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Minute

To: AS Skilled Visas

Date: 17 May 2024

New interpretation for BIIP visa regulations

Timing

30 May 2024 to support strategies to improve the calibre of business migration to Australia and reduce the backlog of Business Innovation and Investment (Provisional) visa applications, ahead of the new program year planning level of 1000 places.

Purpose

1. Provide you with proposed changes to the policy approach in interpreting the following regulations for the Business Innovation stream of the subclass 188 Business Innovation and Investment (Provisional) visa:
 - a. requiring an applicant to have overall had a successful business career (clause 188.224)
 - b. and genuinely has a realistic commitment to manage a qualifying business that, in part, benefits the Australian economy (clause 188.229).
2. **Seek your endorsement** of these new interpretations to be included in the Procedural Instructions.

Background

3. The Business Innovation and Investment Program (BIIP) targets migrants who have a demonstrated history of success or talent in innovation, investment and business and can make a significant contribution to the national innovation system and the Australian economy.
4. The Migration Strategy, released on 11 December 2023, recognises that the BIIP has not been performing as intended and proposes to develop a new talent and innovation visa program to drive growth in sectors of national importance.
5. No new nomination allocations have been provided for the BIIP in the 2023-24 program year due to the large number of applications already on-hand for this program.
6. The Government has decided to close the BIIP from July 2024 and that on hand applications continue to be processed under tighten policy guidance to ensure that future grants in the program meet improved policy interpretations. We continue to explore options to improve policy guidance for BIIP assessments.

Issues

7. Business Innovation stream applications make up 70 per cent of the subclass 188 BIIP pipeline:
 - a. As at 31 March 2024 there were 13,530 un-finalised *business innovation* stream applications for the subclass 188 visa, including 4291 primary applicants and 9239 secondary applicants.
 - b. As these constitute that vast majority of 188 applications, this Minute focusses on the Business Innovation stream applications only. Other BIIP streams and legacy visa types will be considered separately.
8. To satisfy the criteria for the Business Innovation stream of the subclass 188 visa, applicants must, amongst other criteria, have overall had a successful business career (clause 188.224), and genuinely

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has a realistic commitment to manage a qualifying business that, in part, benefits the Australian economy (clause 188.229).

9. The terms *a successful business career* and *benefit to the Australian economy* are not defined in the Migration Regulations 1994 (the Regulations). A policy approach to interpreting these terms is laid out in the procedural instructions. These procedural instructions could be strengthened without making amendments to the Regulations, and could be implemented relatively quickly to support the intent of the Migration Strategy. Regulatory amendments could not be applied retrospectively to pipeline applications, due to applicants having an accrued right to be assessed under the regulations at their time of applications.
10. The proposed policy approach to interpreting these terms focuses on clear measures set to a high standard, and with limited consideration of factors for not meeting these standards. The strengthened interpretation focuses on business migrants that will generate innovative businesses that create quality employment for Australians – which is the original intent of the BIIP.
11. A comparison of the existing policy settings and the new policy approach are provided in Attachment A.

Risks:

S. 47E(d)

Consultation

Legal Group, Immigration Planning and Policy Framework, Migration Review Taskforce.

Recommendation

It is recommended that you:

Endorse the new policy approach to interpreting clause 188.224 and clause 188.229 for the subclass 188 visa in the Business Innovation stream for inclusion in the associated procedural instructions.

Approved



Patrick Bryson
Acting AS Skilled Visas
May 2024

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Contact Officer: s. 22(1)(a)(ii)

Division/branch: Independent Skills Talent & Business/Skills Visas Branch

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Attachments:

Attachment A – Comparison of existing BIIP policy settings and new policy approach

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OFFICIAL: Sensitive**BIIP Subclass 188 PI – New policy approach for Interpreting regulations**

To satisfy the criteria for grant of a visa in the Business Innovation stream of the Business Innovation and Investment Program (subclass 188) applicants must have overall had a successful business career (clause 188.224), and genuinely have a realistic commitment to manage a qualifying business that, in part, benefits the Australian economy (clause 188.229).

A policy approach to interpreting 'a successful business career' and the 'benefit to the Australian economy' are laid out in the procedural instructions. These procedural instructions could be strengthened without making amendments to the *Migration Regulations 1994*, and could be implemented relatively quickly to align with potential ministerial statements about the program.

