Migration and Refugee Division Commentary

Visitor

SUBCLASS 417 – WORKING HOLIDAY VISA

Overview[1]

The Working Holiday (Temporary) (Class TZ) visa class contains only one subclass, being the Subclass 417 (Working Holiday) visa. The visa allows young people (18 to 30 or 35 years old)[2] from specified countries to have an extended holiday supplemented by short term employment. For visa applications made from 1 July 2019, the maximum number of Subclass 417 visas that a person may hold in Australia was increased from two to three.[3]

The Tribunal only has jurisdiction in relation to onshore applications for working holiday visas and only second and third working holiday visas can be applied for onshore. Therefore, this commentary focuses on applications for second and third working holiday visas.

The second and third working holiday visas are designed to encourage visa holders to work in industries in regional Australia where there are significant labour shortages, particularly in the agricultural sector.

Subclass 417 is a temporary visa, permitting holders who are outside Australia when the visa is granted to travel to Australia within 12 months of the grant and remain in, leave and re-enter Australia on multiple occasions for 12 months from the date of first entry.[4] If the applicant was in Australia when their second or third working holiday visa was granted and held a working holiday visa when they made their visa application, the visa will allow them to stay in, leave and re-enter Australia on multiple occasions for 12 months from the day that their previous working holiday visa would have otherwise ceased to be in effect.[5] If the applicant was in Australia but not the holder of a working holiday visa, the second or third working holiday visa will allow the applicant to stay in, leave and re-enter Australia on multiple occasions for 12 months from the date the visa is granted.[6]

The Subclass 417 Working Holiday visa is different to the Subclass 462 Work and Holiday visa which is available to young people from a more limited range of countries.[7] Refusals for second and third Subclass 462 visa applications are also reviewable by the Tribunal.[8]

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] The maximum age increased from 30 to 35 (or a younger age if that age is specified for the applicant's passport type) from 1 July 2017: cl 417.211(2)(b) as amended by the *Migration Legislation Amendment (2017 Measures No 3) Regulations 2017* (Cth) (F2017L00816).
[3] See the amendments made by the *Migration Amendment (Working Holiday Maker) Regulations 2019* (Cth) (F2019L00196).
[4] cl 417.511(1).
[5] cl 417.511(2). For applicants for second and third Subclass 417 visas who carried out special Subclass 417 work under COVID-19 pandemic event visas and are counting that work towards the work requirements for the grant of the second or third visa (see further discussion of this concession below), if the applicant held an eligible 408 visa on the day they applied for the second or third Subclass 417 visa, then the second or third visa will be valid from the day that the eligible 408 visa would have otherwise ceased to be in effect: cls 9205(3), 9206(1)(b)(iii) and 9206(6) of sch 13 to the Regulations.
[6] cl 417.511(3).
[7] 1224A(3)(a). For the applicable instrument setting out the countries with which Australia has arrangements for Work and Holiday visas, see the WorkHolApp tab in the Register of Instruments – Visitor Visas.
[8] Only visa applications validly made in the migration zone are reviewable under s 338(2) and only second and third Subclass 462 visas can be applied for onshore: item 1224A(3)(c). To apply for a second or third Subclass 462 visa, an applicant must declare that they have undertaken 'specified Subclass 462 work' while holding their first or second Subclass 462 visa respectively: items 1224A(3)(c)(ii) and 1224A(3)(c)(iia). For the applicable instrument see the '462Work' tab in the Register of Instruments – Visitor Visas. There are concessions to the requirement to have undertaken the work while holding the previous Subclass 462 visa for applications made on or after 14 November 2020, allowing applicants who undertook 'special Subclass 462 work' while holding an 'eligible 408 visa' or an associated bridging visa to count that work towards the requirements in

Requirements for making a valid visa application

The requirements for a valid application for the Subclass 417 (Working Holiday) visa are set out in item 1225 of Schedule 1 to the Regulations. Different requirements apply depending upon whether the applicant has previously held a Subclass 417 visa, and if so, whether the application is for a second or third Subclass 417 visa. There are concessions for applicants affected by the COVID-19 pandemic, so that a 'COVID-19 affected visa'[9] is disregarded when counting the number of Subclass 417 visas that a person has previously held and when assessing certain Schedule 1 criteria.

Form and fee requirements

An application for a Subclass 417 visa is validly made if:

- it is made on the prescribed form[10]
- the visa application charge is met, unless the applicant is in a class of persons specified in a legislative instrument[11] and
- it is made at the prescribed place and in the prescribed manner.[12]

Item 1225 contains no provisions for an applicant to combine the application with that of a member of a family unit.

Additional requirements for applicants for a first[13] Subclass 417 visa

Applicants for a first Subclass 417 visa:

- must be outside Australia when they lodge the application[14]
- must hold a working holiday eligible passport (as specified in the relevant legislative instrument);[15] and

items 1224A(3)(c)(ii) and 1224A(3)(c)(iia): cls 9207(1)–(2) and 9208(1)–(2) of sch 13 to the Regulations as inserted by *Home Affairs Legislation Amendment (2020 Measures No 2) Regulations* (Cth) (F2020L01427).

[9] 'COVID-19 affected visa' means an 'offshore COVID-19 affected visa' (defined in regs 1.15P(1) and (2)) or an 'onshore COVID-19 affected visa' (defined in regs 1.15P(2A) and (2B)): reg 1.03. See also the discussion below.

[10] Item 1225(1).The approved form is that specified in an instrument under reg 2.07(5). For the applicable instrument see the 'WorkHolApp' tab in the Register of Instruments – Visitor Visas.

[11] Item 1225(2). For visa applications made on or after 1 July 2021, the Minister may specify in a legislative instrument a class of persons who are not required to pay a VAC: item 1225(2)(a)(i) as inserted by item 5 of sch 2 of *Home Affairs Legislation Amendment (2021 Measures No. 1) Regulations 2021* (F2021L00852). For the applicable instrument see the 'WorkHolNilVac' tab in the Register of Instruments – Visitor Visas.

[12] Item 1225(3). The application must be made as specified in a legislative instrument for 1225(3) under reg 2.07(5). For the applicable instrument see the 'WorkHolApp' tab in the Register of Instruments – Visitor Visas.

[13] For visa applications made on or after 1 July 2021, an 'offshore COVID-19 affected visa' is disregarded when assessing whether a person has previously been the holder of a Subclass 417 visa in Australia: item 1225(3A) as amended by item 14 of sch 1 of F2022L00244. This amendment preserved the effect of repealed item 1225(3BA) which was inserted by F2021L00852. 'Offshore COVID-19 affected visa' is defined in regs 1.15P(1) and (2). See also the discussion below.

[14] Item 1225(3A)(a).

[15] Item 1225(3A)(b). For the applicable instrument see the 'WorkHolApp' tab in the Register of Instruments – Visitor Visas.

- the applicant must not have previously been in Australia as the holder of a Subclass 462 (Work and Holiday) visa.[16]

Additional requirements for applicants for second and third Subclass 417 visas[17]

If the application is for a second Subclass 417 visa:

- for applications made *before 14 November 2020* - the application must be accompanied by a declaration that the applicant has carried out 'specified work' in regional Australia for a total period of at least 3 months as the holder of that visa.[18] 'Specified work' and 'regional Australia' are specified in an instrument in writing.[19]

- for applications made *on or after 14 November 2020* - the application must be accompanied by a declaration that the applicant has carried out 'specified Subclass 417 work' for a total period of at least 3 months as the holder of that visa.[20] 'Specified Subclass 417 work' is defined as work that was carried out in one or more specified areas of Australia; and was of one or more kinds specified by a legislative instrument made under reg 1.15FAA.[21] For applications made on or after 5 March 2022, the requirement that the application be accompanied by a declaration does not apply if the applicant holds a passport of a kind specified by the Minister in a legislative instrument made for the purposes of item 1225(3BA)[22]; or the application for a Subclass 417 visa is made between 5 March 2022 and 31 December 2022, the applicant holds or held an 'onshore COVID-19 affected visa'[23] and the applicant has not been granted a Subclass 417 visa on the basis of another application made on or after 5 March 2022.[24]

If the application is for a third Subclass 417 visa:

- for applications made *before 14 November 2020* - the application must be accompanied by a declaration by the applicant that the applicant has carried out

[16] Item 1225(3C).
[17] A 'COVID-19 affected visa' is disregarded when counting the number of Subclass 417 visas the applicant has previously held: items 1225(3B)(c) and (ca) as amended by F2022L00244. The term 'COVID-19 affected visa' means an 'offshore COVID-19 affected visa' (defined in regs 1.15P(1) and (2)) or an 'onshore COVID-19 affected visa' (defined in regs 1.15P(2A) and (2B)): reg 1.03. See also the discussion below.
[18] Item 1225(3B)(c) as in force immediately prior to the amendments made by F2020L01427.
[19] Item 1225(5) as in force immediately prior to the amendments made by F2020L01427. For the relevant instrument, see the '417Work&RegAust' tab of the Register of Instruments – Visitor Visas.
[20] Item 1225(3B)(c) as amended by F2020L01427. Applicants who undertook 'special Subclass 417 work' while holding an 'eligible 408 visa' or an associated bridging visa may also treat that work as if it was carried out as the holder of the first Subclass 417 visa so that it can be counted towards the requirement in item 1225(3B)(c) for the second Subclass 417 visa application: cl 9205(1)–(2) of sch 13 to the Regulations as inserted by F2020L01427. See further discussion of this concession below.
[21] Regs 1.03 and 1.15FAA as inserted by F2020L01427. There is currently no instrument made under reg 1.15FAA, however, any work carried out before 14 November 2020 that was 'specified work in regional Australia' is taken to be 'specified Subclass 417 work' and a legislative instrument that specified a place for the purposes of 'regional Australia' that was in force immediately before 14 November 2020 will continue to be in force as if it was made under the new reg 1.15FAA and specifies that place for the purposes of 'specified Subclass 417 work': cls 9201(2)–(3) of sch 13 of the Regulations as inserted by F2020L01427.
[22] Item 1225(3BA), inserted by item 19 of sch1 to F2022L00244. At the time of writing there is no instrument specifying kinds of passports for item 1225(3BA).
[23] 'Onshore COVID-19 affected visa' is defined in reg 1.15P(2A) and (2B). See also the discussion below.
[24] Item 1225(3BB), inserted by item 19 of sch1 to F2022L00244.

specified work in regional Australia for a total period of at least 6 months; all of that work was carried out either while holding their second Subclass 417 visa or while holding a bridging visa that was in effect and was granted on the basis that they applied for a second Subclass 417 visa; and all of that work was carried out on or after 1 July 2019.[25]

- for applications made *on or after 14 November 2020* - the application must be accompanied by a declaration by the applicant that the applicant has carried out specified Subclass 417 work for a total period of at least 6 months; all of that work was carried out either while holding their second Subclass 417 visa or while holding a bridging visa that was in effect and was granted on the basis that they applied for a second Subclass 417 visa;[26] and all of that work was carried out on or after 1 July 2019.[27] For applications made on or after 5 March 2022, the requirement that the application be accompanied by a declaration does not apply if the applicant holds a passport of a kind specified in a legislative instrument made for the purposes of item 1225(3BA)[28]; or the application for a Subclass 417 visa is made between 5 March 2022 and 31 December 2022, the applicant holds or held an 'onshore COVID-19 affected visa'[29] and the applicant has not been granted a Subclass 417 visa on the basis of another application made on or after 5 March 2022.[30]

Additionally, for both second and third Subclass 417 visa applications:

- the applicant must not be in immigration clearance[31]
- the applicant has previously held not more than:
  - *for applications made from 1 July 2019* – 2 Subclass 417 visas in Australia (including any Subclass 417 visa held by the applicant at the time of application)[32]
  - *for applications made on or after 22 March 2014 and before 1 July 2019* – 1 Subclass 417 visa in Australia[33]
- the applicant must hold a working holiday eligible passport (as specified in the relevant legislative instrument)[34]. For visa applications made on or after 5 March 2022, this requirement does not apply where the applicant is in Australia and held a

[25] Item 1225(3B)(ca) as in force immediately prior to the amendments made by F2020L01427.
[26] Applicants who undertook 'special Subclass 417 work' while holding an 'eligible 408 visa' or an associated bridging visa may also treat that work as if it was carried out as the holder of the second Subclass 417 visa so that it can be counted towards the requirement in item 1225(3B)(ca) for the third Subclass 417 visa application: cl 9206(1)–(2) of sch 13 to the Regulations as inserted by F2020L01427. See further discussion of this concession below.
[27] Item 1225(3B)(ca) as amended by F2020L01427.
[28] Item 1225(3BA), inserted by item 19 of sch1 to F2022L00244. At the time of writing there is no instrument specifying kinds of passports for item 1225(3BA).
[29] 'Onshore COVID-19 affected visa' is defined in reg 1.15P(2A) and (2B). See also the discussion below.
[30] Item 1225(3BB), inserted by item 19 of sch1 to F2022L00244.
[31] Item 1225(3B).
[32] Item 1225(3B)(d) was repealed and replaced by F2019L00196. The amendment applies to applications made on or after 1 July 2019.
[33] Item 1225(3B)(d) as in force immediately prior to the amendments made by F2019L00196 which applied to applications made on or after 1 July 2019.
[34] Item 1225(3B)(e).

working holiday eligible passport when entering Australia and the passport expired after the applicant entered Australia.[35]

- if the applicant is in Australia at time of application, the applicant must hold a substantive visa or have held a substantive visa at any time in the period of 28 days immediately before making an application.[36] This requirement does not apply if the application is made between 5 March 2022 and 31 December 2022 and the applicant holds a bridging visa.[37]

- the applicant must not have previously been in Australia as the holder of a Subclass 462 (Work and Holiday) visa.[38]

As noted above, if the applicant has already reached the maximum number of Subclass 417 visas that can be held in Australia, they cannot make a valid application for the visa.

Visa criteria

All applicants for a Subclass 417 visa must meet the primary criteria at time of application and time of decision. There are no secondary criteria.[39] There are concessions for applicants affected by the COVID-19 pandemic, so that a 'COVID-19 affected visa'[40] is disregarded when counting the number of Subclass 417 visas that a person has previously held and when assessing certain Schedule 2 criteria.

Time of application criteria

At the time of application, cl 417.211 requires that:

- for applications made before 1 July 2017, the applicant has turned 18 and has not turned 31, or, for applications made from 1 July 2017, the applicant has turned 18 and is no more than 35 years of age, or a younger age if that age is specified for the kind of passport that the applicant holds[41] or, if cl 417.211(1A)(a) applies, held.[42]

- the applicant holds a working holiday eligible passport (as specified in the relevant legislative instrument).[43] For visa applications made on or after 5 March 2022, this

[35] Item 1225(3BC) as inserted by item 19 of sch1 to F2022L00244.
[36] Item 1225(3B)(f).
[37] Item 1225(3BD) as inserted by item 19 of sch1 to F2022L00244.
[38] Item 1225(3C). ,
[39] cl 417.3.
[40] 'COVID-19 affected visa' means an 'offshore COVID-19 affected visa' (defined in regs 1.15P(1) and (2)) or an 'onshore COVID-19 affected visa' (defined in regs 1.15P(2A) and (2B)): reg 1.03. See also the discussion below.
[41] cl 417.211(2)(b). This provision was amended by item 1, sch 9 of F2017L00816 for visa applications made from 1 July 2017. For the instrument setting out countries for which a younger age limit is specified, see the 'WorkHolApp' tab in the Register of Instruments – Visitor Visas.
[42] cl 417.211(2)(b)(ii) as amended by item 21 of sch1 to F2022L00244 for visa applications made on or after 5 March 2022. Clause 417.211(1A)(a) is an exception to the requirement that an applicant holds a working holiday eligible passport of the kind, or of one of the kinds, specified in a legislative instrument made by the Minister, as set out in paragraph 417.211(2)(a). The exception is available where the applicant is in Australia; and when entering Australia, the applicant held a working holiday eligible passport specified for cl 417.211(2); and the passport expired after the applicant entered Australia.
[43] This requirement is in cl 417.211(2)(a) for applications made from 1 July 2017 due to amendments made by item 1, sch 9 of F2017L00816. For the relevant instrument see the 'WorkHolApp' tab in the Register of Instruments – Visitor Visas. For visa applications made before 1 July 2017, see cl.417.211(2)(c).

requirement does not apply if the applicant is in Australia; and when entering Australia, the applicant held a working holiday eligible passport (as specified in the relevant legislative instrument)[44]; and the passport expired after the applicant entered Australia.[45]

- the Minister is satisfied that the applicant seeks to enter and remain in Australia as a genuine visitor whose principal purpose is to spend a holiday in Australia[46]

- the Minister is satisfied that the applicant has sufficient money for the fare to the applicant's intended overseas destination on leaving Australia and personal support for the purposes of a working holiday[47]

- the Minister is satisfied that the applicant has a reasonable prospect of obtaining employment in Australia[48]

- the Minister is satisfied that the applicant will not be accompanied by dependent children during his or her stay in Australia;[49] and

- *if the application is for second[50] Subclass 417 visa* – the Minister is satisfied that the applicant has carried out specified work[51] in regional Australia[52] for applications made before 14 November 2020, or for applications made on or after 14 November 2020 specified Subclass 417 work,[53] for a total period of at least 3 months as the holder of a Subclass 417 visa.[54] For visa applications made on or after 5 March 2022, the specified work/specified Subclass 417 work requirement does not apply if the applicant holds a passport of a kind specified in a legislative instrument made for the purposes of subitem 1225(3BA) of Schedule 1;[55] or the application for a Subclass 417 visa is made between 5 March 2022 and 31 December 2022, the applicant holds or held an 'onshore COVID-19 affected visa'[56] and the applicant has not been granted a Subclass 417 visa on the basis of another application made on or after 5

[44] For the relevant instrument see the 'WorkHolApp' tab in the Register of Instruments – Visitor Visas.
[45] See cl 417.211(1A)(a) as inserted by item 20 of sch1 to F2022L00244.
[46] cl 417.211(4)(a).
[47] cl 417.211(4)(b).
[48] cl 417.211(4)(c).
[49] cl 417.211(4)(d). This provision was inserted on 27 October 2008 by *Migration Amendment Regulations 2008 (No 7)* (Cth) (SLI 2008, No 205). These amending regulations also omitted cl 417.211(2)(a) which previously required that the applicant had no dependent children.
[50] A 'COVID-19 affected visa' is disregarded when counting the number of Subclass 417 visas the applicant has previously held: see cl 417.211(7) as inserted by F2021L00852. COVID-19 affected visa' means an 'offshore COVID-19 affected visa' (defined in regs 1.15P(1) and (2)) or an 'onshore COVID-19 affected visa' (defined in regs 1.15P(2A) and (2B)): reg 1.03. See also the discussion below.
[51] See the '417Work&RegAust' tab of the Register of Instruments – Visitor Visas for a list of the 'specified work'.
[52] Areas having postcodes specified in the relevant Instrument are taken to be 'regional Australia' for the purposes of the Working Holiday visa. See '417Work&RegAust' tab of the Register of Instruments – Visitor Visas for a list of the prescribed areas.
[53] See the '417Work&RegAust' tab of the Register of Instruments – Visitor Visas for the relevant instruments.
[54] cl 417.211(5). For applications made on or after 14 November 2020, applicants who undertook 'special Subclass 417 work' while holding an 'eligible 408 visa' or an associated bridging visa may also count that work towards the total work requirements for the second Subclass 417 visa grant: cls 9205(1)–(2) of sch 13 to the Regulations as inserted by F2020L01427. See further discussion of this concession below. Note that for visa applications made from 1 December 2015 to 30 June 2019, cl 417.211(5) required that the total period of work carried out, whether on a full-time, part-time or casual basis, must be or be the equivalent of at least 3 months of full-time work: see the amendments made by the *Migration Legislation Amendment (2015 Measures No 3) Regulation 2015* (Cth) (SLI 2015, No 184). For visa applications made from 1 July 2019, this requirement was omitted and replaced with a requirement that the applicant has carried out a period of specified work for a total period of at least 3 months: see cl 417.211(5) as amended by F2019L00196.
[55] At the time of writing there is no instrument specifying kinds of passports for item 1225(3BA).
[56] 'Onshore COVID-19 affected visa' is defined in reg 1.15P(2A) and (2B). See also the discussion below.

