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DE FACTO PARTNER VISA APPLICATIONS IN AUSTRALIA*

(Reflects law as at 9 November 2009)

This partner visa is for de facto couples (whether same sex or opposite sex couples) in a genuine, continuing and exclusive relationship. From 1 July 2009 same sex couples no longer apply for an Interdependency visa but instead are assessed as a de facto couple.

Generally, a successful applicant will be granted a subclass 820 two year temporary visa. At the end of the two years, counted from the date of the visa application, the couple will need to show the Department of Immigration (**'Department'**) that they are still in a genuine relationship. After confirmation that the relationship is still genuine and continuing, the permanent resident visa may be granted (subclass 801). Some visa applicants may get permanent residence without waiting for 2 years if they have been in a relationship for 5 years or for 2 years if they also have a child(ren) with their partner.

Temporary partner visa holders may also be eligible for a permanent visa if the relationship has ended and there has been domestic violence, or there is a child in relation to whom the sponsor and the visa holder have rights/ obligations, or the sponsor has died.

WHO CAN APPLY?

People who hold a **substantive visa** in Australia may usually apply for the partner visa (unless there is a condition on their last visa such as an '8503' which prohibits the making of an application in Australia). In some limited circumstances, people who do NOT hold a substantive visa may apply for a partner visa. Please make sure you read **all** the following sections:

- What is a substantive visa?
- Living together requirement
- Condition 8503
- Have you had a visa refused or cancelled?
- If you do not hold a substantive visa
- Previous sponsorship
- Assurance of support

* IARC does not guarantee the accuracy of any information contained in this information sheet. It contains general information and is not a substitute for legal advice

WHAT IS A SUBSTANTIVE VISA?

A substantive visa is any visa except a bridging visa, a criminal justice visa or an enforcement visa. *If you don't have a visa at all or if you only have a bridging visa then you do not have a substantive visa. Read the next paragraphs if this applies to you.*

THE “LIVING TOGETHER” REQUIREMENT

The visa applicant and sponsor must have lived together, or not been living apart on a permanent basis, for the 12 months immediately before making the application for the visa unless there are “compelling and compassionate circumstances” or their relationship is registered under the relevant law in Victoria, Tasmania or the ACT.

CONDITION 8503

If condition 8503 appears on your visa you cannot make a valid application for this visa within Australia. Condition 8503 may be waived in rare circumstances. It is important that you seek advice from a registered migration agent in relation to this.

HAVE YOU HAD A VISA REFUSED OR CANCELLED?

Since 14 September 2009, if you have had a visa refused or cancelled since you last came into Australia you may still be able to apply for this visa. However, you must:

- submit both form 47SP (completed, signed and dated by you as the applicant) and 40SP (completed, signed and dated by your partner)
- submit 2 statutory declarations with the application from – each statutory declaration must declare that you and your partner are in a de facto relationship and must be made by an Australian citizen, Australian permanent resident or eligible New Zealand citizen (see form 888), and
- **not** have previously been refused a Spouse, Partner or Interdependency visa since last entering Australia.

In addition, if you do not hold a substantive visa (eg you are unlawful or hold a bridging visa) then you must meet the requirements set out below.

IMPORTANT: IF YOU DO NOT HOLD A SUBSTANTIVE VISA!

When can unlawful non-citizens (people without a visa) or bridging visa holders apply for the spouse visa?

If you do not have a visa (for example over-stayers, unlawful non-citizens) or hold a type of visa known as a bridging visa then you may be able to apply for and be granted a spouse visa but you will need to establish that your circumstances fall within:

(a) the 28 day rule (see below)

OR

(b) the “compelling reasons” exception (see below).

(a) The 28 day rule

If you held a valid visa within the last 28 days and can show that:

- you became unlawful because of circumstances beyond your control;
- there are compelling reasons for granting the visa; and
- you complied with the conditions of your previous visa

you can make an application for the visa and will be assessed about whether you meet the requirements for the 28 day rule.

OR

(b) “Compelling reasons”

Migration law allows people with “compelling reasons” to be considered for a spouse visa in Australia even if they do not hold a substantive visa when they apply. The law does not define “compelling reasons”. Departmental policy says that the following circumstances would normally be considered “compelling reasons”:

- where the couple are in a long-standing spouse relationship (taken to be for at least two years); and/or
- where there are Australian citizen children from the relationship.

