

Migration (1993) Regulations (Amendment) 1994 No. 141

EXPLANATORY STATEMENT

STATUTORY RULES 1994 No. 141

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

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.

The purpose of the Regulations is:

- to omit the requirement for the grant of student, visitor and temporary resident visas that the applicant must not intend to remain in Australia permanently. While an intention to remain permanently may be a factor relevant to the assessment of the genuineness of a proposal to visit or study in Australia it is not to be an automatic bar to temporary stay;
- to introduce changes to the age and language factors of the general points test under which concessional family and independent entrant migration applications are assessed. These changes increase the points awarded on the age factor for some age groups. The changes also provide for the language factor to be assessed generally on the basis of evidence of the applicant's qualifications gained in English or the results of an English proficiency test;
- to make minor technical corrections to the Migration (1993) Regulations.

The regulations omitting the criterion for temporary entry that the applicant must not intend to remain in Australia permanently commenced on 1 March 1994.

Retrospective commencement of the amendments facilitates the grant of student, visitor and temporary resident entry permits to applicants for Class 815, 816 and 818 entry permits. These provisions were implemented on 1 March 1994. Retrospectivity is beneficial to the applicants concerned and is not prejudicial to any other person. It does not, therefore, contravene subsection 48(2) of the Acts Interpretation Act 1901. The remainder of the regulations commence on gazettal.

Details of the Regulations are set out in the Attachment.

ATTACHMENT

Regulation 1 - Commencement

Subregulation 1.1 provides for regulations 8, 9, 10, 11 and 13 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 these 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 1.3 (Interpretation)

Subregulation 3.1 omits the definition of "vocational proficiency in English". It is replaced in the relevant provisions by a requirement that the applicant must have English language skills at a level of a specified standard on the language skill factor of the general points test in Schedule 7, as amended by regulation 14 of these Regulations.

Subregulation 3.2 inserts three new definitions of terms used in the Migration (1993) Regulations. These terms are "ACCESS test", "IELTS test" and "Occupational English Test". The terms are used in regulation 7.8AA (Prescribed evidence - paragraph 4(1A)(b) of the Act), and Schedule 7 (General points test - qualifications and points) as amended by regulation 14 of these Regulations.

Regulation 4 - Regulation 1.13 (Occupations Requiring English List)

This regulation omits regulation 1.13 of the Migration (1993) Regulations and substitutes a new regulation 1.13. The new regulation omits the term "vocational proficiency in English" and substitutes a reference to a level of English proficiency which is at least that of a specified standard on the language skill factor of the general points test in Schedule 7, as amended by regulation 14 of these Regulations. This reflects the general intention that the level of an applicant's English language skill is to be evidenced by educational or occupational qualifications or test results. The evidentiary requirement of English proficiency replace the previous general descriptions of the level of English required.

Regulation 5 - Regulation 2.4 (Prescribed qualifications and prescribed number of points)

This regulation inserts a new subregulation 2.4(3A) in the Migration (1993) Regulations. The new subregulation provides that if an applicant cannot provide the evidence necessary to attain a particular level under Part 3 (language skill qualification) of Schedule 7, as amended by regulation 14 of these Regulations, and it is not reasonably practicable for the applicant to sit for a relevant English language

test, the Minister may determine that the applicant has a level of English proficiency equivalent to that of a particular standard specified in Part 3.

Regulation 6 - Regulation 7.8AA (Prescribed evidence - paragraph 4(1A)(b) the Act)

Subregulations 6.1, 6.2 and 6.3 amend paragraphs 7.8AA(d), 7.8AA(e) and 7.8AA(f), respectively, by bringing terms used in the paragraphs into line with the definitions of those terms inserted in regulation 1.3 (Interpretation) by subregulation 3.2 of these Regulations. These amendments are technical only and involve no substantive changes in policy.

Regulation 7 - Schedule 2. Chapter 1.1 (Migrant visas and entry permits)

Subregulations 7.1, 7.2 and 7.3 amend subclauses 105.332B(1) and 105.332B(2), and clause 126.331A. These subclauses set out the levels of English proficiency required by certain applicants for the Class 105 and 126 visa. The amendments omit the term "vocational proficiency in English" and substitutes a reference to a level of proficiency which is at least that of a specified standard on the language skill factor of the general points test in Schedule 7, as amended by regulation 14 of these Regulations. This reflects the general intention that the level of an applicant's English language skill is to be evidenced by tests results and educational or occupational qualifications, and replaces the previous general descriptions of required English proficiency levels.

Regulation 8 - Schedule 2. Chapter 2.1 (Temporary resident visas and entry permits)

Subregulation 8.1 omits a number of clauses of Schedule 2, Chapter 2.1. Each of the omitted clauses prescribes the criterion that an applicant for a temporary resident visa or entry permit must not intend to become a permanent resident of Australia. The omission of this criterion reflects the policy intention that the grant of a temporary resident visa or entry permit to a person should not be prevented because the person has applied for a permanent visa or entry permit.

The removal of the criteria that a person not intend to remain permanently means that applicants for temporary resident visas and entry permits will be assessed having regard to their skills and employment. The fact that they may be applicants for or contemplating applying for permanent residence will be of no relevance to an assessment of their entitlement to stay in this country as temporary residents, which is judged on their ability to meet objective criteria namely that the occupation they are to fill has been assessed as one which cannot be filled by a suitably qualified member of the Australian workforce, and the applicant has the skills to fill that occupation.

