

Department of Immigration and Citizenship

INVALID VISA APPLICATIONS

July 2009

Report by the Commonwealth Ombudsman,
Prof. John McMillan, under the *Ombudsman Act 1976*

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EXECUTIVE SUMMARY

Until 2000 a visa applicant had to include only minimal information with their visa application form to make a valid visa application. In 2000, the Migration Regulations 1994 (the Regulations) were amended to change the requirements for most visa applications, placing an onus on applicants to include a majority of the information required for a visa application to be valid. This was intended to enable a visa application to be 'decision ready' to allow the Department of Immigration and Citizenship (DIAC) to process these applications in a timely manner.

Visa applications that include insufficient information or evidence at the time of lodgement are generally returned to visa applicants as invalid, rather than being retained by DIAC until the information is provided. Visa applications are invalid if they do not comply with the requirements for the particular class of visa application set out in Schedule 1 of the Regulations. The requirements must be met at the time of application.

As a visa applicant is responsible for lodging a valid visa application, DIAC has a reciprocal responsibility to ensure that an assessment of invalidity is made in a timely manner and that visa applicants are advised of all of the deficiencies with their application. This investigation seeks to highlight the issues surrounding DIAC's management of invalid visa applications and identify areas for reform.

Scope of this investigation

This investigation focused on DIAC's management of invalid visa applications and considered the problems that can occur when invalid visa applications are poorly managed. During the investigation we looked at the timeliness and adequacy of advice given to visa applicants about their invalid visa applications. We did not assess the accuracy of the advice through a review of individual applications. The investigation did not consider the different requirements for a valid application for the various subclasses of visa.

Methodology

The methodology of this investigation included:

- reviewing DIAC's policies regarding invalid visa application processing
- analysing data for all invalid visa applications lodged between 1 June 2006 and 30 June 2008
- examining complaints made to this office about the problems associated with DIAC's management of invalid visa applications
- assessing DIAC's standard invalid visa notification letter
- reviewing a sample of invalid visa notification letters.

PART 1—BACKGROUND

What is an invalid visa application?

Legislative regime

1.1 Under the *Migration Act 1958* (the Act) the Minister for Immigration and Citizenship (the Minister) has the authority to grant a non-citizen a visa to travel to and enter Australia or to remain in Australia.¹ A person must apply for a visa in accordance with the Act.²

1.2 Section 47 of the Act requires the Minister to consider a valid application for a visa until the application is withdrawn or the visa is granted or refused. Under s 47(3) the Minister is specifically prohibited from considering an invalid application.

1.3 Sections 45 to 46 of the Act, Division 2.2 (more specifically regulation 2.07 and regulation 2.10) and Schedule 1 of the Regulations establish a legislative scheme that outlines the requirements for a valid visa application for each specified class of visa. In summary, a valid visa application is an application:

- for a specified class of visa
- on the approved application form (if any) for the specified class of visa that has been completed in accordance with all instructions on the form
- that complies with all of the requirements of Schedule 1 of the Regulations, including lodging the form in the right location and the applicant being in the place specified by the Regulations³
- that includes the applicant's residential address
- that includes the relevant visa application charge (VAC) (if any) as prescribed by Schedule 1 of the Regulations for each specified class of visa.

1.4 A visa application that does not comply with the requirements of this scheme is an invalid visa application. A visa applicant is entitled to a refund of any Schedule 1 fees or charges paid in connection with the visa application if it is invalid. Further, as an assessment that a visa application is invalid is not a decision to refuse a visa, the visa applicant may lodge another visa application.

1.5 The Act excludes assessments of invalidity from consideration by the Migration Review Tribunal (MRT) or the Refugee Review Tribunal (RRT).⁴ Consequently, where a visa application has been determined to be invalid, a visa applicant may only challenge that determination through judicial review.

¹ Section 29 of the *Migration Act 1958*.

² Section 45 of the *Migration Act 1958*.

³ Regulation 2.10 provides that whether an application is made inside or outside Australia it must be made in accordance with Division 2.2 or Schedule 1 of the Regulations regarding where the application is to be made. Schedule 1 of the Regulations may specify that a visa applicant is required to be outside of the migration zone when a visa application is lodged. Schedule 1 may also require that a visa application for a specified class of visa has to be lodged at a particular DIAC office or overseas post.

⁴ Sections 338 and 411 of the Act set out the relevant decisions that are reviewable by the MRT or the RRT.

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1.6 If a visa application is assessed as invalid, any bridging visa that the visa applicant may have been granted in connection with that application will cease 28 days after the date invalidity is notified. The rationale for this is that a visa applicant cannot hold a bridging visa for a visa application that cannot be considered by DIAC.

Policy regime

1.7 DIAC's policy, set out in its *Procedures Advice Manual (PAM) 3—GenGuideA—Visa application procedures (GenGuideA)*, provides an overview of how a decision maker should manage an invalid visa application. The information outlined applies generally to all visa subclasses. GenGuideA provides policy instructions about 'what is a valid visa application'; 'application validity'; 'how to complete an application form', and 'what to do with invalid visa applications'.

1.8 GenGuideA states that it is important for DIAC staff to check an application's validity at all stages of the visa application process. On receipt of a visa application DIAC staff are to check that the application form is fully completed and signed, check for payment of the VAC and 'as far as practicable' check for complete supporting documentation. Further, if Schedule 1 of the Regulations specifies that a visa applicant must be in a specific location at the time of lodgement, DIAC staff should interrogate their information systems to ensure this requirement is met.

1.9 Where a visa application is invalid, DIAC staff must inform a visa applicant in a timely manner that their application is not valid and provide them with advice about the requirements that have not been met. DIAC staff may do this over the phone or via a standard invalid visa notification letter. GenGuideA states that this advice should also cover the impact invalidity may have on the ceasing of the visa applicant's current visa, for example if the applicant may become unlawful.

