

## **BUSINESS INNOVATION & INVESTMENT VISA PROGRAM REVIEW**

### ***Objectives of Program***

1. The government's objectives from the Business Innovation & Investment visa program are:

- generate employment
- increase the export of Australian goods and services
- increase the production of goods and services in Australia
- introduce new or improved technology
- increase competition and commercial activity
- develop links with international markets
- increase the dispersal of business migrants across Australia through state and territory government nomination.

The program was reformed from 1 July 2012. The reforms are expected to improve the outcomes of the program to:

- contribute to the national innovation system
- select and foster innovation
- meet Australia's economic needs
- increase the dispersal of business migrants across Australia through state and territory government nomination

The objective of the reforms was to improve the design of the program to encourage greater ventures by business migrants and foster innovation.<sup>1</sup> This followed observations by DIBP that the program was delivering too many low risk businesses in retail trade such as restaurants, fast food stores, convenience stores and newsagents.

### ***Background***

2. The Business Innovation and Investment visa program is still primarily a two stage visa program. Most applicants are initially granted a provisional visa. They usually have four or possibly more years to enter into business or investment activity in Australia to meet the requirements for permanent residence.

3. The majority of applicants under the old business skills visa program came from non English speaking countries:

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<sup>1</sup> DIAC FAQ Reforms to Business Skills Program July 2012

- China 61.5%
- South Korea 8.2%
- Malaysia 5.3%<sup>2</sup>

The concentration of applicants from developing countries appears to be because:

- Business migrants from developed countries find it easier to apply for a 457 visa
- For applicants without English language skills there are few other visa alternatives.

4. There appears to be a high incidence under the old business skills visa program of the spouse of the primary applicant for the provisional business skills visa becoming the primary applicant for the permanent residence visa. While DIBP has no published any statistics anecdotally it appears to be as high as 50% of all business skills permanent residence applications under the previous program. This was because the primary applicant (usually the husband) remained in his home country running their existing business while the spouse (usually the wife) was sent to Australia to run an existing business bought by the applicant. The children usually came to Australia to be educated in Australian schools and universities.

Under the 1 July 2012 reforms to the program the provision for the spouse to become the primary applicant for the permanent residence visa was removed.

### **Observations**

5. Business skills migrants often do not “migrate” in the sense that we usually understand this word ie. to “move” “resettle” or “relocate”. Many of these applicants do not, at least initially, seek to migrate in this sense. They want to:

- spend more time in Australia
- move more easily back and forward between Australia and their home country
- base their spouse and children in Australia for lifestyle/education reasons while remaining based themselves in their home country (for financial reasons).

6. Business migrants on provisional visas are ‘low risk’ investors and so tend to buy small existing and simple businesses that already meet the requirements for permanent residence. This is particularly true for business migrants from non-English speaking countries that are unfamiliar with

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<sup>2</sup> DIAC Population Flows 2010-11 Business Skills Outcomes 2010-11

Australian language and culture. While successful in their home country it is not possible for many to replicate this level of business success in a more competitive Australian economy. There appear to be similarities to how the Greeks and Italian migrants to Australia in the 1950's and 1960's who often opened grocery shops or restaurants.

7. These migrants are generally the wrong people at the wrong time to be looking to bring innovation to Australia. They may become more adventurous in their business or investment activity once they have more experience and once they have more certainty of their future in Australia through permanent residence. However the reforms announced from 1 July 2012 are unlikely to deliver more innovation or more significant business ventures because the applicants under this program do not have the skills to do so.

8. The provision for the primary applicant for a Business Innovation (Business Innovation) stream visa to be in Australia for at least 50% of their time while on the provisional visa and to be actively involved in the "day to day management" of their business in Australia is unreasonable and should be reformed.

### ***Recommendations***

#### **A. Change the name of the program**

The program name should be called the "Business Skills and Investment Program". The reference to "Innovation" should be removed because as outlined above the program is unlikely to deliver significant innovation.

#### **B. Allow Role Swapping**

It needs to be recognized that it is unreasonable to expect a business applicant from a non English speaking developing country to abandon their existing profitable and successful business and devote all their time and attention to a new business in Australia that may not deliver a profit for several years in return for a provisional four year visa and no certainty of permanent residence. Allowing role swapping where the spouse becomes the primary applicant for permanent residence is the only way to effectively engage these new migrants to settle down and run new businesses in Australia.

#### **C. Reduce the residence time requirement**

It needs to be recognized that for many applicants there will be a transitional period when their spouse and family will migrate and they will not and cannot. However they can be actively and closely involved in establishing a new

business in Australia with the aid of modern communications and family help without the need to spend half their time in Australia.

A requirement to spend 90 days per year in Australia instead of half of 365 days in the last two years would provide for 4-5 visits to Australia per year each of 20 days duration which many of these applicants already do and would be happy to commit to.

