

Migration Amendment Regulations 2004 (No. 6) 2004 No. 269

EXPLANATORY STATEMENT

STATUTORY RULES 2004 NO. 269

Issued by the Minister for Immigration and Multicultural and Indigenous Affairs

Migration Act 1958

Migration Amendment Regulations 2004 (No. 6)

Subsection 504(1) of the *Migration Act 1958* (the Act) provides in part 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.

In addition, regulations may be made pursuant to the provisions listed in Attachment A.

The purpose of the Regulations is to amend the *Migration Regulations 1994* (the Principal Regulations) to introduce new visa arrangements for certain holders and former holders of temporary protection visas and temporary humanitarian visas.

The Regulations implement the measures announced by the Minister for Immigration and Multicultural and Indigenous Affairs on 13 July 2004 to allow temporary protection visa holders to have the opportunity to apply for mainstream visas to enable them to remain in Australia, without needing to leave the country to lodge their applications. In addition, the Regulations implement the Minister's announcement of a new Return Pending visa, which would allow people, who it has been determined no longer need protection, 18 months in which to make arrangements to depart Australia.

In particular, the Regulations effect changes to the Principal Regulations to:

- introduce a new temporary visa, the Return Pending visa, to allow a further stay in Australia of up to 18 months for certain holders and former holders of temporary protection visas and temporary humanitarian visas;
- enable certain holders and former holders of temporary protection and temporary humanitarian visas to apply onshore for a specified range of mainstream, non-humanitarian temporary and permanent substantive visas;
- modify some of the criteria to be met by these persons when applying for a specified visa, including the introduction of an option of sponsorship for applicants for a student visa; and
- allow a wider range of persons to access a Subclass 580 Student Guardian visa onshore.

It is important to note that, under the Regulations, eligibility for the Return Pending visa is be extended to current and former temporary protection visa and temporary humanitarian visa holders, as well as to those persons who are granted a temporary protection visa or a temporary humanitarian visa after the proposed amendments would have commenced. On the other hand, other amendments to allow access to mainstream, non-humanitarian onshore visas only apply to current and former temporary protection visa and temporary humanitarian visa holders who are in Australia when the Regulations commence.

Details of the Regulations are set out in Attachment B.

The Regulations commence on 27 August 2004.

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ATTACHMENT A

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.

In addition, the following provisions may apply:

- section 31 of the Act, which deals with classes of visa. In particular:
 - subsection 31(1) of the Act provides that there are to be prescribed 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 a visa is a visa of a particular class if the Act or the regulations specify that it is a visa of that class;
- 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 the regulations may provide that visas, or visas of a specified class, are subject to specified conditions;
- subsection 41(2) of the Act, which provides that, without limiting subsection 41(1), the regulations may provide that a visa, or visas of a specified class, are subject to:
 - a condition that, despite anything else in the Act, the holder of the visa will not, after entering Australia, be entitled to be granted a substantive visa (other than a protection visa, or a temporary visa of a specified kind) while he or she remains in Australia; or
 - a condition imposing restrictions about the work that may be done in Australia by the holder;
- section 45 of the Act, which provides that, subject to the Act and the regulations, a non-citizen who wants a visa must apply for a visa of a particular class;
- subsection 45B(1) of the Act, which provides that the amount of visa application charge is the amount prescribed in relation to the application, not exceeding the visa application charge limit;
- subsection 45B(2) of the Act, which provides that the regulations may prescribe that the amount of visa application charge in relation to an application may be nil;
- section 46 of the Act, which provides when an application for a visa is a valid application, and in particular:
 - paragraph 46(1)(b) of the Act, which provides that, subject to subsections 46(1A) and 46(2) of the Act, an application for a visa is valid if it satisfies the requirements and criteria prescribed under section 46;

- paragraph 46(1)(d) of the Act, which provides that, among other things, an application for a visa is valid if it is not prevented by section 48 of the Act (visa refused or cancelled earlier);
- subsection 46(1A) of the Act, which provides that, subject to subsection 46(2) of the Act, an application for a visa by an applicant in the migration zone is invalid if the applicant, since last entering Australia, has held a visa subject to a condition described at paragraph 41(2)(a) of the Act (holder not entitled to be granted a further substantive visa, other than a protection visa or a temporary visa of a specified kind, while remaining in Australia), if the condition has not been waived by the Minister and the application is not for a permitted kind of visa;
- subsection 46(2) of the Act, which provides that an application for a visa is valid if it is an application for a visa of a class prescribed for the purposes of this subsection, and under the regulations, the application is taken to have been validly made;
- subsection 46(3) of the Act, which 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;
- paragraph 46(4)(a) of the Act, which provides that, without limiting subsection 46(3), the regulations may also prescribe the circumstances that must exist for an application for a visa of a specified class to be a valid application;
- paragraph 46(4)(b) of the Act, which provides that, without limiting subsection 46(3), the regulations may also prescribe how an application for a visa of a specified class must be made;
- paragraph 46(4)(c) of the Act, which provides that, without limiting subsection 46(3), the regulations may also prescribe where an application for a visa of a specified class must be made;
- subsection 48(1) of the Act, which provides that a non-citizen in the migration zone who does not hold a substantive visa and either since last entering the migration zone has had an application for a visa refused (other than a bridging visa and other than a refusal under sections 501, 501A or 501B of the Act) or had a visa cancelled under section 109, 116, 134, 137J or 137Q of the Act, may, subject to the regulations, apply for a visa of a class prescribed for the purposes of section 48 but not for a visa of any other class;
- subsection 68(2) of the Act, which provides that a visa may provide that it comes into effect at the beginning of a day, being a day after its grant, that is specified in the visa, or when an event, specified in the visa, happens;
- section 70 of the Act, which provides that if a non-citizen is granted a visa, an officer is to give the non-citizen evidence of the visa, subject to the regulations;
- section 71 of the Act, which provides ways of giving evidence, and in particular:
 - subsection 71(1) of the Act, which provides that evidence of a visa is to be given in a way prescribed for giving the evidence;
 - subsection 71(2) of the Act, which provides that the regulations may provide that the way in which evidence of a visa or a visa of a class is to be given is to depend on the circumstances in which it is given;
 - subsection 71(3) of the Act, which provides that if a regulation provides that evidence of a non-citizen's visa may be given by endorsing a valid passport or other valid travel document issued to the non-citizen or another non-citizen associated with him or her, the Minister may direct that a specified document is not to be taken to be a passport or travel document for the purposes of the regulation;

- section 140A of the Act, which provides that Division 3A of Part 2 of the Act (relating to sponsorship) applies to visas of a prescribed kind;
- section 140B of the Act, which provides that the regulations may provide that sponsorship by an approved sponsor is a criterion for a visa of a prescribed kind (however described), and that this criterion is in addition to any other criteria for the visa that may be prescribed or set out under any other provision of the Act, or any other Act;
- section 140C of the Act, which provides for sponsorship as a criterion for a valid visa application and in particular:
 - subsection 140C(1) of the Act, which provides that the regulations may provide that it is a criterion for a valid application for a visa of a prescribed kind (however described) that the applicant is sponsored by an approved sponsor;
 - subsection 140C(2) of the Act, which provides that the regulations may provide that it is a criterion for a valid application for a prescribed kind of visa that the visa applicant's proposed sponsor has applied to be an approved sponsor at, or before, the time the visa application is made;
 - subsection 140C(3) of the Act, which provides that a prescribed criterion under subsection (1) or (2) is in addition to any other criteria for a valid application for the visa that may be prescribed under any other provision of the Act or any other Act, or are set out in the Act or any other Act;
- section 140D of the Act, which provides for who is an approved sponsor;
- section 140E of the Act, which provides that the Minister must approve a person as a sponsor if prescribed criteria are satisfied and that different criteria may be prescribed for different kinds of visa (however described);
- section 140F of the Act, which provides that the regulations may establish a process for the Minister to approve a person as a sponsor and that different processes may be prescribed for different kinds of visa (however described).
- section 140G of the Act, which provides that an approval as a sponsor may be on terms specified in the approval, the terms must be of a kind prescribed by the regulations, and that different kinds of terms may be prescribed for different kinds of visa (however described);
- subsection 140H(1) of the Act, which provides that the regulations may require an applicant for approval as a sponsor of a person for a visa to make prescribed undertakings (such as to pay debts to the Commonwealth incurred by the sponsored visa applicant);
- subsection 140H(4) of the Act, which provides that different undertakings may be prescribed for different kinds of visa (however described);
- subsection 140Q(1) of the Act, which provides that the circumstances in which, and for how long, an undertaking arising out of the sponsorship of a particular temporary visa holder remains enforceable against the sponsor concerned may be prescribed, provided that the visa holder ceases to hold the visa for which he or she was sponsored or the sponsor ceases to be an approved sponsor of the visa holder for the visa (whether because the approval is cancelled or for any other reason);
- subsection 140Q(2) of the Act, which provides that different circumstances and periods may be prescribed for different kinds of temporary visa (however described);

