# Guidance Document Number 3 for 1 March 2022 Code of Conduct for Registered Migration Agents – 20 June 2022

## 1. Answering simple questions via email or on social media

Registered Migration Agents (RMAs) have advised that sometimes they respond to very simple questions via email or on social media without imposing a charge or entering into a service agreement. An example of a simple matter raised could include the number of points required for a subclass 190 Skilled Nomination visa. The RMAs concerned have advised that these interactions were not considered "initial consultations" and are now seeking guidance as to whether they can continue to respond to such questions in this manner under the 1 March 2022 Code.

### Guidance

Whether or not RMAs may answer questions asked through email or Facebook will depend on whether the answer to the question will constitute immigration assistance. Subsection 42(1) of the Code of Conduct makes it clear that an RMA must not give immigration assistance to a client unless a service agreement is in place. The only exception to this is where immigration assistance of a type mentioned in paragraphs 276(1)(b), (2)(b) or (2A)(b) of the *Migration Act 1958* (the Migration Act) is being given at an "initial consultation" (see section 43).

If the scenarios in which the questions are asked can be considered to be initial consultations, RMAs would not be prevented from providing immigration assistance without having a service agreement in place, if the immigration assistance provided was of a type exempted from this requirement by section 43.

RMAs are also free to answer questions online or over social media, without having a service agreement in place, where by answering such questions they are not giving immigration assistance. Without limiting the definition of "immigration assistance" in the Migration Act, the OMARA considers that such questions would have to be generic in nature, and limited to questions that go to whether a person might consider applying for a visa.

Ultimately, it is a matter for the RMA concerned to ensure that they are not inadvertently providing immigration assistance without a service agreement in place (or a copy of the Consumer Guide having been given to the client as required by section 38 of the Code).

For reference, an excerpt from the explanatory statement relating to initial consultations is provided below:

> *An initial consultation would generally be an opportunity for an agent to find out the potential client's circumstances, and to advise what they would be able to do for the potential client, including steps, costs, etc. Generally, the agent would not at this point need to be satisfied of the identity of the potential client, as communication with the Department or review authorities would generally only occur after a service agreement has been entered into. An initial consultation would be a single consultation where the agent would normally find out the facts of the potential client's situation and would either give the client basic advice or would outline processes and costs for the potential client.*

## 2. Global Talent visa – Do RMAs need a service agreement with the nominator?

RMAs have sought guidance on whether they would need to have a service agreement with the nominator, who completes form 1000, in respect of a Global Talent (subclass 858) visa application.

Form 1000 states "*an applicant must produce a completed form 1000 (this form) which requires the applicant's record of achievement in their area of talent to be attested to by an Australian citizen, permanent resident*, eligible New Zealand citizen** or an Australian organisation. In this form, that attestation is called a nomination and the person who makes the attestation is you".*

The form also states "*the term 'nominator' describes an individual or organisation who has completed this form to attest to information in relation to an applicant for a Global Talent (subclass 858) visa".*

In this situation, RMAs question whether they would have provided any immigration assistance, as per s276 of the Migration Act, to the nominator, given the nominator merely attests to information in relation to the applicant and does not hold the same legal obligations to the applicant as say, a business nominator/sponsor or a partner sponsor would. As such, RMAs have sought guidance on whether it would be necessary to enter into a service agreement with the nominator (while acknowledging their obligations under the Code to verify the source and contents of the completed form 1000).

### Guidance

The criteria for a Global Talent visa are set out in Part 858 of Schedule 2 to the *Migration Regulations 1994* (the Migration Regulations). Unless the applicant is endorsed by the Minister's Special Envoy for Global Business and Talent Attraction or satisfies subclause 858.212(4), they must satisfy subclause 858.212(2).

Subclause 858.212(2) provides that the applicant must, among other things, produce a completed approved form 1000 (see cl 858.212(2)(e)).

Form 1000 is titled 'Nomination for Global Talent' and is completed by a 'nominator'. The form states that the term 'nominator' describes an individual or organisation who has completed the form to attest to information in relation to an applicant for a Global Talent visa.

The definition of immigration assistance is set out in section 276 of the Migration Act. Among other things, a person gives immigration assistance if the person uses, or purports to use, knowledge of, or experience in, migration procedure to assist another person by preparing or helping prepare a document indicating that the other person nominates or sponsors a visa applicant for the purposes of the regulations, or advising the person about nominating or sponsoring the visa applicant (see s276(2)(a) and (b)).

The OMARA considers that, despite the fact that a nominator for a Global Talent visa does not have the same obligations as a business sponsor and nominator, they are not precluded by that fact from falling within the scope of a 'person who nominates a visa applicant' for the purposes of paragraphs 276(2)(a) and (b).

