

Genuine Position

Reg. 2.72(10)(a)

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Why do we assess genuineness?

- Ensure employers use the SID program to address genuine skill shortages by hiring appropriately skilled overseas workers
- Prevent misuse of the SID program, such as:
 - Creating positions solely to secure visa outcomes
 - 'Dressing-up' positions that do not align with the nominated ANZSCO occupation

Reg. 2.72(10)

The Minister is satisfied that the position associated with the occupation is:

a) genuine

The legal test

- **Reg. 2.72(10)(a)** requires an assessment of whether the position associated with the nominated occupation is 'genuine' in the sense of **real** and **authentic**
- **Relevant considerations:**
 - Determine not only whether the position **exists**, but also whether the position is what the applicant **purports it to be**
 - Conduct a **qualitative analysis** of the position and how it compares to the nominated occupation as described by **ANZSCO (2022)**
- **Irrelevant considerations:**
 - Genuineness is **not** a test of whether the position is required or makes good commercial sense for the sponsor

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Reg. 2.72(10)(a)

Where further assessment is not required

- DMs can generally consider the genuineness criterion met based on the sponsor's certifications, s. 47E(d)
- DMs can take the sponsor's certifications at face value particularly when:
 - Position clearly fits ANZSCO (2022) descriptions and business activities
 - Evidence demonstrates how the position was created (e.g. business expansion), or how the position was previously occupied and became vacant
 - Position was advertised through a transparent LMT process

Where further assessment may be considered

- Further assessment **may** be appropriate **if there are doubts** about the veracity of the sponsor's certifications **and** there is information to suggest that:
 - The position was created to secure a migration outcome
 - The tasks of the nominated position do not align with the ANZSCO (2022) occupation
 - The position is not consistent with the nature/activities of the business

Important Note:

Reg. 2.72(10)(a) does **not** require the provision of particular documents (e.g. org chart, submission, etc.). If not satisfied that the position is genuine, DMs must justify their assessment based on the **available evidence**, **not** the absence of specific documents.

Position created to secure a migration outcome

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When to Conduct Further Assessment

- The nominee is a relative/personal associate/officer/director/owner of the sponsoring business
- The nominee's immigration history suggest their primary motive is to stay in Australia on any type of visa
- The business is new and appears to have been established for the purpose of nominating the nominee
- There is evidence that the business may have received/will receive payment in return for the nomination

Self-Sponsorship

- An individual cannot nominate themselves, but they can be nominated by a corporation they are associated with, as long as the corporation is a **separate legal entity**
- This is not considered "self-sponsorship" because the corporation, not the individual, is the sponsor
- However, DMs must be satisfied that the position is not **solely** created to help the nominee stay in Australia long-term or gain permanent residency

Tasks of the position do not align with the nominated occupation

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When to Conduct Further Assessment

- The tasks of the nominated position do not align with the ANZSCO-listed duties

Key Factors to Consider

- Review not just the listed duties but the actual tasks the nominee will perform
- Evaluate supporting evidence (e.g., business context, location, role in company)
- Check if tasks are consistent with the nominated occupation, focusing on skill level and relevance

Business Context

- Consider location, organisational structure, proposed tasks, and duties of current employees
- **Example:** A small business may not support a high-level position like a Corporate General Manager (CGM) due to limited scope

Specialisation

- Specialised roles are acceptable, but most time should be spent on tasks related to the nominated occupation
- Consider changes due to the digital transformation of roles, even if not reflected in ANZSCO

Position is not consistent with the nature of the business

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When to Conduct Further Assessment

- If there are significant inconsistencies between the duties of the nominated occupation and the sponsor's business activities

Does the occupation align with the business?

- A **Landscape Gardener** nominated by a Physiotherapy practice
- **Chef** nominated by a technology start-up
- **Software Developer** nominated by a retail store
- **HR Manager** nominated by a small construction business

Key Factors to Consider

- Ensure the nominated occupation is **relevant** to the sponsor's business context (e.g. industry, size, turnover)
- Consider if the business is **diversifying/expanding** into new services which justifies the position
- If multiple individuals are appointed to the same role, assess potential overuse of the SID visa program

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Removal of TSS occupations from SID

Removal of certain TSS occupations from SID

- There are approximately **121 occupations** that were available in the previous TSS visa that are not available in the SID visa – these occupations were not supported by labour market analysis and stakeholder feedback was less compelling
- The removal of certain TSS occupations from the SID visa may result in:
 - Attempts by applicants to ‘dress-up’ positions to align with eligible CSOL occupations
 - Inflation of nominated salaries to meet Specialist Skills stream eligibility criteria

Key Red Flags

- **Skill mismatch:** Tasks/duties listed do not align with the skill level of the nominated occupation
- **Generic/embellished roles:** Overly generalised or artificially embellished positions to fit the nominated occupation
- **‘Not elsewhere classified’ (nec) occupations:** nec occupation nominated but tasks/duties align with a different classified ANZSCO occupation

Careful analysis of claimed tasks/duties:

- DMs should closely tasks/duties with the ANZSCO 2022 occupation description
- **For ‘nec’ occupations:**
 - Determine if the claimed tasks/duties align with another occupation that **is** classified in ANZSCO
 - **Example:**
141999 Accommodation and Hospitality Managers nec nominated for the Core Skills stream, but tasks/duties align more with **141111 Cafe or Restaurant Manager**

TSS Processing - Nominations - Genuineness

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Nominations - *Assessing Genuine Position*

Overview

Under sub-regulation [2.72\(10\)\(a\)](#), decision makers must be satisfied that the position associated with the occupation is genuine.

