



Australian Government
Migration Review Tribunal

DECISION RECORD

APPLICANT: Mr [REDACTED]

MRT CASE NUMBER: 1311256

DIBP REFERENCE(S): CLF2013/[REDACTED]

TRIBUNAL MEMBER: Andrew Jacovides

DATE: 12 May 2014

PLACE OF DECISION: Sydney

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 573 Higher Education Sector visa:

- cl.573.223(1)(a) of Schedule 2 to the Regulations

I, Member Andrew Jacovides, certify that this is the Tribunal's statement of decision and reasons

A. Jacovides

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 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 to the Department of Immigration for the visa on 22 April 2013. The delegate decided to refuse to grant the visa on 22 July 2013. At the time the visa application was lodged, the Student (Temporary) (Class TU) visa contained a number of subclasses: Item 1222 of Schedule 1 to the Migration Regulations 1994 (the Regulations). With limited exceptions not relevant to this case, the subclass that can be granted to an applicant who applies as a student depends upon the type of course in which the applicant is enrolled or has an offer of enrolment as his or her principal course, and the subclass for which that type of course was specified by the Minister under r.1.40A (see cl.570.232, 571.232, 572.231, 573.231, 574.231 and 575.231 of Schedule 2). Under r.1.40A, the Minister must specify by instrument the types of courses for each subclass of student visa, except for Subclass 576: cl.576.229.
3. The delegate refused to grant the visa on the basis that the applicant was not a genuine applicant for entry and stay as a student because he did not satisfy the requirements of cl.572.223 of Schedule 2 to the Regulations. The delegate found that since 2007 the applicant has studied in a variety of unrelated courses in different fields which did contribute to a particular career plan.

CLAIMS AND EVIDENCE

4. The Tribunal wrote to the applicant on 31 October 2013, inviting him to provide evidence to establish that he met the criteria for the visa. The applicant was asked to provide documents which indicated that he was enrolled in or had an offer of enrolment in a registered course as required for the grant of the visa; documents relating to his study in Australia; and an explanation for any gaps in enrolment. The applicant was invited to attend a hearing with the Tribunal which was initially scheduled for 13 January 2014 and then rescheduled to 3 April 2014.
5. The Tribunal received a submission from the applicant's migration agent on 8 January 2014. The agent listed five courses which the applicant had attempted in Australia. He stated that the applicant had not completed any of those courses for the following reasons:

[The applicant] wish to concede, through us, that he has not successfully completed any of the courses listed above and that he himself is largely to blame for such poor progress. Notwithstanding that, we submit [the applicant's] recent academic performance is sound...

Overall, we concede that the factor which adversely affect the assessment of [the applicant] as to whether he intends genuinely to stay in Australia temporarily is the number of course changes and lack of academic progress to date.
6. The agent stated that several factors contributed to the applicant's poor academic performance in Australia, including the death of his father in May 2009 and a miscarriage by the applicant's girlfriend in March 2011. The agent argued that all the courses taken by the

applicant contributed in some way to his goal of becoming a good “salesman” in China. He submitted witness statements and documents relating to the death of the applicant’s father and the miscarriage. The agent stated that the applicant was enrolled and studying in an Advanced Diploma of Marketing course.

