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DECISION RECORD

AGENT	Hadi Payami
COMPLAINT NUMBER	CAS-17235-J0D9
DECISION	Cancellation
DATE OF DECISION	15 November 2023
TERMS USED FOR REFERENCE	Refer Appendix A

JURISDICTION

1. The Office of the Migration Agents Registration Authority performs the functions prescribed under section 316 of the *Migration Act 1958* (the Act).
2. The functions and powers of the Authority under Part 3 of the Act and the *Migration Agents Regulations 1998* (the Agents Regulations) may only be exercised by the Minister or by a delegate of the Minister. The Minister has delegated the powers under Part 3 of the Act and the Agents Regulations to officers of the Authority. I am delegated under the relevant Instrument to make this decision.

Relevant Legislation

3. The functions of the Authority under the Act include:
 - to investigate complaints in relation to the provision of immigration assistance by registered migration agents (paragraph 316(1)(c)); and
 - to take appropriate disciplinary action against registered migration agents (paragraph 316(1)(d)).
4. The Authority may decide to cancel the registration of a registered migration agent by removing his or her name from the Register, or suspend his or her registration, or caution him or her under subsection 303(1), if it is satisfied that:
 - the agent's application for registration was known by the agent to be false or misleading in a material particular (paragraph 303(1)(d)); or
 - the agent becomes bankrupt (paragraph 303(1)(e)); or
 - the agent is not a person of integrity, or is otherwise not a fit and proper person to give immigration assistance (paragraph 303(1)(f)); or

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- an individual related by employment to the agent is not a person of integrity (paragraph 303(1)(g)); or
 - the agent has not complied with the Code prescribed under subsection 314(1) of the Act (paragraph 303(1)(h)).
5. Subsection 314(2) of the Act provides that a registered migration agent must conduct himself or herself in accordance with the Code. The *Migration (Migration Agents Code of Conduct) Regulations 2021* made under the Act prescribes the Code.
6. The Code of Conduct for registered migration agents in force at the time of the conduct that is the subject of this decision is the Code of Conduct current from 1 March 2022 (the Code).

AGENT BACKGROUND

Agent Registration

7. On 30 January 2023, the Agent lodged an initial application for registration as a migration agent with the Authority.
8. In support of the application, the Agent provided a Test of English as a Foreign Language (TOEFL) test result dated 22 January 2023 which showed that he achieved the requisite scores specified by the current legislative instrument¹ for the purposes of subregulation 5(3) of the Agents Regulations. This document was accepted as evidence that he met the English language proficiency requirements for registration as a migration agent.
9. Based on the TOEFL test result and all the information and evidence provided by the Agent in his application for initial registration, the Authority approved his application on 3 March 2023 and he was allocated the MARN 2318053.
10. The Register of migration agents states that the Agent is an employee of AP with the ABN XXXXXXXXXXXX.

Prior disciplinary action

11. No disciplinary action has previously been taken against the Agent.

BACKGROUND

Allegations – the Authority’s investigation

12. On 22 March 2023, the Authority received notification from the Educational Testing Service (ETS) that the ETS Office of Testing Integrity had cancelled the Agent’s 22 January 2023 TOEFL test scores. ETS had identified that unauthorised recording devices/software were open during the test session in violation of ETS policy. This resulted in cancellation of the Agent’s score. ETS had informed the Agent of his score cancellation on 09 March 2023.

¹ IMMI 18/003, Federal Register of Legislative Instruments F2012L01932

13. Section 289A of the Act states that an applicant for registration must not be registered if academic and vocational requirements are not met. Regulation 5 of the Agents Regulations provides for a legislative instrument that sets out the prescribed examinations.² Paragraph 7(3) of *Migration (IMMI 18/003: Specified Courses and exams for registration as a migration agent) Instrument 2018* states the prescribed examinations for English language proficiency. One of the examinations is TOEFL iBT® test. Paragraph 8(1)(b) of the Instrument sets out the minimum scores.
14. Following an investigation into the Agent's conduct, it was alleged that the Agent:
 - No longer met an academic requirement to be a registered migration agent as his TOEFL test score was cancelled;
 - Failed to notify the Authority of changes in his circumstances relevant to the Agent's continued registration as a migration agent contrary to **section 29** of the Code; and
 - Failed to act ethically, honestly and with integrity contrary to **section 13(d)** of the Code.
15. Further, it was alleged that the Agent's actions demonstrated that he is not a person of integrity or fit and proper person to provide immigration assistance as per paragraph 303(1)(f) of the Act.

