Migration and Refugee Division Commentary

Skilled

ENGLISH LANGUAGE ABILITY – SKILLED/BUSINESS VISAS

Overview[1]

Applicants for a number of skilled and business visas are required to demonstrate or possess English language skills of a certain standard. The standard of ability, and requirements for satisfying a decision maker of that standard, vary depending on the date of the visa application, the subclass sought, and the skilled occupation nominated.[2] English language ability is both a visa criterion, and a qualification for the points tests.

The various standards of English language proficiency are defined in regs 1.15B, 1.15C, 1.15D, 1.15E, 1.15EA and 5.17 of the *Migration Regulations 1994* (Cth) (the Regulations). In general terms, they are described, from the most to the least proficient, as follows:

- **Superior English (reg 1.15EA)** – fully operational command of the language with the ability to handle complex detailed argumentation well.
- **Proficient English (reg 1.15D)** – operational command of English with the ability to use and comprehend complex language well and understand detailed reasoning.
- **Competent English (reg 1.15C)** – generally effective command of the English language and the ability to use and understand fairly complex language, particularly in familiar situations.
- **Concessional Competent English (reg 1.15E)** – basic competence in the English language, but skills may not be consistent against the four areas of reading, writing, listening and speaking.
- **Vocational English (reg 1.15B)** – reasonable command of the English language, coping with overall meaning in most situations; ability to communicate effectively in own field of employment.
- **Functional English (s 5(2) of the *Migration Act 1958* (Cth) (the Act) and reg 5.17)** - able to read and understand English texts about familiar topics; despite some errors, write English well enough to communicate ideas or information for a variety of purposes; understand spoken English about familiar topics, and despite some errors, speak English well enough to handle everyday communication adequately.

The definitions in regs 1.15B, 1.15C, 1.15D, 1.15E and 1.15EA are exhaustive and may be satisfied in a variety of ways, most commonly by achieving a specified score in a specified English language test, but also by holding a passport issued by prescribed countries.[3]

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] For discussion of 'skilled occupation', see Skilled Occupation / Australian Study Requirement.
[3] In *Parmar v MIAC* [2011] FCA 760 the Court rejected a contention that the definition of 'competent English' in reg 1.15C should not be read as an exhaustive statement of the circumstances in which competent English might be demonstrated but, holding that it is not open to read 'competent English' in the sch 2 criteria as meaning 'competent English or competent English as defined'. His Honour's reasoning would equally apply to the other defined standards of English language competency. The same argument was rejected in *Munir v MIBP* [2015] FCCA 1629 in relation to reg 1.15D. Also see the cases referred to in *Munir* at [14]–[15]. The Court in *Singh v MIBP* [2016] FCCA 387 considered whether the instrument specifying the demonstration of Competent English through the holding of passports issued by particular countries was irrational, capricious and absurd. In finding that it was not, the Court observed that it is neither inherently irrational and unreasonable, nor, applying *Macabenta v MIMA* (1998) 90 FCR 202, in breach of s 10(1) of the *Racial Discrimination Act 1975* (Cth) insofar as a reference to the country of issue of the passport is different from racial, colour, national or ethnic considerations.

'Score' in relation to a language test, is defined to mean any score or result, however described, from the test, including any combination of scores or results from the test or components of the test.[4]

The tests currently specified are:

- International English Language Testing System (IELTS) test;[5]
- Occupational English Test (OET);[6]
- Test of English as a Foreign Language internet-Based Test (TOEFL iBT) (for applications lodged on or after 23 November 2014);
- Pearson Test of English Academic (PTE Academic) (for applications lodged on or after 23 November 2014); and
- Cambridge English: Advanced (CAE) (for applications lodged on or after 1 January 2015).

The precise requirements for each of these English language proficiency standards are discussed below, followed by a discussion of issues that commonly arise from the definitions.

In addition to the defined standards in the Regulations, for Subclass 485 (Temporary Graduate) applications made on or after 18 April 2015, and for Subclass 457 (Temporary Work (Skilled)) and Subclass 482 (Temporary Skill Shortage) applications, the necessary standards are contained entirely in legislative instruments and not by reference to any definition such as 'competent English'.[7] The relevant standard of English language ability for Subclass 485 is discussed below. For discussion of the relevant standards for Subclasses 457 and 482, see Subclass 457 visa and Subclass 482 visa.

[4] reg 1.03 definition inserted by *Migration Amendment (2015 Measures No 1) Regulation 2015* (Cth) (SLI 2015, No 34), applicable to visa applications made but not finally determined before 18 April 2015 and visa applications made on or after that date.

[5] 'IELTS test' is defined in reg 1.03 to mean the International English Language Testing System test. In *Singh v MIBP* [2016] FCCA 387 the argument that this definition was ambiguous and incapable of practical application was rejected at [43]–[45]. An IELTS test result provided by an applicant can be verified by registered users through the IELTS website (accessed 20 October 2022). Two of the current instruments (IMMI 15/005 and 15/062) incorrectly refer to an International English Language 'Test System' test but this can be overlooked as a minor drafting error that a court would correct under the 'slip rule': see *Milanes v MIBP* [2015] FCA 1105 at [89]. The IELTS test has two modules: the Academic Module and the General Training Module, however as neither is specified in the legislation or relevant instruments it would seem that results from either module would be acceptable. Consistent with that view, Policy states that '[c]andidates sitting the IELTS test for visa purposes need sit only the General Training Module, but the results of an Academic IELTS test will also be accepted': Policy – Migration Regulations – Other – 'English proficiency and assessment' – 9 The International English Language Testing System (IELTS) test (reissued 18 April 2015). In several cases the Courts rejected an argument that reg 1.15C and the instruments made under it were invalid, in part because 'IELTS' was not adequately defined: see e.g. *Milanes v MIBP* [2015] FCA 1105 on appeal from *Milanes v MIBP* [2015] FCCA 205, *Nawaz v MIBP* [2015] FCCA 1245, *Munir v MIBP* [2015] FCCA 1629 and *Singh v MIBP* [2015] FCCA 1793 and cases there cited.

[6] The 'OET' is a specialised English language test targeting healthcare professionals: See Policy – Migration Regulations – Other – 'English proficiency and assessment' – 10 The Occupational English Test (OET) (reissued 18 April 2015). For details see https://www.occupationalenglishtest.org/ (accessed 20 October 2022). It has not existed since 2005, but this fact has not affected the validity of the instruments referring to it: *Singh v MIBP* [2016] FCCA 387 at [46]–[50]. The definition of 'OET' in reg 1.03 was subsequently repealed on 18 April 2015 (SLI 2015, No 34) as it was out of date. The difficulties arising from the definition before its repeal, particularly in relation to the validity of written instruments specifying OET as a relevant test, are discussed in a number of cases including *Milanes v MIBP* [2015] FCA 1105 and *Munir v MIBP* [2015] FCCA 1629. See also *Singh v MIBP* [2015] FCCA 1793 at [19]–[31] and the cases there cited. These difficulties are now of historic interest only, as the repeal of the definition on 18 April 2015 applies to all applications not finally determined as well as applications made on or after that date. However it is worth noting Katzmann J's comments in *Milanes* as to the structure of the instruments, such that the invalid parts (those referring to OET) were severable.

[7] cl 485.212 as substituted by SLI 2015, No 34; cls 457.223(4)(eb)–(ec), 482.223, 482.232.

Superior English

Superior English is the highest standard of English proficiency specified and is defined in reg 1.15EA. It is relevant to applications for points-tested General Skilled Migration (GSM) visas lodged on or after 1 July 2011.[8] Applicants for these visas are awarded points for English language qualifications under Part 6C.2 of Schedule 6C or Part 6D.2 of Schedule 6D if they have 'superior English'.

Regulation 1.03 provides that 'superior English' has the meaning given by reg 1.15EA. Under the definition a person has superior English if they achieved a specified score in a specified English language test, conducted in a specified period.

The current definition applies to visa applications made on or after 1 July 2012. The definition was different (mainly concerning the timing of the test) for applications made before that date. Please contact MRD Legal Services about the definition for visa applications made before 1 July 2012.

Visa applications made on or after 1 July 2012

For visa applications made on or after 1 July 2012, a person has superior English if:

- the person undertook a language test, specified in a written instrument; and
- the person is an applicant for a visa; and
- the test was conducted in the 3 years immediately before the day on which the Minister invited the person under the Regulations, in writing, to apply for the visa; and
- the person achieved a score specified in the instrument.[9]

The written instrument specifying the language tests and scores for the purpose of reg 1.15EA can be accessed at the 'EngTests' tab on the Register of Instruments - Skilled visas. For guidance on how to identify the applicable instrument, see below – What is the relevant instrument for each of the English standards?

Proficient English

Proficient English is the second highest standard of English proficiency specified and is defined in reg 1.15D. It is relevant to applications for points tested GSM visas and to Subclass 188 Business Skills (Provisional) Class EB visas. Applicants for these visas are awarded points for English language qualifications under Part 6B.3 of Schedule 6B,

[8] General Skilled Migration visa means a Subclass 175, 176, 189, 190, 475, 476, 485, 487, 489, 491, 885, 886 or 887 visa, granted at any time: reg 1.03 as amended by *Migration Amendment Regulation 2012 (No 2)* (Cth) (SLI 2012, No 82) to insert references to Subclasses 189, 190 and 489, and further amended by *Migration Amendment (New Skilled Regional Visas) Regulations 2019* (Cth) (F2019L00578) to insert reference to Subclass 491.

[9] reg 1.15EA(a), (c) as substituted by SLI 2012, No 82, changes applying to applications for visas made on or after 1 July 2012; reg 1.15EA(aa) as inserted and (b) as substituted by SLI 2015, No 34, applicable to visa applications made on or after 1 July 2012 and not finally determined before 18 April 2015 and applications made on or after 18 April 2015: item 4102 of sch 13 as substituted by *Migration Legislation Amendment (2015 Measures No 3) Regulation 2015* (Cth) (SLI 2015, No 184). This corrected an error in the amendment to item 4102 made on 18 April 2015 by SLI 2015 No 34 and commenced retrospectively on that date. Note that there is a difficulty with the application of this definition for sch 6C item 6C.21, for Subclass 487, 885 or 886 applications made on or after 1 July 2012 and before the subclasses closed on 31 December 2012. This is because the definition refers to an English test by reference to the date of invitation to apply for the visa and therefore can only sens bly apply to visas that require an invitation to apply, such as those in the SkillSelect program introduced on 1 July 2012. If this issue arises, consult MRD Legal Services.

Part 6C.2 of Schedule 6C, Part 6D.2 of Schedule 6D or Part 7A.3 of Schedule 7A (as relevant) if they have 'proficient English'.

Regulation 1.03 provides that 'proficient English' has the meaning given by reg 1.15D. Under the definition a person has proficient English if they achieved a specified score in a specified English language test, conducted in a specified period.

The current definition applies to visa applications made on or after 1 July 2012. The definition was different (mainly concerning timing of the test) for applications made before that date. Please contact MRD Legal Services about the definitions for visa applications made before 1 July 2012.

Visa applications made on or after 1 July 2012

For visa applications made on or after 1 July 2012, a person has proficient English if:

- the person undertook a language test, specified in a written instrument; and
- the person is an applicant for a visa; and
- the test was conducted in the 3 years immediately before the day on which the Minister invited the person under the Regulations, in writing, to apply for the visa; and
- the person achieved a score specified in the instrument.[10]

The applicable written instrument specifying the language tests and scores can be accessed at the 'EngTests' tab on the Register of Instruments - Skilled visas. For further guidance on how to identify the applicable instrument, see below – What is the relevant instrument for each of the English standards?

Competent English

'Competent English' is the third highest standard of English proficiency specified and is defined in reg 1.15C. It is relevant to applications for GSM visas and to certain Business visa applications.

Almost all GSM visas (with the exception of Subclass 887 visas and Subclass 489 visas in the 'Second Provisional Visa stream') have an English language proficiency criterion prescribed by Schedule 2. In each instance, except for Subclass 485 visa applications made from 18 April 2015, competent English is the relevant standard that must be met to satisfy the relevant criterion or is one of two or more alternative standards, depending on the applicable version of the relevant Schedule 2 criterion.[11] Additionally, applicants for points-tested GSM visas, and their partners, are awarded points for having competent English under the applicable points test.

[10] reg 1.15D(a) and (c) as substituted by SLI 2012, No 82, changes applying to visa applications made on or after 1 July 2012; reg 1.15D(aa) as inserted and (b) as substituted by SLI 2015, No 34, applicable to visa applications made on or after 1 July 2012 and not finally determined before 18 April 2015 and applications made on or after 18 April 2015: item 4102 of sch 13 as substituted by SLI 2015, No 184. This corrected an error in item 4102 as inserted on 18 April 2015 by SLI 2015, No 34, and commenced retrospectively on that date. Note that there is a difficulty with the application of this definition for sch 6B item 6B.31 and sch 6C item 6C.22, for Subclass 487, 885 or 886 applications made on or after 1 July 2012 and before the subclasses closed on 31 December 2012. This is because the definition refers to an English test by reference to the date of invitation to apply for the visa and therefore can only sensibly apply to visas that require an invitation to apply, such as those in the SkillSelect program introduced on 1 July 2012. If this issue arises, consult MRD Legal Services.

[11] See cls 175.213, 176.213, 189.213, 190.213, 475.214, 487.215, 489.223, 491.215, 885.213, 886.213, 487.215 as in force before 18 April 2015.

For business visa applications in the Direct Entry stream of Subclass 186 (Employer Nomination Scheme), Subclass 187 (Regional Sponsored Migration Scheme) and the Employer Sponsored stream of Subclass 494 (Skilled Employer Sponsored Regional (Provisional)), it is a Schedule 2 requirement that the applicant had competent English at time of application, unless they are in a specified class of persons.[12]

Regulation 1.03 provides that 'competent English' has the meaning given by reg 1.15C. The current definition applies to visa applications made on or after 1 July 2012. The definition was different for applications made before that date, mainly relating to the type and timing of the tests. Please contact MRD Legal Services about the definitions for visa applications made before 1 July 2012.