1.10 GenGuideA provides that in limited circumstances an incomplete visa application can be accepted and the applicant allowed an opportunity to comply with the validity requirements. The policy states that 'if a visa applicant can easily overcome the reason for the invalid application ... it would be more appropriate to seek to resolve the situation by phone [or email]'.⁵ Examples of where an applicant can easily rectify an invalid application include the payment of an insufficient VAC or where the applicant has failed to specify the visa subclass for which they are applying.

1.11 However, our investigation has determined that this does not always occur. Since 2002, complaints to our office have suggested that there is inconsistency in the approaches taken by decision makers when deciding whether to contact an applicant to give them the opportunity to rectify deficiencies in their application. This issue was further highlighted in our review of a sample of invalid visa notification letters as part of this investigation. The review indicated that when applications have minor deficiencies such as a credit card being declined, DIAC do not always contact or attempt to contact visa applicants to rectify these minor deficiencies. Our office queried DIAC about whether there were records of contact, or attempted contact, made with visa applicants prior to an invalid visa notification letter being sent. In a majority of cases the records indicate that no contact was made prior to the letter being sent. The following example from the sample of invalid visa notification letters highlights this issue.

⁵ Section 46.2 of 'What to do with invalid visa applications' in PAM3—GenGuideA—Visa application procedures.

Case study: Failure to contact visa applicant before invalid visa notification letter sent

On 5 October 2007 DIAC received a student visa application from Ms A. This first application was invalid because Ms A had failed to sign the form she had lodged. DIAC notified Ms A that her application was invalid on 8 October 2007.

On 12 October 2007 DIAC received a new visa application from Ms A for a Student (Temporary) Visa. On 18 October 2007 Ms A was advised that her visa application was invalid because Ms A's credit card had been declined. The records do not indicate that any attempt was made on the part of DIAC to contact Ms A to resolve the issue of the declined credit card prior to the invalid visa notification letter being sent.

1.12 Where a visa applicant cannot be contacted by phone, cannot provide the additional VAC over the phone, or is unable to rectify the deficiency in their visa application (for example, where an applicant needs to be located offshore to make the application but is located onshore), the DIAC officer should return the invalid visa application with a standard letter explaining any deficiencies.⁶

1.13 DIAC's policy provides that in some situations a visa application must be treated as automatically invalid without contacting the client to rectify the deficiency.⁷ Such situations include where the Schedule 1 requirements for the visa application require more documentation than simply the application form and VAC, or where the application has to be lodged at a specific location and the visa applicant is obviously unable to comply. In these situations visa applicants are automatically sent the standard invalid visa notification letter without being contacted.⁸

Is substantial compliance with the Act and Regulations sufficient?

1.14 Section 25C of the *Acts Interpretation Act 1901* states that 'where an Act prescribes a form, then, unless the contrary intention appears, strict compliance with the form is not required and substantial compliance is sufficient'. Substantial compliance is determined with reference to the relevant statute. The legislative scheme for valid visa requirements goes 'to extraordinary lengths to ensure that a form of application which does not comply with specific requirements shall not be considered'.⁹ As such, the doctrine of substantial compliance does not apply to visa validity requirements and the decision maker cannot decide to grant or refuse a visa based on an invalid application.

1.15 That does not preclude, however, DIAC giving an applicant an opportunity to make their application valid by correcting minor errors or providing additional information. As mentioned earlier, DIAC allows visa applicants to correct minor deficiencies in their applications. We support this flexible approach by DIAC and do not believe that it is inconsistent with the position that the doctrine of substantial compliance does not apply. The decision maker is not making a determination that an invalid application substantially complies with the legislative scheme; rather, they are allowing the applicant to make their application valid in some circumstances. Once the application is valid the decision maker is then able to make a decision about the grant or refusal of the visa on the basis of that valid application.

⁶ Section 46.2 of 'What to do with invalid visa applications' in PAM3—GenGuideA—Visa application procedures.

⁷ *ibid.*

⁸ Section 47 of 'What to do with invalid visa applications' in PAM3—GenGuideA—Visa application procedures.

⁹ *Samuel v Minister for Immigration & Multicultural Affairs* [2000] FCA 854 at 24.

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1.16 Although this approach is included in DIAC's policy, there is room for greater clarity around the difference between a minor deficiency and a serious deficiency, particularly as applications with more serious deficiencies, which cannot be rectified quickly and easily, are returned to the applicant as invalid.¹⁰ DIAC's policy is silent on what constitutes an 'application that is seriously deficient in information'.¹¹

RECOMMENDATION 1

DIAC should provide clear guidance to decision makers about which deficiencies can be referred back to a visa applicant to allow them to validate a visa application, and this policy should be applied consistently.

¹⁰ Section 35 of 'Partly-completed application forms' in PAM3—Gen GuideA—Visa application procedures.

¹¹ *ibid.*

PART 2—DIAC'S MANAGEMENT OF VISA APPLICATIONS

2.1 Administering the legislative scheme applying to visa applications includes:

- making a determination in a timely manner about whether a visa application is valid
- ensuring visa applicants understand the requirements for a valid visa application and any deficiencies in their application
- ensuring staff understand the requirements for a valid visa application and advise applicants of all of the deficiencies in their application
- ensuring staff and visa applicants are aware of the impacts that an invalid visa application can have on immigration status and future immigration options.

2.2 A number of complaints to our office indicate that DIAC does not always consistently manage invalid visa applications. Particular issues that have arisen highlight:

- delay in advising visa applicants that their application is invalid
- poor advice to visa applicants about the reasons their application is invalid and poor advice about the consequential effects on a visa applicant's immigration status
- poor administrative processes for receipting applications and recording invalidity.

