



# **Australia: Reciprocal Visa Arrangements with the United States**

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**AUSTRALIA**

**RECIPROCAL VISA ARRANGEMENTS WITH THE UNITED STATES**

*Executive Summary*

*In 2005, following the coming into force of the Australia-United States Free Trade Agreement, the US Congress enacted a provision that created the E-3 visa category for “specialty occupation” professionals from Australia who are sponsored by a US employer. This appears to have provided access to the US on a similar basis to what was already provided by Australia in relation to business people from any country. In particular, the E-3 visa allows eligible Australian applicants to work in the US for extended periods and provides the ability for spouses of visa holders to also work in the US. These elements were already present in the main visa used in Australia for skilled professionals who are sponsored by Australian employers. No proposals to make changes to this visa as a result of the establishment of the E-3 visa were found.*

This report examines whether Australia implemented any changes to its visa categories that apply to citizens of the United States in reciprocity for the E-3 visa category (“Certain Specialty Occupation Professionals from Australia”) that was enacted by the US Congress in 2005.<sup>1</sup> That enactment occurred subsequent to the signing of the Australia-United States Free Trade Agreement (AUSFTA), which came into effect on January 1, 2005.<sup>2</sup>

**I. AUSFTA and Movement of People**

Under the Australian Constitution, the executive branch has the power to enter into treaties. However, all treaties are examined by the Parliament.<sup>3</sup> In relation to the AUSFTA, a special Senate select committee was appointed in 2004 “to inquire into that agreement and report within 3 months after the text of the agreement is made publicly available, or on such later date as determined by the committee.”<sup>4</sup>

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<sup>1</sup> REAL ID Act of 2005, P.L. 109-13, § 501, 119 Stat. 321–22 (2005) (Reciprocal Visas for Nationals of Australia), <http://www.gpo.gov/fdsys/pkg/PLAW-109publ13/html/PLAW-109publ13.htm>.

<sup>2</sup> See *Free Trade Agreements Australia*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta> (last visited Feb. 14, 2012).

<sup>3</sup> See generally *Treaties and Treaty Making: Treaties, the Constitution and the National Interest*, DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, <http://www.dfat.gov.au/treaties/making/making2.html> (last visited Feb. 9, 2012).

<sup>4</sup> *Senate Select Committee on the Free Trade Agreement between Australia and the United States of America: Terms of Reference*, PARLIAMENT OF AUSTRALIA, [http://www.aph.gov.au/senate\\_freetrade/tor.htm](http://www.aph.gov.au/senate_freetrade/tor.htm) (last visited Feb. 9, 2012).

During the Select Committee's consideration of the AUSFTA, it was specifically noted that Chapter 10 of the agreement, on cross-border trade in services, did not provide for any concessions that would better enable Australian business people to temporarily enter and provide services in the US.<sup>5</sup> After considering submissions from interested groups who had expressed disappointment on this point, the Select Committee recommended as follows:

That the Australian Government press assiduously, through all available diplomatic, official and professional channels, for the removal of all impediments to the mutual recognition of qualifications and the movement of people involved in cross-border service provision.<sup>6</sup>

## II. E-3 Visas and Australian Response

Following the enactment of Section 501 of the Real ID Act of 2005 by the US Congress, the Australian government agency Austrade announced the creation in the US of the E-3 Visa category, which allows Australian nationals to enter the US to perform services in a "specialty occupation."<sup>7</sup> It stated that the new visa "is a great victory for the Australian people and grants unprecedented access to the US marketplace."<sup>8</sup>

A press release by the office of then Minister of Trade, Hon. Mark Vaile, MP, on September 5, 2005 also celebrated the introduction of the E-3 visa, quoting Mr. Vaile as follows:

This is a quantum step forward and great news for Australian business people who will be able to use the E-3 visa to capitalise on opportunities offered under the Australia-United States Free Trade Agreement (AUSFTA). . . .

