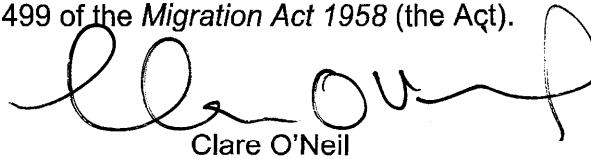


# **DIRECTION NUMBER 106 – ASSESSING THE GENUINE ENTRY AND STAY REQUIREMENTS FOR STUDENT VISA AND STUDENT GUARDIAN VISA APPLICATIONS**

(Section 499)

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

Dated: 21/3/24



Clare O'Neil

Minister for Home Affairs and Minister for Cyber Security

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

## **Part 1 - Preliminary**

### **1. Name of Direction**

This Direction is Direction No. 106 – Assessing the genuine entry and stay requirements for Student visa and Student Guardian visa applications.

It may be cited as Direction No. 106.

### **2. Commencement**

This Direction commences on 23 March 2024.

### **3. Revocation**

Nil.

### **4. Application**

- (1) This Direction applies in relation to Subclass 500 (Student) visa applications and Student Guardian visa applications made on or after 23 March 2024, including visa applications made on or after that date that are remitted from the Administrative

Appeals Tribunal; or the Administrative Review Tribunal, upon its establishment; or a Court.

- (2) This Direction applies to delegates of the Minister performing functions or exercising powers under section 65 of the Act in relation to assessing **the genuine student criterion** and the genuine student dependent criterion for Subclass 500 (Student) visa applications, and **the genuine temporary entrant criterion for Student Guardian visa applications**.
- (3) This Direction also applies to members of the Administrative Appeals Tribunal; or the Administrative Review Tribunal, upon its establishment; who review the decisions of primary decision-makers in relation to an application for a Subclass 500 (Student) visa or Student Guardian visa.

Note: Direction No. 108 applies in relation to Subclass 500 (Student) visa applications and Student Guardian visa applications made before 23 March 2024 but not finally determined on that date, including such visa applications that are remitted from the Administrative Appeals Tribunal; or the Administrative Review Tribunal, upon its establishment; or a Court.

## 5. Interpretation

In this Direction:

**Act** means the *Migration Act 1958*.

**Genuine student criterion** refers to clause 500.212 of Schedule 2 to the Regulations, which must be satisfied by primary applicants for a Subclass 500 (Student) visa.

**Genuine student dependent criterion** refers to clause 500.312 of Schedule 2 to the Regulations, which must be satisfied by secondary applicants for a Subclass 500 (Student) visa.

**Genuine temporary entrant criterion** refers to paragraph 590.215(a) of Schedule 2 to the Regulations, which must be satisfied by primary applicants for a Student Guardian visa.

**Home country** has the meaning given in regulation 1.03 of the Regulations.

**Primary applicant** means a visa applicant seeking to satisfy the primary criteria for the grant of the visa.

**Regulations** means the *Migration Regulations 1994*.

**Relative** has the meaning given in regulation 1.03 of the Regulations.

**Secondary applicant** means a visa applicant seeking to satisfy the secondary criteria for the grant of the visa.

**Spouse** has the meaning given in subsection 5(1) of the Act.

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

**Student visa** has the meaning given in regulation 1.03 of the Regulations.

## 6. Preamble

- (1) This Direction complements changes to criteria for the grant of a Subclass 500 (Student) visa made by the *Migration Amendment (Subclass 500 Visas) Regulations 2024* and provides guidance to decision makers on what factors should be considered when assessing whether an applicant satisfies the genuine student criterion or the genuine student dependent criterion for Subclass 500 (Student) visa applications, or the genuine temporary entrant criterion for Student Guardian visa applications.

