

Migration (1993) Regulations (Amendment) 1994 No. 87

EXPLANATORY STATEMENT

STATUTORY RULES 1994 No. 87

Issued by the Authority of the Minister for Immigration and Ethnic Affairs

Subject - Migration Act 1958

Migration (1993) Regulations (Amendment)

Section 181 of the Migration Act 1958 (the Act) provides that the Governor-General may make regulations, not inconsistent with the Act, to prescribe all matters which are required or permitted by the Act to be prescribed, or which are necessary or convenient to be prescribed, for carrying out or giving effect to the Act. Without limiting the generality of section 181, section 23 of the Act enables regulations to be made providing for different classes of visas and section 33 of the Act enables regulations to be made providing for different classes of entry permits.

In addition, particular provision is made for the making of regulations in relation to the following matters:

- subsection 23(1) of the Act provides that, without limiting the generality of section 181, the regulations may provide for the granting or refusal of visas, including the granting of visas subject to conditions or to a limitation as to time. There is also provision for the regulations to provide for the recording and evidencing of visas, the effect and operation of visas, and the cancellation of visas;
- subsection 23(2) of the Act provides that, the regulations may provide for different classes of visas. The regulations may also provide that a person is entitled to be granted a visa of a particular class if the person satisfies all the criteria prescribed in relation to that class;
- subsection 33(1) of the Act provides that, without limiting the generality of section 181, the regulations may provide for the granting and refusal of entry permits, including the granting of entry permits subject to conditions or to a limitation as to time. There is also provision for the regulations to provide for the recording and evidencing of entry permits, the effect and operation of entry permits, and the cancellation of entry permits;
- subsection 33(2) of the Act provides that the regulations may provide for different classes of entry permits. The regulations may also provide that a person is entitled to be granted an entry permit of a particular class if the person satisfies all the criteria prescribed in relation to that class; and
- paragraph 181(1)(a) of the Act provides that the regulations may provide for the charging and recovery of fees in respect of any matter under the Act or the Regulations.

The purpose of the regulations is:

- to provide that an application for a Class 815, Class 816 or Class 818 entry permit by a person who is a member of the family unit of another applicant must be lodged at the same time as that other applicant's application except where the application is by a dependent child born after the application of the primary person is lodged;
- to provide that a member of the family unit of an applicant for a Class 815, Class 816 or Class 818 entry permit cannot be granted a Class 815, Class 816 or Class 818 entry permit unless the other applicant's application is successful;
- to provide that for a person applying as a member of the family unit of another applicant for a Class 815, Class 816 or Class 818 entry permit to be granted the entry permit, the member of the family unit must be a member of the family unit at the time of decision as well as at the time of application;
- to clarify the matters that will be regarded as evidence that an applicant for a Class 816 entry permit has English language ability of the required standard;
- to provide that an applicant for a Class 815, 816 817, or 818 entry permit may be granted a Class 830 entry permit if an entry permit which he or she previously held has been cancelled or terminated, or if the application for the Class 815, 816 817, or 818 entry permit has been refused but has been successful on review and is taken to have had a prescribed change of circumstances;
- to create a Class 830 visa to provide for return travel to Australia for holders of a Class 830 entry permit who are also applicants for a Class 817 entry permit and were lawfully in Australia when they applied for the Class 817 entry permit. A Class 830 visa can not be granted outside Australia.
- to make a number of corrections, minor clarifying and technical amendments. The purpose of these amendments is to ensure that the Migration (1993) Regulations accurately implement and clearly reflect the intended policy and they have no effect on the substantive operation of the Regulations.

The Regulations commence on gazettal except the following which are taken to have commenced retrospectively on 1 March 1994:

- subregulations 6.4, 6.14 and 6.26 which provide for an application for a Class 815, 816 or 818 entry permit by a child who is born after lodgement of the principal person's application, to be lodged after the application by the principal person; and
- subregulation 9.9 which provides for the grant of a Class 830 entry permit to an applicant for a Class 815, 816, 817 or 818 entry permit if an entry permit which the applicant previously held has been cancelled or terminated.

These amendments implement the intended policy. They are therefore made to operate retrospectively to 1 March 1994, the date of commencement of Classes 815, 816, 817, 818 and 830.

Retrospective operation of these amendments is entirely beneficial to the applicants concerned and is not prejudicial to any person. It does not, therefore, contravene subsection 48(2) of the *Acts Interpretation Act 1901*.

Details of the Regulations are set out in the Attachment.

