

Business Skill applications – for applicants from PR China

On 1st March 2003 a two-stage Business Skills visa structure for Australia was introduced. We discussed these two-stage business skills visas requirements in the last two weeks' articles. In determining the eligibility of the application, the case officer will inevitably use Australian legal concepts to decide ownership of assets in a foreign jurisdiction in applying the Migration Regulations. In other words, the case officer will make decisions based on a reasonable degree of satisfaction that the ownership is proven in the conceptual sense as understood under Australian law. In the countries where International Standard of Auditing (ISA) 910 is closely adhered to, the applicants' company financial statements will be accepted in terms of Australian legal concepts. However, given P. R. China 's transitional economy and its unique position, the determination of ownership of applicants' ownership of assets in the country is crucial and additional steps are always required to ensure that the applicants provide sufficient threshold documentary evidence to support their eligibility. Otherwise, their cases may be decided by the case-officers on the basis of the information provided so far. In many cases the insufficient supporting documents usually lead to rejection of the application.

1. P. R. China Business Ownership

Generally, individual privately-owned small enterprise and sole proprietors are acceptable form of ownership of business assets as long as the business capital are fully funded by the individual or proprietors and it follows that they are able to transfer their assets. For partnerships businesses, the partnership agreement which was used in the partnership registration must be submitted for consideration. Similarly, Limited Companies incorporated under the Company Law, 1994 are also an acceptable form of ownership of business assets. It follows that a joint venture between a Chinese "private enterprise" and "foreign investment enterprise" will be acceptable in terms of Australian legal concepts of ownership.

State Investment Enterprises include collective enterprises and State owned enterprises cannot be considered as an acceptable form of ownership as required by the Migration Regulations of Australia. Similarly, the "State investment enterprise" partners' business assets remain the property of the State and therefore are not an acceptable form of

ownership for migration application. Also, ownership claims by applicants who do business based on “management contracting” leasing State or Collective Enterprise’s assets is not acceptable as they are also not able to claim title or transfer the assets of the business(es).

2. Foreign Exchange Control

Due to the strict PRC foreign exchange control regulations, in the case of Subclass 162 and 165 investors categories where the designated investment is required to be made with funds that are legally owned and unencumbered, applicants may have difficulty in transferring the necessary capital out of the PRC. Even where sufficient funds are held outside the PRC for the making of the designated investment, it is expected that the applicants will be able to clearly demonstrate that such funds are legally owned and have become available in Australia by transparent means. Although in the other subclasses of the Business migration Program where funds have only had to be evidenced as part of personal net assets, and it is not necessary to be transferred at the time of decision, it is expected that the PRC applicant will have to go through the legal channel for the removal of funds from the PRC for settlement and business investment in Australia subsequent to visa grant.

3. Personal Documentation

All PRC nationals need to provide their household registration and notarized certificates of birth.

4. Business Assets Documentation

All applicants need to provide the relevant business licence and certified copies of business licence for the nominated years.

5. Sources of Fund

The onus is on the applicant to provide relevant, reliable documentation to case officer to evidence how they accrued their funds.

6. Financial Statements

As most financial statements prepared by PRC entities may not have adhered to International Standard of Auditing (ISA) 910, depending on the categories of the business subclasses applied for, company financial statements are subject to either “Limited Audit (ISA 910)”, “Special Purpose Report” or “Investment Activity Report” prepared by Hong Kong CPA or an Australian CPA with relevant PRC experience.