

EXPLANATORY STATEMENT

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

Migration Regulations 1994

Migration Legislation Amendment (Expanding Access to Temporary Residence Transition Stream) Instrument (LIN 23/078) 2023

- 1 The instrument, departmental reference LIN 23/078, is made under the following provisions of the *Migration Regulations 1994* (the Regulations):
 - subparagraph 5.19(5)(a)(iii);
 - subregulation 5.19(6);
 - subregulation 5.19(8);
 - subregulation 5.19(13);
 - paragraph 186.221(1)(b) of Schedule 2;
 - paragraph 187.221(b) of Schedule 2;
 - paragraph 187.222(b) of Schedule 2; and
 - subclause 494.223(2) of Schedule 2.
- 2 The instrument amends the following:
 - a) *Migration (LIN 19/216: Exemptions from Skill, Age and English Language Requirements for Subclass 186, 187 and 494 Visas) Instrument 2019* (LIN 19/216); and
 - b) *Migration (LIN 19/049: Specification of Occupations and Assessing Authorities—Subclass 186 Visa) Instrument 2019* (LIN 19/049).
- 3 The instrument repeals the following:
 - a) *Migration (Specified persons and periods of time for regulation 5.19) Instrument (LIN 22/038) 2022* (LIN 22/038); and
 - b) *Migration (LIN 19/047: Specification of Occupations—Subclass 187 Visa) Instrument 2019* (LIN 19/047).
- 4 The above instruments are amended and repealed respectively, in accordance with subsection 33(3) of the *Acts Interpretation Act 1901* (the Acts Interpretation Act).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.

- 5 The instrument commences at the same time as the *Migration Amendment (Expanding Access to Temporary Residence Transition Stream) Regulations 2023* (amending Regulations), and is a legislative instrument for the *Legislation Act 2003* (the Legislation Act).

Purpose

- 6 The purpose of LIN 23/078 is to complement amendments to the Regulations made by the amending Regulations.

Amending Regulations

- 7 Regulation 5.19 of the Migration Regulations prescribes the criteria for approval of a nomination application for the purpose of the Temporary Residence Transition stream in the Subclass 186 (Employer Nomination Scheme) visa (Subclass 186) and the Subclass 187 (Regional Sponsored Migration Scheme) visa (Subclass 187). The Subclass 186 and Subclass 187 visas allow employers to nominate skilled workers for permanent residence to fill genuine vacancies in their business (noting that the Subclass 187 visa is now closed to new applications except for certain transitional cases).
- 8 Within those visas, the Temporary Residence Transition streams provide access to permanent residence for eligible holders of the Subclass 482 (Temporary Skill Shortage) visa (Subclass 482 visa) and eligible remaining holders of the repealed Subclass 457 (Temporary Work (Skilled)) visa (Subclass 457 visa) where their employer wishes to sponsor them. The Subclass 457 visa was repealed on 18 March 2018.
- 9 To qualify under the Temporary Residence Transition stream, a Subclass 482 or Subclass 457 visa holder must have worked in Australia for a specified period and the most recent sponsoring employer must provide a nomination, including a commitment to continue employing the person in the relevant position, on a full-time basis, for at least two years. If the employer's nomination is approved, the Subclass 186 or Subclass 187 visa can be granted, provided that the visa applicant satisfies the applicable criteria for the grant of the relevant visa.