Only 900 Australians succeeded in gaining the US H-1B business visa in 2004. By comparison, there will be 10,500 E-3 visas reserved exclusively for Australian nationals each year.

As of today, qualified Australians wishing to reside and work in the United States find themselves in a privileged position. They have access to a dedicated visa that will be easier and less costly to obtain than the traditional H-1B business visa.

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<sup>5</sup> See *Australia-United States Free Trade Agreement: Chapter Ten – Cross-Border Trade in Services*, DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, [http://www.dfat.gov.au/fta/ausfta/final-text/chapter\\_10.html](http://www.dfat.gov.au/fta/ausfta/final-text/chapter_10.html) (last visited Feb. 10, 2012).

<sup>6</sup> SENATE SELECT COMMITTEE ON THE FREE TRADE AGREEMENT BETWEEN AUSTRALIA AND THE UNITED STATES OF AMERICA, FINAL REPORT 238 (Aug. 2004), <http://www.aph.gov.au/senate/fretrade/report/final/report.pdf>; see also pages 213–14, quoting submissions on this issue, and pages xvi and 226, identifying that the agreement "has not delivered on the matter of mutual recognition of qualifications and the movement of business people between the two countries. This remains a key impediment to cross-border trade in services." Additional documents and transcripts relating to the Select Committee's consideration of the AUSFTA can be found at <http://www.aph.gov.au/senate/fretrade/> (last visited Feb. 10, 2012).

<sup>7</sup> Alexander A. Jeglic, *New US Visa Category Created Exclusively for Australians*, AUSTRADE, <http://www.austrade.gov.au/E3visa/default.aspx> (last visited Feb. 10, 2012).

<sup>8</sup> *Id.*

Unlike the H 1-B visa, spouses of E-3 visa holders will also be able to work in the United States – thus eliminating a barrier that in practice has stopped many Australians from applying for temporary residence in the United States. . . .<sup>9</sup>

The press release also stated that “E-3 visa holders will be able to apply for extensions and the application fee for an E-3 visa will be significantly lower than that for the H-1B visa.”<sup>10</sup>

The E-3 Visa was also highlighted in the Australian government’s response to the Senate Select Committee’s report on the AUSFTA, in which it was stated that,

[w]hile the Agreement does not contain any provisions on movement of business people, Australia and the United States already have well developed and liberal business entry arrangements. There is strong recognition on both sides of the importance of appropriate arrangements in relation to temporary entry to underpin and complement the opportunities which will be opened up under AUSFTA, including particularly in services and investment. Bilateral discussions parallel to the Agreement have already reaped benefits for Australian professionals with the US Congress passing legislation establishing the E-3 visa. The E-3 visa applies to Australians with a university degree or its equivalent in their ‘specialty occupation’ seeking temporary residence in the United States to work, sponsored by a business in the United States that is prepared to employ them.

- This Visa is subject to an annual quota of 10 500 Australian applicants, not including accompanying spouses and children.
- Spouses of E-3 visa holders are able to work.
- E-3 holders are permitted an initial stay of two years, and indefinite extensions of two years.<sup>11</sup>

There is no mention of related or subsequent changes to Australia’s visa arrangements with respect to business people or professionals from the US in the government’s response, in Australian government statements on the E-3 visa, or in later Australian reports that refer to the E-3 visa.<sup>12</sup>

### III. Existing Visas Available to US Business People

In terms of access by US business people or professionals to Australia, there was already in existence in 2005 a visa category called “Temporary Business (Long Stay) – Standard Business Sponsorship.” This category is known as “subclass 457” visas. This is “the most

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<sup>9</sup> Press Release, Hon. Mark Vaile, MP, Australian First – From Today 10,500 E-3 Visa Places for the US (Sept. 5, 2005), [http://www.trademinister.gov.au/releases/2005/mvt063\\_05.html](http://www.trademinister.gov.au/releases/2005/mvt063_05.html) [archived material]. See also an earlier press release on the E-3 visa, Hon. Mark Vaile, MP, New Visa for Australians Opens Up Major Business Opportunities in the United States (May 11, 2005), [http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/7D2G6/upload\\_binary/7d2g62.pdf;fileType%3Dapplication%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/7D2G6/upload_binary/7d2g62.pdf;fileType%3Dapplication%2Fpdf).