Delay

Delay in advising visa applicants that their visa application is invalid

2.3 DIAC's client service charter states that '[DIAC] aim to acknowledge [a visa application] within seven working days of receipt ...'¹² There are no client service standards applying to the notification that a visa application is invalid. However, DIAC's policy requires DIAC staff to advise a visa applicant in a 'timely manner' that their application is not valid.¹³ The policy does not give any guidance on what a 'timely manner' may be.

2.4 The time from lodgement of the application to the determination of potential invalidity by a decision maker can be significant. DIAC provided our office with information about visa applications that were assessed as invalid between 1 July 2006 and 30 June 2008 for all visa subclasses. The information included 16,547 records for invalid visa applications across 96 visa subclasses. On the basis of this information, we determined the average and median length of time between when an application was lodged and when it was recorded as invalid in DIAC's system.

2.5 Approximately 50% of all applications are assessed for invalidity within seven calendar days. In many cases the assessment was made on the same day as lodgement.

¹² For applications lodged by mail or in person. For applications lodged online the visa applicant is immediately provided a transaction number, which the applicant should quote in any correspondence with DIAC about the application.

¹³ Section 46.1 of 'What to do with invalid visa applications' in PAM3—GenGuideA—Visa application procedures.

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2.6 However, the average across all visa subclasses is 38 calendar days from when a visa application is lodged until invalidity is assessed. This figure takes account of all invalid visas including where the invalid assessment was conducted on the same day as lodgement to those that took over two years.

Trends in delays in advising visa applicants that their visa application is invalid

2.7 It appears that a large number of the subclasses in which DIAC is able to quickly detect invalidity are those where the Schedule 1 requirements are simple; for example, all that is required for a valid visa application is an application form and the application charge. Conversely, where the Schedule 1 requirements are more technical DIAC appears to take substantially longer than the overall average to make an assessment of invalidity.

2.8 Our analysis showed, however, that even when DIAC is able to assess the validity of most visa applications of a certain type quite quickly, there were some applications of the same type that took considerably longer.

Complaints to the Ombudsman about delays in advising applicants that their visa application is invalid

2.9 Complaints to our office indicate that DIAC is not advising visa applicants about invalidity in a timely manner. The complaints highlight that sometimes the reason for this is that the aspect of the visa application that makes it invalid is technical and not apparent on initial consideration of the application. These reasons for invalidity are often only detected once a decision maker assesses the visa application, which may be some time after the application has been receipted.

2.10 There are other circumstances in which a visa application should not have been accepted as a valid application because of an apparent deficiency, as demonstrated by the following complaint to the Ombudsman's office.

Case study: Lengthy delay

Mr B arrived in Australia on a subclass 676 – Tourist Visa. On 22 June 2007, while onshore, Mr B lodged an application with the Adelaide Skilled Processing Centre (ASPC) for a subclass 136 – Skilled – Independent Visa. Upon receiving the application the ASPC conducted an assessment of the application's validity.

Mr B left Australia on 30 July 2007. On 21 September 2007, the ASPC sent Mr B a letter acknowledging his application and advising him that the application would be allocated to a case officer in due course. DIAC advised us that prior to sending this letter Mr B's visa application was checked for validity. However, a clerical error resulted in DIAC not assessing Mr B's application as invalid in September 2007.

Mr B's application was allocated to a case officer on 18 June 2008, almost one year after he lodged his application. Mr B then received a letter on 23 June 2008 advising him that his application for a subclass 136 – Skilled – Independent Visa was invalid as Mr B needed to be offshore to lodge the application.

As Mr B's visa application had been receipted and acknowledged as valid by the ASPC, no contact was made with him between 21 September 2007 and 23 June 2008.

Subsequently, DIAC received legal advice that Mr B's application could be considered to have been validly made following his departure from Australia. DIAC proceeded to process it.

2.11 Where DIAC is placing a greater onus on applicants to provide a valid visa application, it follows that DIAC should be advising applicants in a timely manner if

their application is invalid, notwithstanding the complexity of the Schedule 1 requirements.

RECOMMENDATION 2

DIAC introduce a client service standard for assessing whether an application is valid or invalid.¹⁴

Consequences of delay

A visa applicant's immigration options are reduced

2.12 Most onshore visa applications¹⁵ require the visa applicant to hold a substantive visa at the time of making the application. This is different to the requirement that a visa applicant be lawful as a visa applicant can reside lawfully in Australia on, for example, a bridging visa, but a bridging visa is not a substantive visa. There are only a limited number of visa subclasses that allow a visa applicant to make an application onshore where they do not hold a substantive visa.¹⁶

2.13 Where a visa applicant lodges an application for a substantive visa prior to the cessation of their current substantive visa, they are granted a bridging visa in association with that application. The bridging visa commences when the applicant's current substantive visa ceases. However, if due to delays in processing the substantive visa application the bridging visa commences and their application is subsequently determined to be invalid, the applicant may be restricted from applying for most subclasses of visa while onshore. The reason for this is that the visa applicant no longer fulfils the validity requirement of holding a substantive visa at the time of making the application.

2.14 Further, as noted in the case study below, a visa applicant may potentially become unlawful if there is delay in detecting invalidity which can limit a person's onshore immigration options, as a number of specified classes of visa require an applicant to have been lawful in the six months prior to lodging the application.

2.15 The consequences of the delay in reaching a determination of invalidity highlight the reason why DIAC's advice to visa applicants needs to be timely and complete so that an applicant's status is capable of resolution without limitations. The following complaint to our office highlights how a visa applicant's immigration options can be reduced.

Case study: Delay in advising applicant about invalidity leading to reduced immigration options

On 28 September 2007 Mr C lodged a student visa application with DIAC. He provided DIAC with a fully completed application form, the complete VAC and two letters from his education provider outlining that Mr C's results would be delayed as the education provider was conducting a plagiarism investigation. Mr C's application was accepted as valid and receipted into DIAC's systems to be referred to a case officer. Mr C was granted a Bridging Visa A that same day.