Notice under section 309 of the Act

16. On 19 September 2023, the Authority sent to the Agent a Notice pursuant to section 309(2) of the Act, advising the Agent that it was considering cautioning him, or suspending or cancelling his registration under section 303(1) of the Act.
17. The Agent was notified that having regard to the information before the Authority, it was open to the delegate to be satisfied that the Agent:
 - (a) had engaged in conduct that breached the Agent's obligations under sections 29 and 13(d) of the Code; and
 - (b) was not a person of integrity or otherwise not a fit and proper person to provide immigration assistance as per paragraph 303(1)(f) of the Act.
18. Pursuant to section 309(2) of the Act, the Authority invited the Agent to provide written submissions on the matter.
19. To date, no response from the Agent has been received to the Authority's notice.

FINDINGS ON MATERIAL QUESTIONS OF FACT

20. In reaching the findings of fact discussed in this decision record, the Authority considered the following evidence:
 - Documentation contained in the Authority's complaint file for CAS-17235-J0D9; and
 - Information held by the Authority in relation to the Agent.

² IMMI 18/003, Federal Register of Legislative Instruments F2012L01932

21. Having considered the information before me, I am satisfied the Agent:
- has engaged in conduct in breach of the Agent's obligations under **sections 29 and 13(d) of the Code**; and
 - is not a person of integrity or otherwise a fit and proper person to provide immigration assistance as per **paragraph 303(1)(f) of the Act**.
22. My findings and full reasons for the decision are set out below.

Changes in circumstances relevant to the agent's continued registration

23. A registered migration agent is required under section 29 of the Code to give written notice to the Authority within 14 days of becoming aware of any change in the agent's personal circumstances that is reasonably likely to have a negative impact on the Authority's satisfaction that the agent is a person of integrity and is otherwise a fit and proper person to give immigration assistance.
24. ETS informed the Authority that on 09 March 2023 they had sent the Agent a letter advising him of the cancellation of his TOEFL score. The notification letter to the Agent stated:
- "As a result of ETS's rigorous score validation process, we have identified unauthorized recording devices/software that were open during the test session which is a violation of ETS policy and substantiates this score cancellation.*
- ETS reserves the right to cancel scores even after they are released if we find evidence to invalidate them. Please be advised that as indicated on the TOEFL iBT® Home Edition website, recording devices/software of any kind are strictly prohibited and that violating any ETS policy may result in score cancellation and/or your exclusion from future testing. If these scores were reported to any institutions, they will be notified of the cancellation."*
25. Subsection 290(2) of the Act sets out the matters the Authority must take into account in considering whether an agent is fit and proper or a person of integrity. Those matters include:
- "(e) any inquiry or investigation that the applicant is or has been the subject of and that the Authority considers relevant to the application."*
26. I have taken into account the ETS Score Cancellation Policy which is aimed at: *"1) giving test takers equivalent opportunities to demonstrate their abilities; and 2) preventing any test takers from gaining an unfair advantage over others."*³ To promote these objectives, ETS reserves the right to cancel any score when, in its judgement, a testing irregularity occurred. Therefore, I consider the investigation undertaken by ETS of the Agent's TOEFL score to be an inquiry or investigation which is relevant to the Agent's registration as per subsection 290(2) of the Act.
27. Accordingly, I am satisfied that the cancellation of the Agent's score as a result of his misconduct in the TOEFL test was a relevant change to his personal circumstances likely to have a negative impact on the Authority's satisfaction that the Agent is a fit and proper person to give immigration assistance. The cancellation of the Agent's score meant that he had not met the English language proficiency requirement for a registered migration agent.

³ ETS website, <<https://www.ets.org/patl/test-takers/scores/scoring-policies.html>>.

28. The Authority's section 309 notice put to the Agent that he had not complied with his notification obligations under the Code. However, despite being invited to do so, the Agent did not make any submissions nor provide any documents in response to the allegation.
29. In light of the above information, and as there is no evidence to the contrary, I am satisfied that the Agent breached his obligations under **section 29 of the Code**.

