Migration Regulations (Amendment) 1997 No. 279

EXPLANATORY STATEMENT

STATUTORY RULES 1997 No. 279

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

Migration Act 1958

Migration Regulations (Amendment)

Section 504 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 to be prescribed by the Act or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Without limiting the generality of section 504, particular provision is made for and in relation to the following matters:

- paragraph 504(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.

In addition, regulations may be made pursuant to the following powers:

- subsection 29(2) of the Act provides that the Regulations may prescribe a period during which the holder of a visa may travel to, enter and remain in Australia;

- subsection 29(3) of the Act provides that the Regulations may prescribe a period during which the holder of a visa may travel to, enter, re-enter and remain in Australia;

- subsection 31 (1) of the Act provides that the Regulations are to prescribe classes of visas;

- subsection 31(3) of the Act provides that the Regulations may prescribe criteria for visas of a specified class;

- subsection 31(4) of the Act provides for the Regulations to prescribe whether visas are visas to travel to and enter, or remain in Australia, or both;

- subsection 40(1) of the Act provides that the Regulations may provide that visas or visas of a specified class may only be granted in specified circumstances;

- section 41 of the Act provides that, without limiting the generality of the section, the Regulations may provide that visas or visas of a specified class are subject to specified conditions, including but not limited to a condition that a further visa cannot be granted and a condition restricting work rights;

- subsection 45(1) of the Act provides that a non-citizen who wants a visa must apply for a visa of a particular class;

- subsection 45(2) of the Act provides that, without limiting the generality of subsection 45(1), the Regulations may prescribe the way for making applications in specified circumstances, applications for a visa of a specified class and applications for visas in specified circumstances for visas of a specified class;

- subsection 45(3) of the Act provides that, without limiting the generality of subsection 45(1), the Regulations may provide for the place in which an applicant must be when an application for a visa of a specified class is made;

- subsection 46(2) of the Act provides for prescribing a class of visas an application for which may be taken under the Regulations to have been validly made;

- section 48 of the Act provides for prescribing classes of visas which are the only classes of visas for which a person whose visa has been cancelled, or whose application for a visa has been refused, may apply; and

- subsection 7 1 (1) of the Act provides for the Regulations to prescribe the way in which evidence of a visa is to be given.

The purposes of the proposed Regulations are to amend the Migration Regulations to reflect recent Government decisions to make permanent residence available to certain persons who have been in Australia under humanitarian arrangements and who have remained in Australia for some time with their status unresolved.

Those covered by the decision are citizens of Kuwait, Iraq, Lebanon, the People's Republic of China, Sri Lanka and the former Republic of Yugoslavia who arrived in Australia prior to particular dates, which relate to the cessation of previous visa and entry permit arrangements for certain of those citizens.

They will be permitted a further period of temporary residence with the availability of permanent stay after they have been in Australia for a total of ten years. Applicants for the new visas may also include immediate family members in their applications, provided those persons were immediate family members on 13 June 1997, the date of the Minister's announcement. Immediate family member is defined in existing regulation 1.12AA.

In particular, the Regulations:

- create a new temporary visa, the new temporary visa (Class UH), which comprises two subclasses:

* Subclass 850 - Resolution of Status (Temporary) ("Subclass 850 visa"); and

* Subclass 450 - Resolution of Status - Family Member (Temporary) ("Subclass 450 visa") (regulations 11 and 12 and subregulation 10.2);

- create a permanent visa, the new permanent visa (Class BL), which comprises one subclass -Subclass 851 - Resolution of Status ("Subclass 851 visa"), which will be granted to holders of either temporary subclass (that is, Subclass 450 or 850) who satisfy all requirements for permanent stay (regulation 12 and subregulation 10.1);

- provide that, where an applicant has immediate family members overseas, those persons can apply for the Resolution of Status (Temporary) (Class UH) visa to join the applicant in Australia, provided they are (inter alia) sponsored by the applicant (regulations 4 and 11, subregulation 10.2);

- provide that dependent children may be added to applications for the Resolution of Status (Temporary) (Class UH) ("temporary visa (Class UH)") and the Resolution of Status (Residence) (Class BL) visa ("permanent visa (Class BL)") in compelling and compassionate circumstances (regulations 5 and 6);

