



Migration Amendment (2021 Measures No. 1) Regulations 2021

I, General the Honourable David Hurley AC DSC (Retd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulations.

Dated 18 February 2021

David Hurley
Governor-General

By His Excellency's Command

Alex Hawke
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

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1 Name

This instrument is the *Migration Amendment (2021 Measures No. 1) Regulations 2021*.

2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument	27 February 2021.	27 February 2021

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under the *Migration Act 1958*.

4 Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1—Facilitating onshore grants of certain offshore visa applications

Migration Regulations 1994

1 At the end of subregulation 4.02(4)

Add:

- ; (s) a decision made after 26 February 2021 to refuse to grant:
 - (i) a Subclass 300 (Prospective Marriage) visa; or
 - (ii) a Subclass 309 (Partner (Provisional)) visa; or
 - (iii) a Subclass 445 (Dependent Child) visa;if the visa was applied for before the end of the concession period described in subregulation 1.15N(1) by an applicant who:
 - (iv) was outside Australia when the application was made; and
 - (v) was in Australia at any time during that concession period; and
 - (vi) was in Australia on the day the decision was made.

2 Subregulation 4.02(5)

After “made by”, insert “the following”.

3 At the end of subregulation 4.02(5)

Add:

- ; (r) in the case of a decision to which paragraph (4)(s) applies—the sponsor.

4 Clause 101.411 of Schedule 2

Repeal the clause, substitute:

101.411

- (1) The applicant must be outside Australia when the visa is granted if the visa is not a visa to which subclause (2) applies.
- (2) This subclause applies to a visa if:
 - (a) the visa is granted after 26 February 2021; and
 - (b) the application for the visa was made before the end of the concession period described in subregulation 1.15N(1); and
 - (c) the applicant for the visa:
 - (i) was in Australia at any time during that concession period; and
 - (ii) is in Australia, but not in immigration clearance, when the visa is granted.

5 Clause 102.411 of Schedule 2

Repeal the clause, substitute:

102.411

- (1) The applicant must be outside Australia when the visa is granted if the visa is not a visa to which subclause (2) applies.

-
- (2) This subclause applies to a visa if:
- (a) the visa is granted after 26 February 2021; and
 - (b) the application for the visa was made before the end of the concession period described in subregulation 1.15N(1); and
 - (c) the applicant for the visa:
 - (i) was in Australia at any time during that concession period; and
 - (ii) is in Australia, but not in immigration clearance, when the visa is granted.

6 Clause 300.412 of Schedule 2

Repeal the clause, substitute:

300.412

- (1) The applicant must be outside Australia when the visa is granted if the visa is not a visa to which subclause (2) applies.
- (2) This subclause applies to a visa if:
- (a) the visa is granted after 26 February 2021; and
 - (b) the application for the visa was made before the end of the concession period described in subregulation 1.15N(1); and
 - (c) the applicant for the visa:
 - (i) was in Australia at any time during that concession period; and
 - (ii) is in Australia, but not in immigration clearance, when the visa is granted.

7 Clause 309.412 of Schedule 2

Repeal the clause, substitute:

309.412

- (1) The applicant must be outside Australia when the visa is granted if the visa is not a visa to which subclause (2) applies.
- (2) This subclause applies to a visa if:
- (a) the visa is granted after 26 February 2021; and
 - (b) the application for the visa was made before the end of the concession period described in subregulation 1.15N(1); and
 - (c) the applicant for the visa:
 - (i) was in Australia at any time during that concession period; and
 - (ii) is in Australia, but not in immigration clearance, when the visa is granted.

8 Clause 445.411 of Schedule 2

Repeal the clause, substitute:

445.411

- (1) If the application is made outside Australia, the applicant must be outside Australia when the visa is granted if the visa is not a visa to which subclause (2) applies.

- (2) This subclause applies to a visa if:
- (a) the visa is granted after 26 February 2021; and
 - (b) the application for the visa was made before the end of the concession period described in subregulation 1.15N(1); and
 - (c) the applicant for the visa:
 - (i) was in Australia at any time during that concession period; and
 - (ii) is in Australia, but not in immigration clearance, when the visa is granted.

Schedule 2—Subclass 300 (Prospective Marriage) visas

Migration Regulations 1994

1 Clause 300.511 of Schedule 2

Repeal the clause, substitute:

300.511

Temporary visa permitting the holder to travel to, enter and remain in Australia until:

- (a) a date specified by the Minister, which must be a date occurring at least 9 months, but **not more than 15 months, from the date of grant**; or
- (b) if the Minister does not specify a date—9 months from the date of grant.

Schedule 3—Temporary Skill Shortage (Class GK) visas

Migration Regulations 1994

1 Subparagraphs 1240(2)(a)(i) and (ii) of Schedule 1

Before “for” (first occurring), insert “subject to subparagraph (iii),”.

2 At the end of paragraph 1240(2)(a) of Schedule 1

Add:

- (iii) for an applicant in a class of persons specified in a legislative instrument made for the purposes of this subparagraph under subregulation 2.07(5), the amount is nil;

Schedule 4—Distinguished Talent (Class BX) visas

Part 1—Names

Division 1—Main amendments

Migration Regulations 1994

1 Subregulation 1.12(7) (heading)

Omit “*Distinguished*”, substitute “*Global*”.

2 Subregulation 1.12(7)

Omit “*Distinguished*”, substitute “*Global*”.

3 Subregulation 2.06AAB(1) (table item 30)

Omit “*Distinguished*”, substitute “*Global*”.

4 Paragraph 5.35AB(1)(m)

Omit “*Distinguished*”, substitute “*Global*”.

5 Item 1113 of Schedule 1 (heading)

Omit “***Distinguished***”, substitute “***Global***”.

6 Paragraph 1113(3)(c) of Schedule 1

Omit “*Distinguished*”, substitute “*Global*”.

7 Subitem 1113(4) of Schedule 1

Omit “*Distinguished*”, substitute “*Global*”.

8 Part 858 of Schedule 2 (heading)

Omit “***Distinguished***”, substitute “***Global***”.

9 Division 858.3 of Schedule 2 (note 2 to the heading)

Omit “*Distinguished*”, substitute “*Global*”.

10 Paragraph 858.311(a) of Schedule 2

Omit “*Distinguished*”, substitute “*Global*”.

Division 2—Amendments relating to Subclass 773 (Border) visas

Migration Regulations 1994

11 Paragraph 773.213(2)(zy) of Schedule 2

Omit “*Distinguished*”, substitute “*Global*”.

Part 2—Endorsement by Prime Minister's Special Envoy for Global Business and Talent Attraction

Division 1—Prime Minister's Special Envoy for Global Business and Talent Attraction

Migration Regulations 1994

12 Regulation 1.03

Insert:

Prime Minister's Special Envoy for Global Business and Talent Attraction means the SES employee, or acting SES employee, who occupies, or is acting in, the position of Prime Minister's Special Envoy for Global Business and Talent Attraction.

Division 2—Endorsement

Migration Regulations 1994

13 Paragraph 1113(3)(d) of Schedule 1

After “subclause 858.212(2)”, insert “of Schedule 2”.

14 Paragraph 1113(3)(e) of Schedule 1

After “subclause 858.212(4)”, insert “of Schedule 2”.