Other examples that may be compelling reasons include:

- maternity issues where departure from Australia could complicate matters for the applicant
- age related maternity issues for the applicant
- separation issue for an extended period from the sponsor
- the applicant is the sole breadwinner and their departure would significantly impact on the sponsor's welfare
- negative impact on step-children's formative years if the applicant departs
- DFAT warnings on community violence in the applicant's home country which makes it unsafe for the applicant's circumstance
- hardship caused to the relationship between the sponsor and the applicant's children if the applicant and the children have to leave Australia to make an application offshore
- the sponsor feels compelled to leave Australia with the applicant, leading to loss of employment and income in Australia and resulting in serious financial and other difficulties for the family unit when they eventually are able to return
- reasons concerning safety for the applicant and the sponsor in the applicant's home country if required to submit application offshore
- the applicant's family unit and the sponsor would suffer significant psychological and material hardship if they were forced to depart the country, and/or
- the sponsor relies on the applicant for ongoing and continuous care.

If you are thinking of relying on “compelling reasons” and you are not in a long-standing relationship or have children from the relationship it is advisable to get advice from a registered migration agent before applying.

SPONSORSHIP LIMITATIONS

If your sponsor has previously sponsored/nominated a partner or was sponsored/nominated themselves as a partner then there may be limitations on this visa application. If this applies to you it is important that you seek advice from a registered migration agent.

In addition there may be limitations on your sponsor if they hold a Subclass 204 Woman at Risk visa or a Subclass 143 Contributory Parent visa or a Subclass 864 Contributory Aged Parent visa. If this applies to you, please talk to a registered migration agent about this.

MAKING AN APPLICATION

You can download a Partner Migration Booklet free of charge from the Department of Immigration’s website (www.immi.gov.au) or buy it from a Department of Immigration office for \$10 (see below for addresses) or ask for the specific forms listed below, provided without charge.

- Form 47SP or 47SP (Internet) - the application form to be completed by the applicant
- Form 40SP or 40SP (Internet) - the sponsorship form to be completed by the Australian partner

- Form 888 Statutory Declaration forms (you will need at least two). It is possible to use other statutory declaration forms available in news agencies.
- Form 160A X-Ray.
- Form 26A medical examination.
- Form 80 character check.
- *The National Police Check Application Form* (available at www.immi.gov.au).
- You will also be asked to provide a police clearance from your country of origin and from the police authorities of any country where you have lived for a period of at least 12 months in the last 10 years (see the form *Character Requirements Penal Clearance Certificates (formerly form 47P)*).
- Applicants will need 4 recent passport sized photographs (2 to attach to the Form 47SP; 1 for the doctor to attach to Form 26A and 1 for the X-Ray form).
- You will need to pay the fee of \$2,525 at the time of lodgment.

EVIDENCE

You should provide evidence that your relationship is “genuine and continuing” and is similar to a husband and wife relationship. The evidence should be detailed and go into the past as far as possible.

Evidence of a genuine relationship and cohabitation includes:

- At least 2 statutory declarations from friends and relatives explaining how they know the applicant and their partner, what they know about the relationship and why they believe it is genuine and continuing.
- **A statutory declaration from the applicant stating:**
 - when/where/how they met their partner;
 - where and for how long you have lived together;
 - how you share your domestic arrangements (for example who does the cooking, cleaning, shopping, child care);
 - how you share your finances and bills (for example do you have a joint bank account, are gas/water electricity accounts in both names, do you jointly own a house, car or other major asset?);
 - whether you go out/socialise/entertain people as a couple;
 - what your plans are for the future such as where you plan to work, where you plan to live, whether you are planning to have children; and
 - whether you give each other emotional support and companionship.
- A statutory declaration from the partner covering the same things, but in their own words.

Other evidence

- Copies of joint bills or bills in separate names but at the same address, copies of joint bank account statements, leases, wills, powers of attorney, correspondence sent to you jointly or in separate names but showing the same address (the envelopes are particularly useful), joint membership of clubs and societies.
- Evidence of ongoing contact during times spent apart such as letters (with envelopes) written to each other, copies of telephone bills showing the itemised calls to each other, evidence of any money sent to each other.
- Certified copies of the applicant’s passport and birth certificate and the birth certificates of any children.
- Certified copy of partner’s Australian passport, birth certificate, Australian citizenship certificate or permanent residence visa.