The proposed policy approach to interpreting these terms would put the onus on the applicant to positively demonstrate how their business has succeeded and could contribute to the Australian economy, and would require them to demonstrate business success even in the face of challenging economic or personal conditions.

The proposed policy approach would focus on clear measures set to a high standard, and with limited opportunity to consider mitigating factors for not meeting these standards. The strengthened interpretation would focus on business migrants that will generate innovative businesses that create quality employment for Australians.

Regulation	Current interpretation	Future interpretation
188.224 The applicant has overall had a successful business career.	Has not been bankrupt in the past five years	Has not been bankrupt at any time.
	Business has suffered losses but could be successful in the longer term	Losses may be accepted in the start-up phase or resulting from an active business decision to increase equity / profitability / market share and realised through return to profitability in subsequent years. Losses that have not yet returned to profitability should not be accepted.
	Consideration of external economic factors – recession, inflation, drop in commodity prices, tariff changes, losses due to market forces	Limited consideration of external factors to account for poor business performance. Losses that have not yet returned to profitability should not be accepted.
	Consideration of external personal factors – illness in the family, actions of business partners	Limited consideration of external personal factors. Losses that have not yet returned to profitability should not be accepted.
	Opportunity for the applicant to explain losses	Onus is on the applicants to clearly demonstrate that their business is, or has returned to, operating in profit.
	Doubts of the overall success of the applicant may be explained in an interview	No interview provided. Onus is on the applicants to clearly demonstrate that their business is successful via documentary evidence.
	No requirement to demonstrate growth	Applicants should demonstrate positive growth of the business in terms of revenue and profit

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Regulation	Current interpretation	Future interpretation
188.229 (1) The applicant genuinely has a realistic commitment to: (b) maintain a direct and continuous involvement in the management of the qualifying businessin a manner that benefits the Australian economy	development of links with international markets	This factor should be considered only in combination with other beneficial business characteristics
	creation or maintenance of employment	a business plan to develop a business that will create new employment for Australian citizens, Australian permanent residents or holders of a valid New Zealand passport
		the jobs offered to Australians will offer competitive wages
	export of Australian goods or service	This factor should be considered only in combination with other beneficial business characteristics.
	substitution of locally produced goods or services for goods and services currently imported to Australia	Same interpretation
	introduction of new or improved technology	Where the applicant already holds successful patents, bringing these products or processes to the Australian market
	increase involvement in innovation activities	Demonstrating entrepreneurial activities by securing venture capital
		The proposed business should embrace future-focussed sectors, mirroring the Global Talent/Talent and Innovation program
		Specify that purchasing businesses in <i>low productivity sectors</i> , such as retail and hospitality, are not of benefit to the Australian economy

Suggestions for wording of PI

Clause 188.224 *The applicant has overall had a successful business career*

Successful business career

Applicants for:

- subclass 188 in the Business Innovation stream

The policy intention is to measure the business performance of the applicant for their entire business career including any business activities that pre-date the assessment period specified in other criteria for these subclasses.

The onus is on the applicant to positively demonstrate how their business has succeeded even in the face of challenging economic or personal conditions.

Assessment

A successful business career **should** generally include development of business (or businesses) with, but not limited to, one or more of the following characteristics:

- Development of an enterprise engaging 30 or more full- or part-time employees,
- Positive and consistent business growth shown in equity, profitability, and/or business size
- History of securing Venture Capital to support business growth
- Demonstration of innovation through bringing patented products to market successfully
- Market expansion via product development and/or globally via digital platforms
- Gross operating profit growth of 20%

In any assessment of the applicant's business career, the performance of businesses in which the applicant has had a management role is a relevant factor.

Under policy, this criterion generally should not be considered satisfied if any of the following occurred:

- the applicant has been declared bankrupt at any time before or during assessment of the visa application,
- the applicant is, or has been at any time before or during assessment of the visa application, involved in a business that is subject to insolvency, receivership or liquidation,
- the business has suffered trading losses, which have not returned to business profitability,
- business growth only results in development of a small enterprise with less than 30 employees

Net losses

The net value of profits and losses are recorded in the financial statements for the business.

An applicant would not fail the overall successful business career requirements if the loss/losses occurred in the initial start-up of the business, or resulted from legitimate business decisions that resulted in the increased equity in the business, increased profitability, market share, business growth and/or competitive advantage.

