

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Social Services

Social Security Act 1991

*Social Security (Class of Visas – Qualification for Special Benefit)
Determination 2015 (No. 2)*

Purpose

The purpose of this Determination is to consolidate and remove redundant elements of a number of determinations made under subparagraph 729(2)(f)(v) of the *Social Security Act 1991* (the Act).

Background

In broad terms, a person may be qualified for special benefit under the Act if they are:

- in severe financial hardship;
- unable to earn a sufficient livelihood for themselves and dependants due to reasons beyond their control;
- not qualified for any other income support payment; and
- an Australian resident or the holder of a temporary visa in a class of visas determined by the Minister for the purposes of subparagraph 729(2)(f)(v) of the Act.

A number of different visa classes have been determined for the purposes of subparagraph 729(2)(f)(v) of the Act in seven separate determinations. This Determination revokes those separate determinations and consolidates the visa classes into one determination. Some redundant visa classes which are determined in the separate determinations have not been included in this Determination.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make any instrument of a legislative or administrative character, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to revoke such instrument.

Commencement

This Determination commences on 1 October 2015.

Consultation

The Department of Immigration and Border Protection was consulted to assist with ensuring that the visa classes determined by this Determination are current.

The Attorney-General's Department was consulted to ensure an accurate description of offences set out in subsection 4(2) of the Determination.

Public consultation was considered unnecessary because this Determination is administrative in nature in consolidating current determinations. There are no substantive changes to the law as a result of this Determination.

Regulation Impact Statement (RIS)

This Determination does not require a Regulation Impact Statement because the Determination is not regulatory in nature, will not impact on business activity and will have no or minimal compliance costs or competition impact.

Explanation of the provisions

Section 1

This section provides how the Determination is to be cited, that is, as the *Social Security Class of Visas – Qualification for Special Benefit) Determination 2015 (No. 2)*.

Section 2

This section provides that the Determination commences on 1 October 2015. This is the day on which the *Social Security (Class of Visas – Qualification for Special Benefit) Determination 2005* and the *Social Security (Class of Visas – Qualification for Special Benefit) Determination 2005 (No. 2)* cease.

Section 3

Section 3 provides that five determinations are revoked. Those five determinations determine visa classes for the purposes of subparagraph 729(2)(f)(v) of the Act. The visa classes determined in those determinations, and which remain in effect under the *Migration Regulations 1994*, are now determined in this Determination. As such, it is possible to revoke the five determinations.

The *Social Security (Class of Visas – Qualification for Special Benefit) Determination 2005* and the *Social Security (Class of Visas – Qualification for Special Benefit) Determination 2005 (No. 2)* have not been revoked because those determinations cease under Part 6 of the *Legislative Instruments Act 2003* (sunsetting of legislative instruments) on 1 October 2015. This is the same day that this Determination commences.

Section 4

Subsection 4(1) determines classes of visas for the purposes of subparagraph 729(2)(f)(v) of the Act. A holder or former holder of one of these classes of visa is qualified for special benefit if the other qualification requirements are met. The classes of visa are:

- Subclass 070 (Bridging (Removal Pending));
- Subclass 309 (Partner (Provisional));
- Subclass 449 (Humanitarian Stay (Temporary));
- Subclass 785 (Temporary Protection);

- Subclass 786 (Temporary (Humanitarian Concern));
- Subclass 790 (Safe Haven Enterprise);
- Subclass 820 (Partner); and
- if certain circumstances are met, a criminal justice stay visa.

The circumstances for a criminal justice stay visa are that the visa was granted for the purpose of assisting in the administration of criminal justice in relation to an offence of trafficking in persons, slavery or slavery-like practices.

These offence descriptions are in slightly different terms to the offence descriptions currently set out in the *Social Security (Class of Visas – Qualification for Special Benefit) Determination 2004* (the 2004 Determination). The 2004 Determination refers to offences of people trafficking, sexual servitude or deceptive recruiting. Since the 2004 Determination was made, the *Criminal Code Act 1995* (the Criminal Code) has been amended and the offence descriptions in that determination do not accurately reflect all of the trafficking-related offences currently in the Criminal Code. The new offence descriptions in this Determination now accurately reflect the trafficking-related offences in the Criminal Code.

Each of the visa classes determined in section 4 are currently determined in the five separate determinations made under subparagraph 729(2)(f)(v) of the Act. Some of the references to visa classes have been changed to ensure an approach to referencing that is consistent with the *Migration Regulations 1994*.

Some visa classes that are currently determined in separate determinations have not been included in this Determination because they have been repealed. The repealed visa classes which have not been included in this Determination are:

- Subclass 310 (Interdependency (Provisional));
- Subclass 447 (Secondary Movement Offshore Entry (Temporary));
- Subclass 451 (Secondary Movement Relocation (Temporary));
- Subclass 695 (Return Pending);
- Subclass 787 (Witness Protection (Trafficking) (Temporary)); and
- Subclass 826 (Interdependency (Provisional)).

Statement of Compatibility with Human Rights

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

Social Security (Class of Visas – Qualification for Special Benefit) Determination 2015 (No. 2)

The *Social Security (Class of Visas – Qualification for Special Benefit) Determination 2015 (No. 2)* 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 Legislative Instrument

The *Social Security (Class of Visas – Qualification for Special Benefit) Determination 2015 (No. 2)* is made under subparagraph 729(2)(f)(v) of the *Social Security Act 1991*.

The purpose of the Determination is to allow the holders of the determined visas to qualify for Special Benefit, and consequently, a suite of ancillary social security and family payments such as Family Tax Benefit, Education Entry Payment, Rent Assistance, Health Care Card and Pharmaceutical Allowance.

The Determination consolidates a number of determinations currently made under subparagraph 729(2)(f)(v) of the *Social Security Act 1991*.

Human rights implications

This Determination engages or gives effect to the following human rights:

- the right to social security contained in Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 24 of the United Nations (UN) 1951 Convention and 1967 Protocol Relating to the Status of Refugees, Article 28 of the Convention on the Rights of Persons with Disabilities (CRPD), and Articles 11(1)(e) and 14(2)(c) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and
- the right to an adequate standard of living contained in Article 11(1) of the ICESCR, Article 28 of the CRPD and Article 14(2)(h) of the CEDAW.

The Determination will assist Australia to meet its international obligations under the ICESCR, the UN Refugees Convention and Protocol, the CRPD and the CEDAW by providing that holders of the determined visas meet the residence requirements for qualification for Special Benefit. The Determination will also promote an adequate standard of living for those who are granted the determined visas.

Conclusion

This Determination is compatible with human rights as it promotes the right to social security and an adequate standard of living for holders of the determined visas.

The Hon Christian Porter MP, Minister for Social Services