

Management of IMAs (Offshore Entry Persons – OEPs)

Pre 23 March 2012 Cohort: Protection Obligations Determination (POD) process

- Minister took the following simultaneous action:
 - Exercised 195A power to grant the offshore entry person a subclass 449 Temporary Safe Haven Visa (TSHV) valid for 7 days.
 and
 - Granted a BVE 050 (grounds not specified) which ceases in accordance with 050.517 – date specified – estimated at average processing time – and with conditions clause 050.617, where 8101 is discretionary and not imposed; Conditions 8401 and 8506 imposed.
 - The BVE 050 came into effect when the TSHV ceased, and ceases on the specified date.
- Effect of granting the TSHV/BVE050:
 - The OEP became a lawful non-citizen
 - The OEP became immigration cleared and became an eligible non-citizen;
 - As a lawful non-citizen they are not barred by s46A from making a valid application for a visa, however,
 - OEP is barred under s91K as the holder / former TSHV holder from lodging any valid application. This is reflected in ICSE by the grant of a subclass 449 as well as a client of interest note.
- Protection Obligations Determination (POD) process successful:
 - 91K bar lifted (for all application types) by Minister to allow protection visa application (which is also an application for a bridging E visa which should be processed)
 - BVE 050 in association with that application (050.212(3)), which ceases in accordance with 050.511 – application finally determined / withdrawn and with conditions clause 050.617, where 8101 is discretionary and not imposed; 050.613A does not apply as listed in a class specified by Minister; Protection visa granted,
 - Associated BVE 050 ceases.
- Protection Obligations Determination (POD) process unsuccessful:
 - BVE 050 remains in effect until cease date* (see if BVE ceases);
 - OEP may seek merits review
 - if successful 91K bar lifted (for all application types) by Minister to allow protection visa application (which is also an application for a bridging E visa which should be processed)
 - PV granted, BVE 050 ceases.
 - If unsuccessful applicant may seek judicial review.
 - If BVE 050 ceases* then client is detained (Short term administrative)
 - Minister exercises 195A power to grant further BVE 050 (or RPBV not yet decided).
 - If merits and judicial review exhausted and BVE ceases* (see if BVE ceases)
 - OEP liable for detention and removal or
 - detained and subject to further 195A process.
- If BVE ceases;
 - OEP becomes unlawful and Minister would need to personally intervene to grant further BVEs under s195A (while client is in detention as both s46A and s91K bars will be in effect).

Management of IMAs (Offshore Entry Persons – OEPs)**Post 24 March 2012 Cohort: Onshore Protection process****(Arrived after 24 March or had not had a primary assessment prior 24 March)**

- Minister takes the following action;
 - Lifts the s46A* bar to allow the offshore entry person (OEP) to lodge a protection visa application (but not associated bridging E visa application).
 - *(Note that the s46A bar has not been lifted in respect of a BVE for these clients. IMA BVE grant team will prepare a bulk submission for BVE purposes for those who have already been granted a BVE under s195A in the near future).*
 - If the s46a bar has been lifted - this bar lift will be recorded in ICSE and will specify the visa class the bar has been lifted for.
 - Includes the cohort in a class of persons specified by the Minister by instrument in writing for 050.613A(1)(b). (This instrument only applies to this group)
 - Assessed for Identity, Health, Character, and Security, sufficiently to be eligible for a BVE.
 - If checks OK, using s195A, grants the OEP an associated BVE 050 under 050.212(3)(a). Conditions clause 050.617 and conditions 8401 and 8506 imposed.
 - OEP becomes eligible non-citizen per regulation 2.20(17) (“A non-citizen granted a BVE 050 by the Minister under s195A becomes an eligible non-citizen”) –[Reg 2.20(17) Disallowed –only relevant to BVEs granted between 12/10-21/11/12].
 - BVE remains in effect until the protection visa application is finally determined.
- Protection application successful
 - Protection visa granted; OEP becomes Immigration cleared. BVE 050 ceases.
- Protection application refused
 - BVE 050 remains in effect for 28 days
 - OEP may seek merits review within 28 days – BVE will then remain in effect until application finally determined or if successful and PV granted, OEP becomes immigration cleared, BVE 050 ceases.
 - If merits review not successful BVE 050 ceases 28 days after notification.
 - If BVE ceases OEP becomes unlawful and liable for detention.
- For any further visa grant;
 - e.g. a BVE for purposes of judicial review
 - Minister would need to personally intervene to grant further BVEs under s195A (while client is in detention s46A will be in effect and client OEP is not an eligible non-citizen).

*Note: Unlike s48B and s91L which limit the period for which the bar is lifted, there is no limit on applying for a further visa of the class listed in a s46A notice lifting the bar for that visa class.

