



HERBERT
SMITH
FREEHILLS

DOING BUSINESS IN AUSTRALIA

IMMIGRATION



Chapter 14

Immigration

Immigration concerns the entry of non-citizens into Australia for all purposes, whether for tourism, business, employment or any other purpose. Immigration is regulated by laws made by the Australian Parliament, under the authority of the Australian Constitution. Australian immigration law is largely contained in the *Migration Act 1958* (Cth) (**Migration Act**) and the *Migration Regulations 1994* (**Migration Regulations**) and encompasses the entry of non-citizens as well as their presence in, and removal from, Australia. The Migration Act and the Migration Regulations are administered by the Department of Home Affairs (**the Department**).

Under the Migration Act, visas operate to permit non-citizens to travel to, enter and remain in Australia for a specified or indefinite period. The visa system provides a number of options for individuals who wish to visit Australia to undertake business activities or to take up either temporary or permanent residence for business or employment purposes. Entry to Australia for temporary residence for employment usually requires sponsorship by an Australian or overseas company. However, there are options for highly skilled individuals or successful business people to take up permanent residence in Australia in their own right. New Zealand citizens with valid New Zealand passports and who do not have serious character or health concerns are entitled to Special Category Visas which allow them to freely work and live in Australia.

Australia's visa system

All non-citizens wishing to enter Australia for a visit or to reside here are required to hold a visa permitting them to enter and remain in Australia. Non-citizens who do not hold a valid visa are liable to be removed from Australia, which may involve being taken into detention prior to removal. Most visas must be applied for and obtained before travel to Australia.

Visa application process

Non-citizens must generally make an application for a visa appropriate to the purpose and duration of their planned stay in Australia. Most applications must be in writing, using the approved application form. Applications for an increasing number of visa classes may be made electronically via the Department's website, www.homeaffairs.gov.au.

The criteria to lodge a valid application are set out in the Migration Regulations and include the payment of the appropriate lodgement fee and using the correct application form.

Types of visas

Visas which permit non-citizens to enter or stay in Australia indefinitely are known as permanent residence visas. Temporary residence visas permit non-citizens to enter or stay in Australia for a specified period, until a specified event has happened or while the non-citizen has a specified status. Temporary residence visas are also subject to specific conditions which if breached, can lead to visa cancellation and in some cases, removal from Australia. Significant civil and criminal penalties also apply to employers who allow a non-citizen to work in breach of a work-related condition or without a visa. All permanent and temporary visas are classified into particular classes which are further categorised into subclasses. Some of the visa subclasses relevant to conducting business, working or studying in Australia are discussed below. There is a brief overview of visas for family-related permanent residence as well.

Business visitors

Non-citizens wishing to visit Australia for not more than three months to undertake business activities may apply for a business visitor visa, a business Electronic Travel Authority (**ETA**) or an eVisitor visa, depending on the country of the passport that the non-citizen holds. Passport holders of the United States, Canada, Japan and other defined countries are able to apply online through the Department's website for a business ETA; citizens of countries in the European Union are able to apply online for an eVisitor visa; and citizens of other countries not included in the ETA or eVisitor arrangements must apply at the nearest Australian overseas post for a business visitor visa (though some citizens of these other countries are eligible to apply online).

Holders of any of these business visas are only permitted to participate in defined 'business visitor activity' and must not engage in activities that will have adverse consequences for employment or training opportunities for Australian citizens or permanent residents. This means holders of these visas can travel to Australia to participate in meetings and negotiations (including negotiating, entering into or reviewing business contracts) familiarise themselves with the Australian operations of an overseas business or participate in a conference, trade fair or seminar (provided the person is not being paid by an organiser for participation), but are not able to undertake work for or supply services to an organisation or person based in Australia. Care must be taken by holders of these business visas to remain within the limited range of activities that can be undertaken while in Australia.

Temporary residence visas for business and employment

Individuals may enter Australia for stays of up to four years as holders of a temporary residence visa for employment. These individuals may be accompanied by members of their family. The applicant and family members over 11 years of age may be required to undertake a chest x-ray examination and the applicant or family members who are either involved in activities such as education or health care or who are of school age must have a medical examination. The applicant and family members aged 16 and over will also be required to obtain police clearances from countries where they have lived for 12 months or longer in the past 10 years. Holders of these visas are able to make multiple entries to Australia during the validity of their visa.