<sup>10</sup> *Id.*

<sup>11</sup> GOVERNMENT RESPONSE TO THE FINAL REPORT OF THE SENATE SELECT COMMITTEE ON THE FREE TRADE AGREEMENT BETWEEN AUSTRALIA AND THE UNITED STATES OF AMERICA 18–19, [http://www.aph.gov.au/senate\\_freetrade/gov\\_response/gov\\_response.pdf](http://www.aph.gov.au/senate_freetrade/gov_response/gov_response.pdf).

<sup>12</sup> See, e.g., PRODUCTIVITY COMMISSION, BILATERAL AND REGIONAL TRADE AGREEMENTS 177 (Nov. 2010), [http://www.pc.gov.au/data/assets/pdf\\_file/0010/104203/trade-agreements-report.pdf](http://www.pc.gov.au/data/assets/pdf_file/0010/104203/trade-agreements-report.pdf).

commonly used program for employers to sponsor overseas workers to work in Australia on a temporary basis.”<sup>13</sup>

Eligible people from any country may apply for a subclass 457 visa – there is no quota for citizens from any particular country. The eligibility requirements include sponsorship by an eligible employer to fill a nominated position, possessing the “skills, qualifications, experience and an employment background which match those required for the position,” English language proficiency (although citizens of specified countries, including the US, are exempt from this requirement<sup>14</sup>), and eligibility for any relevant licenses or registration required for the position.<sup>15</sup>

Subclass 457 visas may be granted for up to four years and holders of visas of this type are able to apply for permanent residence status in Australia.<sup>16</sup> Spouses and dependants of subclass 457 visa holders also have the right to work or study in Australia.

As at December 31, 2011, there were 68,320 primary subclass 457 visa holders currently in Australia.<sup>17</sup> In the 2010–11 program year, 3,910 primary visas were granted to citizens of the United States, amounting to 8.1 percent of the primary visas granted that year (the third highest country after the United Kingdom and India).<sup>18</sup>

A 2007 report by the Joint Standing Committee on Migration on the subclass 457 visa program provides a detailed analysis of the visa, including a comparison with the H-1B visa in the US.<sup>19</sup> Similar to the Minister’s press release cited above, a key difference identified was that, unlike subclass 457 visas, H-1B visas do not provide an automatic right for spouses and dependents to work in the US.<sup>20</sup> As noted above, the E-3 visa does allow for spouses to work, making it equivalent to the preexisting subclass 457 visa in this regard.

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<sup>13</sup> *Employer Sponsored Workers: Temporary Business (Long Stay) – Standard Business Sponsorship (Subclass 457)*, DEPARTMENT OF IMMIGRATION AND CITIZENSHIP (DIAC), <http://www.immi.gov.au/skilled/skilled-workers/sbs/> (last visited Feb. 10, 2012).

<sup>14</sup> See Migration Regulations 1994: Level of Salary and Exemptions to the English Language Requirement for Subclass 457 (Business (Long Stay)) Visas, cl. 3, <http://www.comlaw.gov.au/Details/F2011L01131>.

<sup>15</sup> *Employer Sponsored Visas, Subclass 457, Employee Eligibility*, DIAC, <http://www.immi.gov.au/skilled/skilled-workers/sbs/eligibility-employee.htm> (last visited Feb. 10, 2012). For more detail, see DIAC, Booklet 9: Temporary Business (Long Stay) (Subclass 457) Visa (2011), <http://www.immi.gov.au/allforms/booklets/books9.htm>.