Requirement to act ethically, honestly and with integrity

30. A registered migration agent is required under subsection 13(d) of the Code to act ethically, honestly and with integrity.
31. I note that the Agent was notified by ETS of the cancellation of his TOEFL score. The letter dated 9 March 2023 stated: *"If these scores were reported to any institutions, they will be notified of the cancellation."* Even though he knew that ETS would inform the Authority about his score cancellation, the Agent chose not to disclose this to the Authority and be honest about his situation.
32. In the section 309 notice, the allegation was put to the Agent that he had disregarded his obligations under the Code to inform the Authority of a significant change in his circumstances. The notice further stated that it was open to consider that the Agent had not taken responsibility for his conduct in the TOEFL examination and had not demonstrated the honesty and integrity expected of a registered migration agent. As the Agent made no response to the notice, I am satisfied that the Agent's failure to notify the Authority of his cancelled score demonstrates that he is not willing to take responsibility for his actions.
33. An ethical migration agent would have contacted the Authority promptly to notify the Authority of their situation.
34. I therefore find that the Agent was in breach of his obligations under **subsection 13(d) of the Code**.

INTEGRITY, FITNESS AND PROPRIETY – SECTION 303(1)(F) OF THE ACT

Integrity

35. Pursuant to paragraph 303(1)(f) of the Act, the Authority may caution a registered migration agent, or suspend or cancel their registration, if it becomes satisfied that the agent is not a person of integrity or is otherwise not a fit and proper person to give immigration assistance.
36. There is a degree of overlap between "fit and proper" and "integrity" to the extent that fitness and propriety includes consideration of the honesty of the actions of an individual.
37. 'Integrity' means 'soundness of moral principle and character, uprightness and honesty'.⁴

Fitness and Propriety

38. Whether a person is a 'fit and proper person to give immigration assistance' is an enquiry which looks broadly at three factors – honesty, knowledge and competency.

⁴ See *Re Peng and Department of Immigration and Multicultural Affairs* [1998] AATA 12 at paragraph [26].

39. In *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, Toohey and Gaudron JJ indicated several factors that could be taken into account in determining whether a person was 'fit and proper.' These included, but were not limited to conduct, character and reputation. At 380 their Honours stated:

[D]epending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.

40. The formula 'fit and proper' (and 'person of integrity') must be construed in light of the particular legislative context at the registration scheme underpinning the migration advice profession.⁵
41. The context in which the reference to 'fit and proper' person occurs in section 303(1)(f) is the person's giving of immigration assistance. The context also includes:
- the Act, which creates offences for misleading statements and advertising, practising when not registered, and misrepresenting a matter; and
 - subsection 290(2) of the Act, which provides that in considering whether it is satisfied that an applicant is not fit and proper or not a person of integrity, the Authority must take into account specified matters, including the person's knowledge of migration procedure; and any other matter relevant to the person's fitness to give immigration assistance.
 - the Code which refers to (among other matters) a registered migration agent acting diligently, ethically, honestly and with integrity, treating persons with appropriate respect, and properly managing and maintaining client records and maintaining client confidentiality.
42. Key elements of the fitness test are:
- the honesty of the person (*Peng and Department of Immigration and Multicultural Affairs* [1998] AATA 12); and
 - the person's knowledge of the migration scheme and ability to fulfil the position of a migration agent (*Mottaghi and Migration Agents Registration Authority* [2007] AATA 60).
43. The reference in section 303(1)(f) to a registered migration agent not being a 'person of integrity' is not concerned with the person's knowledge of the migration scheme or ability as a migration agent, but is primarily concerned with a person's reputation, moral principle and character, including their honesty (*Tejani and Migration Agents Registration Authority* [2009] AATA 240).
44. Having regard to the body of case law cited above, a consideration of whether the Agent is a fit and proper person or a person of integrity to provide immigration assistance can legitimately include the following:
- that the Agent's past conduct can be an indicator of the likelihood of the improper conduct occurring in the future;

