NASSCOM®

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John Azarias
Panel Lead
Independent Review of Integrity in the Subclass 457 Programme

Dear Mr Azarias,

The National Association of Software and Service Companies (**NASSCOM**) is grateful for your invitation to participate in the 457 Integrity Review.

NASSCOM welcomes any changes by Government that will facilitate the use of the 457 visa program by the Information and Communications Technology (**ICT**) and Business Process Outsourcing (**BPO**) industry in Australia without adversely affecting the integrity of the program.

In the view of our members, the 457 visa program is vital to their global business model and is a relatively stable and effective program for the assignment of skilled professionals to Australia to undertake ICT and BPO project work. However, there are several areas of law and policy which in our view require reform in order to ensure that the program is able to deliver consistent results in a timely manner.

In summary, NASSCOM's submissions are as follows:

1. An effective and efficient 457 visa program is critical to the business model used by our members to deliver services to Australian clients.
2. The regulations relating to market salary evidence should be restored to their form prior to the 1 July 2013 changes.
3. The regulations relating to English language evidence should be restored to their form prior to the 1 July changes. Alternatively, the requisite number of years of education in English should be reduced from five years to three.
4. We continue to advocate for a dedicated intra-company transfer visa stream that operates consistently with similar schemes adopted by other countries to give effect to free trade principles. In our view this is an important component to Australia's participation in a global economy.
5. Adoption of the above suggested amendments would not adversely affect the integrity of the program but would allow business to use the program effectively.

1. About NASSCOM

NASSCOM is an industry association founded among companies operating in the Indian ICT and BPO industry. Established in 1988, NASSCOM is a non-profit organisation focussed on facilitating business and trade in software and services and encouraging advancement of research in software technology.

NASSCOM has grown to become a global body consisting of over 1500 member organisations. Of these, over 250 are global companies from the USA, UK, EU, Japan and China. NASSCOM's member companies are primarily in the business of software development, software services, software products, IT-enabled/ BPO services and e-commerce. NASSCOM has been and continues to be a proponent of global free trade with India.

2. How NASSCOM member companies use the 457 program

NASSCOM companies typically use a combined offshore/onshore model to deliver ICT solutions for their clients. This entails the assignment to Australia of skilled ICT professionals from overseas.

NASSCOM companies are primarily contracted by Australian businesses to develop and install cutting-edge ICT solutions in accordance with customer business needs, budget and urgency. ICT work is usually project-based and the ICT supplier will be contracted to provide a specified outcome within a specified time-frame. Clients will generally expect a project to commence within one or two months of the appointment of the contractor. This means that many ICT positions are short-term contractual roles that need to be filled quickly, in turn requiring a fast moving flexible workforce that can be stood down until the next project commences or relocated to another country for another project.

The nature of ICT work thus requires a talented and highly skilled workforce which can be geared up quickly when a project is won and reduced or reassigned when the project is completed. In our experience members require 'T-shaped' professionals who have both broad knowledge and deep expertise, including technical skills, domain knowledge and soft skills including communication and business skills.

Due to the large numbers of skilled professionals required and the short lead times in which to have professionals in place, ICT companies generally need to maintain a large pool of labour that can be moved onto a new project anywhere in the world and commence work almost immediately. The Australian ICT market is simply too small to provide the level of resources needed for large projects.

India continues to produce high numbers of very skilled ICT professionals and has greater capacity to provide pools of workers with well-developed proprietary expertise. It is for this reason that most large ICT projects undertaken by our members in Australia will involve skilled professionals assigned to Australia from overseas, and principally from India.

Accordingly, the 457 program is vital to our members' business model and its efficient operation is critical to the reliable delivery of skilled ICT professionals into client projects in industries across Australia.

3. Submissions

The way our members use the 457 visa program means that 457 visa processing times are critical to the successful implementation of a client project. Since legislative amendments came into effect on 1 July 2013, our members have expressed frustration about the overregulation of some aspects of the program, which have made both the lead time for preparing an application and the processing times through the Department longer than should be required. It is our submission that these changes should be amended or revoked, and that doing so would not threaten the integrity of the program (and in some cases may bolster it).

3.1 Market Salary Evidence

Standard business sponsors must meet certain benchmarks in relation to the salary paid to 457 visa holders. Regulation 2.72(10)(c) provides that the earnings proposed at the time of the 457 application must be

> *no less favourable than the terms and conditions that:*
> *(i) are provided; or*
> *(ii) would be provided;*
> *to an Australian citizen or an Australian permanent resident for performing equivalent work at the same location*. [1]

This is a change from the regulation as it existed prior to 1 July 2013, which required that the applicant be paid an amount equivalent to Australians performing equivalent work **in the same workplace** at the same location.