15 At the end of subitem 1113(3) of Schedule 1

Add:

- (f) If the applicant seeks to meet the requirements of subclause 858.229(2) of Schedule 2, the applicant must have been endorsed by the Prime Minister's Special Envoy for Global Business and Talent Attraction as being likely to make a significant contribution to the Australian economy if granted a Subclass 858 (Global Talent) visa.

16 Subclause 858.212(1) of Schedule 2

Repeal the subclause, substitute:

- (1) Unless the applicant has been endorsed by the Prime Minister's Special Envoy for Global Business and Talent Attraction as mentioned in paragraph 1113(3)(f) of Schedule 1, the applicant meets the requirements of subclause (2) or (4) of this clause.

17 At the end of Subdivision 858.22 of Schedule 2

Add:

858.229

- (1) This clause applies to an applicant who, at the time of application, had been endorsed by the Prime Minister's Special Envoy for Global Business and Talent

Attraction as being likely to make a significant contribution to the Australian economy if granted a Subclass 858 (Global Talent) visa.

- (2) The Minister is satisfied that **the applicant is likely to make a significant contribution to the Australian economy** if the visa is granted.
- (3) For the purposes of subclause (2), the Minister must **not** have regard to the fact that the applicant was endorsed by the Prime Minister's Special Envoy for Global Business and Talent Attraction as being likely to make a significant contribution to the Australian economy if granted a Subclass 858 (Global Talent) visa.

Schedule 5—Application and transitional provisions

Migration Regulations 1994

1 In the appropriate position in Schedule 13

Insert:

Part 95—Amendments made by the Migration Amendment (2021 Measures No. 1) Regulations 2021

9501 Operation of Schedule 2 (Subclass 300 (Prospective Marriage) visas)

The amendment made by Schedule 2 to the *Migration Amendment (2021 Measures No. 1) Regulations 2021* applies in relation to a Subclass 300 (Prospective Marriage) visa granted on or after 27 February 2021, whether the application for the visa was made before, on or after 27 February 2021.

9502 Operation of Schedule 4 (Distinguished Talent (Class BX) visas)

- (1) The amendments made by Division 1 of Part 1, and Division 2 of Part 2, of Schedule 4 to the *Migration Amendment (2021 Measures No. 1) Regulations 2021* apply in relation to an application for a visa made on or after 27 February 2021.
- (2) To avoid doubt, the reference in paragraph 773.213(2)(zy) of Schedule 2 to these Regulations to a Global Talent (Class BX) visa is taken to include a reference to a Distinguished Talent (Class BX) visa issued on the basis of an application made before 27 February 2021.

9503 Transitional provision—Subclass 124 (Distinguished Talent) visas and Subclass 858 (Distinguished Talent) visas

- (1) Division 124.4 of Schedule 2, as in force immediately before 14 November 2020, does not apply in relation to an application for a Subclass 124 (Distinguished Talent) visa if:
 - (a) the application was made before 14 November 2020; and
 - (b) the application was not finally determined before 27 February 2021; and
 - (c) the applicant is not in immigration clearance when the visa is granted.
- (2) Division 858.4 of Schedule 2, as in force immediately before 14 November 2020, does not apply in relation to an application for a Subclass 858 (Distinguished Talent) visa if:
 - (a) the application was made before 14 November 2020; and
 - (b) the application was not finally determined before 27 February 2021; and
 - (c) the applicant is not in immigration clearance when the visa is granted.

Note: Former Division 124.4 required an applicant to be outside Australia when a visa is granted.

Note: Immediately before 14 November 2020, Division 858.4 required an applicant to be in Australia when a visa is granted.

EXPLANATORY STATEMENT

Issued by the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

Migration Act 1958

Migration Amendment (2021 Measures No. 1) Regulations 2021

This instrument makes various amendments to the *Migration Regulations 1994* (the Migration Regulations), including to assist certain visa applicants and holders adversely affected by COVID-19 and to support the attraction of Global Talent to Australia.

The *Migration Act 1958* (the Migration Act) is an Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons.

Subsection 504(1) of the Migration Act provides that the Governor-General may make regulations, not inconsistent with the Migration Act, prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Migration Act.

In addition, regulations may be made pursuant to the provisions listed in Attachment A.

The *Migration Amendment (2021 Measures No. 1) Regulations 2021* (the Regulations) amend the Migration Regulations as follows:

Schedule 1 – Facilitating onshore grants of certain offshore visa applications – enables certain family visas (Subclass 101 (Child), 102 (Adoption), 300 (Prospective Marriage), 309 (Partner (Provisional)) and 445 (Dependent Child) visas), for which the applicant would normally be required to be outside Australia when the visa is granted, to be granted to an applicant who is in Australia and is affected by COVID-19 related travel restrictions, in certain circumstances.

Schedule 2 – Subclass 300 (Prospective Marriage) visas – enables the Minister to grant a Subclass 300 (Prospective Marriage) visa **with a validity period that is longer than the current 9 months (but not longer than 15 months)** in order to assist applicants who have been impacted by COVID-19 related travel restrictions. These amendments apply **to Subclass 300 visas granted on or after 27 February 2021**, whether the application was made before, on or after that date, so that existing applicants can benefit from this change.

Schedule 3 – Temporary Skill Shortage (Class GK) visas – ensures a nil visa application charge (VAC) is payable by Subclass 482 (Temporary Skill Shortage) visa applicants who are in a class of persons specified in a legislative instrument. It is intended that the instrument will specify persons who previously held a relevant temporary skilled work visa (a Subclass 482 visa or a Subclass 457 (Temporary Work (Skilled)) visa) and were unable to enter Australia as a result of travel restrictions due to the COVID-19 pandemic, and are seeking a Subclass 482 visa to enter Australia.

Schedule 4 – Distinguished Talent (Class BX) visas – **changes the name of the visa** to Global Talent to reflect a focus on the Government’s Global Talent Program, and provides for grant of the visa to applicants who are endorsed by the Prime Minister’s Special Envoy for Global Business and Talent Attraction and who the Minister is satisfied are likely to make a significant contribution to the Australian economy if the visa is granted.

Schedule 5 – Application and transitional provisions – provides for the application of Schedules 2 and 4, and enables the grant of Subclass 124 (Distinguished Talent) and Subclass 858 (Distinguished Talent) visas to existing applicants who are affected by COVID-19 related travel restrictions and are therefore unable to meet the current requirements in relation to their location at the time the visa is granted.

The matters dealt with in the Regulations are appropriate for implementation in regulations rather than by Parliamentary enactment. It has been the consistent practice of the Government of the day to provide for detailed visa criteria and conditions in the Migration Regulations rather than in the Migration Act itself. The Migration Act expressly provides for these matters to be prescribed in regulations, as can be seen in the authorising provisions listed at Attachment A. These include, for example, subsection 31(3), which provides that the regulations may prescribe criteria for a visa or visas of a specified class.

The current Migration Regulations have been in place since 1994, when they replaced regulations made in 1989 and 1993. Providing for these details to be in delegated legislation rather than primary legislation gives the Government the ability to respond quickly to emerging situations such as the COVID-19 pandemic.

A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Regulations are compatible with human rights. A copy of the Statement is at Attachment B.

