



# **Immigration Tips for Australian Employers and Recruitment Companies**

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## **Brief Biography of the Author**

Michael Kah is the principal solicitor of Kah Lawyers, which is a specialist immigration law firm in NSW. Michael has extensive experience in advising small and large multinational corporations on temporary and permanent transfer of key personnel to Australia as well as advising entrepreneurs and other skilled personnel in obtaining permanent residency in Australia. Michael is an accredited specialist in Immigration Law and is a member of the New South Wales Law Society Specialist Accreditation Immigration Committee. He is a sitting member of the Migration Agents Registration Authority Conduct Panel. He has delivered various immigration law discussion papers to legal practice groups in New South Wales and is a consultant to Matthews Folbiggs Legal Group and Owen Hodge Lawyers. He is a current member of the Nationality and Residence Committee of the Law Council of Australia.

## **WAIVER**

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## Who Can Work in Australia?

Many employers in Australia have never had any involvement with Australian immigration law and as such never consider whether or not their current employees, or people that they are interviewing for a future position, are allowed to "work". Instead, it is simply assumed that as the person is physically inside Australia, and have a Tax File Number or an Australian Business Number they must be "allowed" to work by the government.

The true situation is very different.

There are only three groups of people in Australia, as follows:

- Australian and New Zealand citizens;
- Overseas citizens with a visa (whether that visa be a permanent visa or a temporary visa); and
- Unlawful non-citizens (people who are not Australian citizens and who do not have a visa).

Different work rights attach to each category.

### GROUP 1: Australian/ New Zealand Citizens

There are different groups of people in Australia who hold Australian citizenship, as follows:

- Australian citizens by birth (born in Australia to Australian citizen or Australian permanent resident parents);
- Australian citizenship by descent (born overseas to Australian citizen parents);  
or
- Australian citizenship by naturalisation (born overseas, migrated to Australia and then applied for Australian citizenship).

### *What Work Rights Do They Have?*

As far as migration law is concerned, Australian and New Zealand Citizens have an unrestricted "right" to work. There are no restrictions that exist.

### *What Evidence Should You Look For?*

The presentation of an Australian passport or certificate of Australian Citizenship evidences an absolute right for that person to work.

The benefit of sighting an Australian passport is that it includes the holders' photograph, whereas there is no photographic identification with a certificate of Australian citizenship.

However, almost every person who has a certificate of Australian citizenship will have been born overseas, migrated to Australia and granted Australian permanent

residence. This means that you can ask to see their passport (with photo identification) and satisfy yourself that the person at least has a permanent visa.

### *Problem Cases – People Born in Australia*

The situation is more complicated when the person is born in Australia and does not have an Australian passport. The presentation of an Australian birth certificate only proves where the person was born and does not mean that they are a citizen. Unlike many other countries, a person does not obtain Australian citizenship simply through birth, but only if at least one of their biological parents held Australian citizenship or Australian permanent residence at the time of their birth.

This is therefore the toughest case and will need to be assessed on a case-by-case basis. However, if the employer has sighted and retained a copy of the Australian birth certificate, verified that the person holds a valid Tax File Number, then it is unlikely that the Department of Immigration & Citizenship (“DIAC”) will expect them to make further investigations in the absence of some “warning bell” ringing.

### GROUP 3: Unlawful non-citizens

This group of people are not Australian citizens and do not hold a visa.

#### *What Work Rights Do They Have?*

Unlawful non-citizens do not have any right to work. Instead, it is a criminal offence for them to work in Australia<sup>1</sup>.

It is also a criminal offence for a business to employ them in Australia<sup>2</sup>.

#### *What Evidence Should You Look For?*

Danger signs are excuses by the person that the passport cannot be produced as it has been lost, stolen, or is with their Embassy for extension. It is our experience that in many cases these claims are excuses to hide the fact of the person’s unlawful status.

### **The following is not proof of entitlement to work**

- A tax file number.
- An Australian driver’s licence.
- A Medicare card.
- A bank/credit card account.
- References from previous employers.

### GROUP 2.1 – Permanent visa holders

The term “Australian permanent resident” means an overseas national who has been granted a visa that allows them to live permanently in Australia for the rest of their life.

<sup>1</sup> Section 235(3) of the (CTH) Migration Act 1958.

<sup>2</sup> Section 248AB of the (CTH) Migration Act 1958.

### *What Work Rights Do They Have?*

A person with a permanent visa has the same unrestricted permission to work as an Australian citizen.

A limited category of visas (mainly people sponsored for Australian permanent residence by regional employers) will be exposed to visa cancellation if they fail to work for their sponsors for a fixed period of time. However, that only creates a “problem” for the visa holder and not for any other sponsor as an exposure to visa cancellation is quite different to a visa condition.

### *What Evidence Should You Look For?*

The first step is always to sight and photocopy the person’s passport. At the top right hand side of the permanent visa label any conditions that attach to the visa are listed.

### GROUP 2.2 – Temporary visa holders

This is the most difficult group as there are three important variables in play here, being:

1. Whether the person is allowed to work at all;
2. If they do have some permission to work, are there any restrictions on how many hours per week they can work; and
3. When the visa (and the attached permission to work) expires.

