

ChAFTA to introduce streamlined immigration processing for Chinese enterprises

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In brief

On 17 June 2015, Australia and China signed the China-Australia Free Trade Agreement (ChAFTA), expected to be ratified in both countries by late 2015 or early 2016. In this article we review some of the key immigration measures being introduced under the ChAFTA to streamline Australian inbound immigration processes for Chinese enterprises.

In detail

I. Investment Facilitation Arrangement (IFA)

A Memorandum of Understanding (**MOU**) has been signed as part of the ChAFTA to introduce a unique Investment Facilitation Arrangement (**IFA**).

Similar to the Enterprise Migration Agreement (**EMA**) introduced by Department of Immigration and Border Protection (**DIBP**) in 2012, the IFA is an individually negotiated project-wide migration agreement. Under the ChAFTA, Chinese enterprises will be able to engage directly with the DIBP to demonstrate their business case, with a view to negotiate project wide immigration measures.

An IFA will be available where:

- the project company is registered as a business in Australia (**the Project Company**);
- the Project Company is proposing an infrastructure development project (**the Project**) with an expected capital expenditure of A\$150 million over the term of the Project;

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- the Project is in one the following sectors:
 - food and agribusiness;
 - resources and energy;
 - transport;
 - telecommunications;
 - power supply and generation;
 - environment; or
 - tourism sectors; and
 - a single Chinese enterprise owns 50% or more of the Project Company; or, where this does not apply, a Chinese enterprise holds a substantial interest as defined in *Australia's Foreign Acquisitions and Takeovers Act 1975* in the Project Company.

Unlike the EMA, which is initiated unilaterally by a resource or construction company, China International Contractors Association (**CHINCA**) and the Australian Department of Foreign Affairs and Trade (**DFAT**) will play significant roles in recommending eligible projects to the DIBP. It is anticipated that this endorsement process will ensure Chinese project companies are adequately guided by governmental agencies from both countries.

An IFA will then be negotiated between the Project Company and the DIBP and implemented through Australia's existing subclass 457 visa program. A Project Company may be able to engage in negotiations with the DIBP for concession in the following areas:

- eligible occupations;
- English language requirements; and
- qualification and skilled experience requirements.

It is worth noting that subclass 457 visa applications nominated under a Standard Business Sponsorship agreement are limited to a specified list of approved occupations comprised mostly of professional, managerial and technical occupations. The approved list also provides access to some trades-based occupations which may have additional formal skills assessment requirements. Where approved, an IFA may extend to a broader range of semi-skilled occupations.

It is also important to note that an IFA is not an arrangement for the importation of cheap labour to Australia, with the wording of the MOU clearly indicating that a salary floor equivalent to Temporary Skilled Migration Income Threshold (**TSMIT**) (currently A\$53,900 per annum) will be maintained.

II. Relaxation of Skills Assessment requirement for Chinese trade persons

Another common hurdle for Chinese trades people seeking to provide services in Australia under the subclass 457 visa program is the lack of immediate recognition of overseas qualifications and employment experience.

In this regard, China is one of ten countries¹ where trade occupations are subject to a mandatory skills assessment requirement as part of the subclass 457 visa application process. Where a skills assessment is required, the timeframe for obtaining a subclass 457 visa will be substantially extended due to the additional documentation required, as well as the extended processing timeframe for offshore skills assessment.

To address this issue and support streamlined arrangements under the ChAFTA, the Australian and Chinese governments have also reached an agreement to reduce the number of trade occupations subject to a mandatory skills assessment from 28 to 19. The Australian Government has also undertaken to review the remaining occupations within two years of ChAFTA coming into force, with the aim of further reducing the number of occupations, or eliminating the mandatory skills assessment requirement within five years of the ChAFTA's commencement.

III. Further exemptions on Labour Market Testing requirement

Labour Market Testing (LMT) was introduced to the Subclass 457 visa program in November 2013 and is a mandatory requirement for subclass 457 visas nominated under the following occupations:

- nursing;
- engineering; and
- occupations for which the skills levels are either 3 or 4 (primarily trade and/or semi-skilled occupations as defined in the Australia New Zealand Classification of Occupations (ANZSCO)²).

The current subclass 457 visa framework offers certain exemptions where the requirement for LMT would conflict with one of Australia's existing international trade obligations. This could include exemptions available to certain Chinese national based on China's membership to the World Trade Organisation.

¹ Other countries include Brazil, Fiji, India, Papua New Guinea, Philippines, South Africa, Thailand, Vietnam, and Zimbabwe.

²<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/1220.0Contents02013,%20Version%201.2?opendocument&tabname=Summary&prodno=1220.0&issue=2013,%20Version%201.2&num=&view=>

Once implemented, it is expected the ChAFTA would result in a general exemption to LMT requirements being extended to Chinese nationals who are nominated under the subclass 457 visa program. This would be similar to the exemptions currently provided to other countries which have free trade agreements with Australia, including Japan and South Korea.

The takeaway

Chinese enterprises have accelerated the pace of investment and participation in large scale construction and infrastructure projects overseas within the last decade and there have been success stories and failures. The IFA will be able to provide guidance on the framework within which an infrastructure project will operate and how a project company can forward plan on the composition of their labour force, project cost and timeframe.

ChAFTA is the culmination of almost a decade of work between China and Australia to liberalise trade between the two countries. Once implemented, ChAFTA will streamline immigration measures addressing some of the difficulties Chinese enterprises face when operating in Australia. However, it is worth noting that there are still important regulatory requirements which must be complied with in order for foreign workers to be employed in Australia, including any mandatory licensing and registration requirements.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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