

# Migration Amendment Regulations 2001 (No. 1) 2001 No. 27

## EXPLANATORY STATEMENT

### STATUTORY RULES 2001 No. 27

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

*Migration Act 1958*

*Migration Amendment Regulations 2001 (No. 1)*

Subsection 504(1) of the *Migration Act 1958* ("the Act") provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Details of additional regulation-making powers under the Act are in Attachment A.

The purpose of the Regulations is to amend the *Migration Regulations 1994* ("the Regulations") in respect of New Zealand citizens and their family members, and to amend the Regulations to:

- insert a definition of "*student visa*". The definition is required because of a cross reference to that phrase in the definition of "*visa monitoring purpose*" in the *Migration Act 1958* ("the Act"). The definition of "*visa monitoring purpose*" is intended to commence on 1 March 2001 (Schedule 2); and
- add a reference to new paragraph 116(1)(fa) of the Act in public interest criterion 4013. The result of this is that a person will be affected by a risk factor under subclause 4013(2), and may be prevented from being granted a visa for three years, if they held a student visa and the Minister was satisfied that a ground under new paragraph 116(1)(fa) applied to them (Schedule 2); and
- make technical changes.

The Regulations restrict those New Zealand citizens able to sponsor family members for permanent visas to the following groups:

- New Zealand citizens in Australia on 26 February 2001 as the holders of special category visas ("SCVs");
- New Zealand citizens not in Australia on that date but who were in Australia as SCV holders for at least 1 out of the 2 years before 27 February 2001; and
- New Zealand citizens who have a certificate issued under the Social Security Act 1991 stating that, for the purposes of that Act, they were residing in Australia on a particular date.

This reflects the Government's decision that only Australian citizens and permanent residents should be able to sponsor family members for migration purposes.

The Regulations also create a new class of permanent visas for which New Zealand citizens in Australia may apply. The new class contains three new subclasses, eligibility for which would be based on the applicant's age, skills, English language ability, and ties with Australian family members. In addition, the Regulations create a new temporary class of visa for family members of New Zealand citizens who are not themselves New Zealand citizens. Such a visa will be valid

for 5 years. The holder may apply for further visas of this class provided he or she remains the family member of a New Zealand citizen, or has not become the family member of another person who is not a New Zealand citizen. This is intended to ensure that a former member of a New Zealand citizen's family unit, who may have been residing in Australia for a substantial period, is not required to leave Australia unless and until he or she becomes the member of another family unit not headed by a New Zealand citizen.

Details of the Regulations are in Attachment B.

The Regulations commence on 27 February 2001.

## ATTACHMENT A

Details of other relevant regulation-making powers are as follows:

Paragraph 504(1)(g) of the Act provides that the regulations may require assurances of support to be given, and provide for the enforcement of assurances of support.

Subsection 31(1) of the Act provides that the regulations prescribe classes of visas;

Subsection 31(3) of the Act provides that the regulations may prescribe criteria for a visa or visas of a specified class;

Subsection 31(4) of the Act 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) of the Act provides that the regulations specify that a visa is a visa of a particular class;

Subsection 39(1) of the Act provides that, in spite of section 49A of the Acts *Interpretation Act 1901*, the regulations may prescribe a criterion for visas of a class, other than protection visas, that the grant of the visa will not cause the number of visas of that class granted in a particular financial year to exceed whatever number is fixed by the Minister, by notice published in the *Gazette*, as the maximum number of such visas that may be granted in that year (however the criterion is expressed);

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;

Subsection 41 (1) of the Act provides that the regulations may provide that visas, or visas of a specified class, are subject to specified conditions;

Subsection 41(3) of the Act provides that, in addition to any conditions specified under subsection 41(1), the regulations may, for the purposes of this subsection, permit conditions, which the Minister may specify that a visa is subject to;

Subsection 45B(1) of the Act provides that the regulations prescribe the amount that is the amount of visa application charge, not exceeding the visa application charge limit.

Subsection 45B(2) of the Act provides that the amount prescribed as the visa application charge may be nil;

Subsection 45C(1) of the Act provides that the regulations may prescribe that the visa application charge is payable in instalments, how those instalments are to be calculated, and when those instalments are payable;

Subsection 46(1) of the Act provides that an application is valid if, inter alia, it satisfies the criteria and requirements prescribed under that section;

Subsection 46(3) of the Act 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) of the Act provides that the regulations may prescribe the circumstances that must exist for an application for a visa of a specified class to be valid application, how and where an application for a visa of a specified class must be made, and where the applicant must be;

Subsection 7 1 (1) of the Act provides that the regulations may prescribe how evidence of a visa must be given;

Subsection 93(1) of the Act provides that the regulations prescribe a number of points and prescribe qualifications for the purposes of section 93 (determination of applicant's score). Subsection 93(2) provides that, in section 93, prescribed means prescribed by the regulations that are in force at the time the assessment is made.

## **ATTACHMENT B**

Details of the Regulations are as follows:

### Regulation 1 - Name of Regulations

This regulation provides that these Regulations are the *Migration Amendment Regulations 2001 (No. 1)*.

### Regulation 2 - Commencement

Paragraph 2(a) provides that regulations 1, 2 and 4, subregulation 3(1), and Schedule 1 to these Regulations commence on 27 February 2001.

Paragraph 2(b) provides that Schedule 2 to these Regulations commences on 1 March 2001.

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

This regulation provides that Schedules 1 and 2 amend the *Migration Regulations 1994*.

### Regulation 4 - Transitional

This regulation provides that the amendment made by item 1 (which provides a new definition of eligible New Zealand citizen) has effect whether or not the provision of the Social Security Act 1991, under which the certificate mentioned in paragraph (b) of the new definition is made, formed part of that Act at the time Schedule 1 commences.

It also provides that the amendment made by item 26 applies to applications for a Skilled - Australian-sponsored (Migrant) (Class BQ) visa made on or after 27 February 2001.