¹⁴ The service standard could be aligned with DIAC's acknowledgement standard outlined in the client service charter referred to in paragraph 2.1 of this report.

¹⁵ An onshore visa application, for the purposes of this report, is defined as an application made by a visa applicant who is located onshore at the time of visa application lodgement and the time of validity assessment.

¹⁶ DIAC Form 1026i 'Limitations on applications in Australia'.

On 30 January 2008, some four months after Mr C lodged his visa application, a DIAC officer advised Mr C that his application was invalid as he had not provided the correct documentation from his education provider. Mr C was also advised that as his application was invalid he was now an unlawful non-citizen. Mr C was subsequently advised that he was not an unlawful non-citizen as his Bridging Visa A did not expire until 27 February 2008.

Mr C was intending to apply for permanent residence in Australia. However, because he had moved onto the Bridging Visa A at the cessation of his previous student visa (due to the delay in the invalidity assessment), he was now precluded from making that application while onshore. This meant that without our office's intervention Mr C would have had to travel overseas to lodge his visa application.

Visa applicants may become unlawful non-citizens

2.16 As noted in paragraph 2.13 above, when a visa applicant makes an application for a substantive visa, for example a skilled migration visa or onshore protection visa, they may be granted a bridging visa associated with that visa application. This bridging visa allows the visa applicant to remain lawfully in Australia while they await the outcome of their substantive visa application.

2.17 If a substantive visa application is subsequently determined to be invalid then the visa applicant's bridging visa will only continue to be in effect for 28 days after the applicant is notified that their visa application is invalid. This is because a bridging visa cannot continue to operate if there is no primary visa application being considered by DIAC.

2.18 As part of the invalid application notification, DIAC's policy requires officers to ensure that the visa applicant is aware of any possible consequences regarding the ceasing of their current visa.¹⁷ The policy also requires officers to consider granting a Bridging Visa D to allow a visa applicant to remain lawfully in Australia for five days while they prepare to lodge another visa application, where it is clear they intend to do so.¹⁸

2.19 If DIAC officers do not comply with this policy, visa applicants may unknowingly become unlawful. This may potentially result in the person's subsequent detention as an unlawful non-citizen. It can also have an adverse impact upon their subsequent visa applications.

2.20 On the basis of our analysis of the information provided by DIAC¹⁹ we identified that 216 visa applicants, who were onshore and lawful at the time of lodging their visa application, were recorded by DIAC as being onshore and *unlawful* when the assessment of invalidity was recorded in DIAC's systems. By inference these visa applicants' immigration status changed during the period between lodging their visa application and when their application was assessed as invalid. On average it took DIAC 30 calendar days to make an assessment of invalidity in these 216 cases.

¹⁷ Section 46.1 of 'What to do with invalid visa applications' in PAM3—GenGuideA—Visa application procedures.

¹⁸ Section 46.2 *ibid*.

¹⁹ The information referred to is the 16,547 records provided by DIAC referred to at paragraph 2.4 of this report.

DIAC's advice to visa applicants about their immigration status

2.21 Our office also conducted a review of a random sample of 30 clients' invalid visa notification files.²⁰ We analysed how many letters sent to visa applicants onshore included information regarding the impact of invalidity on the applicant's immigration status. This included information about any possible consequences regarding the ceasing of their current visa. Our analysis indicated that out of 18 applicants located onshore, only four letters sent to two applicants made reference to their immigration status.

2.22 In a majority of cases DIAC either did not advise applicants about their immigration status as a result of their application being invalid (64%), or alternatively cannot provide any records of having advised the applicant about their immigration status (24%). The reason for this lack of records is that either a letter was sent and there is no copy, or the visa applicant was advised verbally that their application was invalid and the record of the verbal advice does not detail the information provided to the applicant.

2.23 DIAC are either not advising onshore visa applicants or cannot demonstrate that they have advised applicants about their immigration status. This may have serious consequences of an applicant becoming unlawful or having visa options limited as a result of invalidity. For these reasons it is imperative that DIAC provide advice to onshore visa applicants about their immigration status.

Poor advice to visa applicants

Full advice to visa applicants about invalidity

2.24 Unlike the requirement for notifications about decisions to refuse the grant of a visa, there are no specific legislative requirements about the notification of a determination that a visa application is invalid. Consequently, there is no explicit statutory requirement for DIAC to provide full reasons as to why a visa application is invalid.

2.25 Nevertheless, good administrative practice²¹ dictates that DIAC should give applicants an explanation of all of the deficiencies in their application. DIAC's policy states that where a visa application is invalid the visa applicant should be 'given details of the requirement that has not been met'.²² However, the policy could more clearly articulate a requirement for officers to inform the applicant of *all* the reasons for which their application would be considered invalid, to ensure those matters are addressed in any subsequent application.

2.26 An applicant should be informed not only of the criterion they failed, but also of other criteria they are required to satisfy, whether they were assessed and if so, whether they satisfied these criteria.²³ The consequence of a visa applicant not

²⁰ Our random sample looked at clients who had lodged a visa application and had it returned as invalid on two or more separate occasions. Therefore there are more records than there are clients.

²¹ Administrative Review Council, *Decision Making Best Practice Guide 4: Reasons* (August 2007), Also see the Commonwealth Ombudsman's report, *DIAC: Notification of decisions and review rights for unsuccessful visa applicants*, report 15|2007, available at www.ombudsman.gov.au.

²² Section 46.1 of 'What to do with invalid visa applications' in PAM3—GenGuideA—Visa application procedures.