### **Subclass 500 (Student) visas**

- (2) The Australian Government operates a student visa program that enables people who are not Australian citizens or Australian permanent residents to undertake study in Australia. A person who wants to undertake a course of study longer than 3 months' duration under the student visa program must obtain a Subclass 500 (Student) visa before they can commence a course of study in Australia.
- (3) A primary applicant who is a genuine applicant for entry and stay as a student will have circumstances and an intention to comply with their visa conditions that indicate a genuine intention to obtain an education in Australia.
- (4) Under the Regulations, a primary applicant for a Subclass 500 (Student) visa must satisfy the genuine student criterion and a secondary applicant for a Subclass 500 (Student) visa must satisfy the genuine student dependent criterion.
- (5) Those criteria require the applicant to be a genuine applicant for entry and stay as a student, or a genuine applicant for entry and stay as a member of the family unit of a person who holds a student visa having satisfied the primary criteria for that visa (as applicable):
  - a) having regard to:
    - (i) the applicant's circumstances; and
    - (ii) the applicant's immigration history; and
    - (iii) if the applicant is a minor — the intentions of a parent, legal guardian or spouse of the applicant; and
  - b) because the applicant intends to comply with any conditions subject to which the visa is granted, having regard to:
    - (i) the applicant's record of compliance with any condition of a visa previously held by the applicant (if any); and
    - (ii) the applicant's stated intention to comply with any conditions to which the visa may be subject; and
  - c) because of any other relevant matter.

### **Student Guardian visas**

- (6) A primary applicant for a Student Guardian visa must satisfy the primary criteria for the grant of the visa, including the genuine temporary entrant criterion.
- (7) When assessing the genuine temporary entrant criterion, decision makers will have regard to the primary applicant's circumstances, immigration history, and any other relevant matter to determine whether the applicant intends genuinely to stay in Australia temporarily, notwithstanding the potential for this intention to change over time to an intention to utilise lawful means to remain in Australia for an extended period of time or permanently.

## **Part 2 – Directions**

### **7. Assessing Subclass 500 (Student) visa applications and Student Guardian visa applications**

- (1) Decision makers must take a reasonable and balanced approach between the need to make a timely decision on a Subclass 500 (Student) visa or Student Guardian visa application and the need to identify those applicants who, at time of decision, do not satisfy the genuine student criterion, genuine student dependent criterion or genuine temporary entrant criterion (as applicable).
- (2) Decision makers should not use the factors specified in this Direction as a checklist. The listed factors are intended only to guide decision makers when considering the applicant's circumstances as a whole, in reaching a finding about whether the applicant satisfies the genuine student criterion, the genuine student dependent criterion or the genuine temporary entrant criterion (as applicable). There may be relevant factors, other than those set out in this direction that a decision maker needs to consider when assessing an applicant's visa application.
- (3) Decision makers should assess whether the genuine student criterion, the genuine student dependent criterion or the genuine temporary entrant criterion (as applicable) are satisfied, by considering the applicant against all relevant factors specified in this Direction.
- (4) Where closer scrutiny of the applicant's circumstances is considered appropriate, decision makers may request additional information and/or further evidence from the applicant to demonstrate that they satisfy the genuine student criterion, the genuine student dependent criterion, or the genuine temporary entrant criterion (as applicable).
- (5) Circumstances where further scrutiny may be appropriate include, but are not limited to:
  - a) information in statistical, intelligence and analysis reports on migration fraud and immigration compliance compiled by the Department indicate the need for further scrutiny;
  - b) the applicant or a relative of the applicant has an immigration history of reasonable concern;
  - c) the primary applicant for a Subclass 500 (Student) visa intends to study in a field unrelated to their previous studies or employment;
  - d) apparent inconsistencies in information provided by the applicant in their visa application;

- e) the applicant holds a Subclass 485 (Temporary Graduate) visa, a Subclass 600 (Visitor) visa, a Subclass 601 (Electronic Travel Authority) visa or a Subclass 651 (eVisitor) visa; or
  - f) the applicant holds a student visa, or previously held one or more student visas.
- (6) In respect of Subclass 500 (Student) visa applications, if a decision maker is not satisfied that a primary applicant satisfies either paragraph 500.212(a) or (b), the decision maker need not proceed to consider the applicant against the remaining paragraphs in clause 500.212 (as applicable). The same applies in respect of assessing secondary applicants against paragraph 500.312(a) or (b) in clause 500.312.