### Schedule 1 - Amendments commencing on 27 February 2001

#### Item 1 - Regulation 1.03, definition of *eligible New Zealand citizen*

This item inserts a new definition of eligible New Zealand citizen. Persons who come within the definition are able to sponsor family members for certain permanent visas. New Zealand citizen not coming within the definition must be either Australian citizens or permanent residents in order to sponsor family members.

The new definition will cover New Zealand citizens who meet certain health and character requirements and who were either:

- in Australia on 26 February 2001 as the holder of a Special Category visa ("SCV"); or
- in Australia as an SCV holder for at least 1 out of the 2 years immediately before 27 February 2001; or
- have a certificate issued under the Social Security Act 1991 stating he or she was, for the purposes of that Act, residing in Australia on a particular date.

This definition is narrower than the current definition of eligible New Zealand citizen. The new definition reflects the Government's decision that only Australian citizens and permanent residents should be able to sponsor family members for migration purposes. The amendments ensure that New Zealand citizens in Australia at the date of commencement of these Regulations retain their rights to act as sponsors, and that New Zealand citizens who have been recently

resident here, or who arrive in Australia within a specified period after the commencement of these changes, are also unaffected by the changes.

#### Item 2 - After regulation 2.08C

This item inserts new regulation 2.08CA.

The new regulation gives effect to policy relating to the "skill matching" of independent (un-sponsored) applicants for skilled visas.

The regulation provides for such applicants for a Skilled - New Zealand Citizen (Residence) (Class DB) visa (inserted by these Regulations) to have a "deemed" application for a Subclass 857 (Regional Sponsored Migration Scheme) visa, provided all the requirements of regulation 2.08CA, are met. The new regulation mirrors existing regulation 2.08C, which applies in relation to offshore skilled visas.

No first instalment of the visa application charge is payable on the deemed application.

Subregulation 2.08CA(1) provides for the deemed application to have been made where the applicant has been nominated for an appointment by an employer, provided the applicant:

- is less than 45 years of age at the time of the application for the Class DB visa;
- no decision has been made on the Class DB visa application;
- the applicant has been assessed as having a points test score equal to or more than the pool mark for visa Subclass 861 (Skilled - Onshore Independent New Zealand Citizen);
- the appointment has been approved under subregulation 5.19(4) (the regional sponsored migration scheme); and
- the applicant has vocational English and a diploma or higher qualification.

Subregulation 2.08CA(2) provides that where an application is deemed to have been made under subregulation (1), any family members included in the original Class DB application are also taken to be included in the deemed application.

#### Item 3 - Regulation 2.26A, heading

This item inserts a reference to the Skilled - New Zealand Citizen (Residence) visa class (Class DB), inserted by these Regulations, into the heading of regulation 2.26A.

Regulation 2.26A prescribes how points are to be allocated on the points test set out in Schedule 6A of the Regulations, and defines certain terms used in that Schedule. On commencement of these Regulations, regulation 2.26A will also prescribe how points are to be allocated for new Class DB. An amendment to the heading to regulation 2.26A is required to reflect this change.

#### Item 4 - Subregulation 2.26A(1)

This item amends subregulation 2.26A(1) to include a reference to the new Skilled - New Zealand Citizen (Residence) visa class (Class DB). This will have the effect that regulation 2.26A will apply to applications for visas of that class, by prescribing how points are to be allocated on the points test contained in Schedule 6A to such applications, and by defining terms used in that Schedule.

#### Item 5 - Paragraph 2.26A(2)(a)

This item amends paragraph 2.26A(2)(a) to include a reference to the new visa Subclass 861 (Skilled - Onshore Independent New Zealand Citizen) in that provision. This will have the effect of prescribing the qualifications to be used in assessing an applicant's score on the points test, for the purposes of a decision whether to grant a Subclass 861 visa.

#### Item 6 - Paragraph 2.26A(2)(b)

This item amends paragraph 2.26A(2)(b) to include a reference to the new visa Subclass 862 (Skilled - Onshore Australian-sponsored New Zealand Citizen) in that provision. This will have the effect of prescribing the qualifications to be used in assessing an applicant's score on the points test, for the purposes of a decision whether to grant a Subclass 862 visa.

#### Item 7 - Regulation 2.27A, heading

This item substitutes a new heading to regulation 2.27A.

Regulation 2.27A allows certain qualifications of the primary applicant's spouse to be used when assessing the applicant's score on the points test. The regulation applies to points tested visa subclasses where there is a sponsor. On commencement of these Regulations, regulation 2.27A will apply to assessments against the criteria for visa Subclass 862 (Skilled - Onshore Australian-sponsored New Zealand Citizen). The heading of the regulation is therefore being amended to reflect this change.

#### Item 8 - Paragraph 2.27A(1)(a)

This item amends paragraph 2.27A(1)(a) by inserting a reference to persons applying for a Skilled - New Zealand Citizen (Residence) (Class DB) visa who are sponsored.

This will ensure that persons applying for this new class of visa (inserted by these Regulations) will be able to use regulation 2.27A in meeting the criteria for a Subclass 862 (Skilled - Onshore Australian-sponsored New Zealand Citizen) visa. Regulation 2.27A allows certain qualifications of the applicant's spouse to be considered when assessing the applicant's score on the points test.

#### Item 9 - Paragraph 2.27B(1)(c)

This item amends paragraph 2.27B(1)(c) to expand the operation of regulation 2.27B to applications for the Skilled - New Zealand Citizen (Residence) visa class (Class DB).

Regulation 2.27B applies to visa classes where the applicant is required to nominate their occupation and undergo skills assessment for that occupation, when making the application. It enables the Minister to invite the applicant to nominate a second occupation, where it appears on the basis of the person's educational qualifications and work history that it would be appropriate for the applicant to be assessed for a different occupation.

#### Item 10 - Schedule 1, paragraph 1114A(2)(a)

This item amends paragraph 1114A(2)(a).

Item 11 14A of Schedule 1 to the Regulations prescribes the visa application charge, application form, and other matters required for making a valid application for an Employer Nomination (Residence) (Class BW) visa.

