

# IMMIGRATION NEWS

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*The Unwanted Student Visa*



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Dear Students

Welcome to the latest edition of IMMIGRATION NEWS and to the new subscribers. This free service is brought to you by Australian Immigration Law Services. You can subscribe by using the link below or by visiting our web site.

Today we will discuss one of the most confusing and talked about issues facing students after they have lodged the onshore GSM visas and their student visas have not expired.

## The Unwanted Student Visa

Thousands of students are often totally confused about what to do with their student visa that still sits exists after they lodge their 485, 487, 885 or 886 GSM visa applications. Many believe that since they have been granted their Bridging visa A (BVA) they can work full time. Unfortunately it is not as simple as this.

### **Bridging Visas Do Not Cancel Substantive Visas**

Student visas like other visas are what we call “substantive visas”. I’m not sure who thought up that name but that is the legal term.

Bridging visas are not substantive visas because they exist only to let you stay in Australia whilst a decision is made on your substantive visa application (or appeal process), i.e., a GSM visa (485, 885 etc).

Substantive visas are more powerful than bridging visas in a hierarchical sense. Bridging visas do not have any effect until the substantive visa expires. When your current substantive visa expires then the bridging visa will take over. You are meant to keep the conditions that exist on your visa until the BVA takes over. This means that the full time work permission often granted on the BVA onshore GSM visa does not come into effect until the student visa expires.

### **Conditions on Your existing Student visa**

## 1) Permission to Work 8105

Most students are well aware that when they are studying they are limited to 20 hours permission to work whilst the education provider is in session. When on official holidays you have unlimited work rights.

The following is the current DIAC guidelines;

### **CONDITION 8105**

*Condition 8105 applies to students who are granted student visas on or after 26 April 2008 as a primary applicant or those granted a student visa with PTW before 26 April 2008. They are not permitted to undertake paid work (voluntary work may be permitted in certain circumstances) until they have commenced their course in Australia. They are also not permitted to work more than 20 hours a week while the course in which they are enrolled is in session. However, this work limitation does not include work that is a registered component of the student's course of study or training for the award to be obtained.*

*A course is considered to be 'in session':*

- *for the duration of the advertised semesters (including periods when exams are being held);*
- *if the studies have been completed **but the Confirmation of Enrolment is still in effect** ; (with the exception of Masters by Research or PhD students who have submitted their thesis - see section 103 Postgraduate research students - Thesis submitted for marking) and*
- *if a student is undertaking another course during a break from their main course and the points will be credited towards their main course.*

***Students who complete their course as scheduled have access to unrestricted permission to work during the period left on their visa, unless they have enrolled in further studies.** Officers should also note the effect of condition 8202.*

*A 'week' is defined in condition 8105 as commencing on Monday and ending on Sunday. Note that the 20 hours week relates to each week during which the course is in session. The 20 hours a week cannot be "averaged out" over the duration of the course.*

## **2) Condition 8202**

You will note above DIAC makes reference to condition 8202 which is on all student visas for those undertaking their courses here (not dependents). If you have finished your course earlier than expected on the COE you used to obtain the student visa then you will be in breach of this condition. This often occurs when students fast track their courses or apply for RPL credits.

Similarly if you obtained your student visa using multiple COE's and you do not go on to complete these other courses you will breach Condition 8202. The most common example of this is where students have one COE for an Advanced Diploma and another COE for a following Bachelor Degree and they have been given a 573 visa for 3-4 years. They then complete their Advance Diploma and apply for a GSM visa but do not want to go on to study their planned Bachelor Degree course. By not studying this next course a breach of 8202 occurs.

