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A FOCUS ON INTERNATIONAL ISSUES

UK GOVERNMENT INTRODUCES CAP ON MIGRATION

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The new coalition government in the UK announced on 28 June 2010 a limit on immigration from outside the European Union (EU) as part of its plan to reduce annual net migration to less than 100,000 people. This was a key election pledge of the Conservative Party. Net migration to the UK in 2008 – including EU citizens – was 163,000. The change will impact nationals from countries outside Europe, including Australia, and employers with an interest in the UK should be mindful of the changes. This move follows other measures introduced earlier this year by the previous Labour government, which aimed at tightening migration to the UK.

An interim limit is to take effect on 19 July 2010. Following consultation with the business community and receipt of advice sought from the Migration Advisory Committee (MAC) – an independent body – a permanent annual limit will be introduced on 1 April 2011.

The interim limit will only apply to highly-skilled individuals under Tier 1 (General) and sponsored new-hires under Tier 2 (General). The measures are as follows:

Tier 1 (General): a monthly limit on the number of visas issued. This category is for highly-skilled individuals who are not sponsored by an employer. Applications will be considered on a 'first come, first served basis'. If the application is to fail because the limit for the month has been met then it will be held and considered under the limit for the following month. If the limit for the whole of the interim period is met then any further applications may not be considered in that period.

The limit is yet to be published on the UK Border Agency (UKBA) website but will be based on the number of approvals in the equivalent period last year i.e. the interim limit is expected to be 5,400. It might be noted that last year was a period of recession. Moreover, and in response to the recession, the UKBA also did not award points for Bachelors degrees (a restriction removed earlier this year). Last year may therefore prove to be a low comparator.

The pass-mark will also be raised by five points for new visa applications and for applicants in the UK who switch into the category.

Tier 2 (General): a limit on the number of certificates of sponsorship allocated to the sponsor. This category is for new recruits sponsored by a registered employer in the UK. The other sub-categories of Tier 2 – including intra-

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company transfers – will not be included in the interim limit. The government, however, is consulting with business in relation to whether or not the permanent limit to be introduced next year should include intra-company transfers. However it has also acknowledged in its consultation paper that placing a numerical limit on intra-company transfers would breach the UK's obligations under international agreements concerned with trade, and would also threaten the ability of UK businesses' employees to be posted abroad.

The number of certificates is to be reduced by 1,300, which is about 6% less than the number allocated in the equivalent period last year in the same category. The interim limit will apply to both existing sponsors and new sponsors who apply during the interim period. Additional certificates will only be allocated in 'exceptional' circumstances: the sponsor will need to show that it has used up its certificates and has a 'pressing need' for a further allocation. The allocation will be based on the number of certificates used by the sponsor in the equivalent period last year. The UKBA will write to all sponsors in the coming weeks to let them know how their allocation will be affected.

New guidance is expected on 19 July 2010 and will provide clarification of how the limits are to be imposed.

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BUSINESS VISITS TO THE US: TO "B" OR NOT TO "B"? THAT IS THE QUESTION!

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In Australia, visas are identified with a complex numerical system such as 456 visas, 457 visas, 856 visas and so on. In the United States, where we are not quite as sophisticated as Australians, we are still working on our "ABC's," and so we use an alphabetic system with visa categories such as the A, H, L, E, etc. The B visa category in the United States is for visitors – B-1 for business travel and B-2 for tourist travel. Sounds pretty simple, right? Unfortunately, it's a bit more complicated than it seems.

There are three main issues that companies should carefully consider when there is a need to send an employee to the United States as a visitor:

1. Who is eligible to use the Visa Waiver Program and what is the Visa Waiver Program?
2. Are there situations where an employee should obtain a B-1 visa even if he or she is eligible for the Visa Waiver Program?
3. What activities are permitted while in visitor status?

Eligibility for Visa Waiver Program

The Visa Waiver Program (VWP) allows citizens of 36 member countries to enter the United States in business visitor status (the same status as a B-1 visa holder) or tourist visitor status (the same status as a B-2 visa holder) for up to 90 days without needing to obtain a B visa stamp (which requires several steps including completing a visa application form and appearing for an in-person interview at a US Consulate in Melbourne, Sydney, or Perth). All the traveller needs to do to use the VWP is complete a brief, free online registration form, called ESTA, beforehand, located at https://esta.cbp.dhs.gov. Once the ESTA registration is approved, it lasts for two years, or until the passport details of the traveller change.

If the employee is not a citizen of one of the 36 member countries, then he will need to obtain a B-1 visa at a US Consulate (in Australia there are US Consulates in Melbourne, Sydney, and Perth). Some common countries on the list are Australia, the United Kingdom, New Zealand, Germany, and France. The full list can be found at http://travel.state.gov/visa/temp/without/without_1990.html.

Even if an employee is a citizen of a country on the list, he may still be ineligible for the VWP. The following factors render a traveller ineligible to use the VWP:

1. A criminal record;
2. Entering the United States on a private aircraft;
3. Representing foreign media in the United States;
4. Previously being denied a US visa or entry into the United States;
5. Any of the categories of inadmissibility (of which there are many) outlined at http://www.travel.state.gov/visa/frvi/ineligibilities/ineligibilities_1364.html.