March 2022.[57] In addition, for applications made from 1 December 2015, the applicant must be remunerated for the work in accordance with relevant Australian legislation and awards.[58] For applications made after 28 July 2021, work carried out for an excluded employer, as defined in reg 1.15FB, cannot be counted towards this requirement.[59]

- *if the application is for third[60] Subclass 417 visa* – the Minister is satisfied that the applicant has carried out specified work in regional Australia for applications made before 14 November 2020, or for applications made on or after 14 November 2020 specified Subclass 417 work, for a total period of at least 6 months; that all of that work was carried out either while holding their second Subclass 417 visa or while holding a bridging visa that was in effect and was granted on the basis that they applied for a second Subclass 417 visa (made at a time when they held the first Subclass 417 visa); that all of that work was carried out after 1 July 2019; and that the applicant has been remunerated for that work in accordance with relevant Australian legislation and awards.[61] For visa applications made on or after 5 March 2022, the specified work/specified Subclass 417 work requirement does not apply if the applicant holds a passport of a kind specified in a legislative instrument made for the purposes of subitem 1225(3BA) of Schedule 1;[62] or the application for a Subclass 417 visa is made between 5 March 2022 and 31 December 2022, the applicant holds or held an 'onshore COVID-19 affected visa'[63] and the applicant has not been granted a Subclass 417 visa on the basis of another application made on or after 5 March 2022.[64] For applications made after 28 July 2021, work carried out for an excluded employer, as defined in reg 1.15FB, cannot be counted towards this requirement.[65]

Time of decision criteria

At the time of decision, cl 417.221 requires that:

- the applicant continues to meet the time of application criteria except for the age criterion[66]. However, for visa applications made on or after 5 March 2022, the specified work/specified Subclass 417 work requirement does not need to be satisfied where the applicant either:

[57] cl 417.211(1A)(b) and (c) as inserted by item 20 of sch1 to F2022L00244.
[58] cl 417.211(5)(c) applies to visa applications from 1 December 2015 but does not apply in relation to work carried out before that date: SLI 2015, No 184.
[59] cl 417.211(5)(d) as inserted by F2021L01030. At time of writing there is no instrument specifying employers for reg 1.15FB.
[60] A 'COVID-19 affected visa' is disregarded when counting the number of Subclass 417 visas the applicant has previously held: see cl 417.211(7) as inserted by F2021L00852. 'COVID-19 affected visa' means an 'offshore COVID-19 affected visa' (defined in regs 1.15P(1) and (2)) or an 'onshore COVID-19 affected visa' (defined in regs 1.15P(2A) and (2B)): reg 1.03. See also the discussion below.
[61] cl 417.211(6). For applications made on or after 14 November 2020, applicants who undertook 'special Subclass 417 work' while holding an 'eligible 408 visa' or an associated bridging visa may also count that work towards the total work requirements for the third Subclass 417 visa grant: cls 9206(1)–(2) of sch 13 to the Regulations as inserted by F2020L01427. See further discussion of this concession below.
[62] At the time of writing there is no instrument specifying kinds of passports for item 1225(3BA).
[63] 'Onshore COVID-19 affected visa' is defined in reg 1.15P(2A) and (2B). See also the discussion below.
[64] cl 417.211(1A)(b) and (c) as inserted by item 20 of sch1 to F2022L00244.
[65] cl 417.211(6)(f) as inserted by F2021L01030. At time of writing there is no instrument specifying employers for reg 1.15FB.
[66] cl 417.221(2)(a) for visa applications made before 5 March 2022. For visa applications made on or after 5 March 2022, cl 417.221(2)(a) was repealed and replaced by new cl 417.221(a) and (aa): see item 22 of sch1 to F2022L00244.

  - holds a passport of a kind specified in a legislative instrument made for the purposes of subitem 1225(3BA) of Schedule 1;[67] or
  - made the application between 5 March 2022 and 31 December 2022, holds or held an 'onshore COVID-19 affected visa'[68] and has not been granted a Subclass 417 visa on the basis of another application made on or after 5 March 2022[69]
- the applicant holds a working holiday eligible passport (as specified in the relevant legislative instrument)[70]
- the applicant satisfies certain public interest and special return criteria[71]
- the Minister is satisfied that the applicant intends to comply with any conditions subject to which the visa is granted[72]
- approval of the application would not exceed any cap on Working Holiday visas or classes of visa including the Working Holiday visa;[73] and
- Foreign Affairs students meet other special requirements,[74] unless the Minister is satisfied that there are certain reasons for waiving the requirements.[75]
- *for applications lodged from 1 July 2019* – cl 417.222 requires applicants for second and third Subclass 417 visas to have complied substantially with the conditions that applied to any visa held by the applicant and has not previously held more than 2 Subclass 417 visas in Australia (including any Subclass 417 visa held by the applicant at the time of decision on the application).[76]
- *for applications lodged on or after 22 March 2014 and before 1 July 2019* – cl 417.222 requires that applicants for a second Subclass 417 visa have complied substantially with the conditions that applied to any visa held by the applicant and has not previously held more than one Subclass 417 visa in Australia.[77]

The application can be lodged either in or outside of Australia; however, if the applicant was outside Australia when the application was lodged, he or she must be outside Australia when the visa is granted. If the applicant was in Australia when the visa application was lodged, he or she must be in Australia when the visa is granted.[78]

[67] cl 417.221(2)(aa) as inserted by item 22 of sch1 to F2022L00244. At the time of writing there is no legislative instrument made for the purposes of subitem 1225(3BA) of Schedule 1.
[68] 'Onshore COVID-19 affected visa' is defined in reg 1.15P(2A) and (2B). See also the discussion below.
[69] cl 417.221(2)(aa) as inserted by item 22 of sch1 to F2022L00244.
[70] cl 417.221(2)(a) for visa applications made before 5 March 2022 and cl 417.221(2A) for visa applications made on or after 5 March 2022. Clause 417.221(2A) was inserted by item 23 of sch1 to F2022L00244. For the relevant instrument see the 'WorkHolApp' tab in the Register of Instruments – Visitor Visas.
[71] cls 417.221(2)(b) and 417.221(3).
[72] cl 417.221(4).
[73] cl 417.221(5). There are currently no caps in place.
[74] cl 417.221(6). To meet this requirement, the applicant must be a Foreign Affairs student or a Foreign Affairs recipient, and have the support of the Foreign Minister for the grant of the visa.
[75] The Minister may waive the requirements of cl 417.221(6) if the Minister is satisfied that, in the particular case, waiver is justified by compelling circumstances that affect the interests of Australia; or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen.
[76] Note that a reference in cl 417.222(1) to a Subclass 417 visa does not include a 'COVID-19 affected visa': cl 417.222(2) as inserted by F2021L00852 for visa applications made on or after 1 July 2021. COVID-19 affected visa' means an 'offshore COVID-19 affected visa' (defined in regs 1.15P(1) and (2)) or an 'onshore COVID-19 affected visa' (is defined in regs 1.15P(2A) and (2B)): reg 1.03. See also the discussion below.
[77] cl 417.222 amended by SLI 2014, No 30, sch 1, pt 1 item 245.The amendment applies to applications made on or after 22 March 2014.
[78] cl 417.412

Key issues

There is currently no case law in relation to this visa class and its requirements. As only decisions to refuse second and third Working Holiday visas are reviewable by the Tribunal, reviews of Subclass 417 visa refusals tend to focus on the requirement for visa applicants to have carried out the relevant period of specified work. The Tribunal also commonly conducts reviews of s 116 cancellations of Subclass 417 visas for breach of work limitation or as circumstances permitting the grant of the visa no longer exist. Discussion of the key issues is set out below.

Not accompanied by dependent children

It is a criterion for the grant of the visa that the applicant is not accompanied by dependent children during their stay.[79] 'Dependent child' is defined in reg 1.03. This is a time of application criterion which the applicant must continue to satisfy at time of decision.[80] This does not exclude pregnant women from applying, however, if they give birth to a child during the visa period they may come within the cancellation provisions in s 116(1)(a).[81]

Genuine visitor

The Regulations require that at the time of application and time of decision the applicant seeks to enter and remain in Australia as a genuine visitor whose principal purpose is to spend a holiday in Australia. The decision-maker must be satisfied that the visa applicant will not work or study beyond what is permitted by the visa and intends to depart within the period of stay of the visa granted. Policy guidance suggests that applicants would only fail to meet this requirement if there was strong evidence that they would breach the conditions of the visa (including the condition[82] to work with any employer for no more than 6 months).[83]

Cases which have considered the visitor visa criteria in relation to purpose of visit and genuine visit may be relevant, however, the criteria for visitor visas are worded differently and this would need to be taken into account if applying the case law. In *MIMA v Saravanan*, Marshall J held that the 'purpose' of the visitor visa application should be determined by reference to what the applicant intended to do during the duration of the requested visit.[84] Therefore, a person who intends to extend their stay in Australia after their working holiday may still be considered to be a genuine visitor for the purpose of a Subclass 417 visa application.[85] However, the criteria being considered in *Saravanan* related to a purpose 'other than business or medical treatment' whereas for a Subclass 417 visa the Tribunal would need to be satisfied that the applicant's 'principal purpose is to spend a holiday in Australia'.

[79] cl 417.211(4)(d). This provision was inserted on 27 October 2008 by SLI 2008, No 205. These amending regulations also omitted cl 417.211(2)(a) which previously required that the applicant had no dependent children.
[80] cls 417.211(4)(d), 417.221(2)(a).
[81] Policy – Sch2Visa417 – Working Holiday – Not to be accompanied by dependent children (re-issue date 18/11/2017).
[82] Visa condition 8547.
[83] Policy – Sch2Visa417 – Working Holiday – Genuine Visitor (re-issue date 18/11/2017).
[84] *MIMA v Saravanan* (2002) 116 FCR 437 at [39].
[85] Policy – Sch2 Visa417 – Working Holiday – Genuine Visitor (re-issue date 18/11/2017).

Sufficient money

The Regulations require that at the time of application and time of decision the applicant has sufficient money for the fare to the applicant's intended overseas destination on leaving Australia; and personal support for the purposes of a working holiday.[86] Departmental policy states that offshore applicants should only be required to demonstrate they have sufficient money for personal support for the initial stage of their working holiday (3 months) as they are able to supplement their funds through short term employment in Australia. The amount of money needed to be considered sufficient will vary but the Department generally regards AUD$5000, in addition to money for return airfare, to be sufficient to cover the initial 3 month stay of a 12 month working holiday.[87] The Regulations require the applicant to have sufficient money for personal support for the purposes of a working holiday, thus three months appears to be an arbitrary figure not required by the Regulations. Regard would need to be had to all the applicant's circumstances, including his or her ability to find and undertake short-term employment.

Departmental policy also adopts a liberal approach in relation to onshore applicants by not requiring them to provide evidence of sufficient money for a fare to leave Australia and regarding them as having sufficient money for personal support unless the Department has received adverse information suggesting otherwise.[88]

Specified work / specified Subclass 417 work

For applications made before 14 November 2020, an applicant who is applying for a second Subclass 417 visa must have carried out at least 3 months of specified work in regional Australia while holding a Subclass 417 visa.[89] An applicant who is applying for a third Subclass 417 visa must have carried out at least 6 months' specified work in regional Australia while holding the second Subclass 417 visa or a bridging visa that was in effect and was granted on the basis of the application for the second Subclass 417 visa (made at a time when the applicant held the first Subclass 417 visa).[90] For applications made on or after 14 November 2020, the references to 'specified work in regional Australia' were replaced with 'specified Subclass 417 work'.[91] Any work carried out before 14 November 2020 that was 'specified work in regional Australia' is taken to be 'specified Subclass 417 work'.[92] The specified work/specified Subclass 417 work criteria are time of application criteria which must continue to be satisfied at time of decision.

[86] cls 417.211(4)(b), 417.221(2).
[87] Policy – Sch2Visa417 – Working Holiday – Money for personal support (re-issue date 18/11/2017).
[88] Policy – Sch2Visa417 – Working Holiday – Money for personal support, see also Fare to leave Australia (re-issue date 18/11/2017).
[89] cls 417.211(5), 417.221(2)(a).
[90] cls 417.211(6), 417.221(2)(a).
[91] cls 417.211(5)(a) and 417.211(6)(a) as amended by F2020L01427. For applications made on or after 14 November 2020, F2020L01427 also inserted concessions to the requirements to have undertaken the relevant work while holding the first or second Subclass 417 visa, allowing applicants who carried out critical health work as the holder of an eligible 408 visa or an associated bridging visa to count that work towards the work requirements for the grant of a second or third Subclass 417 visa: cls 9205(1)–(2) and 9206(1)–(2) of sch 13 to the Regulations. Please see below for further discussion of these concessions.
[92] cl 9201(2) of sch 13 to the Regulations as inserted by F2020L01427.

What is the relevant instrument?

For visa applications made before 14 November 2020, 'specified work' and 'regional Australia' are defined by reference to a written instrument made under item 1225(5) of Schedule 1.[93] The relevant instruments appear to be those that were in force immediately before 14 November 2020.[94] This is because the transitional provisions that accompanied the *Home Affairs Legislation Amendment (2020 Measures No 2) Regulations 2020* (which repealed the definitions of 'specified work' and 'regional Australia' in item 1225(5) and introduced the new definition of 'specified Subclass 417 work' in reg 1.15FAA) provide that the instruments specifying a place for the purposes of 'regional Australia' and kinds of work for 'specified work' that were in force immediately before 14 November 2020 continue to be in force as if they were made under reg 1.15FAA.[95] Further, the transitional provisions make clear that reg 1.15FAA does not apply to a visa application made before 14 November 2020.[96] Accordingly, it appears that a visa application made before 14 November 2020 is subject to the definitions in, and the instruments made under, item 1255(5).

For visa applications made on or after 14 November 2020, 'specified Subclass 417 work' is defined as work that was carried out in one or more specified areas of Australia; and was of one or more kinds specified by a legislative instrument, made under reg 1.15FAA.[97] The applicable instrument appears to be that in force at the time of decision, rather than that in force at the time of application. The current instrument, LIN 22/012, repealed the previous instrument, LIN 20/182, without any transitional or savings provisions, suggesting that LIN 20/182 could no longer have any operation for reg 1.15FAA from the time it was revoked.[98] Further, LIN 22/012 also broadened the scope of 'specified Subclass 417 work' that could be counted over LIN 20/182 and would be the more favourable of the two.[99] While the obligation to declare that specified Subclass 417 work has been carried out is invoked at the time of application,[100] determining the question by reference to the instrument in effect at time of decision better accords with the purpose of the second and third Working Holiday visa programs which is to help alleviate labour shortages in regional areas.[101] However there has not been any judicial consideration of this and the matter is not beyond doubt.

[93] Item 1225(5) of sch 1 to the Regulations and cl 417.111 as in force immediately prior to the amendments made by F2020L01427. See the '417 Work&RegAust' tab of the Register of Instruments – Visitor Visas for the relevant instrument.
[94] The legislative instruments that were in force immediately before 14 November 2020 are LIN 20/182 (for visa applications made on or after 19 August 2020) and LIN 20/103 (for visa applications made but not finally determined before 19 August 2020). See the '417 Work&RegAust' tab of the Register of Instruments – Visitor Visas.
[95] cls 9201(3) - (4) of Schedule 13 to F2020L0142.
[96] cl 9201(1) of Schedule 13 to F2020L0142.
[97] Regs 1.03 and 1.15FAA as inserted by F2020L01427. At the time of writing, there is one instrument made under reg 1.15FAA, LIN 22/012. See the '417 Work&RegAust' tab of the Register of Instruments – Visitor Visas.
[98] However, LIN 22/012 would not appear to apply to all undetermined applications as it is made under reg 1.15FAA and specifies the kinds of work and areas for the purposes of the definition of 'specified Subclass 417 work' and therefore cannot be an instrument for the purposes of the older definitions of 'specified work' and 'regional Australia'. Therefore, LIN 22/012 appears to only apply to visa applications made from 14 November 2020 and as discussed above, visa applications made before 14 November 2020 appear to be subject to the instruments made immediately before that time under item 1225(5) (LIN 20/182 for visa applications made on or after 19 August 2020, and LIN 20/103 for visa applications made but not finally determined before 19 August 2020).
[99] LIN 22/012 adds certain tourism and hospitality work carried out after 21 June 2021 in Northern Australia and Remote and Very Remote Australia, and paid and volunteer flood recovery work carried out after 31 December 2021 in flood affected areas,[99] as specified Subclass 417 work.
[100] Item 1225(3B) of sch 1 to the Regulations.