The Office of Best Practice Regulation (the OBPR) has been consulted in relation to the amendments. No Regulation Impact Statement is required. The OBPR consultation references are:

- Schedule 1 – 43203;
- Schedule 2 – 42822;
- Schedule 3 – 43194;
- Schedule 4 – 43324;
- Schedule 5 – 42822 and 43324.

Consultation in relation to Schedule 3 was undertaken by the Department with the Department of the Treasury. In relation to Schedules 1, 2 and 3, and the amendments to the Distinguished Talent visas made by Schedule 5, these measures have been informed by feedback received from a number of stakeholders, including affected visa applicants and holders, who have raised concerns about the impacts of ongoing COVID-19 related travel restrictions on these cohorts.

In relation to Schedule 4, the Department has broadly consulted other Commonwealth agencies and industry on developing Global Talent visa policy to benefit Australia through the streamlined migration of highly skilled and exceptionally talented individuals. This also

supports Australia's post-COVID economic recovery, by attracting exceptional individuals that could make a significant contribution to the national economy by opening operations, investing in Australia and creating jobs for Australians.

These consultations accord with subsection 17(1) of the *Legislation Act 2003* (the Legislation Act).

The Regulations commence on 27 February 2021 to align with updates to Department systems.

Further details of the Regulations are set out in Attachment C.

The Migration Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the Legislation Act.

AUTHORISING PROVISIONS

Subsection 504(1) of the *Migration Act 1958* (the Migration Act) relevantly provides that the Governor-General may make regulations (the Regulations) prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Migration Act.

In addition, the following provisions of the Migration Act may also be relevant:

- subsection 29(1), which provides that the Minister may grant a non-citizen permission, to be known as a visa, to do either or both of the following: (a) travel to and enter Australia; (b) remain in Australia;
- subsection 29(2), which provides that, without limiting subsection 29(1), a visa to travel to, enter and remain in Australia may be one to:
 - (a) travel to and enter Australia during a prescribed or specified period; and
 - (b) if, and only if, the holder travels to and enters during that period, remain in Australia during a prescribed or specified period or indefinitely;
- subsection 30(2), which provides that a visa to remain in Australia (whether also a visa to travel to and enter Australia) may be a visa, to be known as a temporary visa, to remain during a specified period, or until a specified event happens, or while the holder has a specified status;
- subsection 31(1), which provides that the Regulations may prescribe classes of visas;
- subsection 31(3), which provides that the Regulations may prescribe criteria for a visa or visas of a specified class;
- subsection 31(4), which provides that the Regulations may prescribe whether visas of a class are visas to travel to and enter Australia, or to remain in Australia, or both;
- subsection 31(5), which provides that the Regulations may specify that a visa is a visa of a particular class;
- section 40, which provides that the Regulations may provide that visas or visas of a specified class may only be granted in specified circumstances;
- subsection 45B(1), which provides that the amount of visa application charge is the amount, not exceeding the visa application charge limit, prescribed in relation to the application (the visa application charge limit is determined under the *Migration (Visa Application) Charge Act 1997*);
- subsection 45B(2), which provides that the amount prescribed in relation to an application may be nil;

- paragraph 46(1)(b), which provides that the Regulations may prescribe the criteria and requirements for making a valid application for a visa;
- subsection 46(3), which provides that the Regulations may prescribe criteria that must be satisfied for an application for a visa of a specified class to be a valid application;
- subsection 46(4), which provides that, without limiting subsection 46(3), the Regulations may prescribe:
 - (a) the circumstances that must exist for an application for a visa of a specified class to be a valid application; and
 - (b) how an application for a visa of a specified class must be made; and
 - (c) where an application for a visa of a specified class must be made; and
 - (d) where an applicant must be when an application for a visa of a specified class is made;
- subsection 338(9), which provides that the Regulations may prescribe a decision to be a *Part 5-reviewable decision*;
- paragraph 347(2)(d), which provides that if a decision is prescribed for the purposes of subsection 338(9) as a *Part 5-reviewable decision*, the Regulations may prescribe the person who may apply for review; and
- subsection 504(2), which provides that section 14 of the Legislation Act does not prevent regulations whose operation depends on a country or other matter being specified by the Minister in an instrument made under the Regulations after the commencement of the Regulations.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Migration Amendment (2021 Measures No. 1) Regulations 2021

The *Migration Amendment (2021 Measures No. 1) Regulations 2021* (the Amendment Regulations) are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The Amendment Regulations amend the *Migration Regulations 1994* (the Migration Regulations) as follows.

Schedule 1 – Facilitating onshore grants of certain offshore visa applications

Overview

The amendments made by Schedule 1 to the Amendment Regulations implement measures to enable visa grants to some Family stream visa applicants **who are located in Australia, but who would be otherwise required to be outside Australia at the time of visa grant.** The visa subclasses are:

- Child (Permanent) (subclass 101) visa;
- Adoption (Permanent) (subclass 102) visa;
- Prospective Marriage (Temporary) (subclass 300) visa;
- Partner (Temporary) (subclass 309) visa; and
- Dependent Child (Temporary) (subclass 445) visa.

COVID-19 related travel restrictions and practical limitations have meant that applicants who applied for one of the above subclasses outside Australia, and have since travelled to Australia, face significant difficulties in departing Australia to be granted a visa outside Australia. They would also face difficulties returning to Australia.

These amendments address the negative impact of COVID-19 travel restrictions by providing the ability to grant a visa to applicants for the above mentioned visa subclasses who are in Australia. The amendments will enable an applicant for any of the above mentioned subclasses who is located in Australia at any time during the COVID-19 ‘concession period’, and who is in Australia at the time of visa grant, to be granted the visa in Australia, without having to travel outside Australia. The COVID-19 ‘concession period’ is described in subregulation 1.15N(1) of the Migration Regulations as the period commencing on 1 February 2020 and ending on a day specified by the Minister by legislative instrument. As at the date of commencement of these amendments, no instrument has been made to specify a day when the concession period ends.

These amendments will ensure that applicants who were in Australia at any time during the COVID-19 concession period are not disadvantaged by the impact of the COVID-19 pandemic in not being able to be granted a visa due to the difficulties of departing Australia.

These amendments also prescribe decisions to refuse applications for a relevant subclass of temporary visa as ‘Part 5-reviewable decisions’. For these visas (Prospective Marriage (Temporary) (subclass 300) visa, Partner (Temporary) (subclass 309) visa and Dependent Child (Temporary) (subclass 445) visa), allowing a visa grant to applicants in Australia would otherwise result in a refusal decision ceasing to be a Part 5-reviewable decision under section 338 of the *Migration Act 1958*. This amendment ensures that **the sponsors of refused applicants continue to have a right to seek merits review of a refusal decision.**

Human rights implications

The amendments made by Schedule 1 to the Amendment Regulations promote rights relating to family unity, in particular:

- Article 23 of the *International Covenant on Civil and Political Rights* (ICCPR); and
- Article 10(1) of the *Convention on the Rights of the Child* (CRC).

Article 23 of the ICCPR provides that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, and that the right of men and women of marriageable age to marry and to found a family shall be recognised.

Article 10(1) of the CRC provides that applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner.