Temporary residence visas for business

It is not possible for an individual business person to enter Australia as the holder of a temporary residence visa to establish a new business or participate in an existing Australian business. The only exception is where the individual is employed by an overseas company to establish a new business in Australia or is employed by a company operating in Australia in an occupation appropriate to the experience of the individual and the requirements of the business.

The requirements for this visa are outlined immediately below.

Temporary residence visas for employment

The temporary residence visas available for individuals to take up employment in Australia consist of one category of visa catering for a defined list of skilled occupations, comprised of select professional, management, associate-professional and trade occupations; this category is known as the Temporary Skill Shortage visa. There are also specialist visas available for defined activities: for example, research, occupational training, religious work, live performances or other productions, sporting events and other Government endorsed events.

Temporary Skill Shortage visa

The Temporary Skill Shortage (**TSS**) visa came into effect on 18 March 2018 and replaced the Temporary Work (subclass 457) visa as the most commonly used visa to employ overseas workers in Australian businesses on a temporary basis. Applicants can be any of the following:

- personnel, including intra-company transfers and overseas recruits, for Australian-based companies;

- personnel (executives and specialists) from offshore companies seeking to establish a branch of the company in Australia, participate in a joint venture, or undertake employment pursuant to a contract between an offshore company and an Australian company;
- personnel covered by a labour agreement or a work agreement; or
- service sellers.

TSS Visa application process

To obtain a TSS visa under the current requirements, the applicant's employer or an associated entity of the employer first must complete an application to be an approved sponsor (sponsorship application). The sponsorship can be sought by a company already established and operating in Australia or an overseas company with no operations in Australia that is seeking to establish operations or is required to send personnel to Australia to fulfil contractual obligations. The company is also required to file a nomination application, identifying an individual for one of the occupations specified by the Minister for Immigration, Citizenship and Multicultural Affairs (the Minister). This nomination application covers aspects such as the nominated role, Labour Market Testing, the terms and conditions of employment as well as the proposed length of stay. Once the sponsorship and nomination applications are approved, the applicant's visa application is then considered.

All three applications can be lodged electronically with the Department and may be filed simultaneously. The visa applicant may be in or outside Australia at the time of the decision.

Sponsorship application

The sponsorship framework for the employment of foreign workers has been in effect since September 2009. There are a number of obligations imposed on the sponsoring company, greater sharing of information and the disclosure of information between other Departments, as well as heightened enforcement mechanisms. The latter includes financial penalty provisions (discussed below), increased monitoring and investigation powers for officials of the Department and information sharing between the Department and other Government agencies such as the Fair Work Ombudsman and the Australian Tax Office.

An Australian business seeking approval as a business sponsor must have the financial capacity to meet its obligations as the sponsor of foreign employees. The business must also demonstrate that it has a strong record of employing local labour, non-discriminatory work practices and there must be nothing adverse known about the business or a person associated

with the business.

The approved sponsorship is valid for a period of five years and it can be renewed providing the sponsoring company meets the relevant criteria.

Accredited sponsorship status is available for sponsors that have proven record with the Department and can satisfy certain additional criteria. This accreditation provides longer status as a sponsor, typically six years, access to expedited processing times for individual nominations and visa applications for temporary workers as well as 'preapproval' of certain factors including occupation, annual market rates and employment conditions.

Nomination application

As part of nomination application, the company must demonstrate and/or certify to the Department that:

- the visa applicant will be employed in a specified occupation from one of three prescribed occupation lists:
 - The Short Term Skilled Occupation List (**STSOL**) comprised of occupations which are in current short term shortage. Unless an international trade agreement provides otherwise, visas granted for such occupations are valid for a maximum period of two years, with the possibility of renewal in Australia for a further two years. A third application for an STSOL occupation may only be lodged from outside Australia and will be subject to strict genuine temporary entry requirements.
 - Occupations on the STSOL are not eligible to be sponsored under the permanent Employer Nomination Scheme, unless the visa holder is eligible for transitional arrangements which apply to certain current or former 457 visa holders (discussed further below).
 - The Medium and Long Term Strategic Skills List (**MLTSSL**) comprised of occupations in high demand, with a high value to Australia's economic development, and with a relatively long lead time for development of occupational skills within Australia. Occupations on the MLTSSL are eligible for a four-year TSS visa, can be renewed and can also be sponsored under the permanent Employer Nomination Scheme.
 - The Regional Occupation List (**ROL**) restricting certain occupations to regional areas of Australia only. The regions are defined by postcode but generally include anywhere outside the metropolitan areas of Sydney, Wollongong, Newcastle, Melbourne, Brisbane, the Gold Coast and Perth.