Regulation 2.08CA (inserted by these Regulations - item 2) deems certain applicants for a Skilled -New Zealand Citizen (Residence) (Class DB) to have also made an application for a Employer Nomination (Residence) (Class BW) visa.

The amendment made by this item provides that no first instalment of the visa application charge is payable on the deemed application.

Item 11 - Schedule 1, after item 1128C

This item inserts item 1128D.

Item 1128D establishes the Skilled - New Zealand Citizen (Residence) visa class (Class DB).

This is a visa class available onshore for New Zealand citizens in Australia who wish to take out Australian permanent residence.

The new class contains three subclasses: Subclass 861 for independent (unsponsored) applicants, Subclass 862 for applicants sponsored by a family member who is an Australian citizen or permanent resident, or who meets the new definition of eligible New Zealand citizen (inserted by these Regulations - item 1), and Subclass 863 for applicants sponsored by a family member who resides in a designated regional area of Australia. Subclasses 861 and 862 are points tested, and for all three Subclasses, primary applicants must meet certain requirements relating to age, English language ability and employment skills.

Subitem 1128D(1) provides that the approved form for making an application for Class DB is form 47SK.

Subitem 1128D(2) provides that there is a first instalment visa application charge payable of \$1,595. No second instalment is payable.

Subitem 1128D(3) prescribes other requirements to be met when making an application. These are that:

- the application must be made in Australia, but not in immigration clearance;
- the applicant must be in Australia, but, not in immigration clearance, at time of application;
- the applicant seeking to satisfy primary criteria (the primary applicant) must be the holder of a Subclass 444 (Special Category) visa;
- an application by a person claiming to be the member of the family unit of another person who is an applicant for a Class DB visa may be made at the same time and place as, and combined with, the application by that other person; and
- the primary applicant's application must be accompanied by satisfactory evidence that his or her skills (or those of his or her spouse, in the case of a person seeking to satisfy the criteria for Subclass 862 or 863) have been assessed by a relevant assessing authority for the occupation nominated by the applicant.

Subitem 1128D(4) sets out the three Subclasses included in Class DB:

- Subclass 861 (Skilled - Onshore Independent New Zealand Citizen);
- Subclass 862 (Skilled - Onshore Australian-sponsored New Zealand Citizen); and



- Subclass 863 (Skilled - Onshore Regional-sponsored New Zealand Citizen).

#### Item 12 - Schedule 1, after item 1214A

This item inserts item 1214AB.

Item 1214AB establishes the New Zealand Citizen Family Relationship (Temporary) visa class (Class UP).

This is a temporary visa class available onshore and offshore for the family members of New Zealand citizens, who are not themselves New Zealand citizens. It is intended to provide long term temporary stay for such persons, or for persons who previously had this status and held a visa on this basis, provided they have not become part of a new family unit not headed by a New Zealand citizen.

The new class contains one subclass - Subclass 461 New Zealand Citizen Family Relationship (Temporary). It provides for travel to, and stay in, Australia for 5 years from date of grant. The holder may obtain further Subclass 461 visas for as long he or she remains a member of the family unit of a New Zealand citizen. Holders, and former holders of Subclass 461 visas may also obtain further Subclass 461 visas provided they do not become the member of the family unit of another person who is not a New Zealand citizen. Persons in this latter group must apply for another Subclass 461 visa within a specified time after the expiry of their last Subclass 461 visa.

Subitem 1214AB(1) provides that the approved form for making an application for Class UP is form 147.

Subitem 1214AB(2) provides that there is a first instalment visa application charge payable of \$150. No second instalment is payable.

Subitem 1214AB(3) prescribes other requirements to be met when making an application. These are that:

- the application may be made in or outside Australia (but not in immigration clearance);
- the applicant must be in Australia to make an application in Australia; and
- an application by a person claiming to be the member of the family unit of another person who is an applicant for a Class UP visa may be made at the same time and place as, and combined with, the application by that other person.

Subitem 1214AB(4) provides that the only subclass included in Class UP is Subclass 461 (New Zealand Citizen Family Relationship (Temporary)).

#### Item 13 - Schedule 2, after paragraph 1219(3)(b)

This item makes it a requirement, for making a valid application for a Subclass 444 (Special Category) visa, that the applicant is not already the holder of a permanent visa.

This amendment is made to ensure that New Zealand citizens who hold permanent visas do not make applications for Special Category visas simply by presenting a passenger card and New Zealand passport at immigration clearance.

The change is made because changes to the rules governing eligibility for social security benefits, Australian citizenship and the sponsorship of relatives for permanent visas, make it more likely

that, after the commencement of these Regulation, larger numbers of New Zealand citizens will obtain permanent visas than is currently the case.

New Zealand citizens who hold a permanent visa do not need to apply for a Special Category visa on arrival in Australia, as their permanent visa confers greater rights than a Special Category visa. Were this change not made, New Zealand citizens holding permanent visas would automatically make Special Category visa applications every time they enter Australia. Those applications would need to be individually decided by immigration clearance officers. The grant of a Special Category visa would have the effect of ceasing the permanent visa, under section 82 of the *Migration Act 1958*.

#### Item 14 - Schedule 2, clause 101.111, and the note

This item omits clause 101.111 and substitutes a new note for the existing note after that clause.

Subclass 10 1 provides for the permanent entry of children adopted by Australian citizens, Australia permanent residents, or New Zealand citizens (as defined in clause 101.111), where the adoption took place overseas before the adoptive parent became an Australian citizen or permanent resident or New Zealand citizen (as defined).

Clause 101.111 (repealed by this item) defines "New Zealand citizen" to mean an eligible New Zealand citizen, or a New Zealand citizen who intends to reside in Australia and who will, on entry, be the holder of a Subclass 444 (Special Category) visa. This second group is included in the definition in contemplation of the fact that the adoptive parent may be overseas at the time of application, so could not, at that time, meet the definition of "eligible New Zealand citizen" (one of the requirements for meeting this definition is that the person holds a Subclass 444 visa - which is not possible while the person is overseas).

