

EXPLANATORY STATEMENT

Issued by the Minister for Immigration and Multicultural Affairs

Migration Act 1958

Migration Amendment (Subclass 462 (Work and Holiday) Visa) Regulations 2024

The *Migration Act 1958* (the Migration Act) is an Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons.

Subsection 504(1) of the Migration Act provides that the Governor-General may make regulations, not inconsistent with the Migration Act, prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Migration Act.

In addition, regulations may be made pursuant to the provisions listed in Attachment A.

The *Migration Amendment (Subclass 462 (Work and Holiday) Visa) Regulations 2024* (the Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) to introduce a requirement that to make a valid application for a Subclass 462 (Work and Holiday) visa, applicants who hold a passport issued by a specified foreign country must have been randomly selected in a visa pre-application process arranged by the Minister in respect of the relevant country.

The Work and Holiday program aims to provide young adults with a temporary visa to holiday in Australia for 12 months, during which they can undertake short-term work and study. The program is for eligible passport holders from countries that have agreed to participate in the program. Bilateral arrangements are negotiated between Australia and each participating country which set out eligibility requirements and an agreed maximum number of visas that may be granted to eligible passport holders of that country.

The Regulations require applicants who hold a passport issued by a foreign country specified by the Minister in a legislative instrument, to register to take part in a visa pre-application process (also referred to generally as a ‘ballot’) for that country. Drawing a place in the ballot will enable an applicant to make a valid application for a Subclass 462 visa. Applicants who hold passports issued by specified foreign countries cannot make a valid application unless they have drawn a place in a relevant ballot.

The requirement to be selected in a ballot has been introduced because demand for Subclass 462 visas from certain countries is significantly high and exceeds the numbers of visas intended to be granted as agreed through bilateral arrangements under the Work and Holiday program. The use of random selection assists in efficiently managing the volume of applications received by the Department and ensures fairness as all registered participants have an equal chance of being selected. Countries in respect of which a ballot for Subclass 462 visa applications will be introduced initially include the Peoples’ Republic of China, India and Vietnam.

Subsection 46C(1) of the Migration Act empowers the Minister to arrange a ballot involving the random selection of registered participants who will then be permitted to lodge an application for a relevant visa. A ballot must involve the random selection of eligible persons who have registered to take part in a ballot. Rules for the conduct of the ballot are set out in a determination made by the Minister under subsection 46C(14) of the Migration Act. Visas will be granted to registered participants who are successful in being selected in the ballot and go on to apply for the visa, subject to satisfaction of the remaining criteria for the visa.

The Regulations amend item 1224A (Work and Holiday (Temporary)(Class US)) of Schedule 1 to the Migration Regulations to insert provisions requiring that if an applicant is not and has not previously been in Australia as the holder of a Subclass 462 visa and holds a passport issued by a foreign country specified in a legislative instrument made by the Minister, the applicant must be randomly selected in a ballot conducted in relation to a Subclass 462 visa and the foreign country that issued the passport held by the applicant.

The matters dealt with in the Regulations are appropriate for implementation in regulations rather than by Parliamentary enactment. It has been the consistent practice of the Government of the day to provide for detailed visa criteria and conditions, including the requirements for making a valid application for a visa, in the Migration Regulations rather than in the Migration Act itself. The Migration Act expressly provides for these matters to be prescribed in regulations, as can be seen in the authorising provisions listed at [Attachment A](#). These include, for example, paragraph 46(1)(b), which provides that the Regulations may prescribe the criteria and requirements for making a valid application for a visa.

The current Migration Regulations have been in place since 1994, when they replaced regulations made in 1989 and 1993. Providing for these details to be in delegated legislation rather than primary legislation gives the Government the ability to respond quickly to emerging situations such as the COVID-19 pandemic.

A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Regulations are compatible with human rights. A copy of the Statement is at [Attachment B](#).

Consultation in relation to the Regulations was undertaken predominately with the Department of Foreign Affairs and Trade and the Attorney-General's Department. This consultation accords with subsection 17(1) of the *Legislation Act 2003* (the Legislation Act).

The Office of Impact Analysis (OIA) was also consulted and advised that the instrument is implementing a previous decision of Government and no further analysis is required. The OIA reference number is OBPR22-03816.

The Regulations commence on 16 September 2024. This commencement date allows systems to be in place and other arrangements to be made for implementation of visa pre-application processes from that date.

Further details of the Regulations are set out in [Attachment C](#).

