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The Hon Peter Dutton MP  
Minister for Home Affairs

The Hon Alan Tudge MP  
Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

Supreme Court  
of Queensland

Dear Mr Dutton and Mr Tudge,

**Re: Submission for requesting relaxation of section 48 compelling reasons for certain applicants to lodge partner visa onshore**

No Border Migration Advocates is an Australia leading migration company assisting thousands of visa applicants with their visa applications and visa refusals each year.

We have noticed in our practice that many potential partner visa applicants currently in Australia need to lodge partner (and other) visa applications offshore due to being affected by section 48 restrictions, but are unable to travel overseas due to the COVID-19 pandemic causing border closures and airline restrictions. We are writing to request that the Minister relax section 48 restrictions for these applicants, particularly those intending to submit a subclass 820/801 Partner Visa. This would allow them to apply for a visa other than the limited visa options that are usually available to a section 48 barred applicant in Australia.

**Scenarios**

In Scenario A, Applicant A is from China. Their current substantive visa has been refused onshore and is currently waiting for an AAT hearing to be scheduled. She wishes to

lodge a partner visa application on the basis of a genuine relationship with her Australian sponsor. Under normal circumstances, she would be able to travel overseas to lodge the partner visa application and then return to Australia on a BVB visa and continue living with her partner/sponsor in Australia while waiting for the AAT hearing. However, under the current COVID-19 pandemic situation, many airlines have canceled scheduled flights and many countries have tightened their border controls and she would have great difficulties to travel overseas. If she is lucky enough to be able to return to her home country China, she would face more problems in terms of home country border controls and flight restrictions to the extent that she might not be able to return for an extended period of time. In addition, it would be challenging for her to return to Australia again as she would have to prove that she is the immediate member of her Australian sponsor's family. Under current travel restrictions, only Australian citizens, residents and immediate family members can travel to Australia, and she needs to prove that she is a de facto partner of the sponsor to get an approval to return to Australia. As she does not hold a partner visa and has not applied for this visa on the basis of her genuine de facto relationship with her Australia partner yet, there is no certainty that her de facto relationship with her partner would be approved or that she would be allowed to return to Australia. In this scenario, applying for a partner visa onshore seems to be a safer option.

In Scenario B, Applicant B has had a visa refused and intends to apply for a partner visa. Applicant B would not be able to return to her home country because COVID-19 is rampant there and her country or her city is locked down. No essential services or jobs are available for Applicant B and Applicant B would face a real risk of significant economic harm causing her an inability to subsist even if she was able to return. In this scenario, Australia's international obligation of non-refoulement should be considered where Applicant B had to return to her home country where she would suffer significant harm, and the best policy would be to allow Applicant B to apply for a partner visa onshore.

### **Adverse interests to Australian Partners**

The undue financial and emotional hardship in lodging an offshore partner visa application to be experienced by many potential partner visa applicants and caused by the current COVID-19 pandemic not through the applicants' own faults, would also be adverse to the best interests of the applicant's Australian partner (and any Australian children) where they would have to fork out substantial amount of money to pay for a high travel costs and face uncertain period of separation from their partners due to travel restrictions. It would not be a surprise if a visa



applicant would not be able 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 cured by a policy relaxation in relation to section 48 of the Migration Act.

### **Section 48**

We note that 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. Reg 2.12 provides that a partner visa may be applied for. 820.312 requires that if the applicant is not the holder of a substantive visa, the Minister is satisfied that there are compelling reasons for granting the visa.

#### **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".<sup>1</sup>

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 is caused by involuntary causes, the airline restrictions and international border control policies are the direct results of the Pandemic, consequently, the necessity for an applicant to seek to remain in Australia due to COVID-19 pandemic as well as a genuine need to lodge a partner visa arise. As a foreseeable consequence of the COVID-19 pandemic, the applicant and the Australian sponsor will suffer from significant hardship if they are not able to apply for a partner visa onshore under Section 48. We submit that COVID-19 pandemic should be regarded as a compelling reason to remove section 48 bar.

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

## Conclusion

Section 48 in conjunction with Reg 2.12 and 820.312 compelling reasons contemplate and allow an applicant to apply for a Partner visa onshore where the applicant's previous substantive visa has been refused. The Minister has a great flexibility to adjust policy to reduce any potential hardship suffered by the visa applicants and their Australian partners. We respectfully request that the Minister and Acting Minister have regard to COVID-19 Pandemic as one of compelling circumstances in determining whether section 48 restrictions applies to a cohort of partner visa applicants whose visas have been refused, and allow them to apply for a partner visa in Australia.

Yours Faithfully,

Cindy Zhao  
Solicitor and Migration Agent

Agnes Kemenes  
Director, Solicitor and Migration Agent