- provide for applicants in Australia to make a concurrent application for the temporary (Class UH) and permanent (Class BL) visas. Immediate family members overseas will make an application for the temporary visa (Class UH), and on entry in Australia as the holder of a Subclass 450 visa, will be deemed to have made an application for the permanent visa (Class BL) (regulation 7 and subregulations 10.1 and 10.2);

- provide that certain applicants refused visas or had visas cancelled may make an application for the new classes (regulation 8);

- provide that applications made onshore for these new visas are also applications for bridging visas (subregulations 10.3 to 10.5); and

- make a minor technical amendment (regulation 9).

Details of the Regulations are set out in the Attachment.

The Regulations, which benefit prospective visa applicants, commence on 1 October 1997.

ATTACHMENT

Regulation 1 - Commencement

This regulation provides for these Regulations to commence on 1 October 1997.

Regulation 2 - Amendment

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

Regulation 3 - Regulation 1.15A (Spouse)

Under existing regulation 1.15A, a spouse includes a de facto spouse. Paragraph 1.15A(2)(d) defines a defacto relationship for the purposes of certain visa subclasses, as, among other things, a relationship which was in existence for 12 months preceding the date of the relevant visa application. This 12 month requirement may be waived (under existing subregulation 1.15A(2A)), including where the applicant can establish compelling and compassionate circumstances for the waiver.

Subregulation 3.1 amends paragraph 1.15A(2)(d) with the intention of excluding applicants for the two new visas from the operation of the paragraph.

Subregulation 3.2 inserts new paragraph 1.15A(2)(e) which provides that where applicants for the temporary visa (Class UH) and the permanent visa (Class BL) seek to rely on the existence of

a de facto relationship, the Minister must be satisfied that the relationship was in existence for the period of 12 months immediately preceding 13 June 1997, that is, the date of the Minister's announcement of the introduction of the new visas, unless the applicant can establish compassionate and compelling circumstances for the grant of the visa.

Regulation 4 - Regulation 1.20 (Sponsorship)

Existing paragraphs 1.20(2)(a) and (b) set out the obligations of a sponsor in relation to an applicant for a permanent visa and a temporary visa respectively. Subregulations 4.1 and 4.2 amend these paragraphs so that they do not apply to sponsors of applicants for the new permanent visa (Class BL) and the new temporary visa (Class UH) respectively.

Subregulation 4.3 inserts new paragraph 1.20(2)(d), which specifies the obligations of a sponsor in respect of an applicant for the new temporary visa (Class UH) made by an applicant outside Australia.

Regulation 5 - Regulation 2.08A (Addition of spouses and dependent children to certain applications for permanent visas)

Subregulations 5.1 and 5.2 amend paragraph 2.08A(1)(a) and insert new subregulation 2.08A(3) respectively. The effect of these amendments is that applicants for the new permanent visa (Class BL) will only be able to add dependent children to their application after it has been made, and then only in certain circumstances. This is because applicants can include immediate family members in their initial application.

New subregulation 2.08A(3) provides that a dependent child may be added to an application for the permanent visa (Class BL) after it has been made, where the Minister is satisfied that compelling and compassionate circumstances exist for the child to be added. An example of such circumstances may be where a child of an applicant was not included in their original application because the child was living overseas with a former spouse of the applicant, but the former spouse has died, leaving no-one other than the applicant to care for the child.

Regulation 6 - Regulation 2.08B (Addition of dependent children to certain applications for temporary visas)

Subregulations 6.1 and 6.2 omit and substitute new paragraph 2.08B(1)(a) and insert new paragraph 2.08B(1)(da) respectively. The purpose of these amendments is to permit an applicant for the new temporary visa (Class U11) to add a dependent child to their application after it has been made, only where the Minister is satisfied that compelling and compassionate reasons exist for the addition of the child (see regulation 5).