Visa applications made on or after 1 July 2012

For visa applications made on or after 1 July 2012, reg 1.15C provides that a person has competent English if:

- the person undertook a language test, specified in a written instrument;[13] and
- the person is an applicant for a visa;[14] and
- the test was conducted in a specified period:
  - *for a person who was invited (or whose spouse or de facto partner was invited) by the Minister under the Regulations, in writing, to apply for the visa* - (with exceptions) the test was conducted in the 3 years immediately before the date of the invitation;[15]
  - *for a person to whom the invitation provision does not apply*, the test was conducted in the 3 years immediately before the day on which the application was made;[16] and
- the person achieved a score specified in the instrument.[17]

Alternatively, a person has competent English if the person holds a *passport* of a type specified in a written instrument.[18]

The applicable instrument specifying the language tests, scores and passports can be accessed at the 'EngTests' tab on the Register of Instruments - Skilled visas. For further guidance on how to identify the applicable instrument, see below – What is the relevant instrument for each of the English standards?

[12] See cls 186.232(a), 187.232(a) inserted by SLI 2012, No 82; cl 494.226 inserted by F2019L00578.
[13] reg 1.15C(1)(a) as substituted by SLI 2012, No 82, applicable to visa applications made on or after 1 July 2012.
[14] reg 1.15C(1)(b) as substituted by SLI 2015, No 34, applicable to visa applications made on or after 1 July 2012 and not finally determined before 18 April 2015 and applications made on or after 18 April 2015: item 4102 of sch 13 as substituted by SLI 2015, No 184. This corrected an error in item 4102 as inserted on 18 April 2015 by SLI 2015, No 34, and commenced retrospectively on that date.
[15] reg 1.15C(1)(ba) as substituted by SLI 2015, No 34. This provision can only apply to visa applications that require an invitation to apply, e.g. applications in the SkillSelect program - Subclasses 189, 190, 489 and 491. It applies to visa applications made but not finally determined before 18 April 2015 and applications made on or after that date.
[16] reg 1.15C(1)(bb) as substituted by SLI 2015, No 34. According to the transitional provisions, the amendment is applicable to visa applications made but not finally determined before 18 April 2015 and applications made on or after that date. However, it is inapplicable to visa applications made before 1 July 2012, because the transitional provision is ineffective for these applications as the provision that was repealed and substituted did not exist prior to 1 July 2012.
[17] reg 1.15C(1)(c) as substituted by SLI 2012, No 82, applicable to visa applications made on or after 1 July 2012.
[18] reg 1.15C(2) as amended by SLI 2012, No 82 and again by SLI 2015, No 34, changes applying to visa applications made on or after 1 July 2012.

Concessional Competent English

Concessional competent English is the fourth highest standard of English proficiency specified and was defined in reg 1.15E. Regulation 1.15E was omitted from the Regulations with effect for all primary visa applications made on or after 1 July 2013.[19] This reflected the repeal of Subclasses 475 and 487 from the Regulations on 1 July 2013.[20] Accordingly, concessional competent English is not relevant to GSM visa applications made on or after 1 July 2013. The definition remains relevant to Subclass 487 applications that have not been finalised. At the time of writing, there remains only one Subclass 487 application before the Tribunal.

Subclass 487 visa applicants may be awarded points under the Schedule 6B points test (if applicable) if they have concessional competent English (Part 6B.3) or if their spouse or de facto partner has concessional competent English (Part 6B.10).

Please contact MRD Legal Services if you require further information about concessional competent English.

Vocational English

Vocational English is the fifth highest standard of English proficiency specified in the Regulations and is defined in reg 1.15B. It is relevant to Schedule 2 criteria for certain business visas.[21] For Subclass 188 Business Skills (Provisional) (Class EB) visas, points are available for vocational English in Part 7A.3 of the Schedule 7A points test.

The current definition applies to visa applications made on or after 1 July 2012. Please contact MRD Legal Services about the definitions for visa applications made before 1 July 2012.

Visa applications made on or after 1 July 2012

For visa applications made on or after 1 July 2012 reg 1.15B provides that a person has vocational English if:

- the person undertook a language test, specified in a written instrument;[22] and
- the person is an applicant for a visa;[23] and
- the test was conducted within a specified period:
  - *for a person who was invited (or whose spouse / de facto partner was invited) by the Minister to apply for the visa* – the test was conducted in the 3 years immediately before the date of the invitation;[24]

[19] See SLI 2012 No 82.
[20] See SLI 2012, No 82.
[21] For example, applicants for an Employer Nomination (Residence) (Class BW) visa are required to have this level of English.
[22] reg 1.15B(1)(a) as substituted by SLI 2012, No 82, applicable to visa applications made on or after 1 July 2012.
[23] reg 1.15B(1)(b) as substituted by SLI 2015, No 34. According to the transitional provisions, the amendment is applicable to visa applications made but not finally determined before 18 April 2015 and applications made on or after that date. However, it is inapplicable to visa applications made before 1 July 2012, because the transitional provision is ineffective for these applications as the provision that was repealed and substituted did not exist prior to 1 July 2012.
[24] reg 1.15B(1)(ba) as substituted by SLI 2015, No 34, applicable to visa applications made on or after 1 July 2012 and not finally determined before 18 April 2015 and applications made on or after 18 April 2015: item 4102 of sch 13 as substituted by SLI 2015, No 184. This corrected an error in item 4102 as inserted on 18 April 2015 by SLI 2015, No 34, and commenced

- *for a person to whom the invitation provision does not apply* – the test was conducted in the 3 years immediately before the day on which the application was made;[25] and

- the person achieved a score specified in the instrument.[26]

Alternatively, a person has vocational English if the person holds a *passport* of a type specified in a written instrument.[27]

The applicable written instrument specifying the language tests, scores and passports can be accessed at the 'EngTests' tab on the Register of Instruments - Skilled visas. For further guidance on how to identify the applicable instrument, see below – What is the relevant instrument for each of the English standards?

Functional English

Functional English is the lowest standard of English proficiency specified. It is relevant to Schedule 1 visa application requirements for business, skilled and several other types of visas, where applicants who are assessed as not having functional English may have to pay a second instalment visa charge, payable before grant.[28] It is also relevant to Schedule 2 visa criteria for certain skilled and business visas.[29]

Section 5(2) of the Act provides that a person has functional English at a particular time if he or she passes a test that is approved in writing by the Minister and is conducted by a person or organisation approved by the Minister[30] or the person provides prescribed evidence of the person's English language proficiency.[31] There are no approved tests, persons or organisations for the purpose of this section. The prescribed evidence of the person's English language proficiency is set out in reg 5.17.

For visa applications made *on or after 1 July 2012 and before 19 April 2021*, reg 5.17 prescribes the following:

- evidence specified by the Minister in an instrument in writing;[32]
- the person holds an award that required at least 2 years of full-time study/training conducted in English;[33]
- the person has been assessed as having functional English by the provider of an approved English course;[34]

retrospectively on that date. This provision can only apply to visa applications that require an invitation to apply, e.g. applications in the SkillSelect program - Subclasses 189, 190, 489 and 491 – however as vocational English currently has no relevance to these subclasses it has no work to do.

[25] reg 1.15B(1)(bb) as substituted by SLI 2015, No 34, applicable to visa applications made on or after 1 July 2012 and not finally determined before 18 April 2015 and applications made on or after 18 April 2015: item 4102 of sch 13 as substituted by SLI 2015, No 184. This corrected an error in item 4102 as inserted on 18 April 2015 by SLI 2015 No 34 and commenced retrospectively on that date.

[26] reg 1.15B(1)(c) as substituted by SLI 2012, No 82, applicable to visa applications made on or after 1 July 2012.

[27] reg 1.15B(2) as amended by SLI 2012 No 82 and SLI 2015, No 34, changes applying to visa applications made on or after 1 July 2012.

[28] For example, item 1104AA(2)(b) for Business Skills – Business Talent (Permanent) (Class EA).

[29] Including Subclass 407 (Training)(Class GF) and Subclass 462 (Work and Holiday)(Class US): see cls 407.212 and 462.215.

[30] ss 5(2)(a)(i) and (ii).

[31] s 5(2)(b).

[32] reg 5.17(a).

[33] reg 5.17(c).

[34] reg 5.17(f). The approved English course must be approved under s 4 of the *Immigration (Education) Act 1971* (Cth).

- the person has been determined by the Minister, on the basis of an interview, to have functional English (if the person cannot provide the specified evidence, *and* it is not reasonably practicable for that person to be assessed by the approved English course provider);[35]
- if the application was made *before 18 April 2017*, evidence that the person has attained the level of functional English under the ACCESS test;[36] or the person has been determined by the Minister, on the basis of an interview, to have functional English (if the person cannot provide the specified evidence, and it is not reasonably practicable for that person to undertake the ACCESS test or to be assessed by the approved English provider).[37]

For visa applications made *on or after 19 April 2021*, reg 5.17 prescribes the following:

- evidence specified by the Minister in an instrument in writing;[38]
- the person holds an award that required at least 2 years of full-time study/training conducted in English;[39]
- if evidence specified by the Minister in an instrument in writing for reg 5.17(a) cannot be provided, evidence the person has been determined by the Minister, on the basis of an interview with the person, to have functional English.[40]

For visa applications made on or after 1 July 2012 the written instrument specifying evidence for the purposes of reg 5.17(a) can be found on the 'FunctionalEng' tab on the Register of Instruments - Skilled visas.

Please contact MRD Legal Services about the definitions for visa applications made before 1 July 2012.

[35] reg 5.17(j).
[36] reg 5.17(e). ACCESS Test was defined by reg 1.03 to mean the Australian Assessment of Communicative English Skills test. Reg 5.17(e) and the definition of ACCESS test under reg 1.03 were removed for visa applications made on or after 18 April 2017 by the *Migration Legislation Amendment (2017 Measures No 1) Regulations 2017* (Cth) (F2017L00437) to remove references to the ACCESS test from the Regulations. Although these changes only affect visa applications made on or after 18 April 2017, the Explanatory Statement notes that the ACCESS test has not been used since 2012 and there are no unfinalised applications relying on the test. Regs 5.17(h) and 5.17(j)(i) were also repealed by F2017L00437 to reflect the repeal of the Business Skills – Established Business (Residence) (Class BH) visa on 1 July 2013.
[37] reg 5.17(j). The words "e or" in reg 5.17(j)(iii) were removed for visa applications made on or after 18 April 2017 by F2017L00437 to remove references to the ACCESS test from the Regulations. Although these changes only affect visa applications made on or after 18 April 2017, the Explanatory Statement notes that the ACCESS test has not been used since 2012 and there are no unfinalised applications relying on the test.
[38] reg 5.17(a).
[39] reg 5.17(c).
[40] reg 5.17(d) as substituted by the *Migration Legislation Amendment (English Tuition) Regulations 2021* (Cth) (F2021L00262) for applications made on or after 19 April 2021. Repealed reg 5.17(f) provided that prescribed evidence of a person's English language proficiency for the purposes of the Regulations included evidence that the person has been assessed as having functional English by the provider of an approved English course for the purposes of section 4 of the Immigration (Education) Act 1971 (Cth). Repealed reg 5.17(j) provided that if other evidence of functional English referred to in reg 5.17(a) cannot be provided, and if it is not reasonably practical for a person to attend at a place or at a time for an assessment referred to in reg 5.17(f), evidence of a person's functional English includes evidence the person has been determined by the Minister, on the basis of an interview with the person, to have functional English. F2021L00262 repealed regs 5.17(f) and 5.17(j) and substituted reg 5.17(d) to take account of the fact that providers of approved courses under the *Immigration (Education) Act 1971* (Cth) will no longer be making determinations that a person has functional English following amendments made by *Immigration (Education) Amendment (Expanding Access to English Tuition) Act 2020* (Cth): see Explanatory Statement to F2021L00262.

English language standard specified by the Minister

For Subclass 485 visa applications made on or after 18 April 2015, the English language proficiency requirement is by reference to a standard specified by the Minister rather than one defined in the Regulations (such as competent English). The requirement is that the application was accompanied by evidence that the applicant has undertaken a language test specified by written instrument, and achieved the specified score, within the specified period, and in accordance with the specified requirements (if any), or alternatively evidence that the applicant holds a passport of a type specified by the Minister.[41]

This enables lower scores for individual components of a test to be specified so that test results can be more flexible and the visas more responsive to Australia's labour market requirements.[42]

The relevant instrument for these provisions can be accessed at the 'Eng476485' tab on the Register of Instruments - Skilled visas.

Common issues

When can the English language test be undertaken?

Under the current definitions, an English language proficiency test undertaken after the date of application cannot be accepted for the purposes of the Schedule 2 criteria and applicable points test provisions for GSM applications.[43] For all relevant GSM applications, except for Subclass 485, the English language proficiency test must be conducted in the 3 years 'immediately before the day on which the application is made' or (where applicable) the day on which the Minister invited the person to apply for the visa.[44]

For Subclass 485, cl 485.212(1)(a)(ii) requires the applicant to *achieve* a certain score within the period specified by legislative instrument. Paragraph 4 of the current instrument, IMMI 15/062, specifies English language tests that 'must have been *undertaken* within the three years before the day on which the application was made'. In *Shine v MICMSMA*[45] the Court held that paragraph 4 of IMMI 15/062 was tainted by a clear drafting error and should be read so as to refer to a score *achieved* from a language test within three years before the day on which the visa application is made. Therefore, where an applicant *undertakes* the test more than three years before the date on which the application was made, they would still meet the requirement as long as they *achieved* the relevant score (i.e., they were issued

[41] cl 485.212 as substituted by SLI 2015, No 34.
[42] See Explanatory Statement to SLI 2015, No 34 sch 2 items 12, 14.
[43] See *Kumar v MIBP* [2014] FCA 1336, citing with approval *Singh v MIBP* [2014] FCA 185 and *Datchinamurthy v MIBP* [2014] FCCA 258 where the Court referred to the 'very clear' words of reg 1.15C. See also *Milanes v MIBP* [2015] FCA 1105 and the cases cited there at [56]. Each of these judgments concerned reg 1.15C, however the Court's reasoning would appear to apply equally to regs 1.15D and 1.15E. *Singh v MIBP* [2015] FCCA 1533 provides a stark example of the effect of the various amendments to the definition of 'competent English'. In that case the applicant's successful test was taken just outside the permissible 2 year period before the date of application, which was shortly before the introduction of the 3 year period.
[44] SLI 2015, No 34. See the case of [redacted] in relation to Tribunal decision [redacted], which was remitted by consent in circumstances where the Minister accepted that if the components of an English test are held over multiple days, not all of those components need to be completed in the relevant period, and that the test is 'undertaken' on the day that the final test component is completed. While this case concerned Subclass 485, which refers to an English standard specified by the Minister, it may also reflect the Department's interpretation of the requirements in relation to the English standards defined in the Regulations, which are relevant to other Skilled visa subclasses.
[45] *Shine v MICMSMA (No 3)* [2022] FedCFamC2G 132 at [14].

with a successful result) in the three years before the day the application was made. The instrument also requires that the English test 'must be completed in a single test sitting'.[46]

Whether misleading application form affects timing of the test

In several cases an issue has arisen as to whether the visa application form was misleading in relation to the time when the test can be taken.[47] While opinion seems to have been divided on whether the form was in fact misleading, the Courts have made it clear that the issue for the Tribunal is whether the applicant satisfies the criterion and the fact that the form is deficient cannot be determinative.[48]

Can test scores from different IELTS tests be combined?

