

EXPLANATORY STATEMENT

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

Migration Regulations 1994

Migration (Specified persons and periods of time for regulation 5.19) Instrument (LIN 22/038) 2022

- 1 The instrument, Departmental reference LIN 22/038, is made under subparagraph 5.19(5)(a)(iii), subregulation 5.19(6) and paragraph 5.19(8)(b) of the *Migration Regulations 1994* (the Regulations).
- 2 The instrument commences on 18 March 2022, and is a legislative instrument for the *Legislation Act 2003* (the Legislation Act).

Purpose

- 3 Certain temporary skilled visa holders may be eligible to become a permanent resident in Australia. This occurs if their employer makes an application to the Minister under regulation 5.19 of the Regulations for the visa holder to be nominated for a position in Australia and, once that application is approved, the visa holder subsequently applies for a Subclass 186 (Employer Nomination Scheme) visa (subclass 186 visa) or Subclass 187 (Regional Sponsored Migration Scheme) visa (subclass 187 visa). Under the subclass 186 visa and subclass 187 visa, applicants can be nominated and apply for a number of streams for permanent residency, including a subclass 186 visa in the Temporary Residence Transition stream (TRT visa).
- 4 In response to the strong labour demand and the declining number of temporary visa holders in 2021 due to the COVID-19 pandemic, on 25 November 2021 the Australian Government announced that measures will be introduced to improve access to permanent residence for certain holders of Subclass 482 (Temporary Skill Shortage) visas (subclass 482 visa) and Subclass 457 (Temporary Work (Skilled)) visas (subclass 457 visa). The instrument forms part of these measures to be implemented on 1 July 2022. More skilled workers holding subclass 457 visas or subclass 482 visas can be nominated and apply for a TRT visa.
- 5 Regulation 5.19 of the Regulations prescribes the process for the approval of nominated positions in Australia, including in relation to a TRT visa. Subregulations 5.19(5) to (8) of the Regulations provides for requirements relating to approval for nomination for a TRT visa. The Minister may specify, by legislative instrument, requirements in subregulations 5.19(5) to (8) of the Regulations. These matters include:
 - specifying persons who hold a subclass 482 visa in the short-term stream at the time of application as eligible to be nominated for a position in Australia (see subparagraph 5.19(5)(a)(iii) of the Regulations);
 - different periods of time that apply to paragraphs 5.19(5)(e), (f) and (g) of the Regulations for specified persons (see subregulation 5.19(6) of the Regulations); and
 - specifying persons exempted from the operation of paragraph 5.19(5)(c) of the Regulations (see paragraph 5.19(8)(b) of the Regulations).

- 6 The purpose of the instrument is to specify a new cohort of specified persons who, after 30 June 2022, will be eligible to meet requirements under regulation 5.19 of the Regulations for applications seeking approval for a nomination of a TRT visa. It also exempts the new specified persons and an additional cohort of subclass 457 visa holders after 30 June 2022 from the operation of paragraph 5.19(5)(c) of the Regulations.
- 7 Additionally, the instrument continues specifying the matters specified in *Migration (IMMI 18/052: Specified Persons and Period of Time for Regulation 5.19) Instrument 2018* (IMMI 18/052). IMMI 18/052 operated to:
- specify a cohort of persons who may hold a subclass 482 visa in the Short-term stream that may be eligible for permanent residency for subparagraph 5.19(5)(a)(iii);
 - specify different time periods for paragraphs 5.19(5)(e), (f) and (g) which apply to specified persons, and for persons who experience a COVID-19 reduced work period or a COVID-19 unpaid leave period as defined in the instrument; and
 - exempt certain persons from operation of paragraph 5.19(5)(c) of the Regulations.
- 8 IMMI 18/052 self-repealed on 18 March 2022. Continuing to specify matters for the specified persons from IMMI 18/052 in the instrument will support the processing of ongoing cases under review at the Administrative Appeals Tribunal (AAT). These cases concern the cohort of specified persons in IMMI 18/052 who have been nominated for a TRT visa. The AAT is unlikely to have made a final decision on these cases by 18 March 2022. Therefore, to the extent that the instrument has any retrospective operation, this will be consistent with subsection 12(2) of the Legislation Act, as the instrument will have a beneficial effect for those whose nomination applications are awaiting a final decision from the AAT. Further detail on this cohort is included at **Attachment A**.
- 9 The instrument also updates and clarifies the drafting of IMMI 18/052.