Types of work specified in the instrument

The types of work specified include plant and animal cultivation, fishing and pearling, tree farming and felling, mining and construction as well as specific subsets of these types of work. In addition, LIN 20/103, which commenced on 5 March 2020, specifies 'bushfire recovery work' carried out after 31 July 2019 as specified work. The term 'bushfire recovery work' is defined in the instrument and includes work undertaken on a volunteer basis to assist with bushfire recovery efforts in specified areas.[102] Note however that it is unclear how bushfire recovery work undertaken on a volunteer basis sits with the requirement for the grant of the visa that the applicant must have been remunerated for the work in accordance with relevant Australian legislation and awards.[103] For visa applications made on or after 19 August 2020, LIN 20/182 also specifies critical COVID-19 work in the healthcare and medical sectors carried out anywhere in Australia after 31 January 2020, including but not limited to medical treatment, nursing, contact tracing, testing and research and support services such as cleaning of medical and health care facilities and equipment.[104] Further, LIN 22/012, which commenced on 5 March 2022, specifies certain tourism and hospitality work carried out after 21 June 2021 in Northern Australia and Remote and Very Remote Australia, and paid and volunteer flood recovery work carried out after 31 December 2021 in flood affected areas,[105] as specified Subclass 417 work. Similar to bushfire recovery work discussed above, it is unclear how flood recovery work carried out on a volunteer basis sits with the requirement for the grant of the visa that the applicant must have been remunerated for the work in accordance with relevant Australian legislation and awards.[106] If issues arise regarding the voluntary nature of bushfire or flood recovery work, please contact MRD Legal Services.

In determining whether the work performed by an applicant falls within one of the categories of 'specified work', particularly for broader categories relating to construction and mining, Department policy states that regard should be had to the Australian New Zealand Standard Industrial Classification (ANZSIC).[107] The 2006 ANZSIC can be found at http://www.abs.gov.au. However, it is important to note that while the ANZSIC may provide useful guidance about 'specified work' it does not form part of the legislative requirements. Accordingly, the Tribunal should not consider itself bound by that document but rather ensure that it applies the test set out in the Regulations.

Concessions for applicants for second and third Subclass 417 visas who carried out specified Subclass 417 work under COVID-19 pandemic event visas

For applications made on or after 14 November 2020, applicants who carried out critical health work (referred to as 'special Subclass 417 work') on a COVID-19 pandemic event visa

[101] Policy – Sch 2Visa 417 – Working Holiday – About the Working Holiday Visa Program (re-issue date 18/11/2017).
[102] See item 4 of pt 1 of LIN 20/103.
[103] See cls 417.211(5)(c), (6)(e). This requirement is discussed below.
[104] See s 9 of LIN 20/182.
[105] See the amendments made by LIN 22/050 which commenced on 1 July 2021.
[106] See cls 417.211(5)(c), (6)(e). This requirement is discussed below.
[107] Policy – Sch2Visa417 – Working Holiday – Types of specified work (re-issue date 18/11/2017).

may count that work towards the work requirements for the grant of a second or third Subclass 417 visa:

- *if the application is for a second Subclass 417 visa*, and the applicant undertook some work that is 'special Subclass 417 work' while holding an eligible 408 visa or an associated bridging visa, then all of the applicant's work that falls within 'specified Subclass 417 work' can be treated as if it was work carried out as the holder of the first Subclass 417 visa.[108]

- *if the application is for a third Subclass 417 visa*, and the applicant undertook some work that is 'special Subclass 417 work' while holding an eligible 408 visa or an associated bridging visa, then all the of applicant's work that falls within 'specified Subclass 417 work' can be treated as if it was work carried out as the holder of the second Subclass 417 visa.[109]

'Special Subclass 417 work' is defined to mean specified Subclass 417 work of a kind specified by the Minister in a legislative instrument, or, if no instrument is in effect, specified by s 9 of LIN 20/182 as in force on 14 November 2020.[110] At the time of writing, LIN20/182 applies and specifies critical COVID-19 work in the healthcare and medical sectors, carried out anywhere in Australia after 31 January 2020, including but not limited to medical treatment, nursing, contact tracing, testing and research and support services such as cleaning of medical and health care facilities and equipment.[111]

An eligible 408 visa is defined as a COVID-19 pandemic event 408 visa that was granted on the basis of an application made while holding the first or second Subclass 417 visa respectively; or an application made within 28 days of that visa ceasing; or an application was made while holding an earlier eligible 408 visa or within 28 days of an earlier 408 visa ceasing.[112]

A COVID-19 pandemic event 408 visa is defined as a Subclass 408 visa granted on the basis that the applicant satisfied the criterion in cl 408.219A of Schedule 2 to the Regulations on the basis of cl 408.229 (Australian Government endorsed events) in relation to an event specified by legislative instrument or, if no instrument is specified, the COVID-19 pandemic within the meaning of Migration (LIN 20/229: COVID-19 Pandemic event for Subclass 408 (Temporary Activity) visa and visa application charge for Temporary Activity (Class GG) visa) Instrument 2020 as in force on 14 November 2020.[113]

To avoid work being double counted for the purposes of the second and third visa grants, the concessions for applications for a third Subclass 417 visa only apply when the work was undertaken on:

[108] cl 9205(1)–(2) of sch 13 to the Regulations as inserted by F2020L01427.
[109] cl 9206(1)–(2) of sch 13 to the Regulations as inserted by F2020L01427.
[110] cl 9204 of Sch 13 to the Regulations as inserted by F2020L01427.
[111] See s 9 of LIN 20/182.
[112] cls 9205(5) and 9206(5) of sch 13 to the Regulations as inserted by F2020L01427
[113] cl 9204 of sch 13 to the Regulations as inserted by F2020L01427. There is currently no instrument specified, however, the purpose of the provision for a legislative instrument in cl 9204(2) is to provide flexibility to respond to any future changes to the eligibility for the Subclass 408 visa: Explanatory Statement, F2020L01427 p 26. LIN 20/229 (accessible via the '408Events&Classes' tab of the Register of instruments - Business visas) defines the COVID-19 pandemic as the pandemic declared by the World Health Organisation on 11 March 2020, caused by the coronavirus COVID-19: see s 4 LIN 20/229..

- a COVID-19 pandemic event 408 visa applied for while the applicant held the second Subclass 417 visa or within 28 days after that visa ceased to be in effect;[114]

- a subsequent COVID-19 pandemic event 408 visa applied for while the applicant held the previous COVID-19 pandemic event 408 visa or within 28 days after that visa ceased to be in effect;[115]

- a bridging visa that was granted on the basis of the application for the second Subclass 417 visa, if the applicant held a COVID-19 pandemic event 408 visa when the application was made, and that COVID-19 pandemic event 408 visa was part of an unbroken chain of COVID-19 pandemic event 408 visas following the first Subclass 417 visa (i.e. no gaps of more than 28 days between an application being made and the previous visa ceasing). [116]

Concessions for applicants for second and third Subclass 417 visas who held 'COVID-19 affected visas' ('offshore COVID-19 affected visas' and 'onshore COVID-19 affected visas')

The term 'COVID-19 affected visas' is defined in regs 1.03 and 1.15P to mean 'offshore COVID-19 affected visas'[117] and 'onshore COVID-19 affected visas'[118] and was inserted into the Regulations to facilitate concessions for applicants who were impacted by the COVID-19 pandemic and travel restrictions that were in place from 20 March 2020.[119]

'Onshore COVID-19 affected visas' covers Subclass 417 visas that were granted before 20 March 2020 and were either in effect on that date or, if the applicant did not hold a substantive visa, was the last substantive visa held by the person.[120] This includes visas that were cancelled at the request of the visa holder during that period.[121] The definition also requires the visa holder or former visa holder to have been in Australia on 20 March 2022 and to have applied for a further Subclass 417 visa from inside Australia between 5 March 2022 and 31 December 2022.[122] The Minister may, by legislative instrument, expand the definition of 'onshore COVID-19 affected visas', including by reference to circumstances relating to a person who holds or held the visa.[123]

As discussed above, to apply for and be granted a second or third Subclass 417 visa, an applicant is required to have undertaken specified Subclass 417 work as specified by the Minister in a legislative instrument while on their first or second Subclass 417 visa, respectively. For visa applications made between 5 March 2022 and 31 December 2022, applicants are exempted from needing to meet the specified work requirements for the grant

[114] cls 9206(1)(b) and 9206(5) of sch 13 to the Regulations as inserted by F2020L01427.
[115] cls 9206(1)(b) and 9206(5) of sch 13 to the Regulations as inserted by F2020L01427.
[116] cls 9206(1)(b)(iii) and 9206(6) of sch 13 to the Regulations as inserted by F2020L01427.
[117] See reg 1.15(1) and (2), as initially inserted by item 2 of sch 2 to F2021L00852 and later amended by items 3 and 4 of sch 1 to F2022L00244.
[118] See regs 1.15P(2A) and (2B) as inserted by item 20 of sch 1 to F2022L00244.
[119] Explanatory Statements to F2021L00852, p 14, and F2022L00244, p 2.
[120] Reg 1.15P(2A)(a) and (b).
[121] Reg 1.15P(2A)(f).
[122] Reg 1.15P(2A)(c) – (e).
[123] Regs 1.15P(2A) - (2B). No specification has been made at the time of writing.

of a second or third Subclass 417 visa where they hold or have held an 'onshore COVID-19 affected visa'.[124] This is because the applicant is not required to re-satisfy certain criteria that they previously met for the grant of a Subclass 417 visa (i.e. the Subclass 417 visa that became the onshore COVID-19 affected visa).[125] That is, the concession allows the applicant to apply for an additional Subclass 417 visa that replaces the visa that was affected by the pandemic.[126] An applicant is only eligible for this concession once.[127]

The term 'offshore COVID-19 affected visas' relevantly covers Subclass 417 visas that were granted before 20 March 2020 and ceased between that date and 31 December 2021 while the visa holder was outside Australia.[128] As the definition of 'offshore COVID-19 affected visas' requires the applicant to have applied for a further Subclass 417 visa from outside Australia between 1 July 2021 and 31 December 2022,[129] a decision to refuse an affected applicant a Subclass 417 visa is not reviewable by the Tribunal, unlike a decision for an applicant who held an 'onshore COVID-19 affected visa' and applies onshore: see s 338(2).

Meaning of work

This definition of 'work' in reg 1.03 of the Regulations states that work means an activity that, in Australia, normally attracts remuneration. Whilst the construction of that definition is a question of law, the question of whether a visa holder's activities fall within the definition is a question of fact to be determined by the Minister (or the Tribunal on review).[130] The definition provided in reg 1.03 may include an activity for which an individual visa holder is not remunerated. It is sufficient that it 'be an activity that normally attracts remuneration'.[131] However note that for visa applications made from 1 December 2015, the applicant must have been remunerated for the work in accordance with relevant Australian legislation and awards (see the discussion below).[132]

For further information on the meaning of 'work' generally please refer to Visa Conditions 8104, 8105, 8607 and 8107 (work restrictions).

A total period of at least 3 months or 6 months

The expressions, '3 months' and '6 months' are not defined in the Regulations. However s 2G of the *Acts Interpretation Act 1901* (Cth) (the AIA) provides that in any Act, a month means a period starting at the start of any day of one of the calendar months and ending immediately before the start of the corresponding day of the next calendar month, or at the

[124] See cl 417.211(1A)(c) as inserted by item 20 of sch 1 to F2022L00244.
[125] Explanatory Statement to F2022L00244, p.26.
[126] As above.
[127] See cl 417.211(1A)(c)(iii) as inserted by item 20 of sch 1 to F2022L00244.
[128] See regs 1.03 and 1.15P(1) and (2), inserted by item 1 of sch 2 to F2021L00852.
[129] Reg 1.15P(1)(d).
[130] *Al Ferdous v MIAC* [2011] FCA 1070 at [25], where Stone J observed that 'involved in that finding [that the applicant's activity was capable of being work within the meaning of the definition and was in fact work] is a conclusion of law in the construction of the definition and a question of fact in finding that the appellant's actions were work within the definition as construed'.
[131] *Braun v MILGEA* (1991) 33 FCR 152 at 156. *Braun* considered the definition in then reg 2, in which work was also defined 'as an activity that, in Australia, normally attracts remuneration'.
[132] See cls 417.211(5)(c), (6)(e).

end of the next calendar month if there is no such day. The term 'calendar month' is defined in s 2B of the AIA as meaning one of the 12 months of the year.

At the time of writing, the Department's Procedural Instructions had not been updated to reflect changes in policy regarding specified work and refer to the Department's website for up-to-date information. The website suggests that 3 months is taken to mean 88 days and 6 months is taken to mean 179 days, which are the shortest possible combinations of months in a calendar year including weekends or equivalent rest days during employment. While the Tribunal may have regard to the Department's policy, it is not bound by it and the policy does not form part of the legislative requirements. It is a finding of fact for the Tribunal on the evidence before it as to whether the applicant has carried out specified work in regional Australia for a total period of at least 3 or 6 months, having regard to the terms of cl 417.211 and the meaning of 'month' in the AIA.

A question arises as to whether part-time or casual work would be sufficient to meet the requirement to have carried out at least 3 or 6 months of specified work and this is answered in some way by reference to the date of application.

Visa applications made from 1 July 2019 and made before 1 December 2015

For visa applications made from 1 July 2019 and visa applications made before 1 December 2015, cl 417.211 does not on its face require the work to be done on a full time basis. Further, the instruments for 'specified work' do not explicitly require the work to be conducted on a full time basis.[133] The Department's policy appears to be more restrictive than the test set out in the Regulations and indicates that the work has to be the equivalent of full time work in that role in the relevant industry and this can be done in a variety of ways, e.g.:

- working five days a week for a continuous period of three or six calendar months, including on a piecework rate agreement; or
- working less than five days a week over a period longer than three or six calendar months, including on a piecework rate agreement
- working multiple short periods of work in any combination of full time, part time or on a piecework rate, which add up to the equivalent of five days a week over three or six calendar months.

Decision makers should be careful, however, to ensure that they apply the test set out in the Regulations and not raise the Department's policy to the level of a legislative requirement.

The requirement to carry out at least '3 months' or '6 months' specified work refers to the cumulative period of work carried out by the applicant and the work need not be completed in a continuous block.

It should also be noted that only specified work done while the holder of:

[133] See the '417Work&RegAust' tab of the Register of Instruments – Visitor Visas.

- *if the application is for a second Subclass 417 visa* – a Subclass 417 visa; or
- *if the application is for a third Subclass 417 visa* – the second Subclass 417 visa or a bridging visa that was in effect and was granted on the basis of the application for the second Subclass 417 visa (made at a time when the applicant held the first Subclass 417 visa)

can be counted towards the 3 or 6 month period.

Visa applications made from 1 December 2015 to 30 June 2019

The uncertainty as to whether part-time or casual work would be sufficient to meet the 'specified work' requirement appeared to have been addressed by legislative amendment for applications for second Subclass 417 visas made from 1 December 2015 to 30 June 2019. For these applications cl 417.211 requires that the total period of work carried out, whether on a full-time, part-time or casual basis, must be or be the equivalent of at least three months of full-time work.[134] However this requirement was omitted for visa applications made from 1 July 2019.[135] See the discussion above for applications made from that date.

Remuneration in accordance with relevant Australian legislation and awards

For visa applications made from 1 December 2015, the applicant must have been remunerated for the work in accordance with relevant Australian legislation and awards.[136] The amendments reflect the earlier Departmental practice outlined above relating to assessing the 'specified work' requirement and address a trend of Subclass 417 visa holders accepting underpaid or non-paid work which was contributing to their exploitation.[137] The amendment does not, however, apply to work carried out before 1 December 2015.[138] This ensures equity for those who have undertaken specified work before commencement of the amending regulation but apply for a second Subclass 417 visa after commencement.[139]

Departmental policy indicates that remuneration verification is intended to be a relatively 'light touch' check, however in certain circumstances a higher degree of scrutiny may be warranted, for example where an applicant appears to have been underpaid or not paid at all.[140] Where the applicant's evidence suggests their employer deducted some or all of their pay to meet board or other expenses, or where an employer required an applicant to repay some or all of their wage, the Tribunal will need to consider whether the applicant was remunerated in accordance with relevant Australian legislation or awards. For example, the *Fair Work Act 2009* (Cth) permits some deductions, including those relating to an

[134] See cl 417.211(5) as amended by sch 5 to SLI 2015, No 184.
[135] See cls 417.211(5)(a)–(b) as amended by items 7 and 8 of sch 1 of F2019L00196. While the Explanatory Statement to F2019L00196 at p.10 states that the amendments are technical and that no substantive change is intended, nor is the intent changed, the amendments appear to restore the requirements to those in place for visa applications made before 1 December 2015, where cl 417.211(5) did not on its face require the work to be done on a full-time basis.
[136] Schedule 5 to SLI 2015, No 184.
[137] Explanatory Statement to SLI 2015, No 184 at 8.
[138] To the extent that the application relates to work carried out before 1 December 2015, new cl 417.211(5)(c) does not apply: item 4802 of sch 13 to the Regulations, as inserted by the amending Regulation.
[139] Explanatory Statement to SLI 2015, No 184 at 9.
[140] Policy – Sch2Visa417 – Working Holiday – Appropriate remuneration (re-issue date 1 July 2019).

employee's personal use of their employer's property (for example, where an employee makes personal calls on a work telephone), or where the deduction is authorised under an enterprise agreement, modern award, or by state, territory, or Commonwealth law.[141] Some awards also place a cap on the amount an employer may deduct for board or other expenses.[142] In addition, requirements to repay money (also known as 'cashback' schemes) are prohibited where the requirement is unreasonable in the circumstances and directly or indirectly benefits the employer or a party related to the employer.[143] As the Tribunal must be satisfied that the applicant was remunerated in accordance with relevant Australian legislation or awards, a higher degree of scrutiny may be appropriate in cases where the evidence indicates deductions or repayments were required by an employer.

The Tribunal must consider evidence submitted by the applicant in support of their claims. Applicants may submit payslips and evidence about relevant awards to show they meet this requirement. If an applicant provides pay slips but does not address the issue of relevant awards, the Tribunal can check the hourly rate of pay provided by the applicant against minimum wage rates on the Fair Work Ombudsman's Pay Calculator website. Note that depending on the nature of the information obtained by the Tribunal through its own inquiries, procedural obligations under s 359A[144] and/or s 360[145] may arise.