Regulation 7 - New regulation 2.08BA

This regulation inserts new regulation 2.08BA, which deems a person who enters Australia as the holder of a Subclass 450 visa to have made a valid application for the new permanent visa (Class BL) immediately after being immigration cleared. The holder of a Subclass 450 visa is an immediate family member of a person in Australia who has been granted a Subclass 850 or 851 visa. This deemed application arises only once, on the person's first entry to Australia as the holder of a Subclass 450 visa.

This deeming regulation:

* means that offshore applicants will only be required to complete one application form; and

* operates after the Subclass 450 holder's entry to Australia.

Regulation 8 - Regulation 2.12 (Certain non-citizens whose application refused in Australia (Act, s.48))

Section 48 of the Act provides that persons in the migration zone who do not hold a substantive visa and have been refused a visa or had a visa cancelled since entering Australia, can only apply for a limited range of visa classes prescribed in existing regulation 2.12.

This regulation adds the new visas (Classes UH and BL) to the classes prescribed for the purposes of section 48.

Regulation 9 - Regulation 2.16 (Notification of decision on visa application)

This regulation makes a minor technical amendment to subregulation 2.16(2),

Regulation 10 - Schedule 1 (Classes of visas)

Subregulation 10.1 inserts new item 1127A as set out in Part 1 of Schedule 1 to these Regulations. New item 1127A sets the way in which a valid application is to be made for the new permanent visa (Class BL).

Subregulation 10.2 inserts new item 1216A as set out in Part 2 of Schedule 1 to these Regulations. New item 1216A sets out the way in which a valid application is to be made for the new temporary visa (Class UM.

Subregulations 10.3, 10.4 and 10.5 amend existing subitems 1301(1), 1303(1) and 1305(1) of Schedule 1 to the Regulations respectively, to include a reference to the application form for the new visa classes, form 1096 . This ensures that an application made in Australia on that form is automatically an application for a Bridging Visa A, C and E. Grant of a bridging visa will ensure that the applicants for the new visas will be lawful while their applications are being considered.

Regulation 11 - Schedule 2, new Part 450

This regulation inserts new Part 450 into Schedule 2 as set out in Part 1 of Schedule 2 to these Regulations.

Regulation 12 - Schedule 2, new Parts 850 and 851

This regulation inserts new Parts 850 and 851 as set out in Part 2 of Schedule 2 to these Regulations.

Schedule 1 - New Items for insertion in Schedule 1

Part 1 - New Item 1127A

This regulation inserts new item 1 127A into Schedule 1 to the Regulations to create the new permanent visa class - Resolution of Status (Residence)(Class BL). New item 1 127A sets out the requirements for making a valid application for the class, which are:

* form 1096 is to be used to make an application, except in respect of a Subclass 450 visa holder (who is deemed to have made an application for the permanent visa (Class BL) on entry in Australia - see the explanation of regulation 7 above);

* no charge is payable,

* the application must be made in Australia but not in immigration clearance,

* the applicant must be in Australia but not in immigration clearance; and

* members of the immediate family of an applicant (except those who hold a Subclass 450 visa) may make an application at the same time and place as, and combine it with, the applicant's application.

The class contains one subclass, Subclass 851 (Resolution of Status).

Part 2 - New Item 1216A

This regulation inserts new item 1216A into Schedule 1 to the Regulations to create the new temporary visa class - Resolution of Status (Temporary)(Class UH). New item 1216A sets out the requirements for making a valid application for the class of visa, which are:

* form 1096 is to be used to make an application. Form 1096 is also the application form for the new permanent visa (Class BL). Hence an applicant in Australia applies for the temporary and permanent visas concurrently on one form; an applicant outside Australia applies for the temporary visa on form 1096, and is deemed to have made an application for the permanent visa on entry (see regulation 7 above);

* the first instalment of the visa application charge is:

- $2000 in the case of an application made in Australia; and

- nil, in the case of an application made outside Australia. This application is made by an immediate family member of an applicant who has made an application in Australia;

* a second instalment of the visa application charge is payable by each applicant who is 18 years or more at the time of the application and does not having functional English. The amount of the instalment is:

- $4470 for an applicant in Australia who satisfies primary criteria for the grant of the visa;