Consultation

- 10 Consultation was undertaken with industry leaders, such as Australian Chamber of Commerce and Industry and Australian Industry Group, and the Ministerial Advisory Council on Skilled Migration who supported the proposed measures to improving skilled visa holders access to permanent residency pathways. The measure implements the recommendation by the Joint Standing Committee on Migration through their inquiry into Australia's skilled migration system. The Prime Minister, through an exchange of letters, has provided authority for this measure.
- 11 The Office of Best Practice Regulation (OBPR) was also consulted and considered that the instrument dealt with matters of a minor nature and no regulatory impact statement was required. The OBPR reference number is 22-01898.

Details of the instrument

- 12 Details of the instrument are set out in **Attachment A**.

Parliamentary scrutiny etc.

- 13 The instrument is exempt from disallowance under section 42 of the Legislation Act. This is because instruments created under Part 5 of the Regulations are exempt under paragraph b of item 20 in the table of section 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015*.
- 14 The instrument was made by the Minister of Immigration, Citizenship, Migrant Services and Multicultural Affairs, in accordance with subparagraph 5.19(5)(a)(iii), subregulation 5.19(6) and paragraph 5.19(8)(b) of the Regulations.

Details of the *Migration (Specified persons and periods of time for regulation 5.19) Instrument (LIN 22/038) 2022*

Section 1 Name

This section provides that the name of the instrument is the *Migration (Specified persons and periods of time for regulation 5.19) Instrument (LIN 22/038) 2022* (the instrument).

Section 2 Commencement

This section provides that the instrument commences on 18 March 2022.

Section 3 Definitions

Under this section:

- **application** is defined to be an application under regulation 5.19 of the Regulations for approval of the nomination of a position in Australia. This is an application made by the employer.
- **concession period** has the meaning given by subregulation 1.15N(1) of the Regulations. At the time of making this instrument, 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.
- **COVID-19** is defined to be the pandemic declared by the World Health Organization on 11 March 2020, caused by the coronavirus COVID- 19.
- **COVID-19 reduced work period**: is defined in subsection 6(2) of the instrument.
- **COVID-19 unpaid leave period**: is defined in subsection 7(2) of the instrument.
- **identified person** has the meaning given by paragraph 5.19(2)(c) of the Regulations.
- **specified person** is defined in subsection 4(1) of the instrument.
- **specified 457 visa holder** is defined in subsection 4(2) of the instrument.
- **subclass 457 visa** means a Subclass 457 (Temporary Work (Skilled)) visa as in force under Schedule 2 to the Regulations before 18 March 2018.

Section 4 Specified persons

Section 4 specifies persons to which subparagraph 5.19(5)(a)(iii) of the Regulations applies, if the person has a Subclass 482 (Temporary Skill Shortage) visa in the Short-term stream. Subparagraph 5.19(5)(a)(iii) of the Regulations provides that, if a nomination relates to a visa in a Temporary Residence Transition stream of the subclass 186 or subclass 187 visa, the person identified in the nomination application (i.e. the identified person) must hold a subclass 482 visa in the short-term stream and be a person specified in a legislative instrument.

Subsection 4(1) provides that a person mentioned in subsection 4(2) or 4(3) is specified (a specified person).

Subsection 4(2) captures a person who, on 18 April 2017, held or applied for a subclass 457 visa that was subsequently granted (a specified 457 visa holder). This cohort was previously specified in IMMI 18/052, which self-repealed on 18 March 2022.

