

EXPLANATORY STATEMENT

Issued by authority of the Minister of Immigration, Citizenship and Multi-Cultural Affairs.

Migration Regulations 1994

Migration (COVID-19 Pandemic event for Temporary Activity (Subclass 408) visa) Amendment Instrument (LIN 23/061) 2023

1. The instrument, Departmental reference LIN 23/061, is made under the following provisions of the *Migration Regulations 1994* (the Migration Regulations):
 - (a) subregulation 2.07(5);
 - (b) subparagraph 1237(2)(a)(i) of Schedule 1; and
 - (c) paragraph 408.229(c) of Schedule 2.
2. The instrument amends *Migration (COVID-19 Pandemic event for Temporary Activity (Subclass 408) visa) Instrument (LIN 22/046) 2022* (LIN 22/046) (F2022L00316) in accordance with subsection 33(3) of the *Acts Interpretation Act 1901* (the Acts Interpretation Act). 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 2 September 2023 and is a legislative instrument for the *Legislation Act 2003* (the Legislation Act).

Purpose

Background – LIN 22/046

4. Subregulation 2.07(5) of the Migration Regulations provides that if an item of Schedule 1 to the Migration Regulations prescribes criteria or requirements by reference to a legislative instrument made under subregulation 2.07(5), the Minister may specify:
 - An approved form for making an application for a visa of a specified class;
 - The way in which an application for a visa of a specified class must be made;
 - The place at which an application for a visa of a specified class must be made;
 - Any other matter.
5. LIN 22/046 specifies, for paragraphs 408.229(b) and (c) of Schedule 2 and subclause 9204(2) of Schedule 13 to the Migration Regulations, the event known as the COVID-19 pandemic as an ‘Australian Government endorsed event’ (AGEE) and classes of persons in relation to the event who may be eligible for a Subclass 408 (Temporary Activity) visa (Subclass 408 visa).
6. An applicant seeking to satisfy the primary criteria for the grant of a Subclass 408 visa must be a person to whom a clause in subdivision 408.2 of Schedule 2 to the Migration Regulations applies. Clause

408.229 will apply to an applicant if that applicant seeks to enter or remain in Australia to undertake work directly associated with the AGEE. To meet this criterion, the AGEE must be specified in a legislative instrument made by the Minister and the applicant is in a class of persons specified in the instrument in relation to the event for the purposes of paragraphs 408.229(b) and (c) of Schedule 2 to the Migration Regulations.

7. Subclause 9204(2) of Schedule 13 to the Migration Regulations provides the Minister may, by legislative instrument, specify an event for the purposes of paragraph (b) of the definition of ‘COVID-19 pandemic event 408 visa’ in subclause 9204(1) to the Migration Regulations (which means, if the event is specified for the purposes of paragraph 408.229(b) of Schedule 2 to the Migration Regulations).
8. Subclause 9204(1) of Schedule 13 to the Migration Regulations defines the ‘COVID-19 pandemic event 408 visa’ to mean a Subclass 408 (Temporary Activity) visa granted on the basis that the applicant satisfied the criterion in clause 408.219A of Schedule 2 to the Migration Regulations on the basis of clause 408.229 in relation to the COVID-19 pandemic (as specified in section 5 of LIN 22/046).

LIN 23/061

9. The purpose of the instrument is to amend LIN 22/046 to gradually close the COVID-19 pandemic event 408 visa to new applications from 2 September 2023. This is designed to encourage individuals to apply for a more appropriate visa to meet their individual circumstances.
10. The COVID-19 pandemic event 408 visa (Pandemic event visa) was introduced in April 2020 to enable temporary migrants to lawfully remain in Australia while the border was closed. It also addressed labour shortages in critical sectors in the local economy. Now that Australia’s borders are open and temporary visa holder numbers in Australia have returned to pre-COVID-19 levels, the Pandemic event visa is no longer required.
11. Closure of the Pandemic event visa will contribute to a well-managed migration system that better regulates visa pathways and normalises the flow of temporary migrants in and out of Australia. It will help to ensure that people are applying for the right visa that matches the reason for their travel and stay in Australia.
12. Closure of the Pandemic event visa also bolsters the integrity of Australia’s visa system. Along with employers who seek to utilise the visa to avoid sponsorship obligations, an increasing number of potential migrants have been coming to Australia with the intent of applying for the Pandemic event visa as soon as possible. This is most prevalent in the English language education sector, where international students were withdrawing from courses upon arrival.