Where there is an Australian performing equivalent work in the same workplace, that Australian provides the benchmark for the nominated position.[2] However where there is no such equivalent Australian, the removal from the regulation of the reference to *the same workplace* compels sponsors to provide the Department with evidence of market rates external to their business. Importantly, this is distinct from a requirement on the part of the sponsor to present to the Department the information taken into account and methodology followed to arrive at the remuneration proposed. Rather, the method through which sponsors are obliged to demonstrate market rates is specified by Ministerial Instrument.[3] The relevant instrument[4] prescribes the acceptable sources of market rate information in order of preference, as follows:

[1] *Migration Regulations 1994* (Cth) (***Regulations***) r. 2.72(10)(c); r. 2.72(10AA).
[2] *Regulations*, r. 2.72(10AA).
[3] *Regulations*, r. 2.72(10AA).
[4] Minister for Immigration and Citizenship, *Specification of method to determine terms and conditions of employment that would be provided to an Australian citizen or an Australian permanent resident to perform equivalent work in the same workplace at the same location (reg 2.72(10AA))*, Instrument No. 113 of 2009, F2009L03515 [14/09/2009].

1. by comparison to any relevant Fair Work instrument; or
2. if there is no relevant Fair Work instrument, by reference to:
    - Fair Work instruments in similar workplaces; or failing that
    - Information available from unions and employer associations; or failing that
    - Other market data from:
        - Australian Bureau of Statistics
        - Job Outlook
        - Remuneration Surveys
        - Job vacancy advertisements.

It is when consulting such external market salary information that our members encounter frustratingly divergent results, and this makes it difficult to determine what the market rate for any particular occupation actually is, in order to provide the Department with evidence that will be acceptable under the current requirements. For example, the below table illustrates the different results from a search for the market rate of an *Analyst Programmer* with three years' experience, located in Sydney:

Source	**Base salary**	**Total Earnings (if reported)**	**Comments**
Award[5]	$55,770		
ABS[6]	$95,264		
Job Outlook[7]	$78,000		
HAYS	$70,000 - $100,000		
Greythorn	$80,000 - $110,000		
Hudson	$70,000 - $90,000		
ACS	$60,000 – $130,000	$70,850 – $151,441	Total Earnings includes superannuation, overtime, Award allowances, motor vehicle use, parking, performance-based pay, FBT items, home and professional expenses

The divergence of these results shows that no salary source can reliably provide a definitive market salary rate. In addition, Department officers are generally unwilling to accept market salary evidence expressed in wide ranges, such as most of those above. There is no method by which a sponsor trying to determine 'market rate' might reasonably be expected to reconcile the divergent rates reported by different prescribed sources. Tellingly, the difference between the two Commonwealth Government sources – ABS and Job Outlook – is significant, yet nowhere explained or sufficiently accounted for. There is also no way for sponsors to qualify the reported rates in order to discount benefits that do not fit the migration law definition of 'earnings', such as performance-based bonuses or workplace car parking.[8] This makes the task of providing the Department with evidence of a particular dollar figure as 'the' market rate an almost impossible task.

[5] *Professional Employees Award 2010*, December 2013, Level 3: Professional.
[6] Australian Bureau of Statistics, Employee Earnings and Hours, Australia, May 2012. http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6306.0May%202012?OpenDocument
[7] Job Outlook reports salaries by 4-digit ANZSCO group and this is the reported salary level for the group *2613 Software and Applications Programmers*. http://joboutlook.gov.au/occupation.aspx?search=alpha&code=2613
[8] *Regulations,* r. 2.57.

Integrity of the 457 Program

In addition to being a source of frustration and delay for our members when trying to prepare a 457 nomination application for lodgement, the lack of clarity in the current market salary requirements presents an area of risk to any government that is concerned with the integrity of the 457 program. Whether any particular source of market information provides the 'correct' rate is entirely arguable, and can be refuted by alternative sources which provide differing figures. This dilutes the efficacy of a comparison to 'external market rates' as a way of ensuring that the 457 program does not undermine the salary levels of Australians and that 457 holders are not treated differently in the workplace.

The effect of the above is that it would be difficult for the Department to take action against a sponsor for breach of market salary requirements. In our view, the Department would have difficulty prosecuting a sponsor for non-compliance with the market rate for a particular position, if research into the market returns such a broad range of results. Accordingly, it is our view that, in addition to frustrating the nomination application process, the current requirement to compare proposed salaries with external market information does little to serve the greater policy purpose of protecting salary levels in the labour market.

