



MIGRATION AND REFUGEE LAW AND POLICY

MLL394

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NOTE – ALL VISA APPLICATIONS MUST PASS CHARACTER AND HEALTH CRITERIA!!

TOPIC 5: FAMILY MIGRATION

Family Migration

Migration Act 1958 – Section 5G Relationships and family members
<p>(1) For the purposes of this Act, if one person is the child of another person because of the definition of child in section 5CA, relationships traced to or through that person are to be determined on the basis that the person is the child of the other person.</p> <p>(2) For the purposes of this Act, the members of a person's family and relatives of a person are taken to include the following:</p> <ul style="list-style-type: none">(a) a de facto partner of the person;(b) someone who is the child of the person, or of whom the person is the child, because of the definition of child in section 5CA;(c) anyone else who would be a member of the person's family or a relative of the person if someone mentioned in paragraph (a) or (b) is taken to be a member of the person's family or a relative of the person. <p>This does not limit who is a member of a person's family or relative of a person.</p>

Family migration has a long history in Australia, though it's over-all importance has changed over time. ("Direct" family migration used to make up well over 50% of total migration to Australia, but it's now about 32%.) So, it has decreased. So, family sponsoring direct migration.

When people move to another country to work (or study), they often want to bring their family members with them. How generous the benefits are can make a big difference for the success of such programs.

Refugees both often want to be with their family members, and often do better when re-settled with them. Programs differ in how generous they are here, too. They can sponsor family members, refugees often do better with settlement if they have family members.

There are a number of important distinctions:

- On-shore/off-shore
- Permanent/temporary residence
- Capped/non-capped groups

On-shore vs. Off-shore

This distinction is based on whether the person seeking the visa is currently in Australia or outside Australia. Sometimes it has no significant substantial difference (just a different visa number), though sometimes there are differences in treatment and/or procedure, and sometimes an applicant can only make one or the other type of application for various reasons.

Sometimes a person can only make one type of application or another. So, if you have a 'no further stay' condition on your visa, they would have to leave Australia before they apply for a new one.

Permanent vs. Temporary residence

In the past, most visas given for family migration were, right away, permanent residence visas. Nowadays, with most visas (not just family based ones), an initial temporary residence visa is given, with eligibility to apply for a permanent resident visa after a set period of time, if certain conditions are met.

In the case of spousal visas, often they apply for a permanent visa at the same time. But the application for permanent isn't acted upon until after the two years/set period of time is met.

If you have a provisional/temporary visa and you haven't applied for another visa after the end of the time of your temporary visa then you will become an unlawful citizen.

Capped vs. Non-Capped

Certain categories of relatives – spouses/partners and dependent children, are not subject to numerical limits, while others – parents, siblings, nephews, nieces, etc. more limited, in various complex ways. (This may have large practical implications.)

Spousal/Partner Visa's

Basic matter: on-shore/off-shore; married or prospective marriage; provisional (temporary) or permanent residence. If the person wanting the visa is off shore – if already married, can apply for **Subclass 309 (Partner (provisional)) visa**.

Subclass 309 (Partner – Provisional) Visa - Offshore

- Valid until decision is made on PR partner visa (usually two years)
 - Applicant must be outside Australia at the time of grant (cl 309.412)
 - Applicant must be spouse or de facto partner of an AUS citizen/perm resident
- (cl 309.211(2)) OR intend to marry AUS citizen/perm resident (cl 309.211(3))
 - If spouse, marriage must be valid under Australian law (legal age for marriage is 18 as of right, and 16 with a court order)
 - If de facto, must have been in de facto r/ship for at least 12 months
- Applicant must be sponsored by spouse or de facto partner, if they are over 18; OR parent/guardian of spouse, if they are under 18 (cl 309.213)
- Applicant must satisfy PIC 4001, 4002, 4007, 4020 (cl 309.225)
- Each family member of the applicant must satisfy PIC 4001, 4002, 4007, 4020
- (cl 309.228)
 - After provisional period, the 309 visa holder may be eligible for a Partner (subclass 100) permanent residence visa: Sch2 r100.111

Secondary criteria (for family members): Must be a member of the family unit of holder of subcl 309 visa (cl 309.321) and must satisfy PIC 4002, 4007, 4020 (cl 309.323)

If not already married, can apply for **subclass 300 (Prospective marriage) visa**. For the purpose of getting married, you have 9 months to do so. You have to have a spouse to do this, you can't do it hoping to find someone to marry.

Subclass 300 (Prospective Marriage) Visa - Offshore

Applicant must be outside Australia when visa is granted (cl 300.412)

Applicant must intend to marry an Australian citizen/perm resident (cl 300.211)

Visa holder required to marry their Australian sponsor within 9 months. After applicant has married the AUS citizen/perm resident, they are eligible for the subclass 820 visa (see cl 820.211)

Secondary criteria (for family members): Must be a member of family unit of holder of subclass 300 via (cl 300.321) and Must satisfy PIC 4001, 4002, 4007, 4020 (cl 300.323)

If you're on-shore both spouses can apply for temporary subclass 820 (partner) visa, later eligible for subclass 801 (partner) permanent visa. Change of status is limited for people in unlawful status or who have visa conditions prohibiting grants of further visas. Most often you will have to leave Australia and apply for an offshore visa, unless exceptional circumstances.

