 09/106, signed by the Minister on 7 September 2009, which previously specified relevant matters.
3. Regulation 2.72 of the Regulations prescribes the criteria for approval of a nomination of an occupation in relation to the holder of, or an applicant or a proposed applicant for a Subclass 457 (Business (Long Stay)) visa.
4. Subparagraph 2.72(10)(d)(ii) provides that, for an application for the approval of a nomination made before 1 July 2010 by a standard business sponsor, if the person is lawfully operating a business outside Australia but does not lawfully operate a business in Australia, the Minister must be satisfied that the person has certified as part of the nomination, in writing, that the nominated occupation is an occupation specified by the Minister in an instrument in writing for sub-subparagraph 2.72(10)(d)(ii)(B) .
5. Subparagraph 2.72(10)(d)(iii) provides that, for an application for the approval of a nomination made before 1 July 2010, by a standard business sponsor, if the person lawfully operates a business in Australia, the Minister must be satisfied that the person has certified as part of the nomination, in writing, that the nominated occupation is an

occupation specified by the Minister in an instrument in writing for sub-subparagraph 2.72(10)(d)(iii)(B).

6. Subparagraphs 2.72(10)(e)(ii) and 2.72(10)(e)(iii), were inserted in a new paragraph 2.72(10)(e) in the Regulations by the *Migration Amendment Regulations 2010 (No. 6)* on 1 July 2010, and provide similar criteria to subparagraphs 2.72(10)(d)(ii) and 2.72(10)(d)(iii) respectively, but apply to nominations lodged on and after 1 July 2010.
7. These provisions ensure that a nominated Subclass 457 (Business (Long Stay)) visa holder must work in a position with a business, or an associated entity of the standard business sponsor, unless the nominated occupation in which they are to work is one that is specified by the Minister in an instrument in writing.
8. Item (2) of this Instrument specifies occupations for the purposes of sub-subparagraphs 2.72(10)(d)(ii)(B) and 2.72(10)(d)(iii)(B) of the Regulations, in respect of nominations made before 1 July 2010. The specified occupations are set out in Column 1 of the Schedule to the Instrument. They are described by reference to the ASCO (Australian Standard Classification of Occupations) and are unchanged from the occupations specified in the previous Instrument number IMMI 09/106.
9. Item (3) of the Instrument specifies occupations for the purposes of sub-subparagraphs 2.72(10)(e)(ii)(B) and 2.72(10)(e)(iii)(B) of the Regulations, in respect of nominations made on and after 1 July 2010. These occupations are set out in Column 2 of the Schedule to the Instrument. They are the same occupations as those specified in Column 1 in respect of sub-subparagraphs 2.72(10)(d)(ii)(B) and 2.72(10)(d)(iii)(B), however they are described by reference to the ANZSCO (Australian and New Zealand Standard Classification of Occupations). This reflects the operational requirements of the Department of Immigration and Citizenship from 1 July 2010 when the ANZSCO rather than the ASCO will become the accepted descriptor of occupations. From that date nominators will generally be required to nominate an occupation by reference to the relevant 6-digit ANZSCO code.
10. Subregulation 2.86(2A) of the Regulations provides that if the Minister specifies an occupation in an instrument in writing, a primary sponsored person may be engaged in

that occupation as an independent contractor by the approved sponsor or an associated entity of the approved sponsor.

11. The purpose of subregulation 2.86(2B) is primarily to accommodate the flexible employment arrangements typically associated with certain occupations such as medical practitioners. The provision ensures that the sponsor will not breach the obligation if the visa holder or former visa holder is engaged by them or their associated entity as an independent contractor rather than as an employee in one of the specified occupations.
12. For the purposes of subregulation 2.86(2B), item (4) of the Instrument specifies the relevant occupations in Column 1 (by reference to the ASCO) and Column 2 (by reference to the ANZSCO) of the Schedule to the Instrument. The same occupations are specified in each column. This reflects the fact that the sponsor may have nominated the visa holder before 1 July 2010 using a descriptive code based on the ASCO, or on or after 1 July 2010 using a descriptive code based on the ANZSCO. The obligation of the standard business sponsor will remain the same and will not be breached if the visa holder is employed as an independent contractor in one of the specified occupations, irrespective of whether the occupation was described by reference to the ASCO or to the ANZSCO when the nomination was made.
13. Paragraph 457.223(4)(ba) of the Regulations that if the business activities of the person who made the approved nomination include activities relating to either or both of the recruitment of labour for supply to other unrelated businesses or the hiring of labour to other unrelated businesses, the Minister must be satisfied that either the occupation must be undertaken in a position with a business, or associated entity of the person who made the approved nomination, or the occupation is specified by the Minister in an instrument in writing for subparagraph 457.223(4)(ba)(iv).
14. For the purposes of subparagraph 457.223(4)(ba)(iv), item (5) of this Instrument specifies the occupations listed in Column 1 (by reference to the ASCO) and Column 2 (by reference to the ANZSCO) of the Schedule to the Instrument. Each column lists the same occupations with an ASCO or ANZSCO descriptor, as relevant. This reflects the fact that from 1 July 2010 a visa application may be in relation to a nomination made before 1 July 2010 with respect to an occupation described with reference to ASCO, or on or

after 1 July 2010 with respect to an occupation described with reference to ANZSCO. An occupation will meet the requirements of subparagraph 457.223(4)(ba)(iv) if it is specified in either column of the Schedule and irrespective of whether an ASCO or ANZSCO description was used at the time the nomination was lodged.

15. The following documents are incorporated in the Instrument by reference:

- ANZSCO means, under regulation 1.03 of the Regulations, the Australian and New Zealand Standard Classification of Occupations published by the Australian Bureau of Statistics as current on 1 July 2010. The ANZSCO - First Edition, Revision 1 (ABS Catalogue No. 1220.0) is available online at <http://www.abs.gov.au>.
- ASCO means, under regulation 1.03 of the Regulations, the Australian Standard Classification of Occupations, published by the Australian Bureau of Statistics on 31 July 1997. The ASCO - Second Edition (ABS Catalogue No. 1220.0) is available online <http://www.abs.gov.au>.

16. Affected government departments and agencies were consulted on the proposal to introduce the ANZSCO standard into the Department's skilled migration programs. These included the Australian Bureau of Statistics, the Department of Education, Employment and Workplace Relations, and the Department of Infrastructure, Transport, Regional Development and Local Government.

17. State and Territory Governments were consulted via the Commonwealth State Working Party on Skilled Migration (CSWPSM). This included the ACT Chief Minister's Department, the NSW Department of State and Regional Development, the NT Department of Business and Employment, the Queensland Department of Employment, Economic Development and Innovation, the Tasmanian Department of Economic Development, Tourism and the Arts, and the SA Department of Trade and Economic Development.

18. The Office of Best Practice Regulation was consulted and advised that because changes from ASCO to ANZSCO are a consequence of the new approach adopted by the Australian Bureau of Statistics for classifying occupations, no regulation impact statement or business cost calculator report was required.

19. This Instrument number IMMI 10/030 commences on 1 July 2010, immediately after the commencement of *Migration Amendment Regulations 2010 (No. 6)*.