Commonwealth of Australia

Migration Regulations 1994

TESTS, SCORES, PERIOD, LEVEL OF SALARY AND EXEMPTIONS TO THE ENGLISH LANGUAGE REQUIREMENT FOR SUBCLASS 457 (TEMPORARY WORK (SKILLED)) VISAS

(Paragraphs 457.223(4)(eb) and 457.223(6)(a),
subparagraph 2.72(10)(g)(iv) and subclause 457.223(11))

I, *MICHAELIA CASH,* Assistant Minister for Immigration and Border Protection, acting under paragraphs 457.223(6)(a), 457.223(4)(eb) and subclause 457.223(11) of Schedule 2 to the *Migration Regulations 1994*, and subparagraph 2.72(10)(g)(iv) of Part 2A to the *Migration Regulations 1994* ('the Regulations'):

1. REVOKE Instrument IMMI 13/099, signed on 25 July 2013, which specified the level of salary that is worked out in a way specified for paragraph 457.223(6)(a) of Schedule 2 to the Regulations, and specified a class of applicants for the meaning of *exempt applicant* under subclause 457.223(11) of Schedule 2 to the Regulations; AND

2. SPECIFY for the purposes of subparagraph 457.223(4)(eb)(iv) of Schedule 2 to the Regulations, the following language tests:

   (a) International English Language Testing System (IELTS test); and
   (b) Occupational English Test (OET).

3. SPECIFY for the purposes of subparagraph 457.223(4)(eb)(v) the following scores:

   (a) a score of at least "B" in each of the four components of an OET; or
   (b) an IELTS test score of at least 5.0 for each of the four test components of speaking, reading, writing and listening.

4. SPECIFY for the purposes of paragraph 457.223(4)(eb), the period of three years from the date of the visa application.

5. SPECIFY for the purposes of subparagraph 2.72(10)(g)(iv), the period of three years from the date of nomination.

6. SPECIFY for the purposes of paragraph 457.223(6)(a) of Schedule 2 to the Regulations, the base rate of pay is at least the level of salary worked out by the following:

The annual salary, paid on a monthly, fortnightly or weekly basis, at a base rate of pay which is equal to or greater than the applicable base salary, where:

the ***base rate of pay*** is the person's rate of pay payable to an employee for his or her ordinary hours of work, not including any of the following:

(a) incentive-based payments and bonuses;

(b) loadings;

(c) monetary allowances;

(d) overtime or penalty rates;

(e) any other separately identifiable amounts; and

the ***applicable base salary*** is AUD 96,400 per annum.

Note: The definition of ***base rate of pay*** is based on the definition given in section 16 of the *Fair Work Act 2009.*

7. SPECIFY for the purposes of the meaning of "exempt applicant" under subclause 457.223(11) of Schedule 2 to the Regulations, the following classes of applicants to be an *exempt applicant*:

(a) applicants who are a citizen of, and who hold a valid passport issued by, the United Kingdom, the United States of America, Canada, New Zealand or the Republic of Ireland;

(b) applicants who:
(i) are nominated in an occupation that does not require a level of English language competency for grant (however described) of registration, licence or membership; and
(ii) have completed at least 5 consecutive years of full-time study in a secondary and/or higher education institution where the instruction was delivered in English;

(c) applicants who are:
(i) nominated in relation to an activity or occupation by a standard business sponsor approved under regulation 2.59 or 2.68 of the Regulations; and
(ii) nominated in relation to activity or occupation that will be performed at a diplomatic or consular mission of another country or an office of the authorities of Taiwan located in Australia;

(d) applicants who lodged the visa application that this Instrument applies to before 1 July 2013 and are:
(i) the subject of an approved nomination and the application for approval of the nomination was made on or after 1 July 2010 in an occupation that does not require a level of English language competency for grant (however described) of registration, license or membership; and

(ii) nominated in the application for approval of nomination in an occupation for an approved position in an occupation that is in ANZSCO Major Groups 1, 2, 4, 5, 6, Sub-Major Group 31 or Unit Group 3993;

(e) applicants who lodged the visa application that this Instrument applies to before 1 July 2013 and are:

(i) the subject of an approved nomination and the application for approval of the nomination was made before 1 July 2010 in an occupation that does not require a level of English language competency for grant (however described) of registration, license or membership; and

(ii) nominated in the application for approval of nomination in an occupation for an approved position in an occupation that is in the ASCO Major Groups 1 – 3, excluding Head Chef 3322-01 and Chef 3322-11, except where an applicant has been nominated for Head Chef or Chef and the visa application that this Instrument applies to was lodged before 14 April 2009.