The Tribunal may also be required to assess whether applicants covered by 'piecework' agreements were remunerated according to the correct piecework rate. A piece rate is where an employee gets paid by the piece, that is, they are paid for the amount picked or packed etc. The Fair Work Ombudsman's website outlines the formula to calculate the piecework rate for a range of industries such as horticulture.

Work carried out for an excluded employer

For visa applications made after 28 July 2021, the work cannot have been 'carried out for an excluded employer', as defined in regs 1.03 and 1.15FB.[146] As work will only be 'carried out for an excluded employer' if the employer is listed in a legislative instrument under reg 1.15FB(2) at the time the work was done,[147] any work carried out for an employer before they are listed as an excluded employer can still be counted.[148]

[141] *Fair Work Act 2009* (Cth) ss 324(1), 326(1).
[142] See for example the Pastoral Award 2010. That award provides for a 'keep rate' of $107.77 per week for 'keep' employees (those receiving food and accommodation from the employer in exchange for deductions), which is the maximum deduction from the minimum wage entitlements owed to the employee. If more than this amount was deducted for board from the pay of an applicant employed under this award, those deductions would appear to contravene both the Pastoral Award 2010 and, by extension, s 45 of the *Fair Work Act 2009* (Cth) (which requires persons not to contravene modern awards).
[143] *Fair Work Act 2009* (Cth) s 325(1).
[144] Under s 359A of the Act the Tribunal must give the applicant clear particulars of information it considers would be the reason, or a part of the reason, for affirming the decision under review, explain the relevance of the information and consequences for the decision of relying upon the information and invite the applicant to comment or respond. There are exceptions to this obligation in s 359A(4), including where the information is just about a class of persons (and not specifically about the applicant or another person) or was given by the review applicant either to the Tribunal or during the Department process that led to the decision under review (other than a Departmental interview). For further information about s 359A see Chapter 10 of the Procedural Law Guide – Statutory duty to disclose adverse information.
[145] Under s 360 of the Act the Tribunal must invite applicants to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review. For further information about this obligation see Chapter 13 of the Procedural Law Guide – The hearing.
[146] cls 417.211(5)(d) and 417.211(6)(f) as inserted by items 3 and 4 of sch 1 of F2021L01030.
[147] reg 1.15FB(1)(a). At time of writing there is no instrument specifying employers for reg 1.15FB(2).
[148] Explanatory Statement, F2021L01030, p 11–12.

Visa conditions

The current conditions state that:

- the holder must not be employed by any 1 employer for more than 6 months without the prior permission in writing of the Secretary (i.e. Secretary of the Department of Immigration) (Visa condition 8547)
- the holder must not engage in any studies or training in Australia for more than 4 months (Visa condition 8548). [149]

There are also discretionary conditions which may be imposed under cl 417.612 including 8106, 8107, 8301, 8303, 8501, 8502, 8503, 8516, 8522, 8525 and 8526.

The Tribunal may also be required to review cancellations of Subclass 417 visas under s 116 where these conditions have been breached.

Merits review

A decision to refuse a Subclass 417 visa is reviewable under Part 5 of the *Migration Act 1958* (Cth) (the Act) if the visa applicant made the application while in the migration zone.[150] This means that only refusals of second or third Working Holiday visas will be reviewable. The visa applicant has standing[151] and the application for review must be lodged within 21 days after the notification is received by the visa applicant.[152] The applicant is required to be in the migration zone at the time of the Tribunal application.[153]

Decisions to cancel Subclass 417 (Working Holiday) visas under s 109 or 116 are also reviewable by the Tribunal. For further information see: Cancellation under s109 or Cancellation under s 116.

Relevant case law

Judgment	Judgment summary
Al Ferdous v MIAC [2011] FCA 1070	
Braun v MILGEA (1991) 33 FCR 152	

[149] The current conditions apply in relation to an application for a visa made on or after 1 July 2006: *Migration Amendment Regulations 2006 (No 2)* (Cth) (SLI 2006, No 123) reg 4 and sch 6. For applications made on or after 1 July 2005 and before 1 July 2006 the relevant visa conditions were 8108 and 8201: *Migration Amendment Regulations 2005 (No 3)* (Cth) (SLI 2005, No 133) reg 4 and sch 14.
[150] s 338(2).
[151] s 347(2)(a).
[152] reg 4.10(1)(a).
[153] s 347(3).

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Amendment Regulations 2005 (No 3) (Cth)	SLI 2005, No 133	No 2/2005
Migration Amendment Regulations 2005 (No 9) (Cth)	SLI 2005, No 240	No 5/2005
Migration Legislation Amendment Regulations 2008 (No 1) (Cth)	SLI 2008, No 91	No 3/2008
Migration Amendment Regulations 2008 (No 7) (Cth)	SLI 2008, No 205	No 8/2008
Migration Amendment Regulations 2010 (No 7) (Cth)	SLI 2010, No 232	No 8/2010
Migration Legislation Amendment Regulation 2012 (No 5) (Cth)	SLI 2012, No 256	No 10/2012
Migration Amendment (Redundant and Other Provisions) Regulation 2014 (Cth)	SLI 2014, No 30	No 2/2014
Migration Amendment (2014 Measures No 1) Regulation 2014 (Cth)	SLI 2014, No 32	No 1/2014
Migration Legislation Amendment (2014 Measures No 1) Regulation 2014 (Cth)	SLI 2014, No 82	No 5/2014
Migration Amendment (2015 Measures No 1) Regulation 2015 (Cth)	SLI 2015, No 34	No 1/2015
Migration Legislation Amendment (2015 Measures No 3) Regulation 2015 (Cth)	SLI 2015, No 184	No 10/2015
Migration Legislation Amendment (2017 Measures No 3) Regulations 2017 (Cth)	F2017L00816	No 4/2017
Migration Amendment (Working Holiday Maker) Regulations 2019 (Cth)	F2019L00196	No 2/2019
Home Affairs Legislation Amendment (2020 Measures	F2020L01427	No 3/2020

No.2) Regulations 2020 (Cth)		
Home Affairs Legislation Amendment (2021 Measures No 1) Regulations 2021 (Cth)	F2021L00852	No 5/2021
Migration Amendment (Subclass 417 and 462 Visas) Regulations 2021 (Cth)	F2021L01030	
Migration Amendment (Subclass 417 and 462 Visas) Regulations 2022 (Cth)	F2022L00244	

Available decision templates / precedents

There is one Subclass 417 decision template / precedent:

- **Subclass 417 – General** – suitable for reviews of decisions to refuse a Subclass 417 visa where the visa application was lodged on or after 27 October 2008.

Last updated/reviewed: 23 January 2023

SUBCLASS 600 (VISITOR) VISA

Overview[1]

This commentary provides an overview of the Subclass 600 (Visitor) visa, which is the only subclass in the Visitor (Class FA) visa class. The Subclass 600 (Visitor) visa was introduced on 23 March 2013 as a simplified visitor visa to replace four visitor visas – Subclasses 676 (Tourist), 679 (Sponsored Family Visitor), 456 (Business (Short Stay)) and 459 (Sponsored Business Visitor).[2]

There are five streams in the Subclass 600 (Visitor) visa:

- **Tourist** – to visit specified family or visit for non-business or non-medical purposes (sponsorship may be required)
- **Sponsored Family** – to visit specified family or visit for non-business or non-medical purposes (sponsorship is required)
- **Business Visitor** – to engage in a 'business visitor activity' as defined in reg 1.03
- **Approved Destination Status** – PRC citizens residing in specified areas of PRC intending to travel for sightseeing and related activities in a tour organised by specified travel agents
- **Frequent Traveller** – specified passport holders[3] to visit as a tourist or to engage in a business visitor activity on multiple occasions for up to a period of 10 years with a maximum stay of up to 3 months each visit.[4] This stream is currently only available to applicants who are nationals of the PRC,[5] but is expected to be expanded to allow nationals of other countries to apply following evaluation.[6]

An application for a Subclass 600 (Visitor) visa must be made for one stream only, and is only to be assessed against the criteria for that stream.[7] Applicants are required to meet the common criteria, as well as the criteria specific for the stream in which they have applied. All applicants are required to meet the primary criteria, and there are no secondary criteria.

The *Migration Regulations 1994* (Cth) (the Regulations) also provide for priority processing of Subclass 600 visas upon payment of a fee for nationals holding a valid passport of a kind specified by instrument in the Tourist stream and Business Visitor streams.[8] Requests for

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] *Migration Amendment Regulation 2013* (Cth) (No 1) (SLI 2013, No 32). See Explanatory Statement to SLI 2013, No 32, pp.1, 40, 44, 45, 50. Contact MRD Legal Services for further information about these visa subclasses.
[3] Item 1236(6A) of sch 1 as inserted by *Migration Legislation Amendment (2016 Measures No 5) Regulation 2016* (Cth) (F2016L01745). The amendments apply to visa applications made on or after 19 November 2016: item 5801 of sch 3.
[4] cls 600.261, 600.512 as amended by F2016L01745. The amendments apply to visa applications made on or after 19 November 2016.
[5] As specified for item 1236(6A) by instrument. See the 'VisApp(ClassFA)' tab of the Register of Instruments – Visitor Visas for the relevant instrument.
[6] Explanatory Statement to F2016L01745, p.5.
[7] Explanatory Statement to SLI 2013, No 32, p.17.
[8] *Migration Amendment (Priority Consideration of Certain Visa Applications) Regulation 2016* (Cth) (F2016L00295) inserts div 2.2B – Priority consideration of certain visa applications on request (regs 2.12M–2.12P) and apply to a visa application

priority processing of a visa application by the Department in accordance with these arrangements do not have any impact upon, or impose any obligation in relation to, review of a decision to refuse to grant a visa by the Tribunal.

Requirements for valid visa application – Schedule 1 requirements

The requirements for making a valid application for a Visitor (Class FA) visa are set out at item 1236 of Schedule 1 to the Regulations. There are separate requirements for making a valid application for each stream, but in short, an application is validly made if:

- it is made on the prescribed form;[9]
- it is made at the prescribed place and in the prescribed manner;[10] and
- the visa application charge (VAC) is met.[11] The VAC is payable at the time of application, and depends on whether the applicant is in or outside Australia at the time of application and the stream in which the application is made.[12] There is nil VAC payable for applicants applying for a visa in the course of acting as a representative of a foreign government, and for classes of persons specified in a written instrument.[13] For onshore visa applications made from 1 July 2013, where the applicant previously held a specified kind of temporary substantive visa applied for onshore, a subsequent temporary application charge may also be payable.[14]

Visa criteria – Schedule 2 requirements

Applicants seeking to satisfy the primary criteria for a Subclass 600 visa are required to satisfy the common criteria, as well as the criteria for the specific stream in which they have applied. All applicants are required to meet the primary criteria for the visa; there are no secondary criteria for family members. The primary criteria must be satisfied at the time of decision.[15]

made on or after 15 March 2016. Relevant passports and visa categories have been specified by instrument. According to the Explanatory Statement to F2016L00295, the Department will trial the process for certain Chinese nationals on the basis that it may appeal to affluent Chinese nationals who may wish to travel to Australia at short notice. Division 2.2B has no connection to the expedited review provisions in reg 4.23 which apply to the Tribunal.

[9] Item 1236(1). For applications made on or after 18 April 2015, the approved form is that specified in an instrument under reg 2.07(5): *Migration Amendment (2015 Measures No 1) Regulation 2015* (Cth) (SLI 2015, No 34). See the 'VisApp(ClassFA)' tab of the Register of Instruments – Visitor Visas for the relevant written instrument.

[10] See items 1236(3), (4), (5),(6) and (6A) of sch 1 to the Regulations. For applications made on or after 18 April 2015, the application must be made as specified in a legislative instrument under reg 2.07(5): SLI 2015, No 34. See the 'InternetApp(ClassFA)' tab of the Register of Instruments – Visitor Visas for the relevant written instrument.

[11] Item 1236(2).

[12] Item 1236(2).

[13] Item 1236(2)(a); see the 'NilVac' tab of the Register of Instruments – Visitor Visas for the relevant written instrument.

[14] reg 2.12C as substituted by the *Migration Amendment (Visa Application Charge and Related Matters) Regulation 2013* (Cth) (SLI 2013, No 118); see also the 'SubTempVAC' tab for the reg 2.12C(5) instrument in the Register of Instruments – Miscellaneous and Other Visa Classes.

[15] See note to div 600.2, which provides that the primary criteria must be satisfied by all applicants, and that all criteria must be satisfied at the time a decision is made on the application.

Common criteria – Division 600.21

The common criteria in sub-division 600.21 must be satisfied by all applicants seeking to satisfy the primary criteria for a Subclass 600 visa. The common criteria require that: the applicant genuinely intends to stay temporarily in Australia for the purpose for which the visa is granted, having regard to relevant factors;[16] the applicant has adequate means, or access to adequate means, to support themselves in Australia;[17] the applicant satisfies certain public interest criteria (PIC)[18] and special return criteria;[19] and there must be exceptional circumstances for the grant of the visa, if the grant of the visa would result in the applicant being authorised to stay in Australia for more than 12 consecutive months as the holder of certain visas.[20]

Criteria for specific streams –Divisions 600.22–600.25

In addition to the common criteria, applicants seeking to satisfy the primary criteria for a Subclass 600 visa must also satisfy the criteria for the stream in which they have applied for the visa. Applicants are to be assessed only against the criteria for the specific stream in which they have applied.[21]

Tourist stream

The Tourist stream criteria are set out in sub-division 600.22 and require that: the applicant intends to visit or remain in Australia to visit a specified Australian relative, or for any other purpose that is not related to business or medical treatment;[22] the visa is not sought for the purpose of commencing, continuing or completing a registered course in which the applicant is enrolled if in Australia as the holder of a student visa;[23] the applicant has not held certain types of visas if in Australia at the time of application;[24]the applicant satisfies relevant Schedule 3 criteria if they did not hold a substantive visa and were in Australia at the time of application;[25] the applicant meets sponsorship requirements, if so required;[26] and if sponsored, a security to be lodged, if so required.[27]

Sponsored Family stream

The Sponsored Family stream criteria are set out in sub-division 600.23 and require that: the applicant intends to visit Australia to visit a specified Australian relative, or for any other purpose that is not related to business or medical treatment;[28] the applicant meets

[16] cl 600.211.
[17] cl 600.212.
[18] cl 600.213.
[19] cl 600.214.
[20] cl 600.215.
[21] Explanatory Statement to SLI 2013, No 32, p.17
[22] cl 600.221.
[23] cl 600.222.
[24] cl 600.223.
[25] cl 600.223(2)(b).
[26] cl 600.224.
[27] cl 600.225.
[28] cl 600.231.

sponsorship requirements, including being sponsored by a specified Australian relative, a member of Parliament or Legislative Assembly, a mayor, or a government agency or instrumentality, and the sponsorship has been approved and is still in force;[29] and a security to be lodged, if so required.[30]

Sponsor's relationship to applicant

The applicant must be sponsored by a person who at least 18 years old, is a settled Australian citizen/permanent resident and is:

- a relative of the applicant;[31] or
- a relative of another applicant who is a member of the family unit of the applicant;[32] or
- a relative of another applicant in relation to whom the applicant is a member of the family unit.[33]

Determining whether or not the applicant has been sponsored by a 'relative' requires consideration of the definition of 'relative' in reg 1.03 of the Regulations, which relevantly includes a 'close relative' or a grandparent, grandchild, aunt, uncle, niece or nephew, or a step-grandparent, step-grandchild, step-aunt, step-uncle or step-niece or step-nephew. 'Close relative' is also defined in reg 1.03 and includes the partner[34] of the person, a child (including adopted child),[35] 'parent', brother or sister of the person (and their 'step' equivalents). Member of the family unit is defined in reg 1.12 and the applicable definition depends on the date of visa application.[36]

Confusion may arise in interpreting cl 600.232(2)(b) and (c). In each situation the sponsor is a relative of another applicant (first applicant). The difference lies in terms of whose family unit each applicant must be a member:

- Clause 600.232(2)(b)[37] provides for the situation where the first applicant is a member of the family unit[38] of the sponsor; whereas,
- Clause 600.232(2)(c)[39] provides for the situation where the second applicant is a member of the family unit of the first applicant.

[29] cls 600.232–234.
[30] cl 600.235.
[31] cl 600.232(2)(a).
[32] cl 600.232(2)(b).
[33] cl 600.232(2)(c).
[34] For visa applications made on or after 1 July 2009, the reference is to 'spouse or de facto partner' which is defined in s 5F of the Act (ie married relationships), and in s 5CB (ie same sex or opposite sex partners): as amended by SLI 2009, No 144.
[35] For visa applications made on or after 1 July 2009, the definition of child in the Act includes 'adopted child' (s 5CA as inserted by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth)). For visa applications made prior to 1 July 2009, the definition specifically referred to 'adopted child' as defined in reg 1.04.
[36] For further guidance see Member of A Family Unit (reg 1.12).
[37] Specifically cl 600.232(2) refers to an applicant who 'is sponsored by a settled Australian citizen, or a settled Australian permanent resident, who is at least 18 and: … (b) a relative of another applicant who is a member of the family unit of the applicant; or…'
[38] Regulation 1.03 provides that the definition of 'member of the family unit' is in reg 1.12. Regulation 1.12 also provides the definition of 'member of the family unit' for the purposes of s 5 of the Act.

The convoluted relationship provisions are necessary to overcome difficulties associated with the definition of 'relative' in reg 1.03,[40] in circumstances where family members are visiting Australia together. Departmental policy gives the following illustrations of the circumstances in which the application of cl 600.232(2)(b) and (c) will result in different outcomes:

- An example of where cl 600.232(2)(b) is engaged includes where a niece of the sponsor has applied for a visa with a parent who is not a blood relation of the sponsor. The parent who is not a blood relation is the sponsor's brother-in-law or sister-in-law and, under reg 1.03 is not a relative of the sponsor. The niece is a relative of the sponsor. Because the niece is a member of the family unit of her parent, the parent (the sister-in-law/brother in law) is also able to be sponsored.