On the basis of the pre 1 July 2011 definitions, a person will have the relevant English standard if he or she has achieved the requisite IELTS (or other) test score 'in *a* test' (emphasis added). Similarly, the post 1 July 2011 definitions of superior English, proficient English, competent English and concessional competent English, and the post 1 July 2012 definition of vocational English, refer to a person undertaking '*a* language test' (emphasis added). Each definition appears to contemplate a score in a single test. This construction is, in general terms, supported by judicial consideration of an item in Schedule 6A which refer to scores achieved in 'an IELTS test'.[49]

In considering reg 1.15B(3) and the standard of vocational English (pre 1 July 2012), the Courts have held that this requires the scores to be achieved in a single test. The requirement will not have been met where a person has achieved a score of at least 5 for each of the 4 components over the course of two or more tests, but not in a single test.[50]

What is the relevant instrument for each of the English standards?

Where the applicable version of an English language definition refers to a test, score or passport specified by the Minister in an instrument in writing, it is necessary to determine

[46] IMMI 15/062 at [2]. The case of [redacted] in relation to Tribunal decision [redacted] was remitted by consent in circumstances where the Minister appeared to accept that an English test was taken in a single sitting even where the separate components of the test were held on different days.
[47] For example, in *Sandhu v MIBP* [2013] FCCA 2285 the Court expressed the view that the application form was 'less than clear' and may have misled the applicants. In *Datchinamurthy v MIBP* [2014] FCCA 258 and again in *Kumar v MIBP* [2014] FCA 1336 the applicants contended that they were misled into believing they had until the date of the decision to satisfy the requirement, and further, that the purportedly misleading information on the application form either expressly or impliedly repealed the effect of reg 1.15C to the extent of any inconsistency. In *Mohamed Farook v MIBP* [2014] FCA 1017 it was argued that the 'competent English' standard did not apply as there was nothing in the application form which indicated any requirement for the appellant to meet it.
[48] In *Sandhu v MIBP* [2013] FCCA 2285 and *Mohamed Farook v MIBP* [2014] FCA 1017 the Court accepted that the form was misleading (*Sandhu*) or at least ambiguous (*Farook*); in *Kumar v MIBP* [2014] FCA 1336, *Datchinamurthy v MIBP* [2014] FCCA 258 and *Kumar v MIBP* [2015] FCCA 2037 (appeal dismissed: *Kumar v MIBP* [2015] FCA 1189), the Courts took a different view, finding nothing misleading or inconsistent about the text of the application form. With respect to the issue for the Tribunal, see *Sandhu v MIBP* [2013] FCCA 2285, *Mohamed Farook v MIBP* [2014] FCA 1017 at [55], and *Kumar v MIBP* [2014] FCA 1336 at [43].
[49] *Bodruddaza v MIMIA* (2007) 228 CLR 651. The High Court in considering reg 2.26A(2)(a)(iv) and Item 6A31 held at [74] that the apparent objective of requiring a particular level of overall competence in the English language would not be achieved if the requirement were to be satisfied by sitting the test on several occasions, concentrating on several different components, until there was accumulated a sufficient collection of scores. See also *Hadiuzzaman v MIAC* [2008] FMCA 1266 where McInnis FM considered item 6A31 and held at [42] that 'there is clearly a logical reason why the phrase refers to a singular test and I do not accept that it is appropriate nor consistent with the regulation to suggest that a combination of tests or a 'mix and match' approach is appropriate' (not disturbed on appeal: *Hadiuzzaman v MIAC* [2008] FCA 1015.
[50] *Mohamad v MIAC* [2010] FMCA 539 at [42] where the Court considered reg 1.15B in the context of cl 880.223 (upheld on appeal: *Mohamad v MIAC* (2010) 191 FCR 31 at [10]).

which instrument applies, e.g. the one in force at time of application or at time of decision or at some other time.

There has been very limited consideration by the Courts of this issue. In general, the statutory context and/or the terms of the legislative instrument will determine the applicable instrument. In some cases, the terms of the legislation may point to the applicable instrument. For example, if the relevant criterion is to be satisfied at the time of application, it may be concluded that the applicable instrument is the one in force at that time.[51] Similarly, if the relevant criterion is to be satisfied at the time of invitation to apply for the visa, it may be concluded that the applicable instrument is the one in force at that time. In other cases the terms of the instrument itself may be determinative.

For English language definitions, there are currently three instruments which together apply to all cases: IMMI 15/004 for Functional English (from 1 January 2015), IMMI 15/062 for Subclass 485 visa applications made on or after 18 April 2015, and IMMI 15/005 for all other currently applicable levels of English language proficiency (from 11 December 2014).

By its terms, IMMI 15/005 makes a number of separate specifications in respect of:

- visa applications lodged before 1 July 2012 (item 2);
- visa applications lodged on or after 1 July 2012 and before 23 November 2014 (item 3);
- visa applications lodged on or after 23 November 2014 (item 4); and
- visa applications lodged on or after 1 January 2015.

There are two things to note about this instrument. First, reading the instrument literally, both items 4 and 5 apply to visa applications lodged on or after 1 January 2015. Item 5 specifies the same tests, scores and passports as item 4 but also includes a new English language test alternative to those previously available and is therefore more beneficial to applicants.[52] For practical purposes, therefore, it is enough to assess post 1 January 2015 applications against item 5.

The second thing to note about IMMI 15/005 is that there is a mismatch between item 2 of the instrument (for applications lodged before 1 July 2012) and some of the legislation to which it refers. In particular, the IMMI 15/005 specifications of IELTS tests and scores are unnecessary for visa applications made before 1 July 2011, because the definitions in regs 1.15C (competent English), 1.15D (proficient English) and 1.15E (concessional competent English) themselves specify an IELTS test and score and so there is no basis for referring to the instrument. However this is of no practical consequence as the IELTS scores are the same in the instrument as in the definition.[53] In addition, item 2 purports to specify

[51] For example, in *Aomatsu v MIMIA* (2005) 146 FCR 58 the Full Federal Court considered which version of the Migration Occupation in Demand List as then defined in reg 1.03 (MODL gazette notice) was to be applied when making an assessment under Part 7 of sch 6A. A majority of the Full Federal Court held that the relevant MODL for the purposes of Part 7 of sch 6A is the list which existed at the time of application, reasoning that if an applicant was required to nominate a skilled occupation and provide evidence of having the skills for the occupation at the time of the application, it was highly l kely that the assessment required was by reference to a skilled occupation specified in a Gazette Notice (instrument) at the time the application was made. Although the reasoning of the leading judgment turns on the particular statutory context considered, the judgment provides authority that an instrument may still have operation after it has been revoked.

[52] IELTS and OET, as well as TOEFL iBT and PTE Academic for visa applications on or after 23 November 2014.

[53] In addition, in relation to the alternative test (OET) IMMI 15/005 misdescribes reg 1.15C for visa applications made before 1 July 2012 and reg 1.15D for visa applications made before 1 July 2011. Earlier versions of reg 1.15C also refer to specified tests, scores and passports in differently numbered provisions.

tests, test scores, and passports for regs 1.15C(1)(a), 1.15C(1)(c) and 1.15C(2) respectively; however for visa applications made before 1 July 2012 there were no such provisions.

These appear to have been drafting errors,[54] and insofar as IMMI 15/005 misdescribes the relevant legislation, the 'slip rule' applies so that the incorrect references to the definitions should be taken to be references to the relevant version of those provisions.[55]

It should also be noted that reference to an incorrect instrument will not be fatal to the decision if the substance of the law applied is the same.[56]

The relevant instruments can be accessed through the 'EngTests' tab, or for functional English the 'FunctionalEng' tab, and for Subclass 485 visa applications made on or after 18 April 2015 the 'Eng476485' tab, of Register of Instruments - Skilled visas.

Relevant amending legislation

Title	Reference	Legislation Bulletin
Migration Amendment Regulations 2011 (No 3) (Cth)	SLI 2011, No 74	No 2/2011
Migration Amendment Regulation 2012 (No 2) (Cth)	SLI 2012, No 82	No 4/2012
Migration Amendment (2015 Measures No 1) Regulation 2015 (Cth)	SLI 2015, No 34	No 1/2015
Migration Legislation Amendment (2015 Measures No 3) Regulation 2015 (Cth)	SLI 2015, No 184	No 10/2015
Migration Legislation Amendment (2017 Measures No 1) Regulations 2017 (Cth)	F2017L00437	No 1/2017
Migration Amendment (New Skilled Regional Visas) Regulations 2019 (Cth)	F2019L00578	No 4/2019
Migration Legislation Amendment (English Tuition) Regulations 2021	F2021L00262	

Relevant case law

Judgment	Judgment summary
Aomatsu v MIMIA [2005] FCAFC 139	Summary

[54] These errors initially appeared in the instrument IMMI 12/018 but have not been corrected in the subsequent instruments. There is a further error in IMMI 15/005 at item 4H which incorrectly refers to reg 1.15D(a) instead of reg 1.15D(c) for the applicable test scores; however this can properly be regarded as a mere typographical error.
[55] See *Mohamed Farook v MIBP* [2014] FCA 1017 at [18]–[24].
[56] See *Mohamed Farook v MIBP* [2014] FCA 1017 at [56]–[57]. See also *Singh v MIBP* [2015] FCA 80 and *Singh v MIBP* [2015] FCA 81.

Berenguel v MIAC [2010] HCA 8	Summary
Bodruddaza v MIMIA [2007] HCA 14	Summary
Datchinamurthy v MIBP [2014] FCCA 258	Summary
Hadiuzzaman v MIAC [2008] FCA 1015	
Hadiuzzaman v MIAC [2007] FMCA 1266	Summary
Kumar v MIBP [2014] FCA 1336	Summary
Kumar v MIBP [2015] FCCA 2037	Summary
Kumar v MIBP [2015] FCA 1189	
Milanes v MIBP [2015] FCA 1105	
Milanes v MIBP [2015] FCCA 205	Summary
Mohamad v MIAC [2010] FMCA 539	Summary
Mohamad v MIAC [2010] FCA 1414	
Mohamed Farook v MIBP [2014] FCA 1017	Summary
Munir v MIBP [2015] FCCA 1629	Summary
Nawaz v MIBP [2015] FCCA 1245	
Parmar v MIAC [2011] FCA 760	Summary
Sandhu v MIBP [2013] FCCA 2285	
Shine v MICMSMA (No 3) [2022] FedCFamC2G 132	Summary
Singh v MIBP [2014] FCA 185	
Singh v MIBP [2015] FCA 80	
Singh v MIBP [2015] FCA 81	
Singh v MIBP [2015] FCCA 1533	
Singh v MIBP [2015] FCCA 1793	
Singh v MIBP [2016] FCCA 387	

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SKILLED OCCUPATION / AUSTRALIAN STUDY REQUIREMENT

Overview[1]

The terms 'skilled occupation' and 'Australian study requirement' are relevant to a wide range of skilled visas. This commentary focuses on General Skilled Migration (GSM) visas.[2]

To make a valid application for most GSM visas, the applicant must nominate a skilled occupation in the visa application form.[3] Criteria for these visas generally require that the applicant's skills have been assessed as suitable for the nominated skilled occupation. For some applications, if the assessment was based on qualifications obtained in Australia while the applicant held a student visa, the qualification must have been obtained as a result of studying a registered course.

The 'Australian study requirement' is included in the criteria for the grant of a number of GSM visas.[4] Broadly speaking, a person satisfies the requirement by completing a course or courses of specified kinds, over a specified period. In some cases, the qualification used to satisfy the Australian study requirement must be closely related to the nominated skilled occupation.

This commentary addresses what is meant by skilled occupation and the requirements relating to skills assessments; the Australian study requirement; and the 'closely related' requirement.

In addition to the 'skilled occupation' criteria, there are other Schedule 2 visa criteria to which the nominated skilled occupation is relevant. These include criteria concerning employment in a skilled occupation, English language ability and points tests, which are discussed in other MRD Legal Services commentaries.[5]

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.

[2] 'General Skilled Migration visa' is defined in reg 1.03 to mean a Subclass 175, 176, 189, 190, 475, 476, 485, 487, 489, 491, 885, 886 or 887 visas, granted at any time: inserted by *Migration Amendment Regulations 2007 (No 7)* (Cth) (SLI 2007, No 257), amended by *Migration Amendment Regulations 2012 (No 2)* (Cth) (SLI 2012, No 82); further amended by *Migration Amendment (New Skilled Regional Visas) Regulations 2019* (Cth) (F2019L00578).