ATTACHMENT

Regulation 1 - Commencement

Subregulation 1.1 provides for subregulations 6.4, 6.14, 6.26, and 9.9 to be taken to have commenced retrospectively on 1 March 1994. Retrospective operation of these amendments is entirely beneficial to the applicants concerned and is not prejudicial to any person. It does not, therefore, contravene subsection 48(2) of the *Acts Interpretation Act 1901*.

The remainder of the Regulations commence on gazettal.

Regulation 2 - Amendment

This regulation provides for the Migration (1993) Regulations to be amended as set out in these Regulations.

Regulation 3 - Regulation 2.10 (Prescribed change in circumstances (paragraphs 36(1)(a) and 37(2)(a) of the Act))

This regulation amends paragraph 2.10(ma) by inserting a reference to the new subclause 830.711(2) inserted by these Regulations (see subregulation 9.7). The amendment facilitates the grant of the class 830 entry permit in certain circumstances. An applicant for a Class 815, 816, 817 or 818 entry permit whose application has been refused but who is successful on review is taken to have had a prescribed change of circumstances. This enables the grant of a class 830 entry permit which in turn allows for the grant of the permanent entry permit.

Regulation 4 - Regulation 2.15 (Special provision for grant outside Australia of certain visas to former holders of corresponding temporary entry permits)

This regulation inserts a new subparagraph 2.15(2)(b)(v). The effect of the new subparagraph is to prevent the grant of the new Class 830 visa, created by these Regulations (see subregulation 9.3), to applicants outside Australia. This reflects the policy intention that a class 830 visa is to be available only to eligible applicants in Australia.

Regulation 5 - Schedule 1 (Classification of visas and entry permits)

This regulation amends item 2801B - Class 830 (1 November 1993 (processing)) - of Schedule 1 by omitting the words "Entry permit only". This amendment is consequential on the creation of the Class 830 visa by these Regulations (see subregulation 9.3).

Regulation 6 - Schedule 2. Chapter 1.2 (Permanent resident (after entry) entry permits)

Part 815 - Class 815 (PRC (permanent)) entry permit

Subregulation 6.1 amends clause 815.131 by omitting the definition "principal applicant" and replacing it with a definition of "principal person". The amendment has no substantive effect other than a change in terminology. The change in terminology is necessary to reflect the fact that a member of the family unit cannot be granted an entry permit until the principal has been granted the entry permit (refer subregulation 6.9 of these Regulations). At that time the principal is not an applicant.

Subregulations 6.2 and 6.3 amend subclause 815.711(2). The effect of the amendments are that, except in the case of dependent children born after an application is lodged, an application by a person who is applying as a member of the family unit of another applicant must be lodged at the same time as that other applicant's application. A member of an applicant's family unit cannot apply separately after the applicant's application has been made. Subclause 815.711(3), as amended by subregulation 6.4 of these Regulations, sets out the position for dependent children born after the application is lodged.

Subregulation 6.4 amends subclause 815.711(3) to make it clear that a dependent child born after his or her parent's application is made may apply at any time until a decision is made on the parent's application notwithstanding the operation of clause 815.512. Clause 815.512 puts a time limit of 30 June 1994 on the making of applications. Subregulation 6.4 operates retrospectively to 1 March 1994, the date of commencement of Part 815. Retrospective operation of this amendment is entirely beneficial to the applicants concerned and is not prejudicial to any person. It does not, therefore, contravene subsection 48(2) of the *Acts Interpretation Act 1901*.

Subregulation 6.5 omits subclause 815.721(4) and substitutes a new subclause. The new subclause makes it a criterion to be satisfied at the time of application by the family unit member of another applicant that he or she is a member of the family unit of an applicant for a Class 815 entry permit who is able to satisfy certain requirements. In addition the family unit member must have been included in the application of the other applicant.

Subregulations 6.6, 6.7 and 6.8 amend clauses 815.722 and 815.723 and subclause 815.732(1), by changing the references to a principal applicant to references to a principal person. These amendments are consequential to the amendment made by subregulation 6.1 of these Regulations.

Subregulation 6.9 omits subclause 815.732(2) and substitutes a new subclause. The new subclause makes it a criteria to be satisfied at the time of decision by a member of the family unit of another applicant that the applicant continues to be a member of the family unit of that other applicant and that the other applicant's application is successful. The new subclause also continues the existing requirement that the family unit member must satisfy certain public interest criteria.

Subregulation 6.10 inserts a new paragraph 815.821(aa). The purpose of the new paragraph is to make it clear that there is no fee for an application by a dependent child who is born after the parent's application is lodged where the dependent child is added to the parent's application before the parent's application has been decided.