- An example of where cl 600.232(2)(c) is engaged includes where the sponsor's uncle and the uncle's child have applied for the visa. Under the reg 1.03 definition, the uncle is a relative of the sponsor but the uncle's child is not, because the child is the cousin of the sponsor and cousins are not included in the reg 1.03 definition of 'relative'. However, because the cousin is a member of the family unit of the uncle and the uncle has also applied for a visa, the cousin may also be sponsored.[41]

Business Visitor stream

The Business Visitor stream criteria are set out in sub-division 600.24 and require that: the applicant intends to visit Australia to engage in a 'business visitor activity';[42] and the applicant does not intend to engage in activities that will have adverse consequences for employment or training opportunities, or conditions of employment, for Australian citizens or permanent residents.[43]

Approved Destination Status stream

The Approved Destination Status stream criteria are set out in sub-division 600.25 and require that: the applicant is a citizen of PRC and is resident in an area of PRC specified in a written instrument;[44] the applicant intends to travel to Australia as a member of a tour organised by a travel agent specified in a written instrument;[45] the applicant intends to travel to Australia for the purpose of sightseeing and related activities;[46] and a statement of the travel and touring arrangements has been provided.[47]

[39] Specifically cl 600.232(2) refers to an applicant who 'is sponsored by a settled Australian citizen, or a settled Australian permanent resident, who is at least 18 and: … (c) a relative of another applicant in relation to whom the applicant is a member of the family unit.'
[40] For further guidance on the definition of 'relative', see Familial Relationships.
[41] POLICY – MIGRATION REGULATIONS – OTHER – GenGuideH – Visitor visas – Visa application and related procedures – Sponsored Family stream valid application requirements – Who can be sponsored (re-issue date 10/9/16).
[42] cl 600.241. 'Business visitor activity' is defined in reg 1.03.
[43] cl 600.242.
[44] cl 600.251. See the 'TravelAgentsPRC' tab of the Register of Instruments – Visitor Visas.
[45] cl 600.252. See the 'VisApp(ClassFA)' tab of the Register of Instruments – Visitor Visas.
[46] cl 600.253.
[47] cl 600.254.

Frequent Traveller stream

The Frequent Traveller stream criteria are set out in sub-division 600.26 and require that: the applicant intends to visit Australia as a tourist or to engage in a business visitor activity,[48] and the applicant does not intend to engage in activities that will have adverse consequences for employment or training opportunities, or conditions of employment, for Australian citizens or permanent residents.[49]

Circumstances applicable to grant

If the applicant is in Australia at the time of application, the applicant must be in Australia at time of grant.[50] If the applicant is outside Australia at the time of application, the applicant must be outside Australia at the time of grant.[51] Applicants in the Approved Destination Status stream must be in PRC at the time of grant.[52]

When visa is in effect

Subclass 600 visas can be granted for periods as specified by the Minister. Subclass 600 visas in the Frequent Traveller stream can be granted for up to 10 years allowing the visa holder multiple entries to Australia with a maximum stay of up to 3 months each entry.[53] There is no limit to the validity or the length of stay for Subclass 600 visas in the other streams specified in the Regulations. However, Departmental policy provides the following guidance in relation to the other visa streams:[54]

[48] cl 600.261.
[49] cl 600.262.
[50] cl 600.411.
[51] cl 600.412.
[52] cl 600.413.
[53] cl 600.512(2)
[54] POLICY – MIGRATION REGULATIONS – OTHER – GenGuideH – Visitor visas – Visa application and related procedures (re-issue date 10/9/16).

Visa stream	Valid for	Stay period
Tourist	Standard 12 months from grant; up to 5 years if low risk of using the visa to establish de facto residence in Australia	Generally 3 or 6 months if offshore (longer if warranted by circumstances/ purpose, or 12 months for a parent visiting children); up to 12 months consecutive stay if onshore
Sponsored Family	Generally 3 months from grant; up to 12 months if applicant will abide by visa conditions	3 months; no stay longer than sponsorship period indicated by sponsor; 12 months only in exceptional circumstances
Business Visitor	Up to 2-3 years from grant for low risk business visitors	3 months

Furthermore, if the grant of a Subclass 600 visa (including where it is consecutive with other visitor, working holiday or work and holiday visas) would permit a person to stay in Australia more than 12 months, there must be exceptional circumstances for the grant of the visa.[55]

Visa conditions

The following is a general overview of the conditions which apply to Subclass 600 visas (division 600.6). For detailed information about the conditions applicable in the Tourist and Sponsored Family streams, see Intention to comply with conditions below.

Subclass 600 visas in the Tourist stream, Sponsored Family stream, and Approved Destination Status stream are subject to condition 8101 which prohibits work in Australia, except in certain cases of financial hardship and compelling reasons.[56] Subclass 600 visas in the Business Visitor stream and the Frequent Traveller stream are not subject to condition 8101, but are instead subject to condition 8115 which prohibits work other than a 'business visitor activity' as defined in reg 1.03.[57]

Subclass 600 visas are also generally subject to condition 8201, which limits study or training in Australia to a maximum period of 3 months.[58]

[55] cl 600.215. See discussion below under 'Legal issues'.
[56] cls 600.611, 600.612 and 600.614. The no work condition does not apply in the Tourist stream where the applicant is not sponsored and in certain circumstances has compelling reasons to work in Australia.
[57] cl 600.613.
[58] cls 600.611, 600.612 and 600.613. Subclass 600 visas in the Approved Destination Status stream are instead subject to condition 8207, which prohibits any studies or training in Australia: cl 600.614.

Subclass 600 visas may be subject to condition 8503 (or may have it imposed), which provides that the visa holder will not be entitled to be granted a substantive visa, other than a protection visa, while he or she remains in Australia.[59] Subclass 600 visas in the Tourist stream, where the applicant is not sponsored and does not meet financial hardship criteria, may have conditions 8501 (requiring health insurance) and 8558 (limiting stay to a maximum of 12 months in an 18 month period) imposed.[60] Subclass 600 visas in the Tourist stream (where sponsored) and in the Sponsored Family stream are also subject to condition 8531, which prohibits the visa holder from remaining in Australia after the end of the period of stay permitted by the visa.[61] Subclass 600 visas in the Frequent Traveller stream are also subject to condition 8573, which prohibits the visa holder from staying in Australia for more than 12 months in any period of 24 months.

For a brief period, Subclass 600 visas were subject to condition 8602 (must not have an outstanding public health debt).[62]

Legal issues

The following commentary addresses legal issues arising in relation to the Tourist stream and Sponsored Family stream only. Decisions to refuse to grant a visa in the Business Visitor stream, the Approved Destination Status stream and the Frequent Traveller stream are not reviewable by the Tribunal (see Merits Review below), and as such are not included in this commentary.

Purpose of visit: cls 600.221, 600.231

Applicants for a visa in the Tourist stream and in the Sponsored Family stream must meet the requirement that they intend to visit Australia (or to remain in Australia, if in the Tourist stream) for prescribed purposes.[63] Those purposes are:

- to visit an Australian citizen or permanent resident who is a parent, spouse, de facto partner, child, brother or sister of the applicant;[64] or
- for any other purpose that is not related to business or medical treatment.

While an applicant may have more than one purpose in seeking to visit or remain in Australia (e.g. to visit a relative and to engage in sightseeing), the applicant is only required to have one of the prescribed purposes in order to obtain the visa.[65] The criteria do not require the

[59] cls 600.611, 600.612, 600.613 and 600.614
[60] cl 600.611.
[61] cls 600.611, 600.612.
[62] The *Migration Legislation Amendment (2017) Measures No 4) Regulations 2017* (Cth) (F2017L01425), which inserted this condition, was subsequently disallowed and is therefore no longer operative. However, it still had legal effect from when it commenced on 18 November until the time of disallowance on 17:56 5 December 2017, meaning that if a visa was granted during this time, the visa conditions imposed will include condition 8602.
[63] cls 600.221, 600.231.
[64] For further information on these relationships as defined, see Familial Relationships.
[65] *Sandoval v MIMA* (2001) 194 ALR 71 at [40], in the context of considering the equivalent provision for a Subclass 676 visa. See also *obiter* comments in *Khanam v MIAC* (2009) 111 ALD 421 at [30], point 3, in relation to the equivalent provision for the Subclass 679 visa, that the language does not appear to require anything more than a statement of purpose by the visa applicant.

purpose to be specified in the visa application, and the applicant's purpose for visiting or remaining in Australia is ultimately a question of fact to be addressed at the time of decision.

Furthermore, in the Tourist stream, the visa must not be sought for the purpose of commencing, continuing or completing a registered course in which the applicant is enrolled, if the applicant is in Australia and holds or has held a student visa since last entering Australia.[66]

Any other purpose that is not related to business or medical treatment

The meaning of 'purpose' and 'related to business' was considered in *MIMA v Saravanan*,[67] where the Court stated that 'purpose' referred to what the visa applicant proposed to do during the period for which the visa was to be granted.[68] In considering the connection between the applicant's purpose and 'business', the Court held that the necessary approach was to:[69]

(1) ascertain the precise purpose for which the applicant wished to [visit or] remain in Australia on a Tourist visa; then

(2) see whether that purpose was in any way 'related to' business; and finally,

(3) if there was such a relationship, determine if it was sufficiently close to satisfy the objects of the criterion.

The Court held that the applicant's purpose of remaining in Australia, which was to apply for a Subclass 457 (Business) visa onshore, was not a purpose related to business.[70] The Court also considered that the applicant's longer-term purpose of conducting a business in Australia in the future was beyond the reach of the 'purpose' of seeking the Tourist visa in the meantime, as he had no intention to conduct business during the currency of the Tourist visa.[71]

Genuine intention to stay temporarily for purpose of the visa: cl 600.211

A common criterion for all streams in the Subclass 600 visa is that the applicant genuinely intends to stay temporarily in Australia for the purpose for which the visa is granted.[72] In assessing this criterion, the decision-maker must have regard to whether the applicant has

[66] cl 600.222.
[67] *MIMA v Saravanan* (2002) 116 FCR 437. Although not identical to cls 600.221(b) and 600.231(b) ('for any other purpose that is not related to business or medical treatment'), the Full Court had considered a similarly worded criterion for a Subclass 676 visa ('for a purpose other than a purpose related to business or medical treatment').
[68] *MIMA v Saravanan* (2002) 116 FCR 437 at [39], agreeing with the primary judge in *Saravanan v MIMA* [2001] FCA 938 at [22].
[69] *MIMA v Saravanan* (2002) 116 FCR 437 at [50]. Although dissenting as to the factual outcome in the particular case, Drummond J at [2] agreed with this approach of Finkelstein J.
[70] *MIMA v Saravanan* (2002) 116 FCR 437 at [37]–[38]. Justice Finkelstein at [54] considered that the applicant's purpose of remaining in Australia in order to apply for a business visa was not reasonably directly connected with 'business' as such. However, Drummond J (dissenting) at [7] concluded that there was a direct relationship between the applicant's purpose to remain in Australia and the applicant's business, such that it was for a purpose related to business.
[71] *MIMA v Saravanan* (2002) 116 FCR 437 at [39]–[41]; see also Finkelstein J at [54] who relied upon this matter in his reasoning.
[72] cl 600.211. Unlike the previous visitor visas (subclasses 676 and 679), the purpose of visit is linked to the 'genuine intention' criterion for the Subclass 600 visa.

complied substantially with conditions of their last visas, their intention to comply with conditions to which the visitor visa would be subject, and any other relevant matter.

The question of the applicant's 'genuine intention' is linked to the 'purpose for which the visa is granted', which must be a purpose permitted in the applicable stream. The decision-maker should consider whether the applicant's stated purpose is a purpose for which the visa could be granted in the stream in which the applicant has applied.[73]

If the purpose for which the visa is sought is not a purpose for which the visa could be granted, then the applicant may not be capable of meeting the 'genuine intention' criterion on that basis (e.g. it is a purpose related to business or medical treatment, or for studying in a registered course in certain circumstances if applying in the Tourist stream). See Purpose of visit above for further discussion.

Complied substantially with conditions of last visa(s): cl 600.211(a)

In considering whether an applicant has complied substantially with the conditions of the last held visa(s) for the purposes of the genuine intention criterion,[74] the decision-maker must consider compliance with the conditions of the most recent substantive visa held (if any), *or* any bridging visas held after that time.

Compliance with the conditions of other visas (such as visas held before the last substantive visa, or, where the applicant has held a subsequent bridging visa, compliance with conditions of the last substantive visa) cannot be considered under cl 600.211(a), but may be considered as a relevant matter under cl 600.211(c).

There are similar provisions relating to whether an applicant has complied substantially with the conditions of their previous visas in the Schedule 2 requirements for various other temporary visas. However, cl 600.211(a) does not impose a *requirement* that the applicant has complied substantially with the conditions of their last held visa(s) – rather, it is a matter to be taken into account by the decision-maker. For further consideration of 'substantial compliance', see the MRD Legal Services Commentary on Substantial Compliance with Visa Conditions.

Intention to comply with conditions: cl 600.211(b)

The genuine intention to stay temporarily criterion also requires the decision maker to have regard to the applicant's intention to comply with conditions.[75] It is necessary to consider the 'conditions to which the Subclass 600 visa would be subject' in order to assess whether the applicant intends to comply with those conditions (see also Visa conditions above).

Depending on the specific stream, division 600.6 sets out mandatory conditions (which 'must be imposed') and discretionary conditions (which 'may be imposed') on the visa. While it is clear that 'conditions to which the Subclass 600 visa would be subject' includes mandatory

[73] e.g. the specified purposes under cl 600.221 in the Tourist stream and cl 600.231 in the Sponsored Family stream.
[74] cl 600.211(a).

conditions, there is some doubt as to whether this also includes discretionary conditions. On one view, if the Tribunal considers that certain discretionary conditions would be imposed in the future, then those could be seen as conditions to which the visa 'would' be subject in the future. However, given the statutory distinction between conditions to which a visa 'is subject' and conditions which the Minister 'may impose' on a visa,[76] the phrase 'conditions to which the Subclass 600 visa would be subject' could be limited to those conditions to which a visa 'is subject' if the visa is granted, and not those which 'may be imposed'.[77] Given the speculative nature of assessing whether a discretionary condition may or may not be imposed by a decision-maker in the future, and the circularity in attempting to decide this when considering whether the applicant intends to comply with those conditions, the better view is to consider only mandatory conditions as conditions to which the visa 'would be subject'.

The table below sets out the mandatory conditions for Subclass 600 visas in the Tourist stream and the Sponsored Family stream in different circumstances. In considering a visa in the Tourist stream, it is necessary to firstly assess whether the applicant is sponsored in accordance with cl 600.224 (see Sponsorship issues below). If the applicant is not sponsored accordingly, it is then necessary to consider whether the financial hardship provisions under cl 600.611(4) apply.

[75] cl 600.211(b).
[76] A visa is either subject to specified conditions (s 41(1) and reg 2.05(1)) or the Minister may impose certain conditions on a visa (s 41(3) and reg 2.05(2)): *Krummrey v MIMIA* (2005) 147 FCR 557 at [28].
[77] The Full Federal Court in *Krummrey v MIMIA* (2005) 147 FCR 557 at [29] interpreted the language of a condition which 'must be imposed' in sch 2 as being a condition to which visas 'are' subject. There is no further action of 'imposing' the condition.

Visa stream	Applicant's circumstances	Mandatory conditions
Tourist	Sponsored under cl 600.224	• 8101 (no work) • 8201 (3 months study limit) • 8503 (no further stay) • 8531 (must not remain beyond visa period)[78]
	Not sponsored under cl 600.224, and does not meet financial hardship provision under cl 600.611(4)	• 8101 (no work) • 8201 (3 months study limit)[79]
	Not sponsored under cl 600.224, and meets financial hardship provision under cl 600.611(4)	• 8201 (3 months study limit)[80]
Sponsored Family	All applicants	• 8101 (no work) • 8201 (3 months study limit) • 8503 (no further stay) • 8531 (must not remain beyond visa period)[81]

Any other relevant matter: cl 600.211(c)

The decision-maker must also have regard to 'any other relevant matter' when considering whether the applicant genuinely intends to stay temporarily in Australia for the purpose for which the visa is granted.[82]

In determining whether the applicant has a genuine intention to stay temporarily in Australia, the Tribunal must consider all the applicant's individual circumstances, including the claimed reason for visiting Australia.[83] In considering a similarly worded criterion for a Subclass 676 (Tourist) visa,[84] the Federal Magistrates Court in *SZPZH v MIAC* held that the Tribunal was entitled to consider the intentions of the visa applicant for the period following the expiry of

[78] cl 600.611(2).
[79] cl 600.611(3). In addition, conditions 8501 (maintain health insurance), 8503 (no further stay) and 8558 (12 months stay in 18 month period) may be imposed.
[80] cl 600.611(4). In addition, condition 8503 (no further stay) may be imposed.
[81] cl 600.612.
[82] cl 600.211(c).
[83] *Khanam v MIAC* (2009) 111 ALD 421. In considering the similarly worded 'genuine visit' criterion for a Subclass 679 visa, the Court held that the Tribunal erred in forming its opinion as to genuine intention based on the likely intentions of Ahmadi Muslims as a group, rather than on the circumstances of the visa applicant, and failed to take into account a relevant consideration, namely the reason given by the visa applicant for the visit to Australia. See also *Khalsa v MIAC* [2012] FMCA 100 at [31] in which the Court held that it was open for the Tribunal to find that the visa applicants did not have a genuine intention to visit Australia temporarily on the basis of their admissions in the visa application form that they intended to remain in Australia to await the outcome of a Tribunal decision on the primary applicant's Subclass 309 (Partner) (Provisional) visa.
[84] cl 676.211, which requires that the applicant satisfies the Minister that the applicant's expressed intention to only visit Australia is genuine.

the visa in determining whether the intention only to visit Australia was genuine.[85] In *Khalsa v MIAC*, the Federal Magistrates Court held that it was open for the Tribunal to take into account the applicant's past travel to Australia.[86] Further, the Court held that it was open for the Tribunal to take into account the intentions of the primary visa applicant in marrying the review applicant insofar as this revealed an underlying intention to remain in Australia after the expiration of the visa.[87]

It is for the applicant to put forward sufficient material on which the decision-maker can be satisfied as to genuineness of the intention to stay temporarily. In assessing the material that is put forward, the decision-maker is not starting from a position that the intention to stay temporarily is not genuine. The decision-maker should reflect on all the evidence, and having weighed the circumstances (e.g. those which would encourage the applicant to return home and those which would encourage the applicant to remain in Australia), determine whether it is satisfied the applicant intends to stay temporarily in Australia for the purpose of the visa.