Migration (LIN 19/216: Exemptions from Skill, Age and English Language Requirements for Subclass 186, 187 and 494 Visas) Instrument 2019 (LIN 19/216)

- 10 LIN 19/216 operates, amongst other things, to specify exemptions in relation to age 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). An applicant for these visas must not have turned 45 at the time of their application, unless an exemption or prescribed circumstance applies.
- 11 LIN 23/078 amends the definitions for the classes of persons who are exempt from or are not required to meet the age requirement.
 - For the purposes of paragraphs 186.221(b), 187.221(b) and 494.223(2) of Schedule 2 to the Regulations:
 - i. the definition of a *Subclass 457/482 worker*, is amended by reducing the period of time a person is required to be employed, hold their visa and have earnings equal to or greater than the high income threshold, from 3 years to at least 2 years;

- ii. the definition of a *regional medical practitioner applicant* is amended by reducing the period of time a person is required to have been employed as a medical practitioner in a designated regional area, and held their visa from 3 years to at least 2 years.
- For the purposes of paragraphs 186.221(b) and 187.221(b) of Schedule 2 to the Regulations:
 - i. The concessions introduced during the COVID-19 pandemic, which specified applicants whose employment was affected by a coronavirus employment change could apply the pro-rata income threshold instead of the high income threshold, are repealed. During the COVID-19 pandemic, employees' earnings may have been impacted by being stood down, having their hours reduced or being 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 have been unable to meet the exemption to the age requirement. A new class of persons was specified as exempt from having to satisfy the age requirement. This class, defined as *Subclass 457/482 coronavirus concession workers*, included holders of a Subclass 457 (Temporary Work (Skilled) visa or a Subclass 482 (Temporary Skill Shortage) who had earnings 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. As the amendments to the definition of a *Subclass 457/482 worker* reduce the period of time an applicant is required to have earnings equal to or greater than the high income threshold, the benefits of this additional class are diminished.
 - ii. Applications lodged prior to commencement will continue to have access to the COVID-19 related concessions to meet the exemption to the age requirement. Applicants who make their visa application on or after commencement will be required to meet the definition of a *Subclass 457/482 worker* to meet the exemption to the age requirement.
 - For the purposes of paragraph 186.221(b) of Schedule 2 to the Regulations:
 - i. the definition of *legacy 457 worker* has been amended to limit the cohort of applicants eligible to meet the definition to applications made on or before 30 June 2024.

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

- 12 A number of concessions were introduced during the COVID-19 pandemic in recognition of the contribution skilled migrants made to Australia, to address skills shortages and to retain skilled migrants in Australia beyond the pandemic. Subparagraph 5.19(5)(a)(iii) of the Regulations (now amended) previously specified the visas that must be held by the identified person if the nomination related to a Subclass 186 or Subclass 187 visa in the Temporary Residence Transition stream. If the identified person held a Subclass 482 (Temporary Skill Shortage) visa (Subclass 482) in the Short-term stream, they must have also been a person specified in a legislative instrument. LIN 22/038 operated to specify Subclass 482 visa holders in the Short-term stream who were working in Australia during the COVID-19 pandemic for the purposes of subparagraph 5.19(5)(a)(iii). Specifying this

cohort improved access to permanent residence for Subclass 482 visa holders in the Short-term stream who were not otherwise eligible. It also enabled certain persons who – on or after 18 April 2017 – held a Subclass 457 visa to continue to be able to access permanent residence through the Temporary Residence Transition stream

- 13 Amendments to paragraph 5.19(5)(a) of the Regulations mean an identified person can now hold any stream of Subclass 482 visa to meet nomination requirements. It is no longer a requirement for the identified person to be specified by legislative instrument. The provisions in LIN 22/038 specifying persons for this purpose have been repealed for nominations made after commencement.
- 14 Subregulation 5.19(6) of the Regulations provides 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 specify periods of time an applicant is required to hold their visa and work in their nominated position or occupation to meet nomination requirements. Prior to the amendments made by the amending Regulations:
 - paragraph 5.19(5)(e) of the Regulations provided that 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;
 - if paragraph 5.19(5)(f) of the Regulations applied to the 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 applied 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 was made.
- 15 LIN 22/038 operated to specify a reduced period of time in relation to specified Subclass 457 visa holders for the purposes of paragraphs 5.19(5)(e), (f) and (g) of the Regulations. A ‘period of 3 years’ was specified, instead of a ‘period of 4 years’ referenced in paragraphs 5.19(5)(e), (f) and (g), while a ‘total period of at least 2 years’, instead of a ‘total period of at least 3 years’ referenced in paragraphs 5.19(5)(e), (f) and (g) of the Regulations.
- 16 The amendments made by the amending Regulations mean these reduced time periods now apply to all identified persons. The provisions specifying different periods of time have been removed from the instrument for nominations made on or after commencement. Nominations made before and not yet finally determined at the time of commencement will still be required to meet the specified time periods outlined in LIN 22/038 as they relate to the *COVID-19 reduced work period* or a *COVID-19 unpaid leave period*. This ensures that applicants who would have had the benefit of these provisions are not disadvantaged
- 17 LIN 22/038 also exempted certain visa holders from needing to meet paragraph 5.19(5)(c) of the Regulations which required the occupation identified in the nomination to be specified in a legislative instrument. This meant that persons:
 - who held a Subclass 482 visa in the Short-Term stream, or