The Migration Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the Legislation Act.

AUTHORISING PROVISIONS

Subsection 504(1) of the *Migration Act 1958* (the Migration Act) relevantly provides that the Governor-General may make regulations (the Regulations) prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Migration Act.

In addition, the following provisions of the Migration Act may also be relevant:

- subsection 29(1), which provides that the Minister may grant a non-citizen permission, to be known as a visa, to do either or both of the following: (a) travel to and enter Australia; (b) remain in Australia;
- subsection 30(2), which provides that a visa to remain in Australia (whether also a visa to travel to and enter Australia) may be a visa, to be known as a temporary visa, to remain during a specified period, or until a specified event happens, or while the holder has a specified status;
- subsection 31(1), which provides that the Regulations may prescribe classes of visas;
- subsection 31(5), which provides that the Regulations may specify that a visa is a visa of a particular class;
- paragraph 46(1)(b), which provides that the Regulations may prescribe the criteria and requirements for making a valid application for a visa;
- subsection 46(4), which provides that, without limiting subsection 46(3), the Regulations may prescribe:
 - (a) the circumstances that must exist for an application for a visa of a specified class to be a valid application; and
 - (b) how an application for a visa of a specified class must be made; and
 - (c) where an application for a visa of a specified class must be made; and
 - (d) where an applicant must be when an application for a visa of a specified class is made;
- subsection 46(4A), which provides that the Regulations may prescribe, as a circumstance that must exist for an application for a visa of a specified class to be a valid application, that the applicant was selected in accordance with the applicable visa pre-application process conducted under subsection 46C(1);
- subsection 46C(1), which provides that the Minister may arrange for a visa pre-application process to be conducted in relation to one or more visas if regulations are in force prescribing criteria mentioned in subsection 46(4A) for those visas;

- subsection 46C(14), which provides that the Minister may, by legislative instrument, determine the rules that apply in relation to the conduct of a specified visa pre-application process under subsection 46C(1); and
- subsection 504(2), which provides that section 14 of the *Legislation Act 2003* does not prevent, and has not prevented, regulations whose operation depends on a country or other matter being specified or certified by the Minister in an instrument in writing made under the regulations after the commencement of the regulations.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Migration Amendment (Subclass 462 (Work and Holiday) Visa) Regulations 2024

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Disallowable Legislative Instrument

The *Migration Amendment (Subclass 462 (Work and Holiday) Visa) Regulations 2024* (Amendment Regulations) amend the *Migration Regulations 1994* (Migration Regulations) to implement a visa pre-application process for the Subclass 462 Work and Holiday visa (WHV) program.

The WHV program promotes cultural exchange and boosts people-to-people connections between young adults from Australia and partner countries. The WHV is a temporary visa that allows the holder to holiday in Australia for 12 months, and undertake short-term work and study. The WHV program is for eligible passport holders from countries that have agreed to participate in the program. Bilateral arrangements are negotiated between Australia and each participating country which set out eligibility requirements and the number of visas that will be granted to eligible passport holders of that country for each program year. Demand for Subclass 462 visas from certain countries is expected to significantly exceed the number of visas agreed to under the WHV program with those countries.

The Amendment Regulations are part of the legislative package that implements a visa pre-application process for the Subclass 462 Work and Holiday visa. The visa pre-application process is an electronic random selection process, often referred to as a ‘ballot’, with successful registrants invited to apply for a WHV. Registrations for the visa pre-application process will be submitted online and the selection will be conducted electronically, providing an equitable, streamlined and transparent means of selecting prospective WHV applicants. Visas will be granted to registered participants who are successful in being selected in the ballot and go on to apply for the visa, subject to satisfaction of the remaining criteria for the visa. The rules that apply to the conduct of the WHV pre-application process will be set out in a determination made by the Minister under subsection 46C(14) of the Migration Act. A determination under subsection 46C(14) of the Migration Act is subject to disallowance and will be accompanied by a Statement of Compatibility with Human Rights.

The Amendment Regulations amend Schedule 1 to the Migration Regulations to introduce a requirement that to make a valid application for a Subclass 462 (Work and Holiday) visa, applicants who hold a passport issued by a specified foreign country must have been

randomly selected in a visa pre-application process arranged by the Minister in respect of the relevant country. Foreign countries to which a WHV pre-application process relates are specified in a legislative instrument made by the Minister for this purpose under the Migration Regulations, as amended by the Amendment Regulations. Countries in respect of which a ballot for Subclass 462 visa applications will be introduced initially include the People's Republic of China, India and Vietnam, where demand for the program will far outweigh the agreed number of places for each country which include up to 5000 places for China, up to 1000 places for India and up to 1500 places for Vietnam per year.

