

EXPLANATORY STATEMENT

Select Legislative Instrument 2011 No. 147

Issued by the Minister for Immigration and Citizenship

Migration Act 1958

Migration Amendment Regulations 2011 (No. 5)

Subsection 504(1) of the *Migration Act 1958* (the Act) provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

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

The purpose of the Regulations is to amend the *Migration Regulations 1994* (the Principal Regulations) to strengthen and improve immigration policy.

In particular, the Regulations amend the Principal Regulations to:

- insert a reference to paragraph 2.43(1)(j) into paragraph 4013(2)(d) of the Principal Regulations to clarify that a visa cancellation ground in paragraph 2.43(1)(j) is within the scope of a “risk factor” in clause 4013. An applicant for a visa who is affected by a risk factor may be excluded from being granted another visa within three years after the cancellation of the visa (Item [1] of Schedule 1 to the proposed Regulations refers); and
- substitute a new regulation 2.12A and substitute the Memorandum of Understanding (MOU) between Australia and the People’s Republic of China (PRC), which relates to PRCs status as a safe third country for Vietnamese nationals who have been previously granted refugee status in PRC, or their close relatives or dependants, who are seeking protection in Australia following an exchange of letters between representatives of PRC and Australia (Items [2] and [3] of Schedule 1 to the proposed Regulations refers).

Details of the Regulations are set out in Attachment B.

The Regulations commence on 15 August 2011.

The Office of the Best Practice Regulation (the OBPR) has been consulted in relation to amendments made by both Schedules to the Regulations and advises that the Regulations are not likely to have a direct effect, or substantial indirect effect, on business and are not likely to restrict competition. The OBPR consultation references are:

- 11789 (Item [1] of Schedule 1); and
- 12337 (Items [2] and [3] of Schedule 1).

In relation to the amendment made by Item [1] of Schedule 1, no further consultation was undertaken, because the amendment does not have any potential implications relating to other government departments or agencies, non-government organisations, or any other organisation or interested party.

In relation to the amendment made by Item [2] and [3] of Schedule 1 to the Regulations, the Attorney-General's Department, the United Nations High Commissioner for Refugees (Australia and New Zealand Regional Office) and the Department of Foreign Affairs and Trade were consulted about the continuation of the Memorandum of Understanding between Australia and the PRC.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

ATTACHMENT A

Subsection 504(1) of the *Migration Act 1958* (the Act) provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

In addition, the following provisions may apply:

- subsection 5(1) of the Act, which provides that “prescribed” means prescribed by the Regulations;
- subsection 31(3) of the Act, which provides that the regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of this subsection, may be a class provided for by section 32, 36, 37, 37A or 38B but not by section 33, 34, 35, 38 or 38A);
- subsection 40(1) of the Act, which provides that the regulations may provide that visas or visas of a specified class may only be granted in specified circumstances;
- section 65 of the Act, which provides for the Minister to grant or refuse a visa. In particular:
 - subsection 65(1) of the Act, which has the effect of providing that after considering a valid application for a visa, the Minister is to refuse to grant the visa if the Minister is not satisfied that a criterion for it prescribed by the Act or the Principal Regulations has been satisfied;
- subsection 91D(1) of the Act, which provides that a country is a safe third country in relation to a non-citizen if:
 - the country is prescribed as a safe third country in relation to the non-citizen, or in relation to a class of persons of which the non-citizen is a member; and
 - the non-citizen has a prescribed connection with the country.

ATTACHMENT B

Details of the Migration Amendment Regulations 2011 (No. 5)

Regulation 1 – Name of Regulations

Regulation 1 provides that the title of the Regulations is the *Migration Amendment Regulations 2011 (No. 5)*.

Regulation 2 – Commencement

Regulation 2 provides that the Regulations commence on 15 August 2011.

Regulation 3 – Amendment of *Migration Regulations 1994* – Schedule 1

Subregulation 3(1) provides that Schedule 1 amends the *Migration Regulations 1994* (the Principal Regulations).

Subregulation 3(2) provides that the amendment made by item [1] of Schedule 1 applies in relation to an application for a visa:

- made, but not finally determined (within the meaning of subsection 5(9) of the *Migration Act 1958* (the Act)), before 15 August 2011; or
- made on or after 15 August 2011.

Subsection 5(9) of the Act provides that for the purposes of the Act, an application under the Act is finally determined when either:

- a decision that has been made in respect of the application is not, or is no longer, subject to any form of review under Part 5 or Part 7 of the Act; or
- a decision that has been made in respect of the application was subject to some form of review under Part 5 or Part 7 of the Act, but the period within which such a review could be instituted has ended without a review having been instituted as prescribed.