In order to get the immigration benefits, relationships must be "valid", "genuine" and "continuing" to ground immigration benefits.

Subclass 300 (Prospective Marriage) Visa - Offshore

Applicant must be outside Australia when visa is granted (cl 300.412)

Applicant must intend to marry an Australian citizen/perm resident (cl 300.211)

Visa holder required to marry their Australian sponsor within 9 months. After applicant has married the AUS citizen/perm resident, they are eligible for the subclass 820 visa (see cl 820.211)

Secondary criteria (for family members): Must be a member of family unit of holder of subclass 300 via (cl 300.321)

Must be married or in a de facto married relationship, with "mutual commitment to a shared life together, to the exclusion of all others". Parties must not live apart on a permanent basis. So, you can live apart at some times, so this could be justified by work commitments, you could be fly in/fly out. So, there is some flexibility. But you cannot live apart permanently. It can also make a difference if you have lived together offshore too.

Nowadays, most spousal visas require a two-year provisional period before full permanent residence is granted. (Applications for both provisional and permanent visas are typically made at the same time.)

In order to change to a permanent visa, the relationship must be on-going at the end of the two years, with some exceptions.

Subclass 100 (Partner - Permanent) Visa - Offshore

- Must be outside Australia when visa is granted (cl 100.411)
- Must hold a subcl 309 visa (cl 100.221(2)(a))
- Must be the spouse or de facto partner of the sponsoring partner (cl 100.221(2)(b))
- Must have been in Australia for 2 years (cl 100.221(2)(c)),

Subclass 820 (Temporary Partner) Visa [2 years] - Onshore

- Applicant must be the spouse or de facto partner of an Australian citizen/perm resident (cl 820.211(2)(a))
 - If a spouse, marriage must be valid under Australian law
 - If de-facto, must've been in de facto relationship for at least 12 months
- Must be sponsored by spouse or de facto partner if they are over 18 (cl 820.211(2)(c)(i)) OR the parent/guardian if the spouse if the spouse has not turned 18 (cl 820.211(2)(c)(ii))

Migration Act 1958 – Section 5CB

De facto partner

(1) For the purposes of this Act, a person is the **de facto partner** of another person (whether of the same sex or a different sex) if, under [subsection \(2\)](#), the person is in a de facto relationship with the other person.

De facto relationship

(2) For the purposes of [subsection \(1\)](#), a person is in a **de facto relationship** with another person if they are not in a married relationship (for the purposes of section 5F) with each other but:

- (a) they have a mutual commitment to a shared life to the exclusion of all others; and
- (b) the relationship between them is genuine and continuing; and
- (c) they:
 - (i) live together; or
 - (ii) do not live separately and apart on a permanent basis; and
- (d) they are not related by family (see [subsection \(4\)](#)).

(3) The regulations may make provision in relation to the determination of whether one or more of the conditions in [paragraphs \(2\)\(a\), \(b\), \(c\) and \(d\)](#) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

Definition

(4) For the purposes of [paragraph \(2\)\(d\)](#), 2 persons are **related by family** if:

- (a) one is the [child](#) (including an adopted [child](#)) of the other; or
- (b) one is another descendant of the other (even if the relationship between them is traced through an adoptive [parent](#)); or
- (c) they have a [parent](#) in common (who may be an adoptive [parent](#) of either or both of them).

For this purpose, disregard whether an [adoption](#) is declared void or has ceased to have effect.

Some Exceptions

If the marriage had existed for 5 years (or two years if there are dependent children) before the application is made, no provisional period is required. This will typically be for offshore applications.

Exceptions to the “continuing” requirement exist in the case of the death of a partner, some cases with children, and for family violence.

Some people with children, even if they get a divorce – so one is a permanent resident and the other doesn’t, the other will be likely to stay in Australia, for the best interests of the child.

Same Sex Couples

In the past, same sex couples had to qualify as de facto partners to get immigration benefits. This was possible, but sometimes more difficult. After changes to the Marriage Act, this no longer applies – same-sex couples are treated the same as opposite sex couples.

Subclass 801 (Permanent Partner) Visa - Onshore

- Must hold a subcl 820 visa (cl 801.221(2)(a))
- Must be sponsored by a sponsoring partner (cl 801.221(2)(b)(i)) who is the spouse or de facto partner of the applicant (cl 801.221(2)(c)) and an Australian citizen/perm resident/eligible NZ citizen (cl 801.111)
- Must’ve been in AUS for at least 2 years (cl 801.211(2)(d)),

What sorts of marriages are accepted?

All valid Australian marriages are accepted.

Foreign marriages - if valid under local law, and not against public policy. This rule out: polygamous, under-age*, incestuous, and non-consensual marriages.

* the age of consent in Australia is 18, but a foreign marriage to someone over 16 but under 18 is usually accepted if it is legal in the place where the marriage took place. Below 16 – bad luck, not valid for Australian migration purposes.

Arranged Marriages

If there is evidence that both parties are consenting, then there is no issue.

Note that arranged marriages and marriage by proxy (assuming they don't run afoul of the conditions above) are allowed, if it is evidenced that there is consent and the parties intend to be bound. For a prospective marriage visa, the parties must have met and be "known personally" to each other.

An arranged marriage where parents got together and decided but the couple have never met, isn't going to work, they have to be personally known to you.