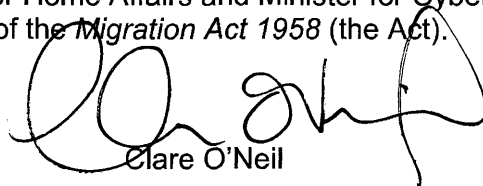


DIRECTION NUMBER 108 – ASSESSING THE GENUINE TEMPORARY ENTRANT CRITERION FOR STUDENT VISA AND STUDENT GUARDIAN VISA APPLICATIONS

(Section 499)

I, CLARE O'NEIL, Minister for Home Affairs and Minister for Cyber Security, give this Direction under section 499 of the *Migration Act 1958* (the Act).

Dated: 21/3/24



Clare O'Neil

Minister for Home Affairs and Minister for Cyber Security

Note: Section 499(1) of the Act empowers the Minister to give a written direction to a person or body having functions or powers under the Act if the directions are about the performance of those functions; or the exercise of those powers. Under section 499(2) of the Act, the direction must not be inconsistent with the Act or the *Migration Regulations 1994*. Under section 499(2A) of the Act, the person or body must comply with the Direction.

Part 1 - Preliminary

Name of Direction

This Direction is Direction No. 108 - Assessing the genuine temporary entrant criterion for Student visa and Student Guardian visa applications.

It may be cited as Direction No. 108.

Commencement

This Direction commences on 23 March 2024.

Revocation

Direction No. 69, given under section 499 of the Act, is revoked.

Interpretation

Act means the *Migration Act 1958*.

Finally determined has the same meaning as is set out in subsections 5(9) and (9A) of the Act.

Genuine temporary entrant means a person who satisfies the genuine temporary entrant criterion for Student visa or Student Guardian visa applications.

Genuine temporary entrant criterion refers to clause 500.212(a), 500.312(a) and 590.215(a) at Schedule 2 to the Regulations.

Home country has the same meaning as the definition of that term in regulation 1.03 in Part 1 of the Regulations.

Regulations mean the *Migration Regulations 1994*.

Relative has the same meaning as the definition of that term in regulation 1.03 in Part 1 of the Regulations.

Spouse has the same meaning as the definition of the term in section 5F of the Act.

Student visa means a Subclass 500 (Student) visa

Student Guardian visa means a Subclass 590 (Student Guardian) visa.

Application

This Direction applies to delegates performing functions or exercising powers under section 65 of the Act in relation to assessing an applicant against the genuine temporary entrant criterion for Student visa applications and Student Guardian visa applications (as applicable).

This Direction also applies to members of the Administrative Appeals Tribunal; or the Administrative Review Tribunal, upon its establishment; who review the decisions of primary decision-makers in relation to a Student visa or Student Guardian visa application.

This Direction applies in relation to Student visa applications and Student Guardian visa applications made before 23 March 2024 but not finally determined on that date, including such visa applications that are remitted from the Administrative Appeals Tribunal; or the Administrative Review Tribunal, upon its establishment; or a Court.

The genuine temporary entrant criterion must be satisfied by all applicants who make an application for a Student visa and seek to satisfy the primary or secondary criteria, or an application for a Student Guardian visa and seek to satisfy the primary criteria.

Note: Direction No. 106 applies in relation to Subclass 500 (Student) visa applications and Student Guardian visa applications made on or after 23 March 2024, including visa applications made on or after that date that are remitted from the Administrative Appeals Tribunal; or the Administrative Review Tribunal, upon its establishment; or a Court.

Preamble

The Australian Government operates a student visa program that enables people who are not Australian citizens or Australian permanent residents to undertake study in Australia. A person who wants to undertake a course of study under the student visa program must obtain a student visa before they can commence a course of study in Australia. A successful applicant must be both a genuine temporary entrant and a genuine student.

An applicant who is a genuine temporary entrant will have circumstances that support a genuine intention to temporarily enter and remain in Australia, notwithstanding the potential for this intention to change over time to an intention to utilise lawful means to remain in Australia for an extended period of time or permanently.

The genuine temporary entrant criterion for Student visa applications requires the Minister to be satisfied that the applicant intends genuinely to stay in Australia temporarily, having regard to:

- a) the applicant's circumstances; and
- b) the applicant's immigration history; and
- c) if the applicant is a minor — the intentions of a parent, legal guardian or spouse of the applicant; and
- d) any other relevant matter

This Direction provides guidance to decision makers on what factors require consideration when assessing the above paragraphs a) to d), to determine whether the applicant genuinely intends to stay in Australia temporarily.

Decision makers must take a reasonable and balanced approach between the need to make a timely decision on a Student visa or Student Guardian visa application and the need to identify those applicants who, at time of decision, do not genuinely intend to stay in Australia temporarily.

Part 2 – Directions

Assessing the genuine temporary entrant criterion

1. Decision makers should not use the factors specified in this Direction as a checklist. The listed factors are intended only to guide decision makers when considering the applicant's circumstances as a whole, in reaching a finding about whether the applicant satisfies the genuine temporary entrant criterion.

2. Decision makers should assess whether, on balance, the genuine temporary entrant criterion is satisfied, by:

- a) considering the applicant against all factors specified in this Direction; and
- b) considering any other relevant information provided by the applicant (or information otherwise available to the decision maker)

3. Decision makers may request additional information and/or further evidence from the applicant to demonstrate that they are a genuine temporary entrant, where closer scrutiny of the applicant's circumstances is considered appropriate.