⁵ See *Cunliffe v Commonwealth* (1994) 182 CLR 272

- the Agent's honesty and competency towards clients, the Department and the Authority;
 - a consideration of the context in which the agent works, for example whether or not the Agent is an employee or owner of the business through which immigration assistance is provided;
 - the Agent's knowledge and competency in immigration law and practice;
 - the reputation of the Agent as a result of their conduct and the public perception of that conduct; and
 - the perception of the conduct by the Agent's "professional colleagues of good repute and competency".
45. Having regard for the totality of the matters discussed within this decision, I am satisfied that the Agent has:
- acted without due regard for the obligations placed upon him under the migration law as a migration agent;
 - not acknowledged the fact that his TOEFL score was cancelled and consequently that he no longer satisfied the English language proficiency requirements for migration agents;
 - demonstrated that he does not consider it important to be honest and candid with the Authority as he has made no attempt to explain or accept responsibility for the conduct of concern outlined in the section 309 notice; and
 - demonstrated a lack of integrity and that he is not a person who is fit and proper to provide immigration assistance.
46. All first time applicants for registration as a migration agent must demonstrate that they meet the English language requirement as prescribed in legislation.⁶
47. Registered migration agents need a high level of English language proficiency to be able to understand complex Australian migration legislation. A registered migration agent must consider the legal requirements along with the client's individual circumstances to determine the client's eligibility for the type of visa they may be seeking. They must be able to understand the legislation in order to lodge applications with relevant and accurate documentation supporting their clients' claims against the visa criteria. They must also be able to advocate on behalf of their clients with the Department and review bodies.
48. The Agent received notification of the outcome of an investigation by ETS into his adherence to the rules of the TOEFL test. That inquiry found that he had unauthorised recording devices or software open during the test session. The outcome was that his TOEFL score was cancelled.
49. The Authority's section 309 notice put to the Agent that shortly after his registration as a migration agent he no longer had evidence that he met the legislated requirement for English language proficiency. The Agent did not respond.

⁶ Section 289A of the Act, Regulation 5 of the *Migration Agents Regulations 1998*, Legislative Instrument Migration (IMMI 18/003: Specified courses and exams for registration as a migration agent) Instrument 2018 (IMMI18/003)

50. In addition, the Agent through his actions has demonstrated his preparedness to act in a dishonest manner in order to achieve results which he may not otherwise have been able to attain. Actions, such as cheating in an examination or assessment, to meet the academic requirements for a registered migration agent are highly relevant considerations as to whether an applicant for registration is a fit and proper person to give immigration assistance.
51. Several months have passed since the Agent was advised by ETS that it would inform the Authority of his cancelled TOEFL score. To date the Agent has not notified the Authority of this as required under section 29 of the Code. This indicates that it is likely that the Agent would act in a dishonest manner in a similar situation in order to derive a benefit for himself or to avoid a negative outcome. There is no evidence presented by the Agent to suggest otherwise. Such conduct falls well below the expectations of registered migration agents to act ethically, honestly and with integrity.
52. In consideration of the discussion of the Agent's conduct in this decision and my findings above, I am satisfied that the Agent is not a person of integrity and is otherwise not a fit and proper person to give immigration assistance.

CONSIDERATION OF APPROPRIATE DISCIPLINARY ACTION

53. In deciding to discipline the Agent under section 303 of the Act, I have taken into account all of the circumstances of the case, including the following:
- Whether the Agent's behaviour is of a minor or serious nature. Conduct that the Authority considers to be adverse, extremely serious and therefore likely to result in discipline at the higher end of the scale includes but is not limited to:
 - criminal behaviour;
 - fraudulent behaviour;
 - behaviour that demonstrates fundamental lack of knowledge of the law; or
 - involves a blatant disregard for or a significant degree of indifference to the law;
 - repeated occurrences of the conduct described in subsection 303(1) (d)-(h) and/or;
 - agent behaviour that has resulted in significant harm or substantial loss to clients.
 - Any aggravating factors that increase the Agent's culpability including but not limited to previous conduct.
 - Any mitigating factors that decrease the Agent's culpability including but not limited to evidence that the Agent's health has contributed to the Agent's culpability or where the Agent has undertaken steps to remedy the situation.

Seriousness of behaviour

54. In deciding to discipline the Agent under section 303 of the Act, I have taken into account all of the circumstances of the case, including the severity of the Agent's behaviour and any mitigating or aggravating circumstances which may exist. I have also considered:
- whether the behaviour in question could be the subject of rehabilitation;
 - the level of impact, if any, that a sanction would have on the Agent's livelihood;

- the circumstances of the clients, including any vulnerability; and
- any wider issues pertaining to consumer protection or the national interest.

55. Having regard to the matters before me, I consider that the Agent's behaviour is serious because:

- The Agent engaged in cheating on a TOEFL exam to ensure that he could meet the academic requirements of the migration agent registration process;
- The Agent has ignored his professional responsibilities by failing to meet his notification obligations under the Code of Conduct; and
- The Agent has made no response to the Authority's notice.