For example, the net value of the profits of the business may have been reduced because potential profits were offset against expenses which resulted from the acquisition of additional assets for business operations (for example, depreciation/finance expenses). The expectation would be that the business has subsequently demonstrated positive growth and profitability as a result of these decisions.

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If losses are recorded, the applicant should be asked to provide details of the decisions taken leading to the loss/losses, in order for officers to assess whether the loss was incurred as the result of poor business acumen/management decisions by the applicant.

External factors

A successful, robust business is one able to continue to be successful irrespective of the market conditions or ever-changing situations it may experience. The onus is on the applicant to positively demonstrate how their business has succeeded even in the face of challenging economic or personal conditions. Where losses have occurred due to external factors the applicant should be asked to demonstrate that the business has subsequently returned to profitability.

If there are doubts

Officers may also undertake further checks or seek more advice, for example, to verify the applicant's involvement in the business or to help establish the nature of the applicant's business reputation and achievements in the local or international business community. Such checks or advice may be obtained by consulting Austrade or Invest Australia offices overseas and/or in Australia.

Clause 188.229:

(1) The applicant genuinely has a realistic commitment to:

- (a) establish a qualifying business in Australia; or*
- (b) participate in an existing qualifying business in Australia.*

(2) The applicant genuinely has a realistic commitment to:

- (a) maintain a substantial ownership interest in the qualifying business mentioned in subclause (1); and*
- (b) maintain a direct and continuous involvement in the management of the qualifying business from day to day, and in the making of decisions that affect the overall direction and performance of the qualifying business, in a manner that benefits the Australian economy.*

Genuine and realistic commitment

As a visa criterion

Under policy, it is intended that subclass 188 provisional business visa holders will enter into business in Australia and plan to meet the requirements for a residency/permanent business visa during the validity period of their provisional visa.

Applicants for provisional *Business Innovation and Investment* visas are required to demonstrate that they have a genuine and realistic commitment, after entry to Australia to:

- either establish a qualifying business in Australia or participate in an existing qualifying business in Australia, and
- maintain a substantial ownership interest in that business, and
- maintain direct and continuous involvement in management of that business from day-to-day and in making decisions that affect the overall direction and performance of the business, in a manner that benefits the Australia economy.

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Documentation

Applicants should present a business plan that demonstrates how they propose to establish or maintain an existing qualifying business. The onus is on the applicant to provide sufficient details of the proposed business or investment activities to demonstrate an understanding of the Australian business or investment environment in which they would operate.

As an applicant may have several business or investment options in mind, officers may wish to assess whether the commitment to follow through one or more of the proposals is genuine as well as realistic.

Assessment

The policy intention is to ascertain that the applicant intends to enter into a level of business or investment activity that will be of economic benefit to Australia.

The applicant seeking to satisfy the primary criteria is required to demonstrate that:

- they plan to establish and maintain a substantial ownership interest in a business in Australia - refer to: [Commitment to maintaining ownership interest](#)
- they plan to maintain direct and continuous involvement in the management of the business in Australia - refer to: [Direct and continuous management](#)
- the intended business will be of economic benefit to Australia - refer to: [Benefit to Australia](#)
- their business or investment intentions are genuine and realistic - refer to: [Realistic and genuine commitment](#).

No individual factor should be taken as definitive evidence of the genuineness (or otherwise) of the applicant's commitment. Rather, officers are expected to have regard to **all factors** relevant to this criterion. The onus is on the applicant to provide sufficient evidence to support their proposed business intentions.

An applicant with clear intentions of remaining overseas whilst the spouse establishes and maintains a business in Australia would generally not meet this requirement.

Commitment to maintaining ownership interest See current GenGuideM

Direct and continuous management See current GenGuideM

Benefit to Australia

Under policy, for the criterion to be satisfied, the applicant should satisfy the decision-maker that the proposed business activity will reflect the expected outcomes of the Business program. The proposed business may include, but not be limited to, some of the following characteristics:

- creation of new employment for Australian citizens, Australian permanent residents or holders of a valid New Zealand passport, with jobs offering competitive wages, or
- substitution of locally produced goods or services for goods and services currently imported to Australia, or
- where the applicant already holds successful patents, bringing these products or processes to the Australian market, or
- introduction of new or improved technology, particularly in key sectors (e.g. new medical technology, renewables), or
- involvement in innovation activities, such as sourcing venture capital funding towards product development, or

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- a new product or service that will fill a gap in the Australian economy in a key sector (e.g. new medical technology, renewables), or
- embracing future-focussed sectors, mirroring the Global Talent/Talent and Innovation program

Under policy, this criterion should generally not be considered satisfied if the applicant proposes purchasing or establishing businesses in low productivity sectors, such as retail and hospitality.