Schedule 1 – Amendments

Item [1] – Schedule 4, paragraph 4013(2)(d)

This item inserts “(j),” after “(ia),” in paragraph 4013(2)(d) of Part 1 of Schedule 4 to the Principal Regulations.

The *Migration Legislation Amendment Regulations 2011 (No. 1)*, which commenced on 1 July 2011, removed a reference to paragraph 2.43(1)(j) of Subdivision 2.9.2 of Part 2 of the Principal Regulations from paragraph 4013(2)(d). This was unintentional and has operated to remove a visa cancellation under paragraph 2.43(1)(j) as a ground for excluding a person whose visa was cancelled under this ground from being granted another visa within three years after the cancellation of the visa.

The purpose of this item is to reinstate the reference to paragraph 2.43(1)(j) in paragraph 4013(2)(d). This item clarifies that a visa cancellation ground in paragraph 2.43(1)(j) is within the scope of a “risk factor” in clause 4013. It also ensures that a person whose visa was cancelled under such a ground may be excluded from being granted another visa within three years after the cancellation of the visa.

Item [2] – Regulation 2.12A

This item substitutes new regulation 2.12A in Division 2.2 of Part 2 to the Principal Regulations.

Subsection 91D(4) of the Act provides that a regulation made for the purposes of paragraph 91D(1)(a) ceases to be in force at the end of 2 years after the regulation commences.

New regulation 2.12A will cease to be in force at the end of 14 August 2013.

Subsection 91D(1) of the Act provides that a country is a safe third country in relation to a non-citizen if:

- the country is prescribed as a safe third country in relation to the non-citizen, or in relation to a class of persons of which the non-citizen is a member; and
- the non-citizen has a prescribed connection with the country.

New regulation 2.12A is made in a slightly different form and is structured differently for greater clarity and ease of reading. However, the change in form is not intended to change the legal effect of the regulation.

New subregulation 2.12A(1) provides that for paragraph 91D(1)(a) of the Act, the People’s Republic of China (PRC) is a safe third country in relation to a person who:

- entered Australia without lawful authority on or after 1 January 1996; and
- meets any of the following criteria, as covered by the agreement between Australia and the PRC, being that:
 - the person is a Vietnamese refugee settled in PRC;
 - the person has been a Vietnamese refugee settled in PRC;
 - the person is a close relative of a person who is a Vietnamese refugee settled in PRC or has been a Vietnamese refugee settled in PRC;
 - the person is dependent on a person who is a Vietnamese refugee settled in PRC or has been a Vietnamese refugee settled in PRC.

New subregulation 2.12A(2) provides that for paragraph 91D(1)(b) of the Act, a person mentioned in new subregulation 2.12A(1) has a prescribed connection with PRC if, at any time before the person entered Australia:

- the person resided in PRC; or
- a parent of the person resided in PRC.

New paragraph 2.12A(3)(a) provides that the term “Agreement between Australia and PRC” means the agreement constituted by the Memorandum of Understanding (MOU), the English text of which is set out in Schedule 11 to the Principal Regulations, together with the exchange of letters between representatives of Australia and PRC dated 19 October 2010 and 6 May 2011, the text of which is set out in Schedule 12 to the Principal Regulations.

The MOU was signed by PRC and Australia on 25 January 1995. The MOU covers Vietnamese refugees who were settled in PRC and provided with effective protection and assistance by PRC government. The effect of the letters of 19 October 2010 and 6 May 2011 are to confirm that the MOU is to continue. The text of these letters is inserted in Schedule 12 to the Principal Regulations by item [3] of this Schedule.

New paragraph 2.12A(3)(b) provides that the use of the word “Vietnamese” is a reference to nationality or country of origin and is not an ethnic description.

The notes following new regulation 2.12A have been substituted with new notes that mirror the previous notes following current regulation 2.12A. New Note 1 provides that PRC is defined in regulation 1.03 to the Principal Regulations. New Note 2 provides that by force of subsection 91(D)(4) of the Act, the regulation will cease to be in force at the end of 14 August 2013.

Item [3] – Schedule 12

This item substitutes new Schedule 12 to the Principal Regulations.

New Schedule 12 contains the text of the letters exchanged between representatives of Australia and PRC continuing the MOU between Australia and PRC in relation to Vietnamese refugees settled in PRC.

Part 1 of new Schedule 12 contains the letter dated 19 October 2010 from the representative of Australia to the representative of PRC.

Part 2 of new Schedule 12 contains the letter dated 6 May 2011 from the representative of PRC to the representative of Australia.

These letters replace the previous letters in Schedule 12 dated 18 September 2008 and 7 October 2008, respectively.