When a breach of 8202 occurs DIAC has the right to begin cancellation procedures of the offending students visa. These procedures are time consuming and complicated and in reality DIAC does not have the resources to pursue every student who has lodged a GSM visa application. To cope with this situation they have devised the following guidelines;

### **112 STUDENT VISA HOLDERS AND APPLICATIONS FOR SKILLED MIGRATION - GUIDELINES ON COMPLIANCE WITH 8202**

*Where a student completes their course of study and lodges an application for skilled migration, they will be granted a Bridging Visa A in association with the application. The BVA however, will not come into effect until the Student Visa expires. Therefore, the applicant remains subject to student visa conditions until such a time as their visa expires, or their application for skilled migration is granted.*

*The following guidelines provide advice for officers in relation to dealing with students who remain on a student visa while awaiting an outcome on a skilled migration application. The general principle is that students who complete the full course of study for which they were granted a student visa should be allowed to remain on a student visa, while visa cancellation and subsequent bridging visa applications should be considered for those who don't complete the full course of studies for which they were visaed.*

*The following scenarios illustrate the policy approach:*

*(1) If the student finishes the principal course for which they were visaed as scheduled or earlier than planned:*

- student to be allowed to remain on student visa, even if not intending to*

*undertake any further studies*

- *if a NCN is issued for early completion, it should be finalised as visa not cancelled.*

*(2) If the student does not attempt principal course, but lodges a GSM application after completing a preliminary course only:*

- *once the NCN brings the student to notice, student to be issued a notice of intention to consider cancellation (NOICC) advising that visa may be subject to cancellation:*

*(a) if student complies with NOICC and intends continuing studies, student can be allowed to remain on student visa and any NCNs for early completion to be finalised as visa not cancelled*

*(b) if student does not continue studies student visa should be cancelled as the student no longer continues to be a person who would satisfy the grant of a student visa (condition 8516). In this instance, student and dependents can apply for a BVE.*

*It is at the officer's discretion as to whether a work condition is imposed on the BVE for either the primary applicant or their dependents. There is no legal requirement for the applicant to demonstrate a compelling need to work to be given unlimited work rights. While the grant of work rights remains up to the discretion of the officer, the policy intention is that work rights should be granted while the skilled migration application is being processed.*

I have made some Q & A's to help explain all this.

**Q. Should I cancel my COE if I have finished my course early?**

It is very likely the education provider has already taken steps to cancel your COE if you have finished your course earlier than the expected completion date. If you are not sure you can ask them to cancel your COE. In this case if you have finished your principle course (i.e.: Masters Degree) earlier than expected you will not be considered to be **"in session"** and thus can work full time. Also according to the above policy DIAC will not actively takes steps to cancel your student visa.

**Q. I have completed my two year Diploma course but have a 573 visa which is for the next Degree I was supposed to start. I have already lodged my GSM visa so do I need to do the degree?**

A. As you can read above DIAC will classify you as completing your **preliminary** course, not your **principle** course. In this case if you cancel your degree course COE they may take steps to cancel your student visa and place you on a Bridging Visa E (BVE). You will be allowed to stay on this BVE until your GSM

application is finalised. If DIAC gives you a BVE visa this will automatically cancel your Bridging Visa A.

**Q. Can I work full time on my BVE and can I travel overseas?**

A. As you can read above DIAC does issue the BVE with full permission to work but all students should realize two important issues about the BVE status;

- 1) You cannot use work experience on a BVE to count towards points for a future GSM application. This means you cannot use the work towards the 10 points for Australian work experience or MODL 15 points.
- 2) You will not be able to travel because on a BVE you cannot obtain a BVB. You will be stuck here until your GSM visa is granted (which could be years).

**Q. I have lodged my GSM visa but I want to travel overseas? I have finished my principle course but my student visa doesn't expire for a few more months?**

A. If you have finished your principle course then DIAC is not going to bother you about your existing student visa (read above). This means while it is still valid then it has multiple travel rights. You must ensure however that you come back before this student visa expires. If you plan to come back after the student visa expires then you need to apply for a BVB which gives you permission to re-enter Australia after your student visa expires. If you travel on this student visa then you will need to apply for another BVA when you return for it was automatically canceled when you left. This is just a formality which must be done to keep you lawful and to maintain your work rights.