- subsection 140V(1) of the Act, which provides that the Minister may disclose to an approved sponsor or former approved sponsor personal information of a prescribed kind about a visa holder or former visa holder sponsored;
- subsection 140V(2) of the Act, which provides that the circumstances in which the Minister may disclose the personal information mentioned in subsection 140V(1) may be prescribed;
- subsection 140V(3) of the Act, which provides that the circumstances in which the approved sponsor, or former approved sponsor, may use or disclose personal information disclosed under subsection 140V(1) of the Act may be prescribed;
- paragraph 504(1)(e) of the Act, which provides that regulations may make provision for and in relation to the giving of documents to, the lodging of documents with, or the services of documents on the Minister, the Secretary or any other person or body, for the purposes of the Act;
- subsection 504(2) of the Act, which provides that section 49A of the *Acts Interpretation Act 1901* does not prevent, and has not prevented, regulations whose operation depends on a country or other matter being specified or certified by the Minister in a notice published in the *Gazette* after the taking effect of the regulations;
- section 505 of the Act, which provides that, to avoid doubt, regulations for the purpose of prescribing a criterion for visas of a class may provide that the Minister, when required to decide whether an applicant for a visa of the class satisfies the criterion:
 - is to get a specified person or organisation to give an opinion on or make an assessment, finding or decision about a specified matter; and
 - is to have regard to that opinion, assessment, finding or decision, or take that opinion, assessment, finding or decision to be correct;

for the purpose of deciding whether the applicant satisfies the criterion.

ATTACHMENT B

Details of the *Migration Amendment Regulations 2004 (No. 6)*

Regulation 1 - Name of Regulations

This regulation provides that these Regulations are the *Migration Amendment Regulations 2004 (No. 6)*.

Regulation 2 - Commencement

This regulation provides that these Regulations commence on 27 August 2004.

Regulation 3 - Amendment of *Migration Regulations 1994*

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

Regulation 4 - Transitional

This regulation provides that all the amendments made to the Principal Regulations by these Regulations apply to an application for a visa made on or after 27 August 2004.

Schedule 1 - Amendments

Item [1] - Regulation 1.03, after definition of *approved professional development sponsor*

This item inserts a new definition, *approved special student sponsor*, in regulation 1.03 of Part 1 of the Principal Regulations.

The term, *approved special student sponsor*, refers to a person or an organisation that has been approved as a sponsor under the new Division 1.4D - Special student sponsorship, inserted in the Principal Regulations by item [4] of these Regulations.

Item [2] - Regulation 1.03, after definition of *permanent humanitarian visa*

This item inserts a new definition, *person designated under regulation 2.07AO*, in regulation 1.03 of Part 1 of the Principal Regulations.

The term, *person designated under regulation 2.07AO*, refers to a person who meets the requirements set out in new subregulation 2.07AO(2), inserted in the Principal Regulations by item [7] of these Regulations.

The main characteristics of a *person designated under regulation 2.07AO* are that the person must be in Australia on the day these Regulations commence and must hold, or have held:

- a Subclass 447 (Secondary Movement Offshore Entry (Temporary)) visa; or
- a Subclass 451 (Secondary Movement Relocation (Temporary)) visa; or
- a Subclass 785 (Temporary Protection) visa.

The term is used in amendments to the Principal Regulations made by these Regulations, to enable certain persons within the designated group to apply for visas of specified subclasses and to modify some of the criteria in respect of these applicants.

Item [3] - After subregulation 1.20(4)

This item inserts a new subregulation 1.20(5) in Part 1 of the Principal Regulations. New subregulation 1.20(5) provides that regulation 1.20 (concerning the obligations of a sponsor of a visa applicant) does not apply to a sponsorship for:

- a Subclass 571 (Schools Sector) visa; or
- a Subclass 572 (Vocational Education and Training Sector) visa; or
- a Subclass 573 (Higher Education Sector) visa; or
- a Subclass 574 (Postgraduate Research Sector) visa;

if the applicant for the visa is a *person designated under regulation 2.07AO* or a member of the family unit of a *person designated under regulation 2.07AO*.

The purpose of new subregulation 1.20(5) is to exempt sponsors of the specified applicants from the operation of regulation 1.20. These sponsors must be *approved special student sponsors*. Their sponsorship obligations are set out in the new Division 1.4D - Special student sponsorship, inserted in the Principal Regulations by item [4] of these Regulations, and not in regulation 1.20.

Item [4] - After Division 1.4C

Division 1.4D - Special student sponsorship

This item inserts a new Division 1.4D in Part 1 of the Principal Regulations.

New Division 1.4D prescribes matters relating to sponsorship of applicants for student visas of subclasses 571, 572, 573 and 574 where the applicant is a *person designated under regulation 2.07AO*. Sponsors of these applicants must be *approved special student sponsors*. New Division 1.4D sets out matters such as:

- how to apply for approval as an *approved special student sponsor*;
- the criteria for approval as an *approved special student sponsor*;
- the terms of approval as an *approved special student sponsor*;
- sponsorship undertakings that an *approved special student sponsor* must make; and
- the personal information that can be disclosed about a sponsored person, and the circumstances in which Immigration and the special student sponsor or former special student sponsor can release this information.

New Division 1.4D is made under Division 3A of Part 2 of the Act.

Subdivision 1.4D.1 - Introductory

New subdivision 1.4D.1 consists of new regulations 1.20UA and 1.20UB in Part 1 of the Principal Regulations, as inserted by these Regulations.

Regulation 1.20UA - Definitions for Division 1.4D

New regulation 1.20UA gives definitions of the following terms as used in new Division 1.4D:

- *organisation*; and
- *relevant student visa*.

The term *organisation* means any body of persons that is lawfully established and actively operating in Australia, whether incorporated or unincorporated.

The term *relevant student visa* means:

- a Subclass 571 (Schools Sector) visa; or
- a Subclass 572 (Vocational Education and Training Sector) visa; or
- a Subclass 573 (Higher Education Sector) visa; or
- a Subclass 574 (Postgraduate Research Sector) visa;

granted to a *person designated under regulation 2.07AO* on the basis of an approved special student sponsorship, and also any visa of the same subclass subsequently granted to the same person solely for the purpose of changing a condition relating to the person's work rights or permitting a change of the education provider.

Regulation 1.20UB - Application of Division 3A of Part 2 of the Act

New regulation 1.20UB of Part 1 of the Principal Regulations provides that for section 140A of the Act, Division 3A of Part 2 of the Act applies to:

- a Subclass 571 (Schools Sector) visa; or
- a Subclass 572 (Vocational Education and Training Sector) visa; or
- a Subclass 573 (Higher Education Sector) visa; or
- a Subclass 574 (Postgraduate Research Sector) visa;

if the applicant for the visa is a *person designated under regulation 2.07AO* or a member of the family unit of a *person designated under regulation 2.07AO*.

Section 140A provides that Division 3A of the Act applies only to visas of a prescribed kind. Division 3A establishes a sponsorship scheme for temporary residence visas that sets out a comprehensive and transparent framework under which sponsorship undertakings and other requirements may be prescribed in regulations. The purpose of new regulation 1.20UB is to ensure that sponsorship for the specified student visa subclasses, when applied for by *persons designated in regulation 2.07AO* and members of their family units, is covered by the operation of Division 3A of the Act.