Part 816 - Class 816 (Special (permanent)) entry permit

Subregulations 6.11 to 6.13 amend Part 816 with the same effect in respect of Part 816 as the amendments made by subregulations 6.1 to 6.3, respectively, have in respect of Part 815.

Subregulation 6.14 amends Part 816 with the same effect in respect to Part 816 as the amendment made by subregulation 6.4 has in respect of Part 815. This subregulation is taken to commence on 1 March 1994, the date of commencement of Part 816. Retrospective operation of this amendment is entirely beneficial to the applicants concerned and is not prejudicial to any person. It does not, therefore, contravene subsection 48(2) of the Acts *Interpretation Act 1901*.

Subregulations 6.15 to 6.17 amend Part 816 with the same effect in respect of Part 816 as the amendments made by subregulations 6.5 to 6.7, respectively, have in respect of Part 815.

Subregulation 6.18 amends subclause 816.732(1) by changing the reference to a principal applicant to a reference to a principal person. This amendment is necessary to reflect the fact that a member of the family unit cannot be granted an entry permit unless the principal has first been granted the entry permit. At that time the principal is no longer an applicant.

Subregulation 6.19 omits paragraph 816.732(2)(a) and substitutes a new paragraph. Subclause 816.732(2) sets out the matters that will be regarded as evidence that an applicant has English language ability of the required standard. The new paragraph provides that one of the matters regarded as evidence is that the applicant has successfully met the academic progress requirements in an accredited course of at least 1 year of full time or equivalent part time study leading to a post secondary qualification where the primary language of instruction was English. The new paragraph differs from the existing requirement in that it clarifies the requirement that the applicant must 'successfully complete' the study and it requires the course of study to be an accredited course.

Subregulations 6.20 and 6.21 amend subclauses 816.734(1) and (2), respectively. The amendments made by these subregulations have the same effect in respect of Part 816 as the amendments made by subregulations 6.8 and 6.9, respectively, have in respect of Part 815.

Subregulation 6.22 inserts new paragraph 816.821(aa). This amendment has the same effect in respect of Part 816 as the amendments made by subregulation 6.10 has in respect of Part 815.

Part 818 - Class 818 (Highly qualified on-shore (permanent)) entry permit

Subregulations 6.23 to 6.25 amend Part 818. The amendments made by these subregulations have the same effect in respect of Part 818 as the amendments made by subregulations 6.1 to 6.3, respectively, have in respect of Part 815.

Subregulation 6.26 amends Part 818 with the same effect in respect of Part 818 as the amendment made by subregulation 6.4 in respect of Part 815. This amendment is taken to have commenced on 1 March 1994, the date of commencement of Part 818. Retrospective operation of this amendment is entirely beneficial to the applicants concerned and is not prejudicial to any person. It does not, therefore, contravene subsection 48(2) of the *Acts Interpretation Act 1901*.

Subregulation 6.27 amends Part 818 with the same effect in respect of Part 818 as the amendment made by subregulation 6.5 in respect of Part 815.

Subregulations 6.28 and 6.29 amend clause 818.722 and subclause 818.723(1), respectively, by omitting the reference to 'principal applicant' and substituting 'principal person'. These amendments are necessary to reflect the fact that a member of the family unit cannot be granted an entry permit unless the principal has first been granted the entry permit. At that time the principal is no longer an applicant.

Subregulation 6.30 amends clause 818.724. The amendment made by this subregulation has the same effect in respect of Part 818 as the amendment made by subregulation 6.6 has in respect of Part 815.

Subregulation 6.31 amends clause 818.725 by omitting the reference to principal applicant and substituting principal person. The amendment has no substantive effect other than a change in terminology.

Subregulations 6.32 and 6.33 amend subclauses 818.732(1) and (2). The amendments made by these subregulations have the same effect in respect of Part 818 as the amendments made by subregulations 6.8 and 6.9, respectively, have in respect of Part 815.

Subregulation 6.34 inserts new paragraph 818.82 1 (aa). This amendment has the same effect in respect of Part 818 as the amendment made by subregulation 6.10 has in respect of Part 815.

Regulation 7 - Schedule 2, Chapter 2.1 (Temporary resident visas and entry permits)

Part 425 - Class 425 (Family relation-ship) visa and entry permit

Subregulation 7.1 omits clause 425.731 and substitutes a new clause 425.731. The new clause makes an additional provision that at the time of decision the applicant may satisfy the criteria for the grant, before entry, to a primary person of a Class 425 visa. This provision is an alternative to the requirement that at the time of application the applicant must have been the holder of a Class 425 entry permit. This amendment reflects the policy intention that grant of a Class 425 entry permit after entry is not to be restricted to persons who held a Class 425 entry permit at the time of application.