- who – on 18 April 2017 – had applied for a Subclass 457 visa that was subsequently granted, and
- had been in Australia for a period of at least 12 months between 1 February 2020 and 14 December 2021, and
- were employed by a person actively and lawfully operating a business in Australia,

were able to apply under the Temporary Residence Transition stream. As paragraph 5.19(5)(c) and subregulation 5.19(8) have been repealed, the exemptions contained in LIN 22/038 are redundant.

- 18 For new applications made on or after commencement, LIN 22/038 is repealed and will have no effect. For applications made prior to commencement, LIN 22/038 will continue to have effect.

Migration (LIN 19/047: Specification of Occupations—Subclass 187 Visa) Instrument 2019 (LIN 19/047)

- 19 Regulation 5.19 of the Regulations prescribes the requirements that must be met for approval of a nomination in relation to a Subclass 186 or Subclass 187 visa. Subregulations 5.19(5)-(8) set out criteria which is specific to nominations in the Temporary Residence Transition stream. One of the requirements prescribed under (now repealed) paragraph 5.19(5)(c) required the occupation identified in the nomination to be specified in a legislative instrument and for the occupation to apply to the person identified in the nomination (the identified person) in accordance with that instrument. Under paragraphs 5.19(8)(a) and (c) the Minister was authorised to specify, by legislative instrument, occupations for the purposes of paragraph 5.19(5)(c) and any matters for determining whether the occupation applies to an identified person.
- 20 Paragraph 5.19(5)(c) and subregulation 5.19(8) have now been repealed. It is no longer a requirement for the occupation identified in the nomination to be specified in a legislative instrument, for applications in the Temporary Residence Transition stream.
- 21 For new applications made on or after commencement, LIN 19/047 is repealed and will have no effect. LIN 19/047 will continue to operate in relation to nominations made and not finally determined at commencement under the Direct Entry stream. This is in accordance with subsection 7(2) of the *Acts Interpretation Act 1901*, the effect of which is that the repeal of an instrument does not affect a person’s right to have their nomination decided with reference to the legislation in force at the time that nomination was made, subject to the existence of a contrary intention.

Migration (LIN 19/049: Specification of Occupations and Assessing Authorities—Subclass 186 Visa) Instrument 2019 (LIN 19/049)

- 22 LIN 19/049 was made for the purposes of paragraph 5.19(5)(c) and paragraphs 5.19(8)(a) and (c) of the Regulations to specify the occupations and matters for determining whether the occupation applied to an identified person, in relation to nominations for a Subclass 186 visa in the Temporary Residence Transition stream. Paragraph 5.19(5)(c) and subregulation 5.19(8) have now been repealed. Accordingly, parts of LIN 19/049 which specified occupations and matters in the Temporary Residence Transition stream of the Subclass 186 visa, have also been repealed.
- 23 LIN 19/049 will continue to specify occupations, assessing authorities and other matters for the purposes of subregulation 5.19(11) which relates to nominations made under the Direct Entry stream.