- $2235 for an applicant in Australia who satisfies secondary criteria for the

grant of the visa; and

- $2235 for an applicant outside Australia who satisfies primary criteria for the grant of the visa;

* an application may be made in Australia, but not in immigration clearance if it is made between 1 October 1997 and 31 March 1998 (inclusive) and at the time when it is made, the applicant is in Australia. For ease of reference such an applicant and their application will be referred to as "an onshore applicant (Subclass 850)" and "an onshore application (Subclass 850)" respectively;

* an application may be made outside Australia if it is made between 1 October 1997 and 30 June 1998 (inclusive) and at the time when it is made, the applicant is outside Australia. For

ease of reference such an applicant and their application will be referred to as "an offshore applicant (Subclass 450)" and "an offshore application (Subclass 450)" respectively;

* an onshore application (Subclass 850) must be accompanied by satisfactory evidence that the applicant, or in the case of a combined application, at least one applicant, entered Australia lawfully as the holder of a valid passport of one of the following countries, and entered on or before the specified date:

- Iraq or Kuwait - 31 October 1991;

- Lebanon - 30 November 1991;

- PRC, Sri Lanka, the Socialist Federal Republic of Yugoslavia, Federal Republic of Yugoslavia, Former Yugoslav Republic of Macedonia, Republic of Bosnia and Herzegovina, Republic of Croatia, or Republic of Slovenia - 1 November 1993;

* an onshore application (Subclass 850) must be made at the same time and place as an application for the new permanent visa (Class BL);

* where a person making an onshore application (Subclass 850) claims to be a member of the immediate family of another person making an onshore application, the application may be made at the same time and place as, and be combined with, that other person's application;

* an offshore application (Subclass 450) must specify a valid onshore application (Subclass 850) by a person ("the sponsor") which identifies the offshore applicant as:

- a member of the immediate family of the sponsor; and.

- a person who has been sponsored by the sponsor;

* an offshore application (Subclass 450) may be made at the same time and place as, and be combined with, another offshore application, if both applicants claim to be:

- identified in a valid onshore application (Subclass 850) as members of the onshore applicant's immediate family; and

- sponsored by that onshore applicant;

* where an onshore applicant (Subclass 850) has a dependent child offshore, that child may make an application outside Australia, if the Minister is satisfied that compelling and compassionate circumstances exist for the application to be made. The child's application must be made prior to the grant of the permanent visa to the parent,"

The class contains two subclasses, Subclass 450 (Resolution of Status - Family Member (Temporary)) and Subclass 850 (Resolution of Status (Temporary)).

Schedule 2 - New Parts for insertion in Schedule 2

Part 1 - New Part 450

Subclass 450 - Resolution of Status - Family Member (Temporary)

New Division 450.2 sets out the primary criteria which must be satisfied by each applicant for the Subclass 450 visa. All applicants must satisfy the primary criteria.

New clause 45 0.211 requires that, at the time of application, the applicant is a member of the immediate family of, and is sponsored by, a person ("the sponsor") who has made a valid application in Australia for the new temporary visa class (Class UH) (that is, an onshore application (Subclass 850)). Under this clause, the sponsor must also appear to satisfy the primary criteria to be met at time of application for Subclass 850 (inserted by these Regulations).

New clause 450.212 requires that the applicant was a member of the sponsor's immediate family on 13 June 1997, unless the applicant became a dependent child of the sponsor after that date.

New clause 450.213 requires that the applicant is identified in the sponsor's onshore application (Subclass 850) as a member of the sponsor's immediate family and is sponsored by the sponsor. An applicant who becomes a dependent child of the sponsor, after the sponsor made their application, is exempted from this requirement.

New Subdivision 450.22 sets out the primary criteria to be satisfied at the time of decision.

New clause 450.221 requires that the applicant continue to satisfy new clause 450.211 and that the sponsor has satisfied the primary criteria for, and been granted, either a Subclass 850 or 851 visa.

New clause 450.222 provides that the applicant must satisfy public interest criteria 4001, 4002, 4003, 4004, 4007, 4009 and 4010.