On commencement of these Regulations, only Australian citizens, Australian permanent residents and those New Zealand citizens who come within the new definition of eligible New Zealand citizen in regulation 1.03 (see item 1), will be able to sponsor their adopted children for migration.

As the new definition of eligible New Zealand citizen will not be limited to persons in Australia but can include persons outside Australia, it will no longer be necessary to make special provision in Subclass 101 for New Zealand citizens outside Australia. The expression "New Zealand citizen" as it is used throughout Part 101 is therefore to be replaced with "eligible New Zealand citizen". The definition in clause 101.111 is therefore repealed.

The new note to be inserted after the heading to Division 101.1 repeats the substance of the current note after clause 101.111 and adds the note that there are no interpretation provisions specific to Part 101.

#### Item 15 - Schedule 2, paragraph 101.211 (1)(a)

This item omits the reference to "a New Zealand citizen" and substitutes a reference to "an eligible New Zealand citizen" (see item 14 above).

#### Item 16 - Schedule 2, subparagraph 101.211 (1)(c)(i)

This item omits "New Zealand citizen" and substitutes "eligible New Zealand citizen" (see item 14 above).

#### Item 17 - Schedule 2, subparagraph 101.211 (1)(c)(ii)

This item omits "a New Zealand citizen" and substitutes "an eligible New Zealand citizen" (see item 14 above).

Item 18 - Schedule 2, paragraph 101.212(b)

This item omits "a New Zealand citizen" and substitutes "an eligible New Zealand citizen" (see item 14 above).

Item 19 - Schedule 2, subparagraphs 101.212(1)(c)(i) and (ii)

This item omits "New Zealand citizen" and substitutes "eligible New Zealand citizen" (see item 14 above).

Item 20 - Schedule 2, paragraph 102.211(2)(b)

This item amends paragraph 102.211(2)(b).

Paragraph 102.211(2)(b) currently provides that an applicant for a Subclass 102 (Adoption) visa must have been adopted overseas by a person who was at the time of adoption an Australian citizen, Australian permanent resident, or New Zealand citizen who intends to be usually resident in Australia and who will, on entry, hold a Subclass 444 (Special Category) visa. At time of application, the adoptive parent must be an Australian citizen, Australian permanent resident, eligible New Zealand citizen, or, if the parent is a New Zealand citizen who is not in Australia at time of application, a New Zealand citizen who intends to be usually resident in Australia and who will, on entry, hold a Special Category visa (clause 102.212).

New Zealand citizens are described in this way (rather than as "eligible New Zealand citizens") in contemplation of the fact that the adoptive parent will be overseas at the time of adoption, and may also be overseas at time of application, so could not meet the definition of "eligible New Zealand citizen" (one of the current requirements for meeting this definition is that the person holds a Subclass 444 visa - which is not possible while the person is overseas).

On commencement of these Regulations, only Australian citizens, Australian permanent residents and those New Zealand citizens who come within the new definition of eligible New Zealand citizen in regulation 1.03 (see item 1), will be able to sponsor their adopted children for migration.

As the new definition of eligible New Zealand citizen will not be limited to persons in Australia but can include persons outside Australia, it will no longer be necessary to make special provision in Subclass 102 for New Zealand citizens outside Australia.

The reference in paragraph 102.211(2)(b)(i) to a New Zealand citizen who intends to reside in Australia is therefore replaced by a reference to an eligible New Zealand citizen.

Item 21 - Schedule 2, subparagraph 102.211(5)(b)(ii)

This item amends paragraph 102.211(5)(b).

That paragraph provides for third party Convention adoptions, whereby an Australian citizen, an Australian permanent resident or a New Zealand citizen coming within a specified group of New Zealand citizens, adopts a child under the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption in an overseas country while residing in a second overseas country.

The New Zealand citizens to whom paragraph 102.211(5)(b) applies are New Zealand citizens who are eligible New Zealand citizens, or New Zealand citizens who intend to be usually resident in Australia and will, on entry, hold a Subclass 444 (Special Category) visa.

New Zealand citizens are described in this way in contemplation of the fact that the adoptive parent may be overseas at the relevant time so could not meet the definition of "eligible New Zealand citizen" (one of the current requirements for meeting this definition is that the person holds a Subclass 444 visa - which is not possible while the person is overseas).

On commencement of these Regulations, only Australian citizens, Australian permanent residents and those New Zealand citizens who come within the new definition of eligible New Zealand citizen in regulation 1.03 (see item 1), will be able to sponsor their adopted children for migration.

As the new definition of eligible New Zealand citizen will not be limited to persons in Australia but can include persons outside Australia, it will no longer be necessary to make special provision in Subclass 102 for New Zealand citizens outside Australia.

Paragraph 102.211(5)(b)(ii) is therefore omitted, and a reference to an eligible New Zealand citizen inserted into subparagraph (i).

#### Item 22 - Schedule 2, paragraph 102.212(a)

This item amends paragraph 102.212(a).

That paragraph sets out who must sponsor the applicant. It currently provides that the applicant must be sponsored by an Australian citizen, Australian permanent resident, eligible New Zealand citizen, or a New Zealand citizen who intends to be usually resident in Australia and who will, on entry, hold a Subclass 444 (Special Category) visa. Paragraphs 102.212(b) and (c) provide that the sponsor must be either the applicant's adoptive parent, or a person who will be adopting the applicant.

The paragraph is to be amended to omit the reference to a New Zealand who intends to be usually resident in Australia and who will, on entry, hold a Subclass 444 visa. New Zealand citizens are described in this way in the current legislation in contemplation of the fact that the sponsor may be overseas at the relevant time, so could not meet the definition of "eligible New Zealand citizen" (one of the current requirements for meeting this definition is that the person holds a Subclass 444 visa - which is not possible while the person is overseas).

On commencement of these Regulations, only Australian citizens, Australian permanent residents and those New Zealand citizens who come within the new definition of eligible New Zealand citizen in regulation 1.03, will be able to sponsor their family members for migration.