### *Offence*

It is a criminal offence for an employer/business to allow a person with a temporary visa to work in breach of their visa conditions, where the employer knows of the work restriction or is reckless to that circumstance<sup>3</sup>.

It is a criminal offence to knowingly or recklessly refer an unlawful non citizen for work or refer a lawful non citizen for work in breach of their visa conditions.<sup>4</sup>

#### *245AD Referring an unlawful non-citizen for work*

(1) *A person commits an offence if:*

- (a) *the person operates a service, whether for reward or otherwise, referring one person to another for work; and*
- (b) *the person refers a person (the prospective worker) to another for work; and*
- (c) *at the time of the referral, the prospective worker is an unlawful non-citizen and the person knows of, or is reckless as to, that circumstance.*

<sup>3</sup> Section 245AC of the (CTH) Migration Act 1958.

<sup>4</sup> Section 245AD & AE of the (CTH) Migration Act 1958.

## Penalties are:

**For an individual** \$ 13,200.00 or 2 years imprisonment

**For a company** \$ 66,000.00 per illegal worker.

### *Where Can You Find Visa Conditions On A Visa Label*

Visa conditions are represented by a 4-digit number starting with an "8" (ie a number between 8001 – 8999). The conditions are printed in the top, right-hand quarter of visa label under a title such as "*Mig Regs Sched 8*"<sup>5</sup>.

The most common types of visa conditions are set out in the table below

### *Common visa conditions*

<b>Condition</b>	<b>What does this mean?</b>	<b>Types of visa *</b>
8101	No work	Visitor visas Bridging visas
8102	The holder must not engage in work in Australia (other than in relation to the holder's course of study or training).	Occupational trainee visa
8107	The holder is limited to 20 hours work per week	Some student visas
8105	The holder is limited to 20 hours work per week while their school, college or university is in session, and they can work full-time in school holidays	Most student visas
8107	The holder can only work for their sponsor in the approved position	sc 457 <i>Business (Long Stay)</i> visa
8108	The holder must not work for any one employer for more than 6 months	Sc 417 <i>Working Holiday</i> visa; Sc 462 <i>Work &amp; Holiday</i> visa <sup>6</sup>
8112	The holder must not engage in work in Australia that might otherwise be carried out by an Australian citizen or an Australian permanent resident.	Business visitor visas

\* sc = visa subclass

<sup>5</sup> Which is short hand for Schedule 8 of the Migration Regulations 1994, being the section of the migration law that lists off all possible conditions that can be attached to a visa.

<sup>6</sup> The subclass 417 *Working Holiday* visa is commonly referred to the "backpacker visa" and is granted to citizens of many European countries such as the United Kingdom. From late 2007 the subclass 462 *Work & Holiday* visa is a similar visa available to American citizens and some limited other nationals such as Iranians.

### *Length Of The Visa*

The act of verifying that the person has permission to work of some description does not end the process of verification, as:

1. Temporary visas are just that – finite as to time. As such, the permission to work will end once the visa expires, unless the person is granted a new visa with work permission; and
2. Many temporary visas are cancelled by DIAC, which also has the effect of removing any permission to work.

At the very least employers need to verify again the work status of staff on the day after the visa was due to expire.

Further, employers need to set up a formal process where the work status of staff with temporary visas are re-checked on a regular basis, such as every 6 months.

### **Checklist which proves entitlement to work**

- Sight and copy certificate of Australian citizenship or Australian passport if available.
- Sight and copy original (overseas) passport and confirm that the name on the passport is that of the recruit.
- Check that the passport has a visa and that the visa is in the name of the recruit. Retain a copy of the visa.
- Check the visa conditions. Visa conditions limiting work rights of visa holders are contained in Schedule 8 of the *Migration Regulations 1994*. [Conditions to look out for: 8101, 8102, 8103, 8104, 8105, 8106, 8107, 8108, 8109, 8110, 8112 and 8547].
- Diarise the expiry date of the visa.

Michael Kah  
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## **WHAT SERVICE DOES KAH LAWYERS PROVIDE?**

- **Advise on immigration strategies for multinational companies, SMEs and recruitment companies;**
- **Obtain sponsorship, nomination and visas approvals for applicants and companies**
- **Procedural advice on Standard Business Sponsorship (SBS) structures;**
- **Managing existing SBS structures and the overall relationship between the Employer and DIAC;**
- **Audit of SBS structures (ensuring DIAC is fully up-to-date with staffing details);**
- **Assistance with work right verification and business monitoring issues;**
- **Contract drafting – inserting DIAC specific clauses for sponsored staff;**
- **Salary packaging issues (LAFHA etc) for subclass 457 visa holders;**
- **Immigration due diligence for a merger/acquisition;**
- **Immigration strategy for the merger/acquisition**

*For further information or assistance please contact Michael Kah on (02) 9689 3173 or by email at [michael@kahlawyers.com](mailto:michael@kahlawyers.com)*