EXPLANATORY STATEMENT

Issued by the Minister for Immigration and Border Protection

Migration Act 1958

Migration Amendment (Priority Consideration of Certain Visa Applications) Regulation 2016

The *Migration Act 1958* (the Migration Act) is an Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons.

Subsection 504(1) of the Migration Act in summary provides that the Governor-General may make regulations prescribing matters required or permitted by the Migration Act to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to the Migration Act. The *Migration Amendment (Priority Consideration of Certain Visa Applications) Regulation 2016* (the Regulation) relies in part on the power in subsection 504(1) to make regulations which are necessary or convenient for carrying out or giving effect to the Migration Act.

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

The purpose of the Regulation is to amend the Migration Regulations to create a priority consideration of visa application service (priority service) for specified kinds of visas and specified kinds of passport holders.

The Government's White Paper on Developing Northern Australia (the White Paper) recommended a number of key visa initiatives including a trial of a priority service for eligible Chinese nationals seeking to visit Australia.

It is expected that the White Paper initiatives, including a trial of the priority service for Chinese nationals in the People's Republic of China, will make Australia a more attractive visitor destination and will help grow the tourist economy, including in northern Australia. These measures will help Australia capitalise on the increased affluence of Asia and the northern Australia's proximity to the region.

The Department of Immigration and Border Protection will trial a priority service for processing Subclass 600 (Visitor) visa applications in both the Tourist and the Business Visitor streams, for certain visa applicants who are Chinese nationals. It is expected this trial may appeal to affluent individuals who may wish to travel to Australia at short notice.

The priority service may be requested by a visa applicant for a fee of AUD1,000, charged in addition to the existing visa application charge. The priority service provides priority consideration of a visa application, however there is no regulatory requirement that the application be decided by a particular timeframe. While the Department will endeavour to make a decision on a priority service visa application within a shortened timeframe, applicants will be informed in advance that there is no guarantee of a faster outcome, as issues such as character and health matters may delay processing. No refund will be available unless the visa application charge is being refunded. Invalid requests for this priority service, for example applicants holding passports not specified under the Regulation, would receive full repayment of the AUD1,000 fee. Processing times for Visitor visas, more generally, will not be affected by this service.

Applicants must still meet all regulatory requirements for the grant of a Visitor visa.

The passport holders and visa categories that may access this priority service are specified in an instrument made under the Regulation. The instrument currently provides for passport holders from the People's Republic of China who are applying for a Visitor visa in either the Tourist or Business Visitor stream. Specifying passport holders and visa categories in an instrument provides flexibility and reduces regulatory burden in the future, for example should this service be extended to passports issued by additional countries.

The Regulation does not fetter the powers under section 51 of the Migration Act, which permit the Minister to consider and dispose of applications for visas in such order as he or she considers appropriate.

A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Regulation is compatible with human rights. A copy of the Statement is at Attachment B.

The Office of Best Practice Regulation (the OBPR) has been consulted in relation to the amendments made by the Regulation. The OBPR considers that the proposal has nil regulatory costing and requires a short form Regulation Impact Statement, which is at Attachment C. The OBPR consultation reference number is 19029.

As it was a whole of government decision to trial a priority visa consideration service, consultation was limited to other Commonwealth Government departments prior to the announcement. After the intended trial was publically announced, the proposal was discussed at a Tourism Visa Advisory Group (TVAG) meeting where it was very well received by key industry lobby groups. The TVAG is a key consultative mechanism for communication between tourism peak bodies and the Department of Immigration and Border Protection.

The Migration Act specifies no conditions that need to be satisfied before the power to make the Regulation may be exercised.

Details of the Regulation are set out in Attachment D.

The Regulation is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulation commences on 15 March 2016.

ATTACHMENT A

AUTHORISING PROVISIONS

Subsection 504(1) of the *Migration Act 1958* (the Migration Act) relevantly provides that the Governor-General may make regulations, not inconsistent with the Migration Act, prescribing all matters which by the Migration 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 Migration Act.

The *Migration Amendment (Priority Consideration of Certain Visa Applications) Regulation 2016* relies in part on the power in subsection 504(1) to make regulations which are necessary or convenient for carrying out or giving effect to the Migration Act.