As the new definition of eligible New Zealand citizen will not be limited to persons in Australia but can include persons outside Australia, it will no longer be necessary to make special provision in paragraph 102.212(a) for New Zealand citizens outside Australia.

#### Item 23 - Schedule 2, subclause 117.211(2)

This item substitutes a new subclause 117.211(2).

Clause 117.211 currently provides that an applicant for a Subclass 117 (Orphan Relative) visa must be the orphan relative of.

- an Australian citizen;

- an Australian permanent resident;
- an eligible New Zealand citizen; or
- a New Zealand citizen who intends to reside in Australia and who will, on entry, be the holder of a Subclass 444 (Special Category) visa.

This last group is intended to cover those persons who would be eligible New Zealand citizens (as defined in regulation 1.03) but for the fact that they are overseas (and therefore are unable to meet the requirement for being an eligible New Zealand citizen that they hold a Subclass 444 visa).

On commencement of these Regulations, only Australian citizens, Australian permanent residents and those New Zealand citizens who come within the new definition of eligible New Zealand citizen in regulation 1.03 (see item 1), will be able to sponsor their orphan relatives for migration.

As the new definition of eligible New Zealand citizen will not be limited to persons in Australia but can include persons outside Australia, it will no longer be necessary to make special provision in subclause 117.211(2) for New Zealand citizens outside Australia. This item therefore repeals the reference in that subclause to a New Zealand citizen who intends to reside in Australia and who, on entry, will be the holder of a Subclass 444 visa.

Item 24 - Schedule 2, subparagraph 117.212(b)(ii)

This item substitutes a new subparagraph 117.212(b)(ii). That subparagraph allows for the applicant to be sponsored by his or her Australian relative's spouse, where the Australian relative is under 18, provided the spouse is:

- an Australian citizen;
- an Australian permanent resident;
- an eligible New Zealand citizen; or
- a New Zealand citizen who intends to reside in Australia and who will, on entry, be the holder of a Subclass 444 (Special Category) visa.

This last group is intended to cover those persons who would be eligible New Zealand citizens (as defined in regulation 1.03) but for the fact that they are overseas (and therefore are unable to meet the requirement for being an eligible New Zealand citizen that they hold a Subclass 444 visa).

Once these Regulations commence, the Australian relative's spouse may only sponsor the applicant if the spouse is an Australian citizen or an Australian permanent resident or a New Zealand citizen who comes within the new definition of eligible New Zealand citizen in regulation 1.03.

As the new definition of eligible New Zealand citizen will not be limited to persons in Australia but can include persons outside Australia, it will no longer be necessary to make special provision in subparagraph 117.212(b)(ii) for New Zealand citizens outside Australia. This item therefore repeals the reference in that subparagraph to a New Zealand citizen who intends to reside in Australia and who, on entry, will be the holder of a Subclass 444 visa.

Item 25 - Schedule 2, after clause 138.216

This item adds new clause 138.217.

The new clause provides for primary applicants to meet time of application criteria relating to age and skills if their spouse meets those requirements, where it appears that the primary applicant will achieve the qualifying score on the points test using regulation 2.27A to have considered, in calculating the score, certain qualifications of the applicant's spouse.

This corrects an anomaly in the current provisions of Part 138 whereby the primary applicant is still required to meet these criteria despite regulation 2.27A being used to consider, in assessing the applicant's score on the points test, age and skill qualifications of the applicant's spouse.

#### Item 26 - Schedule 2, clause 138.228

This item corrects an anomaly in clause 138.228. Under the current provisions in Part 138, the primary applicant is still required to meet time of decision criteria relating to skills assessment and language ability, despite regulation 2.27A being used to consider, in assessing the applicant's score on the points test, language abilities and skill qualifications of the applicant's spouse.

The amendments ensures that where regulation 2.27A is used, only the applicant's spouse has to satisfy these criteria.

#### Item 27 - Schedule 2, paragraph 139.226(b)

This item makes a technical amendment to correct an error.

#### Item 28 - Schedule 2, paragraphs 309.211(2)(c) and (d)

This item omits paragraphs 309.211(2)(c) and (d) and substitutes new paragraph (c).

Subclause 309.211 (1) currently provides for the grant of a Subclass 309 (Spouse (Provisional)) visa to an applicant who is the spouse of.

- an Australian citizen;
- an Australian permanent resident;
- an eligible New Zealand citizen; or
- a New Zealand citizen who intends to reside in Australia and who will, on entry, be the holder of a Subclass 444 (Special Category) visa.

This last group is intended to cover those persons who would be eligible New Zealand citizens (as defined in regulation 1.03) but for the fact that they are overseas (and therefore are unable to meet the requirement for being an eligible New Zealand citizen that they hold a Subclass 444 visa).

Once these Regulations commence, only spouses of Australian citizens, Australian permanent residents, or New Zealand citizens who come within the new definition of eligible New Zealand citizen in regulation 1.03 (or applicants intending to marry such a person) will be eligible for a Subclass 309 visas.

As the new definition of eligible New Zealand citizen will not be limited to persons in Australia but can include persons outside Australia, it will no longer be necessary to make special provision in subclause 309.211(2) for New Zealand citizens outside Australia. This item therefore omits the

reference in that subclause to a New Zealand citizen who intends to reside in Australia and who, on entry, will be the holder of a Subclass 444 visa.

Item 29 - Schedule 2, subparagraphs 309.211(3)(a)(iii) and (iv)

This item omits subparagraphs 309.211(3)(a)(iii) and (iv) and substitutes new subparagraph (iii).

Subclause 309.211(3) currently provides for the grant of a Subclass 309 (Spouse (Provisional)) visa to an applicant who intends to marry:

- an Australian citizen;
- an Australian permanent resident;
- an eligible New Zealand citizen; or
- a New Zealand citizen who intends to reside in Australia and who will, on entry, be the holder of a Subclass 444 (Special Category) visa.