As the Government announced on 18 April 2017 that the subclass 457 visa would cease and be replaced by the subclass 482 visa, transitional arrangements were put in place at the time for those subclass 457 visa holders and applicants to continue to access permanent residence through a subclass 186 visa or subclass 187 visa. IMMI 18/052 formed part of these transitional arrangements, so that this cohort could meet the new eligibility requirements under subregulation 5.19(5) of the Regulations that had been introduced by the *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018* (F2018L00262).

Subsection 4(3) captures a person who, commencing on 1 July 2022, was in Australia for a cumulative total of at least 12 months between 1 February 2020 and 14 December 2021, and is employed by a person actively and lawfully operating a business in Australia at the time the nomination application is made.

Specifying this cohort improves access to permanent residence for the existing subclass 482 visa holders in the short-term stream. This recognises the contribution of skilled migrants to Australia during the COVID-19 pandemic, addresses Australia's skills shortages and seeks to retain those skilled migrants in Australia beyond the pandemic.

Section 5 Different periods of time for paragraphs 5.19(5)(e), (f) and (g) of the Regulations

Section 5 specifies different periods of time for paragraphs 5.19(5)(e), (f) and (g) of the Regulations as permitted by subregulation 5.19(6).

Subregulation 5.19(6) of the Regulations provides that the Minister may, by legislative instrument, determine different periods of time for the purposes of paragraphs 5.19(5)(e), (f) and (g) of the Regulations for persons specified in the instrument. Paragraphs 5.19(5)(e), (f) and (g) of the Regulations set out the requirements for approval which must be met if the nomination relates to a TRT visa as follows:

- during the period of 4 years immediately before the application is made, the identified person must have held one or more of a subclass 457 visa or a subclass 482 visa for at least 3 years (see paragraph 5.19(5)(e) of the Regulations); and
- if paragraph 5.19(5)(f) of the Regulations applies to identified person, the person must have been employed in the position in relation to which the relevant subclass 457 or subclass 482 visa was granted for at least 3 years (not including any periods of unpaid leave) during the period of 4 years immediately before the application is made; or
- if paragraph 5.19(5)(g) of the Regulations applies to the identified person, the person must have been employed in the occupation in relation to which the relevant subclass 457 or subclass 482 visa was granted for at least 3 years (not including any periods of unpaid leave) during the period of 4 years immediately before the application is made.

Subsection 5(1) specifies for different periods of time in paragraphs 5.19(5)(e), (f) and (g) of the Regulations for specified 457 visa holders.

Paragraph 5(1)(a) specifies a ‘period of 3 years’ in relation to a specified 457 visa holder, instead of the ‘period of 4 years’ referenced in paragraphs 5.19(5)(e), (f) and (g) of the Regulations.

Paragraph 5(1)(b) specifies a ‘total period of at least 2 years’ in relation to a specified 457 visa holder, instead of the ‘total period of at least 3 years’ referenced in paragraph 5.19(5)(e) of the Regulations.

Paragraph 5(1)(c) specifies a ‘total period of at least 2 years (not including any periods of unpaid leave)’ in relation to a specified 457 visa holder, instead of the ‘total period of at least 3 years (not including any periods of unpaid leave)’ referenced in subparagraph 5.19(5)(f)(i) and paragraph 5.19(5)(g) of the Regulations.

Subsection 5(2) states that subsection 5(1) is subject to sections 6 and 7. This means that where section 6 or 7 applies to the specified 457 visa holder, the different total periods of time specified in paragraph 6(1)(a) or 7(1)(a) of the instrument applies, respectively. In these circumstances, the total period of time specified in paragraph 5(1)(c) would no longer apply.

For example, this means a specified 457 visa holder to whom paragraph 5.19(5)(f) of the Regulations applies (and to whom paragraph 5.19(5)(g) of the Regulations doesn’t apply) must be employed in the position in relation to which their subclass 457 visa was granted for at least 2 years (not including any periods of unpaid leave) during the period of 3 years immediately before the application for approval of the nomination of a position in Australia is made.