Management of IMAs (Offshore Entry Persons – OEPs)
October 2012 Cohort: Onshore Protection process (Pre 13 August arrivals)

- Minister takes the following action;
 - Assessed for Identity, Health, Character, Security sufficiently to be eligible for a BVE;
 - If checks OK, using s195A, grants the OEP BVE 050 for six weeks to allow for future protection visa application (050.212(3)(b)), which ceases in accordance with 050.517 to a date and with conditions clause 050.617, conditions 8401, 8506, & 8508 imposed.
 - Simultaneously lifts the s46A bar to allow the offshore entry person (OEP) to lodge a future Bridging visa E application;
 - The s46A bar lift will be recorded in ICSE and specify the class of visa it applies to.
- Associated BVE would need to be granted by the Minister under s195A as the client is not an eligible non-citizen. As clients included in a class of persons specified by the Minister by instrument in writing 050.613A would not apply, 050.617 would apply and 8101 would not be imposed.
- Protection application successful
 - Protection visa granted; BVE 050 ceases.
- Protection application refused
 - BVE 050 remains in effect for 28 days
 - OEP may seek merits review within 28 days – if successful PV granted, BVE 050 ceases.
 - If merits review not successful BVE 050 ceases 28 days after notification.
 - If BVE ceases OEP becomes unlawful as subject to s46A bar.
 - For any further visa grant;
 - Minister would need to personally intervene to grant further BVEs under s195A (while client is in detention s46A will be in effect and client OEP is not an eligible non-citizen).

Management of IMAs (Offshore Entry Persons – OEPs)
October 2012 Cohort: Onshore Protection process (POST 13 August arrivals)

No Advantage Group

- **No Minister takes the following simultaneous action:**
 - Exercised 195A power to grant the offshore entry person a subclass 449 Temporary Safe Haven Visa (TSHV) valid for 7 days.
and
 - Granted a BVE 050 (grounds not specified) which ceases in accordance with 050.517 – date specified – estimated at average processing time – and with conditions clause 050.617, where 8101 is discretionary and imposed*; Conditions 8401 and 8506 imposed.
 - The BVE 050 came into effect when the TSHV ceased, and ceases on the specified date.
- **Effect of granting the TSHV/BVE050:**
 - The OEP became a lawful non-citizen
 - The OEP became immigration cleared and became an eligible non-citizen;
 - As a lawful non-citizen they are not barred by s46A from making a valid application for a visa, however,
 - OEP is barred under s91K as the holder / former TSHV holder from lodging any valid application. This is reflected in ICSE by the grant of a subclass 449 as well as a client of interest note.

All further BVE grants to be done by Minister.

*** On 5 December 2014, Parliament passed legislation to introduce Temporary Protection Visas (TPVs). Minister also announced that UMAs would have access to work rights. However only the Minister can grant the BVE without condition 8101 imposed.**

Processes were put in place to gradually grant BVEs without condition 8101 to those UMAs in the community unlawfully and then move to granting UMAs holding BVE with 8101 imposed a BVE without 8101 imposed.

Released by Department of Home Affairs
under the Freedom of Information Act 1982

Management of IMAs (Offshore Entry Persons – OEPs)

18 April 2015 – *Migration Amendment (Protection and Other Measures) Act on 18 April* Applies to all groups

The *Migration Amendment (Protection and Other Measures) Act* on 18 April 2015 altered a number of sections of the *Migration Act 1958* (the Migration Act) which affect Illegal Maritime Arrivals' eligibility to access visa pathways, whilst in Australia.

As particularly relevant to the compliance and status resolution networks, the changes made to the s46A and s91K statutory bars means that a much greater proportion of IMAs will now be, or will become, eligible to make valid BVE applications that can then be assessed for grant by a delegate of the Minister.

Set out below:

- i. A brief overview of the changes to the s46A and 91K bars
- ii. The impact of these changes on IMAs' eligibility to apply for BVEs
- iii. Policy advice on grant guidelines for this cohort; and
- iv. Treatment of invalid applications.

Note: these changes will only affect IMAs who fall within the statutory definition of an 'Unauthorised Maritime Arrival' (UMA), as set out in s5AA of the Migration Act. This means they will not apply to direct entry IMAs, who reached the Australian mainland before 01/06/2013.

Changes to Section 46A and Section 91K

The changes to the s46A and s91K statutory bars are as follows:

Section 46A

Pre 18 April – Before this Act passed, s46A of the Migration Act had prevented a UMA, who was an unlawful non-citizen, from making any visa applications whilst in Australia, unless and until the Minister intervened to lift the bar in respect of a particular visa class or visa classes.

Post 18 April – Now, s46A of the Migration Act will prevent a UMA, who is an unlawful non-citizen, bridging visa holder, temporary protection visa holder or other prescribed temporary visa holder, from making any visa applications whilst in Australia, unless and until the Minister intervenes to lift the bar in respect of a particular visa class or visa classes (noting that it is open to the Minister to only lift the bar for a prescribed period of time and/or revoke the lift of the bar, at any time).

Section 91K

Pre 18 April – Before this Act passed, s91K of the Migration Act had prevented any non-citizen, who had previously been granted a temporary safe haven visa (for example, a s/c 449 (Humanitarian Stay) visa), from making any further visa applications for any other type of visa, whilst in Australia, unless and until the Minister intervened to lift the bar under s91L of the Migration Act.

