

14 September 2020

Senate Select Committee on Temporary Migration
Department of the Senate,
Parliament House,
Canberra ACT 2600

Re: Submission for Migration Policy Changes in Response to the COVID 19 Pandemic

Temporary migration to permanent migration has been an important pathway to meet the needs of labour market shortages and unite families of Australia, strengthening the social cohesion and stabilities of the Australian community.

The COVID 19 pandemic has tested our country's capacity to cope with a global emergency, and in response, migration and border control policies have been amended and updated in order to protect the Australian community, as well as provide a pathway for certain temporary visas holders to lawfully remain in Australia who are unable to leave Australia because of the COVID-19 pandemic. This includes the temporary activity visa (subclass 408), having included a COVID 19 pandemic as an Australian Government endorsed event.

Whilst No Border Migration Advocates appreciates these policy changes in response to the pandemic, as a leading Australia migration company assisting over 1000 visa applicants with their visa applications and visa refusals each year, we wish to bring the Committee's attention to a few practice issues relating to the effects of COVID 19 pandemic on visa applicants, and call for necessary changes in migration policies.

A. Relaxation of s48 bar for certain visa applicants

Section 48 of the Migration Act prevents applications being made for a substantive visa while in Australia if an applicant's visa has been refused or cancelled onshore. However, Reg 2.12 provides that a partner visa may be applied for, and 820.312 requires that the Minister is satisfied that there are compelling reasons for granting the visa under schedule 3.

In our practice, many potential partner visa applicants in Australia need to lodge partner visa applications offshore but are unable to travel overseas due to the COVID 19 pandemic causing border closures and airline restrictions. Normally, these applicants have been in a genuine relationship with an Australian citizen or permanent resident, however, as they have not applied for a partner visa, their relationship has not been recognized by the Department of Home Affairs (“DHA”), as a result, obtaining an entry permit as the member of the immediate family of the Australian may be difficult. If these visa applicants have managed to leave Australia, their Australian partners are forced to be separated from their loved ones for an extended period of time until the partner visa has been granted, before the applicant is able to come to Australia to join their Australia partner. We have observed in our practice, that some Australian partners have suffered emotional and mental stress, particularly in the current COVID climate, affecting their business, employment and health conditions.

In reference to a speech addressed to the National Press Club by the Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, the Hon Alan Tudge MP, on the 28th of August 2020, where he emphasized the commitments of keeping Australians together, maintaining our social cohesion, particularly in the current COVID climate, we submit that in the above circumstances, section 48 restrictions for those partner visa applicants should be expressly relaxed, by considering the COVID pandemic, or any future global public health disasters, as a compassionate and compelling reason for the applicants to meet the schedule 3 criteria to allow them to apply for a partner visa onshore. This is because if these applicants are able to apply for the partner visa onshore, they will be able to stay in Australia with their partner continuously as a family, until the visa decision has been made. Keeping Australia families together is crucial in maintaining the social cohesion, security and stability of Australia, particularly in the current COVID climate.

Scenario

The applicant, Ms A, is from China on a bridging visa A because her current substantive visa has been refused onshore, and is currently waiting for a hearing at the Administrative Appeal Tribunal (AAT). Ms A wishes to lodge a partner visa application on the basis of her genuine relationship with her sponsor. Under normal circumstances, she would be able to travel overseas to lodge the partner visa application and then return to Australia with a Bridging Visa B (“**BVB**”), and continue her relationship with her partner/sponsor in Australia while waiting for the AAT hearing. However, due to the current COVID 19 pandemic situation, most airlines have canceled scheduled flights and many countries have tightened their border controls, and she has encountered great difficulty in travelling overseas. If Ms A is lucky enough to return to her home country China, she would face even more difficulties returning to Australia because of border controls and flight restrictions in China. Ms A would struggle to enter Australia again as she would have to prove that she is the immediate member of her Australian sponsor’s family as required by the Australia border policy. As Ms A is not a spouse, she needs to prove that she is an immediate family member of the sponsor before her partner visa application is lodged. In this scenario, applying for a partner visa onshore would be an appropriate course of action and great relief for Ms A and her Australian partner.

Adverse interests to Australian Partners

There is undue financial and emotional hardship in lodging an offshore partner visa application experienced by many potential partner visa applicants, being also adverse to the best interests of the applicant’s Australian partner, where they would have to fork out substantial amounts of money to pay for the escalating travel costs and face an uncertain period of separation from their partners due to travel restrictions. There is a high risk that a visa applicant would be unable to return to Australia once they depart, due to the border policies, flight limitations and financial restrictions.

We submit that this undue hardship faced by the visa applicants and their Australia partners may be remedied by a policy relaxation in relation to section 48 of the Migration Act.

Is COVID 19 a compelling reason?

“Compelling” denotes a forceful, involuntary and persuasive force.

The purpose of the Minister's having discretion to applying for compelling reason to waive s48 in a partner visa application was to give the Minister “greater flexibility if and when compelling circumstances arise and, for example, to avoid hardship to the visa applicant”.¹

In *Anani v MIMAC* [2013] FCCA 1140 (26 July 2013), Judge Barnes found that the effect that compelling circumstances generally referred to circumstances that were involuntary and characterised by necessity such that the visa holder was faced with a situation in which there was little or no alternative but to seek to remain in Australia did not establish a misstatement or misunderstanding of the law.

In the current COVID 19 situation, the pandemic was caused by involuntary causes, and the airline restrictions and international border control policies are the direct results of the Pandemic. As a foreseeable consequence of the COVID 19 Pandemic, the applicant and the Australian sponsor of a partner visa application will suffer from great hardship due to the Section 48 bar. It is fair to say that the COVID 19 Pandemic is a compelling reason to apply for Schedule 3 compelling reasons to remove section 48 requirement when the necessity of applying for a partner visa onshore arises.