Providing the ability to grant visas in Australia for affected applicants who had applied outside Australia for the Prospective Marriage (Temporary) (subclass 300) visa and Partner (Temporary) (subclass 309) visa, provides spouses, partners and prospective spouses of Australian citizens, permanent residents or eligible New Zealand citizens, and who would have difficulties leaving Australia due to the COVID-19 pandemic, with a pathway to permanent residency. In particular, this amendment means **the visa applicant will not have to depart Australia to be granted the visa and possibly remain separated from their spouse, partner or prospective spouse while trying to make travel arrangements to return to Australia during a time when making travel arrangements is difficult due to the COVID-19 pandemic.**

Similarly, providing the ability to grant visas in Australia for affected applicants who applied outside Australia for the Child (Permanent) (subclass 101) visa, Adoption (Permanent) (subclass 102) visa and Dependent Child (Temporary) (subclass 445) visa, will also allow sponsors and applicants, in particular children and their parents, to remain in Australia as a family unit during the visa process.

The amendments further ensure that merits review avenues remain available to the sponsor of the affected temporary visas (Prospective Marriage (Temporary) (subclass 300) visa, Partner (Temporary) (subclass 309) visa and Dependent Child (Temporary) (subclass 445) visa) if these visas are refused when the applicant is in Australia. For applicants not in Australia when the visa is refused, the sponsor will have the normal review right under s 338(5) of the *Migration Act*.

These changes assist in mitigating the negative impact of travel restrictions on five Family stream visa subclasses. They provide a positive benefit to both the visa applicant and their sponsor, by allowing the applicant to be granted a visa in Australia, if they are located in

Australia at the time of visa grant, during the COVID-19 concession period. This change supports the family unity of spouses, partners and prospective spouses and their Australian partners, and supports the family unity of children and their parents and/or sponsor.

Schedule 2 – Subclass 300 (Prospective Marriage) visas

Overview

The amendments in Schedule 2 to the Amendment Regulations enable the Minister to grant a Subclass 300 (Prospective Marriage) visa with a longer validity period than the current 9 months (but not longer than 15 months). This assists applicants who are impacted by COVID-19 related travel restrictions.

Currently, the Subclass 300 visa enables prospective spouses of Australian citizens, permanent residents or eligible New Zealand citizens to enter and stay in Australia for a period of nine months in order to marry their partner, prior to lodgement of a permanent Partner visa application. Due to COVID-19 related travel restrictions and practical difficulties of arranging travel during the COVID-19 pandemic, many Subclass 300 visa holders have been unable to travel to Australia within the validity period of their visa. This situation is expected to continue for some time and affect current and future applicants for this visa.

The amendments will enable a Subclass 300 visa granted on or after 27 February 2021 to have a validity period longer than 9 months, but not more than 15 months. The validity period of a Subclass 300 visa granted after the amendments come into effect would depend on the circumstances of the applicant. These amendments apply to applications made before, on or after 27 February 2021 so that that existing applicants are not disadvantaged.

Human rights implications

The amendments to Subclass 300 visas may positively engage the following right:

- Right to respect for the family.

Article 23 of ICCPR provides that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, and that the right of men and women of marriageable age to marry and to found a family shall be recognised.

Allowing for the flexibility to grant Prospective Marriage visas with a grant period of more than the current 9 months (but no longer than 15 months) provides prospective spouses of Australian citizens, permanent residents or eligible New Zealand citizens with additional time to enter Australia and marry their partner.

These changes assist in mitigating the negative impact of travel restrictions on Prospective Marriage visa applicants by allowing additional time to utilise their visa and travel to Australia. They provide a positive benefit to both the visa applicant who is outside Australia and their Australian partner in Australia, further supporting the reunification of prospective spouses with their Australian partners, and further supporting the right to respect for the family of those Australian partners.

Schedule 3 – Temporary Skill Shortage (Class GK) visas

Overview

Schedule 1 to the Migration Regulations sets out the specific ways in which a non-citizen can apply for a visa of a particular class. In particular, the application for a Subclass 482 (Temporary Skill Shortage) visa, must be accompanied by a visa application charge (VAC).

The amendments in Schedule 3 to the Amendment Regulations ensure a nil visa application charge (VAC) is payable by Subclass 482 (Temporary Skill Shortage) visa applicants who are in a class of persons specified in a legislative instrument. It is intended to specify persons who previously held a relevant temporary skilled work visa (a Subclass 482 visa or a Subclass 457 (Temporary Work (Skilled)) visa) and were unable to enter Australia as a result of travel restrictions due to the COVID-19 pandemic, and are seeking a Subclass 482 visa to enter Australia. This includes former Subclass 482 or Subclass 457 visa holders who departed Australia during the validity period of their visa and were subsequently unable to re-enter as a result of travel restrictions. This would allow affected former temporary skilled work (Subclass 482 and 457) visa holders to apply for a further visa with a nil VAC to mitigate any disadvantage caused by the COVID-19 pandemic.

Human rights implications

The amendments in Schedule 3 to the Amendment Regulations offer a benefit to persons outside Australia, including some who have previously worked in Australia, who have been disadvantaged by border closures, by reducing the financial burden of applying for a further visa in circumstances where they did not have the opportunity to take full advantage of a Subclass 482 or Subclass 457 visa which has now ceased.

This measure may also assist employers to re-engage the employment of overseas skilled workers.

As such, while this measure does not directly affect the human rights of persons in Australia, this measure may broadly promote the right to work in Article 6 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) for persons who previously held such a visa, were affected by COVID-19 restrictions and who wish to work in Australia in the future.

Schedule 4 – Distinguished Talent (Class BX) visas and Schedule 5 – Clause 9503 Transitional Provision–Subclass 124 (Distinguished Talent) visas and Subclass 858 (Distinguished Talent) visas

Overview

The Distinguished Talent program provides access to permanent residence in Australia for people who have an internationally recognised record of exceptional and outstanding achievement in a profession, sport, the arts, academia and research, are still prominent in the area and would be an asset to the Australian community. Since 2019, Distinguished Talent visas have been used for the new Global Talent Independent program designed to attract exceptionally skilled migrants in priority sectors to Australia. The Global Talent Independent

program has been implemented in response to increasing international competition for highly talented migrants.

The Subclass 858 visa is currently the primary mechanism for filling places allocated under the Global Talent Independent program as well as the Distinguished Talent component of the migration program.

The amendments to the Distinguished Talent visa are designed to streamline the process for granting the visa to applicants of exceptional talent seeking to relocate to Australia and who are likely to make an exceptional contribution to the Australian economy, and support the work of the Global Business and Talent Attraction Taskforce by:

- Changing the name of the Subclass 858 (Distinguished Talent) visa to the Subclass 858 (Global Talent) visa to reflect the visa's primary role;
- Creating a dedicated pathway to grant of a Subclass 858 (Global Talent) visa to applicants who are endorsed by the Prime Minister's Special Envoy for Global Business and Talent Attraction ('Special Envoy') as being likely to make a significant contribution to the Australian economy, by providing for a person who has been endorsed by the Special Envoy to make a valid application for the visa;
- Enabling the grant of Subclass 124 (Distinguished Talent) visas while the applicant is in Australia, to applicants who applied for the visa prior to 14 November 2020, when the subclass was repealed, and whose applications are still being decided. Previously the visa could be granted only while the applicant was outside of Australia; and
- Enabling the grant of a Subclass 858 (Distinguished Talent) visa while the applicant is outside Australia, to applicants who applied for the visa prior to 14 November 2020 and whose applications are still being decided. Prior to amendment on 14 November 2020, an applicant for a Subclass 858 visa was required to be in Australia when the visa was granted.