As such, in circumstances where an RMA uses their knowledge of migration procedure to provide advice to the person completing form 1000 or assists that person to complete form 1000 (and that assistance is more than mere clerical assistance), there is a good argument that they are providing immigration assistance to that person. If this is the case, a service agreement with that person will be required.

Having said this, given that form 1000 is an attestation of certain facts, it seems unlikely that the nominator completing it would require immigration assistance. Merely providing the form to a person to complete and pointing out the instructions on the form would not constitute immigration assistance.

Ultimately it will be a matter for the RMA to consider the circumstances and the nature of any assistance provided to the person completing form 1000 and determine whether or not that assistance constitutes immigration assistance.

## 3. Limits of an initial consultation

RMAs have sought guidance as to whether there are any circumstances in which a consultation with a client, subsequent to an initial consultation, may also be considered an 'initial consultation' and not require a service agreement.

A scenario where RMAs consider a subsequent consultation could be reasonably considered an "initial" consultation is where:

- a consultation is held with a potential client who is advised they don't meet the criteria for a visa and where some advice is provided on what they need to do in order to meet the visa criteria;
- after an interval, of months or even a year or more, that person reappears and says they now want further advice since their circumstances are different from when they first consulted.

RMAs have also sought guidance on:

- the amount of time that must elapse between an initial and subsequent consultation for the second consultation to be considered an initial consultation;
- whether every potential client only ever gets one initial consultation in their life with a specific RMA.

### Guidance

Subsection 42(1) of the Code of Conduct prohibits an RMA from giving immigration assistance unless a service agreement is in force. The only exception to this requirement is where a certain type of immigration assistance is given at an 'initial consultation'.

Subsection 43(4) sets out what constitutes an initial consultation and clarifies that if a consultation consists of a series of sessions conducted on more than one day, sessions conducted on a day other than the first day are taken not to be part of an initial consultation. The Code does not specify a period of time after which a further session may be considered an initial consultation.

Whether or not a further session is rightly considered a subsequent consultation or a new initial consultation will depend on the circumstances of the case. It is expected that RMAs will exercise their professional judgement and act in their client's interests when making this determination and deciding whether or not immigration assistance can be provided without a service agreement being in place.

Paragraph 43(4)(a) of the Code clarifies that only the first consultation between an RMA and a client or a potential client *"**in relation to a particular immigration matter**"* is an initial consultation. As such, OMARA considers that if a subsequent consultation was a continuation of the matter that was the subject of the initial consultation, then the subsequent consultation would not be an "initial consultation" for the purposes of section 43.

For example, in the scenario above, if the client acted on the RMAs advice and returned with evidence that they now met requirements as advised by the RMA, this would be a continuation of the matter and as such would not be an initial consultation even if, for example, more than a year had passed.

A similar example might be where a client holding a student visa was advised by the RMA that they needed to complete their degree (which required a further year of study) before applying for a particular visa. If that client returned to the RMA for assistance to apply for that visa, this would be a continuation of the matter and the RMA should not provide further immigration assistance without a service agreement being in place.

However, if at the time of the subsequent consultation, there had been a material change in the circumstances of the client or the relevant legislation, such that the RMA needed to make a fresh assessment of the client's circumstances and advise the client accordingly, then the subsequent consultation may, depending on any other relevant circumstances, be considered an initial consultation.

For example, if in the period of time that had passed since the initial consultation there had been substantial changes to the circumstances of the client or the legislation that was the subject of the advice in the initial consultation, such that the advice given was no longer of relevance, then the subsequent session may be considered an initial consultation.

Examples of such material changes could include, but are not limited to:

- repeal of the visa subclass that was the subject of the immigration assistance in the initial consultation
- a client who previously sought skilled migration has since married an Australian citizen, whom the client had not met at the time of the initial consultation, and is now seeking advice about a Partner visa.

Where an extensive amount of time has passed such that the relationship between the RMA and client no longer reasonably exists, a further consultation may reasonably be considered to be an initial consultation.

For example, if more than 7 years have passed since the last action on the client file (after which the RMA no longer is obligated under section 56 of the Code to maintain client records) and the RMA has disposed of the relevant file and has no recollection of the initial consultation, a subsequent consultation may be considered an initial consultation.

RMAs should also note that they are not prevented from entering into a service agreement with the client, even if a consultation is an initial consultation. Where an RMA has doubts as to whether or not a subsequent consultation is an Initial consultation for the purposes of section 43, it is open to the RMA to enter into a service agreement with the client. Subsection 43(4) is copied below for reference.

*Section 43*

*(4) To avoid doubt:*

*(a) only the first consultation between a migration agent and a client or a potential client in relation to a particular immigration matter is an **initial consultation**; and*

*(b) if a consultation consists of a series of sessions conducted on more than one day, sessions conducted on a day other than the first day are taken not to be part of an **initial consultation**.*