Parts 571, 572, 573 and 574 of Schedule 2 to the Principal Regulations are amended by items [23], [27], [31], and [35] of Schedule 1 to these Regulations, respectively, to insert a criterion for the grant of student visas of subclasses 571, 572, 573 and 574 which can be met only by an applicant who is a *person designated under regulation 2.07AO* and who has an *approved special student sponsor*. This facilitates the grant of relevant student visas to *persons designated under regulation 2.07AO* without them having to meet the usual financial assessment for grant of a student visa.

Subdivision 1.4D.2 - Becoming an approved special student sponsor

New subdivision 1.4D.2 consists of new regulations 1.20UC, 1.20UD, 1.20UE, 1.20UF and 1.20UG of Part 1 of the Principal Regulations, as inserted by these Regulations.

Regulation 1.20UC - Process for making application to become an approved student sponsor

Subsection 140F(1) of the Act provides that the regulations may establish a process for the Minister to approve a person as a sponsor. New regulation 1.20UC is made in accordance with subsection 140F(1) and sets out a simple process for making an application for approval as a special student sponsor.

There is no application fee. There is no approved form for the application but it must be made in writing. Subregulation 1.20UC(3) provides that the application must:

- state the person or persons sponsored; and
- include the undertakings in regulation 1.20UF in respect of the person or person sponsored; and
- give any other information requested by Immigration.

Subregulation 1.20UC(4) provides that the application must be made either by post or by having it delivered by courier service. In both cases the relevant address is specified in a Gazette Notice.

Regulation 1.20UD - Approving an application to become an approved special student sponsor

Section 140E of the Act provides that the regulations may prescribe criteria to be met for an applicant to be approved as a sponsor. New regulation 1.20UD is made in accordance with section 140E to prescribe the criteria to be met by an applicant for approval as a special student sponsor.

The effect of subsection 140E(1) of the Act is that if a person or an organisation that has applied for approval as an approved special student sponsor meets the criteria in new subregulation 1.20UD(1), then the Minister must approve the person or organisation as an approved special student sponsor. New subregulation 1.20UD(2) requires the Minister to give the applicant a copy of the approval or refusal decision, and, if the application is refused, a statement of the reasons for refusal.

Regulation 1.20UE - Terms of approval as special student sponsor

Section 140G of the Act provides that a sponsorship approval may be on specified terms, and if terms are specified, they must be specified in the approval and must be of a kind prescribed in the regulations. New regulation 1.20UE is made in accordance with section 140G.

Under new regulation 1.20UE, the terms of approval as a special student sponsor are that the approval will cease to have effect on the earlier of the day the person's application for a relevant student visa is finally determined, or 12 months after the date of approval. However, approval will be taken to continue in effect in respect of any subsequent application or applications by the person for a relevant student visa or visas.

Regulation 1.20UF - Sponsorship undertakings

Section 140H of the Act provides that the regulations may prescribe undertakings to be made by an applicant for approval as a sponsor. New regulation 1.20UF is made in accordance with section 140H and requires an applicant for approval as a special student sponsor to make the following undertakings in respect of the visa applicant and any members of the visa applicant's family unit ('the sponsored persons'):

- to pay all course fees for each course to which the relevant student visa relates;
- to ensure that the standard of living (including accommodation) of the sponsored persons is consistent with a reasonable standard of living in Australia;
- to pay all reasonable education costs of members of the sponsored person's family unit (if any);
- to make adequate arrangements in Australia for health insurance of the sponsored persons;
- to pay all medical or hospital expenses of the sponsored persons, if not covered by health insurance; and
- to give the Secretary accurate information, as soon as practicable, about any material change in the sponsor's circumstances, any matter that may affect the sponsor's ability to carry out the undertakings, and any material change in the circumstances of the sponsored persons.

Regulation 1.20UG - Consequences if approved special student sponsor or visa holder changes status - enforceability of undertaking

Section 140Q of the Act provides that the regulations may prescribe the circumstances in which, and for how long, a sponsor's undertaking remains enforceable if the visa holder ceases to hold the relevant visa, or if the relevant sponsorship ceases. New regulation 1.20UG is made in accordance with section 140Q and sets out the period during which each particular undertaking remains enforceable.

The prescribed enforceability period varies according to the nature of the undertaking. Where the undertaking could result in a cost, expense or other amount for which the sponsor would be liable, the undertaking remains enforceable until the full cost, expense or amount has been paid. The undertaking to arrange health insurance for sponsored persons continues while the sponsored persons hold a relevant student visa.

The sponsor's undertaking to inform the Secretary of any material change in the sponsor's circumstances or matter affecting the sponsor's ability to honour the undertakings also continues while a sponsored person continues to hold a relevant student visa. The sponsor's undertaking to inform the Secretary of any material change in a sponsored person's circumstances continues until the earlier of either the grant of a visa other than a relevant student visa to the person, or the person's departure from Australia.

Subdivision 1.4D.3 - General

New subdivision 1.4D.3 consists of new regulation 1.20UH of Part 1 of the Principal Regulations, inserted by these Regulations.

Regulation 1.20UH - Disclosure of personal information

Section 140V of the Act provides that the regulations may prescribe:

- kinds of personal information about a visa holder (or former visa holder) which the Minister may disclose to an approved sponsor (or former approved sponsor); and
- the circumstances in which that information may be disclosed to the sponsor; and
- the circumstances in which the sponsor may then use or further disclose that information.

New regulation 1.20UH is made in accordance with section 140V and prescribes the personal information about a holder or former holder of a relevant student visa that the Minister may disclose to an approved special student sponsor or former approved special student sponsor, and the circumstances when this disclosure is permitted.

New regulation 1.20UH also sets out the circumstances in which an approved special student sponsor or former special student sponsor may use or disclose the personal information provided by the Minister.

The personal information that may be disclosed under new regulation 1.20UH is information that relates to the liabilities and obligations of an approved special student sponsor or former approved special student sponsor under their sponsorship undertakings. The information may be disclosed by the Minister where disclosure is necessary to allow sponsors or former sponsors to meet their liabilities. Sponsors or former sponsors may use the information where it is necessary to allow them to meet their liabilities.

Item [5] - Subregulation 1.41(1)

This item substitutes new subregulation 1.41(1) of Part 1 of the Principal Regulations.

Subregulation 1.41(1) authorises the Minister to specify in a Gazette Notice financial and English assessment levels to which an applicant for a student visa subclass will be subject, depending upon the passport held by the applicant. The new subregulation 1.41(1) exempts applicants who are *persons designated under regulation 2.07AO* from being subject to the assessment level specified in the Gazette Notice when applying for a relevant student visa.

Parts 571, 572, 573 and 574 of Schedule 2 to the Principal Regulations are amended by items [23], [27], [31], and [35] of Schedule 1 to these Regulations, respectively, by inserting an alternative English and financial assessment to be met by applicants for subclass 571, 572, 573 and 574 visas who are *persons designated under regulation 2.07AO*. The modified assessment relates to the level of English that is sufficient for the course enrolled in, and the level of support available to the applicant, either as the applicant's own funds or funds available from a relative, or the support of an approved special student sponsor. These alternative assessment arrangements take account of the special circumstances of applicants who are *persons designated under regulation 2.07AO*, including the fact that many of these persons may not hold a passport and will have varying levels of available support.

Item [6] - After subregulation 1.42(6)

This item inserts a new subregulation 1.42(7) in Part 1 of the Principal Regulations. The purpose of new subregulation 1.42(7) is to exempt applicants for student visas who are *persons designated under regulation 2.07AO* from the requirements of subregulations 1.42(1) to (6). Those subregulations require an applicant to meet the assessment level specified in a Gazette Notice made by the Minister under regulation 1.41, as relevant to the passport held by the applicant. For further details of the background to this amendment, please see the notes on item [5] above.

Item [7] - After regulation 2.07AM

This item inserts two new regulations 2.07AN and 2.07AO in Part 2 of the Principal Regulations.

Regulation 2.07AN - Applications for Return Pending (Temporary) (Class VA) visas

Subsection 46(2) of the Act provides that an application for a visa is valid if it is an application for a visa of a class prescribed for the purposes of subsection 46(2), and if, under the regulations, the application is taken to have been validly made.