Departmental guidelines set out various matters that may be considered in assessing an applicant's genuine intention to stay temporarily in Australia.[88] The Tribunal may have regard to Departmental guidelines; however, they are not binding upon the Tribunal.[89] The Tribunal should consider the individual circumstances of the applicant and not raise any guidelines to the level of a legislative requirement. Matters referred to in the Departmental guidelines include:[90]

- personal circumstances that would encourage the applicant to return to their home country at the end of the proposed visit
    - e.g. ongoing employment, the presence of close family members in their home country, property or other significant assets owned in their home country, and if they are resident in a country whose nationals have a low risk of immigration non-compliance, even if they are originally from a country whose nationals represent a statistically higher risk of non-compliance
- personal circumstances or general conditions in the applicant's home country that might encourage them to remain in Australia

[85] *SZPZH v MIAC* [2011] FMCA 407 at [47]. On appeal, the Federal Court agreed that it was open for the Tribunal to take the visa applicant's intentions beyond the life of the visa into account: *SZPZH v MIAC* [2011] FCA 960 at [28]. See also *Khalsa v MIAC* [2012] FMCA 100 at [41]. In *Umer v MIBP* [2017] FCCA 2934 at [23] it was held that the decision in *Khanna v MIBP* [2015] FCCA 1971 at [34], which held that when considering the genuine temporary entrant criterion for a student visa the Tribunal is required to consider whether the applicant intends to depart Australia after the expiry of the visa should they fail to secure a permanent visa, does not apply to visitor visas, because the judgment was overturned in *MIBP v Khanna* [2016] FCA 142, its rationale was restricted to the student visa context and to ask such a question was 'to ignore and invert the purpose for which a Visitor Visa is granted'.
[86] *Khalsa v MIAC* [2012] FMCA 100 at [45].
[87] *Khalsa v MIAC* [2012] FMCA 100 at [41].
[88] POLICY – MIGRATION REGULATIONS – OTHER – GenGuideH – Visitor visas – Visa application and related procedures – 'The genuine temporary stay requirement' (re-issue date 10/9/16).
[89] In *Ammar v MIBP* [2019] FCCA 376, the Court held that it is open to the Tribunal to consider the matters set out in the Departmental guidelines as relevant to the assessment of 'other relevant matters' under cl 600.211(c) for the purpose of determining whether the applicant genuinely intends to stay temporarily in Australia.
[90] POLICY – MIGRATION REGULATIONS – OTHER – GenGuideH – Visitor visas – Visa application and related procedures – 'The genuine temporary stay requirement' (re-issue date 10/9/16).

  - e.g. economic circumstances (including unemployment or other employment conditions such as low salary rates), economic disruption (shortages, famine, high levels of unemployment or natural disasters), personal ties to Australia (more close family members living in Australia than in their home country, unresolved adoption proceedings in their home country), military service commitments, civil disruption (war, lawlessness, political upheaval)

- the applicant's credibility in terms of character and conduct
  - e.g. false and misleading information provided with visa application
- whether the purpose and proposed duration of the applicant's visit and their proposed activities in Australia are reasonable and consistent
  - e.g. is the period of stay consistent with tourism
- the applicant's immigration and travel history
  - e.g. previous visa applications for Australia, previous overseas travel (to countries other than Australia), compliance with immigration laws of country/countries where the applicant would have significant incentives to remain for economic or personal reasons
- information in statistical, intelligence and analysis reports on migration fraud and immigration compliance compiled by the department about nationals from the applicant's home country[91]

Relationship between genuine intention to stay temporarily and the 'risk factor criterion'

If the Tribunal is remitting the matter with a direction that the visa applicant meets the relevant criterion for genuine intention to stay temporarily in circumstances where the delegate refused to grant the visa on the basis that the genuine intention criterion was not met *and* the visa applicant would be subject to the 'risk factor criterion' in PIC 4011 for the purposes of cl 600.213(1), the Tribunal should also consider PIC 4011 in making its decision, as a direction only in relation to the genuine intention criterion would not bind the delegate upon remittal in relation to the 'risk factor criterion' in PIC 4011. The considerations in relation to PIC 4011 are similar to those for being satisfied as to genuine intention, but impose a higher standard of satisfaction on the decision maker (see Public Interest Criterion 4011 (risk factor criterion) below).

[91] In *Barakat v MIBP* [2018] FCCA 1316 at [28] it was held that there is no requirement that information suggesting a low risk of immigration non-compliance must be factored into a decision or is a relevant consideration.

If the applicant is a minor

There are no secondary criteria for Subclass 600 visas and each applicant must satisfy the primary criteria for grant, including the genuine intention criterion in cl 600.211. There is no relevant judicial consideration, or guidance in Departmental policy, in relation to how this criterion applies in relation to an applicant who is a minor who lacks the capacity to form the relevant intention.

There are two possible approaches to this issue. The first approach is based on the application of a statutory implication. In circumstances where the minor visa applicant lacks the capacity to form the relevant intention, it may be implied, as a matter of statutory interpretation, that the intention of the parent is taken to be the intention of the minor visa applicant. This implication would be on the basis that it is necessary to avoid an absurd result where there is no apparent statutory intention to preclude minor children from the grant of visitor visas and where such an implication would be consistent with existing obligations upon parents who bear responsibilities in respect of their children.

The second approach may be to make it a purely factual inquiry. While a visa applicant who is a child may not understand the concepts of compliance with a visa condition or intention to visit Australia for the purpose of the visa, there may be sufficient evidence that the child would do what the parent wants. On that factual basis, the intention of the parent would be relevant to determining the intention of the child.

Adequate means of support: cl 600.212

A common criterion for all streams in the Subclass 600 visa is that the applicant has adequate means, or access to adequate means, to support themselves during the period of their intended stay in Australia.[92] Departmental guidelines suggest that it would be appropriate to take into account their planned activities and accommodation/living arrangements in Australia when assessing this criterion, noting that funds can also be provided by relatives or friends in Australia.[93] Relevant evidence of means of support may include bank statements/passbooks, letters from banks or other financial institutions concerning the financial position of the applicant or the applicant's access to the funds of another person, air tickets, and available credit card funds (with savings history considered to be better evidence than recently deposited funds).[94] While the Tribunal may have regard to Departmental guidelines, they are not binding and the Tribunal should consider the individual circumstances of the applicant and not raise any guidelines to the level of a legislative requirement.

[92] cl 600.212.
[93] POLICY – MIGRATION REGULATIONS – OTHER – GenGuideH – Visitor visas – Visa application and related procedures – 'Adequate means of support' (re-issue date 10/9/16).
[94] POLICY – MIGRATION REGULATIONS – OTHER – GenGuideH – Visitor visas – Visa application and related procedures – 'Adequate means of support' (re-issue date 10/9/16).

Public Interest Criterion 4011 (risk factor criterion): cl 600.213(1)

All applicants must satisfy the public interest criteria in cl 600.213(1), which includes PIC 4011. PIC 4011 provides that, if the applicant is affected by a risk factor as described in 4011(2), the applicant must satisfy the Minister that, having regard to the circumstances in the applicant's usual country of residence, there is 'very little likelihood' that the applicant will remain in Australia beyond the authorised period of stay.

The applicant is affected by a risk factor if:

- during the period of 5 years immediately preceding the application, the applicant has applied for a visa for the purpose of permanent residence in Australia;[95] or
- the applicant has all the characteristics of a class of persons specified in a legislative instrument made by the Minister.[96]

Since 15 May 2009, there has been no applicable instrument specifying characteristics of a class of persons for the purposes of PIC 4011(2)(b).[97] In these circumstances, the only basis on which an applicant can be subject to the risk factor in PIC 4011 is where the applicant falls within 4011(2)(a) – i.e. during 5 years immediately preceding the application, the applicant has applied for a visa for the purpose of permanent residence in Australia.

Exceptional circumstances for more than 12 consecutive months stay: cl 600.215

Clause 600.215 provides that if the grant of the visa would result in authorising a stay of *more than 12 consecutive months as the holder of* a visitor, working holiday, work and holiday visa or, for applications made from 21 November 2015,[98] a bridging visa, there must be exceptional circumstances for the grant of the visa. This criterion is only engaged where visas of the specified kinds are held consecutively, and not where there is an intervening visa of a different kind, such as a work visa.

Departmental policy suggests that where there has been a cumulative (but not consecutive) recent stay in Australia of more than 12 months, decision-makers should carefully consider whether the applicant continues to meet the genuine temporary stay requirement.[99]

The policy also gives examples of exceptional circumstances for authorising a stay longer than 12 consecutive months, including death or serious illness of a close family member in Australia, where the visa applicant is required to provide assistance or support, or an

[95] PIC 4011(2)(a).
[96] PIC 4011(2)(b).
[97] Instrument IMMI 08/119 with effect from 15 May 2009, revoked the instrument previously made for this purpose IMMI 08/033.
[98] *Migration Legislation Amendment (2015 Measures No 3) Regulation 2015* (Cth) (SLI 2015, No 184) substituted cl 600.215 for visa applications made from 21 November 2015.
[99] POLICY – MIGRATION REGULATIONS – OTHER – GenGuideH – Visitor visas – Visa application and related procedures – 'If total stay will exceed 12 months' (re-issue date 10/9/16).

unexpected change in circumstances beyond the applicant's control, where not granting the visa would cause significant hardship to an Australian resident or citizen.[100]

Sponsorship issues

There are sponsorship-related criteria for certain applicants in the Tourist stream (if the applicant intends to visit certain kinds of relatives and is required to be sponsored) and for all applicants in the Sponsored Family stream. These criteria require that the sponsorship has been approved by the Minister and is still in force.[101] Statutory limitations on sponsorship may apply in certain circumstances (see Limitations on sponsorship in reg 1.20L below).

In both streams, the applicant may be sponsored by a settled Australian citizen or permanent resident who is over 18, and who is a relative of the applicant (or of another applicant who is a member of the applicant's family unit, or in relation to whom the applicant is a member of the family unit).[102]

If the applicant is sponsored by a relative of another applicant (who is a member of the family unit of the applicant, or in relation to whom the applicant is a member of the family unit), then a Subclass 600 visa in the same stream must have been granted to that other applicant.[103] The purpose of this provision is to ensure that, if a family group is sponsored, no member of that family can be granted a visa if the applicant who is a relative of the sponsor is not granted the visa.[104]

In addition, in the Sponsored Family stream, the applicant may also be sponsored by a settled Australian citizen or permanent resident who is a member of a Parliament or Legislative Assembly or who holds the office of mayor. The applicant may also be sponsored by a Commonwealth, State or Territory government agency or instrumentality.[105]

Discretionary sponsorship requirement in the Tourist stream: cl 600.224

The sponsorship requirement in the Tourist stream applies only if the applicant intends to visit certain kinds of relatives, and if the Minister has required the applicant (and each other applicant who is a member of the applicant's family unit, or in relation to whom the applicant is a member of the family unit) to be sponsored by a specified Australian relative under cl 600.224(1). This capacity of the Minister to request sponsorship is intended to provide additional flexibility in relation to applicants who may otherwise not meet the visa criteria.[106] One effect of requiring sponsorship is to engage the security requirement criterion in cl 600.225.

[100] POLICY – MIGRATION REGULATIONS – OTHER – GenGuideH – Visitor visas – Visa application and related procedures – 'If total stay will exceed 12 months' (re-issue date 10/9/16).
[101] cl 600.224(3) in the Tourist stream; cl 600.234 in the Sponsored Family stream.
[102] cl 600.224(1)(b) in the Tourist stream; cl 600.232(2) in the Sponsored Family stream.
[103] cl 600.224(4) in the Tourist stream; cl 600.233 in the Sponsored Family stream. The other applicant must be a relative of the sponsor, and must have been sponsored by the sponsor in relation to the applicant's visit.
[104] Explanatory Statement to SLI 2013, No 32, p.19
[105] cl 600.232(3)–(4).
[106] Explanatory Statement to SLI 2013, No 32, p.18.

If the delegate had not required a sponsorship at the primary level, the Tribunal appears to have discretion to require a sponsorship in accordance with cl 600.224(1). However, it is not possible for the Tribunal to require a security to be lodged, if that has not been requested by an officer authorised under s 269.[107] Therefore the practical effect of the Tribunal requiring a sponsorship, in the absence of being able to request a security, appears to be somewhat limited. Nevertheless, there are certain statutory obligations for a sponsor in relation to a Subclass 600 visa, which the Tribunal may have regard to when considering its discretion to require a sponsorship.[108]

It is unclear whether the Tribunal on review has the power to 'no longer require' a sponsorship which had been requested by a delegate. On one view, if the delegate had required the applicant to be sponsored in accordance with cl 600.224(1), then the sponsorship requirements under cl 600.224(2)–(4) must apply as criteria which must be satisfied. On another view, however, as the Tribunal may exercise all the powers and discretions that are conferred by the Act on the person who made the primary decision,[109] there is scope for the Tribunal to 'no longer require' the sponsorship, in which case the sponsorship criteria under cl 600.224(2)–(4) would no longer apply.[110]

Limitations on sponsorship in reg 1.20L

The Tribunal must consider whether the sponsorship limitations under reg 1.20L apply when considering the approval of a sponsorship under cl 600.224(3) or cl 600.234. Regulation 1.20L imposes a bar on the Minister approving sponsorship for a Subclass 600 visa, where the sponsor has previously sponsored an applicant for a Subclass 600 (Visitor) visa or a Sponsored (Visitor) (Class UL) visa which was granted, and where:

- the visa is still in effect;
    - however, this limitation does not apply if the previously sponsored applicant holds a Subclass 600 visa, and the current visa applicant is a member of the family unit of the previously sponsored applicant, and is proposing to travel to Australia for the same purpose as the previously sponsored applicant;[111] or
- the visa has ceased to be in effect, the previously sponsored applicant did not comply with a condition of that visa, and 5 years have not passed since the grant of that visa;
    - however, this limitation does not apply in certain cases if the previously sponsored applicant holds a Subclass 600 visa, and did not comply with

[107] cl 600.225(1)(d).
[108] Sponsorship obligations in relation to a Subclass 600 visa are set out under reg 1.20(2)(b) – the sponsor must undertake to accept responsibility for: all financial obligations to the Commonwealth incurred by the applicant arising out of their stay in Australia; the applicant's compliance with all relevant legislation and awards in relation to any employment entered into in Australia; and, in certain circumstances, for the applicant's compliance with visa conditions.
[109] s 349(1). See also *MIAC v SZKTI* (2009) 238 CLR 489 and *MIAC v SZNAV* [2009] FCAFC 109.
[110] In addition, if there was a request to lodge a security under s 269, the requirement to lodge a security under cl 600.225 would also no longer apply.
[111] reg 1.20L(3).

condition 8531, exceeding their period of stay due to circumstances beyond their control after they entered Australia on the Subclass 600 visa.[112]

Request for security: cls 600.225, 600.235

In both the Tourist stream and the Sponsored Family stream, it is a requirement that a security has been lodged if a security has been requested by an authorised officer in accordance with s 269 of the Act (which deals with security for compliance with the Act).[113] However, in the Tourist stream, this security requirement only applies if the Minister has required the applicant to be sponsored.[114]

In considering the requirement that a security has been lodged, the Tribunal should firstly consider whether a security has been asked for by an officer authorised under s 269 of the Act. If a security has been asked for, then the question is whether the security has been lodged. If a security has not been asked for, then the Tribunal is not able to ask for a security, and lodgement of a security is not required.[115] Similarly, if a security has been asked for but not by an officer authorised at the time under s 269, lodgement of a security is not required.[116]

Decisions in relation to requiring a security for a Subclass 600 visa are not Part 5 reviewable decisions (see Merits review below for further discussion).

The issue of securities, merits review and related criteria is discussed in detail in the MRD Legal Services Commentary on Securities.

Merits review

Visa refusal decisions

Decisions to refuse to grant a Subclass 600 visa in the Tourist stream and in the Sponsored Family stream may be reviewable by the Tribunal under s 338, and more than one provision may apply, as follows:

- s 338(2) – Tourist stream – the visa applicant has standing to apply for review if:
  - the applicant made the visa application while in the migration zone; and

[112] reg 1.20L(4).
[113] cl 600.225 in the Tourist stream; cl 600.235 in the Sponsored Family stream. Under s 269 of the Act, a security may be requested by an authorised officer for compliance with the provisions of the Act, the Regulations, or with any condition imposed in pursuance of, or for the purposes of, the Act or Regulations. Note that the term 'authorized officer' in this context has a different meaning to 'authorized officer' under s 59 of the *Administrative Appeals Tribunal Act 1975* (Cth), with the former term only referring to an officer authorised under s 296 of the Act.
[114] cl 600.225(1).
[115] In *Tutugri v MIMA* (1999) 95 FCR 592, Lee J observed at [42], in relation to the similarly worded criterion in cl 050.214 as then in force: 'Obviously the applicant did satisfy that criterion … He had not been asked to lodge a security by an officer authorised under s 269 of the Act'.
[116] On the need to establish the relevant authorisation, see *Takli v MIMA* [2000] FCA 1490, in relation to the similarly worded cl 050.214 as then in force.

  - the applicant was not in immigration clearance or had been immigration cleared at the time of the primary decision;

- s 338(5) – Tourist stream and Sponsored Family stream – the sponsor has standing to apply for review if:
  - the applicant made the visa application while outside the migration zone;
  - the applicant was sponsored by an Australian citizen or permanent resident, or by a 'company' that operates in Australia;[117]

- s 338(7) – Tourist stream and Sponsored Family stream – the Australian relative has standing to apply for review if:
  - the applicant made the visa application while outside the migration zone;
  - particulars of the relevant Australian relative are included in the visa application.[118]

Combined review applications in both streams may be permitted in certain circumstances under reg 4.12, as follows:

- s 338(2) – Tourist stream – the visa applicant may combine review applications if the visa applications were combined in Australia under reg 2.08 (child born before primary decision);[119]
- s 338(5) – Tourist stream and Sponsored Family stream – the sponsor may combine review applications if the sponsor has sponsored 2 or more members of a family unit in respect of each of the members of the family unit that were refused the visa;[120]
- s 338(7) – Tourist stream and Sponsored Family stream – the Australian relative may combine review applications if the visa applications were combined under reg 2.08 (child born before primary decision).[121]

Decisions to refuse to grant a Subclass 600 visa in the Business Visitor stream, the Approved Destination Status stream and the Frequent Traveller stream are not reviewable by the Tribunal.