Regulation 8 - Schedule 2, Chapter 2.5 (Extended eligibility visas and entry-permits)

Subregulation 8.1 corrects an error in the numbering of clause 820.341.

Subregulation 8.2 omits paragraphs 820.721(7)(b) and 826.722(5)(b) and the following notes, and substitutes new paragraphs (b), (c), (d) and (e). These amendments are technical only, Their purpose is to incorporate directly into clauses 820.721 and 826.722 material at present contained in the notes and referred to in the clauses.

Regulation 9 - Schedule 2, Chapter 2.8 (Miscellaneous visas and entry permits)

Part 775 - Class 775 (Designated persons (child) (temporary)) visa and entry permit

Subregulation 9.1 amends clause 775.341. This clause imposed condition 9203 on the class 775 visa. This was not a meaningful condition as condition 9203 is applicable only to entry permits. The effect of the amendment is to impose condition 9202 on the class 775 visa.

Part 830 - Class 830 (1 November 1993 (processing)) visa and entry permit

Subregulation 9.2 amends the heading of Part 830 to reflect the creation of a Class 830 visa by these Regulations (refer subregulation 9.3).

Subregulation 9.3 creates a Class 830 visa which may be applied for and granted only in Australia. The new visa will provide re-entry facilities to Australia for eligible applicants, Eligibility is restricted to applicants who hold a Class 830 entry permit, who are also applicants for a Class 817 (protection (permanent)) entry permit and who were in Australia lawfully at the time they applied for that entry permit. A Class 830 visa is valid for re-entry to Australia during a period specified in the visa.

Subregulation 9.4 omits clause 830.511 and substitutes a new clause which makes provision for the grant of a Class 830 entry permit at the Entry Control Point to the holder of a Class 830 travel-only visa. This amendment is consequential to the introduction of a Class 830 visa by these Regulations.

Subregulation 9.5 omits clause 830.521 and substitutes a new clause. The new clause sets out the period of validity of a class 830 entry permit granted to a person whose application for a Class 815, 816, 817 or 818 entry permit has been refused but who is successful on review (refer subregulation 9.7 of these Regulations). These entry permits are valid until the Class 815, 816, 817 or 818 entry permit for which the applicant applied is granted, or until the application is withdrawn, whichever is the sooner.

Subregulation 9.6 omits subdivision 830.6 and substitutes a new subdivision which provides that a Class 830 entry permit may be granted before entry. This amendment is consequential to the introduction of a Class 830 visa. Holders of a Class 830 visa returning to Australia will be granted a Class 830 entry permit on arrival at the Entry Control Point.

Subregulations 9.7 and 9.8 omit clauses 830.711 and 830.731 and substitute new clauses. The amendment facilitates the grant of the Class 815, 816, 817 and 818 entry

permits. An applicant for one of these entry permits whose application for merits review of a decision to refuse the entry permit is successful, is deemed to apply for a Class 830 entry permit. Provision is also made to allow for the grant of this entry permit. The grant of the Class 830 entry permit facilitates the grant of the permanent entry permit as the Class 830 entry permit is an entry permit that is valid for the purpose of obtaining permanent residence.

Subregulation 9.9 inserts a new paragraph 830.732(c). The effect of the new paragraph is to provide that an applicant for a Class 815, 816, 817 or 818 entry permit may be granted a Class 830 entry permit if an entry permit which he or she previously held has been cancelled or terminated. Ineligibility for grant of a Class 830 entry permit effectively prevents the grant of a Class 815, 816, 817 or 818 entry permit.

This amendment implements the intended policy. It is, therefore, made to operate retrospectively to 1 March 1994, the date of commencement of the Class 830 entry permit. Retrospective operation of this provision is not prejudicial to any persons. It does not, therefore, contravene subsection 48(2) of the *Acts Interpretation Act 1901*.

Subregulation 9.10 omits subdivision 830.81 of the Migration (1993) Regulations and substitutes a new subdivision which provides that there is a fee of \$50 for an application for a Class 830 visa.

Regulation 10 - Schedule 4 (Public interest criteria)

Subregulations 10.1 and 10.2 correct syntactical errors in subparagraphs 4005(a)(i) and 4007(a)(i) of the Migration (1993) Regulations, respectively.