However, if a specified 457 visa holder looking to satisfy paragraph 5.19(5)(f) or (g) of the Regulations has taken unpaid leave associated with a COVID-19 reduced work period or a COVID-19 unpaid leave period (as defined in subsections 6(2) and 7(2) respectively), the different periods of time specified in paragraph 6(1)(a) or 7(1)(a) will apply.

Section 6 Different periods of time for paragraph 5.19(5)(f) of the Regulations—COVID 19

Sections 6 and 7, specify different periods of time that apply in subparagraph 5.19(5)(f)(i) (if applicable) and paragraph 5.19(5)(g) of the Regulations, as permitted by subregulation 5.19(6) of the Regulations for those affected by the disruption to the labour market caused by the COVID-19 pandemic. These provisions ensure that those who were stood down, worked on a basis other than a full-time basis due to COVID-19, had their work hours reduced or were required to take unpaid leave due to COVID-19 are not disadvantaged. These provisions operate to recognise those periods of time as time they were employed and, for the purposes of paragraph 5.19(5)(f) of the Regulations, as on a full-time basis.

Paragraph 5.19(5)(f) of the Regulations only applies if paragraph 5.19(5)(g) of the Regulations does not apply in meeting nomination requirements. Therefore, section 6 will only apply to those who do not meet the requirements under paragraph 5.19(5)(g) of the Regulations, but seek to meet the requirements under paragraph 5.19(5)(f) of the Regulations.

Subsection 6(1) specifies a different period of time for identified persons in an application who have COVID-19 reduced work periods during the concession period, for subparagraph 5.19(5)(f)(i) of the Regulations. Instead of the total period of at least 3 years (not including any period of unpaid leave) mentioned in subparagraph 5.19(5)(f)(i) of the Regulations:

- paragraph 6(1)(a) specifies a total period of at least 2 years less the total length of the COVID-19 reduced work period (not including any other period of unpaid leave) for a specified 457 visa holder; and

- paragraph 6(1)(b) specifies a total period of at least 3 years less the total length of the COVID-19 reduced work period (not including any other period of unpaid leave) for any other person who has a COVID-19 reduced work period.

The note at the end of subsection 6(1) indicates that a reference in the instrument to a COVID-19 reduced work period in section 6 can be interpreted as multiple COVID-19 reduced work periods, according to paragraph 23(b) of the *Acts Interpretation Act 1901*. This means if a person experiences one or more COVID-19 reduced work periods, they can be totalled in calculating the total period of time to apply to the identified person.

Subsection 6(2) defines a COVID-19 reduced work period. This is a period that occurred:

- during the concession period (paragraph 6(2)(a)); and
- in the 4 years (or, if the person is a specified 457 visa holder, of 3 years) immediately before the nomination application was made (subparagraphs 6(2)(b)(i) and (ii)), and
- throughout which the affected person was employed in a position for which their visa(s) was granted, and the visa(s) must be any of those mentioned in paragraph 5.19(5)(e) of the Regulations (paragraph 6(2)(c)); and
- throughout which the affected person was employed in that position on a basis other than full time, but would have been full time were it not for COVID-19, or was on unpaid leave from the employment because of COVID-19 (subparagraphs 6(2)(d)(i) and (ii)) This includes circumstances where affected persons worked on a part-time or casual basis, or if the person was stood down.

For example, a specified subclass 457 visa holder, who was working full time in an occupation not specified in an instrument for subregulation 2.72(13) of the Regulations (therefore paragraph 5.19(5)(g) of the Regulations does not apply), was put on a part-time basis for a total of 6 months during the concession period, due to COVID-19. Because paragraph 5.19(5)(g) of the Regulations does not apply, the specified subclass 457 holder must satisfy the requirement paragraph 5.19(5)(f) of the Regulations. By operation of paragraphs 5(1)(a), 6(1)(a) and subsection 6(2) of the instrument, the specified subclass 457 holder only need to have worked for a total period of at least 1 year and 6 months in that position, in the period of 3 years before the nomination application is made to satisfy the requirement in paragraph 5.19(5)(f).