[117] The broad definition of 'company' in s 337 of the Act as 'any body or association (whether or not it is incorporated)' means that a decision to refuse to grant a visa in the Sponsored Family stream, where the sponsor is a Commonwealth/State/Territory government agency or instrumentality as described in cl 600.232(4), is reviewable under s 338(5).
[118] A relative of the relevant kind includes an Australian citizen or permanent resident who is a parent, spouse, de facto partner, child, brother or sister of the applicant.
[119] reg 4.12(2).
[120] reg 4.12(4).
[121] reg 4.12(6). The Australian relative includes an Australian citizen or permanent resident who is a parent, spouse, de facto partner, child, brother or sister of the visa applicants. Please note that if a newborn child is born prior to the primary decision, the 'Australian relative' may not have the requisite relationship to that child for the purposes of s 338(7) and/or the standing requirements under s 347(2)(c). For example, the Australian citizen brother of a Subclass 600 visa applicant may have standing to seek review on her behalf, but not for her newborn child as he is the child's uncle.

Expedited review for close family visits

Regulation 4.23 imposes an expedited review requirement, which requires the Tribunal in certain circumstances to review Subclass 600 visa refusal decisions immediately upon receipt of an application for review and to give notice of its decision as soon as practicable. Regulation 4.23 only applies where the applicant stated in their application that they intended to visit Australia (or remain in Australia as a visitor) for the purposes of visiting an Australian citizen or permanent resident who is a parent, spouse, de facto partner, child, brother or sister of the applicant, in order to participate in an event of 'special family significance' in which the applicant is directly concerned, as identified in the visa application. In addition, the visa refusal must have been made because the delegate 'was not satisfied that the expressed intention of the applicant only to visit Australia was genuine'[122] or because the applicant did not satisfy PIC 4011, and the visa application was made long enough before the event to allow for review if the visa were refused.

Other decisions

Decisions to cancel a Subclass 600 visa are generally reviewable by the Tribunal under s 338(3) of the Act if the former holder of the visa is still in Australia but not in immigration clearance at the time of the cancellation. The review application must be made by the non-citizen who is the subject of the cancellation decision.

There is no separate reviewable decision in relation to approval of a sponsorship. Where sponsorship is a criterion for the grant of the visa, and the sponsorship has been found not to meet the requirements and has not been approved, the visa will be refused and the issue of sponsorship will be reviewable as part of the review of the refusal to grant the visa.

Decisions in relation to requiring a security for a Subclass 600 visa are not reviewable by the Tribunal, as the relevant criteria are not criteria described in reg 4.02(4)(f)(ii) of the Regulations.[123]

Relevant case law

Judgment	Judgment summary
Ammar v MIBP [2019] FCCA 376	Summary
Barakat v MIBP [2018] FCCA 1316	

[122] reg 4.23(1)(d)(i). This reflects the wording of the 'genuine intention' criterion under cl 676.211 for a Subclass 676 visa. Although this does not directly reflect the wording of the similar criterion under cl 600.211 for a Subclass 600 visa, if a Subclass 600 visa application is refused on the basis that the applicant did not have a genuine intention to visit under cl 600.211, such a decision could still fall within reg 4.23(1)(d)(i) for an expedited review.

[123] A decision that relates to requiring a security is reviewable by the Tribunal only if it *also* relates to a refusal to grant a visa which has a criterion to the effect that if an authorised officer has required a security for compliance with any conditions that will be imposed on the visa if granted, the security has been lodged: reg 4.02(4)(f)(ii). The criteria relating to securities for Subclass 600 visas (cls 600.225 and 600.235) do not meet this description because they do not concern securities for compliance with conditions that will be imposed.

Khalsa v MIAC [2012] FMCA 100	
Khanam v MIAC [2009] FCA 966; (2009) 111 ALD 421	Summary
Krummrey v MIMIA [2005] FCAFC 258; (2005) 147 FCR 557	Summary
Sandoval v MIMA [2001] FCA 1237; (2001) 194 ALR 71	
Saravanan v MIMIA [2001] FCA 938	Summary
MIMA v Saravanan [2002] FCA 348; (2002) 116 FCR 437	Summary
MIAC v SZKTI [2009] HCA 30; (2009) 238 CLR 489	Summary
MIAC v SZNAV [2009] FCAFC 109	Summary
SZPZH v MIAC [2011] FMCA 407	Summary
SZPZH v MIAC [2011] FCA 960	Summary
Takli v MIMA [2000] FCA 1490	Summary
Tutugri v MIMIA [1999] FCA 1785; (1999) 95 FCR 592	
Umer v MIBP [2017] FCCA 2934	Summary

Relevant legislative amendments

Title	Reference number
Migration Amendment Regulations 2005 (No 3) (Cth)	SLI 2005, No 133
Migration Amendment Regulation 2013 (No 1) (Cth)	SLI 2013, No 32
Migration Amendment (2015 Measures No 1) Regulation 2015 (Cth)	SLI 2015, No 34
Migration Legislation Amendment (2015 Measures No 3) Regulation 2015 (Cth)	SLI 2015, No 184
Migration Amendment (Priority Consideration of Certain Visa Applications) Regulation 2016 (Cth)	F2016L00295
Migration Legislation Amendment (2016 Measures No 5) Regulation 2016 (Cth)	F2016L01745
Migration Legislation Amendment (2017) Measures No 4) Regulations 2017 (Cth) (NB: Disallowed by the Senate at 17:56 on 5	F2017L01425

December 2017)	

Available decision templates

The following decision template and optional standard paragraph for visitor visa cases are available:

- **Subclass 600 Visa Refusal – Genuine Visit** – this template is suitable for Subclass 600 (Visitor) visa refusals where the visa application was made from 23 March 2013, and the sole issue under consideration is whether the applicant genuinely intends to stay temporarily in Australia for the purpose for which the visa is granted.
- **Optional Standard Paragraphs – Visitor Cases** – this optional standard paragraph sets out relevant law in relation to PIC 4011 (risk factor criterion).

Last updated/reviewed: 22 December 2021

SUBCLASS 602 MEDICAL TREATMENT (VISITOR) (CLASS UB) VISA

Relevant amending legislation

Available decision precedents

Overview[1]

The Subclass 602 Medical Treatment (Visitor) visa is for persons seeking to visit or remain in Australia for medical treatment or related purposes and is the only visa within Class UB. It may be granted for purposes including to obtain medical treatment (other than for surrogate motherhood), to donate an organ, to support another person having medical treatment, for a Papua New Guinea citizen to be treated in Queensland, or where an applicant aged 50 years or over is medically unfit to depart Australia.[2] Applications may be made by applicants in or outside Australia.[3] The visa is generally subject to a 'no work' condition, but this may not apply in cases of financial hardship where the applicant has compelling personal reasons to work.[4] In general, the grant of the visa must not result in any disadvantage to an Australian citizen or permanent resident in obtaining medical treatment or consultation.[5]

Before 23 March 2013, the Medical Treatment (Visitor) visa class had two subclasses – Subclass 675 Medical Treatment (Short Stay), and Subclass 685 Medical Treatment (Long Stay), which generally provided for stays of up to three months and over three months respectively.[6] These two subclasses were effectively replaced by the Subclass 602 Medical Treatment visa from 23 March 2013.[7]

Requirements for making a valid visa application

Item 1214A of Schedule 1 to the *Migration Regulations 1994* (Cth) (the Regulations) sets out the requirements for making a valid application for a Medical Treatment visa. It must be made on the approved form, at the place and in the manner specified by the Minister in a legislative instrument.[8] The applicant may be in or outside Australia.[9] An application made by a person included in the passport of another person may be made at the same time and place as, and combined with, the application by that person.[10]

An application made in Australia by a person who is not the holder of a substantive visa must be accompanied by the documentation specified by the Minister in a legislative instrument.[11] The Minister has specified an approved form which must include brief details of the proposed medical treatment and be signed by a registered medical practitioner.[12] This requirement is intended to prevent vexatious applications by persons in Australia who do not

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] cls 602.212(2), (3), (4), (5) and (6)
[3] Item 1214A of Schedule 1 to the Regulations. Note the form and manner requirements were amended by *Migration Amendment (2015 Measures No.1) Regulation 2015* (Cth) (SLI 2015, No.34) for applications on or after 18 April 2015.
[4] cl 602.611; cl.602.212(7).
[5] cl 602.214.
[6] cl 675.215, 675.511 and 675.512; cl 685.215 and 685.511 (repealed by SLI 2013 No.32).
[7] SLI 2013 No.32.
[8] Item 1214A(3)(a) of Schedule 1 to the Regulations.
[9] Item 1214A of Schedule 1 to the Regulations. Note the form and manner requirements were amended by *Migration Amendment (2015 Measures No.1) Regulation 2015* (Cth) (SLI 2015, No.34) for applications on or after 18 April 2015.
[10] Item 1214A(3)(d) of Schedule 1 to the Regulations.
[11] Item 1214A(3)(e) of Schedule 1 to the Regulations. This requirement applies to applications made on or after 1 July 2017.
[12] For the relevant instrument and approved form, see the 'SpecifiedDocMedTreatment' tab of the Register of Instruments – Visitor Visas. The current approved form states that a registered medical practitioner is a person registered as a medical practitioner under the law of an Australian state or territory providing for the registration of medical practitioners. The Australian Health Practitioner Regulation Agency (AHPRA) publishes a Register of Practitioners, which includes registered medical practitioners, located at https://www.ahpra.gov.au/Registration/Registers-of-Practitioners.aspx (last accessed 21/12/2020).

have a need for medical treatment.[13] However, the criteria for the grant of the visa do not refer to the requirement to have provided the approved form, or connect the medical treatment being sought at time of decision to the treatment identified when the visa application is made, and there does not appear to be anything preventing the grant of the visa if the nature of the medical treatment that an applicant requires changes before a decision is made on the application and the treatment that was identified when the application was made is never obtained.

Visa Criteria

The criteria for Subclass 602 are set out in Part 602 of Schedule 2 to the Regulations. Part 602 contains primary criteria which must be met by all applicants except for applicants who are members of the family unit of a person who holds either a Subclass 602 visa on the basis of satisfying subclause 602.212(6), or a Subclass 685 visa on the basis of satisfying subclause 685.221(4)). Such applicants must instead meet secondary criteria. All primary and secondary criteria must be met at the time of decision.

Primary criteria

All primary applicants must be seeking to visit or remain in Australia temporarily for the purposes of medical treatment or a related purpose (cl 602.211) and must meet one of the following medical treatment categories set out in cl 602.212:

Medical treatment categories

Medical treatment

Clause 602.212(2) applies to applicants who are seeking to obtain medical treatment in Australia. This includes consultations, but does not include treatment for the purpose of surrogate motherhood. The applicant:

- must demonstrate the arrangements to carry out the treatment have been concluded;[14]
- in circumstances where the treatment is an organ transplant - either the donor of the organ must accompany the applicant to Australia, or all requisite arrangements to affect the donation of the organ must be concluded in Australia;[15]
- must not be a threat to public health in Australia, or a danger to the Australian community;[16] and
- must demonstrate that payment of all costs related to the medical treatment and stay in Australia (including expenses of any person accompanying the applicant) have

[13] Explanatory Statement to F2017L00816, p.40.
[14] cl 602.212(2)(b).
[15] cl 602.212(2)(c).
[16] cl 602.212(2)(d).

been arranged and concluded, and that the payment of the costs will not be a charge on the Commonwealth, a State, Territory or public authority in Australia, or in the alternative, evidence is produced that the relevant government authority has approved the payment of the costs.[17]

Organ donor

Clause 602.212(3) applies to applicants seeking to donate an organ for transplant in Australia. The applicant:

- must satisfy public interest criterion (PIC) 4005;[18]
- must demonstrate that payment of all costs related to the medical treatment and stay in Australia (including expenses of any person accompanying the applicant) have been arranged and concluded, and that the payment of the costs will not be a charge on the Commonwealth, a State, Territory or public authority in Australia, or in the alternative, evidence is produced that the relevant government authority has approved the payment of the costs;[19] and
- if the organ recipient is also an applicant, then the medical treatment requirement must also be met in relation to the organ recipient.[20]

Support person

Clause 602.212(4) applies to applicants seeking to give emotional and other support to an applicant seeking to obtain medical treatment or donate an organ for transplant.[21] The person to whom the applicant is to provide support must hold a Subclass 602 visa on the basis of either seeking medical treatment or an organ donation[22] and the 'support person' must satisfy PIC 4005.[23]

Western Province of PNG

Citizens of Papua New Guinea who reside in the Western Province are eligible to apply for a Medical Treatment visa. In order to meet this criteria, the Department of the government of Queensland that is responsible for health must have approved the medical evacuation of the applicant, or the treatment of the applicant in a hospital in Queensland.[24]

Unfit to depart

Clause 602.212(6) applies to applicants who are unfit to depart Australia. The applicant must:

[17] cl 602.212(2)(e) – (f).
[18] cl 602.212(3)(c). For further information see the Health Criteria commentary.
[19] cl 602.212(3)(d) and (e).
[20] cl 602.212(3)(b).
[21] cl 602.212(4)(a)(i). Clauses 602.212(4)(a)(ii)-(iii) refer to Subclass 675 and 685 visas, both were discontinued in 2013.
[22] cl 602.212(4)(b)(i). Clauses 602.212(4)(b)(ii)-(iii) refer to Subclass 675 and 685 visas, both were discontinued in 2013.
[23] cl 602.212(4)(c).
[24] cl 602.212(5)(c).

- be onshore;[25]
- be 50 years old or over;[26]
- have applied for and been refused a permanent visa while onshore and appear to have met all the criteria for that visa, other than any public interest criteria in relation to health;[27] and
- be medically unfit to depart Australia.[28]

Financial hardship

Clause 602.212(7) applies to applicants who satisfy certain requirements in the above criterions, are onshore and the holder of a Subclass 602 visa, and who:

- are suffering financial hardship as a result of changes in their circumstances after entering Australia;[29]
- are, or a member of their immediate family are, likely to become a charge on the Commonwealth, a State, a Territory or a public authority in Australia;[30]
- are, or a member of their immediate family are, unable to leave Australia for reasons outside their control;[31]
- have compelling personal reasons to work; [32] and
- satisfy PIC 4005.[33]

Compelling personal reasons

Clause 602.212(8) applies to applicants who satisfy certain requirements in either subclause (2), (3), (4), (5) or (6) above,[34] as well as are onshore, have compelling personal reasons for the grant of the visa, and satisfy PIC 4005, other than paragraph 4005(1)(c).[35] Whether a reason is compelling is a question of fact and degree for the Tribunal and one which requires a subjective assessment which takes into account all of the circumstances. For further general discussion about compelling circumstances, see the Compelling or Compassionate Circumstances commentary.

[25] cl 602.212(6)(a).
[26] cl 602.212(6)(b).
[27] cl 602.212(6)(c), (d) and (e).
[28] cl 602.212(6)(f).
[29] cl 602.212(7)(d).
[30] cl 602.212(7)(e).
[31] cl 602.212(7)(f).
[32] cl 602.212(7)(g).
[33] cl 602.212(7)(h).
[34] The required criteria are either cl 602.212(2)(a) to (c), (3)(a) and (b), (4)(a) and (b), (5) or (6)(a) to (e): cl 602.212(8)(a).
[35] cl 602.212(8)(b) - (d).

Additional criteria applying to primary applicants who do not meet cl 602.212(6) (unfit to depart)

There are a number of criteria which must be met by applicants who do not meet the unfit to depart requirement in cl 602.212(6). These applicants:

- if they made their application in Australia – the substantive temporary visa they held at the time of their application or which they last held must have been a substantive temporary visa other than a Subclass 403 visa in the Domestic Worker (Diplomatic or Consulate) stream;[36]

- must genuinely intend to stay temporarily in Australia for the purpose for which the visa is granted.[37] The 'purpose for which the visa is granted' must be a purpose for which the visa could be granted and decision-makers should consider whether the applicant's stated purpose is one of the alternative purposes set out in cl 602.212(2)–(8).[38] See Medical treatment categories above for further discussion. This criterion is identical to the 'genuine visitor' criterion in the subclass 600 Visitor visa (cl 600.211). For detailed discussion, see the Subclass 600 Visitor visa commentary;

- are required to have adequate means, or access to adequate means, to support themselves during the period of their intended stay in Australia;[39]

- granting the visa must not disadvantage Australian citizens or permanent residents in obtaining medical treatment or consultation;[40]

- must satisfy PIC 4001, 4002, 4003, 4004, 4013 and 4014;[41] and

- if they made their application in Australia – the period of stay in Australia to which the application relates must not be sought for the purpose of commencing, continuing or completing any studies or training, and, if granting the visa would result in the applicant being authorised to stay in Australia for more than 12 consecutive months as the holder of one or more visitor visas, 'compelling personal reasons or exceptional circumstances' must exist..[42]

[36] cl 602.213. For visa applications made before 1 July 2017, cl 602.213 additionally required applicants to meet certain Schedule 3 requirements. These requirements were repealed by item 4 of Schedule 3 to the *Migration Legislation Amendment (2017 Measures No. 3) Regulations 2017*.
[37] cl 602.215.
[38] In *El Mir v MICMSMA (No 2)* [2021] FCCA 1093 (*El Mir*) at [14]–[15], the Court held the Tribunal had not considered the relevant purpose in cl 602.212 which the applicant was claiming to meet and that its conclusion in relation to cl 602.215 might have been different had it not failed to do so. This was in circumstances where the Tribunal accepted the applicant required cataract surgery and was waiting for an insurance claim to be settled before he could book the treatment, but made findings (in the context of whether cl 602.215(1) applied) that cl 602.212(6) was not met and that none of the alternative sub-criteria in cl 602.212 were relevant. Given the Tribunal did consider the claimed purpose of the visa in assessing if cl 602.215(1) was met, it is difficult to see how the failure to expressly identify cl 602.212(2) as the relevant purpose could have affected the conclusion on cl 602.215. In contrast see *DET22 v MICMA* [2022] FedCFamC2G 774, where the Court held that Tribunal's failure to make any finding about whether the applicant met cl 602.212(2) did not amount to error in the circumstances of that case (at [26]). The Court found that *El Mir* did not require the Tribunal in every case to consider cl 602.212 before considering the genuine temporary stay requirement in cl 602.215, and even if there was such a requirement, the error was not material in the circumstances (at [28] - [30]). However, an error of the type identified in *El Mir* may be avoided by clearly identifying and having regard to the claimed 'purpose' of the visa by reference to cl 602.212(2) – (8) when making findings on the genuine temporary stay criterion in cl 602.215.
[39] cl 602.216.
[40] cl 602.214.
[41] cl 602.217.
[42] cl 602.219B.