Human rights implications

The amendments to the Distinguished Talent (Class BX) visa positively engage the right to work.

Article 6(1) of the ICESCR states:

The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

These amendments broadly promote the right to work for persons eligible for the Subclass 124 and 858 visas, especially those who are already in Australia.

By offering a new pathway for persons endorsed by the Special Envoy and enabling visa grants of on hand applications without the more strict location requirements for grant, visa applicants will more efficiently attain opportunities to gain their living by work in Australia, through a manner of employment that they freely choose and accept. Amending the location requirements for visa grant will also benefit visa applicants who may have difficulties in making travel arrangements during the COVID-19 pandemic. This will in particular support the right to work of subclass 124 visa applicants who are already in Australia as they will not

have to leave Australia to have their visa granted and then try to make arrangements to return to commence or continue in their employment.

Schedule 5 – Application and Transitional Provisions

Overview

Schedule 5 to the Amendment Regulations makes technical amendments to set out how the changes made by Schedules 2 and 4 apply (see clauses 9501 and 9502). In addition, clause 9503 makes transitional amendments to provide for grants of Subclass 124 (Distinguished Talent) visas and Subclass 858 (Distinguished Talent) visas applied for before 14 November 2020.

Human rights implications

The amendments made by clause 9503 are related to the amendments made by Schedule 4 and are therefore discussed above. The amendments made by Schedule 5 are otherwise consequential to Schedules 2 and 4 and technical in nature. They do not raise any human rights issues.

Conclusion

The Amendment Regulations are compatible with human rights.

**The Hon. Alex Hawke MP,
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**

Details of the Migration Amendment (2021 Measures No. 1) Regulations 2021

Section 1 – Name

This section provides that the name of the instrument is the *Migration Amendment (2021 Measures No. 1) Regulations 2021* (the Regulations).

Section 2 – Commencement

This section provides for the commencement of the instrument.

Schedules 1 to 5 commence on 27 February 2021.

Section 3 – Authority

This section provides that the instrument is made under the *Migration Act 1958* (the Migration Act).

Section 4 – Schedules

This section provides for how the amendments in the Regulations operate.

Schedule 1 – Facilitating onshore grants of certain offshore visa applications

Migration Regulations 1994

Item [1] – At the end of subregulation 4.02(4)

This item adds a new paragraph 4.02(4)(s) in regulation 4.02 of the *Migration Regulations 1994* (the Migration Regulations). Regulation 4.02 prescribes decisions which are Part 5-reviewable decisions for the purposes of subsection 338(9) of the Migration Act. Regulation 4.02 also prescribes the person who can apply for merits review by the Administrative Appeals Tribunal of a Part 5-reviewable decision.

New paragraph 4.02(4)(s) prescribes as Part 5-reviewable decisions, decisions to refuse the grant of a Subclass 300 (Prospective Marriage) visa, a Subclass 309 (Partner (Provisional)) visa, or a Subclass 445 (Dependent Child) visa, if the visa was applied for before the end of the concession period described in subregulation 1.15N(1) by an applicant who was outside Australia when the application was made, was in Australia at any time during the concession period, and was in Australia on the day the decision to refuse to grant the visa was made.

The concession period described in subregulation 1.15N(1) is a period commencing on 1 February 2020 and ending on a day specified by the Minister by legislative instrument. As at the date of commencement of these amendments, no instrument has been made to specify a day when the concession period ends.

Under the usual regulations, Subclass 300 and 309 visas may be applied for and granted only while the applicant is outside Australia. Subclass 445 visas may be applied for while the

applicant is in or outside Australia but not in immigration clearance, but if the applicant is outside Australia when the application is made the applicant must also be outside Australia when the visa is granted. Applicants for one of these visas who come to Australia after making the application are normally required to leave Australia in order for the visa to be granted.

The amendments by items 4, 5, 6, 7 and 8 of this Schedule remove the requirement for certain applicants to be outside Australia when a visa of a relevant subclass is granted. See the notes on those items below for further details of these amendments.

These amendments respond to concerns that some applicants have come to Australia after making the application while overseas, but due to COVID-19 related travel restrictions have difficulty leaving Australia for the visa to be granted.

The effect of subparagraph 65(1)(a)(iii) of the Migration Act is that if an applicant cannot satisfy the requirements concerning the applicant's location when the visa is granted, the visa is to be refused. However, refusal of the grant of visas to these applicants is not the Government's preferred option.

The amendments allowing visas to be granted to relevant applicants while they are in Australia affect rights to seek merits review of the decision if the visa is subsequently refused while the applicant is in Australia, because the required location of the applicant when the visa is granted is one of the factors determining review rights under section 338 of the Migration Act.

A decision to refuse to grant a Subclass 300 or 309 visa, or a Subclass 445 visa, to an applicant who was outside Australia when the application was made, would normally be a Part 5-reviewable decision under subsection 338(5) of the Migration Act.

However, following the amendments made by items 6, 7 and 8 of this Schedule, in some circumstances these visas are no longer visas that cannot be granted while the applicant is in Australia. As a consequence, where the visa can be granted while the applicant is in Australia, a decision to refuse to grant a visa to the applicant is not a Part 5-reviewable decision under subsection 338(5) of the Migration Act. It is also not a Part-5 reviewable decision under any other provision of section 338. It is not the intention of these amendments to remove the rights of any applicant to merits review of a decision to refuse a visa, and therefore this item prescribes the relevant decisions as Part 5-reviewable decisions for the purposes of subsection 338(9) of the Migration Act.

Item [2] – Subregulation 4.02(5)

This item inserts the words “made by” after the words “the following” in subregulation 4.02(5) of the Migration Regulations. This is a stylistic amendment only and has no substantive effect.

Item [3] – At the end of subregulation 4.02(5)

This item adds a new paragraph 4.02(5)(r) in regulation 4.02 of the Migration Regulations. The purpose of new paragraph 4.02(5)(r) is to prescribe that the person who may apply for review of a Part 5-reviewable decision prescribed in new paragraph 4.02(4)(s) (see item 1,

above) is the sponsor. This is consistent with the review right that existed under subsection 338(5) of the Migration Act before the amendments allowing grant of the visa while the applicant is in Australia were made.

Item [4] – Clause 101.411 of Schedule 2

This item repeals clause 101.411 of Schedule 2 to the Migration Regulations and substitutes a new clause 101.411.

Previous clause 101.411 required that an applicant for a Subclass 101 (Child) visa must be outside Australia when the visa is granted. New clause 101.411 provides that the applicant must be outside Australia when the visa is granted, unless:

- the visa is granted after 26 February 2021 (that is, after the commencement of these amendments);
- the application for the visa was made before the end of the concession period described in subregulation 1.15N(1); and
- the applicant for the visa was in Australia at any time during the concession period, and is in Australia, but not in immigration clearance, when the visa is granted.