It should also be noted that travellers' passports must be "machine-readable" in order to utilise the VWP. If the passport has two lines of alphanumeric data at the bottom of the photo page, along with these characters "<<<<<<" interspersed, then it is "machine-readable." Lastly, the traveller should also be sure to have a return ticket booked prior to attempting to enter the United States in VWP status.

B-1 Visa Versus VWP

Even if an employee is eligible to use the VWP, there

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are some scenarios in which it may nevertheless be advantageous to obtain a B-1 visa, for example, if the employee:

1. May need to remain in the United States for more than 90 days.

A B-1 visa is usually granted for a five-year period. This, however, does not mean that the visa holder will be permitted to remain in the United States for five years. The validity of the visa represents the period during which the visa may be presented to gain admission to the United States. Upon arrival at the port of entry in the United States the Immigration Officer will admit the visa holder for 3, 6, or 12 months. This period of admission will be noted on the traveller's white I-94 card, which will be stapled into his passport. As such, if an employee may need to remain in the US for more than 90 days, it would be a good idea for the employee to obtain a B-1 visa and then request admission at the port of entry for the period of time required. It should be noted that under no circumstances can VWP status be extended beyond 90 days, nor can the status be changed to a different visa category, whereas extensions and changes of status may be accomplished with B-1 status.

2. Will be engaging in activities that border between "business visitor activities" and actual work.

In this scenario, it may be possible to obtain a special B-1 visa referred to as a "B-1 in lieu of H-1B" visa. This visa will authorize the employee to perform work in the United States under certain conditions (for example, that the employee will not receive any income from any US source). This scenario often arises with Australian companies who need to send an employee to the US to service a client there.

What Activities are Permitted while in VWP or B-1 Visitor Status?

The short answer to this question is "anything but actual work," but of course that begs the obvious question; how do you define "work"? This is a grey area of the law and advice and guidance should be sought on a case by case basis.

Common permissible activities:

- Soliciting sales, negotiating contracts, or taking orders from established customers for work that will be performed outside of the US.
- Purchasing goods, components, or raw materials for use outside the US.
- Performing services based on a written sales or service contract or agreement already undertaken by their home country employer, outside of the US.
- Engaging in meetings with US based counterparts or with business associations.
- Performing activities in conjunction with litigation which requires the input of the foreign entity.
- Attending professional or business conferences, conventions, or executive seminars.
- Undertaking independent research, such as market or product research, not directly connected with sales or service contracts or the solicitation of business.
- Visits by Professionals arranging employment in the US (not those seeking jobs).
- Visits by Investors coming to the US to take steps to set up their investment.
- Performing the initial set-up of a US office, subsidiary, or affiliate on behalf of the foreign employer, provided the foreign national will qualify for L-1 status once suitable physical premises have been obtained for the office.
- Receive training in the US, usually for short periods, which will be used by the employee upon return to his or her position abroad. On-the-job training may only be an incidental part of the foreign national's activities in the US.

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AN ALTERNATIVE TO BUSINESS VISAS - THE APEC BUSINESS TRAVEL CARD SCHEME

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An excellent option available to Australian citizen business travellers, but which is seldom used, is the APEC Business Travel Card. This Card is valid for three years (but linked to the validity of the traveller's passport) and through successful application, permits multiple short-term business visitor entry to accredited business people within the APEC region without a visa.

Some real benefits of the card include a longer period of stay allowed than those applying for the usual business visitor visa, and the cardholder's ability to access special 'APEC lanes' at major international airports which fast-track immigration processing on arrival and departure.

The APEC Business Travel Card Scheme is an APEC initiative. The Scheme was developed in response to a need from business people for streamlined visitor entry to the economies of the Asia-Pacific region to explore business opportunities, attend meetings, and conduct trade and investment activities.

Just like a visa however, the APEC Business Travel Card Scheme does not affect the right of each participating economy to determine who may travel to, enter and remain in their economy, even after a business person has been issued with an APEC Business Travel Card.

The 17 APEC economies currently participating in the APEC Business Travel Card Scheme are:

- Australia·
- Brunei Darussalam
- Chile
- Hong Kong (China)
- Indonesia
- Japan
- Republic of Korea
- Malaysia
- New Zealand
- Papua New Guinea
- People's Republic of China
- The Philippines
- Peru
- Singapore
- Chinese Taipei
- Thailand
- Vietnam

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AUSTRALIA: COMPANIES FACE PROSECUTION FOR UNLAWFUL HIRES

Sasko Markovski, National Manager, Compliance and Advisory Practice, Sydney

On 21 May 2010, the Minister for Immigration and Citizenship, Senator Evans, announced a review of the penalties facing Australian employers who recruit workers that are present in Australia unlawfully. This comes after recently released figures revealed that a large number of people working unlawfully continue to be identified, particularly in the agriculture, construction and hospitality industries.

For the current financial year, NSW was the location for 4834 unlawful workers, more than any other Australian state or territory.

An independent expert has been appointed to lead the review which will consult Australian employees, union and industry representatives as well as Commonwealth, state and territory agencies.