**Division 1 – Assessing the genuine student criterion and the genuine student dependent criterion for Subclass 500 (Student) visa applications**

**8. The applicant's circumstances (subparagraphs 500.212(a)(i) and 500.312(a)(i))**

- (1) Decision makers should have regard to the applicant's circumstances in their home country and the applicant's potential circumstances in Australia.

***The applicant's circumstances in their home country***

- (2) When considering the applicant's circumstances in their home country, decision makers should have regard to the following factors:
- a) For primary applicants – whether the primary applicant has reasonable reasons for not undertaking the study in their home country or region if a similar course is already available there. Decision makers should allow for any reasonable motives established by the primary applicant;
  - b) the nature of the applicant's personal ties to their home country (for example family, community and employment) and whether those circumstances would serve as a significant incentive for the applicant to apply for a Subclass 500 (Student) visa as means of obtaining entry to Australia for purposes other than study or other than to accompany a Subclass 500 (Student) visa holder to Australia (as applicable);
  - c) economic circumstances of the applicant that would present as a significant incentive for the applicant to apply for a Subclass 500 (Student) visa as means of obtaining entry to Australia for purposes other than study or other than to accompany a Subclass 500 (Student) visa holder to Australia (as applicable). These circumstances may include consideration of the applicant's circumstances relative to the home country and to Australia;
  - d) military service commitments that would present as a significant incentive for the applicant to apply for a Subclass 500 (Student) visa as means of obtaining entry to Australia for purposes other than study or other than to accompany a Subclass 500 (Student) visa holder to Australia (as applicable); and
  - e) political and civil unrest in the applicant's home country. This includes situations of a nature that may present as a significant incentive for the applicant to apply for a Subclass 500 (Student) visa as means of obtaining entry to Australia for purposes other than study or other than to accompany a Subclass 500 (Student) visa holder to Australia (as applicable). Decision makers should be aware of the

circumstances in the applicant's home country and the influence these may have on an applicant's motivations to seek a Subclass 500 (Student) visa.

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

#### ***The applicant's potential circumstances in Australia***

- (4) In considering the applicant's potential circumstances in Australia, decision makers should have regard to the following factors:
- a) the primary applicant's knowledge of living in Australia and of their intended course of study and the associated education provider; including previous study and qualifications.
  - b) the level of research the primary applicant has undertaken into their proposed course of study and living arrangements;
  - c) whether the Subclass 500 (Student) visa is being used to maintain ongoing residence and not for the purposes of study; and
  - d) whether the primary and secondary applicant(s) have entered into a relationship of concern for a successful Subclass 500 (Student) visa outcome, i.e. whether the primary and secondary applicants have contrived their relationship for the purpose of obtaining a Subclass 500 (Student) visa.

#### ***Value of the course to the primary applicant's future***

- (5) When considering the primary applicant's circumstances, decision makers should have regard to the value of the course to the primary applicant's future, and in doing so should have regard to the following factors:
- a) whether the primary applicant is seeking to undertake a course that is consistent with their past employment and their current level of education, and whether the course will assist the primary applicant to obtain employment or improve employment prospects in their home country or another country. Decision makers should allow for reasonable changes to career or study pathways; and
  - b) remuneration the primary applicant could expect to receive in their home country or another country, using the qualifications to be gained from the proposed course of study.

### **9. The applicant's immigration history (subparagraphs 500.212(a)(ii) and 500.312(a)(ii))**

- (1) An applicant's immigration history refers both to their visa and travel history.
- (2) When considering the applicant's immigration history, decision makers should have regard to the following factors:
- a) previous visa applications for Australia and other countries, including:
    - i. if the applicant previously applied for an Australian temporary or permanent visa – whether those visa applications are yet to be finally determined (within the meaning of subsections 5(9) and (9A) of the Act), were granted, or grounds on which the application(s) were refused, or whether the visa was cancelled; and
    - ii. if the applicant has previously applied for visa(s) to other countries – whether the applicant was refused a visa and the circumstances that led to visa refusal; and

- b) previous travels to Australia and other countries, including:
  - i. if the applicant previously travelled to Australia – whether they complied with the conditions of their visa and left Australia before their visa ceased, and if not, were there circumstances beyond their control;
  - ii. whether the applicant has previously been refused entry into Australia, and the circumstances associated with that outcome; and
  - iii. if the applicant has travelled to countries other than Australia – whether they complied with the migration laws of that country and the circumstances around any non-compliance.