- if the occupation is subject to a 'caveat' (which relates to attributes about the nature of the position, size of business etc.), that these additional requirements are met;
- unless an international trade obligation applies, the sponsor has undertaken labour market testing (**LMT**) to demonstrate there is no suitably qualified and experienced Australian who is readily available to fill the nominated position. In most cases, this will require the sponsor to have undertaken suitable advertising in the four months prior to lodging the nomination. Strict criteria apply to the format, content and medium of advertising. For certain 'select occupations' or 'select positions', the nominator may provide, in lieu of prescribed advertising, a submission or alternative evidence detailing that there is no suitably qualified and experienced Australian who is readily available to fill the nominated position must be made;
- in all cases, the sponsor must also provide details of any redundancies or retrenchments of Australians in the same occupation, in the business of the sponsor (or an associated entity) and in the last 4 months prior to nomination lodgement. There are additional requirements that need to be made to meet the LMT criterion in these situations;
- the duties of the nominated position include a significant majority of the duties of the nominated occupation listed in the Australian New Zealand Standard Classification of Occupations (**ANZSCO**);
- the visa applicant's experience and qualifications are commensurate with the qualifications and experience specified in ANZSCO for the nominated occupation;
- the salary and other terms and conditions of employment offered to the visa applicant are no less favourable than those offered to an Australian in the same occupation in the same location, known as the 'annual market salary rate' requirement;
- the visa applicant will be engaged as an employee under a written contract of employment and the sponsor certifies in writing that the employment contract with the TSS visa holder/applicant is compliant with the National Employment Standards;
- the nominated position is a genuine one and is a full-time position (unless it is reasonable for the Minister to disregard this requirement); and
- for applications lodged on or after 12 August 2018, the applicable 'Training Contribution Charge' has been paid in relation to the nomination. This is calculated based on the turnover of the sponsoring business and the proposed period of stay. It is currently set at A\$1,800 per year where the turnover is more than \$10 million and \$1,200 per year where the turnover is less than \$10 million. A refund of the Training Contribution is available only in limited circumstances.

The annual market salary rate requirement means that overseas workers should receive the same or not less than the 'guaranteed earnings' that an Australian citizen or permanent resident earns or would earn performing equivalent work on a full-time basis for a year at the same workplace at the same location.. The payments that can be included in 'guaranteed earnings' are specified. Broadly they include wage payments, certain allowances and the value of agreed non-monetary benefits but do not include amounts that cannot be determined in advance, reimbursements or compulsory contributions to superannuation (pension) funds. In most cases, the cash components of the remuneration to be paid to the foreign worker should be greater than the Temporary Skilled Migration Income Threshold (**TSMIT**) which is currently set at A\$53,900. The annual market salary rate requirement does not need to be demonstrated where the guaranteed earnings of the applicant are A\$250,000 or higher.

Visa application

The individual applicants for a TSS visa are required to:

- have at least 2 years' relevant experience in the nominated role. For some occupations (predominantly Trades occupations from specified countries), a formal skills assessment must also be obtained;
- show they have the necessary qualifications and/or skills and English language level to perform the duties of the nominated role and meet any relevant caveats that are placed on that occupation;
- in the case of the Short-term stream, satisfy a 'genuine temporary entrant' requirement to demonstrate their intention to only remain temporarily in Australia;
- show the individual and accompanying family members meet the health and character criteria for the grant of the TSS visa; and
- provide documentary evidence of adequate health insurance arrangements for the individual and family members at the time of application, which must be maintained for the duration of their stay in Australia.

Sponsorship obligations

Companies that sponsor individuals for TSS visas to work in their Australian operations take on a number of obligations with respect to the sponsored employees and their accompanying family members. These obligations include the following:

- providing terms and conditions of employment, including remuneration, that are at least equivalent to those of an Australian employee in the same occupation in the same location;
- meeting travel costs for the employee and family members to return to their home country in certain circumstances;
- ensuring that the employee only works in their approved nominated occupation;
- ensuring all necessary taxation and superannuation payments are made on behalf of the individual employee; and
- notifying the Department within 28 days and keeping records of certain events, including when the sponsored employee leaves the company's employ for any reason; a change of the duties of the employee; the payment of return travel costs; change of circumstances relevant to the approval of the sponsorship or nomination applications; and the appointment of a new director of the company.