The purpose of new regulation 2.07AN is to prescribe the new Return Pending (Temporary) (Class VA) visa (created in Schedule 1 to the Principal Regulations by item [19] of these Regulations) for the purposes of subsection 46(2) of the Act. This is necessary as visas of all subclasses required to be held or to have been held at some time by the intended applicants (see below) are subject to a condition of a kind described in paragraph 41(2)(a) of the Act ('no further stay') and the application would otherwise be invalid under subsection 46(1A) of the Act.

Under new regulation 2.07AN a person is taken to have made a valid application for a Return Pending (Temporary) (Class VA) visa if all of the following circumstances are met:

- the person holds or has held:
 - a Subclass 447 (Secondary Movement Offshore (Temporary)) visa; or
 - a Subclass 451 (Secondary Movement Relocation (Temporary)) visa; or
 - a Subclass 785 (Temporary Protection) visa

which has not been cancelled; and

- since holding the visa the person has remained in Australia and has applied for a Protection (Class XA) visa; and
- that application has been refused by the Minister (other than on character grounds); and
- the person is in Australia on the day of refusal; and
- the person does not have a substantial criminal record, and was not refused protection on grounds relating to character.

When these circumstances are satisfied, the application will be deemed to have been made without the person having to do anything further. The application is taken to have been made on the day the Minister refuses the Protection (Class XA) visa, or on the day new regulation 2.07AN commences if the refusal occurred before that day. The criteria to be satisfied for the grant of the visa and other details of the visa are set out in new Part 695, inserted in Schedule 2 of the Principal Regulations by item [50] of these Regulations.

Regulation 2.07AO - Applications for certain substantive visas by specified persons

Subsection 46(2) of the Act provides that an application for a visa is valid if it is an application for a visa of a class prescribed for the purposes of subsection 46(2), and if, under the regulations, the application is taken to have been validly made.

The purpose of new regulation 2.07AO is to prescribe the 36 temporary and permanent subclasses set out in subregulation 2.07AO(3) for the purposes of subsection 46(2) of the Act, when an application for one of those subclasses is made by a person described in subregulation 2.07AO(2) ('a *person designated under regulation 2.07AO*'). A significant requirement of subregulation 2.07AO(3) is that a person must on the day of commencement of new regulation 2.07AO, hold (or have held) one of three specified subclasses of visa (see below), all of which are subject to a condition of a kind described in paragraph 41(2)(a) of the Act ('no further stay'). It is therefore necessary to prescribe the subclasses for which it is intended to allow the designated group of persons to apply in order for the application to be valid.

The requirements of new subregulation 2.07AO(3) are that:

- the person is in Australia on the day new regulation 2.07AO commences; and

- the person holds or has held:
 - a Subclass 447 (Secondary Movement Offshore (Temporary)) visa; or
 - a Subclass 451 (Secondary Movement Relocation (Temporary)) visa; or
 - a Subclass 785 (Temporary Protection)) visa

which has not been cancelled; and

- the person has not left Australia between the time of first holding, or first arriving as the holder of, a visa of subclass 447, 451 or 785, and the time of first applying for a visa mentioned in subregulation 2.07AO(3); and
- at the time of first applying for a visa mentioned in subregulation 2.07AO(3) the person must be the holder of a subclass 447, 451, 785 or 695 (Return Pending) visa; and
- the person has not been refused a visa or had a visa cancelled on grounds relating to character.

A person meeting these requirements is a '*person designated under regulation 2.07AO*' for the purposes of the Principal Regulations as amended by these Regulations. The amendments made to the Principal Regulations by these Regulations, as well as facilitating a valid application by this group of persons for a visa of a subclass listed in new subregulation 2.07AO(3), also introduce a number of modified concessionary criteria and other requirements applicable only to them.

Item [8] - Paragraph 2.12(1)(p)

This item changes the punctuation at the end of paragraph 2.12(1)(p) of Part 2 of the Principal Regulations, consequential upon the amendment made by the following item of these Regulations.

Item [9] - After paragraph 2.12(1)(p)

This item amends regulation 2.12 of Part 2 of the Principal Regulations to insert a new paragraph 2.12(1)(p) which prescribes the Return Pending (Temporary) (Class VA) visa for the purposes of section 48 of the Act.

Section 48, in conjunction with paragraph 46(1)(d) of the Act, prevents a valid application being made for a visa other than a visa prescribed for the purposes of section 48 by a person who has been refused a visa or had a visa cancelled, in certain circumstances, since last entering Australia and at the time of application does not hold a substantive visa.

This amendment is necessary to ensure the validity of an application for a Return Pending (Temporary) (Class VA) visa under new regulation 2.07AN inserted in Part 2 of the Principal Regulations by item [7] of these Regulations, where the person formerly held a subclass 447, 451 or 785 visa and may not hold a substantive visa at the time of the deemed application.

Item [10] - After Division 2.2

Division 2.2AA - Special provisions relating to persons designated under regulation 2.07AO

This item inserts a new Division 2.2AA in Part 2 of the Principal Regulations. The purpose of the new Division 2.2AA is to set out a number of provisions and requirements which apply only to *persons designated under regulation 2.07AO* when applying for a visa of a subclass mentioned in new subregulation 2.07AO(3), and members of their family units (whether in Australia or

offshore) who are applying on the basis of satisfying the secondary criteria for grant of a visa of the same subclass. New Division 2.2AA also applies to a member of an applicant's family unit offshore, who is not applying for a visa but a criterion to be met by the applicant requires all members of the family unit (whether or not they are applicants for a visa) to satisfy specified public interest criteria.

There are five regulations in new Division 2.2AA.

Regulation 2.12BB - Application of Division 2.2AA

This regulation makes it clear that the provisions of new Division 2.2AA apply only to applicants who are *persons designated under regulation 2.07AO*, and members of their family units, whether or not the family unit members are in Australia or offshore, and whether or not they are also applicants for a visa.

Regulation 2.12BC - Place to which application for visa by person mentioned in paragraph 2.12BB(a) is to be sent

This regulation provides that an application by a person to whom new Division 2.2AA applies for a visa of a subclass mentioned in new subregulation 2.07AO(3) must be made by posting it or having it delivered by courier to an address specified in a Gazette Notice. This provision applies to the relevant persons despite any other provision in the Principal Regulations relating to the place where an application for a visa of the particular subclass must be made. All applications made in accordance with regulation 2.07AO will be processed at a centralised processing point.

Regulation 2.12BD - Visas that may be held by person mentioned in paragraph 2.12BB(a) at time of application

This regulation provides that where the criteria for a visa of a subclass mentioned in new subregulation 2.07AO(3) requires an applicant to hold a visa of a specified subclass at the time of application, the requirement can be met by an applicant who is a *person designated under regulation 2.07AO* if the person holds:

- a Subclass 447 (Secondary Movement Offshore Entry (Temporary)) visa;
- a Subclass 451 (Secondary Movement Relocation (Temporary)) visa;
- a Subclass 785 (Temporary Protection) visa; or
- a Subclass 695 (Return Pending) visa.

This allows an applicant who is a *person designated under regulation 2.07AO* to meet the time of application criteria for a relevant visa by over-riding any requirement in the Principal Regulations that the applicant must hold a visa of any other subclass. It should be noted however that an applicant who is a *person designated under regulation 2.07AO* will hold a visa of one of the above subclasses only at the time of first applying for a visa of a subclass mentioned under new subregulation 2.07AO(3). At the time of any second or subsequent application for a visa of one of those subclasses, *persons designated under regulation 2.07AO* will be required to hold a visa of a subclass normally required under the criteria for the relevant subclass. However, other provisions of new Division 2.12AA will continue to apply to them.

Regulation 2.12BE - Application of public interest criterion 4004 to person mentioned in regulation 2.12BB

This regulation provides that an applicant for a visa of a subclass mentioned in new subregulation 2.07AO(3) and to whom new Division 2.2AA applies, does not have to satisfy public interest criterion 4004 wherever that public interest criterion is a prescribed criterion for

the grant of a visa of the relevant subclass. (Public interest criterion 4004 requires an applicant not to have outstanding debts to the Commonwealth unless satisfactory arrangements have been made for repayment.) This regulation also has the effect that if a criterion for the visa applied for is that all members of the applicant's family must meet public interest criterion 4004 whether or not they are applying for a visa, family unit members will not be required to meet the criterion.