8. For the purposes of Item (7) of this Instrument:

(a) in relation to secondary education, "***full-time study"*** means the standard number of contact hours that a student would undertake in the relevant country; and

(b) in relation to higher education, "***full-time study"*** means the completion of at least three subjects in each semester or trimester of study; and

(c) for the purposes of regulation 1.03 of the Regulations **"ANZSCO"** means the Australian and New Zealand Standard Classification of Occupations as published by the Australian Bureau of Statistics; and

(d) **"ASCO"** means the Australian Standard Classification of Occupations, Second Edition, published by the Australian Bureau of Statistics on 31 July 1997, as defined at regulation 1.03 of the Regulations.

This Instrument number IMMI 14/009 commences on 22 March 2014 immediately after the commencement of the *Migration Amendment (Redundant and Other Provisions) Regulation* 2014.

Dated 19 / 03 / 2014

MICHAELIA CASH

Assistant Minister for Immigration and Border Protection

EXPLANATORY STATEMENT

Migration Regulations 1994

TESTS, SCORES, PERIOD, LEVEL OF SALARY AND EXEMPTIONS TO THE ENGLISH LANGUAGE REQUIREMENT FOR SUBCLASS 457 (TEMPORARY WORK (SKILLED)) VISAS

(Paragraphs 457.223(4)(eb) and 457.223(6)(a),
subparagraph 2.72(10)(g)(iv) and subclause 457.223(11))

1. This Instrument is made under clause 457.223 and subparagraph 2.72(10)(g)(iv) of Schedule 2 to the *Migration Regulations 1994* ('the Regulations').

2. The purpose of the Instrument is to specify:

   (a) the language tests that can be undertaken, the required scores for each of the tests and the period in which the test must have been undertaken for an applicant for a Subclass 457 (Temporary Work (Skilled)) visa in order to satisfy the English language proficiency requirement at paragraph 457.223(4)(eb) of Schedule 2 to the Regulations; or

   (b) the level of salary an applicant for a Subclass 457 (Temporary Work (Skilled)) visa must be paid in order to be exempt from the English language proficiency requirement and the classes of applicants who are exempt from the English language proficiency requirement.

3. The Instrument operates to specify the language tests that can be undertaken; the required scores for each of the tests; the period in which the test must have been undertaken; an annual salary at a base rate of pay which is equal to, or greater than, the applicable base salary and the classes of applicants who are 'exempt applicants'.

4. Item (7) of the Instrument specifies the classes of applicants who are an *exempt applicant* for the purposes of subclause 457.223(11) of Schedule 2 to the Regulations. Paragraph (a) is an amendment resulting from regulation changes to specify an additional class of exempt applicant; applicants who are a citizen of, and who hold a valid passport issued by the United Kingdom, the United States of America, Canada, New Zealand or the Republic of Ireland. These applicants were previously not required to be exempt as they were deemed to

have vocational English. Paragraphs (b), (c), (d) and (e) specify the same classes of applicants that were specified in the previous instrument. These are:

- applicants whose nominated occupation does not require a level of English language competency for registration or licensing purposes and who have completed at least five consecutive years of full-time study in a secondary and/or higher education institution where the instruction was delivered in English; and
- certain sponsored applicants who will work at a diplomatic or consular mission of another country or an office of the authorities of Taiwan in Australia; and
- applicants who lodged a visa application, to which this Instrument applies before 1 July 2013, who are the subject of an approved nomination made on or after 1 July 2010 in an occupation that does not require a level of English language competency for grant (however described) of registration, license or membership where the nominated occupation is in ANZSCO Major Groups 1, 2, 4, 5, and 6, Sub-Major Group 31 or Unit Group 3993; and
- applicants who lodged a visa application to which this Instrument applies before 1 July 2013, who are the subject of an approved nomination made before 1 July 2010 in an occupation that does not require a level of English language competency for grant (however described) of registration, license or membership, where the nominated occupation is in the ASCO Major Groups 1, 2 and 3, excluding Head Chef 3322-01 and Chef 3322-11, except where an applicant has been nominated for Head Chef or Chef and the visa application to which this Instrument applies was lodged before 14 April 2009.

5. The Instrument reflects the same test scores that were previously associated with the 'Vocational English' definition.

6. The Office of Best Practice Regulation has advised that a Regulatory Impact Statement is not required (OBPR Ref 16356).

