

25 January 2010

Committee Secretary
Joint Standing Committee on Migration
Department of House of Representatives
PO Box 6021
Parliament House
CANBERRA ACT 2600
AUSTRALIA

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By Express Post

Dear Sir/Madam

RE: Submissions in relation to the Joint Standing Committee on Migration

Wavelength International is a medical recruitment business which provides a large volume of medical doctors of all grades and allied health professionals to a range of public and private medical institutions in Australia, New Zealand, Singapore and Canada.

Many of our General Practitioners work in rural or semi-rural areas doing critical work such as providing healthcare to indigenous Australians, working in farming or mining towns, working for emergency services such as medical evacuation services. Our Specialist doctors work in private and public hospitals. Our Locum doctors provide urgent relief for staff shortages. We have at times been told by hospitals that without the presence of a doctor an emergency department in a local community may be closed down temporarily to the detriment of patients. Our doctors also work for Australian government departments. The contributions these doctors make to the Australian community is invaluable. It is therefore all the more difficult when we have a doctor or a nurse who want to come to Australia or stay in Australia permanently but cannot due to the health requirement.

Set out below are experiences the migration agents and immigration lawyers of Wavelength International have had in relation to various medical conditions.

Down Syndrome

A real life case

A senior nurse who is very experienced wanted to migrate to Australia. A GP clinic extended an employment offer to the nurse. One of the nurse's children is mildly intellectually impaired. He suffers from Down syndrome. The senior nurse did extensive research and found a private specialist college which could teach the child sufficient life skills so that he would have reasonable prospects of employment in the future. The GP clinic was keen to sponsor the nurse for a subclass 457 visa and would have been willing to sign 4006A health waiver undertakings.

The nurse applied for the 457 visa, but when the child could not pass the health test it was an emotional blow to her. She was aware that the child would likely not pass the health test but the MOC's decision, based on a generic profile of a Down syndrome sufferer, was emotionally disturbing for her. She had hopes of applying for permanent residence in the future. The nurse was faced with a difficult choice. Should she and her husband give up the well paid jobs they had in the UK and move to Australia on a 457 visa? Even if they did so, they were faced with a permanent visa application, possibly followed by a Migration Review Tribunal Appeal and possibly a Ministerial request. With several years of uncertainty ahead of her, the nurse decided that it would be too stressful for her and her family to come to Australia.

[Used with permission from visa applicants]

In the role of a migration agent, it is sometimes my job to explain to a visa applicant why a visa rule exists. I had great difficulty telling this nurse that unfortunately because her son is disabled, he is deemed likely to be a burden to the Australian community. Notwithstanding her likely contribution as a nurse, her husband's contribution as an academic and their substantial assets; under the current system, a permanent visa application could still be refused. Though it was painfully obvious that she, her husband and their other children would not hesitate to assist the child if he had any financial need whatsoever for the foreseeable future, this also may not be enough for the application to succeed in the first instance.

The nurse was gracious in relation to the health obstacle. To my embarrassment, she then told me that this was not the first negative experience her family has had with Australian immigration processes. A few years earlier, her family was refused grant of an Australian visa on the "one fail, all fail" rule. At the time her son afflicted with Down syndrome was not yet born. Rather a relative of her husband was a member of their family unit due to a disability. The nurse and her family put their migration plans on hold and looked after the family member until the family member passed away. It would seem that inadvertently, the "one fail, all fail" rule prejudices the migration opportunities of those families generous enough to willingly take on responsibility for the care of disabled relatives.

In the case of *Bui v Minister for Immigration & Multicultural Affairs* [1999] FCA 118 (1 March 1999), the Federal Court judges commented:

"The volunteering by the Medical Officer of a questionable estimate of cost may be criticised. The absence of any disclosed basis for that estimate and the apparent reliance placed upon it by the delegate raise concerns about the quality of the decision making process in this case."

The judgment also introduced the concept that making a moral decision may be of benefit to Australia.