²³ Commonwealth Ombudsman's report, *DIAC: Notification of decisions and review rights for unsuccessful visa applicants*, report 15|2007, paragraph 3.16.

receiving this information is that they may subsequently lodge a fresh visa application addressing the deficiencies of which they were previously advised, only to have their application returned to them a second time as invalid due to other deficiencies. Thorough initial advice listing all the deficiencies in the person's initial application would prevent this cycle. The following case study from our review of a sample of invalid visa notification letters highlights this issue.

Case study: Failure to provide full advice about all deficiencies in the first invalid letter

Mr D lodged an application for a subclass 136 – Skilled – Independent visa with the Adelaide Skills Processing Centre (ASPC) on 14 June 2007. On 16 August 2007 Mr D was sent an invalid visa application notification letter noting that his visa application was invalid because he did not submit 'evidence of a satisfactory skills assessment from the relevant assessing authority'.

On 31 August 2007 Mr D re-lodged his application for a subclass 136 – Skilled – Independent visa with the ASPC. On 12 February 2008 Mr D was sent an invalid visa application notification letter noting that his visa application was invalid because the primary criteria for the visa required the applicant to be under 45 years of age.

Mr D's year of birth is 1957, which means that when he first lodged his visa application on 14 June 2007 he was 50 years of age and already unable to meet the primary criteria. However, the first invalid visa notification letter only sighted the lack of satisfactory skills assessment as the reason for invalidity. That letter made no mention of the subsequent deficiency being Mr D's age, resulting in a further unnecessary application.

Adequacy of the standard invalid visa notification letter

2.27 In advising visa applicants about invalidity DIAC has drafted a template invalid visa application notification letter (the letter), which is to be sent to all visa applicants when their application is returned.²⁴ This office supports DIAC's approach in this regard as it should promote consistency and efficiency. However, there are some areas in which the letter can be improved.

2.28 A number of complaints made to our office indicate that visa applicants are often confused by the term 'invalid'. Applicants equate invalidity to 'rejection' or 'refusal' of a visa application and often do not lodge another application. The letter, while making it clear why an application is invalid, does not outline what invalidity means and that it is distinct from refusal or rejection.

2.29 The information in the letter about lodging another application may be confusing, depending on the reasons for the application's invalidity. For example, the letter states that an applicant 'may want to consider lodging a visa application that is more suitable to [their] circumstance'. However this advice would only be relevant in limited circumstances, such as where an applicant has lodged an application for the wrong subclass of visa.

2.30 The letter also states that an applicant 'may want to consider lodging a fresh application when [they] can provide new information, or further evidence to satisfy the requirements for making a valid application'. It would seem that this advice could be clearer to ensure visa applicants are made aware of the requirements they need to meet, such as addressing all the reasons for invalidity in the first instance, in order to lodge a fresh *valid* application.

²⁴ See Appendix A for a copy of the standard template invalid visa notification letter.

2.31 Finally, on the basis of our review of the sample invalid visa notification files, it appears that DIAC officers are not effectively using DIAC's template letter. Although DIAC's policy authorises DIAC officers to 'tailor the letter to their needs to notify the persons that their visa application is invalid,' these tailored letters are leaving out important details. Such details include information about the VAC, whether it will be refunded or not charged and information about immigration status.

RECOMMENDATION 3

DIAC should revise the template invalid visa application notification letter to include more compulsory paragraphs and improve its advice to visa applicants about their invalid application to ensure they are provided with specific information about:

- what 'invalid' means and how an assessment of invalidity is distinct from a decision to refuse or reject a visa application
- all of the requirements that have not been met for the visa application to be valid
- the visa applicant's immigration status
- the visa application charge
- what the visa applicant needs to do to lodge a fresh valid application
- what limitations there may be on a visa applicant lodging a fresh valid visa application.

Inadequate record keeping around assessments that a visa application is invalid

2.32 Good recordkeeping practices are fundamental to provide evidence of advice and information provided to clients and actions undertaken by departmental officers. DIAC recordkeeping practices could be improved when it comes to recording the advice they provide to clients about their invalid visa applications.

2.33 DIAC's policy notes that DIAC officers may advise a visa applicant that their application is invalid by telephone.²⁵ Although this policy may be acceptable, DIAC should ensure that its officers make an appropriate record of the advice provided to a visa applicant during the course of the telephone conversation. This investigation found that DIAC officers often make a cursory note about the telephone conversation. For example, in one telephone record our office reviewed it noted: 'Given verbally. No [confirmation of enrolment] or letter of offer in system'. This record falls short of an appropriate record of the telephone conversation. Further, this telephone conversation was not followed-up with written correspondence. DIAC may want to consider requiring officers to send a follow-up letter confirming an oral advice, particularly for visa applicants that are located onshore.

2.34 Another issue we identified is that DIAC officers do not always retain copies of letters they send to visa applicants notifying them that their visa application is invalid. This has the potential to expose the department to risk as it is not able to prove the advice that it gave to visa applicants about their invalid application. This office suggests that DIAC should be retaining copies of all letters sent to visa applicants notifying them of invalidity.

²⁵ Section 46.1 of 'What to do with invalid visa applications' in PAM3—GenGuideA—Visa application procedures.

RECOMMENDATION 4

DIAC should:

- ensure that officers maintain comprehensive records of all advice provided to visa applicants about their invalid visa application, including retaining copies of invalid visa application notification letters sent to visa applicants
- consider requiring officers to send a follow-up letter to confirm an oral advice, particularly for visa applicants that are located onshore.

Administrative processes

2.35 When a visa application is lodged, whether in person or by mail, DIAC staff issue a receipt to the applicant for the VAC paid (if any) and then enter the details of the application into DIAC's systems. When staff enter the application details into DIAC's systems, DIAC's policy provides that they should undertake an initial validity check.²⁶ This check may include an interrogation of DIAC's systems to ensure the application can be lodged. Alternatively, if an applicant lodges a visa application online then the e-visa system undertakes some initial validity checks and, where the system detects a deficiency in the application, it will not allow the applicant to lodge the application. This is a positive process that DIAC has implemented to ensure basic invalidity is detected early in the application process.

