
T R I B U N A L W A T C H

Employer Nomination Visa - an appropriate record of employment

The Immigration Review Tribunal in Melbourne recently handed down a decision concerning an application for a Malaysian citizen to enter Australia as a permanent resident, under the Employer Nomination Scheme.

Rankine and Hill Pty Ltd made an application for Jee Toon Tan to enter Australia and be employed as an engineer with their Company. Regulation 51 of the Migration Regulations specifies several criteria to be met before an Employer Nomination Visa may be granted.

The application was refused by a Departmental decision-maker, and was reviewed by the Migration Internal Review Office which affirmed the decision. The MIRO review is a pre-requisite to an application to the IRT.

Upon review, the IRT set aside the refusal and substituted a new decision accepting Rankine and Hill's nomination of Jee Toon Tan. The IRT considered that the Department had erred by applying policy guidelines rather than applying the terms of the Regulations in determining whether Jee Toon Tan's work experience constituted an 'appropriate record of employment in that occupation'. It was on that basis that the application had been initially refused.

The Department's guidelines required one of the elements 'in determining an appropriate record of employment' to be that an applicant should possess 3 years work experience. The IRT determined that the terms of the Regulations revealed that the legislators had used the chosen form of words in order to 'ensure flexibility in labour market recruitment overseas for employers who have been unable to recruit locally', consequently a strict application of a 3 year period as a limitation was not correct.

The IRT made two further points:

- (i) some occupations included periods of training prior to graduation, so there may not be an extra requirement of work experience; and
- (ii) an employers' judgment of what was an appropriate record of employment for the occupation nominated should normally carry great weight.

Immigration Review Tribunal: Practice Notes
Social Security Appeals Tribunal Manual

Both the IRT and the SSAT have recently prepared and released documents which detail the manner in which they will conduct reviews.