Consultation

- 24 These changes have been implemented in response to stakeholder feedback received at the Jobs and Skills Summit, held in September 2022, as well as support for expanding access to permanent residence through public submissions to the review of Australia’s migration system. The feedback was supportive of the proposed changes.
- 25 The Office of Impact Analysis (OIA) consulted in relation to the amendments. No Regulation Impact Statement is required. The consultation reference number is OIA23-04693.

Details of the instrument

- 26 Section 1 sets out the name of the instrument.
- 27 Section 2 provides that the instrument commences on the same day as the amending Regulations.
- 28 Section 3 provides that the instrument is made under the following provisions of the Migration Regulations 1994:
- subparagraph 5.19(5)(a)(iii);
 - subregulation 5.19(6);
 - subregulation 5.19(8);
 - subregulation 5.19(13);
 - paragraph 186.221(1)(b) of Schedule 2;
 - paragraph 187.221(b) of Schedule 2;
 - paragraph 187.222(b) of Schedule 2; and
 - subclause 494.223(2) of Schedule 2.
- 29 Section 4 provides how the amendments in the instrument operate.

Schedule 1 – Amendments

Migration (LIN 19/216: Exemptions from Skill, Age and English Language Requirements for Subclass 186, 189 and 494 Visas) Instrument 2019. (LIN 19/216)

- 30 Item 1 of Schedule 1 repeals the definition of “concession period” from section 5.
- 31 Item 2 of Schedule 1 repeals the definition of “coronavirus employment change” from section 5.
- 32 Item 3 of Schedule 1 amends the definition of “legacy 457 worker” in section 5.
- 33 Item 4 of Schedule 1 repeals the definition of “pro rata threshold” from section 5.
- 34 Item 5 of Schedule 1 amends the definition of “regional medical practitioner applicant”. Under the new definition an applicant will be a “regional medical practitioner applicant”, if they satisfy all of the following criteria:
- the nominated position (as defined in section 5 of LIN 19/216) to which the applicant’s visa application relates is located in a designated regional area (as defined in regulation 1.03 of the Regulations); and

- during the 3 years ending immediately before the date the visa application was made, the applicant spent at least 2 years (whether a continuous period or 2 or more non-consecutive periods) employed, as a medical practitioner, at a place or places that, at the time, were located in a designated regional area; and
- during the 3 years immediately before the day the visa application was made, the person held one or more of the following for a total period of at least 2 years:
 - Subclass 457 visa or
 - Subclass 482 visa.

35 Item 6 of Schedule 1 repeals the definition of “Subclass 457/482 coronavirus concession worker” from section 5.

36 Item 7 of Schedule 1 amends paragraph (a) of the definition of “Subclass 457/482 worker” in section 5.

37 Item 8 of Schedule 1 amends paragraph (b) of the definition of “Subclass 457/482 worker” in section 5.

38 Item 9 of Schedule 1 amends paragraph (c) of the definition of “Subclass 457/482 worker” in section 5.

39 For the purposes of items 7, 8 and 9 of Schedule 1 to this instrument (and the above paragraphs; 36-39), to meet the amended definition of a “Subclass 457/482 worker” the applicant will need to satisfy all of the following criteria, in relation to an application for a visa:

- during the 3 years ending immediately before the day the visa application was made, the applicant was employed for a period of at least 2 years:
 - by the employer who made the nomination to which the visa application relates; and
 - in the nominated occupation (as defined in section 5 of LIN 19/216) to which the visa application relates; and
- for each of the above 2 years, the applicant’s earnings (as defined in subregulation 2.57A(1) of the Regulations) for the year were equal to or greater than the high income threshold (as defined in section 12 of the *Fair Work Act 2009*) (as applying at the end of the year); and
- during 3 years immediately before the day the visa application was made, the person held one or more of the following for a total period of at least 2 years:
 - a Subclass 457 (Temporary Work (Skilled)) visa; or
 - a Subclass 482 (Temporary Skill Shortage) visa.