Companies that do not adhere to these obligations face a range of penalties, including financial penalties and administrative penalties such as cancellation of their sponsorship and/or a bar from sponsoring additional employees for a set period of time. From 13 December 2018, the Department has the power to publish details of sponsors who have been sanctioned for failing to meet their sponsorship obligations.

Specific visas for certain occupations and activities

Depending on the proposed period of stay and location of the individual, applications for temporary residence visas for specified occupations, such as religious workers, researchers, sports persons, entertainers and domestic workers, have similar sponsorship rules as set out above. For stays of less than 3 months or where the individual is outside of Australia, the visa applicant will require a letter of support from an appropriate organisation or person in Australia to accompany the visa application. Temporary residence visas are also available for individuals to take up occupational training and professional development programs in Australia providing these opportunities do not impact on training opportunities for Australian citizens or permanent residents.

The Temporary Work (Short Stay Specialist) Subclass 400 visa allows for short term travel to:

- undertake non-ongoing highly specialised work (generally up to 3 months although stays of up to 6 months may be granted where there is a strong business case); or

- undertake an activity or work where there are compelling circumstances affecting Australia's interest. This may include, for example, assistance with a disaster or emergency.

Subclass 400 visas can only be applied for and be granted whilst the applicant is outside of Australia and there are specific and extensive policy on the 400 visa and its allowable usage. Client's should apply and utilise the 400 visa with care and this should not be used as an automatic alternative to the TSS work visa due to the very specific nature of the requirements.

Australia's student visa program caters to international students wishing to undertake full-time study. Holders of most student visas are able to work up to 40 hours per fortnight and fulltime during semester breaks. Holders of retirement investment visas are able to work up to 40 hours per fortnight.

Working holiday visas

Non-citizens from participating countries who are at least 18 but have not turned 31 (or 35 for Irish and Canadian citizens) are able to enter Australia, usually for periods of up to 12 months, to undertake a combination of work and holiday activities. These arrangements are the subject of bilateral agreements between Australia and a growing number of countries. For passport holders of countries such as the United Kingdom, Germany, Ireland, Sweden, Norway, Finland, Japan, Canada, France, Taiwan, Hong Kong and several more, the visa is known as a 'working holiday visa'. For those from countries such as the United States, China, Thailand, Malaysia, Indonesia, Chile, Spain, Turkey and several more it is known as the 'work and holiday visa'. Employment is usually restricted to no more than six months with any one employer. In some cases, visa holders are able to extend their stay for up to 12 months where they have undertaken particular work in prescribed regional areas for a period of at least 3 months.

Permanent residence visas for business and employment

A number of options are available for individuals wishing to take up permanent residence in Australia for business or employment purposes.

Permanent residence for business

There are two visa categories in which experienced business people, either as owners or investors, who are aged less than 55 years of age and are sponsored by a state or territory government, can apply to migrate to Australia in the business innovation and investment category. Older applicants may apply for a visa under this program if the nominating state or

territory government provides its support to waive the age requirement in circumstances where the proposed business or investment activities will be of exceptional economic benefit to the region.

In general terms, applicants in the Business Innovation and Investment Program (**BMP**) must have an overall successful business career or successful record of business investment activity, and meet requirements for either owning or operating a business in Australia, by making a designated investment into state or territory government bonds or making a 'complying' investment into managed funds. There is also a specific stream for entrepreneurs who have secured funding from an appropriate third party in Australia.

High-calibre business owners and entrepreneurs can apply directly for a permanent visa under the Business Talent (subclass 132) visa category which is comprised of two streams:

- Venture Capital Entrepreneur stream: for individuals who have sourced at least A\$1million in venture capital funding from a member of the Australian Venture Capital Association Limited for the early-phase start-up of a business in Australia; the commercialization of a product in Australia; or the development or the expansion of a business in Australia. No age limit applies to this stream.
- Significant Business History stream: For high-calibre business owners with a business turnover of at least A\$3million and business assets of at least A\$400,000 and who have a genuine and realistic commitment to establish or participate in a business in Australia. An age limit of 55 applies to this stream.

Provisional visa application

With the exception of a limited number of high-calibre business owners and entrepreneurs who can meet the above criteria for the Business Talent (subclass 132) visa, the business innovation and investment category of permanent residence requires the business person or investor to fulfil two stages in order to be granted a permanent residence visa. At the first stage, the individual applies for a provisional visa which allows the applicant to enter and remain in Australia for a four-year period to establish or enter into a business in Australia or to make prescribed investments. Depending on the stream, some business migrants may renew their provisional visa for another two years if they require additional time to establish their business in Australia or meet the requisite residence test before applying for the second stage of permanent residence, providing that state or territory government agrees to further their support.