[3] Items 1135(3)(c); 1136(4)(b)(ii), (5)(b)(ii), (6)(b)(iii); 1137(4) table item 4; 1138(4) table item 4; 1230(4) table item 4 First Provisional visa stream; 1241(4) table item 4; 1228(3)(b)(ii); and for visa applications made before 23 March 2013 items 1229(4)(b)(ii), (5)(b)(ii), (6)(b)(iii), (7)(b)(ii), or for visa applications made on or after 23 March 2013 items 1229(3)(k), (5)(b)(ii), (6)(b)(iii), (7)(b)(ii) as substituted by *Migration Legislation Amendment Regulation 2013 (No 1)* (Cth) (SLI 2013, No 33. There are some exceptions, such as where the applicant already holds a relevant temporary skilled visa (see e.g., item 1230(5)) or where the application is during a certain time period (see e.g., item 1229(3)(ka)).

[4] Subclass 485 and repealed subclasses 175, 176, 475, 487, 885, and 886.

[5] Prior employment in a skilled occupation for a specified period is a sch 2 criterion for Subclass 175, 176 and 475 visas, and a qualification for the points test – see the Commentary: Employment in a Skilled Occupation. Applicants for most GSM visas are required to demonstrate or possess certain English language skills, with different standards and requirements for satisfying them depending on the subclass sought and the skilled occupation nominated – see the Commentary: English Language Ability. An applicant's nominated skilled occupation is also relevant to a number of qualifications under the points test – see Skilled Visas – overview, and General Points Test (Schedule 6D).

Skilled occupation

Key concepts and definitions

Skilled occupation

'Skilled occupation' is defined in reg 1.15I of the *Migration Regulations 1994* (Cth) (the Regulations) to mean, in relation to a person, an occupation of a kind:

- that is specified by the Minister in an instrument in writing to be a skilled occupation; and
- if a number of points are specified in that instrument as available - for which the number of points are available; and
- that is applicable to the person in accordance with the specification of the occupation.[6]

These occupations are specified in lists in instruments which can be found on the 'SOL-SSL' tab of the Register of Instruments: Skilled visas. There are a number of instruments concurrently in force that apply depending on the visa application and when it was made. For discussion of which instrument applies to a particular application and how the instruments are organised, see below.

ANZSCO

The occupation lists refer to 'ANZSCO' (Australian and New Zealand Standard Classification of Occupations) codes. The courts have observed that by referring in skilled occupation instruments to the ANZSCO code for each occupation, Parliament intended to import the defining criteria described in the applicable ANZSCO classification as the means to assess whether the visa applicant's nominated occupation qualifies as a 'skilled occupation'.[7] Occupations are grouped by ANZSCO into five hierarchical levels and classified by reference to defining criteria including a 'lead statement', 'skill level' and 'tasks'.[8]

For visa applications made on or after 1 July 2013 'ANZSCO' has the meaning specified by the Minister in an instrument in writing.[9] The instrument for this purpose is also the instrument which specifies skilled occupations, available on the 'SOL-SSL' tab in the Register of Instruments – Skilled visas. The definitions in current instruments refer to the Australian and New Zealand Standard Classification of Occupations as published by the

[6] regs 1.15I(1)(a)–(c) respectively, as inserted by *Migration Amendment Regulations 2010 (No 6)* (Cth) (SLI 2010, No 133) (which applies to visa applications made on or after 1 July 2010 and applications not finally determined before that date) and as amended by *Migration Amendment Regulations 2011 (No 3)* (Cth) (SLI 2011, No 74). There are no transitional provisions for this amendment, so it applies to all applications as of 1 July 2011: see reg 3(2) and Note.
[7] *Seema v MIAC* (2012) 203 FCR 537 at [44].
[8] See *Parekh v MIAC* [2007] FMCA 633 at [11].
[9] reg 1.03 as amended by *Migration Legislation Amendment Regulation 2013 (No 3)* (Cth) (SLI 2013, No 146). For applications made before 1 July 2013 'ANZSCO' was defined by reg 1.03 to mean the Australian and New Zealand Standard Classification of Occupations, published by the Australian Bureau of Statistics as current on *1 July 2010*.

Australian Bureau of Statistics and may also specify a currency date. ANZSCO is available online.

Relevant assessing authority

'Relevant assessing authority' is defined in reg 1.03 as a person or body specified under reg 2.26B. Under reg 2.26B(1), the Minister may, by instrument, specify a person or body as the relevant assessing authority for a skilled occupation and one or more countries for the purposes of an application for a skills assessment made by a resident of one of those countries. The Minister cannot specify a person or body as a relevant assessing authority unless the Skills Assessment Minister has approved the person or body in writing.[10] The Skills Assessment Minister may delegate the power to approve persons and bodies to be relevant assessing authorities to the Skills Assessment Secretary or an SES employee who is in the Skills Assessment Department and has responsibilities relating to skills assessment services.[11] The instrument for the purposes of reg 2.26B(1) is also the instrument which specifies skilled occupations for the purposes of reg 1.15I. These instruments can be located on the 'SOL-SSL' tab in the Register of Instruments – Skilled visas. For discussion of which instrument applies to a particular application and how the instruments are organised, see below.

Registered course

'Registered course' is defined in reg 1.03 as meaning a course of education or training provided by an institution, body or person that is registered, under Division 3 of Part 2 (or, for applications made before 23 March 2013, s 9) of the *Education Services for Overseas Students Act 2000* (Cth) (ESOS Act), to provide the course to overseas students.[12] Whether an education provider is registered to provide the course can be checked on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) website.[13] If the education provider is no longer registered to provide the course, historical data can be checked on the Provider Registration and International Students Management System (PRISMS).

Skilled occupation list instruments

The instrument that applies in any case will depend on the applicant's circumstances, as specified in the instrument itself. Each instrument contains lists of occupations which are specified as skilled occupations for the purposes of reg 1.15I(1)(a). These occupations apply

[10] reg 2.26B(1A) as amended by *Home Affairs Legislation Amendment (2020 Measures No 1) Regulations 2020* (Cth) (F2020L00281). The term 'Skills Assessment Minister' is defined in reg 1.03: inserted by F2020L00281 There was an administrative oversight where the relevant assessing authority was not validly specified for certain occupations in visa applications made before 1 October 2011. Please contact MRD Legal Services for more information.

[11] reg 2.26(1C) inserted by F2020L00281. The terms 'Skills Assessment Secretary' and 'Skills Assessment Department' are defined in reg 1.03: inserted by F2020L00281.

[12] The definition was amended by SLI 2013, No 33 to reflect changes to the *Education Services for Overseas Students Act 2000* (Cth) (ESOS Act) made by the *Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Act 2012* (Cth) (Act No 9 of 2012). Section 9 was replaced by div 3 of pt 2 (ss 9AA–9AH), which now provides for a similar system of course registration.

[13] The CRICOS website is the official Australian Government website that lists all Australian education providers that offer courses to people studying in Australia on student visas and the courses offered.

to different specified classes of persons, identified by the visa sought, the date of the visa application or invitation and certain other conditions. The lists also set out the relevant assessing authorities for reg 2.26B(1).

The names of the lists, and the number of lists, have changed over time. For invitations issued and applications made on or after 18 March 2018, there are three lists called the 'Medium and Long-term Strategic Skills List' (MLTSSL), the 'Short-term Skilled Occupation List' (STSOL) and the 'Regional Occupational List' (ROL).[14] For invitations issued and applications made from 19 April 2017 until 17 March 2018, there were two lists called the MLTSSL and the STSOL.[15] For earlier invitations and applications, there were two lists called the 'Skilled Occupation List' (SOL) and 'Consolidated Sponsored Occupation List' (CSOL).

The Skilled Occupation Lists Instruments - Quick Guide sets out all current instruments and which cases they apply to. The following briefly explains the application of a number of key recent instruments.

LIN 19/051 and IMMI 18/051

Compilation No. 2 of LIN 19/051 (which includes amendments by LIN 19/243 and LIN 22/053) applies in relation to applications for Subclass 189, 190, 485, and 491 visas on or after 6 May 2022.[16] Compilation No. 1 of LIN 19/051 (including amendments made by LIN 19/243) applies to invitations issued to Subclass 189 or 190 applicants on or after 11 March 2019 where the visa application was made before 6 May 2022; applications for a Subclass 485 made between 11 March 2019 and 5 May 2022; applications for a Subclass 491 made between 16 November 2019 and 5 May 2022; and invitations issued to Subclass 489 applicants on or after 11 March 2019 and before 16 November 2019, provided the application was also made before 16 November 2019.[17] IMMI 18/051 applies to applications made or invitations issued from 18 March 2018 to 10 March 2019.[18]

The MLTSSL, STSOL and ROL are in tables in each instrument.[19] A further table sets out which list applies to which applicants.[20] The MLTSSL generally applies to all persons invited to apply for Subclass 189, 190, 489 and 491 visas, applicants for Subclass 485 visas, and their spouses or de facto partners.[21] The STSOL is only available to government nominated

[14] In addition to retaining the MLTSSL and STSOL, IMMI 18/051 introduced a Regional Occupation List (ROL). The subsequent instrument similarly includes the MLTSSL, STSOL and ROL.
[15] Amendments made to IMMI 16/059 by IMMI 17/040 on 19 April 2017 renamed the former SOL to the MLTSSL and the former CSOL to the STSOL; subsequent instruments have used the updated terminology.
[16] LIN 19/051 (F2022C00574) is a compilation of LIN 19/051 taking into account amendments made by LIN 19/243 (from 16 November 2019) and LIN 22/053 (from 6 May 2022).
[17] LIN 19/051 (F2019C00855) is a compilation of LIN 19/051 taking into account amendments made by LIN 19/243 (from 16 November 2019).
[18] IMMI 18/051 was repealed by LIN 19/051. Part 3 s 13 of LIN 19/051 (as amended by LIN 19/243 and LIN 22/053) provides that IMMI 18/051 continues to apply to applications made or invitations issued from 18 March 2018 to 10 March 2019.
[19] ss 8, 9, 10(1) of LIN 19/051 (as amended by LIN 19/243 and LIN 22/053); ss 8, 9, 10(1) of LIN 19/051 (as amended by LIN 19/243); ss 8(1), 9(1), 10(1) of IMMI 18/051.
[20] s 7(1) of LIN 19/051 (as amended by LIN 19/243 and LIN 22/053); s 7(1) of LIN 19/051 (as amended by LIN 19/243); s 7(1) of IMMI 18/051.
[21] Items 1, 2, 3 and 4 of the table in s 7(1) of LIN 19/051 (as amended by LIN 19/243 and LIN 22/053); items 1, 2, 3 and 4 of the table in s 7(1) of LIN 19/051 (as amended by LIN 19/243); items 1, 2, 3 and 4 of the table in s 7(1) of IMMI 18/051.

Subclass 190/489/491 invitees and partners.[22] The ROL is only available to government nominated Subclass 489/491 invitees and partners.[23]

Where IMMI 18/051 applies and an occupation is marked with an 'A' in column 4 of the MLTSSL, its availability is further limited to Subclass 189 invitees, Subclass 485 applicants, and Subclass 489 applicants who are not nominated by a government agency.[24]

IMMI 18/007 and IMMI 17/072

IMMI 18/007 applies to applications made or invitations issued from 17 January 2018 to 17 March 2018 and IMMI 17/072 applies to applications made or invitations issued from 1 July 2017 to 16 January 2018.[25]

The MLTSSL and STSOL are in tables in each instrument.[26] A further table sets out which list applies to which applicants.[27] The MLTSSL generally applies to all persons invited to apply for Subclass 189, 190, or 489 visas, applicants for Subclass 485 visas, and their spouses or de facto partners.[28] The STSOL is only available to government nominated Subclass 190/489 invitees and their partners.[29]

Where an occupation is marked with a 'Y' in column 4 of the occupation list, its availability is further limited as follows:

- MLTSSL – these occupations apply only to Subclass 189 invitees, Subclass 485 applicants, and Subclass 489 applicants who are not nominated by a government agency;[30]
- STSOL – these occupations apply only to government nominated Subclass 489 applicants.[31]

IMMI 16/059

This instrument applies to visa applications made and invitations issued from 1 July 2016 to 30 June 2017.[32] There are two versions of the lists in this instrument applicable, depending on the time that invitations were issued or visa applications made.

[22] Items 3 and 4 of the table in s 7(1) of LIN 19/051 (as amended by LIN 19/243 and LIN 22/053); items 3 and 4 of the table in s 7(1) of LIN 19/051 (as amended by LIN 19/243); items 3 and 4 of the table in s 7(1) of IMMI 18/051.
[23] Item 4 of the table in s 7(1) of LIN 19/051 (as amended by LIN 19/243 and LIN 22/053); item 4 of the table in s 7(1) of LIN 19/051 (as amended by LIN 19/243); item 4 of the table in s 7(1) of IMMI 18/051.
[24] s 8(2) of IMMI 18/051.
[25] IMMI 17/072 was repealed by IMMI 18/007. IMMI 18/007 pt 2 of sch 1 provides that IMMI 17/072 continues to apply to invitations issued and applications made from 1 July 2017 to 16 January 2018. IMMI 18/007 was repealed by IMMI 18/051. IMMI 18/051 pt 2 of sch 1 provides that IMMI18/007 continues to apply to invitations issued and applications made from 17 January 2018 to 17 March 2018.
[26] ss 8(1), 9(1) of IMMI 18/007; ss 7(1), 8(1) of IMMI 17/072.
[27] s 7(1) of IMMI 18/007; s 6(1) of IMMI 17/072.
[28] Items 1, 2 and 3 of the table in s 7(1) of IMMI 18/007; items 1, 2 and 3 of the table in s 6(1) of IMMI 17/072.
[29] Item 3 of the table in s 7(1) of IMMI 18/007; item 3 of the table in s 6(1) of IMMI 17/072.
[30] s 8(2) of IMMI 18/007; s 7(2) of IMMI 17/072.
[31] s 9(2) of IMMI 18/007; s 8(2) of IMMI 17/072.
[32] IMMI 16/059 was repealed by IMMI 17/081 in respect of persons to whom IMMI 17/072 applies (i.e., visa applicants/invitees from 1 July 2017 to 16 January 2018), so it continues to remain in force for earlier applications/invitations: item 2(1)(c) pt 2 of sch 1 to IMMI 17/081.

