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AUSTRALIAN IMMIGRATION LAW IN BRIEF

By Charles Yuen, Ward Keller

As with Australian Tax Law, the Australian Migration Act and its Regulations require a practitioner to deal with the issues from a planning and strategic perspective rather than a remedial one.

The complexity of the migration legislation, and in particular the detailed regulations coupled with the even more complex manual known as PAM used by migration officers (which gives the internal directives on interpretation and policies), makes it highly desirable for a migration agent or a lawyer in this area of practice to plan ahead for a client. Migration officers are by nature suspicious and required to do everything by the book (PAM). They also keep track of every movement that a person has made in or out of Australia and are meticulous with chronologies of events. Furthermore, the collective knowledge of the department about different cultures and customs and social/political circumstances gained from having outposts in almost every country in the world is quite impressive.

It is important that from the first moment that a client consults you regarding migrating to Australia or sponsoring someone from overseas to come here, that they are alerted to all they must do to make the application successful on the first attempt. Good preparation is the key to success. A failed first attempt can create a kind of legal cancer which spreads and contaminates all other future attempts to apply for any kind of visa to enter Australia.

A migration agent should be able to advise a prospective client what kind of conditions, evidence, and supporting documents are needed to give the application its best chance of success. The application form should not even be filled in until everything is ready. However, giving the application form to the client and going through it with him or her will certainly help to identify what information and which supporting documents will be required.

Good preparation of documents and supporting evidence makes it easier for a decision maker in the Department of Immigration and Multicultural Affairs (DIMA) to work through a file and give approval. The most common cause of refusing a visa is lack of supporting evidence. Sadly, the evidence might have previously existed but was discarded or destroyed out of ignorance of its importance. A simple example is where a sponsor of a foreign spouse failed to prove there was regular communication between them because all of their long distance calls were made with a phonecard instead of from a home telephone where the end of month statement would record all the overseas calls made to the prospective spouse.

Sometimes a client seeking an independent skilled visa might have had their overseas qualifications assessed by one of the authorised assessing bodies and found to be wanting. Quite often, they could have had a different result if the poorly drafted resume describing their work experience had been checked and amended by an experienced agent.

Knowing when and where to lodge the application for a client can also save them a lot of waiting time and improve the chances of success. It is always an advantage if the application can be lodged in Australia where it is easier for the agent to follow up a file and where the approval time is much shorter. If the application can only be lodged overseas then there is some skill in deciding which Australian outpost to lodge it with. There is no rule that says it must be lodged in the country where the applicant lives. The skill is in finding an outpost where the waiting time for that kind of visa is shortest and where the applicant can cheaply and conveniently travel in the event that an interview is required.

There are around 138 different types of visas that an applicant can apply for to come to Australia or to remain here either as a visitor or as a migrant. While a migration officer is bound to consider an applicant of one type of visa for qualification under other related categories of visas, it is better for the applicant to know which is the best type of visa to apply for to maximise the chances of success. Sometimes, where a family unit is applying for migration, it is necessary to identify which member of the family unit (the husband or the wife) should be the main applicant. Obviously, the person who — because of age, vocation, language ability or other skills — will get the highest points on an application should be the main applicant. For example, if the husband is a doctor qualified overseas and not immediately able to practice in Australia but the wife is a nurse who would be able to register quite easily in Australia, it would be wise to make the wife the main applicant and the husband would come as her dependent.

Having an application knocked back after waiting one or two years for a decision to be made can be emotionally trying for an applicant and the family. While applications with a sponsor in Australia can have their application reviewed by the Administrative Appeals Tribunal (AAT) or Migration Review Tribunal (MRT), a long and expensive process in itself, those overseas applicants without an Australian sponsor will have no right to appeal at all. There is nothing to stop a person applying all over again, but the fact that the first application has been rejected will prejudice the success of the next application unless there has been a significant change in circumstances favourable to the applicant. That is why it is so important to get it right the first time. Reviews by the AAT and MRT are *de novo* hearings. The member hearing the review is not bound by the factual findings of the original decision maker. The Tribunal can look at fresh evidence and make a different finding of fact. However, the delay, expense and anxiety caused by a review can frequently be avoided by careful planning from the outset.

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