2.36 Although there is an automatic process for initial validity checks for e-visa lodgement, the initial validity check for mail and in person lodgement is not covered in detail by DIAC's policy. Nor does it appear that there are any checklists or other reference tools for DIAC staff to refer to, to check the validity requirements for each visa subclass. This may be problematic as many applications are not receipted by a person in the business area responsible for that subclass of visa, but rather by DIAC counter staff who may not be familiar with the detailed requirements of each visa class.

2.37 When conducting the initial check, it appears that DIAC staff are not always properly interrogating DIAC's systems. This may result in an application being accepted as valid when there is an obvious impediment to the application's validity.

RECOMMENDATION 5

DIAC implement staff training to ensure that department officers who are responsible for receipting and assessing the validity of visa applications, are aware of the bars to lodging an application, for example condition 8503 or s 48A(1)/s48B of the *Migration Act 1958*.

Policy surrounding part payment of the visa application charge

2.38 The *Migration (Visa Application) Charge Act 1997* (the Charge Act) allows DIAC to impose a charge on visa applications. The operation of the Charge Act and the amount of the fees charged are governed by the Act and Schedule 1 of the Regulations. The VAC is a key requirement of a visa application as the Act specifically requires a valid visa application to be accompanied by the full payment of the VAC.²⁷ The amount of the VAC is prescribed in Schedule 1 of the Regulations for

²⁶ Section 36.2 of 'What is a valid application' in PAM3—GenGuideA—Visa application processing.

²⁷ Section 46 of the *Migration Act 1958*.

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each specified class of visa. For some subclasses of visa, Schedule 1 requires the VAC be paid in two instalments. The first instalment is paid at the time the application is lodged. The second instalment is paid after the visa application has been considered but prior to a decision.

2.39 DIAC's policy on valid visa applications states that there may be exceptional circumstances where the VAC may be paid in part or paid over time. Examples of such exceptional circumstances include when an applicant is angry or insistent.²⁸ Where DIAC accepts part payment of the VAC (whether by mail or in person) the policy directs staff to advise the applicant that the visa application will not be considered and is not valid until the balance of the VAC is paid, and that the application will be assessed according to the Act as it stands at the point in time when the validity requirements are met.²⁹ The date of the visa application is the date the balance of the VAC is paid.³⁰ DIAC staff may advise applicants of this information by phone or letter.³¹

2.40 DIAC's policy regarding part payment of the VAC appears to be silent on a number of important issues, which appears to cause poor decisions to be made in relation to the VAC. This office believes DIAC's policy could provide more guidance to decision makers in relation to the VAC. For example:

- DIAC's policy does not outline what proportion of the total VAC the first part payment should be, how many part payments a visa applicant can make and in what increments.
- The policy does not direct DIAC staff to alert visa applicants of the potential impact on their immigration status that may result from DIAC not considering their visa application until the VAC is paid. As the visa application is not valid until full payment of the VAC, there is the potential for people to become unlawful if it is not made clear to the applicant that their application will not be considered by DIAC, nor will any potential bridging visa granted in association with the application, until the VAC is paid in full.
- The policy provides that where the applicant does not make their application valid by paying the balance of the VAC within a reasonable time, then the VAC should be refunded. However, the policy is silent on what constitutes a reasonable time.
- There also appears to be some inconsistencies in DIAC's policy in relation to part payment of the VAC. The above approach is difficult to reconcile with DIAC's internal protocol for *Encouraging the Payment of Correct Charges* which states:

When receiving an inquiry regarding the charge applicable for any visa application, staff **must** ... explain that if [the applicant] submit their application ... with an incorrect charge their application may be returned to them and this will cause processing delays³² (*emphasis added*).

²⁸ Section 48.2 of 'If part payment is accepted' in PAM3—GenGuideA—Visa application procedures.

²⁹ *ibid.*

³⁰ Exceptions to this are where there are other outstanding validity requirements for the visa application. For example, the application has not been signed or it does not include a residential address.

³¹ Section 48.2 *ibid.*

³² DIAC protocol on *Encouraging the Payment of Correct Charges*.

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2.41 Complaints to our office indicate that there is the potential for confusion for visa applicants about whether or not they can part-pay their VAC. The following complaint highlights this possible confusion.

Case study: Misunderstanding regarding the VAC

Ms E lodged an application for a spouse visa with DIAC. Ms E enclosed \$40.00 with the application as part payment of the VAC. Ms E requested in her application that she be able to part pay the VAC. Ms E's visa application was subsequently returned as invalid because it did not include the full VAC.

RECOMMENDATION 6

DIAC should revise its policy on part payment of the visa application charge to give clear guidance to decision makers.

PART 3—CONCLUSION AND RECOMMENDATIONS

3.1 Our investigation found that on the whole DIAC's management of invalid visa applications is effective and in accordance with policy and legislation. Nevertheless, there is room for DIAC to improve. Such areas for improvement identified in this report include:

- improving the clarity of the policies utilised by DIAC officers when dealing with invalid visa applications
- addressing delays associated with assessing invalidity
- increasing the thoroughness of the advice to visa applicants about the invalidity of their application
- improving recordkeeping practices regarding advice about an invalid visa application, particularly in relation to oral advice.

3.2 Given the seriousness to the applicant of the potential consequences resulting from an invalid visa application, the following recommendations seek to ensure that DIAC manages invalid visa applications consistently, fairly, reasonably and in a timely manner.

Recommendation 1

DIAC should provide clear guidance to decision makers about which deficiencies can be referred back to a visa applicant to allow them to validate a visa application and this policy should be applied consistently.

Recommendation 2

DIAC introduce a client service standard for assessing whether an application is valid or invalid.