Realistic and genuine commitment

In assessing whether the applicant's commitment to establishing (or participating in) and maintaining involvement in a business or investment in Australia is genuine and realistic, officers should generally have regard to factors such as, but not necessarily limited to:

- considering the probability of the applicant's commitment to establishing (or participating in) a business in Australia being realised, taking into account their background, resources, stated intentions, and research undertaken in their proposed area of business activity
- the extent of the applicant's research into the Australian business environment (whether this was undertaken personally or by others may also be relevant, depending on the nature of the proposed business and the standing of the person)
- the degree of planning undertaken by the applicant for the establishment of a business in Australia or for participation in an existing business
- the applicant's proposed timetable for establishing a business in Australia, including proposed timing for the transfer of cash and other assets
- the applicant's stated intentions relating to their existing business in their home country and when the applicant plans to reside in Australia. Note: the applicant is not required to discontinue business activity in their home country but is required to effectively manage the business in Australia on a day to day basis
- pre-existing businesses, investments or other business links with Australia
- whether the applicant has made any business-related exploratory visits to Australia to assess business and settlement possibilities
- support, if appropriate, from a reputable potential joint venture partner in Australia.

In making their assessment, officers are expected to have regard to all factors relevant to this criterion. The onus is on the applicant to provide sufficient evidence to support their proposed business intentions.

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Business Innovation and Investment Program (BIIP)

The new policy approach to interpretation of:

- ❖ *Successful business career*
- ❖ *Benefits the Australian economy*

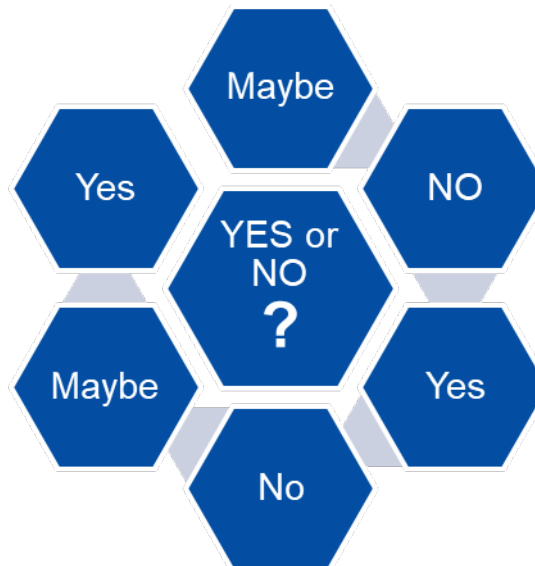
Background - Strategic Direction 2024

- ❖ The Business Innovation and Investment Program (BIIP) closed to **new applications** on 31 July 2024.
- ❖ BIIP policy guidance is being tightened to ensure that all business migrants coming to Australia through this program have had a **successful business career** and will bring an **economic benefit to Australia**.
 - Measures set to a higher standard, and limited consideration of factors for not meeting these standards.
 - Focus on business migrants who will generate innovative businesses that create quality employment for Australians.

Successful business career

Clauses 188.224 (BI) and 132.223 (SBH):

The applicant has overall had a successful business career.



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Current settings v new approach

Existing policy settings	New policy approach
Has not been bankrupt in the last 5 years	Has not been bankrupt at any time
Business has suffered losses but could be successful in the longer term	Losses at start-up or to increase equity / profitability with a return to profit .
Consideration of external economic or external personal factors	Limited consideration of external factors. Losses that have not yet returned to profitability should not be accepted.
Opportunity for the applicant to explain losses	Applicants to demonstrate that their business is operating in profit.
Doubts of the overall success may be explained in an interview	No interview provided, demonstrate success via documentary evidence.
No requirement to demonstrate growth	Applicants to demonstrate growth of the business in terms of revenue/profit

Successful business career

What do we consider to be a **successful business career**?

