

EXPLANATORY STATEMENT

Issued by authority of the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

Migration Regulations 1994

Migration (COVID-19 Pandemic event for Subclass 408 (Temporary Activity) and nil VAC for Temporary Activity (Class CG) visa) Amendment Instrument (LIN 21/038) 2021

- 1 The instrument, Departmental reference LIN 21/038, is made under subregulation 2.07(5) and paragraphs 408.229(b) and (c) of Schedule 2 to the *Migration Regulations 1994* (the Migration Regulations).
- 2 The instrument amends the *Migration (LIN 20/229: COVID-19 Pandemic event for Subclass 408 (Temporary Activity) visa and visa application charge for Temporary activity (Class CG) visa) Instrument 2020 (F2020L01145)* (LIN 20/229) in accordance with subsection 33(3) of the *Acts Interpretation Act 1901*. That subsection provides that a power to make a legislative instrument includes a power to amend or repeal that instrument in the same manner, and subject to the same conditions, as the power to make the instrument.
- 3 The instrument commences on the day after this instrument is registered on the Federal Register of Legislation and is a legislative instrument for the *Legislation Act 2003* (the Legislation Act).

Purpose

- 4 In response to the COVID-19 pandemic, LIN 20/229 has specified that the pandemic declared by the World Health Organisation is an ‘Australian Government endorsed event’ for the purpose of paragraph 408.229(b) of Schedule 2 to the Migration Regulations. This means that a Subclass 408 visa may be granted to a visa applicant if:
 - the applicant seeks to enter or remain in Australia to undertake work directly associated with an event (paragraph 408.229(a)); and
 - the applicant is in a class of persons specified in LIN 20/229 in relation to the event (paragraph 408.229(b)).
- 5 LIN 20/229 specifies three different classes of persons for the purpose of paragraph 408.229(b) of Schedule 2, in subsections 8(1), (2) and (3) respectively.
- 6 Subsection 8(1) provides that a person is in a specified class where they are in Australia, unable to depart as a result of the COVID-19 pandemic, the holder of a substantive temporary visa that is 28 days or less from ceasing to be in effect (or was the holder of such a visa that ceased to be in effect not more than 28 days before making the application), and is unable to make a valid application, or meet the criteria in Schedule 2 of the Regulation for another Subclass 408 visa, or an application for another substantive temporary visa of any Subclass other than Subclass 408 visa.
- 7 A person is in a class under subsection 8(2) where they are in Australia, unable to depart Australia as a result of the COVID-19 pandemic, the holder of a substantive temporary visa, which has a condition attached prohibiting the holder from working in Australia; or the holder of a substantive temporary visa

that is 90 days or less from ceasing to be in effect; (or was the holder of a substantive temporary visa that has ceased to be in effect not more than 28 days before the application for a Subclass 408 visa is made) and is in receipt of an offer of employment from an approved provider or a service provider of a Commonwealth-funded aged care service to undertake work in the aged care sector.

