

Direction No 53 - Assessing the Genuine Temporary Entrant Criterion for Student Visa Applications

I, CHRIS BOWEN, Minister for Immigration and Citizenship give this Direction under section 499 of the *Migration Act 1958*.

Dated _____ 2011

Minister for Immigration and Citizenship

Note: Section 499(1) of the Act empowers the Minister to give to a person or body having functions or powers under the Act written directions not inconsistent with the Act or the Regulations, in accordance with which the person or body shall perform those functions and exercise those powers. The person or body must comply with the Direction.

Part 1 Preliminary

Name of Direction

This Direction is Direction No. 53 - Assessing the genuine temporary entrant criterion for Student visa applications.

It may be cited as Direction No. 53.

Commencement

This Direction commences on 5 November 2011.

Application

This Direction applies to delegates performing functions or exercising powers under section 65 of the *Migration Act 1958* ("the Act") in relation to assessing the genuine temporary entrant criterion at Schedule 2 to the *Migration Regulations 1994* ("the Regulations") for Student visa applications.

This Direction also applies to members of the Migration Review Tribunal and the Administrative Appeals Tribunal who review the decisions of primary decision makers in relation to Student visa applications.

The genuine temporary entrant criterion must be satisfied by all applicants who make an application for a Class TU (Student) (Temporary) visa on or after 5 November 2011, except for applicants for permission to work (being persons who hold a Student visa subject to condition 8101 that was granted before 26 April 2008 and who have applied for a Student visa with permission to work) and secondary applicants for the Subclass 580 (Student Guardian) visa.

Preamble

The Australian Government operates a Student Visa Program that enables people who are not Australian citizens or Australian permanent residents to study in Australia. A person who wants to study under the Student Visa Program must obtain a Student visa before they can commence a course of study in Australia. Amongst other things, 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 enter and remain in Australia temporarily, 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 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:

- (i) the applicant's circumstances; and
- (ii) the applicant's immigration history; and
- (iii) if the applicant is a minor — the intentions of a parent, legal guardian or spouse of the applicant; and
- (iv) any other relevant matter

This Direction provides guidance to decision makers on the factors that should be considered in weighing up: the applicant's circumstances; the applicant's immigration history, the intentions of a parent, legal guardian or spouse of a minor applicant, and any other relevant matter to determine whether the applicant genuinely intends to stay in Australia temporarily. This Direction is binding on all decision makers.

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

Interpretation

Act means the *Migration Act 1958*.

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

Genuine temporary entrant criterion refers to clause 570.223(1)(a), 571.223(1)(a), 572.223(1)(a), 573.223(1)(a), 574.223(1)(a), 575.223(1)(a), 576.222(1)(a), 580.226(1)(a), 570.326(aa), 571.326(aa), 572.326(aa), 573.326(aa), 574.326(aa), 575.326(aa) or 576.325A 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 Student (Temporary) Class TU visa.

Part 2 Directions

ASSESSING THE GENUINE TEMPORARY ENTRANT CRITERION

1. Decision makers should not use the factors specified in this Direction as a checklist. Rather, they are intended to guide decision makers to weigh up 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 or not, on balance, the genuine temporary entrant criterion is satisfied, by:
 - a. considering the applicant against all factors specified in this Direction; and
 - b. taking into account 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 concern.
 - c. The applicant intends to study in a field unrelated to their previous studies or employment.
 - d. Apparent inconsistencies in information provided by the applicant in their Student visa application.
5. An application for a Student visa must 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 must have regard to the applicant's circumstances in their home country and the applicant's potential circumstances in Australia.
7. For primary applicants of subclass 570, 571, 572, 573, 574, 575 and 576 Student visas, decision makers must also 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 is intended primarily for maintaining residence in Australia.

The applicant's circumstances in their home country

9. In considering the applicant's circumstances in their home country, decision makers must have regard to the following factors:
 - a. Whether the applicant has sound reasons for not undertaking the study in the home country or region if a similar course is already available there. Decision makers should allow for any reasonable motives as 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 they 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. This 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.
 - 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 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.
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 must 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 program is being used to circumvent the intentions of the migration program.
 - c. Whether the Student visa is being used to maintain ongoing residence.
 - d. Whether the primary and secondary applicant(s) have entered into a relationship of concern for Student visa purposes. Where it has been determined that an applicant and dependant have contrived their relationship for Student visa purposes, the decision maker can find that both applicants do not satisfy the genuine temporary entrant criterion.
 - 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 could be 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 must have regard to the following factors in 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.
 - b. Relevance of the course to the student's past or proposed future employment either in their home country or a third country.
 - 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. In considering the applicant's immigration history, decision makers must 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 they were refused.
 - ii. If the applicant has previously applied for visas to other countries, whether they were refused a visa and the circumstances that led to visa refusal.
 - b. Previous travels to Australia or other countries, including:
 - i. 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.
 - ii. whether the applicant previously held a visa that was cancelled or considered for cancellation, and the associated circumstances.
 - iii. the amount of time the applicant has spent in Australia and whether the Student 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.
 - iv. if the applicant has travelled to countries other than Australia, whether they complied with the immigration 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 subclass 570, 571, 572, 573, 574, 575 or 576 visa is a minor, decision makers must have regard to the intentions of a parent, legal guardian or spouse of the applicant.

ANY OTHER RELEVANT MATTERS

16. Decision makers must 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.