



Administrative Appeals Tribunal

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: [REDACTED]

CASE NUMBER: 1710828

HOME AFFAIRS REFERENCE(S): [REDACTED]

MEMBER: Stephen Witts

DATE: 17 September 2018

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the application for a Student (Temporary) (Class TU) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 500 (Student) visa:

- cl.500.212 of Schedule 2 to the Regulations.

I, Member S. Witts certify that
this is the Tribunal's statement of decision and reasons

Statement made on 17 September 2018 at 2:18pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection on 16 May 2017 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 9 March 2017. At the time of application, Class TU contained two subclasses: Subclass 500 (Student) and Subclass 590 (Student Guardian). The applicant applied for the visa to undertake study in Australia and does not claim to meet the criteria for a Subclass 590 (Student Guardian) visa.
3. The delegate in this case refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.500.212 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate was not satisfied that the applicant genuinely intends to stay in Australia temporarily.
4. The applicant appeared before the Tribunal on 17 September 2018 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
5. The applicant was assisted in relation to the review by their registered migration agent.
6. For the following reasons, the Tribunal has concluded that the matter under review should be remitted for consideration

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The criteria for a Subclass 500 (Student) visa are set out in Part 500 of Schedule 2 to the Regulations. The primary criteria in cl.500.211 to cl.500.218 must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need only satisfy the secondary criteria. The issue in the present case is whether the applicant genuinely intends to stay in Australia temporarily.

Genuine applicant for entry and stay as a student (cl.500.212)

8. Clause 500.212 requires as follows:

The applicant is a genuine applicant for entry and stay as a student because:

- (a) the applicant intends genuinely to stay in Australia temporarily, having regard to:
 - (i) the applicant's circumstances; and
 - (ii) the applicant's immigration history; and
 - (iii) if the applicant is a minor—the intentions of a parent, legal guardian or spouse of the applicant; and
 - (iv) any other relevant matter; and
- (b) 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) of any other relevant matter.

Does the applicant intend genuinely to stay in Australia temporarily?

9. In considering whether the applicant satisfies cl.500.212(a), the Tribunal must have regard to Direction No.69, 'Assessing the genuine temporary entrant criterion for Student visa and Student Guardian visa applications', made under s.499 of the Act. This Direction requires the Tribunal to have regard to a number of specified factors in relation to:
- the applicant's circumstances in their home country, potential circumstances in Australia, and the value of the course to the applicant's future;
 - the applicant's immigration history, including previous applications for an Australian visa or for visas to other countries, and previous travel to Australia or other countries;
 - if the applicant is a minor, the intentions of a parent, legal guardian or spouse of the applicant; and
 - any other relevant information provided by the applicant, or information otherwise available to the decision maker, including information that may be either beneficial or unfavourable to the applicant.
10. The Direction indicates that the factors specified should not be used as a checklist but rather, are intended only to guide decision makers when considering the applicant's circumstances as a whole, in reaching a finding about whether the applicant satisfies the genuine temporary entrant criterion.
11. At the hearing the Tribunal had a discussion with the applicant regarding the considerations outlined in Ministerial Direction 69.

Background

12. According to the applicant's evidence she was first granted a Student visa TU 571 on 7 October 2013 which was valid until 15 March 2017. The applicant lodged an application for a Student visa TU 500 on 3 February 2017. This application was refused by the delegate on 16 May 2017.
13. According to the delegate's decision record, provided by the applicant, the applicant withdrew from this course of study in secondary school whilst on her TU571 visa with a last day of attendance of 18 December 2015. The delegate noted that the applicant remained in Australia until the lodgement of her visa application on 9 March 2017 without enrolment in a course of study. The delegate also noted that the applicant did not provide any evidence regarding her non-attendance at her studies and was over 18 years of age during this period. The delegate contended that the applicant was in breach of her student visa condition 8202.
14. According to the applicant, and to the applicant's s.359(2) questionnaire (AAT file folio 23-28) the applicant is currently studying a Certificate III in Business which she completed in August 2018. She is then enrolled in a Certificate IV in Business from 15 September 2018 until 14 March 2019. After that she is enrolled to study a Diploma of Business from 15 April 2019 until 14 October 2019.
15. According to the applicant, and to the applicant's s359(2) questionnaire, the applicant has been enrolled in the following study since her arrival here: English language studies from January 2014 until June 2014, year 10 of High School from July 2014 until December 2014,

year 11 of High School from January 2015 until December 2015, and an initial enrolment in a Certificate III in Business cancelled in January 2017.

Circumstances in home country

16. The applicant stated that she first decided to come to Australia because her parents thought that it would be a good opportunity to improve her English and live with her aunt.
17. According to the applicant's evidence he has a mother, father and sister back in his home country in [REDACTED] who she remains in regular contact with.
18. There is no relevant evidence regarding the following factors indicated by Ministerial Direction 69 and the Tribunal makes no findings against the applicant based on: any potential military service in the home country, political circumstances in the home country, civil unrest in the home country, and the applicant's circumstances in the home country relative to others in that country.

Circumstances and study in Australia and the value of the proposed course to the applicant's future

19. The applicant stated that she rents in Melbourne with a Vietnamese family. She stated that she has an aunt living in Melbourne who she first lived with when she arrived in Australia.
20. According to the applicant's evidence she is currently working as a team member with Woolworths where she has worked since January 2018 and is earning approximately \$300AUD per week. She stated that she was paying her study fees from savings from her employment.
21. The applicant gave evidence that she first arrived in Australia to study at high school level and completed year 11 in 2015. The applicant acknowledged that she was not able to proceed with her year 12 in 2016 and that at that point she was not studying whilst on a student visa. The applicant testified that at that time she didn't realise that she was formerly in breach of her visa conditions. The Tribunal finds that the applicant was, in fact, in breach of her visa at the time she should have been studying her year 12 but accepts her evidence that she was very young and was not aware of her responsibilities in this matter.
22. The applicant explained that she then went on to proceed with a Certificate III in Business which she started in January 2017 but struggled to finish within the timeframe required and which she successfully completed in August 2018. She stated that she has now started her Certificate IV in Business with the intention of finishing her Diploma of Business and then going back to her home country with a good qualification in business to proceed with her stated intention of opening a business in warehouse operations.
23. The applicant in her s.359(2) questionnaire Q15 (AAT file folio 23) stated that that *"after finished courses in Australia, I want to come back [REDACTED] to open business such as export and import clothes or my parents can help me to find job as operations manager in warehouse"*.
24. The Tribunal, although mindful that the applicant was in breach of her student visa in 2016 when she dropped out of year 12 is now progressing academically in general business studies and has a stated intention of returning home when she has finished her Diploma of Business in 2019.
25. The Tribunal accepts the applicant's evidence that upon completion of her diploma level course that she will return to her home country.

26. On the basis of the above, the Tribunal is satisfied that the applicant intends genuinely to stay in Australia temporarily. Accordingly, the applicant does meet cl.500.212(a).

Conclusion on cl.500.212

27. Accordingly, the Tribunal is satisfied that the applicant is a genuine applicant for entry and stay as a student as required by cl.500.212.
28. Given the above findings, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 500 (Student) visa.
29. Given the above findings, the Tribunal finds that the criteria for the grant of a Subclass 500 (Student) visa are not met. The applicant does not claim to meet the criteria for a Subclass 590 (Student Guardian) visa. Accordingly, the decision under review must be affirmed.

DECISION

30. The Tribunal remits the application for a Student (Temporary) (Class TU) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 500 (Student) visa:
 - cl.500.212 of Schedule 2 to the Regulations.

Stephen Witts
Member