New clause 450.223 provides that each member of the applicant's family unit who is not an applicant for a Subclass 450 visa, must satisfy:

* public interest criteria 4001, 4002, 4003 and 4004; and

* public interest criterion 4007, unless the Minister is satisfied that it would be unreasonable to require the person to be assessed in relation to that criterion.

New clause 450.224 provides that, if an applicant is, or has been, a student who undertook a course of studies approved by AusAID, the applicant must either..

* have made the application more than two years after departing Australia on ceasing their studies; or

* have the support in writing of AusAID, for the grant of the visa.

New clause 450.225 provides that if the applicant has previously been in Australia, the applicant must satisfy special return criteria 5001 and 5002.

New clause 450.226 provides that the Minister must be satisfied that the grant of a Subclass 450 visa to the applicant will not prejudice the rights and interests of any person who has custody or guardianship of, or access to, the applicant. This clause is a standard criterion relating to child visa applicants.

There are no secondary criteria for the grant of a Subclass 450 visa; all applicants must satisfy the primary criteria.

New clause 450.411 requires that the applicant must be outside Australia when the visa is granted.

New clause 450.511 provides that the Subclass 450 visa is a visa permitting the holder to travel to and enter Australia until a specified date, and to remain in Australia until the end of the day on which:

* the holder is notified that their application for the new permanent (Class BL) visa has been decided; or

* that application has been withdrawn.

New clause 450.611 provides that first entry to Australia must be made before a date specified by the Minister.

New clause 450.612 provides that condition 8515, that the holder of the visa must not marry before entering Australia, may be imposed. New clause 450.711 requires that the visa label be affixed to a valid passport.

Part 2 - New Parts 850 and 851

Subclass 850 - Resolution of Status (Temporary)

New Division 850.2 sets out the primary criteria, which must be satisfied by at least one applicant for the Subclass 850 visa.

New Subdivision 850.21 sets out the primary criteria to be satisfied at time of application.

New clause 850.211 requires that an applicant who:

* was in Australia on 1 September 1994, and

* was subject to section 37 of the Act as in force prior to that date; and

* has not since been granted a substantive visa;

must not have been refused a visa, or had a visa cancelled, under section 501 of the Act. The new clause provides that an applicant who is subject to section 48 of the Act similarly must not have been refused a visa, nor had a visa cancelled, under section 501 of the Act.

New subclause 850.212(1) provides that the applicant must have entered Australia as the holder of both a valid passport issued by a country specified in new subclause 850.212(3) and an entry permit or an entry visa that had effect as an entry permit. New subclause 850.212(2) provides that the applicant must have entered Australia on or before the date specified in new subclause 850.212(3) in relation to the relevant country.

New subclause 850.212(3) sets out the countries and dates mentioned in subclauses 850.212(1) and (2) as:

* Iraq and Kuwait - 31 October 1991;

* Lebanon - 30 November 199 1;

* PRC, Sri Lanka, Socialist Federal Republic of Yugoslavia, Federal Republic of Yugoslavia, Former Yugoslav Republic of Macedonia, Republic of Bosnia and Herzegovina, Republic of Croatia and Republic of Slovenia - 1 November 1993.

New clause 850.213 provides that immediately before entering Australia as mentioned in new clause 850.212, the applicant must have been a citizen of the relevant country, and usually resident in that country. Where the applicant was a citizen of one of the countries listed in subparagraphs 850.213(f)(i) to (vi), the applicant, immediately before entering Australia, must have been usually resident in a place that, on 19 June 199 1, formed part of the Socialist Federal Republic of Yugoslavia.

New subclause 850.214(1) provides that the applicant must have been in Australia for a period or periods that total at least 90% of the period from a date of entry mentioned in 850.212, to the date of making the Subclass 850 application (inclusive).

New Clause 850.212 and new subclause 850.214(1) give effect to the Government's intention that the new visas will be available to persons who entered Australia on or before the relevant dates specified in Subclause 850.212(3), and who have continued to reside in Australia. The 90% requirement allows for applicants to have departed Australia for short periods.

New subclause 850.214(2) provides that for the purposes of assessing subclause 850.214(1), where the applicant was not in Australia for the required 90% period, the Minister may include periods when the applicant was outside Australia, if:

* the applicant has maintained close business, cultural or personal ties in Australia; and

* the Minister is satisfied that compelling or strongly compassionate reasons exist to explain the applicant being outside Australia for that period or periods.