In addition, the following provisions of the Migration Act may apply:

- subsection 47(1), which provides that the Minister is to consider a valid application for a visa;

- subsection 47(2), which provides that the requirement to consider an application for a visa continues until:
  (a) the application is withdrawn; or
  (b) the Minister grants or refuses to grant the visa; or
  (c) the further consideration is prevented by section 39 (limiting number of visas) or 84 (suspension of consideration);

- subsection 51(1), which provides that the Minister may consider and dispose of applications for visas in such order as he or she considers appropriate;

- subparagraph 504(1)(a)(i), which provides that the Governor-General may make regulations making provision for and in relation to the charging and recovery of fees in respect of any matter under the Migration Act or the *Migration Regulations 1994* (the Migration Regulations), including the fees payable in connection with the review of decisions made under the Migration Act or the Migration Regulations, whether or not such review is provided for by or under the Migration Act; and

- subsection 504(2), which provides that section 14 of the *Legislative Instruments Act 2003* does not prevent regulations whose operation depends on a country or other matter being specified or certified by the Minister in an instrument in writing made under the regulations after the regulations take effect.

ATTACHMENT B

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Migration Amendment (Priority Consideration of Certain Visa Applications) Regulation 2016

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Amendment

The Government is trialling a priority visa consideration service for Subclass 600 (Visitor) visa applicants in either the Tourist or Business Visitor stream who are nationals of the People's Republic of China, for a fee of AUD1,000. This will be achieved through Instruments made under the powers introduced in this Legislative Amendment.

The priority service fee is an additional fee, on top of the visa application charge, for priority consideration of the visa application (i.e.: for the visa application to be processed in less time than the standard time for consideration).

The priority service, which requires the payment of the fee, is not mandatory and must be requested. A visa applicant could choose not to request the priority service, and their application would then be processed within the standard processing timeframes. Applicants will indicate that they want the priority service by paying the priority service fee and by submitting a priority service form. The statutory requirements for the grant of a visa under the priority service will remain the same as the requirements for the grant of a visa processed within standard timeframes through the regular pathway.

Where the priority service fee is paid and a valid priority service form is lodged (as prescribed in a new instrument) with a visa application, that visa application may receive the priority service. Initially the trial will limit this priority service to Visitor visa applicants who are Chinese nationals in the People’s Republic of China but if the trial is successful then the priority service may be expanded to additional countries. There is no guarantee that the application will be processed in less than the standard time for consideration (for example, consideration of the application might be delayed if additional health checks are required). An applicant would not be entitled to a refund if the shorter visa consideration timeframe was not met, subject to regulation 2.12F. Applicants will be advised of this on both the priority visa consideration form and on the relevant departmental websites in the People's Republic of China.

Human rights implications

The Legislative Amendment has been considered against each of the seven core international human rights treaties.

Non-discrimination

Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) states:

> *Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Article 26 of the ICCPR states:

> *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Article 2(1) of the International Convention on the Elimination of all Forms of Racial Discrimination relevantly states that:

> *(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.*

To the extent that the Legislative Amendment engages the obligations in Article 2(1) and Article 26 of the ICCPR and Article 2 of the International Convention on the Elimination of all Forms of Racial Discrimination by only providing a benefit to Chinese nationals, the Government considers that this measure is reasonable in the context of a trial programme that is testing the potential for success/interest of this process with a cohort of applicants who may most likely wish to use this process in the future. If sufficient interest is shown in the priority visa consideration service, it may be expanded to eligible passport holders of other countries in the future. It is also noted that the benefit to Chinese nationals is not intended to disadvantage, and will in fact not disadvantage, other nationalities. This is due to the fact that the payment of the priority visa consideration fee makes no difference to the granting of a visa, and may simply speed up visa processing times for eligible persons. Processing times for visitor visas, more generally, would not be affected by this service.

Conclusion

To the extent that he Legislative Amendment engages human rights, it is compatible with those human rights.

The Hon. Peter Dutton MP, Minister for Immigration and Border Protection

ATTACHMENT C

Short-form Regulation Impact Statement

Name of department/agency: Department of Immigration and Border Protection (DIBP)

OBPR reference number: 19029

Name of proposal: Trial an offer of a priority visa consideration service for a fee

Summary of the policy and any options considered:

This proposal seeks to offer to trial a priority visa consideration service for certain Subclass 600 (Visitor) visa applicants that are nationals of the People's Republic of China, for a fee of AUD1,000 which would be charged in addition to the existing visa application charge.

This proposal will be implemented through initially offering this service for paper-based Visitor visa applications lodged through DIBP's existing network of Service Delivery Partners (SDPs) in the People's Republic of China. Pending evaluation, the priority visa consideration service may be progressively expanded to a broader cohort of Chinese applicants and other nationalities. Visitor visa eligibility criteria, including legislative requirements, will remain the same as the current Visitor visa.

The settings and requirements, such as passport eligibility and location where a request for a priority service can be made will be specified in an instrument which will provide DIBP with flexibility in determining and adjusting the requirements.

