

## EXPLANATORY STATEMENT

### *Migration Regulations 1994*

#### **Migration (Exemptions from Skill, Age and English Language Requirements for Subclass 186, 187 and 494 Visas) Amendment Instrument (LIN 20/189) 2020**

*(paragraphs 186.221(b) and 187.221(b) of Schedule 2)*

1. The instrument, LIN 20/189, is made under paragraphs 186.221(b) and 187.221(b) of Schedule 2 of the *Migration Regulations 1994* (the Regulations).
2. In accordance with subsection 33(3) of the *Acts Interpretation Act 1901* (the AIA), the instrument amends the *Migration (LIN 19/216: Exemptions from Skill, Age and English Language Requirements for Subclass 186, 187 and 494 Visas) Instrument 2019* (F2019L01404). Subsection 33(3) of the AIA states that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.
3. LIN 19/216 operates to specify exemptions in relation to age, skills, employment history or English language requirements for the Subclass 186 (Employer Nomination Scheme) visa (Subclass 186), Subclass 187 (Regional Sponsored Migration Scheme) visa (Subclass 187) and Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa (Subclass 494).
4. The purpose of the amending instrument, LIN 20/189, is to amend LIN 19/216 to ensure that LIN 19/216, amongst other things, exempts certain applicants of the Subclass 186 and Subclass 187 visas in the Temporary Residence Transition stream from having to satisfy the age requirement at the time of application. Currently, under regulation 186.221 or 187.221 of Schedule 2 to the Regulations, an applicant for these visas must not have turned 45 at the time of their application. However, subsections 6(1) and 7(1) of LIN 19/216 provides that applicants are exempt from satisfying this age requirement

if they fall in a specified class of persons. One such class is Subclass 457/482 workers, which is defined in section 5 of LIN 19/216. A Subclass 457/482 worker is defined as a person who, after having worked for the nominating employer for 3 years, has had earnings equal to, or greater than, the high income threshold for each of the three years prior to making their application for a visa that this instrument applies to.

5. Due to the COVID-19 pandemic, there has been significant disruption to the Australian labour market. Many workers who are employed by businesses operating in Australia have had their earnings impacted by the COVID-19 pandemic. This includes if an employee has been stood down, has had their hours reduced or has been required to work at a reduced salary. As a result, these applicants (who may have ordinarily fallen under the definition of a Subclass 457/482 worker by having earnings equal to, or greater than the high income threshold) may no longer be exempt from satisfying the age requirement.
6. To ensure that this class of persons will continue to be exempt from satisfying the age requirement at the time of their application for a Subclass 186 or 187 visa in the Temporary Residence Transition stream, LIN 20/189 introduces a new class of persons who are specified as exempt from having to satisfy the age requirement.
7. This new class of persons, defined as Subclass 457/482 coronavirus concession workers, includes workers who:
  - would ordinarily be Subclass 457/482 workers, but for the requirement to satisfy the high income threshold; and
  - have had their employment affected by the COVID-19 pandemic during the concession period (as mentioned in subregulation 1.15N(1) of the Regulations); and
  - have earnings that are equal to, or greater than, a pro-rata threshold (instead of the high income threshold) for earnings of any year that was impacted by the COVID-19 pandemic (excluding any earnings in a week when the person's employment was affected by the COVID-19 pandemic); and

- have earnings that are equal to, or greater than, the high income threshold for earnings of any year that were not impacted by the COVID-19 pandemic.

8. The pro-rata threshold is calculated by the following formula:

$$\frac{\text{High income threshold (as applying at the end of the year)}}{52} \times \left( 52 - \begin{array}{l} \text{Number of weeks in the year} \\ \text{when the person's employment} \\ \text{was affected by a coronavirus} \\ \text{employment change} \end{array} \right)$$

9. As such, applicants who are holders of a Subclass 457 (Temporary Work (Skilled)) visa or a Subclass 482 (Temporary Skill Shortage) visa and have been affected by a coronavirus employment change can apply the pro-rata income threshold instead of the high income threshold for the year impacted by the COVID-19 pandemic. For any years that were not impacted by the COVID-19 pandemic, the person's earnings for the year will continue to be assessed against the high income threshold.
10. The amendments made by LIN 20/189 will apply to all applications made on or after the day of commencement of LIN 20/189. However, for the purposes of these amendments, a person's earnings will only be considered to have been impacted by the COVID-19 pandemic if their employment was affected by the COVID-19 pandemic during the concession period. The concession period is defined in subregulation 1.15N(1) of the Regulations as the period that commences on 1 February 2020 and ends on a day specified by the Minister.
11. Section 17 of the *Legislation Act 2003* requires consultation which is appropriate and reasonably practicable to be undertaken. Consultation was undertaken with a range of stakeholders and Commonwealth Departments as part of the whole of government response to the COVID-19 pandemic.
12. The Office of Best Practice Regulation (OBPR) has advised that a Regulatory Impact Statement is not required (OBPR Reference 42656).

13. Under section 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015*, the instrument is exempt from disallowance and therefore a Statement of Compatibility with Human Rights is not required.
14. The instrument commences on the day after registration on the Federal Register of Legislation.