Recommendations

NASSCOM recommends the following amendments:

- Regulation 2.72(10)(c) is amended to restore the words "in the same workplace". This would allow sponsors to use their own method for determining and demonstrating what an Australian is or would be paid to do the same work. We note however that this would require a legislative change to the *Migration Regulations*.
- Until such time as the Regulation can be changed, a new Ministerial Instrument should be issued which moves away from prescribed methods and sources and instead allows sponsors greater flexibility in the way they determine and demonstrate what an Australian is or would be paid relevant to the particular workplace.

In our submission, these changes will restore the focus on whether sponsors have differential employment terms and conditions in place for Australian and non-Australian workers.

3.2 English language evidence

One of the requirements of a successful 457 visa application is that the applicant has at least a vocational level of English language proficiency.[9] The stated policy purpose behind this requirement is to ensure that all employees at a given workplace have the necessary communication skills to relay and understand occupational health & safety and workplace welfare information.[10] Accordingly, the criteria for approval of a 457 visa require applicants to provide evidence of English language proficiency unless they:

[9] *Regulations*, Sched. 2 r. 457.223(eb)

[10] Minister for Immigration and Citizenship, *Visa Subclass 457 Integrity Review Issues Paper #2: English Language Requirement / Occupational Health and Safety,* August 2008, page 11. We note that for some occupations, the relevant professional regulatory body stipulates levels of English language skills and the Migration Regulations accommodate these higher standards. However this does not apply to IT occupations. See: *Regulations,* Sched. 2 r. 457.223(ea).

- are the holder of a passport from the USA, UK, Ireland, Canada or New Zealand; or
- are otherwise exempt from the requirement.[11]

In the July 2013 changes to the legislation, the available exemption was changed from a skills-based exemption to a purely salary-based exemption. Prior to July 2013, trade occupations remunerated at below $92,000 were subject to English language testing, whereas 'white collar' managerial and professional occupations were not.[12] We submit that this structure to the English language requirement was consistent with ensuring that workers performing more physical work at more dangerous workplaces were able to communicate and understand work health and safety instructions. If that is indeed the policy aim, a salary-based requirement rather than an occupation-specific requirement appears to be misdirected. The same considerations that compel the importance of OH&S communication in trade work do not immediately arise in the case of professional knowledge work performed in an office, and a one-dimensional salary threshold for determining whether English language should be tested is not sufficient to capture this important difference in workplace environment. Furthermore, ICT workers assigned to Australia are invariably university educated and, by being employed in a global firm, work in the English language as the international language of commerce.

The requirement to provide evidence of English language proficiency has impacted significantly on the lead time required to prepare a 457 visa application. It requires applicants to either:

- provide evidence of at least five consecutive years of education in which the language of instruction was English;[13] or
- undertake an IELTS English language test and achieve the required score.[14]

The vast majority of our members' assignees have a Bachelor degree from India. University education in India is conducted in English, but a standard degree course in ICT would be three or four years. The requirement of five years' consecutive study in English requires 457 visa applicants to source evidence from their secondary school – often decades after graduation. Where obtaining such a letter is not possible, or if the applicant took a break between secondary school and university, the only recourse is to sit the IELTS test, which in the larger centres are booked out weeks in advance. The time taken to try to source evidence from various institutions and/or secure a place in an IELTS examination creates significant delays which affect our members' ability to deliver project deliverables to their Australian clients on time.

Integrity of the 457 Program

The extension of the English language requirement to professional and managerial occupations has not changed the English language proficiency of the employees that our members assign to Australia. Nor has the requirement resulted in any discernable change in nomination approval rates for applicants from India. The only perceptible outcome has been delay.

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[11] *Regulations*, Sched. 2 r. 457.223(4)(eb); Sched. 2 r. 457.223(11); Assistant Minister for Immigration and Border Protection, *Tests, scores, period, level of salary and exemptions to the English language requirements for Subclass 457*, Instrument no. 9 of 2014, F2014L00327 [21/03/2014] ('***Instrument***').

[12] *Regulations*, Sched. 2 r. 457.223 (6)(a); Minister for Immigration and Citizenship, *Level of salary and exemptions to the English language requirement for Subclass 457 (Business (Long Stay)) visas (clauses 457.223(6)(a) and 457.223(11))*, Instrument No. 48 0f 2012, F2012L01275 [01/07/2012].

[13] ***Instrument*** at 7(a).

[14] ***Instrument*** at 7(b).

Recommendations

For this reason, NASSCOM is of the view that a new Ministerial Instrument should be issued to restore ANZSCO skill levels 1 and 2 to the classes of applicants that are exempt from demonstrating English language proficiency.