Post 18 April – Now, s91J of the Migration Act has been amended to provide that the s91K bar does not apply to any UMA or transitory person, irrespective of whether the UMA or transitory person has previously been granted a temporary safe haven visa.

Eligibility to Submit Bridging Visa E Applications

Looking forward, the combined effect of these changes mean:

- o If the Minister intervenes to lift the s46A bar to allow a UMA to make an application for a BVE; and

- The UMA is an eligible non-citizen (because, for example, they had previously been granted a substantive visa such as a s/c449 visa) **and**
- The UMA has not previously had a visa cancelled on the basis of a breach of condition 8564 (must not engage in criminal conduct) or 8566 (code of conduct) **and**
- The UMA has not previously had a BVE cancelled under s116(1)(g) Reg 2.43(1)(p) or (q),

the UMA will be eligible to make an application for a BVE and which, provided the UMA can meet the remaining schedule 1 requirements, can be assessed by a delegate of the Minister, for grant.

Please note: To determine whether the Minister has intervened to lift the s46A bar in relation to BVE (or other) applications, you can refer to MI RIDs in ICSE to identify ministerial intervention outcomes. However, in the event you cannot identify whether s46A has been lifted (or for which visa classes) from ICSE, please contact the IMA BVE team via email for non-urgent queries (s. 22(1)(a)(ii) @immi.gov.au) or s. 22(1)(a)(ii) by phone for urgent queries (that is, if an IMA approaches a counter as an unlawful non-citizen and an immediate validity assessment of a BVE application is required to be made).

Management of the UMA Cohort

It is anticipated that the majority of UMAs who are, or become, eligible for delegate grants of BVEs will be managed by the IMA BVE teams by considering a BVE grant without application, pursuant to Reg 2.25, shortly after the 46A bar is lifted.

However, in the event a UMA approaches a compliance counter (or is otherwise located by a compliance or status resolution officer), the officer should consider whether the UMA can make a valid application for a BVE and (if they are eligible) make a decision on that application as soon as possible.

Grant Guidelines

As a matter of policy, the following grant guidelines should generally be observed when considering BVE applications made by UMAs (provided all other schedule 2 requirements are met):

- For UMA applicants who are yet to submit a protection visa application, a BVE on departure grounds, with conditions 8401, 8506, 8564 and 8566* should be granted for the same period of time as their previous BVE; and
- For UMA applicants who have already made a valid application for a protection visa application, and who have previously been granted a BVE under s195A, an associated BVE with conditions 8401, 8506, 8564 and 8566* should be granted.

For UMA applicants in any other circumstances (for example, seeking judicial review, ministerial intervention or finally determined), please seek further advice from the IMA BVE team via email (s. 22(1)(a)(ii) @immi.gov.au) or the Compliance Helpdesk before making a decision to grant a further BVE.

***Please note:** 8566 must (and can only) be imposed on BVEs that are granted to non-citizens who has signed the code of behaviour.

Reporting Guidelines – Condition 8401

UMAs will continue to need to report to the department by calling or emailing the BVE Reporting Line every three months.

When describing this reporting condition for a UMA with a BVE granted for more than 3 months, please use the following standard language:

You must report by close of business on REPORT DATE [three months after grant date] and three monthly thereafter or as instructed by the department. It is important that you notify the department of any change in address two business days prior to moving. You can contact the department by calling the IMA BVE Reporting line on s. 22(1)(a)(ii) between 9am to 4pm, Monday to Friday, or via email to s. 22(1)(a)(ii) @immi.gov.au Please include the following information when contacting the department by email.

- *Name*
- *Boat Id*
- *Current address and contact number*

When describing this reporting condition for a UMA with a BVE granted for less than 3 months, please use the following standard language:

You must report by close of business on REPORT DATE [the date the BVE will cease] or as instructed by the department. It is important that you notify the department of any change in address two business days prior to moving. You can contact the department by calling the IMA BVE Reporting line on s. 22(1)(a)(ii) between 9am to 4pm, Monday to Friday, or via email to s. 22(1)(a)(ii) @immi.gov.au Please include the following information when contacting the department by email:

- *Name*
- *Boat Id*
- *Current address and contact number*

Invalid Applications

Notwithstanding these changes to the *Migration Act*, there will still be a number of UMAs who will not be eligible to make valid BVE applications because, for example, the Minister has not intervened to lift the s46A bar or alternatively, because the UMA is not an eligible non-citizen.

If a UMA does make an application for a BVE that is assessed as invalid, as a matter of policy, the UMA should be notified of this determination.

The template to notify a **UMA** of an invalid BVE application, where the reason the BVE application is invalid is because s46A has not been lifted, is available at ADD2015/444721.

The template to notify a **UMA** of an invalid BVE application, where the reason the BVE application is invalid is because the applicant is not an eligible non-citizen, is available at ADD2014/1501301.