Regulation 2.12BF - Application of public interest criterion 4007 to person mentioned in regulation 2.12BB

This regulation provides that where a person to whom new Division 2.2AA applies is an applicant for a visa subclass mentioned in new subregulation 2.07AO(3), and public interest criterion 4005 or 4006A is prescribed in respect of the visa subclass applied for, the person is required to satisfy public interest criterion 4007 instead of either public interest criterion 4005 or 4006A. The subclasses where public interest criterion 4007 is substituted for public interest criteria 4005 or 4006A are listed in new subregulation 2.12BF(1).

In addition, new subregulation 2.12BF(3) has the effect that where it is a criterion of the visa subclass applied for that all members of the applicant's family unit must satisfy public interest criteria 4005 or 4006A including family members who are not applying for a visa, the family members have to satisfy public interest criterion 4007 rather than public interest criteria 4005 or 4006A.

Public interest criteria 4005, 4006A and 4007 all relate to health standards which must be met by an applicant. Public interest criterion 4007 incorporates a provision under which the Minister may waive the requirement that an applicant must not have a disease or condition requiring health care or community services in Australia, provided all other criteria for the grant of the visa are met and the Minister is satisfied that granting the visa would not result in undue cost to the Australian community or unduly prejudice access to health care or community services by Australian citizens or permanent residents.

Extending public interest criterion 4007, including the waiver provision, to all members of the family unit (including those not applying) may facilitate the grant of a visa to applicants who are *persons designated under regulation 2.07AO* because the availability of the Minister's discretion to exercise the waiver may mean that if one member of the family unit (whether or not applying for a visa) fails to satisfy the 'normal' criteria, the applicant would not automatically be precluded from being granted a visa provided circumstances existed under which the waiver could be exercised.

Item [11] - Paragraph 5.19(4)(b)

This item substitutes a new paragraph 5.19(4)(b) in Part 5 of the Principal Regulations. The new subparagraph 5.19(4)(b)(i) retains the existing criterion for approval of a nominated position for purposes of an employer nomination. New subparagraph 5.19(4)(b)(ii) introduces an alternative criterion applicable only to an employer nomination relating to a *person designated under regulation 2.07AO*. For these applicants, the appointment may provide seasonal employment that will continue (as an alternative to full-time employment lasting for at least 2 years) provided the employment is in accordance with the employment the applicant has undertaken over the previous 12 months.

The new paragraph 5.19(4)(b) is intended to facilitate, primarily, the grant of subclass 857 (Regional Sponsored Migration Scheme) visas to *persons designated under regulation 2.07AO* who have been performing part-time or seasonal (rather than full-time) work in regional areas and for which there is an on-going need.

Item [12] - Schedule 1, Part 1, after heading

This item inserts a note after the heading of Part 1 of Schedule 1 to the Principal Regulations. The purpose of the note is to alert the reader that some of the provisions in Part 1 of Schedule 1, relating to where an application for particular visa classes must be made, are over-ridden in relation to applicants who are *persons designated under regulation 2.07AO* by the provisions of new regulation 2.12BC, inserted in Part 2 of the Principal Regulations by item [10] of these Regulations.

Item [13] - Schedule 1, paragraph 1104B(3)(d)

This item substitutes a new paragraph 1104B(3)(d) in Part 1 of Schedule 1 to the Principal Regulations. The new paragraph 1104B(3)(d) retains, in subparagraph (i), the existing requirement that an application for a subclass 890 (Business Owner) visa will be valid only if the applicant is the holder of a Business Skills (Provisional) (Class UR) visa, but also includes an additional provision, in subparagraph (ii) that an applicant who is a *person designated under regulation 2.07AO* may be the holder of a subclass 447, 451, 785 or 695 visa.

This amendment enables *persons designated under regulation 2.07AO* to make a valid application for a subclass 890 (Business Owner) visa. These persons will not be able to hold a Business Skills (Provisional) (Class UR) visa, but may have commenced a business as the holder of a subclass 447, 451, 785 or 695 visa.

Item [14] - Schedule 1, paragraph 1104B(3)(f)

This item substitutes a new paragraph 1104B(3)(f) in Part 1 of Schedule 1 to the Principal Regulations. The new paragraph 1104B(3)(f) retains, in subparagraph (i), the existing requirement that an application for a subclass 892 (State/Territory Sponsored Business Owner) visa will be valid only if the applicant is the holder of a Business Skills (Provisional) (Class UR) visa or a subclass 457 (Business (Long Stay)) visa granted in specified circumstances, or must hold or have held within the previous 28 days a Skilled - Independent Regional (Provisional) (Class UX) visa.

In addition, the new paragraph 1104(3)(f) includes a provision, in subparagraph (ii), that an applicant who is a *person designated under regulation 2.07AO* may be the holder of a subclass 447, 451, 785 or 695 visa.

This amendment has the same effect of facilitating an application by a *person designated under regulation 2.07AO* for a subclass 892 visa, as the amendment made by item [13], above, has in respect of facilitating a subclass 890 visa by the same group of persons.

Item [15] - Schedule 1, after paragraph 1113(3)(aa)

This item inserts a note after paragraph 1113(3)(aa) in Part 1 of Schedule 1 to the Principal Regulations. The purpose of the note is to alert readers that the requirements for lodging an application for a Distinguished Talent (Residence)(Class BX) visa in paragraph 1113(3)(aa) are over-ridden in respect of applicants who are *persons designated under regulation 2.07AO* by new regulation 2.12BC, inserted in Part 2 of the Principal Regulations by item [10] of these Regulations.

Item [16] - Schedule 1, Part 2, after heading

This item inserts a note after the heading of Part 2 of Schedule 1 to the Principal Regulations. The purpose of the note is to alert the reader that some of the provisions in Part 2 of Schedule 1, relating to where an application for particular visa classes must be made, are over-ridden in relation to applicants who are *persons designated under regulation 2.07AO* by the provisions of new regulation 2.12BC, inserted in Part 2 of the Principal Regulations by item [10] of these Regulations.

Item [17] - Schedule 1, after paragraph 1205(3)(c)

This item inserts a note after paragraph 1205(3)(c) in Part 2 of Schedule 1 to the Principal Regulations. The purpose of the note is to alert readers that the requirements for lodging an application for a subclass 420 (Entertainment) visa in paragraph 1205(3)(c) are over-ridden in respect of applicants who are *persons designated under regulation 2.07AO* by new regulation 2.12BC, inserted in Part 2 of the Principal Regulations by item [10] of these Regulations.

Item [18] - Schedule 1, after paragraph 1211(3)(ab)

This item inserts a note after paragraph 1211(3)(ab) in Part 2 of Schedule 1 to the Principal Regulations. The purpose of the note is to alert readers that the requirements for lodging an application for a subclass 455 (Dependent Child) visa in paragraph 1211(3)(ab) are over-ridden in respect of applicants who are *persons designated under regulation 2.07AO* by new regulation 2.12BC, inserted in Part 2 of the Principal Regulations by item [10] of these Regulations.

Item [19] - Schedule 1, after item 1217

This item inserts a new Item 1217AA. Return Pending (Temporary) (Class VA) in Part 2 of Schedule 1 to the Principal Regulations. This amendment creates the new Return Pending (Temporary) (Class VA) visa.

There is no form or visa application charge for an application for the new Return Pending (Temporary) (Class VA) visa. An application may only arise if it taken (or deemed) to have been validly made under the new regulation 2.07AN, inserted in the Principal Regulations by item [7] of these Regulations.

There is only one subclass in the new Return Pending (Temporary) (Class VA), subclass 695 (Return Pending). The criteria and other requirements and provisions relating to the grant of a subclass 695 (Return Pending) visa are set out in the new Part 695, inserted in Schedule 2 to the Principal Regulations by item [50] of these Regulations.

Item [20] - Schedule 1, paragraphs 1222(3)(g) and (h)

This item omits paragraphs 1222(3)(g) and (h) from Part 2 of Schedule 1 to the Principal Regulations. The effect of the omitted paragraphs was that a valid application for a subclass 580 (Student Guardian) visa could be made only by a person who was outside Australia, or in Australia as the holder of a subclass 580 visa. Following the amendments to Part 580 (Subclass 580 - Student Guardian) of Schedule 2 to the Principal Regulations, made by these Regulations, a subclass 580 visa may be granted to a wider number of applicants in Australia and it is no longer necessary to restrict eligibility to make a valid application.