<sup>16</sup> See DIAC, Booklet 5: Employer Sponsored Migration 6 (2011), <http://www.immi.gov.au/allforms/booklets/1131.pdf>.

<sup>17</sup> DIAC, Subclass 457 State/Territory Summary Report, 2011–12 to 31 December 2011 [introductory pages], <http://www.immi.gov.au/media/statistics/pdf/457-stats-state-territory-dec11.pdf>.

<sup>18</sup> DIAC, Subclass 457 State/Territory Summary Report 2010–11 to 30 June 2011, at 4, <http://www.immi.gov.au/media/statistics/pdf/457-stats-state-territory-jun11.pdf>.

<sup>19</sup> JOINT STANDING COMMITTEE ON MIGRATION, TEMPORARY VISAS ... PERMANENT BENEFITS: ENSURING THE EFFECTIVENESS, FAIRNESS AND INTEGRITY OF THE TEMPORARY BUSINESS VISA PROGRAM 49–52 (Aug. 2007), <http://www.aph.gov.au/house/committee/mig/457visas/report/fullreport.pdf>. See also AUSTRALIAN GOVERNMENT, REPORT BY THE JOINT STANDING COMMITTEE ON MIGRATION: TEMPORARY VISAS ... PERMANENT BENEFITS – GOVERNMENT RESPONSE TO THE REPORT, <http://www.aph.gov.au/house/committee/mig/457visas/report/gov%20response.pdf>.

<sup>20</sup> JOINT STANDING COMMITTEE ON MIGRATION, *supra* note 19, at 49.

Other elements of the E-3 visa category appear to be similar to subclass 457 visas, including the fact that there is the ability to remain in the country for an extended period if conditions are met. It appears, therefore, that the agreement to create this category relating to employer-sponsored professionals may have been reached on the basis of providing access to the US for Australian citizens on similar terms to what was already accorded by Australia for US citizens.

#### IV. Most-Favored-Nation Status

Chapter 10 of the AUSFTA requires that each party accord the other party most-favored-nation treatment.<sup>21</sup> Most-favored-nation treatment means according the other party no less favorable treatment than is provided to any nonparty country. While this reflects a type of reciprocity, it does not necessarily mean that each party must have the exact same rules relating to the ability for citizens of the other country to temporarily enter and work in the country. For example, the AUSFTA recognizes that each country may maintain its own rules relating to recognizing the education and licenses of service suppliers that were received in another country.<sup>22</sup> However, these rules must not be applied so as to discriminate between countries or be a disguised restriction on trade in services. The AUSFTA included a mechanism for further discussions between the parties relating to the “development of mutual recognition arrangements among the relevant professional bodies.”<sup>23</sup>

#### V. Concluding Remarks

While the details of the negotiations that led to the enactment of the new E-3 visa category in the US have not been located, it is clear that enhancements to the ability of Australian service providers to access the US market following the signing of the AUSFTA was a key concern of the Australian government. No evidence has been found that shows that Australia proposed or enacted any changes to its visa categories as a consequence of the establishment of the E-3 visa category in the US. The title of the provision that enacted the new category, which referred to “reciprocal” visas for Australian nationals, may have related to elements of the new visa having been agreed to in reciprocity for what Australia already had in place for citizens of the US and other countries.

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<sup>21</sup> *Australia-United States Free Trade Agreement: Chapter Ten – Cross-Border Trade in Services*, *supra* note 5, art. 10.3.

<sup>22</sup> *Id.* art. 10.9.

<sup>23</sup> *Australia-United States Free Trade Agreement – Guide to the Agreement: 10. Cross-Border Trade in Services*, DFAT, <http://www.dfat.gov.au/fta/ausfta/guide/10.html> (scroll down to the heading “Recognition”). The provisions also include a type of exception to most-favored-nation treatment, allowing the two parties to distinguish between countries in recognizing qualifications and licenses, but requiring that the other party be given the chance to show that it should also be accorded the same recognition as a non-party.