Does your proposal have any regulatory impacts? Explain

The proposal does not have any regulatory impact on businesses, community organisations or individuals as charges payable to government for a priority visa consideration service is out of scope of the Regulatory Burden Measurement framework. The Office of Best Practice Regulation has agreed the proposal has nil regulatory costs.

ATTACHMENT D

Details of the *Migration Amendment (Priority Consideration of Certain Visa Applications) Regulation 2016*

Section 1 – Name

This section provides that the title of the Regulation is the *Migration Amendment (Priority Consideration of Certain Visa Applications) Regulation 2016*.

Section 2 – Commencement

Subsection 2(1) provides that each provision of the Regulation specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

The table states that the whole of this instrument commences on 15 March 2016.

A note clarifies that this table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

Subsection 2(2) provides that any information in column 3 of the table is not part of the Regulation. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument. Column 3 of the table provides the date/details of the commencement date.

The purpose of this section is to provide for when the amendments made by the instrument commence.

Section 3 – Authority

This section provides that the Regulation is made under the *Migration Act 1958* (the Migration Act).

The purpose of this section is to set out the Acts under which the Regulation is made.

Section 4 – Schedule(s)

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

The effect of this section is that the *Migration Regulations 1994* (the Migration Regulations). are amended as set out in the applicable items in Schedule 1 to the Regulation.

The purpose of this section is to provide for how the amendments in this Regulation operate.

Schedule 1 – Amendments

Item 1 – After Division 2.2A of Part 2

This item inserts a new Division 2.2B, entitled "Priority consideration of certain visa applications on request", in Part 2 of the Migration Regulations.

New regulation 2.12M is entitled "Priority consideration of certain visa applications on request". The purpose of regulation 2.12M is to enable a request to be made to prioritise consideration of an application for a fee (priority service). However, the priority consideration is not a guarantee of visa decision in less than the usual time to process such an application. For example, if the application is incomplete or there are health or character related issues or the Minister seeks further information or comments on adverse information, then visa processing times are likely to be extended, despite the priority consideration. In particular, the prescribed time for responding to a section 56 or section 57 invitation under Division 2.3 (Communication between applicant and Minister) is very specific and the Minister must allow the applicant the full time to respond.

New subregulation 2.12M(1) provides that the Minister may prioritise the consideration of a valid visa application on a request made in accordance with regulation 2.12M. This regulation does not fetter the powers under section 51 of the Migration Act, which permit the Minister to consider and dispose of applications for visas in such order as he or she considers appropriate.

New paragraph 2.12M(2)(a) provides that an applicant for a visa may make a request for priority service only if the visa is of a kind specified by the Minister by legislative instrument. Such an instrument made under subregulation 2.12M(7) may include one or more classes, subclasses or streams of visa. The effect of this amendment is that only applicants for specified visas can request priority service under Division 2.2B.

New paragraph 2.12M(2)(b) provides that an applicant for a visa may make a request for priority service only if the applicant holds a valid passport of a kind specified by the Minister in relation to that kind of visa and meets any other requirements specified by the Minister in relation to that kind of visa and that kind of valid passport. An instrument made under subregulation 2.12M(7) for this purpose may include the country that issues the passport and any conditions attached to such passports.

The effect of this amendment is is that a request for priority service may only be made if the applicant holds a specified passport and meets any other specified requirements. Different requirements may be specified in relation to different passport holders and different visas.

New subparagraph 2.12M(2)(c)(i) provides that an applicant for a visa may only make a request for priority service if the visa application is made using an approved form specified by the Minister in relation to that kind of visa and that kind of valid passport.

The effect of this is that a request for priority service may only be made if the visa application was made using a specified form (eg, paper or online). Different requirements may be specified in relation to different passport holders and different visas.

New subparagraph 2.12M(2)(c)(ii) provides that an applicant for a visa may only make a request for priority service if the visa application is made in a way specified by the Minister in relation to that kind of visa and that kind of valid passport.

The effect of this is that a request for priority service may only be made if the visa application is made in the specified way (eg, by posting to a particular address or by applying online). Different requirements may be specified in relation to different passport holders and different visas.

The purpose of these provisions is to limit the requests for priority service to certain kinds of visa applications, based on the visa type, the country, the form used (paper or online) and the place lodged. These settings are specified in an instrument and reflect where this priority service can practically be offered. The settings are appropriately provided in an instrument to enable flexibility as practical circumstances change. Subsection 504(2) of the Migration Act provides authority for such matters to be specified in an instrument made under the regulations.

New subregulation 2.12M(3) provides that the request for priority service must be made either as permitted by subregulation 2.12M(4) or in a form approved by the Minister under regulation 1.18 for the purposes of paragraph 2.12M(3)(b). The effect of this amendment is that the request under regulation 2.12M is invalid unless the request is made in one of these ways.