**Q. I have lodged my GSM application after completing my 2 year Diploma and my student visa (573) goes longer because I was meant to go on to a Bachelor Degree. Can I travel overseas on this student visa for it doesn't expire for another 2 years?**

A. Since the Bachelor Degree would be regarded as your principle course of study then according to the above guidelines DIAC can always takes steps to cancel your existing visa and they would give you a BVE. Students need to be aware that this cancelation procedure of your student visa can take place even if you are not in Australia.

DIAC simply needs to send a letter of "Intention to Cancel" to your last known address in their system and if they do not get a response by a certain time frame they will automatically cancel your visa. This means it is possible if you are away overseas this can all happen without your knowledge. If this occurs you will have to obtain another visa to return to Australia which for some countries may not be so easy. Best advice is to stay in Australia until your GSM visa is granted, this will then cancel your old student visa for you and then you can travel. This is why it is a good idea to apply for the 485 TR visa for it can cancel your old student visa for you and then you can travel as much as you like.

**Q. I have a longer 573 visa as described in the above question. Should I go**

**to DIAC to have them cancel my visa?**

A. If you have your student visa canceled then that is ok but remember as I mentioned above, you cannot travel overseas until your GSM visa is granted and you cannot use any work experience towards points for a GSM application. Remember even by going to any DIAC office to ask this question they may force you to attend the Compliance section to have your visa canceled on the spot.

**Q. I have a longer student visa (573) as in the above question and didn't attend my university to start my Bachelor Degree but I want to use work experience later to lodge my GSM visa and claim work experience points.**

A. If you don't enroll into your university degree the education provider will automatically cancel your COE and tell DIAC. However DIAC is a busy place and most of the time they do not bother to contact you to take steps to cancel your student visa. While you hold that student visa then the work experience will be counted. If you are fortunate DIAC will be too busy to cancel your visa and it will expire in due course on its own.

**Q. Can I work more than 20 hours per week after I have finished my course?**

A. You can read above, if you are regarded not “**in session**” then you have unlimited work permission for the remaining time of the student visa. If you have finished your course earlier or are not planning to attend the next course make sure all the COE's are canceled and then this will meet the “not in session” criteria. You will find on the telephone DIAC will give you multiple answers to this same question.

**Q. If I work more than 20 hours a week can I use this work experience towards my GSM application?**

A. This is a complicated issue and I will answer it in two sections;  
1) Firstly when you are regarded as “**not in session**” then you can work as much as you like anyway and this can be counted.  
2) Secondly, DIAC has a special law called Regulation 2.27C regarding counting work experience towards any GSM application. It states;

*Regulation 2.27C states:*

*In determining whether an applicant satisfies a criterion that the applicant has been employed in a skilled occupation for a certain period, a period of employment in Australia must not be counted unless the applicant:*

*(a) held:*

*(i) a substantive visa; or*

*(ii) a Subclass 010 Bridging A visa; or*

*(iii) a Subclass 020 Bridging B visa;*

*authorising him or her to work during that period; and*

*(b) complied with the conditions of that visa.*

Recently received policy advice from Independent Skilled Migration Policy Section, DIAC regarding working more than 20 hours is reproduced below;

*“If an applicant has breached the conditions of their visa, by working when they had no work rights, or by working in excess of the amount of work allowed, the employment that was in breach of work conditions or that is in excess to the employment allowed under the visa conditions cannot be counted under Schedule 6B.*

*For example, a Student visa holder who was subject to a condition that they must not work more than 20 hours a week but who was employed in their nominated occupation for 25 hours a week while their course was in session, could not use the 5 hours of employment gained by breaching the visa conditions to claim points under Schedule 6B”*

According to the above policy advice, the 20 hours for that week can be used but not the extra 5 hours.

Students should also note that being on a BVE does not meet i, ii, or iii and therefore as I mentioned above the work experience cannot be used.

I think this is enough to absorb is enough for one day.

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