Noting that the TSS program is designed to enable employers to bring in skilled workers to fill genuine positions where they cannot source appropriately skilled Australian workers, this criterion intends to ensure that the TSS program is not used to bring in unskilled workers or circumvent other visa programs.

The 'genuineness' assessment is not a test of whether the position is required, or whether it makes good commercial sense for the nominating business to hire a particular worker/pay them a particular salary. Rather, **the 'genuineness' assessment is a test of whether the position associated with the nominated occupation is 'genuine' in the sense of 'real' and 'authentic'.**

The Court has held that this means it is necessary for the decision maker to determine not only **whether the position exists but also whether the position is what the applicant purports it to be.**

In practice, the assessment of 'genuineness' requires a **qualitative analysis of the nominated position (as claimed by the applicant) and how it compares to the nominated occupation as described in the ANZSCO.**

^ Conducting further assessment

Under policy, decision makers can generally consider the 'genuineness' criterion met on the basis of the certifications provided by the sponsor in their application.

If there are doubts about the veracity of the sponsor's certifications, further assessment may be appropriate if there is information to suggest that:

- [The position was created to secure a migration outcome;](#)
- [The tasks of the nominated position do not align with the ANZSCO occupation;](#) and/or
- [The position is not consistent with the nature of the business.](#)

s. 47E(d)

^ Evidence which may support genuineness

If 'genuineness' can **not** be considered met on the basis of the sponsor's certifications and further assessment is deemed appropriate in consultation with **s. 47E(d)** sponsors can be requested to provide additional evidence which **may add weight** to the assessment of 'genuineness' including but not limited to:

- how the position fits into the business' activities and structure
- how the position contributes to maintaining or enhancing the volume and/or quality of outputs
- the position having existed/previously occupied, but subsequently having become vacant or being currently occupied by a temporary resident
- the position being newly created to support plans for business expansion
- an increase in business activity over previous months-years (i.e. new contracts won, increased demand) requiring additional staffing to meet increased demand

Whilst supporting evidence may be requested to support the assessment of 'genuineness', the submission of specific documents is **not** required to satisfy sub-regulation [2.72\(10\)\(a\)](#).

'Genuineness' refusals on the basis of the absence of particular evidence goes beyond the requirements of sub-regulation [2.72\(10\)\(a\)](#). If particular information are deemed necessary to assess whether the nominated position is genuine, decision makers should first consider

whether a phone call/RFI is a more appropriate remedy to address any potential concerns to ensure lawful, fair and reasonable decisions.

^ Refusing under genuineness

Before refusing under sub-regulation 2.72(10)(a), decision makers should first consider:

- Can 'genuineness' be considered met on the basis of the certifications provided by the sponsor in their application **S. 47E(d)**
- If there is insufficient information to assess 'genuineness', and the application is otherwise credible and on an approval pathway, would an RFI be a more appropriate remedy?
- If there are inconsistencies in the sponsor's certifications, can a phone call be made to clarify any outstanding issues?

As the assessment of 'genuineness' requires a qualitative analysis of the nominated position as purported by the applicant, **refusals against sub-regulation [2.72\(10\)\(a\)](#) must detail a proper analysis of the evidence weighing in favour for, and against, the 'genuineness' of a position.**

If the decision maker is not satisfied that sub-regulation [2.72\(10\)\(a\)](#) is met, they should explain in detail why, in considering the **available evidence**, they find that the position associated with the nominated occupation is not genuine.

Decision makers should refrain from making broad and blanket statements which are not substantiated by evidence, and without explaining how (in considering the available evidence) the decision maker has reached the conclusion that the position is not genuine.

Genuineness refusals: Dos and Don'ts

Here are some examples of dos and don'ts when writing refusals under sub-regulation [2.72\(10\)\(a\)](#).

Note: These examples are for illustration purposes only and should not be taken as pre-approved wording for refusals under this criterion.

DON'Ts

- Making broad/blanket statements without explaining in detail how, in considering the available evidence, a particular conclusion was made, for example:

"I have considered all of the available information. However, there is insufficient information for me to be satisfied that the position associated with the nominated occupation is genuine."

"Whilst I recognise that the nominated position fits within the context and activities of the business, I do not find that the applicant has adequately demonstrated the need for a [Occupation] on an on going full time basis."

- Implying that the provision of particular information is required to satisfy sub-regulation 2.72(10)(a), for example:

"I have considered all of the available information including the application form, employment contract, evidence of Labour Market Testing and AMSR, however I find that there is insufficient information provided in support of the application. I note that the applicant has not submitted information such as a position description, organisation chart, genuine position statement and financial documents. In the absence of this and other supporting information, I cannot assess whether the position associated with the nominated occupation is genuine."

DOs

- Refusals against sub-regulation [2.72\(10\)\(a\)](#) must detail a proper analysis of the evidence weighing in favour for, and against, the 'genuineness' of a position, for example:

"In the absence of evidence that the business space is used to a significant degree for events outside of the normal restaurant and bar operations (for example, conferences, trade shows, or similar), I am not satisfied that there is sufficient work for a full-time Events Manager. I note from the organisation chart provided that the business already employs a number of people in management roles who take care of restaurant and bar operations, and as it is expected that these employees would continue in those roles to a large extent during a function in the venue, I do not find that there would be sufficient additional work at the stated ANZSCO level to justify a full-time Events Manager. If there are other business operations that might be relevant to the nominated position, details of those activities and how they relate to this position has not been provided. Therefore, having considered the tasks and duties of the nominated position and how they relate to the businesses operations as it appears from the material submitted, and in the absence

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*of additional information, I am not satisfied that there is sufficient work for a full-time
Events Manager."*

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