As an alternative, we recommend that the current requirement of five years' consecutive study in English is reduced to three years. This would mean applicants would be able to demonstrate English proficiency on the basis of their university qualifications alone. In our submission, this amendment would not significantly impact on the integrity of the program in relation to ensuring a minimum level of English proficiency among 457 visa holders; but would make a significant impact to the time involved in preparing a 457 visa application for lodgement.

3.4 Intra Company Transfer pathway

As discussed in section 2 above, our multi-national members view their global workforce as a single talent pool from which they draw depending on need, mobilising and remobilising personnel and teams as required for projects or contracts in different countries. This pool of skilled resources is experienced in the company's 'proprietary knowledge' which enables them to meet project deliverables in accordance with the company's framework and in conformance to those standards. In this way, companies enable their pool to realise their true potential and become domain or vertical experts. It is this proprietary framework which differentiates each service provider and their respective offerings to Australian customers and so the proprietary knowledge is essential.

These pools of experts can be very large, in some cases many hundreds of thousands of people around the world; and/or very specialised, in some cases employing a sizeable percentage of the world's most talented professionals in their field of expertise. Project roles will not usually be advertised to the broader market unless there is no employee available from within the global workforce as there tends to be a high level of proprietary knowledge required as essential to most specialist roles of this nature. These positions are not viewed by these companies as 'vacancies' because no net increase in staff is required to fill the role.

Accordingly, it is in our view essential that the Australian work visa program operates so as to give effect to the principles of free trade in services and that the Australian work visa program recognises the unique requirements of multi-national companies and the need to transfer key personnel.

For this reason, we continue to advocate for a dedicated visa stream for intra-company transfers. This is essential to the growth of the world economy as well as to endure the delivery into Australia of professionals able to use their skills to assist in Australia's long-term development.

A growing number of major economies have created dedicated visa pathways for intra-corporate transfers on the basis that this is essential to the delivery model of global companies, supported by agreed free trade principles. For example:

- The United Kingdom's Tier II visa provides a dedicated visa pathway for intra-corporate transferees who have worked for the same employer outside the UK for at least 12 months. Sponsors are pre-approved as a sponsor of certain occupations and receive a licence number ('certificate of sponsorship') for inclusion as a reference number in each visa application. No separate 'nomination' application is required to approve each sponsored position. Where the employer is assigning a skilled worker for less than 12 months, the minimum salary is set

at £24,000. The rationale for this is that workers coming in for less than 12 months will not be competing with the domestic workforce. Additional requirements such as English language testing, labour market testing and a higher salary level are only required if the person is applying for a longer period of stay, or if later applying onshore for a renewal, as this will result in the person entering the domestic labour market. In our view it is a sensible approach to require these additional tests at a later stage, and where the person is renewing their visa onshore that are already in role and may continue throughout visa processing.

- Canada has a dedicated visa pathway for transferees who are considered executives, managers, or specialized knowledge workers and work for a foreign company with a qualifying relationship to the company in Canada. This pathway is designed to give effect to Canada's obligations under the General Agreement of Trade in Services (GATS) and is not subject to economic needs tests.

- The United States has the L-1B visa which Congress created for the specialized knowledge category in 1970 in recognition of the need for international companies to have a way to temporarily transfer employees with a high level of knowledge and skill from abroad to the United States.

It is NASSCOM's submission that a dedicated intra-corporate transfer visa stream should be developed for use by trusted employers which then provides a simplified work visa application process. As in the UK example above, much of the current process could be front-end loaded by pre-approving sponsors for certain occupations and conditions of employment as part of an 'intra-company transfer sponsor' application process. This would negate the need for a separate nomination application, reducing the overall processing time for a 457 visa.

Furthermore, our members assign intra-company transferees to Australia in order to perform highly skilled and technical work in satisfaction of their contractual obligations to Australian clients. It is inconceivable that our members would assign to those projects professionals that are not highly skilled with expert proprietary knowledge and able to communicate effectively in the workplace. Accordingly, it is our view that visa applicants under a dedicated intra-company transfer pathway should not be subject to labour market testing, English language testing, or skills assessments, if the assignment to Australia is 24 months or less. Where an intra-corporate transferee is proposed for a stay beyond 24 months, either at initial application stage or through a 'renewal' application, any such testing considered desirable could be imposed at that stage.

NASSCOM thanks the Panel for the opportunity to make these submissions and would welcome an opportunity to meet and discuss these matters further.

We look forward to hearing from you.

Yours faithfully,

Sameer Arora
General Manager, Australia

Phillip Lockwood
Acting Chair