

# **Migration Amendment Regulations 1999 (No. 12) 1999 No. 243**

## **EXPLANATORY STATEMENT**

### **STATUTORY RULES 1999 NO. 243**

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

*Migration Act 1958*

Migration Amendment Regulations 1999 (No. 12)

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. In addition, regulations may be made under:

- subsection 29(1) of the Act which provides that the Minister may grant a visa to a non-citizen which permits the holder of the visa to travel to and enter, or remain in Australia;
- subsection 29(2) of the Act which provides that the regulations may prescribe a period during which the holder of a visa may travel to, enter and remain in Australia;
- subsection 31(1) of the Act which provides that the regulations are to prescribe classes of visas;
- subsection 31(3) of the Act which provides that the regulations may prescribe criteria for visas of a specified class;
- subsection 31(4) of the Act which 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 which provides that the regulations may provide that visas or visas of a specified class may only be granted in specified circumstances;
- subsection 41(1) of the Act which 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;
- subsection 45(1) of the Act which provides that the regulations may make provision in relation to applications for visas;
- subsection 45(2) of the Act which provides that, without limiting the generality of subsection 45(1), the regulations may prescribe the way for making applications for a visa of a specified class, and in specified circumstances for a visa of a specified class;
- subsection 45(3) of the Act which 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 71(1) of the Act which provides for the regulations to prescribe the way in which evidence of a visa is to be given.

The purpose of the Regulations is to amend the *Migration Regulations* 1994 to set up new arrangements for dealing with people who arrive in Australia unlawfully. The new scheme excludes unauthorised arrivals from accessing protection visas which provide permanent residence, and limits those found to be refugees to a three year temporary protection visa, unless the Government decides to offer a short-term safe haven visa. In particular, the Regulations will:

- ensure that an application for a Protection (Class AZ) visa made before the commencement of these Regulations will continue to be considered under the existing criteria for that Class (Regulation 4);
- omit the Protection (Class AZ) visa from Schedule 1 to the *Migration Regulations* (Item 1);
- establish a new visa class: Protection (Class XA) in new Part 4 of Schedule 1 (Item 2);
- establish a new visa subclass under visa class Protection (Class XA): visa Subclass 785 (Temporary Protection), which will allow an applicant to make an application for a Protection (Class XA) visa where the person is owed protection obligations under the Refugees Convention by Australia and add existing Subclass 866 to that Class of visa (Item 3); and
- make consequential amendments (Items 4, 5, 6, 7 and 8).

Details of the Regulations are set out in the Attachment.

The Regulations commence on gazettal.

## ATTACHMENT

### Regulation 1 - Name of Regulations

This regulation provides that these Regulations are the *Migration Amendment Regulations 1999 (No. 12)*.

### Regulation 2 - Commencement

This regulation provides that these Regulations commence on gazettal.

### Regulation 3 - Amendment of *Migration Regulations 1994*

This regulation provides that Schedule 1 amends the *Migration Regulations 1994* ("the Migration Regulations").

### Regulation 4 - Transitional

Regulation 4 provides that the amendments made by these Regulations do not apply to a person who applied for a Protection (Class AZ) visa before the commencement of these Regulations and whose application was not finally determined before the commencement of these Regulations.

### Schedule 1 - Amendments

#### Item 1 - Schedule 1, item 1126

This item omits item 1126 of Part 1 of Schedule 1 to the Migration Regulations.

#### Item 2 - Schedule 1, after Part 3

This item inserts new Part 4 to the Migration Regulations, which contains new item 1401. New item 1401 contains a new visa class: "Protection (Class XA)".

The requirements for making a valid application in the new visa class "Protection (Class XA)" are that:

- \* the application form number is 866;
- \* a the first instalment of the visa application charge is:
- \* in the case of each applicant who is in immigration detention and has not been immigration cleared, nil; and
- \* in any other case, \$30;
- \* the second instalment of the visa application charge (payable before grant of the visa) is nil;
- \* the application must be made in Australia;

- \* the applicant must be in Australia; and
- \* an application may be made by a person claiming to be a member of the family unit of a person who is an applicant for a Protection (Class XA) visa at the same time and place as, and combined with, the application made by that person.

The class contains two subclasses, Subclass 785 (Temporary Protection) and current Subclass 866 (Protection). The criteria for the grant of a visa in Subclass 785 are inserted into Schedule 2 to the Migration Regulations by item 3 of these Regulations.

Item 3 - Schedule 2, after Part 773

This regulation inserts new Part 785 in Schedule 2 to the Migration Regulations.

Subclass 785 - Temporary Protection

This item introduces new Part 785 (Temporary Protection). New Part 785 allows a person to make an application for a visa if the applicant has specific claims under *the* Refugees Convention or is a member of the same family unit of a person who has also made these claims and who has applied for a Protection (Class XA) visa.