The effect of new clause 101.411 is that if an applicant for the visa has come, or comes, to Australia during the concession period and is in Australia when it is decided to grant the visa, the visa may be granted while the applicant is in Australia provided the application for the visa was made before the end of the concession period. This provision recognises that an applicant who enters Australia during the concession period is likely to be impacted by COVID-19 related travel restrictions which present difficulties to the applicant in going overseas for grant of the visa. This provision applies only to applicants who are in Australia at the time of the decision to grant the visa.

For details of the concession period described in subregulation 1.15N(1), please see the notes on item 1, above.

Item [5] – Clause 102.411 of Schedule 2

This item repeals clause 102.411 of Schedule 2 to the Migration Regulations and substitutes a new clause 102.411.

Previous clause 102.411 required that an applicant for a Subclass 102 (Adoption) visa must be outside Australia when the visa is granted. New clause 102.411 provides that the applicant must be outside Australia when the visa is granted, unless:

- the visa is granted after 26 February 2021 (that is, after the commencement of these amendments);
- the application for the visa was made before the end of the concession period described in subregulation 1.15N(1); and
- the applicant for the visa was in Australia at any time during the concession period, and is in Australia, but not in immigration clearance, when the visa is granted.

The effect of new clause 102.411 is that if an applicant for the visa has come, or comes, to Australia during the concession period and is in Australia when it is decided to grant the visa, the visa may be granted while the applicant is in Australia provided the application for the

visa was made before the end of the concession period. This provision would recognise that an applicant who enters Australia during the concession period is likely to be impacted by COVID-19 related travel restrictions which present difficulties to the applicant in going overseas for grant of the visa. This provision applies only to applicants who are in Australia at the time of the decision to grant the visa.

For details of the concession period described in subregulation 1.15N(1), please see the notes on item 1, above.

Item [6] – Clause 300.412 of Schedule 2

This item repeals clause 300.412 of Schedule 2 to the Migration Regulations and substitutes a new clause 300.412.

Previous clause 300.412 required that an applicant for a Subclass 300 (Prospective Marriage) visa must be outside Australia when the visa is granted. New clause 300.412 provides that the applicant must be outside Australia when the visa is granted, unless:

- the visa is granted after 26 February 2021 (that is, after the commencement of these amendments);
- the application for the visa was made before the end of the concession period described in subregulation 1.15N(1); and
- the applicant for the visa was in Australia at any time during the concession period, and is in Australia, but not in immigration clearance, when the visa is granted.

The effect of new clause 300.412 is that if an applicant for the visa has come, or comes, to Australia during the concession period and is in Australia when it is decided to grant the visa, the visa may be granted while the applicant is in Australia provided the application for the visa was made before the end of the concession period. This provision recognises that an applicant who enters Australia during the concession period is likely to be impacted by COVID-19 related travel restrictions which present difficulties to the applicant in going overseas for grant of the visa. This provision applies only to applicants who are in Australia at the time of the decision to grant the visa.

For details of the concession period described in subregulation 1.15N(1), please see the notes on item 1, above.

Item [7] – Clause 309.412 of Schedule 2

This item repeals clause 309.412 of Schedule 2 to the Migration Regulations and substitutes a new clause 309.412.

Previous clause 309.412 required that an applicant for a Subclass 309 (Partner (Provisional)) visa must be outside Australia when the visa is granted. New clause 309.412 provides that the applicant must be outside Australia when the visa is granted, unless:

- the visa is granted after 26 February 2021 (that is, after the commencement of these amendments);
- the application for the visa was made before the end of the concession period described in subregulation 1.15N(1); and

- the applicant for the visa was in Australia at any time during the concession period, and is in Australia, but not in immigration clearance, when the visa is granted.

The effect of new clause 309.412 is that if an applicant for the visa has come, or comes, to Australia during the concession period and is in Australia when it is decided to grant the visa, the visa may be granted while the applicant is in Australia provided the application for the visa was made before the end of the concession period. This provision would recognise that an applicant who enters Australia during the concession period is likely to be impacted by COVID-19 related travel restrictions which present difficulties to the applicant in going overseas for grant of the visa. This provision applies only to applicants who are in Australia at the time of the decision to grant the visa.

For details of the concession period described in subregulation 1.15N(1), please see the notes on item 1, above.

Item [8] – Clause 445.411 of Schedule 2

This item repeals clause 445.411 of Schedule 2 to the Migration Regulations and substitutes a new clause 445.411.

Previous clause 445.411 required that an applicant for a Subclass 445 (Dependent Child) visa who was outside Australia at the time the application was made must be outside Australia when the visa is granted. New clause 445.411 provides that an applicant who was outside Australia when the application was made, must be outside Australia when the visa is granted, unless:

- the visa is granted after 26 February 2021 (that is, after the commencement of these amendments);
- the application for the visa was made before the end of the concession period described in subregulation 1.15N(1); and
- the applicant for the visa was in Australia at any time during the concession period, and is in Australia, but not in immigration clearance, when the visa is granted.

The effect of new clause 445.411 is that if an applicant for the visa has come, or comes, to Australia during the concession period and is in Australia when it is decided to grant the visa, the visa may be granted while the applicant is in Australia provided the application for the visa was made before the end of the concession period. This provision recognises that an applicant who enters Australia during the concession period is likely to be impacted by COVID-19 related travel restrictions which present difficulties to the applicant in going overseas for grant of the visa. This provision applies only to applicants who are in Australia at the time of the decision to grant the visa.

For details of the concession period described in subregulation 1.15N(1), please see the notes on item 1, above.

Schedule 2 – Subclass 300 (Prospective Marriage) visas

Migration Regulations 1994

Item [1] – Clause 300.511 of Schedule 2

This item repeals clause 300.511, which provided that a Subclass 300 (Prospective Marriage) visa is valid for 9 months from date of grant, and replaces it with a new clause 300.511 that allows the Minister to specify the date on which the visa ceases. This date must be a date which is at least 9 months after the date of grant and no more than 15 months after the date of grant.

The amendment enables the Minister, or a delegate of the Minister, to grant a Subclass 300 (Prospective Marriage) visa for up to 15 months. The amendment provides flexibility to grant a visa with a longer validity period than the previous 9 months, in order to assist applicants who have been impacted by COVID-19 related travel restrictions or other similar circumstances outside their control. The validity period of a Subclass 300 visa granted after the amendment commences would depend on the circumstances of the applicant.

Schedule 3 – Temporary Skill Shortage (Class GK) visas

Migration Regulations 1994

Item [1] – Subparagraphs 1240(2)(a)(i) and (ii) of Schedule 1

This item inserts “subject to subparagraph (iii)” before “for” at subparagraph 1240(2)(a)(i) and subparagraph 1240(2)(a)(ii).

The amendment ensures that these subparagraphs, which set out the relevant visa application charges (VACs), are subject to new subparagraph 1240(2)(a)(iii), which is inserted by item 2 and which provides that there is a nil VAC for an applicant in a class of persons specified by the Minister in a legislative instrument. This ensures that all applicants in a class of persons specified in the legislative instrument are eligible for the nil VAC. This amendment is consequential to the amendment at item 2.

Item [2] – At the end of paragraph 1240(2)(a) of Schedule 1

This item inserts a new subparagraph (iii) at the end of paragraph 1240(2)(a) providing, “for an applicant in a class of persons specified in a legislative instrument made for the purposes of this subparagraph under subregulation 2.07(5), the amount is nil”.