Aggravating factors

56. I consider that the Agent's conduct falls short of the standard expected of a registered migration agent and is aggravated by the following matters:

- The Agent did not comply with his responsibilities as a migration agent by failing to inform the Authority of the significant change to his circumstances under the Code of Conduct. Instead he has continued to practice as a migration agent in the knowledge that he had not attained the English language proficiency required of him by the legislation;
- The Agent did not notify the Authority of the communication he had received from ETS. The Agent did not respond to the Authority's section 309 notice. If the Agent's cheating on his TOEFL exam had come to light prior to the approval of his registration application, his application would have been refused; and
- The Agent engaged in dishonest conduct to become a registered migration agent. As he has not acknowledged his conduct this suggests a real likelihood that the Agent may act dishonestly in the future.

Mitigating Factors

57. The section 309 notice advised the Agent that he could present evidence of any mitigating circumstances that he thought should be taken into account by the decision maker. As the Agent has not made any response to the section 309 notice there is no evidence of mitigating circumstances which can be considered.

58. I accept that a disciplinary decision will have an impact on the Agent's future livelihood. The Agent has not advanced any evidence with respect to hardship he might face. However, I am of the view that any loss in earnings from the provision of immigration assistance is significantly outweighed by the fact that the Agent obtained his registration as a migration agent by dishonesty and that dishonesty is unacceptable in a registered migration agent.

Consumer Protection

59. Consumers of professional services of registered migration agents are often vulnerable and place a high degree of trust in their registered migration agent. Consumers are therefore entitled to a high level of professional service from their registered migration agent.

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60. A migration agent is required to take instructions from a client, to accurately determine the needs of the client, to understand and interpret legislation and case law, to understand and draft documents, and to make representations on behalf of, and to advise the client. These tasks require well-developed skills in speaking, listening, reading and writing in English.
61. As discussed above, the Agent has not met the requirement of English language proficiency. I am therefore not satisfied that the Agent has a sufficient command of the English language to perform the functions and obligations of a registered migration agent. The Agent's lack of the requisite skills poses a serious risk to consumers who may seek his immigration assistance.
62. I therefore consider that a disciplinary decision is warranted in the interest of consumer protection and in maintaining confidence in the integrity of the Australian migration program.

DECISION

63. The evidence before me is that the Agent does not meet an essential academic requirement to be a registered migration agent. If the fact of the Agent's cheating in his TOEFL exam had come to light prior to the approval of his registration application, his application would have been refused.
64. I consider that as the Agent does not meet a mandatory requirement to be a registered migration agent and was the subject of an adverse finding as a result of an investigation relevant to his registration application, he cannot be regarded as a fit and proper person to provide immigration assistance as set out in section 290 of the Act.
65. Based on the facts and evidence before me, I have decided to cancel the Agent's registration as a migration agent under subparagraph 303(1)(a) of the Act.
66. I am satisfied for the purposes of subparagraphs 303(1)(f) and (h) that:
- the Agent is not a person of integrity, or is otherwise not a fit and proper person to give immigration assistance; and
 - the Agent has not complied with sections 29 and 13(d) of the Code.
67. In accordance with section 292 of the Act, an agent who has had their registration cancelled must not be registered within 5 years of the cancellation.
68. Accordingly, this cancellation will be in effect for a period of 5 years from the date of this decision.



Mark Abalos
Professional Standards Officer
Office of the Migration Agents Registration Authority
Department of Home Affairs

Date of Decision: 15 November 2023

APPENDIX A: TERMS USED FOR REFERENCE

The following abbreviations may have been used in this decision:

ABN	Australian Business Number
MARN	Migration Agent Registration Number
Section 309 Notice	Notice issued by the Authority under section 309 of the Act
The Act	The <i>Migration Act 1958</i>
The Agents Regulations	<i>Migration Agents Regulations 1998</i>
The Agent	<i>Hadi Payami</i>
The Authority	The Office of the Migration Agents Registration Authority
The Code	The <i>Migration (Migration Agents Code of Conduct) Regulations 2021</i> prescribed for the purposes of subsection 314(1) of the <i>Migration Act 1958</i>
The Department	The Department of Home Affairs
The Register	Register of migration agents kept under section 287 of the Act