"The evaluative judgment whether the cost to the Australian community or prejudice to others, if the visa is granted, is "undue" may import consideration of compassionate or other circumstances. It may be to Australia's benefit in moral or other terms to admit a person even though it could be anticipated that such a person will make some significant call upon health and community services. There may be circumstances of a "compelling" character, not included in the "compassionate" category that mandate such an outcome. But over and above the consideration of the likelihood that cost or prejudice will be "undue" there is the discretionary element of the ministerial waiver. And within that discretion compassionate circumstances or the more widely expressed "compelling circumstances" may properly have a part to play."

According to various newspaper reports, it is the view of the current Immigration Minister Senator Chris Evans that investing ultimate discretion to intervene in visa decisions in a single person is disturbing:

"I am uncomfortable with that, not just because of concern about playing God, but also because of the lack of transparency and accountability for those decisions and the lack in some cases of any appeal rights against those decisions."

["I should not play God: Evans", Sydney Morning Herald, reporter Mark Metherell, February 20, 2008]

As Ministers change from time to time, it might be speculated that each person vested with this power would have their own moral values, political inclinations, virtues and prejudices. It is submitted that the current system, which relies heavily on individual discretion, is not truly equitable.

HIV

HIV positive visa applicants are also disadvantaged by the current system. I have encountered cases where HIV positive visa applicants are refused grant of visas due to not meeting the health requirement.

In one instance, the sponsor of an Interdependency spouse application was a Nurse. Such refusals often lead to Migration Review Tribunal appeals. The MRT appeal can take months or years to be finalised. It is interesting that when these cases reach the MRT, they are usually remitted:

N04/04470 [2006] MRTA 136 (10 March 2006)

N04/05504 [2005] MRTA 965 (28 September 2005)

V05/01275 [2005] MRTA 1122 (12 December 2005)

N04/00123 [2005] MRTA 614 (1 June 2005)

Amanda MacDonald (Member) [2005] MRTA 103 (9 February 2005)

Creek (Member) [2004] MRTA 7559 (1 November 2004)

Creek (Member) [2004] MRTA 6769 (24 May 2004)

MRT appeals can involve substantial legal costs and review application fees. Appellants experience the stress that in the event of a negative decision they would no longer be able to remain in Australia.

HIV affects people from all walks of life. However, its impact is worst felt in countries of lower social economic status. The prospect that a life partner of many years could be sent back to a home country where lifesaving medication was not available would be harrowing for the Australian partner.

For those visa applicants who are afflicted with HIV and who also happen to be in a same-sex relationship, it may be more difficult to obtain a health waiver. This is because for opposite-sex couples, sometimes there are children of the relationship. It is then possible for the visa applicant to highlight the fact that the interest of Australian children would be adversely affected if a parent is sent overseas.

The effectiveness of HIV medication is such that many HIV positive visa applicants can live an ordinary life after the initial diagnosis. They can continue to work for many years, participate in sporting events and be valued members of the community. The risk of the spread of HIV and any danger to the local community would be very low, particularly in relation to couples who are in committed spouse relationships.

Couples who knowingly enter a relationship where one of them is HIV positive appear to have intensely committed relationships whereby reliance and trust is strongly placed in each other. In my personal observation, often it is the HIV sufferer who looks after Australian spouse's emotional needs. In the visa applications I have dealt with, the HIV afflicted individuals I have met were asymptomatic. In the handful of cases I have encountered, the HIV afflicted applicants were all highly skilled professionals, they earned a much higher salary than their spouses, were fearless in their outlook. In small but significant ways, the

HIV afflicted applicants looked after their Australian spouses with touching attention to detail. For example, they saved money to buy houses with their spouses, looked out for their spouses health (e.g. reminder them to take vitamins etc), often telling their spouses not to be concerned or stressed out about the possible visa outcome. Such details proliferate in the Statutory Declarations provided by the couples in support of their spouse visa applications and appeal applications.

- Is the current process for assessing a visa applicant against the health requirement fair and transparent?