- 8 The specified class in subsection 8(3) captures people who are in Australia, and the holder of a substantive temporary visa that is 90 days or less from ceasing to be in effect (or was the holder of a substantive temporary visa that ceased to be in effect not more than 28 days before the application for a Subclass 408 visa is made) and is employed by, or in receipt of an offer of employment from, an employer in the aged care sector; agriculture sector; or childcare sector; or disability sector; or food processing sector; or health care sector; and is unable to make a valid application, or meet the criteria in Schedule 2 of the Regulations for another Subclass 408 visa, or a substantive temporary visa of another Subclass other than a Subclass 408 visa.
- 9 The class specified in subsection 8(3) of LIN 20/229 is intended to capture persons who are, or will be, employed in industries that have been particularly impacted by the COVID-19 pandemic.
- 10 The purpose of this instrument is to:
 - expand the class of persons specified in subsection 8(3) to capture people who are employed by, or in receipt of an offer of employment from, an employer in the tourism and hospitality sector (see item 3 of Schedule 1 to the instrument); and
 - amend the class of persons specified in subsection 8(1) to allow for an application for a Subclass 408 visa to be made if the person holds a substantive temporary visa that is 90 days or less from ceasing to be in effect (see item 2).
- 11 For the purposes of this instrument, an employer in the ‘tourism and hospitality sector’ is intended to be defined with reference to the Australian and New Zealand Standard Industrial Classification (ANZSIC) system under the Division of Accommodation and Food Services. This will also include work for employers whose primary purpose is to directly provide a service to tourists, when their activities are not listed in the Division of Accommodation and Food Services under the ANZSIC system.
- 12 LIN 20/229 also specifies that the visa application charge (VAC) amount is nil for visa applications captured by LIN 20/229 for the purpose of subparagraph 1237(2)(a)(i) of Schedule 1 to the Migration Regulations. The instrument does not make any changes to VAC arrangements, and nil VAC continues to be payable for any application captured by LIN 20/229.
- 13 New section 6B clarifies that the amendments made by the instrument to LIN 20/229 apply to a Subclass 408 visa application made, but not finally determined, before the commencement of the instrument and an application made on or after the commencement of the instrument. This means that:
 - if a person has applied for a visa as part of the class of persons specified in subsection 8(1) before the commencement of the instrument, they will be captured under subsection 8(1); and
 - if a person has made a visa application whilst being engaged in, or with an offer for, work in the tourism and hospitality sector they will be captured in the class specified in subsection 8(3).
- 14 For the purposes of this amendment, an application has not been finally determined, if a valid application has been made and a decision is not yet made on the application, or if a delegate has made a

decision, the decision is reviewable under Part 5 or Part 7 of the Migration Act. Where a decision is reviewable, the application has been finally determined if either the timeframe for making an application for review has lapsed without a review application being made, or the decision is reviewed by a reviewing body and a decision has been made, which does not include remitting the decision back to the Department.

Consultation

- 15 Before making the instrument, the Department consulted with the Department of Prime Minister and Cabinet, Attorney General, Austrade and the Department of Education, Skills and Employment about the expansion of subsection 8(3). The consultations were part of broader discussions to support the Tourism and Hospitality sector and the consulted agencies agreed to the expansion of the class to include workers in the Tourism and Hospitality sector.
- 16 The Office of Best Practice Regulation (OBPR) was also consulted and considered that the instrument dealt with matters of a minor or machinery nature and no regulatory impact statement was required. The OBPR reference number is 44060.

Details of the instrument

- 17 Section 1 sets out the name of the instrument.
- 18 Section 2 provides for the commencement of the instrument on the day after it is registered on the Federal Register of Legislation.
- 19 Section 3 states that the instrument amends *Migration (LIN 20/229: COVID-19 Pandemic event for Subclass 408 (Temporary Activity) visa and visa application charge for Temporary Activity (Class CG visa) Instrument 2020*.
- 20 Item 1 of Schedule 1 inserts new section 6B into LIN 20/229. This section provides that the amendments made by LIN 21/038 apply to an application made for the Subclass 408 visa, but not finally determined, before the commencement of that instrument; and an application made on or after the commencement of that instrument.
- 21 Item 2 of Schedule 1 amends subparagraph 8(1)(c)(i) in LIN 20/229 to include in the class of persons, who are able to apply for a Subclass 408 visa, the holder of a substantive temporary visa that is 90 days or less from ceasing to be in effect.
- 22 Item 3 of Schedule 1, in effect, inserts a reference to the ‘tourism and hospitality sector’ and in new subparagraph 8(3)(c)(vii). This change adds applicants working in the tourism and hospitality sector as an additional class of persons for the purpose of paragraph 408.229(c) of Schedule 2 to the Regulations. Technical amendments to subparagraph 8(3)(c)(vi) are also included to give effect to this change.

Parliamentary scrutiny etc.

- 23 The instrument is exempt from disallowance under section 42 of the Legislation Act. This is because the powers to make the instrument are prescribed in item 20 of the table in section 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015*.

- 24 The instrument was made by a Senior Executive Service Band One in the Immigration Programs Division of the Department who has been delegated the powers to make the instrument by the Minister for Home Affairs.