New subregulation 2.12M(4) provides that a request for priority service made as mentioned in paragraph 2.12M(3)(a) may be made on the approved form for making the visa application (the visa application form) if the visa application form enables the making of the request.

The effect of this amendment is that if a visa application form has a space or tickbox relating to making a request for the priority service, then a valid request for the priority service can be made on the visa application form. However, if the visa application form does not enable a request for priority service to be made on it, then the specified request form must be used instead, in accordance with paragraph 2.12M(3)(b) and paragraph 2.12M(5).

New paragraph 2.12M(5)(a) provides that a request for priority service made as mentioned in paragraph 2.12M(3)(b) must be made using an approved form specified by the Minister in relation to the kind of visa applied for and the kind of valid passport held by the applicant.

The effect of these provisions together is that a request for priority service must be made on either the visa application form (where the application form enables this) or a form specified in the instrument. Different request forms may be specified for different countries and different visas. This enables the request form to be tailored to the needs of that country or visa.

Where a visa application form does not enable the request to be made on the form, then the specified request form must be used. Where both options are available, the applicant may choose to use either.

New paragraph 2.12M(5)(b) provides that a request for priority service made as mentioned in paragraph 2.12M(3)(b) must be made in a way specified by the Minister in relation to the kind of visa applied for and the kind of valid passport held by the applicant. The effect of this is that a request for priority service may only be made in the specified way (for example, by posting to a particular address or by applying online). Different requirements may be specified in relation to different passport holders and different visas.

New subregulation 2.12M(6) provides that the fee for the request for priority consideration prescribed under regulation 2.12N must be paid in accordance with that regulation. The effect of this amendment is that the request for priority service is invalid unless the prescribed fee is paid in the way set out under regulation 2.12N.

New subregulation 2.12M(7) provides that the Minister may, by legislative instrument, specify matters for subregulations 2.12M(2) and (5). These matters include:

- kinds of visas;
- kinds of valid passports;
- requirements the applicant must meet;
- approved forms;
- ways an application or request for priority processing can be made.

The purpose and effect of this amendment is to put beyond doubt the power of the Minister to specify such matters by a legislative instrument. Subsection 504(2) of the Migration Act provides authority for these kinds of matters to be specified in an instrument made under the regulations.

New subregulation 2.12M(8) provides that the legislative instrument may specify different matters for different classes of applicant. For example, applicants who are in Australia and applicants who are outside Australia may have different requirements to fulfil in order for their request under regulation 2.12M to be valid. The effect of this amendment is that different classes of applicants may have different requirements set out in the legislative instrument made under subregulation 2.12M(7).

New regulation 2.12N is entitled “Fee for request for priority consideration of visa applications”. The fee for a request for priority consideration of a visa application under regulation 2.12M is AUD1,000. The purpose of this amendment is to set the amount charged for the request under regulation 2.12M and the requirements associated with payment of this fee. The effect of this amendment is that a request under regulation 2.12M is invalid unless this prescribed fee is paid in full to the Commonwealth at or before the time the request is made.

If the request for priority service is lodged on the internet, the fee must be paid by credit card or funds transfer, in accordance with the instructions given to the applicant as part of making the request. This applies whether the request is made on the visa application form or made separately. A note clarifies that a credit card surcharge is payable if a fee, or part of a fee, is paid by credit card, and refers the reader to regulation 5.41A.

New regulation 2.12P is entitled "Refund of fee for request for priority consideration of visa applications". The Minister must refund the fee for a request for priority consideration of a visa application to the person who paid the fee if the Minister decides, under regulation 2.12F, to refund the visa application charge paid in relation to that application. If the fee to be refunded was originally paid in another currency, then the refund can only be made in that same currency or in Australian dollars. The purpose and effect of regulation 2.12P is to allow refunds to made in certain situations.

Schedule 2 – Application and transitional provisions

Item 1 – Schedule 13

This item amends Schedule 13 to the Migration Regulations to insert Part 53 entitled "Amendments made by the Migration Amendment (Priority Consideration of Certain Visa Applications) Regulation 2016" and inserts new clause 5301. Schedule 13 is the repository for application and transitional provisions relating to amendments to the Migration Regulations.

The purpose of Part 53 of Schedule 13 is to set out the application and transitional provisions for the amendments made by the Regulation.

Inserted clause 5301, entitled "Operation of Schedule 1", provides that the amendments made by Schedule 1 to the Regulation apply in relation to an application for a visa made on or after 15 March 2016.

A note clarifies that Schedule 1 to the Regulation commences on 15 March 2016.