7. The agent submitted an academic transcript for two courses attempted by the applicant, but only partially completed, for a Bachelor of Professional Accounting course which he did between 2008 and 2011, and a Diploma of Tourism course which he did in 2012 and 2013. The transcripts indicate that the applicant passed seven subjects in each course.
8. The applicant and his agent attended the hearing with the Tribunal on 3 April 2014. The applicant submitted a statement of attainment from his course provider which indicated that he had partially completed an Advanced Diploma in Marketing course. The applicant stated that he attempted many different courses since he arrived in Australia in 2006 but he did not have the academic capacity to complete any of those courses. He stated that he has been enrolled and studying throughout his stay in Australia but he did not have the language and academic skills to succeed. He stated that his family have been pressuring him to complete his degree before he returns to China. The Tribunal indicated to the applicant that his poor academic record, the length of time he has been in Australia, and the variety of courses he has attempted, which did not demonstrate a particular career path, or increase his future employment prospects, raised questions for the Tribunal as to whether he was a genuine student. The applicant stated that he was a genuine student but he struggled academically. He stated that if he was granted the visa he was determined to complete the degree course before he returned to his country. The applicant’s agent asked for time to make further written submissions.
9. The Tribunal received a submission from the applicant’s agent on 9 April 2014. He submitted two Confirmation of Enrolment (CoE) certificates relating to a Bachelor of Business course which commenced on 7 April 2014 and ended on 31 December 2014; and a Bachelor of Professional Accounting course which commenced on 16 March 2015 and ended on 31 December 2015. The enrolment certificates relating to the applicant’s study, indicate that the applicant had 8 subjects to complete before he could be awarded the first degree and a further eight subjects to be awarded the Bachelor of Professional Accounting degree. The applicant’s agent submitted a copy of the applicant’s IELTS result obtained on 8 June 2013 in which he achieved an Overall Band Score of 6.0.
10. The applicant’s agent repeated what he understood to be the applicant’s evidence at the hearing. He stated that the applicant has always had an ambition to be a salesman and he believed that that marketing course would assist him in this regard but he has been pressured by his family to complete the business/accounting courses. The agent stated that at the beginning of the hearing the applicant stated that he planned to complete his Advanced Diploma in Marketing but later he stated that his family wanted him to return to the Bachelor of Professional Accounting course and then return to China as quickly as possible. He stated that the applicant had decided to comply with the wishes of his family and he his mother’s advice that two degrees would “increase his future job prospects” in China.
11. An officer of the Migration Review Tribunal contacted the applicant’s course provider, at the Tribunal’s request, to make enquiries regarding the applicant’s courses. The General Manager of Holmes Institute, Ms Maree Brezzi, responded on 5 May 2014. Ms Brezzi stated that the subjects which the applicant had already completed could be used to attain the Bachelor of Business degree or the Bachelor of Professional Accounting degree or both

degrees. She indicated that the applicant had enrolled in both degree programs with a view of completing the Bachelor of Business (in 2014) and then undertaking the extra subjects (in 2015) to obtain the second degree.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. Having regard to the applicant's current proposed course of study, the relevant subclass in this case is Subclass 573. The criteria for the grant of this visa are set out in Schedule 2 to the Regulations.
13. The issue in the present case is whether the applicant meets the time of decision criterion in cl.572.223. Clause 572.223(1) relevantly states:
 - (1) The Minister is satisfied that the applicant is a genuine applicant for entry and stay as a student because:
 - (a) the Minister is satisfied that the applicant intends genuinely to stay in Australia temporarily, having regard to:
 - (i) the applicant's circumstances; and
 - (ii) the applicant's immigration history; and
 - (iii) if the applicant is a minor — the intentions of a parent, legal guardian or spouse of the applicant; and
 - (iv) any other relevant matter; and
 - (b) the applicant meets the requirements of subclause (1A) or (2).
14. The requirements of subclause (1A) or (2) are not relevant to the present matter.
15. In considering whether the applicant satisfies this criterion, the Tribunal must have regard to Direction No.53, *Assessing the genuine temporary entrant criterion for Student 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.
16. The Direction indicates that the factors specified should not be used as a checklist but rather, are intended to guide decision makers to weigh up the applicant's circumstances as a whole,

in reaching a finding about whether the applicant satisfies the genuine temporary entrant criterion.

17. The Tribunal has formed the view that the applicant provided a credible account of his circumstances in Australia. However, the Tribunal has some doubts as to whether the applicant has had the academic skills or the motivation to succeed in his studies. The Tribunal finds that the applicant has over a considerable period of time unsuccessfully attempted a variety of courses which did not enhance his future employment prospects or demonstrate that he has an interest in any particular field. The applicant claims that his current involvement with the Bachelor of Business and Bachelor of Professional Accounting courses is being undertaken to please his family.
18. Nevertheless, despite the above considerations, the Tribunal is satisfied that the applicant has been enrolled and studying throughout his stay in Australia; and it finds that despite his poor academic performance, he has had some success with the courses attempted by passing approximately half of all the subjects he did. The Tribunal accepts the applicant's claim that he is now more academically capable and motivated to obtain his degree; and it finds that the applicant should be permitted to make this one last attempt to succeed before he returns to his country. The Tribunal accepts the applicant's claim that he does intend to return to China when he has completed his current courses and it finds that he satisfies the genuine temporary entrant criterion.
19. On the basis of the above, and having considered the applicant's circumstances, immigration history, and other matters it considers relevant, the Tribunal is satisfied that the applicant intends genuinely to stay in Australia temporarily. Accordingly, the Tribunal finds that the applicant does meet cl.572.223(1)(a).
20. As the Tribunal has found the applicant meets the requirement of cl.572.223(1)(a), it will remit the matter to the delegate for reconsideration.

DECISION

21. 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 573 Higher Education Sector visa:

- cl.573.223(1)(a) of Schedule 2 to the Regulations

Andrew Jacovides
Member