HEALTH AND CHARACTER

In order to be granted a spouse visa the applicant will need to satisfy relevant health and character criteria. This will involve undergoing appropriate medical examinations, providing appropriate criminal record checks and passing general character requirements. Detailed discussion of these criteria and how to satisfy them is set out in IARC's *Health and Character* information sheets.

Applicants should be aware that all members of their family unit (ie spouse, dependent children and some dependent relatives) will also need to satisfy the health criteria **even if they are not applying to migrate to Australia**. If any member of the family unit fails the health test the spouse application may be refused. In some circumstances the health criteria may be waived (at the Minister's discretion). For more detail about this please refer to IARC's *Health* information sheet.

INCLUDING DEPENDANT RELATIVES IN YOUR APPLICATION

Your dependent child(ren) can be included in your application if they are not married, engaged or in a de facto relationship and they are either:

- under 18 years of age; or
- over 18 years of age but either wholly or substantially dependent on you for a substantial period (usually at least 12 months) for their basic needs or have a total or partial loss of their bodily or mental functions that stops them from earning a living.

If you include your child as a secondary applicant on your application then you will need to provide:

- proof of the child's relationship to you – eg birth certificate, adoption papers, family book, court order
- evidence that either:
 - the law of the child's home country permits the removal of the child - generally this will be a court order granting the primary visa applicant sole right to determine where the child lives, OR
 - each person who can lawfully determine where the child is to live consents to the grant of the visa – for example a statutory declaration (or equivalent) from the other parent saying they have no objection to the child traveling to, or settling in, Australia or proof that the other parent is dead or missing, OR
 - that the grant of the visa would be consistent with any Australian child order in force in relation to the child – this means a residence order, a contact order, care order or a State child order.

It may also be possible to include other relatives and members of your family unit in your application. If you are in this situation you should seek advice from a registered migration agent about your circumstances.

For all dependent relatives aged 18 years or older, you must complete form 47A *Details of child or other dependent family member aged 18 years or over*. This must be completed whether the relative is migrating with you or not.

OFFENCES

You must ensure that you are honest with the Department of Immigration. Under the *Migration Act 1958* it is an offence to:

- arrange a de facto relationship for the purposes of obtaining permanent residence
- make false, misleading or unsupported statements in relation to whether or not other persons live together on a genuine domestic basis as spouses without being married to each other.

WHAT IF I HAVE BEEN MARRIED BEFORE?

You can still be in a de facto relationship even if you are still or were legally married to another person. In those circumstances you need to show:

- You are legally divorced or permanently separated from that other person; and
- You are in a genuine, continuing and exclusive relationship with your new spouse.

CERTIFIED COPIES, STATUTORY DECLARATIONS AND TRANSLATIONS

Any photocopies of documents to be included with the application must be certified¹ by a solicitor/Justice of the Peace/bank manager etc). People who make a statutory declaration for you must attach a certified copy of the front page of their passport, permanent resident's visa, Australian citizenship certificate or birth certificate if the person making the statutory declaration was born in Australia. The statutory declaration must be signed in front of a solicitor, Justice of the Peace or bank manager.

Any documents which are not in English should be translated by an accredited translator. Both the translation and a certified copy of the un-translated original should be submitted with the application. For accredited translators call either the Community Relations Commission on 1300 651 500 or the Translating and Interpreting Service on 131 450.

ASSURANCE OF SUPPORT

The Minister may request an assurance of support ('AOS') before making a decision. An AOS is a legal commitment by a person or entity ('Assurer') to repay to the government the amount of any welfare payments made to the applicant within the first two years after the applicant enters Australia/is granted their visa. The Assurer does not have to be the sponsor.

An AOS does not need to be provided at the time of application. It should only be provided if requested later by the Minister. The Minister may require an AOS where the Minister believes that the applicant is likely to claim welfare allowances from the Australian government.