Recommendation 3

DIAC should revise the template invalid visa application notification letter to include more compulsory paragraphs and improve its advice to visa applicants about their invalid application to ensure they are provided with specific information about:

- what 'invalid' means and how an assessment of invalidity is distinct from a decision to refuse or reject a visa application
- all of the requirements that have not been met for the visa application to be valid
- the visa applicant's immigration status
- the visa application charge
- what the visa applicant needs to do to lodge a fresh application
- what limitations there may be on a visa applicant lodging a fresh valid visa application.

Recommendation 4

DIAC should:

- ensure that officers maintain comprehensive records of all advice provided to visa applicants about their invalid visa application, including retaining copies of invalid visa application notification letters sent to visa applicants
- consider requiring officers to send a follow-up letter to confirm an oral advice, particularly for visa applicants that are located onshore.

Recommendation 5

DIAC implement staff training to ensure that department officers who are responsible for receipting and assessing the validity of visa applications, are aware of the bars to lodging an application, for example condition 8503 or s 48A(1)/s48B of the *Migration Act 1958*.

Recommendation 6

DIAC should revise its policy on part payment of the visa application charge to give clear guidance to decision makers.

PART 4—AGENCY RESPONSE TO RECOMMENDATIONS

The Department of Immigration and Citizenship has accepted all of the Ombudsman's recommendations.



Australian Government
Department of Immigration and Citizenship

SECRETARY

7 July 2009

Prof. John McMillan
Commonwealth and Immigration Ombudsman
GPO Box 442
Canberra ACT 2601

Dear Prof. McMillan

Own Motion investigation and draft report – Invalid Visa Applications

Thank you for the opportunity to respond to your draft report about the outcome of your own motion investigation into *Invalid Visa Applications*.

You acknowledge your investigation found that DIAC's management of invalid visa applications was, on the whole, effective and in accordance with current policy and legislation. However there was some scope for improvement. Key areas in need of improvement were:

- Improving the clarity of DIAC policies;
- Addressing the delays associated in assessing invalidity;
- Increasing the thoroughness of the advice to visa applicants about the invalidity of their applications; and
- Improving record keeping practices.

I agree with all six of your six recommendations in the draft report. The Department's response to these recommendations (Attachment A) outlines the action that has already been undertaken and what will be implemented to improve our policies, guidance, training and record keeping practices relating to invalid visa applications.

For example, steps being taken to address the issues raised in these recommendations include:

- Amendments to relevant parts of Procedures Advice Manuals (PAMs) and updating our Good Decision Making training material.
- A review of the Client Service Charter and Client Services Standards. It is anticipated that these will be completed by September 2009.

people our business

- Enhanced consultation with the client service delivery network and policy areas. This is currently underway.
- The policy guidelines for record keeping are currently being revised. It is anticipated that these should be completed by December 2009.

I look forward to working with your Office in implementing our responses to your recommendations.

Yours sincerely *regards*

Dr. Metcalfe

Andrew Metcalfe

APPENDIX A

Template invalid visa application notification letter provided by DIAC



Australian Government
Department of Immigration and Citizenship

<<Date>>

<<Client Name>>

<<Client address>>

In reply please quote:

Client Name <<Applicant_GivenNames>> <<Applicant_FamilyName>>

Date of Birth <<Applicant DOB>>

Client ID <<ICSE Client ID>>

Application ID <<ICSE Permission Request ID>>

File Number <<TRIM Reference>>

Transaction Reference Number <<Transaction Reference Number>>

Visa Application Charge Receipt Number <<Visa Application Charge Receipt Number>>

Dear Mr/Mrs/Ms/Miss/Dr <<Client Family Name>>

Notification of invalid application for a <<Application_VisaClassDesc>> (class <<Application_VisaClass>>) visa

This letter refers to your application for a <<Application_VisaClassDesc>> (class <<Application_VisaClass>>) visa, which was lodged at <<place>> on <<date>>.

I wish to advise you that the application for this visa was not a valid application. The requirements for making a valid visa application are set out in Australian migration law. The reason for this assessment and the applicants this applies to are set out in the attached Assessment Notice.

****Visa specific content here****

Review rights

There is no right of merit review of the assessment that an application is invalid.

Questions about this decision

****This paragraph is compulsory but content will vary by business area****

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No further assessment of this visa application can be taken at this office. If you have questions about the process or information that was taken into account in determining that your application was not valid, you may contact <<business area to include their contact details/instructions>>.

OPTION ONSHORE — IF BRIDGING VISA GRANTED

Your immigration status

OPTION — SINGLE APPLICANT WITH BRIDGING VISA

When you lodged your application for a <<Application_VisaClassDesc>> (class <<Application_VisaClass>>) visa, you were granted a bridging visa to allow you to stay in Australia while your application was being processed. Your bridging visa will cease 28 calendar days after you are taken to have received this letter. This means that your bridging visa will cease on <<date of decision + 28 calendar days + relevant notification period>>.

OR — MULTIPLE APPLICANTS WITH BRIDGING VISA

When this application for <<Application_VisaClassDesc>> (class <<Application_VisaClass>>) visa was lodged, a bridging visa was granted to each of the applicants listed in the Visa Application Summary to allow them to stay in Australia while your application was being processed. The bridging visas will cease 28 calendar days after you are taken to have received this letter. This means that each bridging visa will cease on << date of decision + 28 calendar days + relevant notification period >>.

END OPTION

OPTION SELECT ONE

OPTION MAIL IN AUSTRALIA

As this letter was sent by mail to an address in Australia, you are taken to have received it seven (7) working days after the date of the letter. A working day does not include weekends or public holidays in the Australian state or territory to where this letter was posted.

OPTION MAIL OUTSIDE AUSTRALIA

As this letter was sent by mail to an address outside Australia, you are taken to have received it 21 days after the date of the letter.