The visa criteria differ depending in which stream the applicant applies for a visa: business

innovation, investor, significant investor, premium investor or entrepreneur (noting the latter is different from the Business Talent permanent visa described earlier).

Individuals applying in the business innovation stream must demonstrate a genuine and realistic commitment to be involved as an owner of a new or existing business in Australia, have net business and personal assets of at least A\$800,000 and a business turnover of at least A\$500,000. Applicants in the investor stream must have at least three years' experience of direct involvement in an eligible investment, make a designated investment of at least A\$1.5 million into state or territory government bonds for four years and have net business and personal assets of at least A\$2.25 million. In addition to meeting the basic eligibility criteria, business innovation and investment applicants must meet an innovation points test which is based on criteria including age, English language ability, qualifications, experience in business, net personal and business assets and business turnover and innovation. All family members must also be able to meet health and character criteria before the visa can be granted.

Individuals applying under the significant investor stream must make a 'complying significant investment' of at least A\$5 million for a period of at least four years into Australian managed funds (which themselves have additional criterion placed on them) and which fund is comprised of the following:

- at least A\$500,000 invested in venture capital funds registered under the *Venture Capital Act 2002* (Cth);
- at least A\$1.5 million invested in emerging companies i.e. companies with market capitalisation of less than A\$500,000 incorporated in Australia or quoted on an Australia securities exchange; and
- the remaining A\$3 million portion is to be invested in defined 'balancing investments'.

No age limit applies to this stream.

Individuals applying under the Premium Investor stream must invest at least A\$15 million into prescribed investments and/or philanthropic contributions (which must be approved by a State/Territory government) for a period of at least 12 months. No age limit applies to this stream.

Individuals applying under the Entrepreneur stream must have sourced at least A\$200,000 from approved third party funding, have a 'Competent' level of English and undertake or propose to undertake 'complying entrepreneurial activity' in Australia.

Permanent visa application

At the second stage, the applicant who holds a provisional visa applies for permanent residence as a business owner or investor. For the business owner and entrepreneur category this application can be lodged after residing for a minimum period of two years in Australia as the holder of a provisional business innovation and investment visa. For the investor and significant investor categories, the permanent residence stage can only be applied for after the individual has held the appropriate investments for at least four years and can satisfy a prescribed residence requirement of at least two years (investor stream) or 160 days (significant investor stream) over the preceding four year period. For the premium investor category, the minimum investment period is reduced to 12 months and there is no residence requirement.

In order to be eligible for a permanent visa, in addition to meeting all of the obligations of the provisional visa, the individuals must show a satisfactory record of compliance with Australian laws and a genuine and realistic commitment to continue a business or investment in Australia. Applicants in the business innovation stream will also need to demonstrate a business turnover of at least A\$300,000 in the 12 months immediately before the application is lodged and to meet two of the following criteria: business assets of at least A\$200,000, net personal and business assets of at least A\$600,000 and/or employment of at least two full-time employees who are Australians or New Zealanders and who are not members of the applicant's family, throughout the 12 months immediately before making an application.

Applicants in the entrepreneur stream will also need to demonstrate an overall successful record of undertaking activities of an entrepreneurial nature in Australia in order to be eligible for permanent residency. Factors that are considered to assess the success of the applicant's record include:

- the number of Australians that are employed in Australia in relation to the activities;
- the level and nature of ongoing funding of, or investment in, the activities; and
- the annual turnover of businesses related to the activities.

Permanent residence for employment based on nomination by an employer

Companies are able to nominate highly skilled individuals to migrate to Australia as permanent residents or to remain permanently in Australia under the Employer Nomination Scheme. The individual must have the necessary skills and experience to be employed in an occupation defined in a list of highly skilled occupations. These occupations include a number professional,

management, para-professional and trade-based occupations. An age limit of 45 applies unless the individual meets one of the prescribed aged exemptions.

The application process consists of two stages. First, the company must have the nomination of the position approved by the Department. As part of the nomination application, the company is required to demonstrate that it is of good corporate standing (no adverse information is known about the business), it is actively and lawfully operating in Australia and adheres to all workplace and immigration laws. For applications lodged on or after 12 August 2018, the applicable 'Training Contribution Charge' must accompany the nomination. This is calculated based on the turnover of the sponsoring business and is currently set at A\$5,000 per nomination where the turnover is more than \$10 million and A\$3,000 per nomination where the turnover is less than \$10 million. A refund of the Training Contribution is only available in limited circumstances.