Generally include business(es) with **one or more** of the following:

- an enterprise engaging 30 or more full- or part-time employees,
- business growth shown in equity, profitability, and/or business size
- securing Venture Capital to support business growth
- bringing patented products to market successfully
- market expansion via product development and/or globally via digital platforms
- gross operating profit growth of 20%

Successful business career

What then do we consider to be signs of **not achieving** a successful business career?

Generally not satisfied if:

- the applicant has been declared **bankrupt** at any time
- the applicant is, or has been, involved in a business that is subject to **insolvency, receivership or liquidation** at any time,
- the business has suffered **trading losses**, which have **not returned to profitability**,
- business growth only results in development of a **small enterprise** with less than 30 employees.

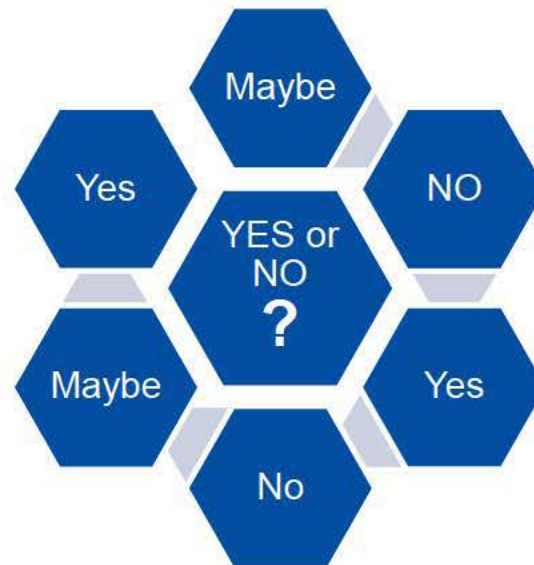
Questions/comments received

- ❖ Has not been bankrupt at any time – how do we know?
- ❖ What time period for return to profit after financial losses?
- ❖ What consideration of external factors can we give?
- ❖ What level of business evidence is required?
- ❖ What time period for the 20% growth to be achieved?
- ❖ Does this mean businesses with less than 30 employees will not meet this criterion?

Benefits the Australian Economy

Clauses 188.229(2)(b) (BI), 132.227(2)(b) (SBH) and 132.234 (VCE)

The applicant genuinely has a realistic commitment to maintain a direct and continuous involvement in the management of the qualifying business... **in a manner that benefits the Australian economy**



Current settings v new approach

Existing policy settings	New policy approach
Development of links with international markets	Only in combination with other beneficial business characteristics
Creation or maintenance of employment	Create new employment for Australian citizens, PRs or holders of NZ passport
	Offer competitive wages
Export of Australian goods or service	Only in combination with other beneficial business characteristics.
Locally produced goods or services substituted for those currently imported	No change in approach
Introduction of new or improved technology	Where applicant already holds patents, bringing these to the Australian market
Increase involvement in innovation activities	Securing venture capital or embracing sectors mirroring the National Innovation program
	Purchasing businesses in low productivity sectors, such as retail and hospitality, are not of benefit to the Australian economy

Benefit to Australian Economy

The applicant should satisfy the decision maker that the proposed business activity will reflect the expected outcomes of the BIIP program.

Questions/comments received

- ❖ How many *other* characteristics would be sufficient?
- ❖ This is referring to a 'commitment' that in most cases hasn't happened yet.
- ❖ Not all applicants submit a business plan, do we request one?
- ❖ What is the minimum standard for a business plan?
- ❖ Do we simply accept the on-hand business plan as evidence and can we assess them against the new policy setting?

GenGuide A

- ❖ A decision maker is not bound by other delegates
- ❖ It is for the decision maker to decide the level of proof they require to be satisfied that a requirement is met.
- ❖ Different parts of the application may be processed by different delegates.
- ❖ When deciding the visa application, the second delegate should not consider themselves bound by the decision of the first delegate, as this amounts to split decision making and could be seen as the second delegate acting under the dictation of the first delegate.
- ❖ Turn their mind to the first delegate's assessment
- ❖ Explain in the decision record as to how they reached the necessary state of satisfaction

New Procedural Instructions

- ❖ The new policy approach to ‘a successful business career’ and the ‘benefits the Australian economy’ for BIIP visa regulations has been cleared and approved.
- ❖ Should be applied consistently across both subclasses 132 and 188.
- ❖ Incorporated in the BIIP Procedural Instructions (PIs)

Further Questions/Concerns?