The factors which are relevant to whether an AOS is requested are:

- the applicant's age
- the applicant's employment prospects (including skills and qualifications)
- the applicant's eligibility for social security, and
- the sponsor's ability to provide assistance beyond that to be provided as part of the sponsorship undertaking.

The Assurer must have sufficient income to ensure that they can meet any debts if they arise. Income, assets, liabilities and spouse's income may all be relevant to the assessment of the Assurer financial status. Generally an AOS will not be accepted from an Assurer if they have received social security benefits in the last 12 months or if their income is low enough to qualify for a Health Care Card.

If the Minister requires that an AOS is provided then the Department will direct the applicant to Centrelink. Centrelink is responsible for the processing of all AOSs. For further details in relation to an AOS please refer to IARC's *Assurance of Support* information sheet.

Where an AOS has been requested and cannot be provided, a decision may be made refusing the visa.

VISA APPLICATION PROCESS

Step 1 Applicant should complete the 47SP form or 47SP (Internet).

¹ a certified copy is a copy containing a statement to the effect that the copy is a true copy of the original document.

Step 2 Australian sponsor should complete form 40SP or 40SP (Internet).

Step 3 Attach the evidence mentioned above.

Step 4 Attach a cover letter to the application form with:

- your name;
- current address;
- reasons for applications; and
- list of documents attached to application. If you are waiting for any information to be included with the application say that it will be provided to the Department as soon as it is received.

Also offer to provide any further information required by the Department of Immigration.

Step 5 Complete a form 80 and attach it to the application.

Step 6 Write the applicant's name on the back of 2 passport sized photographs and hand them in with the application form.

Step 7 Keep a photocopy of all the documents you submitted to the Department of Immigration.

Step 8 Lodge these forms with the application fee at your nearest Department of Immigration office. It is best to ring the National Enquiry Line first (see contact details below) as you may need to make an appointment.

Remember to keep your receipt as it is proof that you lodged the application.

The health check and police clearance can be lodged at the same time as the application forms (see Steps 8 & 9). If you do not provide your health test results and police clearances at the time of lodgment you will be asked to do so during processing or you can initiate the process yourself. It is highly advisable to undergo the testing as soon as possible. Otherwise the visa processing will be delayed.

Step 9 Health check: phone Health Services Australia to make arrangements for your X-Ray and medical examination. You will need to complete forms 160A and 26A, remembering to attach your photograph to Form 26A. The results will be sent to you through the post. Do not open the form. Send it to the Department of Immigration with a letter clearly identifying your name, address and Department of Immigration file number.

Step 10 Police clearance: follow the instruction on *The National Police Check Application Form* (available at www.immi.gov.au) to obtain an Australian police clearance. The clearance will be sent to you through the post. Send it to the Department of immigration with a letter clearly identifying your name, address and Department of Immigration file number. If you are required to provide overseas police clearances the Department of Immigration will advise you of the process to follow to obtain these clearances.

Step 11 If the visa is approved you will either be granted the two year temporary visa or the permanent visa, if you were in a long term spouse relationship as outlined above. If the visa is the two year temporary visa, it will be conditioned on the relationship continuing (with some exceptions).

Remember to tell the Department of any change in your circumstances, for example if you change your address or the relationship ends.

CONTACT INFORMATION

DEPARTMENT OF IMMIGRATION AND CITIZENSHIP (DIAC)

Counter service all NSW offices

9am–4pm Monday to Friday

Sydney CBD 26 Lee Street, Sydney 2000
GPO Box 9984, Sydney, NSW 2001

Parramatta 9 Wentworth Street
Parramatta NSW 2150
GPO Box 9984, Sydney, NSW 2001

National Telephone Inquiry Line: 131 881

Website: www.immi.gov.au

IMMIGRATION ADVICE AND RIGHTS CENTRE INC (IARC)

Administration line: (02) 9279 4300 (between 9am and 5pm)

Website: www.iarc.asn.au

IARC Telephone Advice	IARC Face-to-Face Advice (by appointment only)
(02) 9262 3833 Tuesday and Thursday 2.00pm–4.00pm	Contact us to make an appointment at: Immigration Advice and Rights Centre Inc. Level 5, 362 Kent Street Sydney NSW 2000 Ph: +61 2 9279 4300 (Admin Line, 9-5pm)