- 40 Item 10 of Schedule 1 repeals section 5A; coronavirus employment change.
- 41 Item 11 of Schedule 1 repeals paragraph 6(1)(da). This removes ‘Subclass 457/482 coronavirus concession workers’ from the class of persons who are exempt from the age requirement in paragraph 186.221(a) of Schedule 2 to the Regulations.
- 42 Item 12 of Schedule 1 repeals paragraph 7(1)(da). This removes ‘Subclass 457/482 coronavirus concession workers’ from the class of persons who are exempt from the age requirement in paragraph 187.221(a) of Schedule 2 to the Regulations.
- 43 Item 13 of Schedule 1 inserts section 12 after section 11 in Part 3; the Application and Transition provisions. Subsection 12(1) provides for the amendments made to LIN 19/216 by items 1, 2, 3, 4, 6, 10, 11 and 12 of Schedule 1 to LIN 23/078 will apply to all visa applications made on or after the day of commencement of LIN 23/078. Subsection 12(2) provides for the amendments made to LIN 19/216 by items 5, 7, 8 and 9 of Schedule 1 to LIN 23/078 will apply in relation to the following visa applications:
- those made, but not yet finally determined, upon commencement of LIN 23/078;
 - those made on or after the commencement of LIN 23/078.

Migration (LIN 19/049: Specification of Occupations and Assessing Authorities—Subclass 186 Visa) Instrument 2019 (LIN 19/049)

- 44 Item 14 of Schedule 1 repeals paragraph 3(a). This removes the reference to the relevant provisions of LIN 19/049 being made under the now repealed subregulation 5.19(8) of the Regulations.
- 45 Item 15 of Schedule 1 repeals subsection 6(1) and the heading. This removes the reference to the repealed paragraphs 5.19(8)(a) and (c) of the Regulations and the heading; Occupations – Temporary Residence Transition stream.
- 46 Item 16 of Schedule 1 omits the reference to the repealed paragraph 5.19(8)(c) from subsection 8(1).
- 47 Item 17 of Schedule 1 inserts section 14 after section 13 in Part 3; the Application and savings provisions. New section 14 provides that the amendments made to LIN 19/049 by Schedule 1 to LIN 23/078 apply to the following:
- an application for approval of a nomination that is made on or after 18 March 2018, but is not yet finally determined, upon commencement of LIN 23/078;
 - an application for approval of a nomination that is made on or after the commencement of Schedule 1 to LIN 23/078.

Schedule 2 – Repeals

- 48 Item 1 of Schedule 2 repeals *Migration (Specified persons and periods of time for regulation 5.19) Instrument (LIN 22/038) 2022*.
- 49 Item 2 of Schedule 2 repeals *Migration (LIN 19/047: Specification of Occupations—Subclass 187 Visa) Instrument 2019*.
- 50 Item 3 of Schedule 2 provides that the amendments made by Schedule 2 to LIN 23/078 will apply to the following:
- an application for approval of a nomination that is made on or after 18 March 2018, but is not yet finally determined, upon commencement of that Schedule 2 to LIN 23/078;
 - an application for approval of a nomination that is made on or after the commencement of Schedule 2 to LIN 23/078.

Parliamentary scrutiny etc.

- 51 The instrument is exempt from disallowance under section 42 of the Legislation Act. This is because it is an instrument made under Part 5 of and Schedule 2 to the Regulations, and so it is exempt from disallowance under subitem 20(b) of the table in section 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015*.
- 52 The instrument was made by the Minister, in accordance with the following provisions of the Regulations:
- subparagraph 5.19(5)(a)(iii);
 - subregulation 5.19(6);
 - subregulation 5.19(8);
 - subregulation 5.19(13);
 - paragraph 186.221(1)(b) of Schedule 2;
 - paragraph 187.221(b) of Schedule 2;
 - paragraph 187.222(b) of Schedule 2; and
 - subclause 494.223(2) of Schedule 2.