Applications / invitations from 19 April 2017 to 30 June 2017

IMMI 16/059 was amended by IMMI 17/040 on 19 April 2017.[33] These amendments renamed the former SOL to the MLTSSL and the former CSOL to the STSOL and removed a number of occupations.[34] The MLTSSL is in Schedule 1 and the STSOL in Schedule 2.

The MLTSSL generally applies to all persons invited to apply for a Subclass 189, 190 or 489 visa, their partners, and also to persons who make an application for a Subclass 485 visa.[35] Occupations marked 'see note 25' are restricted to applications for Subclass 189, Subclass 485, and non-government-nominated Subclass 489 visas.[36]

The STSOL is only available to government nominated Subclass 190/489 visa invitees and their partners. Occupations marked 'see note 26' are restricted to applications for government nominated Subclass 489 visas.[37]

Applications / invitations from 1 July 2016 to 18 April 2017

The SOL and CSOL appeared in Schedule 1 and Schedule 2 to the instrument as in force at this time.[38] These applied in the same way as the renamed MLTSSL and STSOL except that they did not contain the 'note 25' and 'note 26' restrictions.

Earlier current instruments

These instruments are all structured in the same way as the original IMMI 16/059 (i.e., with the SOL and CSOL in Schedule 1 and Schedule 2). The differences generally relate to the types of visas covered and the number of occupations specified. In addition to Subclass 189, 190 or 489 applicants and their spouse or de facto partners, IMMI 13/065 and IMMI 13/064 also applied to the now repealed Subclass 487, 885 and 886 visas.[39] Instruments from IMMI 15/091 onwards make explicit the relationship between applicants and their spouses for the purpose of claiming points under Schedule 6D, Part 6D.11, for Subclass 189, 190 and 489 visa applications.

[33] A compilation incorporating these amendments (and earlier amendments made by IMMI 16/118 which didn't affect the occupation lists) is available as 'IMMI 16/059 (Compilation No 2)'. The amendments made by IMMI 17/040 only applied to invitations and applications after IMMI 17/040 commenced on 19 April 2017 – see sch 3 to IMMI 16/059, inserted by item 4 of sch 1 to IMMI 17/040, and Explanatory Statement to IMMI 17/040 at [7]-[10].
[34] Explanatory Statement to IMMI 17/040 at [3]-[4].
[35] Items 3–5 of IMMI 16/059 as amended by IMMI 16/118 and IMMI 17/040.
[36] Item 10 and note 25 of IMMI 16/059 as amended by IMMI 16/118 and IMMI 17/040.
[37] Item 10 and note 26 of IMMI 16/059 as amended by IMMI 16/118 and IMMI 17/040.
[38] IMMI 16/059 (as originally made and as amended by IMMI 16/118, which did not affect these lists), before amendment by IMMI 17/040 (see above).
[39] Generally, SOL applies to Subclass 885 or 886 applicants and CSOL applies to Subclass 487 or 886 applicants (who were nominated by a State or Territory government agency) and their spouse or partner.

Nominating a skilled occupation

With limited exceptions,[40] it is a Schedule 1 requirement for making a valid skilled visa application that an applicant has *nominated* a skilled occupation in the visa application form.[41]

In relation to applications for Subclasses 189, 190, 489 and 491, there is an additional requirement that the skilled occupation nominated by the applicant must be the skilled occupation that was specified in the Minister's invitation to apply for the visa.[42] Whether an applicant has nominated a skilled occupation, and what occupation has been nominated are findings of fact. There is no definition in the Regulations for the word 'nominate' and it is generally taken to refer to the occupation that the applicant has set out in the visa application form in response to the question 'What is your nominated occupation?'. In making a determination as to what occupation has been nominated, it is necessary to have sufficient evidence (either the description of the occupation or the ANZSCO code) to identify a 'skilled occupation' as listed in the relevant instrument. Where the description and code don't match each other, a finding must be made as to what occupation was actually nominated.

Can an applicant change his or her nominated skilled occupation?

Under the GSM scheme, an applicant is not permitted to change his/her nominated skilled occupation during the processing of the visa application.[43]

For Subclass 189, 190, 489 and 491 applicants who have made a mistake in their nominated occupation, it appears that they cannot correct that mistake. This is because the requirements for making a valid visa application for these visas include that the nominated skilled occupation is the one that is specified in the invitation to apply for the visa, and the visa criteria and Schedule 6D points test qualifications which refer to skilled occupation expressly relate to the time of invitation to apply for the visa, leaving no scope for 'correcting' the nominated skilled occupation.[44]

For other GSM visas, there is no clear answer as to whether an applicant can *correct a mistake* in the nominated occupation.[45] There are several cases in which applicants have alleged they had mistakenly nominated the wrong occupation, however in each of these

[40] e.g., as provided for in item 1229(3)(ka) or where the applicant already holds a relevant temporary skilled visa: see e.g., item 1230(5).
[41] Items 1135(3)(c); 1136(4)(b)(ii), (5)(b)(ii), (6)(b)(iii); 1137(4) table item 4; 1138(4) table item 4; 1230(4) table item 4 First Provisional visa stream; 1241(4) table item 4; 1228(3)(b)(ii); and for visa applications made before 23 March 2013 items 1229(4)(b)(ii), (5)(b)(ii), (6)(b)(iii), (7)(b)(ii), or for visa applications made on or after 23 March 2013 items 1229(3)(k), (5)(b)(ii), (6)(b)(iii) and (7)(b)(ii) as substituted by SLI 2013, No 33.
[42] Items 1137(4) table item 4(b), 1138(4) table item 4(b) and 1230(4) table item 4(b) of sch 1, inserted by SLI 2012, No 82; 1241(4) table item 4(b), inserted by F2019L00578.
[43] *Patel v MIAC* (2011) 198 FCR 62 at [53]-[61], and *Pavuluri v MIBP* [2014] FCA 502 at [9], [35] agreeing with what Robertson J said in *Patel*. In *Akbar v MIBP* [2019] FCA 515 the applicant sought to argue that the Court wasn't bound by the judgments in *Patel* and *Pavuluri*, but the Court did not think they were wrong and followed them. An application for special leave to appeal from *Akbar* was refused: *Akbar v MIBP* [2019] HCASL 258.
[44] Items 1137(4) table item 4; 1138(4) table item 4; 1230(4) table item 4 First Provisional visa stream of sch 1; 1241(4) table item 4. Clauses 189.212(1), 190.212(1), 489.222(1), 491.214(1) of sch 2; sch 6D pts 6D.3, 6D.4, 6D.6, 6D.7 and 6D.11.
[45] e.g., Subclass 485, 487, 885 and 886 visas.

cases, the Tribunal rejected at a factual level the assertion that the nominated occupation was incorrect.[46]

Obiter comments in *Chen v MIAC* suggest that where an applicant makes a mistake of this kind, the only option is to make another application.[47] On the other hand, the decisions in *Patel v MIAC*, *Shafiuzzaman v MIAC* and *Pavuluri v MIBP* leave open the possibility that it may be possible to correct an incorrect answer of this kind, for example under s 105 of the *Migration Act 1958* (the Act).[48]

For example, in *Pavuluri v MIBP* the Tribunal expressed the view that, in principle, there may be circumstances in which it could find the nominated occupation on the visa application form to be something other than what was stated, if there was evidence to support a different characterisation of the nominated occupation at the time of the visa application, but found that this was not such a case.[49] While the Court did not reach a concluded view, it appears to have tentatively accepted the Tribunal's opinion, i.e. that it may be able to examine other evidence or material to clarify or explain precisely which occupation an applicant intended to specify.[50]

Thus, while not free from doubt, it may be possible to find, as a matter of fact, that the occupation specified in the application form is not (*and was not*) the nominated occupation. However, having regard to the concept of nominating an occupation as a requirement of a valid visa application, and the terms of the application form ('What is your nominated occupation?') the circumstances in which this may be open would appear to be narrowly confined. In considering this question, the applicant's explanation for the mistake would be relevant. Other relevant factors may include the match (or mismatch) between the occupations in question and the applicant's qualifications and experience, the skills assessment sought, and the relevant assessing authority specified on the application form.[51] It may not necessarily be enough that the applicant 'made a mistake' as a result of incorrect advice or lack of legal advice when completing the form.[52] However a finding that the

[46] e.g., *Patel v MIAC* [2011] FMCA 399 upheld on appeal in *Patel v MIAC* (2011) 198 FCR 62; *Chen v MIAC* [2011] FMCA 859; *Shafiuzzaman v MIAC* [2011] FMCA 874; *KC v MIAC* [2013] FCCA 296; and *Pavuluri v MIBP* [2014] FCA 502. In *Hemlata v MIBP* [2014] FCCA 968 it is not apparent whether the Tr bunal had rejected the contention at a factual level; in any case it took the view that it was not possible for the applicant to correct or alter his nominated skilled occupation, or to change his nominated occupation during the processing of the application, and this was held to accord with *Patel* and *Chen.*

[47] *Chen v MIAC* [2011] FMCA 859 at [58].

[48] *Patel v MIAC* [2011] FMCA 399, upheld on appeal: *Patel v MIAC* (2011) 198 FCR 62; *Shafiuzzaman v MIAC* [2011] FMCA 874; *Pavuluri v MIBP* [2014] FCA 502. For detailed consideration of the applicability of ss 104-105 in this context, see *Pavuluri* at [41]-[49]. Mortimer J's reasoning in *Pavuluri* regarding ss 104-105 was adopted in *Akbar v MIBP* [2019] FCA 515 at [57]-[58].

[49] *Pavuluri v MIBP* [2014] FCA 502 at [21]. In that case the appellant had explained that he had been ill-advised as to the appropriate occupation to nominate for his degree and, relying on s 105, asked the Tribunal to allow him to correct his occupation (from 'finance manager' to 'market research analyst') as he had made a mistake. The Tribunal found that the evidence did not support a finding that he had intended to nominate an occupation other than 'finance manager' and had made a 'mistake'. It found that his only 'mistake' was that, having recorded in his application the occupation he intended to specify, he subsequently discovered he had been ill-advised. The Court observed that while in colloquial terms that was a mistake, it was not a mistake in the sense of specifying on the visa application an occupation the appellant did not intend to specify, or a mistake of the kind capable of correction under s 105.

[50] *Pavuluri v MIBP* [2014] FCA 502 at [33].

[51] In *obiter* comments the Court in *KC v MIAC* [2013] FCCA 296 at [17] noted that a finding a mistake had been made was open to the Tribunal given an application for a skills assessment in respect of the 'correct' occupation had been made shortly prior to the lodgement of the visa application.

[52] e.g. *Chen v MIAC* [2011] FMCA 859 and *Pavuluri v MIBP* [2014] FCA 502.

mistake was in the nature of a clerical error may support a conclusion that the nominated occupation was other than as specified in the application form.[53]

The skills assessment

For many skilled visas, the applicant's skills must also have been *assessed as suitable* for the nominated skilled occupation. For certain Subclass 487, 885 and 886 applications and Subclass 189, 190, 489 and 491 applications, this is a requirement for making a valid application under Schedule 1; for others it's a criterion for the grant of the visa under Schedule 2. Where it is a Schedule 2 criterion, there is an additional requirement that if the skills assessment was based on qualifications obtained in Australia while the applicant held a student visa, the qualification must have been obtained as a result of studying a registered course.

As a visa application requirement (Schedule 1)

For Subclass 189, 190, 489 (other than applications in the 'Second Provisional visa' stream) *and 491 visa applications* the applicant must *declare* in the application that the applicant's skills have been assessed as suitable by the relevant assessing authority.[54] For Subclass 189, 190 and 489 (other than applications in the Second Provisional Visa stream) applications made on or after 28 October 2013 where the invitation to apply was given on or after that date, and Subclass 491 visa applications, the declaration must include that this assessment was not for a Subclass 485 (Temporary Graduate) visa.[55] Because all that is required at this point is a declaration, any question as to existence or validity of the relevant skills assessment will not affect the validity of the visa application; however, it will affect the Schedule 2 visa criteria (discussed below), which require that the relevant assessing authority *had assessed* the skills as suitable for the nominated skilled occupation at the time of invitation to apply for the visa.[56]

For Subclass 487, 885 and 886 visa applications made on or after 1 January 2010, there are two alternative skills assessment requirements for making a valid visa application. Either:

- for applicants who did *not* nominate a skilled occupation specified by the Minister for these purposes, the applicant's skills must have been assessed as suitable by the relevant assessing authority, or

[53] See the example provided in *Pavuluri v MIBP* [2014] FCA 502 at [49], of a wrong skills assessment receipt number or reference number entered because of a typographical error.
[54] Items 1137(4) table item 4(c), 1138(4) table item 4(c) and 1230(4) table item 4(c) inserted by SLI 2012, No 82; item 1230(4) table item (c), inserted by F2019L00578.
[55] Items 1137(4) table item (4)(c), 1138(4) table item (4)(c) and 1230(4) table item (4)(c) as substituted by *Migration Amendment (Skills Assessment) Regulation 2013* (Cth) (SLI 2013, No 233); item 1241(4)(c) inserted by F2019L00578
[56] cls 189.222(1), 190.212(1), 489.222(1), 491.214(1). In *Thapa v MICMSMA* [2021] FCCA 686, the Court held at [28]–[30] that the words 'at the time of invitation to apply for the visa' in cl 189.222(1) meant the period within which the invitation was valid or open, not the date the invitation to apply was made or given to an applicant. As the invitation expressed that it was valid for 60 days, it was open for the applicant to submit a skills assessment that had only been obtained during that period, even though it had not been in existence at the date the invitation was issued. The Court's reasoning would appear equally applicable to the similarly worded skills assessment requirement in cls 190.212(1), 489.222(1) and 491.214(1).

- for applicants whose nominated skilled occupation *is* specified by the Minister for these purposes, the applicant's skills must have been assessed by the relevant assessing authority on or after 1 January 2010 as suitable for that occupation.[57]

The relevant instrument can be located in the Register of Instruments: Skilled visas on the 'SOL-SSL' tab .