The company must also satisfy the Department that there is a genuine need for the nominated position, which must be full-time and available for at least two years with nothing expressed in the employment agreement to exclude the possibility of renewal beyond two years. The employer will also need to meet the 'annual market salary rate' requirement as required for the approval of a TSS visa.

Pathways to Permanent Residence

There are three eligibility pathways to permanent residence under the Employer Nomination Scheme: one for select TSS or subclass 457 visa holders transitioning to permanent status (Temporary Residence Transition stream), another for those seeking permanent residence directly (Direct Entry stream), and a third for applicants who are sponsored by an employer that has an agreed labour agreement with the Department (Labour Agreement stream). Some common criteria apply, including an age limit of 45 and the requirement to have at least 'competent' English, with some limited exemptions.

TSS or subclass 457 visa holders applying for permanent residence under the Employer Nomination Scheme benefit from the streamlined Temporary Residence Transition (**TRT**) pathway if they have worked for their sponsoring employer for at least three years in the period of four years immediately before the nomination application is made and if the nominated role falls within the Medium and Long-Term Strategic Skills List (**MLTSSL**). The visa holder must have been employed full time and in Australia, as well as being paid the annual market rate. As a result of the prior employment and the continuing employer sponsorship, applicants under this stream do not require a formal assessment of their skills or qualifications. However, a significant change in role or in the legal structure or entity of the sponsoring employer may affect a person's ability to satisfy the Temporary Residence Transition requirements.

Transitional arrangements for certain current and former 457 visa holders

Transitional arrangements apply to current and/or former 457 visa holders who held or had applied for a subclass 457 visa as at 18 April 2017. Under these transitional arrangements the applicant:

- needs to have been employed full-time in Australia in their nomination occupation for a period of at least 2 years in the 3-year period to the application being made (rather than 3 years in the last 4 years);
- can apply in their nominated occupation regardless of whether it is on the MLTSSL at the time the ENS application is lodged; and
- will not need to be 45 years old but will still need to be under 50 years old at the time of application (unless an age exemption applies).

These transitional arrangements are available until 18 March 2022.

Foreign nationals applying under the Employer Nomination Scheme under the Direct Entry (**DE**) stream are those applicants applying from overseas, or applicants who hold a temporary visa other than a primary TSS visa (for example, New Zealand citizens or family members holding New Zealand Family Relationship visas), or applicants who have not completed the required three years of employment with the sponsoring employer. The nominated position must appear on the MLTSSL and these applicants are subject to more stringent requirements requiring the nominated position to be under the employer's direct control (as opposed to under the TRT stream where the applicant can be employed by an associated entity of the nominating employer). The applicant must also have at least three years' work experience and undergo a formal skills assessment, although some exemptions apply.

Under current rules, specific exemptions for age, skill and English language requirements are available in some cases. For example, age concessions apply to for prescribed occupations, for New Zealand citizens or New Zealand Family Relationship visa holders who have worked for their nominating employer for at least two years or for TSS or subclass 457 visa holders who have worked for their nominating employer for at least three years and during that time earned above the Fair Work High Income Threshold which is indexed each year.

Under the Regional Occupation List, there are additional occupations available for nominations under the Regional Sponsored Migration Scheme relating to employment in regional areas of Australia. In these cases the nominations must be supported by the relevant Regional Certifying Body in the region.

Dependent family members may be included in the visa application, and all applicants are required to meet health and character criteria (including those who will not be migrating to Australia).

Permanent residence for employment based on skills and experience

Individuals, who are under 45 years of age, are able to apply to take up permanent residence based on their skills and experience in a highly skilled occupation under the General Skilled Migration (**GSM**) program. Applicants may apply independently or through nomination by a state/territory government or sponsorship by an eligible relative living in a designated area of Australia. The number of skilled occupations available for this purpose has been significantly reduced and now only includes occupations in fields such as health care, information technology, accounting, engineering and construction (both professional and trade), education and agriculture. There are six permanent visa categories that are available for skilled migration under GSM. One for individuals who are applying on basis of their skills and work experience (subclass 189 visa) and another for those who are nominated by a state or territory government (subclass 190 visa). Other subclasses cover applicants who fall under categories including nominated, regional, temporary and recognised graduate applicants. Each visa subclass has its own eligibility criteria, and the application process (known as '**SkillSelect**') for this type of visa takes place over three stages, including submitting an online Expression of Interest, meeting the eligibility criteria and satisfying a points test, and then making a visa application, if invited, within a prescribed time. Generally in applying for these permanent residence visas, the individual must meet a points test based on factors such as age, English language ability, Australian and overseas employment experience and qualifications, credentialed community language, partner's skills, studying and living in regional Australia and sponsorship by a state or territory government. Points can be awarded for credentialed community language if an applicant has been accredited at the para-professional level or above by the National Accreditation Authority for Translators and Interpreters (**NAATI**) as either a translator or interpreter. The main applicant and all family members, including those who are not migrating to Australia, must meet health and character requirements.