The review will focus on strengthening associated penalties and address the low level of prosecutions of employers who employ unlawful workers. It will also examine the current measures in place to ensure that employers comply with their obligations.

Clients should ensure that they have sound processes in place for checking the work rights of foreign national recruits (which can include use of the Department's free visa entitlement verification online, or VEVO, service) prior to recruitment.

Please speak to your Fragomen contact for further information about how we can assist you in educating your staff, and developing processes to mitigate potential risks when it comes to the recruitment and employment of foreign nationals.

For further information please contact Sasko Markovski, National Manager, Compliance and Advisory Practice on +61 2 8224 8509 or via email at smarkovski@fragomen.com.

AUSTRALIA POLICY UPDATE: LAFHA PAID AS A REIMBURSEMENT AND CURRENCY EXCHANGE FLUCTUATION ISSUE

Maija Morris, Manager, Sydney

In May 2010 Fragomen met with senior officials of the Department of Immigration & Citizenship (DIAC) responsible for the changes to the Temporary Business Entry (Sponsorship and 457 Visa) scheme to discuss key questions raised by our clients and other issues we identified as requiring clarification since the changes to the 457 visa program were introduced in September last year.

We outline below the two major issues that were of concern to clients and DIAC's response. Please note that DIAC may revise its position on these issues in the future and we will advise clients accordingly. Please also be aware that formal written policy on the two issues, through the Policy Advice Manual, which Departmental officers use to assist in their interpretation of migration law, has not yet been released.

LAFHA reimbursements can be included as Annual Earnings

Following a formal submission and a number of discussions, DIAC's approach is that, where guaranteed Living Away From Home Allowance (LAFHA) will be paid as a reimbursement, this may be included in the total annual earnings figure at nomination application stage.

In addition, one of the obligations of a sponsor to a person who holds a 457 visa, approved on or after 14 September 2009, is that the 457 visa holder is remunerated at least the total annual earnings figure provided to DIAC at nomination stage. As such, where a sponsor includes in this annual earnings amount any LAFHA reimbursements, but does not end up reimbursing to the amount that was intended, the sponsor would need to "make up" the difference to ensure that the annual earnings amount remains unchanged.

As such, sponsors may wish to continue to exclude LAFHA paid as a reimbursement where the value of the reimbursements cannot be guaranteed. Or they may ensure that the agreed and disclosed annual earnings to DIAC allow for any possible downward variation to LAFHA that may be subsequently made so that the annual earnings provided to the 457 visa holder do not decrease.

Currency Exchange Fluctuations and the Remuneration Obligations

Many 457 visa holders are paid in a currency other than Australian dollars. At nomination application stage, however, sponsors must provide the annual earnings figure in Australian dollars. This typically involves the sponsor converting the proposed annual earnings to Australian dollars at the time the nomination application is made. Fragomen has engaged in dialogue with DIAC over an extended period in relation to the issue of how the currency exchange issue would be treated by DIAC should it perform an audit of whether a sponsor has met its remuneration obligations to 457 visa holders.

DIAC's traditional response has been that sponsors need to monitor payroll and perform any necessary adjustment before each pay day. This meant that if the value of the currency in which the applicant is paid decreased against the Australian dollar, DIAC expected a sponsor to lift the salary of the 457 holder, where necessary, to ensure remuneration obligations were met in that pay cycle.

Following our discussions, DIAC has acknowledged the practical difficulty in sponsors having to continually vary a 457 visa holder's salary in such a way. They have advised that, where a sponsor is monitored by DIAC in this area, DIAC will use the conversion rate that was current when the nomination application was lodged. Separate to this however, sponsors should be wary of the ongoing sponsorship obligation to continue to pay at market rate for the given sponsored occupation which can be monitored by DIAC as part of its ongoing processes.

For further details please do not hesitate to contact your Fragomen representative.

DIAC PROCESSING TIMES

Below is a summary of the current processing times, as Fragomen has experienced, in DIAC offices in Sydney, Melbourne and Perth for key application types relevant to the employment of foreign staff.

Health examinations undertaken offshore are processed by the Health Operations Centre in Sydney. Visa applicants in Australia may generally undertake health examinations at Medibank Health Solutions (MHS). We also include processing times for each of these bodies.

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	Sydney	Melbourne	Perth
Standard Business Sponsorship application	3 weeks	2-3 weeks	4 weeks
Nomination and Subclass 457 Visa application	3-4 weeks (Processing times fluctuate)	1-3 weeks	3 weeks
Employer Nomination Visa (Subclass 856) application	4-5 months	2-3 months	4-5 months
MHS (from completion of all examination requirements)	10 days from receipt	2-3 days	2 weeks
HOC (from completion of all examination requirements)	2 weeks from receipt	N/A	N/A

Note: Processing times are indicative only. A range of factors, including the nationality of the visa applicant, can impact visa processing times.

The Manager of the Sydney DIAC office recently advised that the rate of applications increased significantly throughout March and remained high during April and that processing times had been impacted accordingly. Your usual Fragomen contact can advise which DIAC office processes your applications. This will generally be the DIAC office located in the city in which your business has its headquarters.