7. 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.

8. This Instrument number IMMI 14/009 commences on 22 March 2014 immediately after the commencement of the *Migration Amendment (Redundant and Other Provisions) Regulation* 2014.

Statement of Compatibility with Human Rights

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

Specifying English Language test requirements for the Temporary Work (Skilled) (Subclass 457) visa programme in a Legislative Instrument

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

The objective of this change is to introduce a new Legislative Instrument to specify the relevant English language proficiency tests, scores and validity period for people applying for a Subclass 457 (Temporary Work (Skilled)) visa. This is as a result of amendments to regulation 2.72, clause 457.111 and subclause 457.223(4) of the *Migration Regulations 1994* to remove references to 'vocational English' and create an instrument making power to enable the specification of English language requirements by way of this instrument.

Currently, exemptions to the English language requirement apply to temporary workers whose income is in excess of $96,400.00 and to visa applicants who have completed five years of consecutive full-time study in a secondary or tertiary institution where the instruction was delivered in English. Those exemptions will still apply. Additionally, applicants who hold a valid passport issued by the United Kingdom, the United States of America, Canada, New Zealand or the Republic of Ireland and are citizens of one of those countries will be specified in the instrument as being exempt from the English language requirement. Currently these applicants satisfy the vocational English requirement and are not required to be exempted.

Human rights implications

The new Instrument has been assessed against the seven core international human rights treaties. Generally, Australia owes human rights obligations only to those within its territory and/or jurisdiction. The Subclass 457 (Temporary Work (Skilled)) visa to which this amendment relates may be applied for both onshore (i.e. while the applicant is in Australia) or offshore (i.e. when the applicant is outside Australia). Therefore, the human rights implications assessed below are relevant to the extent that they pertain to persons seeking to satisfy the criteria for the grant of a Subclass 457 (Temporary Work (Skilled)) visa while onshore.

Recognition of the right to work – Article 6 of the ICESCR

As the new Instrument deals with the extension of work rights to non-citizens, Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) is relevant. Article 6 provides:

> *The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*

The work rights of temporary non-citizens may be conditioned or limited on a case by case basis. Article 4 of ICESCR provides that the State may subject the rights enunciated in the ICESCR:

> *…only to such limitations as are determined by law only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in democratic society.*

It is the long standing position of the Australian Government that an authority from the Government needs to be granted before a non-citizen is permitted to work. This authority and associated 'work rights' are attached to certain types of visas, including the Subclass 457 (Temporary Work (Skilled)) visa. A person is not permitted to work in Australia unless work rights have been granted, and merely arriving lawfully in Australia does not entitle a person to work rights.

The authority from the Government granting work rights and conditions or limitations placed on temporary non-citizens in respect of those work rights (such as language requirements) are lawful as a matter of domestic law and have as their objective the continued access of Australian citizens and permanent residents to paid employment. As such, the proposed amendments are justified in accordance with Article 4 of ICESCR.

Prohibition on discrimination – Articles 2 and 26 of the International Covenant on Civil and Political Rights

Consideration also has to be had to whether the making of the new Instrument engages Article 2 and Article 26 of the International Covenant on Civil and Political Rights (ICCPR).

Article 2(1) of the ICCPR also provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2 of the ICESCR reflects the provision relating to discrimination on article 2(1) of the ICCPR.

Article 26 of the ICCPR provides:

> *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

'Language' is listed in these articles of the ICESCR and the ICCPR as a ground upon which an individual may be discriminated. However, not all treatment that differs among individuals or groups on any of the grounds mentioned above will amount to prohibited discrimination. The UN Human Rights Committee has recognised that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.

As outlined above, the purpose of the Instrument is to set out the minimum level of English proficiency that Subclass 457 (Temporary Work (Skilled)) visa holders are required to have . The Instrument specifies the acceptable English language tests, the period in which the test must have been undertaken and the score required to be achieved in the relevant test to satisfy the English language requirement for Subclass 457 (Temporary Work (Skilled)) applicants. . The main objective of the English language requirement is to ensure that those working and living in Australia have minimum standards of English.

The measure is an administrative measure only and will not affect those persons seeking entry to Australia on a Subclass 457 (Temporary Work (Skilled)) visa as the Instrument does not change current requirements for English language proficiency.. The measure is therefore considered reasonable, legitimate and proportionate in the circumstances.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

Senator the Hon. Michaelia Cash, Assistant Minister for Immigration and Border Protection