New Division 785.1 sets out the interpretation provisions relevant to this Part.

New clause 785.111 provides that the term Refugees Convention means the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees.

New clause 785.112 provides that for the purposes of this Part, a person (A) is a *member* of the same family unit as another person (B) if:

- A is a member of B's family unit; or
- B is a member of A's family unit; or
- A and B are members of the same family unit of a third person.

New Division 785.2 inserts the primary criteria to be satisfied in respect of a Subclass 785 visa. It is noted that the primary criteria must be satisfied by all applicants.

New Subdivision 785.21 sets out the primary criteria to be satisfied at the time of application. In particular, new clause 785.211 provides that the applicant must claim to be a person to whom Australia has protection obligations under the Refugees Convention and:

- makes specific claims under the Refugees Convention; or
- claims to be a member of the same family unit as a person who:
  - \* has made specific claims under the Refugees Convention and is an applicant for a Protection (Class XA) visa.

New clause 785.212 provides that the applicant must not be immigration cleared.

New Subdivision 785.22 sets out the primary criteria to be satisfied at the time of decision.

New clause 785.221 provides that the Minister must be satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

New clause 785.222 provides that in the case of an applicant referred to in paragraph 785.211 (b), inserted by these Regulations, the Minister must be satisfied that the applicant is a member of the same family unit as a person who has made specific claims under the Refugees Convention (a claimant) and that claimant has been granted a Protection (Class XA) visa.

New clause 785.223 provides that the applicant or a member of the family unit of the applicant has not been offered a temporary stay in Australia by the Australian Government for the purposes of regulation 2.07AC.

New clause 785.224 requires the applicant to undergo a medical examination by a Commonwealth Medical Officer.

New clause 785.225 requires the applicant:

- to undergo a chest x-ray examination conducted by a medical practitioner who is a qualified radiologist in Australia; or

- to be under 16 and is not a person who the Commonwealth Medical Officer has requested undergo a chest x-ray examination; or

- is a person:

- \* who is confined by a Commonwealth Medical Officer to be pregnant and who has been examined for tuberculosis by a chest clinic officer employed by a health authority of a State or Territory; and

- \* who has signed an undertaking to place herself under the professional supervision of a health authority in a state or Territory and to undergo any necessary treatment; and

- \* who the Minister is satisfied should not be required to undergo a chest x-ray examination at this time.

New clause 785.226 requires an applicant to satisfy public interest criteria 4001, 4002 and 4003.

New subclause 785.227 requires the Minister to be satisfied that the grant of the visa is in the national interest.

New Division 785.3 provides for the secondary criteria, which must be satisfied for the grant of a Subclass 785 visa. It is noted that all applicants must satisfy the primary criteria.

New Division 785.4 provides for the circumstances applicable to the grant of the visa.

New clause 78 5.411 provides that the applicant must be in Australia when the visa is granted.

New Division 785.5 provides for when the visa is in effect.

New clause 785.511 provides that a Subclass 785 visa is a temporary visa permitting the holder to remain in, but not re-enter, Australia until the earlier of the end of 36 months from the date of grant of the visa and the day on which an application by the holder for a permanent visa is finally determined.

New Division 785.6 provides for conditions that are attached to the visa.

New clause 785.611 requires that the holder of the Subclass 785 cannot be granted a substantive visa other than a protection visa.

New Division 785.7 provides for the way in which evidence of a valid visa is to be given.

New clause 785.711 requires that the visa be evidenced by way of a visa label affixed to a Convention travel document or passport.

Item 4 - Schedule 2, subparagraph 866.211 (b) (ii)

This item corrects the alpha code for the new Protection (Class XA) visa.

Item 5 - Schedule 2, after clause 866.211

This item inserts new clause 866-212 to specify that the applicant must be immigration cleared.

Item 6 - Schedule 2, paragraph 866.222(b)

This item omits a reference to "Protection visa" in paragraph 866.222(b) and substitutes a reference to a "Protection (Class XA) visa".

Item 7 - Schedule 2 after clause 866.226

This item inserts new clause 866.227 to require an applicant or a member of the family unit of the applicant has not been offered a temporary stay in Australia by the Australian Government for the purposes of regulation 2.07AC,

This item inserts new clause 866.228 to provide that if the applicant holds a Subclass 785 (Temporary Protection) visa, the applicant has hold that visa for the lesser of a continuous period of 30 months and a shorter period specified in writing by the Minister in relation to the applicant.

Item 8 - Schedule 2, clause 866.511

This item inserts the word "to" after the word "travel" in clause 866-511.