This provision is intended to allow an applicant who does not meet subclause 850.214(1), to nonetheless be eligible for grant if their absence from Australia for more than 10% of the relevant period is explained by circumstances which amount to compelling or strongly compassionate reasons. For example, strongly compassionate circumstances may exist where the applicant has been absent from Australia for more than 10% of the period due to serious illness or death of a close family member. Compelling circumstances may exist, for example, where the applicant has been outside Australia for more than 10% of the period because of travel essential to their Australian employer. New clause 850.215 requires that on 13 June 1997, the applicant was either:

* in Australia; or

* outside Australia and the holder of a visa that was in effect and permitted the applicant to travel to and enter Australia.

New clause 850.216 requires that the applicant must not be the holder of a Diplomatic (Temporary)(Class TF) visa, or a transitional (temporary) visa held on the basis of having held or applied for a diplomatic (code number 995) visa under the Migration (1989) Regulations or a Class 995 (Diplomatic) visa granted under the Migration (1993) Regulations.

New clause 850.217 provides that if two or more persons have made a combined application as permitted by paragraph 1216A(3)(f) of Schedule 1, the applicant must be 18 years old or more.

New Subdivision 850.22 sets out the primary criteria to be satisfied at the time of decision.

New clause 850.221 requires that the applicant satisfies public interest criteria 4001, 4002, 4003, 4004, 4007, 4009 and 40 10.

New clause 850.222 requires that each member of the immediate family of the applicant who is an applicant for a Subclass 850 visa satisfies public interest criteria 4001, 4002, 4003, 4004, 4007, 4009 and 4010.

New clause 850.223 requires that each member of the applicant's family unit who is not an applicant for a Subclass 450 visa, satisfies

* public interest criteria 4001, 4002, 4003 and 4004; and

* public interest criterion 4007, unless the Minister is satisfied that it would be unreasonable to require the person to be assessed in relation to that criterion.

New clause 850.224 requires that the applicant held a valid passport and a visa or entry permit on all entries to Australia.

New clause 850.225 is the same, in effect, as new clause 450.224 (inserted by these Regulations)

New clause 850.226 requires that the Minister be satisfied that the grant of the visa would not prejudice the rights and interests of any person with custody or guardianship of, or access to, a dependent child of the applicant.

New Division 850.3 sets out the secondary criteria for the Subclass 850 visa. A member of the immediate family of a person who satisfies the primary criteria, is also eligible for grant of the visa if they satisfy the secondary criteria. (For ease of reference an applicant meeting secondary criteria will be referred to as the "secondary applicant").

New Subdivision 850.31 sets out the secondary criteria to be satisfied at the time of application.

New clause 850.311 requires that at time of application the secondary applicant is a member of the immediate family of a person who has made an application for a Resolution of Status (Temporary)(Class UH) visa mentioned in paragraph 1216A(3)(a) of Schedule 1 (that is, an onshore application (Subclass 850)). That person, of whose immediate family the secondary applicant is a member, is referred to in Division 850.3 as "the principal person". This clause also provides that the principal person must appear, on the basis of information provided in their application, to satisfy the requirements of new subdivision 850.21 (inserted by these Regulations).

New clause 850.312 requires that the secondary applicant was a member of the immediate family of the principal person on 13 June 1997, except where the applicant becomes a dependent child of the principal person after that date.

New clause 850.313 provides that the secondary applicant must have made (or is taken by regulation 2.08B to have made) a combined application with the principal person.

New clause 850.314 requires that the secondary applicant must riot be the holder of a Diplomatic (Temporary)(Class TF) visa, or a transitional (temporary) visa held on the basis that they held or applied for a diplomatic (code number 995) visa under the Migration (1989) Regulations or a Class 995 (Diplomatic) visa under the Migration (1993) Regulations.

New Subdivision 850.32 sets out the secondary criteria to be satisfied at the time of decision.

New clause 850.321 requires that the secondary applicant satisfy new subclause 850.321(2) or (3).

