

EXPLANATORY STATEMENT

Migration Regulations 1994

**SPECIFICATION OF OCCUPATIONS FOR NOMINATIONS IN RELATION TO
SUBCLASS 457 (TEMPORARY WORK (SKILLED)) FOR POSITIONS OTHER THAN IN
THE BUSINESS OF THE NOMINATOR**

(Regulation 1.03, 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), subregulation 2.86(2B) and subparagraph 457.223(4)(ba)(i))

1. This Instrument is made under regulation 1.03, 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)(i) of Schedule 2 to the Regulations.
2. Regulation 1.03 provides that defined terms are used within the Regulations, unless the contrary intention appears.
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 (Temporary Work (Skilled)) 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)(B) provides that if the nomination is made on or after 1 July 2010 the person has certified as part of the nomination, in writing, that if the person is lawfully operating a business outside Australia but does not lawfully operate a business in Australia the nominated occupation is an occupation specified by the Minister in the instrument in writing for this sub-subparagraph.
7. Subparagraph 2.72(10)(e)(iii)(B), provides that if the nomination is made on or after 1 July 2010 the person has certified as part of the nomination, in writing, that if the person lawfully operates a business in Australia the nominated occupation is an occupation specified by the Minister in an instrument in writing for this sub-subparagraph.
8. These provisions also ensure that a nominated Subclass 457 (Temporary Work (Skilled)) 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.
9. 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 Australian Standard Classification of Occupations (ASCO).
10. 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 Australian and New Zealand Standard Classification of Occupations (ANZSCO). This reflects the operational requirements of the Department of Immigration and Citizenship from 1 July 2010 when the ANZSCO rather than the ASCO became 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.

11. Subregulation 2.86(2B) 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.
12. 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.
13. 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.
14. Paragraph 457.223(4)(ba) of the Regulations provides that either the nominated occupation is specified by the Minister in an instrument in writing for this subparagraph or the applicant is employed to work in the nominated occupation; and if the person who made the approved nomination met paragraph 2.59(d) or (e), or paragraph 2.68(e) or (f), in the person's most recent approval as a standard business sponsor, the applicant is employed to work in a position in the person's business or in a business of an associated entity of the person; and if the person who made the approved nomination met paragraph 2.59(h), or paragraph 2.68(i), in the person's most recent approval as a standard business sponsor, the applicant is employed to work in a position in the person's business.

15. Paragraph 6 of the instrument provides that the definition of ANZSCO is the Australian and New Zealand Standard Classification of Occupations as published by the Australian Bureau of Statistics.
16. The following documents are incorporated in the Instrument by reference:
 - ANZSCO means the Australian and New Zealand Standard Classification of Occupations published by the Australian Bureau of Statistics.
 - 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. The purpose of the Instrument is to specify occupations for nominations in relation to the holder of, or an applicant or a proposed applicant for a Subclass 457 (Temporary Work (Skilled)) visa.
17. The Instrument operates to provide the ASCO and ANZSCO codes and occupations required for nominations in relation to applications for a Subclass 457(Temporary Work (Skilled)) visa.
18. Consultation was undertaken with the Ministerial Advisory Council on Skilled Migration, Commonwealth agencies through an inter-departmental committee and internal and external stakeholders.
19. The Office of Best Practice Regulation has advised that a Regulatory Impact Statement is not required (OBPR Reference 14634).
20. Under section 42 of the *Legislative Instruments Act 2003* the Instrument is subject to disallowance and therefore a Human Rights Statement of Compatibility has been provided.
21. This Instrument number IMMI 13/067 commences on 1 July 2013, immediately after commencement of the *Migration Legislation Amendment Regulation 2013 (No. 3)*.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

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This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

Legislative instrument F2010L01412 lists the occupations which are not subject to the requirement for Temporary Work (Skilled) (Subclass 457) visa holders to work directly for their sponsor. One of the instrument making powers of this instrument is 457.223(4)(ba)(vi).

457.223(4)(ba) is being amended to remove redundant transitional regulations which were included to facilitate the reforms to the Temporary Work (Skilled) (Subclass 457) visa program in September 2009. As a result, the sub-paragraphs will be renumbered, and subsequently the references to the sub-paragraph 457.223(4)(ba)(vi) in the legislative instrument will need to be amended. It is referenced in the section which lists the instrument making powers, the introductory statement and instruction 5 of the legislative instrument.

The title of this legislative instrument will also be amended replacing “Subclass 457 (Business (Long Stay))” with the visas new name “Subclass 457 (Temporary Work (Skilled))”.

The change will apply to Subclass 457 visa applications lodged on, or after, the revised legislative instrument comes into effect and any application that was lodged prior but has not been finally determined on that date.

Human rights implications

As the proposed amendments seek to effect administrative changes only and do not seek substantive changes to policy, they do not engage any of the human rights enunciated in the seven core international human rights treaties.

Conclusion

This proposed regulation amendment is compatible with human rights.

The Hon. Brendan O'Connor MP, Minister for Immigration and Citizenship