

Immigration/Health Law Client Alert

21 September 2009

Sponsoring Medical Practitioners as Independent Contractors

We all know that there is a critical shortage of health and allied care professionals. In response to the critical skills shortages and Australia's burgeoning healthcare needs, on 14 September 2009 new laws came into effect so that Medical Practitioners can be sponsored and work as independent contractors.

Organisations or lawful residents who wish to sponsor a qualified Medical Practitioner where there is a demonstrated need for employing practitioners from overseas for temporary employment in Australia, can do so for up to 4 years.

From 14 September 2009 the following occupations can be sponsored under the Subclass 457 Business (Long Stay) Visa ("457 Visa") as independent contractors:

- General Medical Practitioner (ASCO Code 2311-11)
- Medical Practitioner in Training (ASCO Code 2311-81)
- Anaesthetist (ASCO Code 2312-11)
- Dermatologist (ASCO Code 2312-13)
- Emergency Medicine Specialist (ASCO Code 2312-15)
- Obstetrician and Gynaecologist (ASCO Code 2312-17)
- Ophthalmologist (ASCO Code 2312-19)
- Specialist Medical Practitioners not elsewhere classified (ASCO Code 2312-79)
- Paediatrician (ASCO Code 2312-21)
- Pathologist (ASCO Code 2312-23)
- Specialist Physician (ASCO Code 2312-25)
- Psychiatrist (ASCO Code 2312-27)
- Radiologist (ASCO Code 2312-29)
- Surgeon (ASCO Code 2312-31)
- General Manager (ASCO Code 1112.11)

The 457 Visa is a 3-step application process:

- Sponsorship;
- Nomination; and
- Visa Application.

Independent contractor 457 Visa holders – specified Medical Practitioners

Under the new rules, the sponsored person does not have to work in the business of the Sponsor, nor an associated entity of the Sponsor, as they may be engaged as an independent contractor by the Sponsor or an associated entity of the Sponsor. This means they may work for multiple employers, either simultaneously or consecutively.

This provides a new degree of mobility so that sponsored Medical Practitioners can work, for example as locums at various hospital clinics, and between employers, throughout the duration of their visa validity.

However, the Sponsor who originally nominated the visa holder continues to have, and must comply with, the sponsorship obligations in relation to the visa holder.

This provides both opportunities and risks for the Sponsor as the sponsored Medical Practitioner can work for the Sponsor, an associated entity of the Sponsor, as well as with unrelated entities as an independent contractor.

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Worker Protection Reforms

With the 457 Visa Reforms, which took effect also on 14 September 2009, Sponsors are now subject to enhanced sponsorship obligations under the *Migration Legislation Amendment (Worker Protection) Act 2008* (“**Worker Protection Act**”) in relation to:

- monitoring Sponsors to ensure compliance with obligations;
- gathering and sharing information relating to the Sponsor and the Visa Applicant;
- cooperating with inspectors including when conducting site visits and requiring production of information and documents; and
- administrative as well as pecuniary penalties including infringement notices and civil pecuniary penalty proceedings in respect of breaches of the law.

Gathering information for civil pecuniary penalty proceedings

The Secretary of the Department can now require any person (other than the wrongdoer) to give information in relation to any breaches of the law by requiring the person to give all reasonable assistance in connection with the alleged breach.

Waiver of the “Self-Incrimination Rule”

The person must give information or produce the document or thing when requested or required to do so, even if doing so would incriminate them or expose them to a penalty.

This means that non-lawyer registered migration agents, the Sponsor or Nominator for the Visa Application (or their staff), the Visa Applicant (or a family member) is required to give information relevant to an Application for a Civil Penalty Order, in relation to a breach, if required to do so.

Communications between the Sponsor (or their staff) and the non-lawyer registered migration agent (or their staff) must be provided to the Department even though, by doing so, it would incriminate them or expose them to a penalty.

These provisions do **not** apply in relation to a lawyer who is acting, or has acted, for the wrongdoer as lawyer migration agents can claim legal professional privilege in respect of the communications between them, the Sponsor, the Nominator (or their staff including their accountants) and the Visa Applicant.

A person who fails to give assistance as required commit an offence and is liable to a penalty of \$33,000 for a body corporate and \$6,600 for an individual.

Recruitment and migration agent costs cannot be recovered

The Sponsor must not recover, or seek to recover, from the sponsored person (or their family members) any or all the costs (including migration agent costs) relating to the recruitment of the sponsored person, or accompanying family members with becoming or being an approved Sponsor or being a former approved Sponsor.

A Sponsor who seeks to recover, or has recovered, the costs of recruiting or being the Sponsor of a person is liable for administrative and civil pecuniary penalty action which includes sponsorship cancellation and significant fines.

Medical Practitioner – Temporary (Subclass 422) Visas

Medical Practitioners can continue to be sponsored for the 422 Visa, but can only work for the Sponsor or a related entity in the nominated position.

Who can be an approved Sponsor?

To be approved as a Sponsor, the organisation or lawful resident must:

- be lawfully established and actively operating in Australia; or

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- be an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; and
- have signed the Sponsorship Undertaking; and
- make and have the capacity to comply with the Sponsorship Undertakings; and
- have a satisfactory record of compliance with Immigration Laws in Australia.

Sponsorship Undertaking

The Sponsor accepts responsibility for:

- all financial obligations to the Commonwealth incurred by the sponsored person arising out of their stay in Australia; and
- compliance by the sponsored person with all relevant legislation and awards in relation to any employment entered into by the sponsored person in Australia; and
- compliance by the sponsored person with the conditions under which that person was allowed to enter Australia; and
- providing any information relating to the Sponsorship Application or approval to assist the Department in the monitoring process, if so requested.

Monitoring of Sponsorship Undertaking

The Department may require Sponsors to provide information to the Department to ensure compliance with Sponsorship Undertakings. Monitoring may include a site visit by officers of the Department.

A failure to comply with Sponsorship Undertakings may affect future sponsorships and/or cancel the visas of the persons who are sponsored.

The Department may seek to recoup any costs to the Commonwealth incurred by the visa holder during their stay in Australia.

Sponsored person's mandatory conditions

Sponsored persons on 422 Visas will be granted the visa subject to Condition 8107 and Condition 8501.

Condition 8107 provides that the sponsored person must undertake the activity in relation to which their visa was granted, work in the activity which is consistent with the position in relation to which the visa was granted, and cannot engage in work for another person or on their own account while undertaking their employment in Australia.

Condition 8501 requires the sponsored person to maintain adequate arrangements for health insurance while they are in Australia (including cover for any accompanying family members, for example their partner, children and other relatives 18 years or over who are wholly or substantially reliant on the sponsored person for financial support for their basic needs).

If you require any assistance or have any queries, please contact Maria Jockel.

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