New subclause 850.321(2) requires that the secondary applicant is a member of the immediate family of a person who, having satisfied the primary criteria, is the holder of a Subclass 850 visa ("the principal holder").

New subclause 850.321(3) applies in a situation where the secondary applicant was, at time of application, the spouse of a person who has become the principal holder, and where that spouse relationship has ceased, thereby preventing the secondary applicant from satisfying new subclause 850.321(2). The effect of subclause 850.321(3) is to make the secondary applicant eligible in this situation, if the secondary applicant and the principal holder have legal rights and, or, obligations, as specified in 850.321(3)(c)(i) to (v), in respect of at least one child.

New clauses 850,322, 850.324 and 850.325 are the same, in effect, as new clauses 450.222, 450.224 and 450.226 respectively (inserted by these Regulations).

New clause 850.323 is intended to ensure that any entries to Australia by the applicant have been lawful.

New clause 850.411 requires that the applicant must be in Australia, but not in immigration clearance, when the visa is granted.

New clause 850.511 provides that the Subclass 850 visa is a temporary visa permitting the holder to travel to and enter Australia until a specified date, and to remain in Australia until the end of the day on which:

* the holder is notified that their application for the new permanent visa (Class BL) has been decided; or

* that application has been withdrawn.

New Division 850.6 provides that there are no conditions in respect of this visa subclass. New clause 850.711 is the same as new clause 450.711 inserted by these Regulations.

Subclass 851 - Resolution of Status

New Division 851.2 sets out the primary criteria which must be satisfied by at least one applicant for the Subclass 851 visa.

New Subdivision 851.21 provides that there are no primary criteria that must be satisfied at the time of application. New Subdivision 851.22 sets out the primary criteria to be satisfied at the time of decision.

New clause 851.221 provides that the applicant must be the holder of a Subclass 850 visa at the time of application for the Subclass 851 visa, unless:

* they held a Subclass 850 visa that ceased on notification of a decision to refuse the permanent Subclass 851 visa; and

* a review officer or the Tribunal has determined that they satisfy the Subclass 85 1 criteria (apart from the criterion that they hold a Subclass 850 visa).

New subclause 851.222(1) requires that the applicant has been physically present in Australia for a total of 10 years in the 12 years following their earliest date of entry in Australia, in relation to which they satisfy clause 850.214.

New subclause 851.222(2) provides that the Minister may waive the requirement in subclause 851.222(1) where:

* at least 12 years have passed since the applicant's earliest date of entry in Australia, in relation to which they satisfy clause 850.214; and

* the applicant has maintained close business, cultural or personal ties in Australia., and

* the Minister is satisfied that compelling or strongly compassionate circumstances exist for the applicant's failure to meet subclause 851.222(1).

It is therefore intended the residence requirement only be waived once 12 years have elapsed since the earliest date of entry by the applicant, which is mentioned in clause 850.212 and in relation to which they satisfy the requirements of clause 850.214. (See above explanation of new subclause 850.214(2) in relation to compelling or strongly compassionate circumstances.)

New subclause 851.222(3) ensures that the residency requirement does not prevent the Minister from refusing to grant a Subclass 851 visa before the end of the period of 12 years following the relevant date.

New clauses 851.223, 851.224, 851.225 and 851.226 are the same as clauses 450.222, 850.222, 450.223 and 450.226 respectively (inserted by these Regulations).

New Division 851.3 sets out the secondary criteria for the Subclass 851 visa. A member of the immediate family of a person who satisfies the primary criteria is also eligible for grant of the visa if they satisfy the secondary criteria.

New Subdivision 851.31 sets out the secondary criteria to be satisfied at the time of application.

New clause 851.3 11 provides that the secondary applicant must have made (or is taken by regulation 2.0813 to have made) a combined application with the person who satisfies primary criteria, unless the applicant is the holder of a Subclass 450 visa.

New Subdivision 851.32 sets out the secondary criteria to be satisfied at the time of decision.

New clause 851.321 provides that the applicant must satisfy one of new subclauses 851.321(2) to (7).