It is intended to specify persons who: previously held a relevant temporary skilled work visa (a Subclass 482 (Temporary Skill Shortage) visa or a Subclass 457 (Temporary Work (Skilled)) visa); were unable to enter Australia as a result of travel restrictions due to the COVID-19 pandemic; and are seeking a Subclass 482 visa to enter Australia. This allows affected former temporary skilled work (Subclass 482 and 457) visa holders to apply for a further visa with a nil VAC to mitigate any disadvantage caused by the COVID-19 pandemic.

Schedule 4 – Distinguished Talent (Class BX) visas

Migration Regulations 1994

Part 1 – Names

Division 1 – Main amendments

Item [1] – Subregulation 1.12(7) (heading); Item [2] – Subregulation 1.12(7); Item [3] – Subregulation 2.06AAB(1) (table item 30); and Item [4] – Paragraph 5.35AB(1)(m)

These items omit the word “Distinguished” in references to Distinguished Talent (Class BX) and Subclass 858 (Distinguished Talent) in various provisions of the Migration Regulations, and substitute the word “Global”. These amendments are consequential to the amendments made by items 5-10 below, which change the name of Distinguished Talent (Class BX) to Global Talent (Class BX), and the name of Subclass 858 (Distinguished Talent) to Subclass 858 (Global Talent).

Item [5] – Item 1113 of Schedule 1 (heading); Item [6] – Paragraph 1113(3)(c) of Schedule 1; and Item [7] – Subitem 1113(4) of Schedule 1; Item [8] – Part 858 of Schedule 2 (heading); Item [9] – Division 858.3 of Schedule 2 (note 2 to the heading); and Item [10] – Paragraph 858.311(a) of Schedule 2

These items amend item 1113 of Schedule 1, and Part 858 of Schedule 2, to the Migration Regulations to change the name of Distinguished Talent (Class BX) and Subclass 858 (Distinguished Talent) to Global Talent (Class BX) and Subclass 858 (Global Talent). This change in name recognises the role of the Subclass 858 permanent visa in delivering the Global Business and Talent Attraction component of the migration program which aims to attract high value businesses and exceptionally talented people to Australia to help create more Australian jobs.

Part 2 of this Schedule makes further amendments to the Migration Regulations to implement the Global Business and Talent Attraction program. For further details, please see the notes on Part 2, below.

Division 2 – Amendments relating to Subclass 773 (Border) visas

Migration Regulations 1994

Item [11] – Paragraph 773.213(2)(zy) of Schedule 2

This item amends paragraph 773.213(2)(zy) in Subclass 773 (Border) of Schedule 2 to the Migration Regulations, to change a reference from Distinguished Talent (Class BX) to Global Talent (Class BX). This change is consequential to the change in the name of the visa made by the amendments in Part 1 of this Schedule. See the notes on Division 1 of Part 1, above, for further details.

Part 2 – Endorsement by Prime Minister’s Special Envoy for Global Business and Talent Attraction

Division 1 – Prime Minister’s Special Envoy for Global Business and Talent Attraction

Migration Regulations 1994

Item [12] – Regulation 1.03

This item inserts a new definition in regulation 1.03 (Interpretation) of the Migration Regulations. The new defined term is *Prime Minister’s Special Envoy for Global Business and Talent Attraction*, which is defined to mean the SES employee, or acting SES employee, who occupies, or is acting in, the position of Prime Minister’s Special Envoy for Global Business and Talent Attraction (the Prime Minister’s Special Envoy).

The position of Prime Minister’s Special Envoy has been created by the Government to head the Global Business and Talent Attraction Taskforce (the Taskforce). The Taskforce is a whole-of-Government body which brings together experts from across the Commonwealth and the States and Territories as well as the private sector. It is based in the Department of Home Affairs and the Australian Trade and Investment Commission (Austrade), and draws on expertise from the Department of the Treasury, the Department of Foreign Affairs and Trade, the Department of Industry, Science and Resources, the Department of Defence, and the Department of Education, Skills and Employment. The role of the Taskforce is to boost Australia’s efforts to identify and attract high value business and exceptional talents to Australia to contribute to the development of the Australian economy.

Peter Verwer AO was appointed as the first Prime Minister’s Special Envoy in August 2020 and continues in this role at the time the Regulations commence.

The term *Prime Minister’s Special Envoy for Global Business and Talent Attraction* is used in new provisions added to Schedules 1 and 2 to the Migration Regulations by Division 2 of Part 2 of this Schedule. For further details, see the notes on Division 2, below.

Division 2 – Endorsement

Migration Regulations 1994

Item [13] – Paragraph 1113(3)(d) of Schedule 1

This item inserts the words “of Schedule 2” after a reference to subclause 858.212(2) in subitem 1113(3) of Schedule 1 to the Migration Regulations. The amendment is stylistic and has no substantive effect.

Item [14] – Paragraph 1113(3)(e) of Schedule 1

This item inserts the words “of Schedule 2” after a reference to subclause 858.212(4) in subitem 1113(3) of Schedule 1 to the Migration Regulations. The amendment is stylistic and has no substantive effect.

Item [15] – At the end of subitem 1113(3) of Schedule 1

This item adds a new paragraph 1113(3)(f) in subitem 1113(3) of Schedule 1 to the Migration Regulations. Item 1113 of Schedule 1 provides for the requirements for making a valid application for a Subclass 858 (Global Talent) visa (previously the Subclass 858 (Distinguished Talent) visa).

New paragraph 1113(3)(f) requires that an applicant seeking to satisfy the requirements of subclause 858.229(2) of Schedule 2 to the Migration Regulations must have been endorsed by the Prime Minister’s Special Envoy as being likely to make a significant contribution to the Australian economy if granted a Subclass 858 (Global Talent) visa. New subclause 858.229(2) is inserted in Schedule 2 to the Migration Regulations by item 17 of this Schedule, below.

An endorsement of an applicant could be given by the Prime Minister’s Special Envoy, for example, to an applicant whom he or she identifies as representing exceptional talent or having a high value business which has the potential to create jobs and who is therefore likely to make a significant contribution to the Australian economy. An applicant who is endorsed would then be able to make a valid application for a Subclass 858 visa for consideration under new subclause 858.229(2).

Item [16] – Subclause 858.212(1) of Schedule 2

This item amends subclause 858.212(1) in Schedule 2 to the Migration Regulations, to provide that at the time of application an applicant for a Subclass 858 visa must satisfy subclause 858.212(2) or (4), unless the applicant is endorsed by the Prime Minister’s Special Envoy in accordance with new paragraph 1113(3)(f) of Schedule 1 to the Migration Regulations (see item 15 of this Schedule, above).

Subclauses 858.212(2) and (4) refer, respectively, to applicants who produced a completed Form 1000 at the time of application or who were the subject of advice at the time of application that they had provided specialised assistance to the Australian Government in matters of security. These provisions have been retained. The effect of the amendment is that an applicant who is endorsed in accordance with new paragraph 1113(3)(f) at the time of application only has to meet the requirements of subclause 858.229(2) and other requirements of Subdivision 858.22 at the time of decision.