4. Circumstances where further scrutiny may be appropriate include but are not limited to:

- a) information in statistical, intelligence and analysis reports on migration fraud and immigration compliance compiled by the department indicates the need for further scrutiny;
- b) the applicant or a relative of the applicant has an immigration history of reasonable concern;
- c) the applicant intends to study in a field unrelated to their previous studies or employment; and

- d) apparent inconsistencies in information provided by the applicant in their Student visa application or Student Guardian visa application.

5. An application for a Student visa or a Student Guardian visa should be refused if, after weighing up the applicant's circumstances, immigration history and any other relevant matter, the decision maker is not satisfied that the applicant genuinely intends a temporary stay in Australia.

The applicant's circumstances

6. Decision makers should have regard to the applicant's circumstances in their home country and the applicant's potential circumstances in Australia.

7. For primary applicants of Student visas, decision makers should have regard to the value of the course to the applicant's future.

8. Weight should be placed on an applicant's circumstances that indicate that the Student visa or Student Guardian visa is intended primarily for maintaining residence in Australia.

The applicant's circumstances in their home country

9. When considering the applicant's circumstances in their home country, decision makers should have regard to the following factors:

- a) whether the applicant has reasonable reasons for not undertaking the study in their home country or region if a similar course is already available there. Decision makers should allow for any reasonable motives established by the applicant;
- b) the extent of the applicant's personal ties to their home country (for example family, community and employment) and whether those circumstances would serve as a significant incentive to return to their home country;
- c) economic circumstances of the applicant that would present as a significant incentive for the applicant not to return to their home country. These circumstances may include consideration of the applicant's circumstances relative to the home country and to Australia;
- d) military service commitments that would present as a significant incentive for the applicant not to return to their home country; and
- e) political and civil unrest in the applicant's home country. This includes situations of a nature that may induce the applicant to apply for a Student visa or Student Guardian visa as means of obtaining entry to Australia for the purpose of remaining indefinitely. Decision makers should be aware of the changing circumstances in the applicant's home country and the influence these may have on an applicant's motivations for applying for a Student visa or a Student Guardian visa.

10. Decision makers may have regard to the applicant's circumstances in their home country relative to the circumstances of others in that country.

The applicant's potential circumstances in Australia

11. In considering the applicant's potential circumstances in Australia, decision makers should have regard to the following factors:

- a) The applicant's ties with Australia which would present as a strong incentive to remain in Australia. This may include family and community ties;
- b) evidence that the student visa programme is being used to circumvent the intentions of the migration programme;
- c) whether the Student visa or Student Guardian visa is being used to maintain ongoing residence;
- d) whether the primary and secondary applicant(s) have entered into a relationship of concern for a successful Student visa outcome. Where a decision maker determines that an applicant and dependant have contrived their relationship for a successful Student visa outcomes, the decision maker may find that both applicants do not satisfy the genuine temporary entrant criterion; and
- e) the applicant's knowledge of living in Australia and their intended course of study and the associated education provider; including previous study and qualifications, what is a realistic level of knowledge an applicant is expected to know and the level of research the applicant has undertaken into their proposed course of study and living arrangements.

Value of the course to the applicant's future

12. Decision makers should have regard to the following factors when considering the value of the course to the applicant's future:

- a) whether the student is seeking to undertake a course that is consistent with their current level of education and whether the course will assist the applicant to obtain employment or improve employment prospects in their home country. Decision makers should allow for reasonable changes to career or study pathways; and
- b) relevance of the course to the student's past or proposed future employment either in their home country or a third country; and
- c) remuneration the applicant could expect to receive in the home country or a third country, compared with Australia, using the qualifications to be gained from the proposed course of study.

The applicant's immigration history

13. An applicant's immigration history refers both to their visa and travel history.

14. When considering the applicant's immigration history, decision makers should have regard to the following factors:

- a) Previous visa applications for Australia or other countries, including:
 - i. if the applicant previously applied for an Australian temporary or permanent visa, whether those visa applications are yet to be finally determined (within the meaning of subsection 5(9) of the Act), were granted, or grounds on which the application(s) were refused; and
 - ii. if the applicant has previously applied for visa(s) to other countries, whether the applicant was refused a visa and the circumstances that led to visa refusal.
 - iii. b. Previous travels to Australia or other countries, including:
 - iv. if the applicant previously travelled to Australia, whether they complied with the conditions of their visa and left before their visa ceased, and if not, were there circumstances beyond their control;
 - v. whether the applicant previously held a visa that was cancelled or considered for cancellation, and the associated circumstances;

- vi. the amount of time the applicant has spent in Australia and whether the Student visa or Student Guardian visa may be used primarily for maintaining ongoing residence, including whether the applicant has undertaken a series of short, inexpensive courses, or has been onshore for some time without successfully completing a qualification; and
- vii. if the applicant has travelled to countries other than Australia, whether they complied with the migration laws of that country and the circumstances around any non-compliance.

If the applicant is a minor — the intentions of a parent, legal guardian or spouse of the applicant

15. If the primary or secondary applicant for a Student visa is a minor, decision makers should have regard to the intentions of a parent, legal guardian or spouse of the applicant.

Any other relevant matters

16. Decision makers should also have regard to any other relevant information provided by the applicant (or information otherwise available to the decision maker) when assessing the applicant's intention to temporarily stay in Australia. This includes information that may be either beneficial or unfavourable to the applicant.