An applicant will meet the requirements of subclause 851.321(2) if the applicant is the holder of a Subclass 450 visa and a member of the immediate family of the "sponsor" referred to in clause 450.211, where the sponsor has since been granted a Subclass 851 visa on the basis of having satisfied primary criteria.

An applicant will meet the requirements of subclause 851.321(3) if the applicant is the holder of a Subclass 850 visa and a member of the immediate family of a person with whom the applicant has made (or is taken by regulation 2.08B to have made) a combined application for a subclass

851 visa, and that other person has been granted a Subclass 851 visa on the basis of having satisfied primary criteria.

An applicant satisfies the requirements of subclause 851.321(4) if they:

* are the holder of a Subclass 450 or 850 visa,- and

* at the time of application was the dependent child, or the dependent child of a dependent child of a person who has been granted a Subclass 851 visa on the basis of having satisfied primary criteria (the "principal holder"); and

* the principal holder sponsored the applicant as mentioned in new clause 450.211 or has made (or is take to have made under regulation 2.08B) a combined application with the applicant; and

* would satisfy the requirements of subclause 851.321(2) or (3) except that they have ceased to be the dependent child, or the dependent child of a dependent child, of the principal holder.

This new subclause recognises that an applicant who is a dependent child at time of application, may cease to be dependent between the grant of the new temporary visa (Class UH) and a decision on the new permanent visa (Class BL), due to the passage of time. The new subclause is intended to ensure that such persons remain eligible for the grant of the Subclass 851 visa provided the original sponsor or principal person has been granted the Subclass 851 visa.

An applicant meets the requirements " of new subclause 851.321(5) if they are the. holder of a Subclass 450 or 850 visa and would meet the requirements of subclause 851.321(2) or (3) except that the person who would have satisfied the primary criteria has died. The Minister must be satisfied that the applicant:

* would have continued to be a member of the immediate family of the deceased had that person not died; and

* has maintained close business, cultural or personal ties in Australia.

New subclause 851.322(6) applies where the applicant:

* is the holder of a Subclass 450 or 850 visa; and

* was, at time of application, the spouse of a person (the 'principal holder") who either sponsored the applicant as mentioned in clause 450.211 or made a combined application (or is taken by regulation 2.08B to have made a combined application) with the applicant for a Subclass 851 visa; and

* would meet the requirements of subclause 851.321(2) or (3) except that the spouse relationship has ceased; and

* the applicant or an immediate family member of the principal holder has suffered domestic violence committed by the principal holder; or

* the applicant and the principal holder have legal rights and, or, obligations, as specified in subsubparagraphs 851.321(5)(d)(ii)(A) to (E), in respect of at least one child.

New subclause 851.322(7) will be met by a secondary applicant whose Subclass 450 or Subclass 850 visa ceased on notification of a decision to refuse a Subclass 851 visa to their immediate family, where that family member has subsequently been granted a Subclass 851 visa

New Subclause 851.322(8**)** provides a definition of "member of the immediate family" for the purposes of clause 851.321. Included in the definition are:

* a spouse of a person;

* a dependent child of a person;

* a parent of a person, where the person was not 18 years or more at time of application;

* a dependent child of a person who is, or has been, a dependent child of the person.

This is intended to provide for certain situations, for example where a person who is a dependent child at the time of application, has a child before grant of the permanent visa. That child may be taken to have applied for the visa under regulation 2.08. Paragraph 851.321(8)(d) ensures that such a child, whether the dependent child of a dependent child, or the dependent child of a child who has ceased to be a dependent child, falls within the definition of "immediate family member" and hence may be eligible for grant of the visa, for example by satisfying subclause 851.321(3).

New clauses 851.322 and 851.323 are the same as new clauses 450.222 and 450.226 respectively (introduced by these Regulations).

New clause 85 1.411 provides that the applicant must be in Australia, but not in immigration clearance, when the visa is granted'.

New clause 851.511 provides that the Subclass 851 visa is a permanent visa permitting the holder to travel to and enter Australia for 5 years from the date of grant. New Division 851.6 provides that there are no conditions in respect of this visa subclass. New clause 851.711 requires that the visa label be affixed to a passport.