#### D. Remove the 'day to day' management test

To achieve the objectives of the program, applicants need to work **on** their business instead of being required to "work **in** their business" on a 'day to day' basis as currently required under the 'day to day' management test.

Regulation 1.1 (1) (b) definition of a 'Main Business' under this program requires the provisional visa holder who is an applicant for permanent residence to show "direct and continuous involvement in the management of the business from day to day" (see Attachment 1 for extracts from Regulations and related Policy Advice Manual). Good management does not require daily involvement in the operations of a business. This 'day to day' management test drives applicants to purchase 'low risk' 'safe' businesses such as restaurants and coffee shops where they can easily show their involvement in the business operations each day instead of establishing new entrepreneurial 'start up' businesses where demonstrating 'day to day' involvement is more difficult.

The 'day to day management' test for permanent residence under the Business Innovation stream should be removed by deleting from the definition of a 'Main Business' the requirement to show "direct and continuous involvement in the management of the business from day to day" and by deleting paragraph 54.3 from the Policy Advice Manual. Instead applicants would be required to show "direct and continuous involvement in making decisions that affect the overall direction and performance of the business".

#### E. Introduce Site Visit and Interview for permanent residence applications

Provisional visa holders applying for permanent residence are currently required to provide DIBP with large volumes of documents to demonstrate their involvement in the management of the business eg. copies of contracts or orders with their signature, invoices with their name, diaries showing involvement in business activity, references from customers outlining the applicants involvement in the business. This is necessary as DIBP case officers do not visit the applicant's business or interview the applicant.

To demonstrate “direct and continuous involvement in making decisions that affect the overall direction and performance of the business” (refer Attachment 1), a site visit by DIBP officers to the applicant’s business venue and interview of the applicant during the visit should be introduced to provide a better assessment of whether the applicant meets these criteria rather than seeking to assess such a requirement through a review of documents.

#### F. Simplify Selection Criteria

The BIIP program is one of the most prescriptive and complex visa programs administered by DIBP. Applicants suffer from the departments’ changing interpretations of these complex requirements as well as changes to complex regulations. They cannot possibly understand the legal complexity of the rules they are seeking to comply with. In this environment they again seek ‘low risk’ businesses that provide certainty for their visa application eg. buy a café. They can see that applicants who are more entrepreneurial are sometimes unsuccessful in their visa applications. The Significant Investor Visa has more appeal to those with the necessary funds as the visa requirements are so much more simple to understand and appear to involve fewer risks.

For example, the Policy Advice Manual provides that for a business where an applicant acts as an agent only the commission obtained or service fee of the applicant can be accepted as turnover. Even where the revenue reported by the applicant’s accountant complies with Australian accounting standards and the contracts under the law of agency do not show an agency business ie. there is no agreed commission rate or service fee and there is no contract between the principal provider and the third party - the DIBP case officer can still ‘deem’ that the business is an agency business and ‘deem’ what is the level of the business turnover and net assets and as a result the application can be unsuccessful.

#### G. Reward Bigger Investments with Faster Visa Processing

Applicants for permanent residence who have made larger investments in Australia significantly above minimum requirements should be rewarded with priority processing for their visa applications. This would provide an incentive for greater business commitments as well as rewarding applicants who make commitments well above most other applicants.

### **Conclusion**

Given the challenges that these business migrants face, and the risk of failure if they move beyond just buying a safe small business to meet the requirements for permanent residence, these migrants should be given more

support by government to assist in their business development and settlement in Australia. This would be a productive investment that could increase the number of business migrants that are successful in establishing new businesses that create new jobs and lead to an increase in the size and growth of these businesses.

Attachment 1

**BUSINESS INNOVATION & INVESTMENT VISA PROGRAM  
'DAY TO DAY' MANAGEMENT TEST  
EXTRACTS FROM REGULATION & POLICY ADVICE MANUAL**

**Regulation 1.1**

**Reg 1.11 Main business**

**1.11 (1)** For the purposes of these Regulations and subject to subregulation (2), a business is a main business in relation to an applicant for a visa if:....

- (b) the applicant maintains, or has maintained, direct and continuous involvement in management of the business **from day to day** and in making decisions affecting the overall direction and performance of the business; and

**Policy Advice Manual**

**OTHER BUSINESS-RELATED REQUIREMENTS**

**54 Direct and continuous management involvement**

**54.3 Continuous involvement from day to day**

An applicant is expected to consistently spend a significant portion of their time managing the business on an ongoing basis from day to day. For a business to be considered a 'main business' it is intended that the visa applicant would be involved in actively exercising their claimed management role:

- without any significant or frequent breaks in their management involvement
- without any significant or frequent gaps in the activities of the business and
- on any ordinary business day.

Whether a break or gap is significant will depend on the nature of the business and the particulars of the applicant's management role.

An 'ordinary business day' is a day on which most businesses would ordinarily be operating in the country in which the business is located. Whether Saturday or Sunday is considered an ordinary business day depends on local customs.