As a visa criterion (Schedule 2)

Apart from the cases discussed above (Subclass 487, 885 and 886 applications made on or after 1 January 2010, and Subclass 189, 190, 489 and 491 applications), the skills assessment requirement is contained in Schedule 2, either as a time of application (or invitation) or a time of decision requirement. Where it is a 'time of decision' criterion, there is an associated requirement that the applicant must have applied for a skills assessment at the time of application. There are thus two kinds of Schedule 2 criteria relating to 'skilled occupation': those relating to the skills assessment application, and those relating to the assessment itself.

Application for a skills assessment

With limited exception, an application for a Subclass 485 visa made on or after 23 March 2013 must have been *accompanied by evidence* that the applicant had applied for an assessment of the applicant's skills for the nominated skilled occupation by a relevant assessing authority.[58] However, this requirement does not apply to a visa application made in the period mentioned in item 1229(3)(ka),[59] being the period commencing on 1 July 2022 and ending on 30 June 2023 or a later date specified by the Minister in a legislative instrument.[60] To date, no such instrument has been made.

For Subclass 485 visa applications made before 23 March 2013, Subclass 487 applications made at any time, and Subclass 885 and 886 visa applications made before 1 January 2010, it is a time of application criterion that the Minister is satisfied that the applicant has *applied for* an assessment of the applicant's skills for the nominated skilled occupation by a relevant assessing authority.[61] As this must be satisfied at the time of application, it cannot be met by

[57] The requirement applies if the applicant is not seeking to satisfy the criteria for the grant of a Subclass 485 or 887 visa respectively, see items 1229(3)(aa), (ab) and 1136(3)(ba), (bb) as inserted by *Migration Amendment Regulations 2009 (No 15)* (Cth) (SLI 2009, No 375); or for visa applications made on or after 23 March 2013 item 1229(3)(d) and (e) as inserted by SLI 2013, No 33; and item 1136(3)(ba) and (bb) as inserted by SLI 2009, No 375. 'Relevant assessing authority' is defined in reg 1.03 as a person or body specified under reg 2.26B. For further information see Relevant assessing authority in this commentary.

[58] cl 485.223 as inserted by SLI 2013, No 33. This criterion applies only to the Graduate Work stream. Although pt 485 is no longer structured as time of application and time of decision criteria the terms of the criterion are such that it must be satisfied at the time of application. For visa applications made on or after 1 July 2014 this requirement is arguably superfluous, as the assessment itself must also have been obtained at the time of application.

[59] cl 485.223(2) inserted by the *Migration Amendment (Occupation Nomination and Skills Assessment for Subclass 485 Visas) Regulations 2022* (Cth) (F2022L00822).

[60] Item 1229(3)(ka) inserted by F2022L00822.

[61] cl 485.214 as in force before 23 March 2013; cl 487.214; and for visa applications made prior to 1 January 2010, cls 885.212, 886.212. Policy for these provisions state that the applicant does not have to have applied to the assessing authority that is the relevant assessing authority for their nominated skilled occupation – it can be any relevant assessing authority (see e.g., Policy – Migration Regulations – Schedules – Sch2 Visa 485-Skilled-Graduate – Skills Assessment at [8.1]: 15/02/2013 – 22/03/2013). However, having regard to reg 2.26B which provides that an assessing authority is specified for a skilled occupation and the instrument itself which lists the relevant body against each occupation, it would not appear to be sufficient

a skills assessment application made after the date of application.[62]

Whether or not the applicant has applied for an assessment of his/her skills by a relevant assessing authority, or whether the visa application was accompanied by evidence of an assessment application, is a finding of fact. The relevant assessing authority for a given skilled occupation is listed in the same instrument as that specifying the skilled occupations: see the 'SOL-SSL' tab in the Register of Instruments – Skilled visas.

Skills assessment

For Subclass 175, 176, 189, 190, 475, 485, 487, 489, 491, 885 and 886 applications, the skills assessment criterion contained in Schedule 2 must be satisfied at either -

- time of invitation to apply (Subclasses 189, 190, 489 and 491);[63]
- time of application (Subclasses 175, 176 and 475);[64] or
- time of decision (Subclasses 485,[65] 487, 885 and 886).[66]

The skills assessment criterion contains several elements:[67]

- the applicant's skills must have been assessed by the relevant assessing authority as suitable for the nominated skilled occupation; and

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for an applicant to have applied for an assessment of their skills by a 'relevant assessing authority' that was not specified for their nominated skilled occupation

[62] *Patel v MIAC* (2011) 198 FCR 62. In considering cl 485.214 (as in force before 23 March 2013), Robertson J distinguished *Berenguel v MIAC* [2010] HCA 8 and held that an application for the assessment was required to be made at the time of application. The Court did not expressly refer to the contrary view in the *obiter* comments in *Rai v MIAC* [2010] FMCA 472, where the Federal Magistrates Court applied *Berenguel* and observed that cls 485.214 and 487.214 could be satisfied anytime up until the decision on the application. An application for extension of time to appeal from *Rai* was dismissed, with the Court declining to comment on the correctness of the Federal Magistrate's conclusion that the Tr bunal had erred in its application of *Berenguel v MIAC*: *Rai v MIAC* [2010] FCA 1289 at [13].

[63] cls 189.212 for applications made before 1 July 2017, 189.222 for applications made on or after 1 July 2017, 190.212, 489.222, 491.214. In *Thapa v MICMSMA* [2021] FCCA 686, the Court held at [28]–[30] that the words 'at the time of invitation to apply for the visa' in cl 189.222(1) meant the period within which the invitation was valid or open, not the date the invitation to apply was made or given to an applicant. As the invitation expressed that it was valid for 60 days, it was open for the applicant to submit a skills assessment that had only been obtained during that period, even though it had not been in existence at the date the invitation was issued. The Court's reasoning would appear equally applicable to the similarly worded skills assessment requirement in cls 190.212(1), 489.222(1) and 491.214(1).

[64] cls 175.212(1), 176.212(1), 475.212(1).

[65] cl 485.221 for visa applications made before 23 March 2013; cl 485.224(1) (as inserted by SLI 2013, No 33) for visa applications made between 23 March 2013 and 30 June 2014; cl 485.224(1) and (1A) as substituted by *Migration Amendment (Temporary Graduate Visas) Regulation 2014* (Cth) (SLI 2014, No 145) for visa applications made on or after 1 July 2014. For visa applications made on or after 23 March 2013, this criterion applies only to the Graduate Work stream. Clause 485.224(1) was initially amended on 1 July 2014 for visa applications made on or after that date: *Migration Legislation Amendment (2014 Measures No 1) Regulation 2014* (Cth) (SLI 2014, No 82); this had the unintended effect of requiring the skills assessment criterion to be satisfied at the time of application, and was amended on 2 October 2014, applicable to visa applications made on or after 1 July 2014: SLI 2014, No 145. Clause 485.224 does not apply if the visa application was made in the period mentioned in Item 1229(3)(ka): see cl 485.224(3) inserted by F2022L00822.

[66] cls 487.223, 885.222, 886.223. As explained above, where the skills assessment criterion is to be satisfied at time of decision, there is an associated time of application criterion effectively requiring the applicant to have *applied for* a skills assessment at that time.

[67] cls 175.212(1), 176.212(1), 189.212, 190.212, 475.212(1); cl 485.224(1) (as inserted by SLI 2013, No 33 and as substituted by SLI 2014, No 82 for visa applications made on or after 1 July 2014) or cl 485.221 for visa applications made before 23 March 2013; cls 487.223, 489.222, 885.222, 886.223; cl 491.214 as inserted by F2019L00578. For Subclass 485 visa applications made on or after 23 March 2013, this criterion applies only to the Graduate Work stream. Clause 485.224(1) was initially amended on 1 July 2014 for visa applications made on or after that date (SLI 2014, No 82); this had the unintended consequence of requiring the skills assessment criterion to be satisfied at the time of application, and was amended on 2 October 2014, with new cl 485.224(1) and (1A), applicable to visa applications made on or after 1 July 2014: SLI 2014, No 145. Note that the requirements in cl 485.224 do not apply if the visa application was made in the period mentioned in Item 1229(3)(ka): see cl 485.224(3) inserted by F2022L00822.

- *for Subclass 189, 190 and 489 visa applications made on or after 28 October 2013, and Subclass 491 visa applications*, the assessment must not have been for a Subclass 485 (Temporary Graduate) visa;[68] and

- *for Subclass 189, 190, 485 and 489 visa applications made on or after 1 July 2014, and Subclass 491 visa applications,* the skills assessment must be current and cannot be more than 3 years old at the relevant time. This is intended to ensure that applicants are not able to meet skills criteria by providing old assessments that may not meet current standards.[69] The requirement varies for the different subclasses, in the way it is expressed and the time it must be satisfied:

  - *for Subclass 189, 190, 489 and 491* – **at the time of invitation to apply**, if the assessment specifies a period of validity of less than 3 years after the date of assessment then that period must not have ended, otherwise, not more than 3 years must have passed since the date of assessment;[70]

  - *for Subclass 485* – **at the time of decision**, the applicant's skills for the nominated skilled occupation must have been assessed during the last 3 years by a relevant assessing authority as suitable for that occupation; and if the assessment is expressed to be valid for a particular period, that period must not have ended.[71] However these requirements do not apply if the visa application was made in the period mentioned in Item 1229(3)(ka);[72] and

- if the applicant's assessment was based on qualifications obtained in Australia while the holder of a student visa, the qualification must have been obtained as a result of studying a registered course.

The skills assessment criterion

The issues that arise in assessing the skills assessment criterion include whether there is a suitable skills assessment; whether it was based on a qualification obtained in Australia while the applicant held a student visa, and if so whether the qualification was obtained by studying a registered course; the evidence required; and whether an applicant can rely on a further skills assessment.

[68] cls 189.212(1), 190.212(1), 489.222(1) as substituted by SLI 2013, No 233; cl 491.214(1) inserted by F2019L00578.
[69] Explanatory Statement to SLI 2014, No 82.
[70] cls 189.212(1)(c) and (d) for applications made before 1 July 2017, 189.222(1)(c) and (d) for applications made on or after 1 July 2017, 190.212(1)(c) and (d), 489.222(1)(c)–(d) as inserted by SLI 2014, No 82, applicable to visa applications made on or after 1 July 2014; cl 491.214(c)–(d) inserted by F2019L00578. In *Thapa v MICMSMA* [2021] FCCA 686, the Court held at [28]–[30] that the words 'at the time of invitation to apply for the visa' in cl 189.222(1) meant the period within which the invitation was valid or open, not the date the invitation to apply was made or given to an applicant. As the invitation expressed that it was valid for 60 days, it was open for the applicant to submit a skills assessment that had only been obtained during that period, even though it had not been in existence at the date the invitation was issued. The Court's reasoning would appear equally applicable to the similarly worded skills assessment requirement in cl 190.212(1), 489.222(1) and 491.214(1).
[71] cl 485.224(1) as amended and (1A) as inserted by SLI 2014, No 145, applicable to visa applications made on or after 1 July 2013. This amendment was intended to correct an unintended consequence of amendments made by SLI 2014, No 82 which had the effect of changing this requirement from a time of decision criterion to a time of application criterion. The purpose of the amendment was to ensure that an applicant can be assessed as having suitable skills at the time of decision: Explanatory Statement to SLI 2014, No 82.
[72] cl 485.224(3) inserted by F2022L00822.

Suitable skills assessment

An applicant will satisfy the requirement to have a suitable assessment where there is evidence of an assessment from a relevant assessing authority stating the applicant's skills have been assessed as suitable for the nominated occupation.

In considering whether an assessment has been provided by a relevant assessing authority, the decision maker should consider whether the person or body who has made the assessment is the assessing body specified in the skilled occupation instrument. In some instances there may be more than one relevant assessing authority and/or a different assessing body depending on the country identified in the instrument.

In some cases there are restrictions on what skills assessments can be relied on: as mentioned above, for Subclass 189, 190 and 489 visa applications made on or after 28 October 2013, where the invitation to apply was given on or after that date, and Subclass 491 visa applications, this skills assessment must not have been one for a Subclass 485 (Temporary Graduate) visa.[73] Thus, for these applications, a skills assessment given by the relevant assessing authority for the purposes of a Subclass 485 visa will not satisfy the suitable skills assessment requirements. In addition, for Subclass 189, 190 and 489 visa applications made on or after 1 July 2014, and Subclass 491 and 485 visa applications, the assessment must be no more than 3 years old, and current, at the relevant time, that is, for Subclasses 189, 190, 489 and 491 the time of invitation to apply, for Subclass 485, the time of decision.[74]

Where an applicant has provided a suitable skills assessment, but the relevant assessing authority subsequently revokes or withdraws the assessment, that assessment cannot be relied upon to satisfy the requirement that the skills have been assessed by the relevant assessing authority as suitable. This is because it cannot be said that the authority 'has assessed' the applicant's skills at the relevant time, when at that time a previously favourable assessment had been withdrawn.[75]

There may be some doubt as to whether this criterion can be met where the *application* for a skills assessment was required to be made at the time of application (see above) but was not made until after that time, in that the definite article in 'the relevant assessing authority' in the time of decision criterion could be construed as a reference back to the assessing authority referred to in the time of application criterion. In any event, if the time of application criterion is not satisfied, it will not be necessary to consider whether the related time of decision criterion could be satisfied.

[73] cls 189.212(1), 190.212(1), 489.222(1) as substituted by SLI 2013, No 233, and 491.214(1) inserted by F2019L00578. Under reg 2.26B(3), as inserted by SLI2013, No 233, a relevant assessing authority may set different standards for assessing a skilled occupation for different visa classes or subclasses.

[74] In *Thapa v MICMSMA* [2021] FCCA 686, the Court held at [28]–[30] that the words 'at the time of invitation to apply for the visa' in cl 189.222(1) meant the period within which the invitation was valid or open, not the date the invitation to apply was made or given to an applicant. As the invitation expressed that it was valid for 60 days, it was open for the applicant to submit a skills assessment that had only been obtained during that period, even though it had not been in existence at the date the invitation was issued. The Court's reasoning would appear equally applicable to the similarly worded skills assessment requirement in cl 190.212(1), 489.222(1) and 491.214(1).

