

EXPLANATORY STATEMENT

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

Migration Regulations 1994

Migration (COVID-19 Pandemic event for Temporary Activity (Subclass 408) visa) Instrument (LIN 22/046) 2022

- 1 The instrument, Departmental reference LIN 22/046, is made under subregulation 2.07(5) of, paragraph 408.229(b) of Schedule 2 to, and subclause 9204(2) of Schedule 13 to, the *Migration Regulations 1994* (the **Regulations**).
- 2 The instrument repeals *Migration (LIN 20/229: COVID- 19 Pandemic event for Subclass 408 (Temporary Activity) visa and visa application charge for Temporary Activity (Class GG) visa) Instrument 2020* (LIN 20/229) (F2021C00483) in accordance with subsection 33(3) of the *Acts Interpretation Act 1901*. 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 the day after registration, and is a legislative instrument for the *Legislation Act 2003* (the Legislation Act).

Purpose

- 4 LIN 20/229 specified, for paragraphs 408.229(b) and (c) of Schedule 2 to the Regulations, 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).
- 5 A person may be eligible for the grant of a Subclass 408 visa where the person meets one of the primary criteria set out in Subdivision 408.2 of Schedule 2 to the Regulations. One of the primary criteria is that the person seeks to enter or remain in Australia to undertake work directly associated with an AGEE (see clause 408.229). To meet this criteria, relevantly, the AGEE must be specified in a legislative instrument and the applicant must be in a class of persons specified in the instrument (see paragraphs 408.229(b) and (c)).
- 6 LIN 20/229 provided a pathway for substantive temporary visa holders in Australia to stay in Australia and work in key sectors of the economy (agriculture, food processing, health care, aged care, disability care, child care, and tourism and hospitality) to support Australia during the pandemic. LIN 20/229 also provided a pathway for visa holders unable to depart Australia as a result of the COVID-19 pandemic to remain lawfully in Australia and make arrangements to depart, even if they were not working in a key sector.
- 7 The instrument continues to specify the COVID-19 pandemic an AGEE. The instrument does, however, modify the classes of persons that are specified in relation to the event.
- 8 The purpose of the instrument is to expand the kind of work an applicant can be doing, or have an offer to do, to be eligible for grant of a Subclass 408 visa by removing the limitation to work in key sectors.

This will support businesses across the Australian economy as they recover from the COVID-19 pandemic.

- 9 The instrument removes the specified class of persons for visa holders in Australia who are unable to depart as a result of the COVID-19 pandemic. Removing this class reflects that international borders are now open and difficulties faced by individuals seeking to leave Australia at the beginning of, and during, the pandemic no longer exist.
- 10 The instrument also provides, for subparagraph 1237(2)(a)(i) of Schedule 1 to the Regulations, a nil visa application charge amount for applicants in a class of persons specified in the instrument. This measure continues as in place under LIN 20/229.

Consultation

- 11 Consultation was undertaken with the Department of Prime Minister and Cabinet before the instrument was made. The consultation supported the measures implemented by the instrument.
- 12 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 OBPR22-01817.

Details of the instrument

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

Parliamentary scrutiny etc.

- 14 The instrument is exempt from disallowance under section 42 of the Legislation Act. This is because instruments made under Part 2 of and Schedule 1 to the Regulations are exempt under paragraph b of item 20 in section 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015*.
- 15 The instrument was made by a delegate of the Minister, in accordance with subregulation 2.07(5) of, paragraph 408.229(b) of Schedule 2 to, and subclause 9204(2) of Schedule 13 to, the Regulations.

Details of the Migration (COVID-19 Pandemic event for Temporary Activity (Subclass 408) visa) Instrument (LIN 22/046) 2022

Section 1 Name

This section provides that the name of the instrument is the *Migration (COVID-19 Pandemic event for Temporary Activity (Subclass 408) visa) Instrument (LIN 22/046) 2022* (the instrument).

Section 2 Commencement

This section provides that the instrument commences on the day after it is registered on the Federal Register of Legislation.

Section 3 Application

This section provides that the instrument applies to all visa applications made on or after 21 February 2022. This means, for example, an application made on 21 February 2022 will be assessed under the eligibility criteria specified in the instrument. This confers a benefit to applicants by ensuring applications can be accepted from that date, and by not requiring applicants to reapply once the instrument commences.

The note to section 3 indicates the effect of both the instrument and LIN 20/229 applying to visa applications made between 21 February 2022 and the commencement of the instrument—an applicant for a Subclass 408 visa may be granted that visa as a result of being in a specified class of persons in section 8 of LIN 20/229 or section 6 of the instrument. From the commencement of the instrument, however, LIN 20/229 is repealed and an applicant submitting an application from that time must be in a specified class of person listed in section 6 of the instrument.