Our views

Section 48 in conjunction with Reg 2.12 and 820.312 contemplates and allow a partner visa applicant to apply for a Partner visa, and even the Minister has a flexibility to determine what is compassionate and compelling reasons. We submit that an uniformed expression of the COVID pandemic or any future global public health disasters should be clearly articulated in the schedule 3 policy as the compelling reasons to remove any uncertainties. This will reduce any potential financial and emotional hardships suffered by the visa applicants and their Australian partners, keep Australia families together, maintain social cohesion, security and stability.

B. Relaxation of Bridging Visa B schedule 1 criteria

A BVA takes effect as the visa applicant applies for a substantive visa and their current substantive visa has expired. A BVB allows the holder of BVA to remain lawfully in Australia as well as travel to and re-enter Australia. Schedule 1 Item 1302 of the Migration Regulations 1994 provides that a BVB application must be made in Australia.

¹ *Waensila v Minister for Immigration and Border Protection* (2016) FCAFC 32 (11 March 2016), Judge Robertson's view.

Since the COVID 19 pandemic started in early 2020, we have found many BVB holders who are stranded offshore, unable to return to Australia as their BVB has expired. Many of these BVB holders have applied for skilled visas, family visas and even business visas. Some of them are no longer in a position to apply for a visitor visa to return to Australia due to a change of circumstances. As foreseeable consequences of these applicants being offshore, their visas cannot be granted, their appeal may be decided in their absence, they may lose the right to appeal further, and their families in Australia may face indefinite separations.

These adverse consequences have arguably been caused by the COVID 19 pandemic with non-faults of the BVB holders. The COVID pandemic has caused these visa applicants lose their legitimate rights to return to Australia, as well as the inconvenience or hardships of their Australian employers and families, not to mention many potentially highly skilled migrants for Australia.

In view of the adverse consequence of these BVB holders being stranded, unable to apply for another BVB offshore to return to Australia, we suggest that BVB schedule 1 criteria be added a schedule 3 criteria, that is, if the BVB holder is offshore and the Minister is satisfied that there are compassionate and compelling reasons, the BVB holder may apply for a subsequent BVB, outside Australia.

C. Family violence provision for offshore partner visa (subclass 309) applicants in Australia

It is stated on the DHA's website:

Family violence is a crime in Australia. You and your family members don't have to remain in a violent relationship to stay in Australia. You might still be able to be granted a visa if all of the following apply to you:

- *you have married your spouse while the holder of a Prospective Marriage visa (subclass 300) and applied for a Partner visa (subclass 820/801), or you are awaiting the outcome of your application for a temporary Partner visa (subclass 820), or you have been granted a temporary Partner visa (subclass 820), or you have entered Australia as the holder of a provisional Partner visa (subclass 309)*
- *you or your family members have experienced family violence*
- *your relationship has ended.*

Here the subclass 820 visa is an onshore partner visa whilst subclass 309 is an offshore partner visa.

In our view, this migration policy does not contemplate the situation where family violence suffered by an offshore partner visa (subclass 309) applicant who are in Australia on a different visa, such as a visitor visa.

During the COVID pandemic, we have seen a subclass 309 visa applicant, Mrs B, waiting for the outcome of her partner visa came to Australia on a visitor visa and has been unable to leave Australia due to the COVID restrictions. Mrs B and her Australian child subsequently experienced serious family violence perpetrated by her Australian husband. As a result, Mrs B and her child were granted a 5-year permanent Domestic Violence protection order by the Magistrate Court. Consequently, Mrs B's marriage with her Australian husband has ended.

Mrs B found that she is unable to apply for a permanent partner visa because she is an offshore partner visa applicant, and only the subclass 309 visa holders who has experienced family violence are eligible to apply for a permanent partner visa. Mrs B wishes to leave her Australian child in Australia as it is the child's home country, and this means she must return to her home country without her child. In addition, Mrs B's Australian child will be at a risk of harm if the child's father becomes the primary carer of the child because the child is also aggrieved in the protection order.

Family violence is a crime in Australia and an offshore partner visa applicant and their Australian child should be protected against family violence in Australia. In our view, this situation may be remedied if the 309 offshore partner visa policy provides a solution.

For this reason, we respectfully submit that a family violence provision be inserted into schedule 2 of the permanent offshore partner visa subclass 100 as follows:

The applicant meets the requirements of the subclass 100 visa, if:

- (1) the applicant is the applicant of the subclass 309 visa; and*
- (2) **the applicant is in Australia;** and*
- (3) The applicant meet the requirement of partner visa except that the relationship between the applicant and the sponsoring partner has ceased; and*

Either or both of the following circumstances applies:

- (i) either or both of the following:*
 - (A) the applicant;*

(B) a dependent child of the sponsoring partner or of the applicant or of both of them;

has suffered family violence committed by the sponsoring partner;

(ii) the applicant:

(A) has custody or joint custody of, or access to; or

(B) has a residence order or contact order made under the Family Law Act 1975 relating to;

at least 1 child in respect of whom the sponsoring partner:

(C) has been granted joint custody or access by a court; or

(D) has a residence order or contact order made under the Family Law Act 1975; or

(E) has an obligation under a child maintenance order made under the Family Law Act 1975, or any other formal maintenance obligation.

Conclusion

Australia has a long history of welcoming migrants and a highly functional migration program. The COVID 19 pandemic has demonstrated the need to amend certain migration policies to facilitate a fairer and uniformed standard to maintain the integrity of the visa policy, for the greater good of Australia, in the future.

Yours Faithfully,

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