OPTION EMAIL

As this letter was sent to you by email, you are taken to have received it at the end of the day it was transmitted.

OPTION FAX

As this letter was sent to you by fax, you are taken to have received it at the end of the day it was transmitted.

OPTION BY HAND

As this letter was given to you by hand, you are taken to have received it when it was handed to you.

OPTION BY HAND — LAST KNOWN ADDRESS

As this letter was handed to a person, who appeared to be over 16 years of age, at the last residential or business address you provided, you are taken to have received it when it was handed to that person.

END OPTION

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OPTION ONSHORE — IF BRIDGING VISA GRANTED

Leaving Australia

OPTION SINGLE APPLICANT WITH BRIDGING VISA

If you do not hold a current visa other than your bridging visa, then you must depart Australia by the date your bridging visa ceases, that is by no later than <<bridging visa cease date>> unless you are granted another visa. If you stay in Australia after this date (and you do not hold another visa) you will be here unlawfully. This has serious consequences including possible detention and removal from Australia.

If there are reasons why you cannot depart Australia by the time your visa ceases, you should contact us for advice and assistance as soon as possible. You can call 13 18 81 toll-free between 9 am and 4 pm Monday to Friday or you can visit any one of the department's offices. Details of our office locations and opening hours are available on our website.

OR OPTION MULTIPLE APPLICANTS WITH BRIDGING VISAS

If each applicant does not hold a current visa other than their bridging visa, then they must depart Australia by the date their bridging visa ceases, that is by no later than <<bridging visa cease date>> unless they are granted another visa. If you stay in Australia after this date (and you do not hold another visa) you will be here unlawfully. This has serious consequences including possible detention and removal from Australia.

If there are reasons why you cannot depart Australia by the time your visa ceases, you should contact us for advice and assistance as soon as possible. You can call 13 18 81 toll-free between 9 am and 4 pm Monday to Friday or you can visit any one of the department's offices. Details of our office locations and opening hours are available on our website.

END OPTION

Application charge

OPTION — SELECT ONE

PAYMENT NOT TAKEN

As your application was not valid, we have not taken payment of the Visa Application Charge.

OR — PAYMENT TO BE REFUNDED

As your application was not valid, we will provide a repayment of your Visa Application Charge.

END OPTION

Free text

Lodging another application

You may want to consider:

- lodging a visa application that is more suitable to your circumstances. More information on visa options is available on the department's website at www.immi.gov.au
- lodging a fresh application when you can provide new information, or further evidence to satisfy the requirements for making a valid application. However, be aware that visa requirements change from time to time, and you should check the visa requirements current at the time of any future application.

Any new application will be considered on its individual merits.

Contacting <<the processing office>>

This paragraph is compulsory but content will vary by business area, standard wording includes:

If you need to contact us about your application, we prefer that you do this by email. This helps us to continue processing all applications as quickly as we can. We try to respond to all email enquiries within <<timeframe>> working days. If you do not have access to email or need to contact us urgently, you can send a fax to <<fax number>> or call us on <<phone number>>.

If you need to contact us about your application, we prefer that you do this by using the form at <<weblink>>. This helps us to continue processing all applications as quickly as we can. We try to respond to all enquiries within <<timeframe>> working days. If you do not have access to the internet or need to contact us urgently, you can fax me on <<fax number>> or call us on <<phone number>>.

Your information—your privacy

The department respects your privacy. We are collecting your personal information for the purposes of making decisions under the *Migration Act 1958* and the *Migration Regulations 1994*. We are aware that the way information about you is used and managed can affect your life. We recognise that it is important that the information we hold about you is up-to-date, relevant, and is used for the purposes it was collected.

Laws stop us from giving your information to others unless you agree to it or we are authorised or required by law. You need to be aware that the department may disclose your details to other Commonwealth agencies such as Centrelink and/or Medicare. Otherwise there are very few circumstances where your personal information can be disclosed to anyone else. One such circumstance is where we are authorised or required by law to disclose it.

For more detailed information, you should read *Form 993i Safeguarding your personal information*, available on our website or from any of our offices

Client Service Charter

Our Client Service Charter explains our service commitment to you. We are committed to service delivery that is timely, open and accountable, and responsive to your needs. The Charter explains how you can help us and how you can provide feedback or make a complaint. You can read our Client Service Charter on our website, or in a printed copy available from any of our offices.

Service satisfaction

The department remains committed to ensuring that all clients, both in Australia and overseas, receive not only fair and reasonable treatment, but also an efficient standard of service that is sensitive to each client's needs.

To provide a compliment, complaint or suggestion you can:

- telephone the Global Feedback Unit (toll-free within Australia) on 13 31 77 during business hours
- complete a feedback form online at www.immi.gov.au
- write to the Manager, Global Feedback Unit, Reply Paid 241, Melbourne Vic 3001 Australia
- contact us directly through any of our offices.

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Contacting the department

You can contact us with a general enquiry in a number of ways including by email, through our website, by telephone through our Contact Centres or offices around the world, or in person. In Australia you can call 13 18 81 between 9 am and 4 pm Monday to Friday. Details on contacting our offices outside Australia are available on our website at www.immi.gov.au.

Yours sincerely

<<either first name and last name or first initial and last name of signatory of letter>>

<<position number>>

<<title>>

<<work unit>>

<<processing office>>

Department of Immigration and Citizenship

Telephone <<insert phone number of signatory of letter >>

Facsimile <<insert fax number of signatory of letter >>

Email <<insert email address of signatory of letter >>

Attachment(s)

Assessment Notice

Visa Application Summary

OPTION — AUTHORISED RECIPIENT

Please note the original of this letter including attachments was sent to:

<<Authorised recipient's business name if applicable>>

<<Authorised recipient's name>>

<<Authorised recipient's mailing address>>

END OPTION