This last group is intended to cover those persons who would be eligible New Zealand citizens (as defined in regulation 1.03) but for the fact that they are overseas (and therefore are unable to meet the requirement for being an eligible New Zealand citizen that they hold a Subclass 444 visa).

Once these Regulations commence, only persons who intend to marry an Australian citizen, Australian permanent resident, or New Zealand citizen who comes within the new definition of eligible New Zealand citizen in regulation 1.03 (or applicants intending to marry such a person) will be eligible for a Subclass 309 visas.

As the new definition of eligible New Zealand citizen will not be limited to persons in Australia but can include persons outside Australia, it will no longer be necessary to make special provision in paragraph 309.211(3)(a) for New Zealand citizens outside Australia. This item therefore repeals the reference in that subclause to a New Zealand citizen who intends to reside in Australia and who, on entry, will be the holder of a Subclass 444 visa.

Item 30 - Schedule 2, after Part 459

This item inserts new Part 461.

New Part 461 establishes new Subclass 461 (New Zealand Citizen Family Relationship (Temporary)).

This is a temporary visa subclass available onshore and offshore for the family members of New Zealand citizens, who are not themselves New Zealand citizens. It is intended to provide long term temporary stay for such persons, or for persons who previously had this status and held a visa on this basis, provided they have not become part of a new family unit not headed by a New Zealand citizen.

A Subclass 461 visa provides for travel to, and stay in, Australia for 5 years from date of grant. The holder may obtain further Subclass 461 visas for as long as he or she remains a member of the family unit of a New Zealand citizen. Holders, and former holders of Subclass 461 visas, who are no longer members of a New Zealand citizen's family, may also obtain further Subclass 461 visas provided they have not become part of another family unit. Persons in this latter group must apply for another Subclass 461 visa within a specified time after the expiry of their last Subclass 461 visa.

All applicants must satisfy the primary criteria.

To be eligible for the visa, the applicant must not be a New Zealand citizen and must be a member of the family unit of a NZ citizen who is in Australia as the holder of a Subclass 444 (Special Category) visa, or who will accompany the applicant to Australia.

A person who is no longer the member of the family unit of a NZ citizen, who has not become the member of the family unit of another person who is not, himself or herself, a NZ citizen, is also eligible for the visa. Such a person must hold a Subclass 461 visa at time of applying for the further visa, or, if the person does not hold a visa, their last visa must have been a Subclass 461 visa.

Persons applying in Australia must apply while still the holder of a substantive visa, or within 1 year of ceasing to hold a substantive visa.

A person applying outside Australia, who is no longer the member of a New Zealand citizen's family unit, must have been in Australia as a Subclass 461 holder for at least 2 out of the 5 years immediately before making the application. A person who cannot meet this requirement may still be eligible if they have substantial business, cultural, employment or personal ties with Australia, provided they can show compelling reasons for any absence from Australia of more than 5 years.

Applicants must also meet public interest criteria relating to health and character.

Applicants who apply in Australia must be in Australia at time of grant. Applicants who apply outside Australia must be outside Australia at time of grant.

The visa is valid for 5 years from date of grant, and allows the holder to travel to, and remain in Australia for that period.

Conditions 8303 (holder must not become involved in disruptive activities) and 8501 (holder must maintain adequate arrangements for health insurance while in Australia) may be imposed.

The visa is evidenced by a visa label affixed to a valid passport.

#### Item 31 - Schedule 2, paragraph 773.213(2)(zn)

This item amends paragraph 773.213(2)(zn) and adds new paragraph 773.213(2)(zo).

Subsubparagraph 773.213(1)(d)(i)(B) provides for the grant of a Subclause 773 (Border) visa to a person who is the dependent child of a person holding a visa of a class listed in subclause 773.213(2).

Item 30 amends subclause 773.213(2) to add the new Skilled - New Zealand Citizen (Residence) (Class DB) visa class to the list of classes in that provision.

#### Item 32 - Schedule 2, after paragraph 773.213(3)(i)

This item amends paragraph 773.213(3)(i) and adds new paragraph 773.213(3)(ia).

Subsubparagraph 773.213(1)(d)(i)(C) provides for the grant of a Subclause 773 (Border) visa to a person who is the dependent child of a person holding a visa of a class listed in subclause 773.213(3). Subsubparagraph 773.213(1)(e)(i)(A) provides for the grant of a Subclass 773 visa to a person who immediately before last leaving Australia held a visa of a class listed in subclause 773.213(3).



Item 31 amends subclause 773.213(3) to add the new New Zealand Citizen Family Relationship (Temporary) (Class UP) visa class to the list of classes in that provision.

Item 33 - Schedule 2, paragraph 857.213(b)

This item amends the time of application primary criteria for a Subclass 857 (Regional Sponsored Migration Scheme) visa.

It provides for particular time of application requirements to apply to applicants taken to have made an application under new regulation 2.08CA (inserted by these Regulations see item 2). Regulation 2.08CA provides that certain applicants for a Skilled - New Zealand Citizen (Residence) (Class DB) visa are taken to have made an application for a Employer Nomination (Residence) (Class BW) visa.

The particular requirements are:

- the applicant had not have turned 45 at the time of the application for the Skilled New Zealand Citizen (Residence) (Class DB) visa;
- the applicant has vocational English;
- the applicant has a diploma or higher qualification that is, unless the appointment is exceptional, relevant to that appointment; and
- the applicant is, or is eligible to become, the holder of a licensed, registered or a member of a professional body, if it is mandatory in Australia, in respect of work of the kind to be performed under the appointment, that a person be the holder of such a licence, registration or membership.

Item 34 - Schedule 2, after Part 859

This item inserts three new visa subclasses, as follows:

Subclass 861 (Skilled - Onshore Independent New Zealand Citizen)

Subclass 862 (Skilled - Onshore Australian-sponsored New Zealand Citizen)

Subclass 863 (Skilled - Onshore Regional-sponsored New Zealand Citizen)

These visa subclasses are available onshore for New Zealand citizens in Australia who wish to take out Australian permanent residence.

