

Filipino Migrants Forum

IS YOUR VISA BEING CANCELLED?

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Most visas, permanent or temporary resident visa, can be cancelled under certain grounds. A common ground for cancellation is a breach of visa condition, such as working where there is a condition of “no work” for tourist visa holders or working for over 20 hours per week during sessions where there is a condition of “work limitation” for student visa holders, change of employer under certain circumstances for sponsored overseas employees. The range goes through to the more complex issues of character (providing false, misleading information or honest errors) and national security.

The effects of having a visa cancelled can include restriction on further visa applications lodged within Australia or outside Australia, difficulty in obtaining future visas and deportation.

The power to cancel a visa is derived from the Migration Act 1958 and there are a number of sections within the Act authorising visa cancellation. In this paper, our discussion will be limited to Section 116, the general power to cancel.

The Migration Act requires that where grounds for cancellation appear to exist, the visa holder must be given notice of the Department’s intent to consider visa cancellation and an opportunity to respond. This notice may be oral but will normally be in writing. Particulars of the grounds and of the information which suggests that grounds for cancellation exist must be provided in the notice. Time limits apply to the period to respond and the timeframe must also be identified in the notice.

Response to the notice of intent to cancel is subject to strict time limits. It is therefore vital that the response be prompt and that it addresses in detail not only the alleged ground for cancellation but also all aspects of the visa holder’s circumstances.

The delegate of the Minister of Immigration, Multicultural and Indigenous Affairs will determine if a ground for cancellation validly exists. This will involve consideration not only of information already held by the Department but also any information put forward by the visa holder in response to the notice of intent. It could be the only opportunity to influence the decision maker.

Cancellation could be either discretionary or mandatory. If it is decided that a ground for cancellation exists, but cancellation is discretionary, the visa holder’s particular circumstances must be put forward for consideration by the decision maker when exercising discretion whether or not to cancel the visa.

Matters are considered by decision makers include:

- the purpose of the visa holder's travel to and stay in Australia;
- any hardship which would result from cancellation;
- the circumstances in which the ground for cancellation arose;
- the visa holder's behavior in relation to the Department;
- the level of non-compliance with visa conditions

It is advisable that anyone receiving a notice of intent to consider cancellation of their visa contact a competent Registered Migration Agent immediately for advice. The notice must be checked for any errors at law and if the Delegate of the Minister decides to cancel the visa, appeal rights must be canvassed. A very good knowledge of the cancellation provisions and policy regarding notice of intent to cancel, cancellation and appeal would be necessary to avoid disaster.

It is quite possible that notwithstanding efforts to put forward mitigating circumstances, the delegate of the Minister of Immigration decides to cancel the visa anyway. If this happens the decision can be appealed to the Migration Review Tribunal, provided the former visa holder is in Australia. Waiver of "no work" and "no study" while on appeal should be considered.

A good example of a case where the MRT has set aside the decision of DIMIA to cancel the business long stay visa of the review applicant is *Galletes v DIMIA* (MRT N04/02375) 25 August 2004. The MRT decided that the visa not be cancelled. We acted for the review applicant in this case.

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Readers of the Philippine Community Herald Newspaper are invited to send their comments to "The President, Filipino Migrants Forum" c/o Imelda Argel & Associates, Solicitors & Attorneys, by email at info@iargel.com.au or by fax at (+612) 9699 3210 or by post to Suite 41, Ground Floor, 61-89 Buckingham St. SURRY HILLS NSW 2010.

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