Item [21] - Schedule 1, subclause 1222(3A)

This item omits subclause 1222(3A) of Part 2 of Schedule 1 to the Principal Regulations. This amendment is consequential upon the omission of paragraphs 1222(3)(g) and (h) by item [20] of these Regulations.

Item [22] - Schedule 2, paragraph 418.230(a)

This item substitutes a new paragraph 418.230(a) in Part 418 of Schedule 2 to the Principal Regulations. The new paragraph 418.230(a) retains the provisions of the previous paragraph relating to the visas that an applicant for a subclass 418 (Educational) visa must have held at the time of applying for the visa. In addition, the new paragraph 418.230(a) includes a provision that if the applicant is a *person designated under regulation 2.07AO* the applicant may hold a subclass 447, 451, 785 or 695 visa. This enables the relevant applicants to satisfy the time of decision criteria.

Item [23] - Schedule 2, subclause 571.223(2)

This item substitutes a new subclause 571.223(2) in Part 571 of Schedule 2 to the Principal Regulations. Subclause 571.223(2) relates to the English language and financial assessments to be met at the time of decision by an applicant for grant of a subclass 571 (Schools Sector) visa. Applicants for a subclass 571 visa who are *persons designated under regulation 2.07AO* are exempt from the usual assessment levels specified in a Gazette Notice following amendments to made to regulation 1.41 and 1.42 of Part 1 of the Principal Regulations made by items [5] and [6] of these Regulations.

The new subclause 571.223(2) retains the provisions of the previous subclause in relation to applicants who are not *persons designated under regulation 2.07AO*. In addition, the new subclause 571.223(2) provides that applicants who are *persons designated under regulation 2.07AO* may satisfy the criterion if the Minister is satisfied that the applicant has the financial capacity to undertake the course, without contravening any work condition of the visa, because the applicant has sufficient funds of his or her own or provided by a relative, or because the applicant is sponsored by an approved special student sponsor under new Division 1.4D of the Principal Regulations (inserted by item [4] of these Regulations).

Item [24] - Schedule 2, clause 571.230

This item substitutes a new clause 571.230 in Part 571 of Schedule 2 to the Principal Regulations. The new subclause exempts a *person designated under regulation 2.07AO* who is applying for grant of a subclass 571 (Schools Sector) visa from the requirement at the time of decision to hold a passport of a kind specified in a Gazette Notice made under regulation 1.40. It is expected that a number of these applicants will not hold a passport.

Item [25] - Schedule 2, subclause 571.312(2)

This item substitutes a new subclause 571.312(2) in Part 571 of Schedule 2 to the Principal Regulations. The new subclause 571.312(2) retains the provisions of the previous subclause relating to kinds of visas which an applicant applying for a subclass 571 (Schools Sector) visa on the basis of satisfying the secondary criteria, must hold to satisfy the subclause. In addition, new subclause 571.312(2) includes a new provision (at paragraph 571.312(2)(e)) that the criterion can be met by an applicant who is a *person designated under regulation 2.07AO*. This amendment enables those applicants to satisfy the requirements for the grant of a subclass 571 visa.

Item [26] - Schedule 2, clause 571.711

This item substitutes a new clause 571.711 in Part 571 of Schedule 2 to the Principal Regulations. The new clause 571.711 includes an additional provision (at new paragraph 571.711(b)) that no evidence of the grant of a subclass 571 (Schools Sector) visa need be given if the applicant is a *person designated under regulation 2.07AO*. this provision overcomes any difficulties if the person does not have a travel document in which evidence of the visa grant can be placed.

Item [27] - Schedule 2, subclause 572.223(2)

This item substitutes a new subclause 572.223(2) in Part 572 of Schedule 2 to the Principal Regulations. Subclause 572.223(2) relates to the English language and financial assessments to be met at the time of decision by an applicant for grant of a subclass 572 (Vocational Education and Training Sector) visa. Applicants for a subclass 572 visa who are *persons designated under regulation 2.07AO* are exempt from the usual assessment levels specified in a Gazette Notice following amendments to made to regulation 1.41 and 1.42 of Part 1 of the Principal Regulations made by items [5] and [6] of these Regulations.

The new subclause 572.223(2) retains the provisions of the previous subclause in relation to applicants who are not *persons designated under regulation 2.07AO*. In addition, the new subclause 572.223(2) provides that applicants who are *persons designated under regulation 2.07AO* may satisfy the criterion if the Minister is satisfied that the applicant has the financial capacity to undertake the course, without contravening any work condition of the visa, because the applicant has sufficient funds of his or her own or provided by a relative, or because the applicant is sponsored by an approved special student sponsor under new Division 1.4D of the Principal Regulations (inserted by item [4] of these Regulations).

Item [28] - Schedule 2, clause 572.230

This item substitutes a new clause 572.230 in Part 572 of Schedule 2 to the Principal Regulations. The new subclause exempts a *person designated under regulation 2.07AO* who is applying for grant of a subclass 572 (Vocational Education and Training Sector) visa from the requirement at the time of decision to hold a passport of a kind specified in a Gazette Notice made under regulation 1.40. It is expected that a number of these applicants will not hold a passport.

Item [29] - Schedule 2, subclause 572.312(2)

This item substitutes a new subclause 572.312(2) in Part 572 of Schedule 2 to the Principal Regulations. The new subclause 572.312(2) retains the provisions of the previous subclause relating to kinds of visas which an applicant applying for a subclass 572 (Vocational Education and Training Sector) visa on the basis of satisfying the secondary criteria, must hold to satisfy the subclause. In addition, new subclause 572.312(2) includes a new provision (at paragraph 572.312(2)(e)) that the criterion can be met by an applicant who is a *person designated under regulation 2.07AO*. This amendment enables those applicants to satisfy the requirements for the grant of a subclass 572 visa.

Item [30] - Schedule 2, subclause 572.711

This item substitutes a new clause 572.711 in Part 572 of Schedule 2 to the Principal Regulations. The new clause 572.711 includes an additional provision (at new paragraph 572.711(b)) that no evidence of the grant of a subclass 572 (Vocational Education and Training Sector) visa need be given if the applicant is a *person designated under regulation 2.07AO*. This provision overcomes any difficulties if the person does not have a travel document in which evidence of the visa grant can be placed.

Item [31] - Schedule 2, subclause 573.223(2)

This item substitutes a new subclause 573.223(2) in Part 573 of Schedule 2 to the Principal Regulations. Subclause 573.223(2) relates to the English language and financial assessments to be met at the time of decision by an applicant for grant of a subclass 573 (Higher Education Sector) visa. Applicants for a subclass 573 visa who are *persons designated under regulation 2.07AO* are exempt from the usual assessment levels specified in a Gazette Notice following amendments made to regulation 1.41 and 1.42 of Part 1 of the Principal Regulations made by items [5] and [6] of these Regulations.

The new subclause 573.223(2) retains the provisions of the previous subclause in relation to applicants who are not *persons designated under regulation 2.07AO*. In addition, the new subclause 573.223(2) provides that applicants who are *persons designated under regulation 2.07AO* may satisfy the criterion if the Minister is satisfied that the applicant has the financial capacity to undertake the course, without contravening any work condition of the visa, because the applicant has sufficient funds of his or her own or provided by a relative, or because the applicant is sponsored by an approved special student sponsor under new Division 1.4D of the Principal Regulations (inserted by item [4] of these Regulations).

Item [32] - Schedule 2, clause 573.230

This item substitutes a new clause 573.230 in Part 573 of Schedule 2 to the Principal Regulations. The new subclause exempts a *person designated under regulation 2.07AO* who is applying for grant of a subclass 573 (Higher Education Sector) visa from the requirement at the time of decision to hold a passport of a kind specified in a Gazette Notice made under regulation 1.40. It is expected that a number of these applicants will not hold a passport.