The amendments will apply to any applicant who holds a valid passport issued by a specified foreign country who is not, and has not previously been, in Australia as the holder of a WHV. Current WHV holders will not be impacted by the amendments.

The use of the visa pre-application process is to enable the random selection of eligible registrants from the specified countries so that they have an equal chance of being selected to apply for a WHV, and assists in efficiently managing the volume of applications received by the Department. This will provide fair and equitable access to the WHV program where the demand would likely significantly exceed the available visa places for that country program in any given year.

Human rights implications

The Amendment Regulations may engage the following rights:

- the right to equality and non-discrimination in Article 2(2) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR).

Article 2(2) of the ICESCR states:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 of the ICCPR states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In its General Comment 18, the UN Human Rights Committee (UNHRC) stated that:

The Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR].

Similarly, in its General Comment on Article 2 of the ICESCR, the United Nations Committee on Economic Social and Cultural Rights has stated that:

Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the [ICESCR] rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.

Neither the ICCPR nor the ICESCR give a right for non-citizens to enter Australia for the purposes of seeking residence or employment. The UNHRC, in its General Comment 15 on the position of aliens under the ICCPR, stated that:

The [ICCPR] does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the [ICCPR] even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.

Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment. A State may also impose general conditions upon an alien who is in transit. However, once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the [ICCPR].

As such, Australia is able to set requirements for the entry of non-citizens into Australia, and does so on the basis of reasonable and objective criteria.

The Amendment Regulations set up a framework that permits differentiation between prospective visa applicants on the basis of country of citizenship and therefore may engage the above rights to non-discrimination, including in relation to the ability of a passport holder of a specified foreign country to obtain a WHV that would allow them to enter and remain in Australia, as well as to undertake periods of study or work on that visa. As a result of these amendments, nationals of specified foreign countries seeking to apply for and be granted an initial WHV while located outside of Australia must have been selected in the applicable visa pre-application process before they can lodge a valid WHV application.

The purpose of a visa pre-application process that selects registered participants at random is to ensure there is a fair, equitable and objective method for providing access to the WHV program, which has an agreed number of visa places for each partnering country each year. The use of a visa pre-application process for the random selection of eligible applicants from specified foreign countries is appropriate because demand from these countries is expected to significantly exceed the agreed number of visa places for that country program in a given year. Other countries do not reach their agreed annual WHV allocation, or do so much more slowly over the course of the year. The use of random selection for countries with very high demand for the WHV ensures fairness as all applicants have an equal chance of being selected to apply for a WHV, rather than being dependent on, for example, having the fastest internet connection.

The amendments do not adversely affect the WHV arrangements for existing WHV holders or prospective applicants who hold other passports, or the ability of passport holders of the specified countries to apply for other visas to travel to, work or study in Australia. Passport holders of the specified countries may also enter subsequent ballots for WHV places if they are unsuccessful in being selected in a particular program year as long as they meet the eligibility requirements for the ballot.

To the extent that the Amendment Regulations differentiate on the basis of nationality or citizenship, this is reasonable and proportionate to the aim of providing eligible registrants from countries with high demand for a WHV an equal and fair chance of being selected to apply for the WHV.

Conclusion

The Amendment Regulations are compatible with human rights because, to the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate to legitimate aims.

The Hon Tony Burke MP
Minister for Immigration and Multicultural Affairs

Details of the Migration Amendment (Subclass 462 (Work and Holiday) Visa) Regulations 2024

Section 1 - Name

This section provides that the name of the instrument is the *Migration Amendment (Subclass 462 (Work and Holiday) Visa) Regulations 2024*.

Section 2 - Commencement

This section provides for the commencement of the instrument.

Subsection 2(1) provides that each provision of the instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table.

Table item 1 provides that the entire instrument commences on 16 September 2024.

The note below the table covered by subsection 2(1) makes it clear that the table relates only to the provisions of the instrument as originally made. The table will not be amended to deal with any later amendments of the instrument.

Subsection 2(2) provides that any information in column 3 of the table is not part of the instrument. Information may be inserted in this column, or information in it may be edited, in any published version of the instrument. Column 3 of the table confirms only that the date of commencement of the instrument is 16 September 2024.