The amendment is made to operate retrospectively to 1 March 1994 to facilitate the grant of temporary resident entry permits to applicants for Class 815, 816 and 818 entry permits. 1 March 1994 was the date of commencement of these classes of entry permit. 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.

Regulation 9 - Schedule 2. Chapter 2.2 (Student visas and entry permits)

Subregulations 9.1 to 9.8 omit a number of clauses of Schedule 2, Chapter 2.2. The effect of these amendments is to omit the criterion that an applicant for a student visa or entry permit must not intend to become a permanent resident of Australia. The omission of this criterion reflects the policy intention that the grant of a student visa or entry permit to a person should not be prevented merely because the person has applied for a permanent visa or entry permit.

The fact that an applicant for a student visa or entry permit has applied for permanent residence will continue to be relevant in an assessment of whether the person is a genuine student. It will not, however, be determinative of this fact as is the case now. It will be possible in a particular case for a person to be found to be a genuine student notwithstanding that he or she has applied for permanent residence.

The amendment is made to operate retrospectively to 1 March 1994 to facilitate the grant of student entry permits to applicants for Class 815, 816 and 818 entry permits. 1 March 1994 was the date of commencement of these classes of entry permit. 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.

Regulation 10 - Schedule 2. Chapter 2.3 (Visitor visas and entry permits)

This regulation amends Schedule 2, Chapter 2.3 by omitting a number of clauses. The effect of the amendment is the same in respect of visitor visas and entry permits as the amendment made by regulation 9 in respect of student visas and entry permits. This regulation is made to operate retrospectively to 1 March 1994 for the same reasons, and with the same effect, as the retrospective operation of regulation 9.

Regulation 11 - Schedule 2. Chapter 2.4 (Visitor (short stay) visas and entry permits)

This regulation omits a number of clauses from Schedule 2, Chapter 2.4. The effect of the amendment is the same in respect of visitor (short stay) visas and entry permits as the amendment made by regulation 9 in respect of student visas and entry permits. This regulation is made to operate retrospectively to 1 March 1994 for the same reasons, and with the same effect, as the retrospective operation of regulation 9.

Regulation 12 - Schedule 2. Chapter 2.5 (Extended eligibility visas and entry permits)

This regulation omits subdivision 820.34 and substitutes a new subdivision. This amendment corrects the numbering of clause 820.341 and has no other substantive effect.

Regulation 13 - Schedule 3 (Provisions with respect to the grant of visas and entry permits included in certain groups to secondary persons)

This regulation omits a number of clauses from Schedule 3. The omitted clauses prescribed the criterion that a secondary applicant for a temporary resident or student visa or entry permit must not intend to become a permanent resident of Australia. In determining eligibility of a secondary person for the grant of a visa or entry permit it

will still be necessary for the decision maker to assess whether the applicant intends to remain temporarily in Australia as a member of the primary person's family unit.

The policy intention is that the grant of a temporary resident or student visa or entry permit to a secondary person should not be prevented merely because the secondary person has applied for a permanent visa or entry permit.

The amendment is made to operate retrospectively to 1 March 1994 to facilitate the grant of temporary resident and student entry permits to applicants for Class 815, 816 and 818 entry permits. 1 March 1994 was the date of commencement of these classes of entry permit. 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.

Regulation 14 - Schedule 7 (General points test - qualifications and points)

This regulation omits and substitutes specific items from Schedule 7. The effect of the amendment is twofold - to increase the points awarded to certain applicants for age and to set out the evidence required to show the level of English proficiency.

Part 2 - Age Qualification

Subregulation 14.1 amends item 7202 by raising the points for applicants aged not less than 30 years and under 35 years from 20 points to 25 points.

Subregulation 14.2 amends item 7203 by raising the points for applicants aged not less than 35 years and under 40 years from 10 points to 15 points.

Subregulation 14.3 omits item 7204 and substitutes two new items 7204 and 7205. Item 7204 provides for 10 points for an applicant aged not less than 40 years and under 45 years. Item 7205 provides for 5 points for an applicant aged not less than 45 years and under 50 years. The effect of this amendment is to raise the points for an applicant aged between 40 years and 45 years from 5 points to 10 points.

Part 3 - Language Skill Qualification

Subregulation 14.4 omits items 7301, 7302, 7303 and 7304, and substitutes new items 7301 to 7316. The purpose of the new items is to provide for applicants to produce evidence of their English language ability in the form of educational or occupational qualifications obtained in educational institutions in which all instruction was conducted in English, or in the form of evidence of scores attained on certain specified English tests. The number of points awarded to the applicant is dependent upon the level of education which he or she has reached in an education institution where all the instruction was in English or upon the score attained on the test undertaken, as appropriate. Where an applicant is unable to produce any of the relevant evidence and it is not reasonably practicable for the applicant to sit for an accepted English test, the Minister may determine that the applicant has a level of English proficiency equivalent to that mentioned in one of the items (see the new subregulation 2.4(3A), inserted by regulation 5 of these Regulations).

The new system of the award of points on the language skills factor in accordance with evidence produced by the applicant replaces the existing system which describes the level of English proficiency required without giving details of how proficiency may be evidenced.