Item [33] - Schedule 2, subclause 573.312(2)

This item substitutes a new subclause 573.312(2) in Part 573 of Schedule 2 to the Principal Regulations. The new subclause 573.312(2) retains the provisions of the previous subclause relating to kinds of visas which an applicant applying for a subclass 573 (Higher Education Sector) visa, on the basis of satisfying the secondary criteria, must hold to satisfy the subclause. In addition, new subclause 573.312(2) includes a new provision (at paragraph 573.312(2)(e)) that the criterion can be met by an applicant who is a *person designated under regulation 2.07AO*. This amendment enables those applicants to satisfy the requirements for the grant of a subclass 573 visa.

Item [34] - Schedule 2, clause 573.711

This item substitutes a new clause 573.711 in Part 573 of Schedule 2 to the Principal Regulations. The new clause 573.711 includes an additional provision (at new paragraph 573.711(b)) that no evidence of the grant of a subclass 573 (Higher Education Sector) visa need be given if the applicant is a *person designated under regulation 2.07AO*. This provision overcomes any difficulties if the person does not have a travel document in which evidence of the visa grant can be placed.

Item [35] - Schedule 2, subclause 574.223(2)

This item substitutes a new subclause 574.223(2) in Part 574 of Schedule 2 to the Principal Regulations. Subclause 574.223(2) relates to the English language and financial assessments to be met at the time of decision by an applicant for grant of a subclass 574 (Postgraduate Research Sector) visa. Applicants for a subclass 574 visa who are *persons designated under regulation 2.07AO* are exempt from the usual assessment levels specified in a Gazette Notice following amendments to made to regulation 1.41 and 1.42 of Part 1 of the Principal Regulations made by items [5] and [6] of these Regulations.

The new subclause 574.223(2) retains the provisions of the previous subclause in relation to applicants who are not *persons designated under regulation 2.07AO*. In addition, the new subclause 574.223(2) provides that applicants who are *persons designated under regulation 2.07AO* may satisfy the criterion if the Minister is satisfied that the applicant has the financial capacity to undertake the course, without contravening any work condition of the visa, because the applicant has sufficient funds of his or her own or provided by a relative, or because the applicant is sponsored by an approved special student sponsor under new Division 1.4D of the Principal Regulations (inserted by item [4] of these Regulations).

Item [36] - Schedule 2, clause 574.230

This item substitutes a new clause 574.230 in Part 574 of Schedule 2 to the Principal Regulations. The new subclause exempts a *person designated under regulation 2.07AO* who is applying for grant of a subclass 574 (Postgraduate Research Sector) visa from the requirement at the time of decision to hold a passport of a kind specified in a Gazette Notice made under regulation 1.40. It is expected that a number of these applicants will not hold a passport.

Item [37] - Schedule 2, subclause 574.312(2)

This item substitutes a new subclause 574.312(2) in Part 574 of Schedule 2 to the Principal Regulations. The new subclause 574.312(2) retains the provisions of the previous subclause relating to kinds of visas which an applicant applying for a subclass 574 (Postgraduate Research Sector) visa on the basis of satisfying the secondary criteria, must hold to satisfy the subclause. In addition, new subclause 573.312(2) includes a new provision (at paragraph 574.312(2)(e)) that the criterion can be met by an applicant who is a *person designated under regulation 2.07AO*. This amendment enables those applicants to satisfy the requirements for the grant of a subclass 574 visa.

Item [38] - Schedule 2, clause 574.711

This item substitutes a new clause 574.711 in Part 574 of Schedule 2 to the Principal Regulations. The new clause 574.711 includes an additional provision (at new paragraph 574.711(b)) that no evidence of the grant of a subclass 574 (Postgraduate Research Sector) visa need be given if the applicant is a *person designated under regulation 2.07AO*. This provision overcomes any difficulties if the person does not have a travel document in which evidence of the visa grant can be placed.

Item [39] - Schedule 2, clause 580.111, after definition of *acceptable individual*

This item inserts a new definition, *family applicant*, in clause 580.111 of Schedule 2 to the Principal Regulations. The term *family applicant* is defined to mean, in relation to an applicant for grant a subclass 580 (Student Guardian) visa, a member of the applicant's family unit who is seeking to satisfy the secondary criteria for grant of the visa. It is necessary to introduce this term into Part 580 due to the amendments made by items [45] and [48] of these Regulations, which, respectively, permit an applicant to have a dependent member of their family unit under certain circumstances and insert secondary criteria for the grant of a subclass 580 visa. Previously, members of an applicant's family unit were not eligible for the grant of a subclass 580 visa.

Item [40] - Schedule 2, clause 580.111

This item amends clause 580.111 of Schedule 2 to the Principal Regulations by substituting a new definition of *living costs*. The new definition retains the previous meaning of \$12 000 per year for a single applicant, but inserts new provisions that the basic rate is to be increased by 20% for the first dependent child, and 15% each for any subsequent dependent child. This amendment to the definition is necessary because amendments made by items [45] and [48] of these Regulations allow the inclusion of a dependent child and introduce secondary criteria for grant of a subclass 580 visa. Previously, an applicant was not permitted to include a dependent child in a subclass 580 visa application.

Item [41] - Schedule 2, clause 580.111, definition of *travel costs*

This item amends clause 580.111 of Schedule 2 to the Principal Regulations by substituting a new definition of *travel costs*. The new definition includes a reference to a family applicant's costs in travelling to Australia and returning to their home country at the end of stay, as well as those costs for the main applicant. This amendment to the definition is necessary because amendments made by items [45] and [48] of these Regulations allow the inclusion of a dependent child and introduce secondary criteria for grant of a subclass 580 visa. Previously, an applicant was not permitted to include a dependent child in a subclass 580 visa application.

Item [42] - Schedule 2, Subdivision 580.21

This item substitutes a new Subdivision 580.21 (Criteria to be satisfied at time of application) in Part 580 of Schedule 2 to the Principal Regulations. New Subdivision 580.21 contains one clause 580.211 which sets out the criteria to be satisfied at the time of decision if the application is made in Australia. New clause 580.211 works in conjunction with the amendment made to item

1222 of Part 2 of Schedule 1 to the Principal Regulations by item [20] of these Regulations which permit a wider range of applicants to make a valid application for a subclass 580 (Student Guardian) visa in Australia. At the time of application an applicant in Australia must hold a visa of a subclass mentioned in new subclause 580.211(2), or, if not the holder of a substantive visa at the time of application, meet the requirements set out in new subclause 580.211(3).

It may be noted that the effect of new regulation 2.12BD, inserted in the Principal Regulations by item [10] of these Regulations, is that an applicant for a subclass 580 visa who is a person designated under regulation 2.07AO may hold a visa of subclass 447, 451, 785 or 695 at the time of application, in addition to the subclasses mentioned in new subclause 580.211(2).

Item [43] - Schedule 2, clause 580.221

This item omits clause 580.221 from Subdivision 580.22 of Part 580 of Schedule 2 to the Principal Regulations. The omitted clause related to criteria to be met at the time of decision by an applicant for a subclass 580 visa who was in Australia as the holder (or former holder) of a subclass 580 visa. This clause is no longer appropriate as eligibility for the grant of a subclass 580 visa to an applicant who is in Australia, following the amendments made by these Regulations, will not be restricted to applicants who already hold, or formerly held, a subclass 580 visa.

Item [44] - Schedule 2, paragraph 580.223(2)(d)

This item substitutes a new paragraph 580.223(2)(d) in Part 580 of Schedule 2 to the Principal Regulations. The new paragraph 580.223(2)(d) retains the previous requirement that an applicant for a subclass 580 visa must not have member of their family unit under 6 years of age (unless the applicant meets the requirements of subclause 580.222(4) relating to benefit to the Australian government and the government of another country). Additionally, new paragraph 580.223(2)(d) introduces a provision for the Minister to waive this requirement under new subclause 580.223 (2A), inserted in the Principal Regulations by item [45] of these Regulations.

Item [45] - Schedule 2, after subclause 580.223(2A)

This item inserts a new subclause 580.223(2A) in the Principal Regulations. The purpose of new subclause 580.223(2A) is to set out the circumstances under which the Minister may waive the requirement of paragraph 580.223(2)(d) that an applicant for grant of a subclass 580 visa must not have a member of their family unit who is aged under 6 years. These circumstances are if:

- the applicant is a person designated under regulation 2.07AO; or
- each child under 6 would be subject to assessment level 1 or 2 (relating to the passport held by an applicant) if the child were an applicant for a subclass 571 (Schools Sector) visa; and
- the Minister is satisfied that there are compelling and compassionate reasons for waiving the requirement.