Item [17] – At the end of Subdivision 858.22 of Schedule 2

This item inserts a new clause 858.229 in Subdivision 858.22 of Subclass 858 in Schedule 2 to the Migration Regulations. The purpose of the new clause is to prescribe requirements to be satisfied at the time of decision on an application by an applicant who at the time of application was endorsed by the Prime Minister's Special Envoy in accordance with new paragraph 1113(3)(f) of Schedule 1 to the Migration Regulations (which is inserted by item 15 of this Schedule, above).

New subclause 858.229(1) provides that the clause applies to an applicant who, at the time of application, has been endorsed by the Prime Minister's Special Envoy as being likely to make a significant contribution to the Australian economy if granted a Subclass 858 visa. The effect of the subclause is that the requirements of subclause 858.229(2) only apply to an applicant who was endorsed by the Prime Minister's Special Envoy at the time of application, and not to other applicants. However, applicants who were endorsed by the Prime Minister's Special Envoy at the time of application *must* satisfy 858.229(2) in order to be granted the visa.

New subclause 858.229(2) provides that the Minister must be satisfied that the applicant is likely to make a significant contribution to the Australian economy if the visa is granted.

New subclause 858.229(3) provides that for the purposes of assessing the requirement in subclause 858.229(2) above, the Minister (which includes a delegate of the Minister) must not have regard to the fact that the applicant was endorsed by the Prime Minister's Special Envoy as being likely to make a significant contribution to the Australian economy if granted a visa. The effect of this provision is that in considering a valid application by an endorsed applicant, the Minister or the Minister's delegate must make a fresh assessment of the applicant's claims, qualifications and other relevant matters and not rely on the fact that the applicant was endorsed by the Prime Minister's Special Envoy for the purpose of making a valid application.

Schedule 5 – Application and transitional provisions

Migration Regulations 1994

Item [1] – In the appropriate position in Schedule 13

This item inserts a new Part 95 – Amendments made by the Migration Amendment (2021 Measures No. 1) Regulations 2021 – in Schedule 13 (Transitional Arrangements) to the Migration Regulations to provide how the amendments made by the Regulations apply, and also to set out certain transitional provisions.

Part 95 has three clauses, as set out below.

9501 Operation of Schedule 2 (Subclass 300 (Prospective Marriage) visas)

Clause 9501 sets out the application provisions in relation to the amendments made by Schedule 2 to the Regulations. In particular, the amendments made by Schedule 2 to the Regulations apply in relation to a Subclass 300 (Prospective Marriage) visa granted on or

after 27 February 2021, whether the application for the visa was made before, on or after 27 February 2021.

This beneficial approach ensures the amendment applies to visas granted after the amendments commence, regardless of when the application was made, so that existing applicants impacted by COVID-19 related travel restrictions are not disadvantaged.

9502 Operation of Schedule 4 (Distinguished Talent (Class BX) visas)

Subclause 9502(1) provides that the amendments made by Division 1 of Part 1, and Division 2 of Part 2, of Schedule 4 to these Regulations, relating to applicants for a Subclass 858 visa who are endorsed by the Prime Minister's Special Envoy, apply to applications made on and after 27 February 2021.

Subclause 9502(2) provides that, to avoid doubt, the reference in new paragraph 773.213(2)(zy) of Schedule 2 to the Migration Regulations to a Global Talent (Class BX) visa is taken to include a reference to a Distinguished Talent (Class BX) visa granted on the basis of an application made before 27 February 2021. This provision relates to the amendment made by item 11 of Schedule 4 to these Regulations which changes the reference in paragraph 773.213(2)(zy) from Distinguished Talent (Class BX) to Global Talent (Class BX) consequential to the change of the name of the visa by Division 1 of Part 1 of Schedule 4 to these Regulations. The purpose of subclause 9502(2) is to clarify that a dependent child of the holder of a Class BX visa may be eligible for the grant of a Subclass 773 (Border) visa irrespective of the name of the Class BX visa held by the parent.

9503 Transitional provision – Subclass 124 (Distinguished Talent) and Subclass 858 (Distinguished Talent) visas

The purpose of clause 9503 is to change the circumstances applicable to the grant of a Subclass 124 (Distinguished Talent) visa, and a Subclass 858 (Distinguished Talent) visa, that was applied for before 14 November 2020. Amendments made by Schedule 2 to the *Home Affairs Legislation Amendment (2020 Measures No. 2) Regulations 2020*, which commenced on 14 November 2020 included:

- the repeal of the Subclass 124 (Distinguished Talent) visa, which could only be granted to an applicant who was outside Australia; and
- amendments to clause 858.411 of Subclass 858 (Distinguished Talent) which prior to 14 November 2020 provided that an applicant must be in Australia, but not in immigration clearance, when the visa is granted; from 14 November 2020 the applicant may be in Australia or outside Australia when the visa is granted, but not in immigration clearance.

These amendments did not apply to an application for a Subclass 124 visa or a Subclass 858 visa that was made before 14 November 2020 and was not finally determined before that date. The effect is that if a Subclass 124 visa that was applied for before 14 November 2020 is granted on or after that date, the applicant must be outside Australia when the visa is granted, and where a Subclass 858 visa that was applied for before 14 November 2020 is granted on or after that date, the applicant must be in Australia but not in immigration clearance when the visa is granted.

Concerns have been raised in regard to certain applicants for a Subclass 124 visa who have come to Australia pending finalisation of the visa application but are unable to leave because of travel restrictions put in place due to the COVID-19 virus. These applicants are now unable to travel overseas to meet the requirements for grant of the visa. Similarly, certain applicants for a Subclass 858 visa who applied prior to 14 November 2020 have subsequently gone overseas and are unable to return to Australia for the visa to be granted.

The effect of subparagraph 65(1)(a)(iii) of the Migration Act is that if an applicant cannot satisfy the requirements concerning the applicant's location when the visa is granted, the visa is to be refused. However, refusal of the grant of visas to these applicants is not the Government's preferred option.

Clause 9503 enables visas to be granted to applicants for Subclass 124 and Subclass 858 visas in this situation by providing that from the commencement of these Regulations on 27 February 2021 the provisions that prevented the grant of the visa because of the location of the visa applicant no longer apply.

Subclause 9503(1) provides that Division 124.4 of Schedule 2 to the Migration Regulations as in force immediately before 14 November 2020, which prevented the grant of a Subclass 124 visa to an applicant who was in Australia, does not apply in respect of an application that was made before 14 November 2020 and was not finally determined before 27 February 2020 provided the applicant is not in immigration clearance when the visa is granted. The effect of the subclause is that the applicant may be in or outside Australia, but not in immigration clearance, when the visa is granted.

Subclause 9503(2) provides that Division 858.4 of Schedule 2 to the Migration Regulations as in force immediately before 14 November 2020, which prevented the grant of a Subclass 858 visa to an applicant who was outside Australia, does not apply in respect of an application that was made before 14 November 2020 and was not finally determined before 27 February 2020, provided the applicant is not in immigration clearance when the visa is granted. The effect of the subclause is that the applicant may be in or outside Australia, but not in immigration clearance, when the visa is granted.

These provisions are entirely beneficial to the applicants concerned, as they permit the grant of visas that would otherwise have to be refused.