A new pathway for New Zealand citizens was introduced on 1 July 2017 into the subclass 189 visa category for certain New Zealand citizens who were present in Australia on or before 19 February 2016, have been usually resident in Australia for a continuous period of at least five years and during that time have earned above a specified amount.

There is also a visa for recent graduates of Australian tertiary education institutions in most areas of study or from engineering courses at designated overseas universities. These visas create a pathway for graduates to apply for permanent residence onshore either in the highly

skilled category, but only in an approved occupation, or as sponsored by an employer toward the end of their initial visa which can be granted for periods of between 18 months to four years depending on stream.

Once a permanent residence visa is granted, it is generally valid for five years and allows travel in and out of Australia over that period. After this initial period of permanent residence has elapsed, eligibility to continue to re-enter Australia after travel overseas is reassessed based on the length of time that the individual has been physically present in Australia during the initial five-year period. In cases where the individual has spent less than two years in Australia, the business, personal, employment and cultural ties that the person has to Australia and the benefit of these ties to Australia are assessed as part of the application process.

Application process for certain visa categories under the Business Innovation and Investment BMP and GSM programs

Since 1 July 2012, individuals who are interested in skilled migration to Australia under the Business Innovation and Investment (**BMP**) and GSM programs, they must make the application through the Skilled Migration Selection Model. The scheme is a two-stage initial application process where prospective applicants first submit an indication that they would like to be considered for a visa, through an online expression of interest (**EOI**) and subsequently the Department may invite the individual to make an application for a visa.

For the points-based skilled migration programs, applicants have their skills and attributes ranked according to the appropriate points test, and therefore, only those applicants who receive the highest score will be invited to apply for a visa. Each occupation has an 'occupation ceiling' which means that there is a limit on how many people are selected for skilled migration from particular occupation groups. There are further measures where certain occupations are listed on State and Territory lists as those in need or priority where an application may ultimately be sought to be made under State or Territory Nomination.

Prospective migrants are also able to nominate in the EOI their willingness to live and work in regional Australia as well as their interest in being considered for state/territory or employer-sponsored visa categories. All EOIs are recorded online through a database called SkillSelect. Employers and state or territory governments interested in sponsoring overseas workers are able to search through SkillSelect to locate workers with the requisite skills and attributes and nominate them for a permanent or a temporary visa. As SkillSelect records whether the individual is willing to live and work in regional Australia, it may assist employers and state and territory governments with filling vacancies in areas of Australia with acute skills shortages.

Family members and partners visas

There are a variety of permanent visas for family members and partners. Legally married spouses and de facto partners (including same sex partners) of Australian citizens, permanent residents and eligible New Zealand residents can apply onshore or offshore for a partner visa and be sponsored by their spouse or de facto for a visa. The individual applies first for a provisional visa and then after a certain period of time has passed may be considered for permanent residence so long as the applicant continues to meet the eligibility criteria (with some limited exceptions). Applicants in a married and de facto relationship must demonstrate that they are in a genuine and continuing relationship with their spouse or de facto partner and mutual commitment to a shared life to the exclusion of all others. There is a prospective spouse visa for fiancés of Australian citizens and permanent residents which may only be applied for outside Australia, and which allow the visa holder nine months to marry an Australian citizen, permanent resident or eligible New Zealand citizen who has sponsored the individual for the visa.

Permanent visas are available for children (natural, adopted, stepchildren, orphaned and more), as well as for parents and close relatives of Australian citizens and permanent residents. To qualify for permanent visas, children must be considered dependent upon their Australian citizen or permanent resident sponsor under the Regulations. There are both onshore and offshore options available. Parents can qualify for permanent visas if they are able to show that requisite numbers of their children usually reside in Australia. There is a category of permanent residence for parents where significantly higher lodgement fees are required to be paid. These applications have much shorter processing times than is the case for the other categories of parent visas. Only parents who are considered to be 'aged parents' are eligible to apply under onshore subclasses and are thus eligible for a bridging visa upon lodgement of a valid application allowing them to remain in Australia during lengthy visa processing.