It is submitted that the use of a generic patient profile is not a fair benchmark for the health requirement.

Calculations of the cost of treatment and care for various medical conditions appear to visa applicants to be inflated. In addition the costs calculations do not take into consideration the level of care and financial assistance available to individual visa applicants from their families or spouses.

In particular, for visa applicants who work in the healthcare industry, their significant contribution to our community, their high earnings capability and their existing monetary assets should be considered.

- What types of contributions and costs should be considered?

It is submitted that the contributions of any visa applicants, their spouse or their close relatives to the Australian Healthcare System be considered. In particular, in the case of doctors, the number of patients they assist on a daily basis should be considered. So that if a doctor is able to assist 20 patients a day for the next 30 years, perhaps on balance there is no detriment to the Australian community even if one of his children is only able to be employed part-time in lesser skilled employment.

In addition, the permanent presence of a doctor can significantly represent savings to an Australian employer. For example, if in a public hospital, a doctor migrated permanently and worked there full time for only 6 months, the costs of the doctor's salary would be a fraction of the cost of having a Locum doctor for the same period. Locum doctors are paid up to thousands of dollars per day.

Finally the quality of the skills of the medical professional the visa would bring to Australia should be considered. For example, Specialist doctors who are recognised exports in their field would provide invaluable training and knowledge to Australian medical graduates.

- How do we measure these?

Perhaps one way to measure contributions to the Australian community would be:

1. Giving consideration to the skills a visa approval would bring to Australia. Giving special consideration where the skills are in the healthcare area. Perhaps a list of occupations in critical demand can be used.
2. Giving consideration to the number of years of medical experience the visa approval would bring to Australia.
3. Giving consideration to the shortage of specialisations of medical experience the visa approval would bring to Australia.
4. Giving consideration to the earning potential of the healthcare professional the visa approval would bring to Australia.
5. Giving consideration to the current healthcare professional shortage.
6. Giving consideration to the location where the healthcare professional would provide his services.
7. Giving consideration to the current assets of the healthcare professional would bring to Australia.
8. Basing any assessment of costs on the individual visa applicant's circumstances.

It may be necessary to have a prescriptive system which would lead to the objective allocation of merit to each application. This is because that for certain medical conditions, such as HIV, prejudices may affect unbiased consideration of each case, therefore a system which clearly prescribes merit would be more fair, for example something which looks a little like the health matrix:

Merit criteria	1	2	3
On Skilled Occupations List		X	
On Critical Skilled List			X
Occupational experience 3 years plus	X		
Occupational experience 6 years plus		X	
Occupational experience 9 years plus			X
Occupational experience Critical			X

Skills List			
Earning potential above 80,000 per annum	X		
Earning potential above 100,000 per annum		x	
Earning potential above 165,000 per annum			X
Assets above 100,000	X		
Assets above 250,000		X	
Assets above 500,000			x
Propose to live in regional area for at least 5 years		X	
Propose to live in rural area for at least 5 years			X

The issue with using a prescriptive system involving points is that unfortunately points are vulnerable to adjustments on the basis of changing public policy. It is submitted that where visa applications can take years to process (e.g. the 175 visa), any system used to calculate whether a health waiver can be given should be impervious to temporary fluctuations in the economy or political landscape. Therefore a points based system may not be ideal.

In summary

It is submitted that in an ideal world the "one fail, all fail" rule should be abolished.

It is submitted that the health criteria should be assessed on the basis of individual patients not a generic patient profile. The view of one or more independent medical professionals, such as Specialists reports should be taken into account. Whilst the view of the Medical Officer of the Commonwealth should still be

given consideration, it is submitted that Specialists reports should be the final benchmark for assessing potential costs. It is submitted that private health insurance should be taken into consideration and the amount of money the insurer would pay in the event of a claim be deducted from the calculation of potential costs.

Ideally, a prescriptive and stable system should be put in place to measure the value of contributions a visa approval would mean for Australia.

Thank you for the opportunity to provide this submission.

Kind Regards

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