Consultation

13. The Department of Home Affairs (the Department) has undertaken consultation with internal stakeholders, through a whole of government cabinet process.
14. The Office of Impact Analysis (OIA) was consulted and considered that the measures in this instrument are unlikely to have more than a minor or machinery regulatory impact and therefore an Impact Analysis is not required.

- The OIA reference number is OIA23-05026.

Details of the instrument

15. Section 1 sets out the name of the instrument.
16. Section 2 provides for the commencement of the instrument on 2 September 2023.
17. Section 3 provides that Schedule 1 to the instrument amends LIN 22/046.
18. Item 1 of Schedule 1 to the instrument inserts new section 3A, which provides that the amendments made by this instrument will apply to an application for a Subclass 408 (Temporary Activity) visa made on or after commencement. This means that applications made up to and including 1 September 2023, which have not been determined, will continue to be assessed against the criteria set out in LIN 22/046 as in force before this instrument's commencement.
19. Item 2 of Schedule 1 to the instrument repeals the definitions of 'relevant temporary visa', 'Subclass 403 Seasonal Worker visa', 'substantive temporary visa' and 'work rights' in section 4 of LIN 22/046. These repeals are consequential to the amendments made by items 6 and 7 of Schedule 1 to the instrument.
20. Item 3 of Schedule 1 to the instrument substitutes the definition of 'Subclass 408 visa' in section 4 of LIN 22/046 with a new definition of 'COVID-19 pandemic event 408 visa'. This definition provides that this term has the same meaning as in Division 3 of Part 92 of Schedule 13 to the Migration Regulations. Subclause 9204(1) of Schedule 13 to the Migration Regulations provides that COVID-19 pandemic event 408 visa means a Subclass 408 (Temporary Activity) visa granted on the basis that the applicant satisfied the criterion in clause 408.219A of Schedule 2 to the Migration Regulations on the basis of clause 408.229 (Australian Government endorsed events) in relation to the COVID-19 pandemic (as specified in section 5 of LIN 22/046).
21. Item 4 of Schedule 1 to the instrument repeals the note under section 4 of LIN 22/046. This repeal is consequential to the amendments made by items 6 and 7 of Schedule 1 to the instrument.
22. Item 5 of Schedule 1 to the instrument omits references to subsections 6(3), 6(4) or 6(5) in subsection 6(1) of LIN 22/046. These repeals are consequential to the amendments made by item 7 of Schedule 1 to the instrument.
23. Item 6 of Schedule 1 to the instrument amends paragraph 6(2)(c) of LIN 22/046. The effect of this amendment is that an applicant for a Subclass 408 (Temporary Activity) visa will be in a class of persons specified for paragraph 408.229(c) of Schedule 2 to the Migration Regulations if the applicant is in Australia; is working or is in receipt of an offer to work in Australia; and holds a Pandemic event visa that is 28 days or less from ceasing to be in effect or has held a Pandemic event visa that ceased not more than 28 days before the application date.
24. Item 7 of Schedule 1 to the instrument repeals paragraphs 6(3), (4) and (5) of LIN 22/046.
25. Item 8 of Schedule 1 to this instrument repeals section 7 of LIN 22/046. This means that applicants for the Pandemic event visa are no longer specified as a class of persons for whom the visa application charge is nil (for subparagraph 1237(2)(a)(i) of Schedule 1 to the Migration Regulations). For applicants not covered by subparagraphs 1237(2)(a)(i), (ii), or (iii) of Schedule 1, the base application

charge mentioned in subparagraph 1237(2)(a)(iv) of Schedule 1 to the Migration Regulations applies, being \$405.00.

26. Item 9 of Schedule 1 to this instrument repeals the note under section 7 of LIN 22/046.

Parliamentary scrutiny etc.

27. The instrument is exempt from disallowance under section 42 of the Legislation Act. This is because it is an instrument made under subregulation 2.07(5) of the Migration Regulations, for the purposes of subparagraph 1237(2)(a)(i) of Schedule 1 to, and paragraph 408.229(c) of Schedule 2 to the Migration Regulations, which is exempt from disallowance under subitem 20(b) of the table in section 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015*.

28. As the instrument is exempt from disallowance, a Statement of Compatibility with Human Rights is not required.

29. The instrument is made by a delegate of the Minister, in accordance with the following provisions of the Migration Regulations:

(a) subregulation 2.07(5);

(b) subparagraph 1237(2)(a)(i) of Schedule 1; and

(c) paragraph 408.229(c) of Schedule 2.