However, the last two requirements above also do not apply to applicants who meet cl 602.212(7) (financial hardship) or cl 602.212(8) (compelling personal reasons).

Other criteria applying to all primary applicants

All applicants must satisfy PIC 4020 and 4021[43] and, for applicants who have not turned 18 years of age, 4012, 4017 and 4018.[44]

Additionally, all applicants must satisfy special return criteria 5001, 5002 and 5010.[45] For more information see the Special Return Criteria commentary.

Secondary criteria

Secondary criteria apply to members of the family unit of an applicant who has satisfied the 'unfit to depart' primary criteria, and has been granted a Medical Treatment visa.[46] A secondary applicant must satisfy certain public interest criteria and special return criterion 5010.[47]

An additional criterion applies to secondary applicants who are the holder of a Subclass 602, 675 or 685 visa. Clause 602.314 requires these applicants to meet financial hardship requirements equivalent to those in cl 602.212(7)(d)-(h). Applicants who meet this clause may be granted a visa without work restrictions.[48]

Key issues

Seek to visit or remain temporarily for medical or related purposes

Unlike cl 602.212 that requires an applicant to meet a medical treatment or related purposes criteria, or cl 602.215 that requires the applicant to have a genuine intention to stay temporarily, cl 602.211 only requires that an applicant *seeks* to visit Australia, or remain in Australia[49] temporarily, for the purposes of medical treatment or for related purposes. While this requires a subjective assessment of what an applicant is seeking to do, it is unclear the extent to which a decision maker could look behind an applicant's stated intention to find that they did not genuinely seek the visa to visit or remain temporarily, or for medical treatment or related purposes. Later statements or evidence from an applicant that contradict or undermine an earlier stated purpose for seeking the visa may be sufficient, although ultimately matters that go towards the genuineness of the intention or purpose of the visa may still be more appropriately considered under cls 602.212 or 602.215.

[43] cl 602.218.
[44] cl 602.219.
[45] cl 602.219A.
[46] cl 602.311.
[47] cl 602.312 and 602.313.
[48] cl 602.611.
[49] 'Remain in Australia', in relation to a person, means remain in the migration zone: s 5(1).

Medical treatment

A purpose of the visit may be for medical treatment, provided that treatment is not for surrogate motherhood. 'Medical treatment' is not a defined term in the Act or Regulations and should be given its ordinary meaning. 'Medical' is defined in the Macquarie Dictionary to include of, or relating to, the science or practice of medicine, for example; while 'treatment' is defined to include the application of medicines, surgery, psychotherapy etc to a patient to cure a disease or condition.[50] While qualified medical practitioners, such as a GP or surgeon, would come within the terms of medical, it is less clear whether allied health professionals, such as a physiotherapist, osteopath or chiropractor, or an alternative health care provider, such as a homeopath, would also be included.

The term 'treatment' appears broad, given that it expressly includes consultations. It does not appear limited to just the application of a principle or procedure to a known medical condition, but may extend to the testing and diagnosis of a known or unknown medical condition as well. On this broad view of treatment, procedures such as diagnostics, pathology and imaging may also be included provided they are medical in nature or carried out by medical practitioners.

The provision does not require a subjective assessment of the person's need to visit Australia in order for the medical treatment to be performed and it does not seem relevant whether the medical treatment is also available in the person's home country or elsewhere, although such matters might be relevant if considering the genuine temporary entrant criterion.[51]

As the medical treatment must not be for the purposes of surrogate motherhood, procedures such as artificial insemination or in vitro fertilisation for the purposes of impregnating a woman to carry a baby through to birth on behalf of another person or couple would appear to be excluded. However, if such treatments were being undertaken for a purpose other than as a surrogate mother, they would not appear to be excluded.

Departmental guidelines also suggest the term 'medical treatment' can include all medical procedures (such as tests, surgery and/or consultations), whether minor or major, life-saving or cosmetic, consultation or surgery, and whether available in the home country or not. Although they also suggest that alternative health care services such as homeopathy are not included, Departmental guidelines are not binding and decision makers must have regard to the language of the criterion and the circumstances of each case.[52]

As discussed above, there also appears no requirement that the medical treatment relied upon to satisfy cl 602.212(2) at time of decision must be the same medical treatment that was identified when the visa application was made.

[50] Macquarie Dictionary online – https://www.macquariedictionary.com.au (accessed 11/09/2020).
[51] For detailed discussion regarding genuine temporary entrant criteria see the Subclass 600 Visitor visa commentary.
[52] Policy – Sch2 Visa 602 – Medical Treatment – 4.3 MTV-specific criteria - 'What is included in the definition of medical treatment' (reissued 8/12/2019).

Arranged and concluded

Applicants seeking to arrive or remain in Australia temporarily for medical treatment or as an organ donor/recipient must have concluded the arrangements for their treatment at the time of the Tribunal's decision. Whether arrangements are 'concluded' will be a question of fact for the decision maker and will likely depend upon the type and purpose of treatment that is proposed in the circumstances of each case. However, the term 'concluded' does suggest some degree of commitment or finality to the treatment being undertaken. A referral to a specialist but no evidence of an appointment with the specialist being made, or a medical treatment plan with no evidence that it has been committed to, for example, may satisfy the requirement to be arranged, but may not satisfy the additional requirement to also be concluded.

Relevant evidence of concluded arrangements will depend upon the purpose of the visit and type of medical procedure being undertaken. For medical treatment or organ transplant, Departmental guidelines suggest the following may be relevant:

If the purpose is for *medical treatment*:

- the name and address of the relevant medical practitioner and medical facility in Australia,
- Written confirmation from the medical practitioner and/or medical establishment that they agree to treat the patient, including details such as:
  - the nature and estimated duration of the treatment
  - proposed date of treatment and/or consultation
  - the possible cost of treatments, and likely treatment scenarios if an applicant is coming to Australia for a consultation only, and
  - if applicable, a proposed date of admission to the relevant medical facility.

If the purpose is to *receive an organ transplant*:

- there is a donor accompanying the applicant (and there is evidence of compatibility between the donor and applicant) or
- the medical facility or medical practitioner in Australia has confirmed that all arrangements for the organ donation have been finalised, and that as far as possible, compatibility investigations have been undertaken.

If the purpose is to *donate an organ for transplant*:

- the name and address of the referral source (that is, the referring doctor or hospital in the donor applicant's home country), and
- the name and address of the relevant medical practitioner and medical facility in

Australia (that is, the hospital or clinic treating the donor applicant), and

- written confirmation from that medical practitioner or medical facility in Australia that they agree to treat the donor, and including:
  - the details of the nature and estimated duration of the treatment
  - the proposed dates of treatment and (if applicable)
  - a proposed date of admission to the relevant medical facility.[53]

Unfit to depart

Clause 602.212(6) applies if the applicant is onshore, over 50 years of age, has already been refused a permanent visa on health criteria grounds and is 'medically unfit to depart' Australia due to a permanent or deteriorating disease or health condition as evidenced by a written statement to that effect from a Medical Officer of the Commonwealth (MOC). It is not clear whether the 'medically unfit to depart' requirement is directed only to the existence of such a MOC statement, or whether it allows for the decision maker to make a finding of fact about the applicant's fitness to depart, having regard to the MOC statement and other factors, for example, the intended destination they would be departing for and the length and mode of travel required to get there. A person's ability to travel unassisted and unaccompanied without undue discomfort, special health arrangements or travel assistance being required are other matters identified in Departmental guidelines.[54]

However, the requirement would clearly not be met if there was no MOC statement evidencing that the person was medically unit to depart Australia due to a permanent or deteriorating disease or health condition. Further, although the Tribunal is not bound to take an opinion of an MOC to be correct for the purposes of deciding whether cl 602.212(6)(f) is met, there would appear very limited grounds for a written statement from an MOC evidencing this requirement to be disregarded by a decision maker. A written statement that appeared to ask the wrong question or was out of date, or where there was more recent evidence suggesting an improvement in the person's medical condition, may bring the validity of the MOC's written statement into question though such that it would be prudent for a more current MOC written statement to be requested from the applicant. The written statement about the person's medical fitness to depart must be from a MOC, meaning that written statements, reports or diagnosis from other health care specialists or providers would not meet this requirement.

Finally, the disease or health condition preventing departure must be a permanent or deteriorating one. A disease or condition that is temporary in nature, or one that is stable or improving, would not meet the relevant standard. There is also no requirement for the condition to be a physical one. The criterion itself refers to the person being 'medically unfit', as opposed to physically unfit for example, and a neurological or psychological disease or health condition preventing a person's departure would appear equally applicable.

[53] Policy – Sch2 Visa 602 – Medical Treatment – 4.5 MTV for medical treatment and/or consultation (reissued 8/12/2019).
[54] Policy – Sch2 visa 602 – Medical Treatment – MTV eligibility – unfit to depart – what does unfit to depart mean (reissued 8/12/2019).

Adequate means to support

Unless an applicant meets the 'unfit to depart' criteria, they are required to have, or have access to, adequate means to support themselves during the period of their intended stay.

Has, or has access to,…

The person may have adequate means to support themselves or they may have access to that support from another person or source. Relevant evidence of a person's own support may include bank savings or lines of credit in their name or travel tickets or accommodation arrangements that they have already paid for. The support may also be held by someone other than the applicant, provided they can still demonstrate that they have access to it. Access in this sense might not necessarily mean having direct control over it, but some control or ability to actually draw upon the support does seem necessary.[55]

There is also nothing to suggest that the means of support must be held by, or accessible from, a single person or source. This suggests that support spread across multiple people or sources may still be sufficient provided the applicant can demonstrate their necessary ability to access it.

…adequate means to support themselves…

The amount of support that the applicant must have, or have access to, needs to be adequate to support themselves during the period of their intended stay in Australia. A person's medical and hospital costs, for example, their general living expenses or any other accommodation costs whilst they are in Australia may be relevant matters that the applicant is required to demonstrate adequate support for, however there is no defined list of matters that the support must cover and it will be a question of fact for the decision maker to determine having regard to the circumstances in each case.

…during the period of their intended stay

The applicant must demonstrate adequate means to support themselves for the length of their intended stay in Australia. This will require a finding of fact about the length of an applicant's intended stay having regard to the circumstances of each case. The purpose of the applicant's visit, the type of medical procedure(s) proposed to be undertaken and their likely recovery time (if any) may be relevant considerations going towards this. While Departmental policy suggests that a Medical Treatment visa is not appropriate for a person wishing to stay in Australia beyond one year,[56] Medical Treatment visas can be granted for

[55] Departmental guidelines suggest that it would be appropriate to take into account their planned activities and accommodation/living arrangements in Australia, noting that funds can also be provided by relatives or friends in Australia. Relevant evidence of means of support may include bank statements/passbooks, letters from banks or other financial institutions concerning the financial position of the applicant or the applicant's access to the funds of another person, air tickets and available credit card funds. It also notes that written evidence from certain Australian medical aid organisations , such as Rotary, is sufficient for an applicant to satisfy this criterion: Policy – Migration Regulations – Other – GenGuideH – Visitor Visas – Application and Related Procedures – Adequate Means of Support (reissued 8/12/2017).
[56] Policy – Sch2 Visa 602 – Medical Treatment – Overview (reissued 8/12/2019).

any period specified by the Minister and there is no limit to the length of stay currently specified in the Regulations.

Threat to public health or danger to Australian community

While an applicant seeking to satisfy the medical treatment criteria (602.212(2)) is not required to satisfy health criteria 4005 or 4007, decision makers must be satisfied the person is free from a disease or condition that results in them being a threat to public health in Australia or a danger to the Australian community. These terms are not further defined in the Act or Regulations. Any threat to public health or danger to the Australian community must be the result of the person's disease or condition, however. This suggests the focus may be on transmittable or communicable diseases or conditions and is not intended as a general character assessment of the individual, noting that an applicant is required to meet character requirements in PIC 4001 elsewhere. However other types of conditions, such as a psychological condition causing a propensity for violence towards members of the public, for example, might be caught by this provision. To the extent that Department policy suggests it only requires an applicant to be free of active tuberculosis,[57] this appears an overly narrow interpretation of the requirement that should not be followed.

In determining whether an applicant satisfies the criteria for a Medical Treatment visa, any information to the effect that cl 602.212(2)(d) has not been met means the Minister (or Tribunal on review) must seek, and take to be correct, the opinion of a Medical Officer of the Commonwealth on whether the requirement has been met.[58]

No disadvantage to an Australian citizen or permanent resident

Unless satisfying the 'unfit to depart' criteria, no Australian citizen or permanent resident must be disadvantaged in obtaining medical treatment or consultations if the visa was granted. A disadvantage may arise where a medical service or treatment is in short supply or subject to a waiting list, for example, and an Australian citizen or resident's access to that service or treatment would be delayed or restricted because of the visa being granted.

Departmental policy suggests that organ transplants, unless the recipient is also being accompanied by the overseas donor, and dialysis are services considered by the Department of Health to be in short supply and may therefore result in an Australian citizen or permanent resident being disadvantaged.[59]

Conditions

Medical Treatment visas are potentially subject to conditions 8101, 8201 and 8503.

[57] Policy – Sch2 Visa 602 – Medical Treatment – 4.5 MIV for medical treatment and/or consultation - Health requirement – Must not be a risk to public health (reissued 8/12/2019).
[58] r 2.25A(2) and (3). The Tribunal is only bound by an MOC's medical opinion to the extent it has been made according to law. For further information on assessing the validity of an MOC's medical opinion see MRD Legal Services commentary: Health Criteria – PIC 4005, 4006A and 4007.
[59] Policy – Sch2 Visa 602 – Medical Treatment – 4.3 MTV - 'What is not included in the definition' – Australian citizens or permanent residents must not be disadvantaged' (reissued 8/12/2019).

Conditions 8101 and 8201 *must* be imposed, which prohibit work and limit study or training in Australia to a maximum period of 3 months respectively,[60] unless the applicant already holds a Subclass 602 visa granted to them on the basis of satisfying certain primary or secondary criteria in which case only condition 8201 must be imposed.[61] The 3 month limitation on study or training does not apply to someone under 18 years of age if they have experienced a change in their circumstances whilst in Australia and the Minister has given written permission for them to engage in more than 3 months of study or training because there are compelling or compassionate circumstances.[62]

Condition 8503 *may* also be imposed, which provides that the visa holder will not be entitled to be granted a substantive visa, other than a protection visa, while he or she remains in Australia.[63]

Medical Treatment visa applications that were made and finally determined between 18 November 2017 and 5 December 2017 were subject to condition 8602, which provided that the holder must not have an outstanding health debt.[64]

Circumstances applicable to grant

Where the application for a Medical Treatment visa was made in Australia, the applicant must be in Australia at time of grant.[65] For visa applications made outside of Australia, the applicant must be outside Australia at the time of grant.[66]

When visa is in effect

Medical Treatment visas can be granted for periods as specified by the Minister. There is no limit to the validity of these visas or the length of stay specified in the Regulations, but Departmental policy suggests that Medical Treatment visas are not appropriate for persons wishing to stay in Australia for periods beyond one year.[67]

Merits review

A decision to refuse the grant of an onshore visa application is a reviewable decision under s 338(2) of the Act. The onshore applicant has standing to apply for review.[68] The refusal of an offshore application is not reviewable by the Tribunal because it is applied for while the

[60] cl 602.611(1) and (2).
[61] Condition 8101 is not imposed if an applicant already holds a Subclass 602 visa granted to them on the basis of satisfying the primary criteria and who meets the financial hardship requirements in cl 602.212(7); or already holds a Subclass 602 visa granted to them on the basis of satisfying the secondary criteria and, among other things, is suffering financial hardship as a result of changes in the applicant's circumstances after entering Australia.
[62] Item 1A to the table in condition 8201(2).
[63] cl 602.612
[64] cls 600.616 and 602.613, as amended by Migration Legislation Amendment (2017 Measures No.4) Regulations 2017 (F2017L01425). These regulations were disallowed (and repealed) from 17:56 5 December 2017, with the effect that the amendments only applied to visa applications *made and finally determined* in the period the regulations were in effect.
[65] cl 602.411
[66] cl 602.412
[67] Policy – Sch2 Visa 602 – Medical Treatment – Overview (reissued 8/12/2019).
[68] s 347(2)(a).

applicant is outside the migration zone or in immigration clearance and does not include a criterion for a relevant sponsorship or visiting a relative.

Decisions to cancel Medical Treatment visas are generally reviewable by the Tribunal where the former holder of the visa is still in Australia but not in immigration clearance at the time of the cancellation.[69]

Relevant case law

Judgment	Judgment summary
DET22 v MICMA [2022] FedCFamC2G 774	Summary
El Mir v MICMSMA (No 2) [2021] FCCA 1093	Summary

Relevant amending legislation

Title	Reference number	Legislation Bulletin
Migration Amendment Regulation 2013 (No.1)	SLI 2013, No.32	No.3/2013
Migration Legislation Amendment (2016 Measures No. 5) Regulation 2016	F2016L01745	No.5/2016
Migration Legislation Amendment (2017 Measures No.3) Regulations 2017	F2017L00816	No.4/2017
Migration Legislation Amendment (2017 Measures No.4) Regulations 2017 NB: disallowed (and repealed) from 17:56 5 December 2017	F2017L01425	No.5/2017

Available decision precedents

The following decision template / precedent is available:

- **Subclass 602 Visa Refusal** – suitable for Subclass 602 Medical Treatment (Visitor) (Class UB) visa refusals for visa applications made on or after 23 March 2013. It includes optional paragraphs addressing the following issues: cl.602.211 (medical or related purposes), cl.602.212(2) (seeks to obtain medical treatment), cl.602.212(6) (unfit to depart), cl.602.213 (Schedule 3) (for visa applications made prior to 1 July 2017), cl.602.214 (no disadvantage), cl.602.215 (genuine intention to stay) and cl.602.216 (adequate means of support).

[69] s 338(3).

Last updated/reviewed: 26 October 2022