*Subclass 861 (Skilled - Onshore Independent New Zealand Citizen)*

This subclass is for independent (unsponsored) applicants.

Primary applicants must meet the following time of application criteria:

- be aged less than 45 years;
- have nominated a skilled occupation in the visa application;
- have been employed in a skilled occupation for either at least 12 months in the 18 months immediately before making the application, or for at least 24 months in the 36 months immediately before the application, depending on the skill level of the occupation (this

requirement does not apply if the applicant has completed a degree, diploma or trade qualification at an Australian educational institution as the result of at least 1 year's fulltime study, in the 6 months before making the application); and

- be in Australia as the holder of a Subclass 444 (Special Category) visa.

They must also meet the following time of decision criteria:

- if the applicant has been invited to submit an assessment of their skills in another occupation under regulation 2.27B, the applicant must provide that assessment;
- the applicant's skills must have been assessed by the relevant assessing authority as suitable for the nominated skilled occupation;
- the applicant must achieve the qualifying score on the points test in Schedule 6A according to the allocation of points in regulation 2.26A;
- the applicant must have vocational English;
- there must be no evidence that the information given or used in the assessment of the applicant's skills in the nominated skilled occupation is false or misleading;
- the applicant (and members of his or her family in certain cases) must satisfy specified public interest criteria relating to health and character;
- if requested, an assurance of support has been provided and accepted by the Minister;
- approval of the application would not exceed any cap on the number of Subclass 861 visas that may be granted in a financial year.

Secondary applicants for a Subclass 861 visa must, at time of application, be the member of the family unit of the primary applicant, and have made a combined application with that person. They must continue to be a member of the primary applicant's family unit at time of decision.

In addition, secondary applicants must meet certain public interest criteria relating to health and character.

All applicants must be in Australia when the visa is granted.

This is a permanent visa, and allows the holder to travel to Australia for 5 years from date of grant.

There are no conditions attaching to Subclass 861 visas.

The visa is evidenced by a visa label affixed to a valid passport.

#### *Subclass 862 (Skilled - Onshore Australian-sponsored New Zealand Citizen)*

Subclass 862 is for applicants sponsored by a family member who is an Australian citizen or permanent resident, or who meets the new definition of eligible New Zealand citizen (inserted by these Regulations - item 1). They must achieve the qualifying score on the points test, which takes into account the applicant's skills, language ability, age, and employment experience.

Primary applicants must meet the following time of application criteria:

- the applicant be sponsored by an Australian citizen, Australian permanent resident, or eligible New Zealand citizen, to whom the applicant has the following relationship:
  - parent;
  - child, adoptive child or step-child (but not where the applicant is the sponsor's dependent child);
  - brother or sister, adoptive brother or sister, or step-brother or step-sister; or
  - nephew or niece, adoptive nephew or niece, or step-nephew or step-niece.
- an assurance of support has been given, and has been accepted by the Minister;
- the applicant must be aged less than 45 years;
- have nominated a skilled occupation in the visa application;
- have been employed in a skilled occupation for either at least 12 months in the 18 months immediately before making the application, or for at least 24 months in the 36 months immediately before the application, depending on the skill level of the occupation (this requirement does not apply if the applicant has completed a degree, diploma or trade qualification at an Australian educational institution as the result of at least 1 year's fulltime study, in the 6 months before making the application);
- if the applicant does not satisfy the time of application criteria relating to age and skills, and it appears that certain qualifications of the applicant's spouse will be used in assessing the applicant's score on the points test, using regulation 2.27A, then the applicant's spouse must satisfy those time of application criteria (in which case the primary applicant is not required to satisfy those criteria); and
- be in Australia as the holder of a Subclass 444 (Special Category) visa.

Primary applicants must also meet the following time of decision criteria:

- the sponsorship has been approved by the Minister and is still in force;
- the assurance of support continues to be acceptable to the Minister;
- if the applicant has been invited to submit an assessment of their skills in another occupation under regulation 2.27B, the applicant must provide that assessment;
- the applicant's skills must have been assessed by the relevant assessing authority as suitable for the nominated skilled occupation;
- the applicant must achieve the qualifying score on the points test in Schedule 6A according to the allocation of points in regulation 2.26A;
- the applicant must have vocational English;
- there must be no evidence that the information given or used in the assessment of the applicant's skills in the nominated skilled occupation is false or misleading;
- if attributes of the primary applicant's spouse are to be used in calculating the applicant's score on the points test (pursuant to regulation 2.27A), the applicant's spouse satisfies time of

decision criteria relating to skills and English language ability (in which case the applicant is not required to satisfy those criteria);

- the applicant (and members of his or her family in certain cases) must satisfy specified public interest criteria relating to health and character; and
- approval of the application would not exceed any cap on the number of Subclass 862 visas that may be granted in a financial year.

Secondary applicants for a Subclass 862 visa must, at time of application, be the member of the family unit of the primary applicant, and have made a combined application with that person. They must also be included in the sponsorship of the primary applicant, and in the primary applicant's assurance of support or another assurance of support acceptable to the Minister.

At time of decision, secondary applicants must continue to be a member of the primary applicant's family unit. The sponsorship, and assurance of support, must be approved and still in force. They must also meet specified public interest criteria relating to health and character.

All applicants must be in Australia when the visa is granted.

This is a permanent visa, and allows the holder to travel to Australia for 5 years from date of grant.

There are no conditions attaching to Subclass 862 visas.

The visa is evidenced by a visa label affixed to a valid passport.

#### *Subclass 863 (Skilled - Onshore Regional-sponsored New Zealand Citizen)*

Subclass 863 is for applicants sponsored by a family member who resides in a designated regional area of Australia. The family member must be an Australian citizen, Australian permanent resident, or eligible New Zealand citizen. Primary applicants must meet certain requirements relating to age, English language ability and employment skills.