**10. If the applicant is a minor - the intentions of a parent, legal guardian or spouse of the applicant (subparagraphs 500.212(a)(iii) and 500.312(a)(iii))**

- (1) Where the primary applicant is a minor, decision makers should consider whether the intentions of the parent, legal guardian or spouse (as applicable) of the applicant are that the applicant's primary purpose for coming to Australia is to study.

**11. Any other relevant matter (paragraphs 500.212(c) and 500.312(c))**

- (1) For primary applicants, decision makers should have regard to the following matters:
  - a) if multiple course loads would make successful completion of a course by the primary applicant impossible or highly improbable;
  - b) if the primary applicant previously held a student visa – whether they were reasonably engaged in the course of study for which the visa was granted, having regard to whether:
    - i. they satisfied course requirements for the course;
    - ii. they participated in assessment activities for the course;
    - iii. they commenced and completed their course as scheduled;
    - iv. they demonstrated logical course progression;
    - v. there is a history of starting, but not completing courses; and
    - vi. there are study gaps of concern, a pattern of changing or deferring courses, changing to unrelated courses or changing education providers.
- (2) Decision makers must also have regard to any other relevant information provided in respect of the visa application when assessing applicants against paragraph 500.212(c) or 500.312(c) (as applicable). This includes information that may be either beneficial or unfavourable to the applicant.

**Division 2 – Assessing the genuine temporary entrant criterion for Student Guardian visas**

**12. The primary applicant's circumstances (subparagraph 590.215(a)(i))**

- (1) Decision makers should have regard to the primary applicant's circumstances in their home country and their potential circumstances in Australia.
- (2) When considering the primary applicant's circumstances in their home country, decision makers should have regard to the following factors:

- a) the extent of the primary applicant's personal ties to their home country (for example family, community and employment) and whether those circumstances would serve as a significant incentive to return to their home country; and
  - b) the amount of time the primary applicant has spent in Australia and whether the Student Guardian visa may be used primarily for maintaining ongoing residence.
- (3) Decision makers may have regard to the primary applicant's circumstances in their home country relative to the circumstances of others in that country.

### **13. The primary applicant's immigration history (subparagraph 590.215(a)(ii))**

- (1) A primary applicant's immigration history refers both to their visa and travel history.
- (2) When considering the primary applicant's immigration history, decision makers should have regard to the following factors:
  - a) previous visa applications for Australia and other countries, including:
    - i. if the applicant previously applied for an Australian temporary or permanent visa – whether those visa applications are yet to be finally determined (within the meaning of subsection 5(9) and (9A) of the Act), were granted, or grounds on which the application(s) were refused, or whether the visa was cancelled; and
    - ii. if the applicant has previously applied for visa(s) to other countries – whether the applicant was refused a visa and the circumstances that led to visa refusal; and
  - b) previous travels to Australia and other countries, including:
    - i. if the applicant previously travelled to Australia – whether they complied with the conditions of their visa and left Australia before their visa ceased, and if not, were there circumstances beyond their control;
    - ii. whether the applicant has previously been refused entry into Australia, and the circumstances associated with that outcome; and
    - iii. if the applicant has travelled to countries other than Australia – whether they complied with the migration laws of that country and the circumstances around any non-compliance.

### **14. Any other relevant matter (subparagraph 590.215(a)(iii))**

- (1) Decision makers must also have regard to any other relevant information provided in respect of the visa application when assessing primary applicants against the genuine temporary entrant criterion for a Student Guardian visa. This includes information that may be either beneficial or unfavourable to the applicant.