Item [46] - Schedule 2, paragraph 580.226(1)(a)

This item substitutes a new paragraph 580.226(1)(a) in Part 580 of Schedule 2 to the Principal Regulations. New paragraph 580.226(1)(a) retains the provision of the previous paragraph relating to the Minister's satisfaction as to the applicant being a genuine applicant for entry and stay as a student guardian on the grounds of evidence of financial capacity as set out in subclause 580.226(2), (3), (4) or (5). In addition, new paragraph 580.226(1)(a) introduces a new provision relating to the Minister's satisfaction that an applicant who is a person designated under regulation 2.07AO is a genuine applicant because of access that the applicant has to funds. The requirements for an applicant who is a person designated under regulation 2.07AO

are less stringent, as these applicants may not be able to obtain the financial evidence required under subclauses 580.226(2), (3), (4) and (5).

Item [47] - Schedule 2, after clause 580.226

This item inserts new clauses 580.227, 580.228 and 580.229 in subdivision 580.22 of Part 580 of Schedule 2 to the Principal Regulations.

New clause 580.227

This clause requires that at the time of decision, an applicant for grant of a subclass 580 visa who is in Australia and who met specified requirements at the time of application relating to the visa held, or formerly held, at that time, and whose nominating student is subject to assessment levels 2, 3, 4 or 5 (relating to the 'eligible passport' held by the nominating student), must establish exceptional circumstances for the grant of a subclass 580 visa. 'Exceptional circumstances' will be the subject of policy guidelines.

New clause 580.228

This clause prescribes special requirements for an applicant for grant of a subclass 580 visa who at the time of applying was in Australia as the spouse or dependent relative of a diplomatic or consular representative of a country other than Australia.

New clause 580.229

This clause sets out special requirements to be met at the time of decision by an applicant for grant of a subclass 580 visa who applied in Australia when the holder, or former holder, of a student visa subject to condition 8535 in Schedule 8 to the Principal Regulations, and the applicant is or was provided with financial support by the Commonwealth or the government of a foreign country. (Condition 8535 prevents the grant of a visa other than a protection visa or a specified student visa, while the holder remains in Australia.)

Item [48] - Division 580.3

This item substitutes a new Division 580.3 (Secondary criteria) in Part 580 of Schedule 2 to the Principal Regulations. New Division 580.3 contains two subdivisions 580.31 and 580.32 which set out the criteria to be satisfied at the time of application and the time of decision (respectively) by an applicant for grant of a subclass 580 visa on the basis of being a member of the family unit of an applicant who satisfies the primary criteria.

Insertion of secondary criteria in subclass 580 facilitates the grant of a subclass 580 visa to a member of an applicant's family unit, where the Minister has exercised the discretion in new subclause 580.223(2A), inserted in the Principal Regulations by item [45] of these Regulations, to waive the requirement that an applicant for grant of a subclass 580 visa must not have a dependent child under 6 years of age. It may be noted that where a member of an applicant's family unit is over 6 years of age, the family member would be expected to meet the requirements for grant of a subclass 571 (Schools Sector) visa or other relevant student visa.

Item [49] - Clause 580.611

This item substitutes new clauses 580.611 and 580.612 in Part 580 of Schedule 2 to the Principal Regulations. The new clauses relate to the conditions, as set out in Schedule 8 to the Principal Regulations, that are to be imposed on a subclass 580 visa. New clause 580.611 retains the previous provisions relating to the conditions imposed on a subclass 580 visa granted to a person who satisfies the primary criteria. New clause 580.612 prescribes the conditions which are imposed on a subclass 580 visa granted to an applicant who satisfies the secondary criteria. This

is consequential the insertion of secondary criteria in subclass 580 of the Principal Regulations by item [48] of these Regulations.

Item [50] - Schedule 2, after Part 686

This item inserts new Part 695 in Schedule 2 to the Principal Regulations, setting out the criteria and other requirements that an applicant for a Return Pending (Temporary) (Class VA) visa must meet for the grant of a Subclass 695 (Return Pending) visa.

Division 695.2 - Primary Criteria

New Division 695.2 sets out the primary criteria that must be satisfied by an applicant for the grant of the new Subclass 695 (Return Pending) visa. There are no secondary criteria. Each applicant must meet the primary criteria in his or her own right.

There are no criteria to be satisfied at the time of application. (Note: The applicant will have to have satisfied the requirements of new regulation 2.07AN to be deemed to have a valid application.)

At the time of decision, the following requirements must be satisfied:

- the applicant must not hold a substantive visa other than:
 - a Subclass 447 (Secondary Movement Offshore Entry) (Temporary) visa; or
 - a Subclass 451 (Secondary Movement Offshore Entry (Temporary)) visa; or
 - a Subclass 785 (Temporary Protection) visa; and
- the applicant must satisfy public interest criteria 4001, 4002 and 4003; and
- if the applicant has previously been in Australia, the applicant must satisfy special return criterion 5001; and
- the Minister must be satisfied that the applicant has not at any time obtained a subclass 447, 451, 785 or 695 visa through the concealment or misrepresentation of facts material to the decision to grant the visa.

Division 695.3 - Secondary Criteria: Nil

As noted above, all applicants must satisfy the primary criteria.

Division 695.4 - Circumstances applicable to grant

New clause 695.411 requires that an applicant must be in Australia at the time a subclass 695 (Return Pending) visa is granted.

Division 695.5 - When visa is in effect

New clause 695.511 provides that the new subclass 695 (Return Pending) visa is a temporary visa permitting the holder to remain in, but not to re-enter, Australia for 18 months from:

- if the holder's application for a Protection (Class XA) visa was finally determined before the commencement of these Regulations (and the person was therefore deemed to have applied for a Return Pending (Temporary)(Class VA) visa on the date of commencement), the date the subclass 695 visa is granted; or

- if the holder's application for a Protection (Class XA) visa is refused after the commencement of these Regulations, the date on which the Protection (Class XA) visa is finally determined, within the meaning of subsection 5(9) of the Act.

Division 695.6 - Conditions

The effect of new clauses 695.611 and 695.612 is that a subclass 695 (Return Pending) visa is subject to the conditions that:

- the holder cannot be granted another substantive visa other than a protection visa; and
- the holder must notify Immigration of any change of residential address, within 14 days of the change.

Division 695.7 - Way of giving evidence

New clause 695.711 provides that no evidence of visa grant need be given unless the visa holder asks for it.

New clause 695.712 provides that if evidence is given, it is to be given in the form of a visa label placed on a Convention travel document or passport.

Item [51] - Schedule 2, after Division 785.3 (including the note)

This item inserts a Note at the end of Part 785 (subclass 785 (Temporary Protection)) of Schedule 2 to the Principal Regulations, to the effect that if a person's application for a Protection (Class XA) visa is refused after the commencement of these Regulations and the person holds or held a subclass 451, 447 or 785 visa, the person is taken under new regulation 2.07AN to have applied for a Return Pending (Class VA) visa.

Item [52] - Schedule 2, after Division 866.3 (including the note)

This item inserts a Note at the end of Part 866 (subclass 866 (Protection)) of Schedule 2 to the Principal Regulations, to the effect that if a person's application for a Protection (Class XA) visa is refused after the commencement of these Regulations and the person holds or held a subclass 451, 447 or 785 visa, the person is taken under new regulation 2.07AN to have applied for a Return Pending (Class VA) visa.

Item [53] - Schedule 5, paragraph 8535(c)

This item amends paragraph 8535(c) of Schedule 5 to the Principal Regulations by inserting a reference to new clause 580.229, inserted in Schedule 2 to the Principal Regulations by item [47] of these Regulations. This item is consequential upon the amendments made by item [47] which allows the grant of a subclass 580 (Student Guardian) visa to a wider range of applicants onshore. It is not intended that holders of a visa with condition 8535 be prevented from applying for a subclass 580 (Student Guardian) visa onshore.