

## Filipino Migrants Forum

### ***ARE YOU A LONG TERM OVERSTAYING NON CITIZEN?***

*By Atty. Imelda Argel, Bachelor of Laws (UP), Master of Laws (University of Sydney)*

This article relates to **long term** overstaying non-citizens. Under certain circumstances, you could be granted a permanent visa, known as '*absorbed person visa*'. The grant of an *absorbed person visa* does not involve a decision, rather it is a finding of fact against the relevant provisions of the Migration Act and is not subject to merits review.

DIMIA makes the following observation regarding “absorption”:

*"Absorption" is a constitutional doctrine developed by the High Court in the interpretation of paragraph 51(27) of the Commonwealth Constitution (the "immigration and emigration" power). Generally speaking, all persons entering Australia (whether permanently or temporarily) entered as "immigrants". However, the doctrine held that certain persons who arrived in Australia did not remain "immigrants" for all time. At some point certain persons were "absorbed" into the Australian community and ceased to be "immigrants". When this occurred, those persons moved outside those provisions of the Migration Act 1958 which at that time referred to immigrants.*

The grant of an absorbed person visa occurs by operation of law. A finding of fact must be made that the person concerned satisfies **all** of the requirements of relevant provision of the Migration legislation *and* the indicators of absorption before the visa can be taken to have been granted. The question of whether a valid deportation existed can only be resolved by enquiry to DIMIA.

Very broadly, the relevant provision requires that a person must :

- Be physically in Australia at the time their case is put to DIMIA for determination;
- Be a person whose last entry permit expired or was cancelled before 2 April 1979;
- Have been present in Australia on 2 April 1984;
- Not have left Australia;
- Be of good moral character, that is, not be a person who had criminal convictions, provided false or misleading information to an immigration officer (either to obtain a visa or gain entry) or evaded immigration controls.

Factors identified by the courts as evidence of absorption include whether a person has:

- Married (and/or had a longstanding stable relationship) with an Australian citizen

- or Australian permanent resident;
- Established a permanent home;
- Children born and educated in Australia;
- Obtained and retained remunerative employment;
- Purchased property and acquired significant assets;
- Made efforts to become part of the community (learning English/ enquired about citizenship);
- Abided by the law.

Evidence would be required as to a person's satisfaction of these indicators.

If a person is able to satisfy all the legislative provisions and has satisfied all the absorption indicators, then he/she is taken to have been granted an absorbed person visa effective from 1 September 1994.

An absorbed person visa is a visa only for permanent stay. The holder of an absorbed person visa must apply for a resident return visa should they wish to travel overseas.

There is no provision to provide evidence of an absorbed person visa in the form of a visa label in a passport. However, DIMIA will provide a letter advising the fact. If a holder requires more substantial evidence then a certificate of evidence of resident status or a resident return visa can be applied for in the normal way.

**By Imelda Argel**  
**February 2005**

*This information is of a general nature and should not be taken as authoritative legal advice for specific cases. The writer, Atty. Imelda Argel is a practising Filipino lawyer and a registered migration agent in Sydney, Australia. She is a Solicitor of the Supreme Court of New South Wales, the High Court of Australia, Attorney at law in the Philippines and in the State of New York, USA. Her Registered Migration Agent no. is 9682957. More information is available at [www.iargel.com.au](http://www.iargel.com.au) and by watching IBC Channel 13 at 6:00PM on Saturdays in Manila.*

*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](mailto: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.*