

SUPPLEMENTARY EXPLANATORY STATEMENT

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

Migration Act 1958

Migration Amendment (Australian Agriculture Workers) Regulations 2021

Purpose of the supplementary explanatory statement

The purpose of this supplementary explanatory statement is to provide additional information concerning the meaning of *adverse information* and policy guidance as to when it would be reasonable to disregard adverse information for the purposes of paragraph 403.281(e) of Schedule 2 to the *Migration Regulations 1994* (the Migration Regulations), as inserted by Item 8 of Schedule 1 to the *Migration Amendment (Australian Agriculture Workers) Regulations 2021* (the Amending Regulations). This is done in accordance with paragraph 15J(1)(c) of the *Legislation Act 2003* and is in response to a request from the Senate Standing Committee for the Scrutiny of Delegated Legislation, as part of their review of the instrument.

The additional detail does not alter the assessment of compatibility with human rights set out in the initial explanatory statement for the Amending Regulations.

Amendments to the explanatory statement

Item [8] – At the end of Division 403.2 of Schedule 2

At the end of the description for clause 403.281, insert the following:

The meaning of *adverse information* for the purposes of paragraph 403.281(e) is set out in regulation 1.13A of the Migration Regulations which applies whenever the term is used in the Migration Regulations. Regulation 1.13A defines *adverse information* as follows:

“1.13A (1) *Adverse information* about a person is any adverse information relevant to the person’s suitability as:

- (a) an approved sponsor; or
- (b) a nominator (within the meaning of regulation 5.19).

(2) Without limiting subregulation (1), *adverse information* about a person includes information that the person:

- (a) has contravened a law of the Commonwealth, a State or a Territory; or
- (b) is under investigation, subject to disciplinary action or subject to legal proceedings in relation to a contravention of such a law; or
- (c) has been the subject of administrative action (including being issued with a warning) for a possible contravention of such a law by a Department or regulatory authority that administers or enforces the law; or
- (d) has become insolvent (within the meaning of section 95A of the *Corporations Act 2001*); or

(e) has given, or caused to be given, to the Minister, an officer, the Tribunal or an assessing authority a bogus document, or information that is false or misleading in a material particular.

(3) Nothing in this regulation affects the operation of Part VIIC of the *Crimes Act 1914* (which includes provisions that, in certain circumstances, relieve persons from the requirement to disclose spent convictions and require persons aware of such convictions to disregard them).

(4) In this regulation:

information that is false or misleading in a material particular means information that is:

- (a) false or misleading at the time it is given; and
- (b) relevant to any of the matters the Minister may consider when making a decision under the Act or these Regulations, whether or not the decision is made because of that information.

Note: For the definition of ***bogus document***, see subsection 5(1) of the Act.”

The criterion in paragraph 403.281(e) is consistent with requirements that an organisation would have to meet to be approved as a sponsor. It is designed to ensure that no adverse information has come to light between the time of approval as a sponsor and consideration of a visa application on the basis of sponsorship by the sponsor. If it has, it must be considered whether it would be reasonable to disregard the information. The departmental Procedural Instructions provide the following guidance in considering whether it would be reasonable to disregard any adverse information:

Circumstances in which it may be reasonable to disregard the adverse information

There are no definitive rules in relation to when it will be reasonable to disregard adverse information which is known about an applicant or a person associated with the applicant. Decision makers must exercise judgement and assess the circumstances of each case on their merit. Factors which may be taken into account in deciding whether it is reasonable to disregard the adverse information include but are not limited to:

- *the nature of the adverse information;*
- *how the adverse information arose;*
- *whether the adverse information arose recently or a long time ago; and*
- *whether the person has taken any steps to ensure the circumstances which led to the adverse information did no recur.*

Examples of circumstances in which it may be reasonable to disregard adverse information may include situations where the person:

- *has developed practices and procedures to ensure the relevant conduct was not repeated; and*
- *has complied with sponsorship obligations on all other occasions and the decision maker is satisfied that the breach for which the infringement notice was issued was a one-off and is unlikely to recur; and*

- *has disassociated themselves from the overseas employer or agents involved in preparing fraudulent applications, or the sponsor may have introduced additional quality control measures; and*
- *has the capacity to comply with their sponsorship obligations; and*
- *has not been the subject of disciplinary action in relation to exploitation and mistreatment of vulnerable migrant workers.*

Due to the wide range of information that may be captured by the definition of adverse information (noting that it must be relevant to their suitability to be a sponsor), it is appropriate to provide that the information may be disregarded if it is reasonable to do so. This would allow the visa application to proceed, for instance, in circumstances where the decision maker is satisfied that the risk of any adverse consequences to the visa holder, or repeat of the circumstances that led to the adverse information, has been mitigated.

In view of the varied and complex situations in which adverse information may arise, that may be different from case to case, it is not possible to set out in the legislation all the circumstances when it would be reasonable to disregard the adverse information, and it may result in an unreasonable outcome to do so. Rather, a decision maker must assess the factors relevant to a particular case. A decision that it would not be reasonable to disregard adverse information would be merits reviewable under section 338 of the *Migration Act 1958* (the Migration Act).

Section 338 of the Migration Act provides a right to seek a review by the Administrative Appeals Tribunal of a decision to refuse to grant a Subclass 403 visa on the grounds that an applicant fails to satisfy these criteria.