The following time of application criteria apply to primary applicants:

- the applicant must be sponsored by an Australian citizen, Australian permanent resident, or eligible New Zealand citizen, to whom the applicant has the following relationship:
    - parent;
    - child, adoptive child or step-child (but not where the applicant is the sponsor's dependent child);
    - brother or sister, adoptive brother or sister, or step-brother or step-sister;
    - nephew or niece, adoptive nephew or niece, or step-nephew or step-niece;
- or
- grandchild or first cousin.
- the sponsor must reside in an area specified by Gazette Notice under item 6701 in Schedule 6 as a designated area, and have been resident in a designated area for the 12 months immediately before the sponsorship is given to Immigration;

- an assurance of support has been given, and has been accepted by the Minister;
- the applicant must be aged less than 45 years;
- the applicant has nominated a skilled occupation in the visa application;
- the applicant has been employed in a skilled occupation for either at least 12 months in the 18 months immediately before making the application, or for at least 24 months in the 36 months immediately before the application, depending on the skill level of the occupation, (this requirement does not apply if the applicant has completed a degree, diploma or trade qualification at an Australian educational institution as the result of at least 1 year's fulltime study, in the 6 months before making the application);
- if the applicant's spouse is also an applicant for a Subclass 863 visa, and he or she meets certain criteria relating to age and skills, the primary applicant is not required to meet those criteria;
- the applicant must be in Australia as the holder of a Subclass 444 (Special Category) visa.

Primary applicants must also meet the following time of decision criteria:

- the sponsorship has been approved by the Minister and is still in force;
- the sponsor still resides in a designated area;
- the assurance of support continues to be acceptable to the Minister;
- if the applicant has been invited to submit an assessment of their skills in another occupation under regulation 2.27B, the applicant must provide that assessment;
- the applicant's skills must have been assessed by the relevant assessing authority as suitable for the nominated skilled occupation;
- the applicant must have vocational English, but a specified lesser proficiency in English is acceptable if particular English language training is available where the sponsor lives and the applicant has paid a fee for such training;
- there must be no evidence that the information given or used in the assessment of the applicant's skills in the nominated skilled occupation is false or misleading;
- if the applicant was not required to meet the time of application criteria relating to age and skills because the applicant's spouse was able to meet those criteria, the applicant's spouse must continue to meet those criteria and must also meet the time of decision criteria relating to skills assessment and English language ability;
- the applicant (and members of his or her family in certain cases) must satisfy specified public interest criteria relating to health and character;
- approval of the application would not exceed any cap on the number of Subclass 863 visas that may be granted in a financial year.

Secondary applicants for a Subclass 863 visa must, at time of application, be the member of the family unit of the primary applicant, and have made a combined application with that person. They must also be included in the sponsorship of the primary applicant, and in the primary applicant's assurance of support or another assurance of support acceptable to the Minister.

At time of decision, secondary applicants must continue to be a member of the primary applicant's family unit. The sponsorship, and assurance of support, must be approved and still in force. They must also meet specified public interest criteria relating to health and character.

All applicants must be in Australia when the visa is granted.

This is a permanent visa, and allows the holder to travel to Australia for 5 years from date of grant.

There are no conditions attaching to Subclass 863 visas.

The visa is evidenced by a visa label. affixed to a valid passport.

#### Schedule 2, Amendments commencing on 1 March 2001

##### Item 1 - Regulation 1.03, after definition of **step-child**

This item inserts a definition of "*student visa*" after the definition of "**step-child**" in regulation 1.03. "**Student visa**" means a Student (Temporary) (Class TU) visa. This visa class is located in item 1222 of Schedule 1 to the Regulations.

The new definition is required because of a cross reference to "student visa" in the definition of "**visa monitoring purpose**" in the Act. The definition of "**visa monitoring purpose**" is being inserted into the Act by virtue of new section 268AA in item 2 of Schedule 2 to the *Migration Legislation Amendment (Overseas Students) Act 2000*. Schedule 2 to that Act is intended to commence on 1 March 2001.

Under the *Migration Legislation Amendment (Overseas Students) Act 2000*, "**visa monitoring purpose**" means a purpose of determining whether the conditions of a particular student visa or visas, or of student visas generally, are being or have been complied with.

Certain notices relating to the monitoring of compliance with student visa conditions can only be issued under the Act where they are relevant to a visa monitoring purpose. In addition, under new section 268CA of the Act, an authorised officer may in certain circumstances enter certain premises (in relation to an education provider) for a visa monitoring purpose.

##### Item 2 - Schedule 4, after paragraph 4013(2)(c)

The *Migration Legislation Amendment (Overseas Students) Act 2000* inserted new paragraph 116(1)(fa) into the Act. New paragraph 116(1)(fa) commenced on 21 December 2000.

Section 116 of the Act sets out various visa cancellation powers. New paragraph 116(1)(fa) provides that, subject to subsections (2) and (3), the Minister may cancel a visa if he or she is satisfied that - in the case of a student visa:

- its holder is not, or is likely not to be, a genuine student; or
- its holder has engaged, is engaging, or is likely to engage, while in Australia, in conduct (including omissions) not contemplated by the visa.

Clause 4013 in Schedule 4 to the Regulations is a public interest criterion which must be satisfied by an applicant in relation to most temporary visas.

The amendment to subclause 4013(2) refers to new paragraph 116(1)(fa) of the Act. The result of this is that a person will be affected by a risk factor under subclause 4013(2) if they held a

student visa and the Minister was satisfied that a ground under new paragraph 116(1)(fa) applied to them.

If a person is affected by a risk factor under subclause 4013(2), that person will not satisfy public interest criterion 4013 unless:

- their visa application is made more than 3 years after the cancellation of their student visa (see paragraph 4013(1)(a)); or
- the Minister is satisfied as to certain circumstances that justify the granting of the visa within 3 years after the cancellation or determination (see paragraph 4013(1)(b)).

The 3 year period mentioned above is known as an "exclusion period". Exclusion periods are intended to:

- demonstrate the seriousness with which breaches of migration or other Australian laws are viewed;
- deter people from breaching migration law; and 0. maintain the integrity of migration policies.