Student visas

Non-citizens seeking to enter and remain in Australia for the purpose of full-time study must generally obtain a student visa. On 1 July 2016 all student visa subclasses in existence were repealed and replaced with two student visa subclasses – the Class TU Student (Temporary) Visa and the Student Guardian Visa.

In order to apply for a valid student visa, the applicant must have applied for and been accepted to study in a, full-time course of study which is provided by an institution that is registered under the Education Services for Overseas Students Act. A confirmation of enrolment from the institution is generally required in most cases. If the applicant is under 18 years of age, then the applicant must also show that appropriate welfare arrangements have been made for

the duration of their intended stay in Australia.

On 1 July 2016, a new 'Simplified Student Visa Framework' was introduced to replace the previous assessment level regime and the streamlined processing arrangements which was previously available for certain courses. Under the new framework, the level of evidentiary requirements in relation to English language skills and financial capacity are now assessed and managed by an online document checklist tool available on the Department's website: <http://www.border.gov.au/Trav/Visa-1/500->. Any applicant wishing to study in Australia must also satisfy the Department that they are both a genuine student and have a genuine intention to stay in Australia temporarily. In all cases, the Migration Regulations require all family unit members to be declared in the student's application regardless of whether they intend to accompany the student to Australia.

The student guardian visa may be applied for by a family member in order to provide appropriate care and welfare arrangements for the Student visa holder if they under 18 years of age during their studies, or for student visa holders over 18 in exceptional circumstances. Student Guardian visa applicants are required to meet prescribed financial requirements and provide evidence of their financial capacity,

There are other temporary visas outside of the student visa program that permit short-term study in Australia of generally up to 3 months, and may be used such as where the course is not a registered course of study. These include visa issued under the Visitor's visa program and the Working Holiday or Work and Holiday program.

Immigration review

In most cases, a decision by a Department official to refuse an application for a visa or a sponsorship application may be reviewed, generally provided one of the parties with an interest in the application is present in Australia. Since 1 July 2015 the Migration Review Tribunal and Refugee Review Tribunal have merged with the Administrative Appeals Tribunal (**AAT**) which is now the sole review body for migration decisions. Applicants may apply online for review, and may make their application either under the Migration and Refugee Division or the General Division of the AAT depending on the decision to be reviewed. However, it is essential to apply within the required statutory timeframe or such an application will not be valid and cannot be reviewed.

The AAT reviews the merits of the Department's decision and can also review visa cancellation decisions (known as migration decisions), most onshore protection refusal decisions (refugee decisions), character-related refusal decisions, and citizenship refusal decisions. The AAT has the power to set aside the decision of the Department official and substitute the Department's

decision with its own. If the AAT determines that the Department's decision was correct then the applicant will no longer have the right to remain in Australia unless they hold another visa. The person must return home or to a country where the person has the right of entry and stay as soon as possible.

Further avenues of review are available on legal issues (known as judicial review) associated with particular decisions to the Federal Magistrates Court, the Federal Court and the High Court.

The Migration Act empowers the Minister for Immigration, Citizenship and Multicultural Affairs to intervene in particular cases and grant a visa where the application has been refused by the Department and the refusal has then been considered by the AAT.

Concluding comments

The Australian Government welcomes applications from non-citizens who wish to live and work in Australia. While the process of applying is detailed, the criteria for the visa to be approved are set out in the Migration Regulations. Provided the requirements for the visa can be met by both the individual and the sponsor (if any), genuine applicants should have little difficulty in being granted the visa they seek where entry is sought for employment or business purposes. These visas are often processed more quickly by Department officials than for some of the family-related visa categories.

There are regional offices of the Department in each state and territory capital city and a number of Australian diplomatic missions overseas. The Department's website is at www.border.gov.au and a number of visa applications can now be lodged online with approval being notified electronically. It is the intention that in the future, more visa categories will be eligible to lodge online.

The Australian Government continues to review and adjust its migration program and future amendments, some of which have already been detailed, are expected.

Last updated: 01/03/2019

Key contacts



Drew Pearson
Partner
+61 2 9225 5492
Sydney
drew.pearson@hsf.com



Miles Bastick
Regional Head of Practice
(EPI) Australia
+61 2 9225 5722
Sydney
miles.bastick@hsf.com



Teresa Liu
Partner, Fragomen
+61 2 8224 8518
Sydney
tliu@fragomen.com