Section 3 - Authority

This section provides that the instrument is made under the *Migration Act 1958* (the Migration Act).

Section 4 - Schedules

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Migration Regulations 1994

Item [1] – After subitem 1224A(3) of Schedule 1

This item inserts a new subitem (3A) in item 1224A (Work and Holiday (Temporary)(Class US)) in Part 2 (Temporary visas) of Schedule 1 (Classes of visa) to the *Migration Regulations 1994* (the Migration Regulations).

Item 1224A sets out the requirements for making a valid application for a Subclass 462 (Work and Holiday) visa. New subitem 1224A(3A) inserts additional requirements for making a valid Subclass 462 visa application, if:

- the applicant is not and has not previously been in Australia as the holder of a Subclass 462 visa (see paragraph 1224A(3A)(a)); and
- the applicant holds a valid passport issued by a foreign country specified by the Minister in a legislative instrument made for the purposes of paragraph 1224A(3A)(b) (see paragraph 1224A(3A)(b)).

The additional requirements in subitem 1224A(3A) only apply to applicants who have not previously travelled to Australia as the holder of a Subclass 462 visa and who also hold a passport issued by a country specified in a legislative instrument made for the purposes of paragraph 1224A(3A)(b).

New subitem 1224A(3A) includes a table following paragraph 1224A(3A)(b) that sets out the requirements to be met by an applicant to which the subitem applies. These requirements are:

- Item 1 of the table requires the applicant to be a selected participant for a visa pre-application process conducted under subsection 46C(1) of the Migration Act in relation to a Subclass 462 visa and the foreign country that issued the valid passport held by the applicant. The effect of this is, applicants to which subitem 1224A(3A) applies, must be randomly selected in a ballot process conducted for the Subclass 462 visa and in relation to the same country that issued the applicant's passport. The requirement to be selected in a visa pre-application process before making a valid application for a visa is in accordance with subsection 46(4A) of the Migration Act. The meaning of *selected participant* is explained in the note following the table (see below).
- Item 2 of the table requires that at the time the applicant became a registered participant for the relevant process, the applicant held a valid passport issued by a foreign country to which the visa pre-application process relates. This requirement works as an integrity measure to assist in confirming the identity of the applicant throughout the ballot process and to ensure that at the time of registration, selection and visa application, the applicant continues to hold a relevant passport issued by the same specified country in relation to which the ballot was conducted. The meaning of *registered participant* is explained in the note following the table (see below).
- Item 3 of the table requires the application to be made on or before the date specified in the notice given to the applicant after becoming a selected participant for the visa pre-application process as the date by which the applicant must make a valid application for a Subclass 462 visa. The determination made under subsection 46C(14) of the Migration Act for the relevant visa pre-application process, provides for the giving of notice to applicants who are *selected participants* (see the note following the table, below).

A note following the table indicates that subsection 46C(14) of the Migration Act provides power for the Minister to make a determination to determine the rules that apply to the conduct of a visa pre-application process arranged by the Minister under subsection 46C(1).

The note advises that the rules set out in a determination include when a person is a *registered participant* for the process (see item 2 of the table, above), and a *selected participant* for the process (see item 1 of the table, above). The determination also provides for the giving of a notice referred to in item 3 of the table.

The purpose of the requirement in subitem 1224A(3A) is to support efficient management of visa applications where demand for a Subclass 462 visa is significantly high. Arranging for ballots to be conducted in relation to specific countries assists in ensuring the number of visa applications better aligns with the number of intended visa grants agreed to through bilateral arrangements with those countries. While this may result in nationals of those countries having to meet additional requirements, the use of a ballot allows the program to function equitably with random selection being the fairest way to distribute the visas available. The use of a ballot process in the Work and Holiday program where demand is high, is reasonable, necessary and proportionate to the aim of the program to provide intended numbers of visas to eligible applicants in a fair and equitable way.

Item [2] – In the appropriate position in Schedule 13

This item inserts a new Part 138 – Amendments made by the Migration Amendment (Subclass 462 (Work and Holiday) Visa) Regulations 2024 – in Schedule 13 (Transitional Arrangements) to the Migration Arrangements. New Part 138 has one item 13801 – Operation of amendments.

The purpose of the new part is to provide for how the amendments made by the Regulations apply. The item provides that they apply in relation to an application for a visa made on or after the commencement of the Schedule to the Regulations which sets out the amendments.