[75] *Singh v MIBP* (2015) 233 FCR 34 at [40]. The Court also confirmed at [39] that it is inherent in the regulatory scheme that the relevant assessing authority has the capacity to withdraw or revoke a favourable skills assessment when it forms the view that that positive assessment should not stand.

Based on a qualification obtained in Australia

With a limited exception that only applies to certain applications for a Subclass 485 visa, the second part of the skills assessment criterion is that if the assessment was based on a qualification obtained in Australia while the applicant held a student visa, the qualification was obtained as a result of studying a registered course.[76] This requirement only applies where the applicant's skills assessment was based on:

- a qualification obtained in Australia;
- while the applicant was the holder of a student visa.

It is usually evident on the face of the assessment whether the assessment was based on a qualification obtained in Australia. It may be necessary to seek confirmation from the assessing authority where this is not clear to determine whether it is necessary to consider if the qualification was obtained as a result of studying a registered course.

It appears that cl 485.221(2) does not apply to applicants who did not hold a student visa *at all* while undertaking the relevant course. Where the applicant did hold a student visa at some point during the relevant study, it is unclear at what point the applicant must have held the visa for cl 485.221(2) to apply. In the absence of judicial consideration of this provision, three interpretations of the expression 'a qualification obtained in Australia while the applicant held a student visa' appear to be available:

- the applicant must have held a student visa *when the qualification was obtained*; or
- the applicant must have held a student visa *at the time of completion of the relevant course*; or
- the applicant must have held a student visa *throughout the course and until the course was completed*.

The above problem of interpretation will only need to be addressed if the applicant held a student visa *at some point* while studying the relevant course which led to the qualification, and the course was *not* a registered course.

Evidence of a suitable skills assessment

Assessing the evidence of a skills assessment involves different considerations depending on whether the skills assessment criterion is to be satisfied at the time of decision, time of application, or time of invitation to apply for the visa.

[76] See cls 189.222(2), 190.212(2), 489.222(2), 492.214(2), 485.221(2) for applications made on or after 1 September 2007 but before 23 March 2013 and 485.224 for applications made on or after 23 March 2013. Note that the requirements in cl 485.224 do not apply if the visa application was made in the period mentioned in Item 1229(3)(ka): see cl 485.224(3) inserted by F2022L00822. 'Registered course' is defined in reg 1.03 as meaning a course of education or training provided by an institution, body or person that is registered, under div 3 of pt 2 (or, for visa applications made prior to 23 March 2013, s 9) of the ESOS Act, to provide the course to overseas students. The definition was amended with effect from 23 March 2013 to refer to div 3 of pt 2 (instead of s 9), reflecting changes made to that Act (SLI 2013, No 33).

At time of decision

Where having a suitable skills assessment is a time of decision criterion, it is clear that evidence of the assessment can be given any time until the Tribunal's decision is made.[77] Additionally, whilst the criteria suggest a continuous process (i.e. the making of an application for an assessment at time of application followed by obtaining a suitable skills assessment at time of decision), on the face of the legislation there does not appear to be any requirement that the assessment obtained be the direct result of the same assessment application made to the relevant assessing authority at time of the visa application.

At time of application

Where having a suitable skills assessment is a time of application criterion, it appears that the applicant must have been assessed at the time the visa application was made although the criterion could be met by evidence of that assessment provided after that time.[78]

There is a question as to whether the approach taken in *Berenguel v MIAC* would apply so that the criterion could be met by an assessment made after the time of application.[79] There is nothing in the terms of the criterion itself linking to the time of visa application, nor is there any related time of decision criterion which indicates a clear progression from the time of application. However, *Berenguel* has not been applied in this context, and the skills assessment requirement as a 'time of application' criterion may be distinguishable from the English language criterion considered in *Berenguel* on the basis of the context in which the visa is sought.[80] The requirement for a suitable skills assessment is a time of application criterion only in relation to offshore applicants. The intention appears to be that an offshore applicant must have the relevant skills when making the application for the visa (which is evidenced by the suitable skills assessment), whereas onshore applicants are given further time to obtain the assessment up until a decision is made.

At time of invitation to apply

Where the criteria require the applicant to have a suitable skills assessment at the time of the invitation to apply for the visa (Subclasses 189, 190, 489 and 491), the relevant skills assessment must exist at the time of invitation.[81] The applicant need not have *supplied* the actual assessment at the time of visa application, as the requirements for making a valid visa application require only a declaration that their skills have been assessed as suitable by the

[77] Subclasses 485, 487, 885 and 886. See cl 485.224 (as inserted by SLI 2013, No 33) or cl 485.221 for visa applications made before 23 March 2013, cls 487.223, 885.222, 886.223. For Subclass 485 visa applications made on or after 23 March 2013 the criteria are not divided into time of application and time of decision but the structure of pt 485 and the terms of the skills assessment criterion in cl 485.224 are such that the criterion is to be satisfied at the time of decision. This criterion applies only to the Graduate Work stream and does not apply to visa applications that were made in the period mentioned in Item 1229(3)(ka).

[78] Subclasses 175, 176 and 475. See cls 175.212, 176.212, 475.212.

[79] *Berenguel v MIAC* [2010] HCA 8. The High Court held that cl 885.213, a 'time of application' English language criterion, could be satisfied by a language test taken after the date of application.

[80] *Berenguel v MIAC* [2010] HCA 8.

[81] cls 189.212, 190.212, 489.222, 491.214. In *Thapa v MICMSMA* [2021] FCCA 686, the Court held at [28]–[30] that the words 'at the time of invitation to apply for the visa' in cl 189.222(1) meant the period within which the invitation was valid or open, not the date the invitation to apply was made or given to an applicant. As the invitation expressed that it was valid for 60 days, it was open for the applicant to submit a skills assessment that had only been obtained during that period, even though it had not been in existence at the date the invitation was issued. The Court's reasoning would appear equally applicable to the similarly worded skills assessment requirement in cl 190.212(1), 489.222(1) and 491.214(1).

relevant assessing authority.[82] However, they must supply evidence by the time of decision that the relevant skills assessment existed at the time of invitation to apply for the visa.

Can an applicant rely on a further skills assessment?

For onshore visa applications, Subclasses 485 and 487 visa applications, and Subclass 885 and 886 visa applications made prior to 1 January 2010 where a suitable skills assessment is required, there are two relevant criteria relating to the skills assessment. The time of application criterion requires that the applicant has applied for a skills assessment 'by a relevant assessing authority'.[83] The time of decision criterion requires that the applicant's skills 'have been assessed by the relevant assessing authority as suitable for that occupation'.[84] The use of the definite article 'the' before 'relevant assessing authority' in the time of decision criterion appears to suggest a reference back to the same assessing body as the one for which an application for an assessment was made at the time of application. On that view, the assessment would need to be by that assessing authority.

For offshore visa applications where a suitable skills assessment is required, the requirement to have a suitable skills assessment appears under the heading 'Criteria to be satisfied at time of application'. For the reasons given above, an applicant would not meet the requirement of having their skills assessed by the relevant assessing authority if the assessment was made after the visa application date. Thus, any later suitable assessment whether by the same assessing body or a different assessing body would not meet this requirement.

Australian study requirement

The 'Australian study requirement', defined in reg 1.15F, is relevant to a number of skilled visa subclasses for visa applications from 15 May 2009. Applicants for Subclass 485 visas must satisfy the requirement in the 6 months before the visa application was made or, if the applicant was unable to apply during that period because they were outside Australia at some point between 1 February 2020 and 19 September 2020, they must satisfy the requirement in the 12 months before the visa application was made.[85] Additionally, for applicants in the Graduate Work stream, each degree, diploma or trade qualification used to satisfy the study requirement must be 'closely related' to the nominated skilled occupation

[82] Items 1137(4) table item 4(c); 1138(4) table item 4(c); 1230(4) table item 4(c) First Provisional visa stream and 1241(4) table item 4(c) of sch 1.
[83] cl 485.223 as inserted by SLI 2013, No 33 or cl 485.214 for visa applications made before 23 March 2013; cl 487.214; and for visa applications made prior to 1 January 2010, cls 885.212, 886.212. For Subclass 485 visa applications made on or after 23 March 2013 the criterion requires that '[w]hen the application was made, it was accompanied by evidence that the applicant had applied for' the assessment. Although pt 485 criteria are no longer divided into time of application and time of decision, the terms of the criterion are such that it must be satisfied at the time of application. This criterion applies only to the Graduate Work stream and does not apply to visa applications that were made in the period mentioned in Item 1229(3)(ka).
[84] cl 485.224 as inserted by SLI 2013, No 33 or cl 485.221 for visa applications made before 23 March 2013; and cls 487.223(1), 885.222(1), 886.223(1). For Subclass 485 visa applications made on or after 23 March 2013 the criteria are not divided into time of application and time of decision but the structure of pt 485 and the terms of the skills assessment criterion in cl 485.224 are such that the criterion is to be satisfied at the time of decision. This criterion applies only to the Graduate Work stream and does not apply to visa applications that were made in the period mentioned in Item 1229(3)(ka).
[85] cls 485.221 and 485.231(3) as amended by *Migration Amendment (COVID-19 Concessions) Regulations 2020* (Cth) (F2020L01181).

unless the visa application was made in the period mentioned in Item 1229(3)(ka).[86] Certain applicants for Subclass 487, 885 and 886 visas must also satisfy the study requirement.[87] The requirement is also relevant to certain qualifications in the points test.[88]

'Australian study requirement' is defined in reg 1.15F.[89] A person meets the 'Australian study requirement' if they have completed one or more degrees, diplomas or trade qualifications for award by an Australian educational institution as a result of a course or courses:[90]

- that are 'registered courses' (as defined in reg 1.03): reg 1.15F(1)(a);
- that were completed in a total of at least 16 calendar months: reg 1.15F(1)(b);
- that were completed as a result of at least 2 academic years study: reg 1.15F(1)(c);[91]
- for which all instruction was conducted in English: reg 1.15F(1)(d); and
- that the applicant undertook while in Australia as the holder of a visa authorising the applicant to study: reg 1.15F(1)(e).

The elements of reg 1.15F raise a number of issues that require consideration: the meaning of its terms - 'degree', 'diploma', 'trade qualification', 'completed', 'as a result of a course or courses', and 'registered course' - the timeframes for course completion; and finally, how an applicant can satisfy the requirement that they hold a visa authorising study.

Degree, diploma and trade qualification

The terms 'degree', 'diploma' and 'trade qualification for the purposes of the 'Australian study requirement' are defined in reg 2.26AC(6) for visa applications made on or after 1 July 2012.[92] The main points of those definitions are:

- *'Degree'* - a formal educational qualification under the Australia Qualifications Framework (AQF), awarded by an Australian educational institution as a degree or postgraduate diploma for which the entry level to the course leading to the qualification is as specified; and, in the case of a bachelor's degree, not less than 3 years full-time study, or equivalent part-time study is required;
- *'Diploma'* - a diploma or an advanced diploma under the AQF awarded by a body authorised to award diplomas of those kinds; or an associate diploma or diploma

[86] cl 485.222 as amended by F2022L00822. In *Singh v MICMSMA* [2021] FedCFamC2G 208 at [85] the Court made *obiter* comments that the qualifications used to satisfy the Australian study requirement in cl 485.221 must be the same qualifications used to satisfy the Australian study requirement in cl 485.222.
[87] cls 487.212(2), 487.212(3), 885.211(2), 885.211(3), 886.211(2), 886.211(3).
[88] For discussion of the points system, see Skilled Visas – Overview and General Points Test (Schedule 6D).
[89] reg 1.03 as amended by *Migration Amendment Regulations 2009 (No. 4)* (Cth) (SLI 2009, No 84).
[90] 'Degree', 'diploma' and 'trade qualification' are defined in reg 2.26AC(6) for visa applications made on or after 1 July 2012 following the omission of reg 2.26A by SLI 2012, No 82. 'Completed' is defined in reg 1.15F(2) as, in relation to a degree, diploma or trade qualification, having met the academic requirements for its award.
[91] The term 'academic year' is defined in reg 1.03 to mean a period that is specified by the Minister as an academic year in an instrument in writing. Inserted by SLI 2009, No 84, the definition applies to visa applications made on or after 15 May 2009. The relevant instrument in writing can be located on the 'AcadYear' tab of the Register of Instruments: Skilled visas.
[92] reg 1.15F(2). Regulation 2.26A omitted and reg 2.26AC inserted by SLI 2012, No 82. Regulation 2.26A(6) provided the same definition of these terms for the purpose of the '2 year study requirement'.

within the meaning of the Register of Australian Tertiary Education (as current on 1 July 1999), awarded by a body authorised to award such diplomas.

- *'trade qualification'* – an Australian trade qualification obtained as a result of completion of an indentured apprenticeship, or a training contract or a qualification under the AQF of at least Major Group 3 in ANZSCO.[93]

The links to the AQF in reg 2.26AC(6) do not import the entirety of the AQF into the Regulations.[94] For example, there are references to '*graduate certificate*' and '*associate degree*' in the AQF but not in the definitions of 'degree' or 'diploma' in the Regulations, and the precise content of those definitions leaves little room for judgment or discretion in this regard.

It has been held that a '*graduate certificate*' is not a 'degree', 'postgraduate diploma' or 'diploma' as defined in the Regulations.[95] In *Bhatt v MIAC*, Nicholls FM rejected the applicant's argument to the effect that a graduate certificate should be regarded as a postgraduate qualification embraced within the term 'postgraduate diploma', because 'the Regulations make no reference to it and make no provision for its incorporation into those terms as defined in the Regulations'.[96] In dismissing an appeal, Buchanan J observed that the relevant qualifications are 'explicitly and comprehensively stated by regulation' and '[l]ittle room is left by those who draft such regulations for the application of judgment or discretion'.[97] His Honour rejected the proposition that a graduate certificate either fell within the natural meaning of 'postgraduate diploma', or alternatively that its absence from the definitions was the result of inadvertence and having regard to the broader statutory purpose the Regulations could be legitimately construed in the manner contended for. His Honour considered that the two qualifications are not generally regarded as the same. With respect to the alternative argument, he held that there was no basis to conclude that omission of a reference to graduate certificates was inadvertent, that no intent of the kind urged was discernible, and that the suggested construction required the rewriting of the stated conditions to create a new entitlement.