An applicant for a Subclass 408 visa in relation to an AGEE (as specified for clause 408.229 of Schedule 2) will need to nominate which event they are applying in relation to at the time of application for a visa. At the time of making the instrument, a number of different events are specified for this purpose.¹

Section 4 Definitions

In this section:

- **relevant temporary visa** is defined to be a substantive temporary visa other than a Subclass 403 (Temporary Work (International Relations)) visa in the Seasonal Worker Program stream.
- **substantive temporary visa** is defined to be a temporary visa that is not a bridging visa. Temporary visa excludes permanent visas. Bridging visa, permanent visa, substantive visa and temporary visa are defined in the *Migration Act 1958*.
- **work rights** is defined to be a visa that permits work. For clarity, ‘no work’ is not a work right, e.g. if condition 8101 is attached to a person’s visa, they do not have work rights.

¹ see for example, *Migration (ICC Men's T20 World Cup 2022 and FIFA Women's World Cup 2023—AGEEs) Instrument (LIN 21/049) 2021* (F2021L01550), which relates to sporting events.

Section 5 Event

This section provides that the COVID-19 pandemic is specified for paragraph 408.229(b) of Schedule 2 and subclause 9204(2) of Schedule 13 to the Regulations.

Making the instrument under subclause 9204(2) of Schedule 13 continues concessions implemented by the *Home Affairs Legislation Amendment (2020 Measures No. 2) Regulations 2020* for former working holiday maker visa holders (Subclass 417 and Subclass 462) affected by COVID-19.²

Section 6 Class of persons

Section 6 provides, for paragraph 408.229(c) of Schedule 2 to the Regulations, an applicant mentioned in subsection (2), (3), (4) or (5) is in a specified class of person in relation to the event.

This means that, if a visa applicant is in a class described in any of these subsections, the applicant may be eligible for the grant of a Subclass 408 visa. Applicants should provide evidence of employment or an offer of employment at time of application.

Subsection 6(2) provides that an applicant is in a specified class if, at the time of application, the applicant:

- is in Australia; and
- is working, or in receipt of an offer to work, in Australia; and
- either holds a relevant temporary visa with work rights that is 90 days or less from ceasing to be in effect, or held such a visa that ceased to be in effect not more than 28 days before making the application.

This class extends to applicants who hold or held a substantive temporary visa with work rights, regardless of when they arrived in Australia (cf. subsection 6(3) which includes a date of arrival criteria). The specified class in subsection (2) does not extend to substantive temporary visa holders without work rights, or Subclass 403 (Temporary Work (International Relations)) visa holders in the Seasonal Worker Program. A substantive temporary visa holder without work rights might be covered by subsection 6(3) or (4). A Subclass 403 (Temporary Work (International Relations)) visa holders in the Seasonal Worker Program might be covered by subsection 6(5).

Subsection 6(3) provides that an applicant is in a specified class if, at the time of application, the applicant:

- is in Australia—and had arrived in Australia before 21 February 2022; and
- is working, or in receipt of an offer to work, in Australia; and
- either holds a substantive temporary visa without work rights that is 90 days or less from ceasing to be in effect, or held such a visa that ceased to be in effect not more than 28 days before making the application.

This extends to holders of a substantive temporary visa without work rights and who last arrived in Australia before 21 February 2022. This means if an applicant held a multiple entry visa, on which they first entered Australia before 21 February 2022, left Australia and then re-entered on or after 21 February 2022, they will

² see *Home Affairs Legislation Amendment (2020 Measures No. 2) Regulations 2020* (F2020L01427).

not be in this class. An applicant who last entered Australia on or after 21 February 2022 might be captured by subsection 6(2), (4) or (5). If an applicant holds or held a visa with work rights when they make an application, they will not fall within this class of persons.

Subsection 6(4) provides that an applicant is specified if, at the time of application, the applicant:

- is in Australia; and
- is employed by, or in receipt of an offer of employment from a Commonwealth funded aged care service; and
- either holds a substantive temporary visa that is 90 days or less from ceasing to be in effect, or held such a visa that ceased to be in effect not more than 28 days before making the application.

This extends to all applicants regardless of the substantive temporary visa they hold (i.e. with or without work rights) or time of arrival in Australia (i.e. whether they arrived in Australia before, on, or after 21 February 2022).

Subsection 6(5) provides that an applicant is specified if, at the time of application, the applicant:

- is in Australia; and
- either holds a Subclass 403 (Temporary Work (International Relations)) visa in the Seasonal Worker Programme stream that is 90 days or less from ceasing to be in effect, or held such a visa that ceased to be in effect not more than 28 days before making the application; and
- are employed by, or in receipt of an offer of employment from, an approved employer under the Seasonal Worker Programme.

These visa holders and former holders may be eligible for grant of a Subclass 408 visa in relation to work in the agricultural sector for an approved employer. This maintains the link between Seasonal Worker Programme participants and approved employers, which is managed by the Department of Education, Skills and Employment. This extends to all applicants who hold or held such a visa, regardless of when they arrived in Australia.

Section 7 Nil visa application charge

This section sets out, for subparagraph 1237(2)(a)(i) of Schedule 1 to the Regulations that for applicants for the class of persons specified in section 5, the visa application charge amount is nil.

Section 8 Repeal

LIN 20/229 is repealed under this section. As Australia's international border is now open, many provisions in that instrument including the facilitation of a short term visa for visa holders unable to depart Australia as a result of the COVID-19 pandemic are no longer necessary. The instrument implements a framework which will continue supporting the economy in the pandemic recovery.