Section 7 Different periods of time for paragraph 5.19(5)(g) of the Regulations—COVID 19

Subsection 7(1) specifies a different period of time for identified persons who have one or more COVID-19 unpaid leave periods during the concession period, for subparagraph 5.19(5)(g) of the Regulations, as permitted by subregulation 5.19(6) of the Regulations. Instead of the total period of at least 3 years (not including any other period of unpaid leave) mentioned in subparagraph 5.19(5)(g) of the Regulations:

- paragraph 7(1)(a) specifies a total period of at least 2 years less the total length of the COVID-19 unpaid leave period (not including any other period of unpaid leave) for a specified 457 visa holder; and
- paragraph 7(1)(b) specifies a total period of at least 3 years less the total length of the COVID-19 unpaid leave period (not including any other period of unpaid leave) for any other person.

The note at the end of subsection 7(1) indicates that a reference in the instrument to a COVID-19 unpaid leave period in section 6 can be interpreted as multiple COVID-19 unpaid leave periods, according to paragraph 23(b) of the *Acts Interpretation Act 1901*. This means if a person experiences one or more COVID-19 unpaid leave periods, they can be totalled in calculating the total period of time to apply to the identified person.

Subsection 7(2) defines a COVID-19 unpaid leave period. This is a period that that occurred:

- during the concession period (paragraph 7(2)(a)); and
- in the 4 years (or, if the person is a specified 457 visa holder, of 3 years) immediately before the nomination application was made (subparagraphs 7(2)(b)(i) and (ii)), and
- during which the affected person was employed in the occupation for which their visa granted, and the visa must be one or more of those mentioned in paragraph 5.19(5)(e) of the Regulations (subparagraph 7(2)(c)(i)); and
- during which the person was on unpaid leave due to COVID-19. This unpaid leave can be initiated by an employee and is different from being stood down by the employer (subparagraph 7(2)(c)(ii)).

Section 8 Exemption

Section 8 exempts certain persons from the operation of paragraph 5.19(5)(c) of the Regulations, as permitted by paragraph 5.19(8)(b) of the Regulations. Paragraph 5.19(5)(c) requires that the occupation of the identified person must be specified in a legislative instrument unless the identified person is exempted. At the time of making the instrument, the occupations of the identified persons in relation to a subclass 186 visa are specified as the medium and long-term strategic skills list (MLTSSL) in *Migration (LIN 19/049: Specification of Occupations and Assessing Authorities—Subclass 186 Visa) Instrument 2019*. This means that the identified persons in the nomination application, if exempted by the instrument, are not required to hold an occupation on the MLTSSL.

Paragraph 8(1)(a) exempts the specified persons in the instrument from operation of paragraph 5.19(5)(c). That means the specified persons at subsections 4(2) and (3) of the instrument are not required to hold an occupation on the MLTSSL, to have a nomination application made for them.

Paragraph 8(1)(b) exempts, commencing on 1 July 2022, a person mentioned in subsection 8(2).

Subsection 8(2) sets out an exempted class of persons. These are persons who, after 18 April 2017:

- applied for and was granted a subclass 457 visa (paragraph 8(2)(a)),
- was in Australia for at least 12 months between 1 February 2020 and 14 December 2021 (paragraph 8(2)(b)); and
- is employed by a person actively and lawfully operating a business in Australia at time of application (paragraph 8(2)(c)).

The cohort captured here are those subclass 457 visa holders that were not able to access transitional arrangements (as opposed to specified 457 visa holders), who hold an occupation other than that on the MLTSSL. Exempting this cohort from the operation of paragraph 5.19(5)(c) of the Regulations is

complementary to the 1 July 2022 implementation of the measure on improving access to permanent residence for skilled visa holders. Because of this exemption, this cohort does not need to apply for a subclass 482 visa in the short-term stream to be eligible for a nomination application.