It has also been argued that an '*associate degree*' meets the requirements of reg 1.15F because associate degrees are essentially the same as diplomas as both are included in the

[93] The definition of 'trade qualification' was substituted by item [10] of sch 1 of SLI 2010, No 133. This definition applies to visa applications made before 1 July 2012 (see SLI 2012, No 82 for applications made on or after that date). To the extent the judgment in *Brar v MIBP* [2016] FCCA 951 suggests otherwise, it should be treated with caution.
[94] *Bhatt v MIAC* [2012] FMCA 317 at [50], upheld on appeal: *Bhatt v MIAC* [2012] FCA 918. This case concerned reg 2.26A(6) but the reasoning would apply equally to reg 2.26AC(6).
[95] The Department has taken the view that a graduate diploma does not meet the definition of 'degree' in reg 2.26AC(6) as it is not the same qualification as a postgraduate diploma. This view appears to be based on an erroneous understanding of the Court's reasoning about graduate certificates in *Bhatt v MIAC* [2012] FMCA 317 and is also not supported by the wording in reg 2.26AC(6). The Court in *Bhatt* appeared to use the terms 'graduate diploma' and 'postgraduate diploma' interchangeably at [15]–[16] and [19], further the Australian Qualifications Framework uses the term 'graduate diploma' in place of 'postgraduate diploma'. These would support the view that 'graduate diploma' and 'postgraduate diploma' are the same qualification. See AAT decision in 1705511, where the Tribunal found that a graduate diploma is a degree for the purpose of reg 2.26AC(6).
[96] *Bhatt v MIAC* [2012] FMCA 317 at [51], upheld on appeal in *Bhatt v MIAC* [2012] FCA 918. Buchanan J held that graduate certificates are not in name, recognition or significance the same qualification as postgraduate diplomas and there was no basis for concluding that omission of reference to graduate certificate in reg 2.26A(6) was inadvertent. This appears equally applicable to the replacement reg 2.26AC(6).
[97] *Bhatt v MIAC* [2012] FCA 918 at [12].

AQF at the same level and have the same entry requirements and study outcomes.[98] Policy provides that in some circumstances, an associate degree that has been suitably awarded does not meet the definition of 'diploma' as defined in reg 2.26AC(6)(b), however the policy does not elaborate on what is meant by 'in some circumstances'.[99] Overall, having regard to the reasoning in *Bhatt v MIAC* both at first instance and on appeal, and the clear language of the Regulations, it does not appear that an 'associate degree' can be regarded as either a 'degree' or a 'diploma' under these definitions.[100]

This does not necessarily mean that an applicant who has been awarded a qualification such as a graduate certificate or an associate degree could not meet one of those definitions. Depending on the facts of the particular case, further evidence from the education provider could support a finding that an applicant who has relied on such a qualification meets the reg 2.26AC(6) definition of 'degree' or 'diploma' even if that qualification is not mentioned in those definitions.[101]

The definition of 'trade qualification' is not limited in the same way as the definitions of 'degree' and 'diploma' and is wide enough to include a qualification such as an associate degree, depending on the circumstances. For example, an associate degree may be a qualification under the AQF, of at least the Certificate III level for a skilled occupation in ANZSCO Major Group 3, and thus a trade qualification as defined in reg 2.26AC(6).[102]

'Completed' a qualification

A person satisfies the study requirement if they have 'completed' 1 or more degrees, diplomas or trade qualifications for award by an Australian educational institution as a result of a course or courses of a specified kind that were completed in a specified way.[103] 'Completed' in relation to a degree, diploma or trade qualification is defined to mean 'having met the academic requirements for its award'.[104] It is a finding of fact for the decision-maker whether a course has been completed.

The relevant date for determining when a student has completed the academic requirements is the date when the educational institution decides that the academic requirements have

[98] This was the argument put to the Tribunal in MRT decision [redacted] (K Raif, 12 February 2014). The Tribunal rejected the argument, referring to the 'quite specific' definitions in the Regulations and to *Bhatt v MIAC* [2012] FMCA 317 and on appeal *Bhatt v MIAC* [2012] FCA 918.
[99] Policy – Migration Regulations – Divisions – Div1.2-Interpretation – [Div1.2/reg1.15F] Reg 1.15F – Australian Study Requirement – 3.7.1 What is a degree, diploma or trade qualification (reissued 20/01/2021).
[100] *Bhatt v MIAC* [2012] FMCA 317. See in particular the *obiter* comments at [46], noting that 'associate degree' is included in AQF but not mentioned in the Regulations. This was not mentioned on appeal.
[101] For example, in MRT decision [redacted] (Richard Derewlany, 31 August 2011) the delegate was not satisfied that the applicant's Associate Degree met any of the definitions in reg 2.26AC(6). On review, the Tribunal had before it additional evidence from the education provider that: the applicant was enrolled in a Diploma of Event Management but had transferred her enrolment to an Associate Degree in Business when the provider invited her to do so; the study programme for both courses was identical; the applicant had met all the requirements for the diploma course; and following a request from the applicant, the provider had agreed to rescind the associate degree and to award the applicant a Diploma of Event Management. The Tribunal noted that although the Diploma had not yet been conferred, the applicant had completed the diploma at the relevant time in that she had met the academic requirements for its award. This decision predates the judgments in *Bhatt v MIAC* [2012] FMCA 317 but does not appear to be inconsistent with the reasoning in those cases.
[102] e.g. in MRT decision [redacted] evidence from the relevant assessing authority confirmed that the applicant's Associate Degree in Civil Engineering was appropriate for his nominated occupation of Civil Engineering Draftsperson, which is specified in IMMI 14/049 as a skilled occupation with corresponding ANZSCO code 312311 and thus in ANZSCO Major Group 3.
[103] reg 1.15F(1).
[104] reg 1.15F(2), introduced by SLI 2008, No 56.

been met, namely, the date on which the results are finalised by the institution.[105] The date of submission of the final piece of assessment is not the relevant date, and nor is the date when the institution informs the student of the results, or the date of the formal conferral of the degree or other qualification at a graduation ceremony.[106]

In both *Sapkota v MIAC* and *Ali v MICMSMA* the Court was concerned with the definition of 'completed' as it first appears in reg 1.15F(1).[107] However, the reasoning would appear to be equally applicable to the term as it appears in regs 1.15F(1)(b) and (c) even though they are concerned with completion of the course rather than the resulting qualification. These requirements are discussed below.

As a result of a registered course or courses

A person satisfies the study requirement if they have completed 1 or more degrees, diplomas or trade qualifications for award by an Australian educational institution 'as a result of a course or courses' of a specified kind.[108]

While reg 1.15F(1) allows a person to meet the requirement by the completion of multiple qualifications, it does not say that a particular qualification may be awarded following the completion of multiple courses; and it has been observed that this would be contrary to the basic structure of our education system, in which a student completes a particular course and is awarded the corresponding qualification.[109] In *Singh v MIBP* the Court observed that many courses have prerequisites but that does not mean that the prerequisites are part of the course that results in a particular qualification.[110]

[105] *Sapkota v MIAC* [2012] FCA 981 at [26], dismissing an appeal from *Sapkota v MIAC* [2012] FMCA 137. *Sapkota v MIAC* [2012] FCA 981 was followed in *Ali v MICMSMA* [2021] FCA 1311 in which it was held at [39] that the date of completion is not what the university considers it should be, yet rather what Parliament says it is. Accordingly, at [48] the Court in *Ali v MICMSMA* [2021] FCA 1311 accepted that the language of reg 1.15F(2) referring to the 'academic requirements' of a degree, is comfortably met by study assessed as satisfactory and grounding the award of a degree.

[106] *Sapkota v MIAC* [2012] FCA 981 and *Ali v MICMSMA* [2021] FCA 1311 at [46] cited with approval the decision of Burchardt FM in *Venkatesan v MIAC* [2008] FMCA 409 concerning an identically worded definition of 'completed' in item 1128CA(3)(l) of sch 1. The applicant in that case had been granted credit transfers after he had completed the relevant courses. The Court held an applicant completes the academic requirements for a course when the applicant achieves the necessary results or credits to be awarded the relevant qualifications and that credit transfers were purely administrative steps. In relation to the distinction between academic and administrative requirements for the award of a degree, his Honour observed that 'there was nothing more for the Applicant to do of an academic nature after 2 August 2006. What was required, admittedly, were certain steps, but they were purely administrative steps that did not require any form of academic effort by Mr Venkatesan nor any evaluation of any such effort by the university'. Although in *Sapkota v MIAC* [2012] FCA 981 at [25] Cowdroy J referred to the point where the result of assessment for the final course of item of assessment required to complete the course has been made 'publicly available', at [26] this appears to be clarified as being the date on which results are finalized by the institution such that a student would be able to find out whether they had been satisfied if they contacted the institution. It was similarly held in *Ali v MICMSMA* [2021] FCA 1311 at [57] that whilst the date of publication of results could well indicate that an applicant's study has been assessed as satisfactory, this does not have the effect that it is the only point in time from which it can be established that an applicant's study has 'passed muster'.

[107] *Sapkota v MIAC* [2012] FCA 981; *Ali v CMSMA* [2021] FCA 1311.

[108] reg 1.15F(1).

[109] *Singh v MIBP* [2014] FCCA 1666. The applicant had contended that his Certificate course should be regarded as part of his Management Diploma, relying on a previous decision where the Tribunal had reasoned that the applicant's Certificate and Diploma courses were combined to comprise one qualification in that the first and second courses were pre-requisites for completion of the Diploma. The Court upheld the Tr bunal's rejection of that argument. While aspects of the Court's reasoning could also suggest that it would not be open to find that a single qualification was completed 'as a result of' multiple courses, the judgment should not be taken to go that far. The Tribunal in that case was willing to receive evidence from the education provider confirming the applicant's claim that the Certificate and Diploma were 'part of the same course', or a 'single course or a packaged program of study', or 'a single, packaged course' but such evidence was not forthcoming. It was not suggested that such evidence could not have made any difference.

[110] *Singh v MIBP* [2014] FCCA 1666.

The mere fact that a particular course has pre-requisites courses does not mean that the qualification is completed 'as a result of' those pre-requisite courses.[111]

Ultimately, whether the study requirement is satisfied is a factual question that will depend on the evidence, including evidence from the education provider as to whether a qualification was completed or granted 'as a result of' a combination of courses.

Among other things, the course or courses undertaken to satisfy the study requirement must be registered courses. *'Registered course'* is defined in reg 1.03. Whether a course is a 'registered course', which in effect refers to courses registered on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS), is not something that can be flexibly applied, that is, a course is either registered or it is not.[112]

Course completion - when and how

The course or courses must have been completed:

- in a total of 16 calendar months (reg 1.15F(1)(b)); and
- as a result of a total of at least 2 academic years study (reg 1.15F(1)(c)).

The '16 calendar months' requirement directs attention to the chronological period over which the course or courses undertaken by the applicant were completed. Its focus is the period of time actually taken by the applicant to complete the course or courses. He or she must have completed the relevant course or courses over at least 16 calendar months. In contrast, the '2 academic years' requirement directs attention to the quantity of academic study required by the particular course or courses undertaken. The academic study required by the course or courses of study must total at least '2 academic years'. That is, sub-paragraph (c) is focused upon the duration of course work required for the course of study undertaken by the visa applicant measured by reference to the academic study years required to ordinarily complete the course or courses in question by full-time study.[113]

In other words, the '16 months' requirement in reg 1.15F(1)(b) is a temporal requirement and the '2 academic years' requirement in reg 1.15F(1)(c) is directed to workload - that is, at assessing an 'academic years' worth or quality or quantity of 'study' engaged in during a period satisfying the temporal test in reg 1.15F(1)(b).[114]

Whether the 2-year study rule precludes consideration of credits given for *study in Australia* is discussed below.

[111] See also *Singh v MIBP* [2015] FCCA 2499 where the Court held at [24] that the Tribunal had correctly concluded that the applicant's Business Certificates could not be counted as part of his Diploma of Management, as the evidence showed that they were pre-requisites rather than a part of the diploma itself.
[112] In *Sandhu v MICMSMA* [2021] FCCA 1229 at [96]-[97] the Court rejected the applicant's submission that the course she had completed on-line in Perth was a 'registered course' in circumstances where the same course was registered on CRICOS if completed in-person in a different State.
[113] *Perumal v MIBP* [2014] FCA 555. The Court held that it was open to the Tribunal to conclude on the evidence before it that her degree required one and a half academic years of full-time study and that reg 1.15F(1)(c) was not satisfied. The Court considered that the applicant's challenge focused on the time she spent in study rather than the amount of time required to undertake by course work the degree upon which she relied.
[114] *Nayeem v MIAC* [2010] FMCA 980 at [21]–[22].

At least 16 calendar months

Regulation 1.15F(1)(b) is concerned with completion of the course itself. The meaning of 'completed' in this context has not been judicially considered; however, aspects of the reasoning in judgments considering the meaning of 'completed' as it first appears in reg 1.15F(1), would appear to be equally applicable in this context. In particular, if the view is taken that administrative steps taken by the university without any academic effort on the part of the applicant should not be counted for reg 1.15F(1)(b), it would follow that the minimum 16 calendar month period should be calculated on the basis of the actual study to achieve the necessary results, and not on purely administrative steps such as recording of credits.[115] On that view, if the award of the qualification was based on credits from another course, the time taken to obtain those credits could only be counted toward the 16 calendar months if the other course meets other requirements of reg 1.15F.[116] However, it is unclear whether this interpretation of 'completed' in reg 1.15F(1)(b) would be adopted by a court.

At least 2 academic years study

Regulation 1.15F(1)(c) specifies a course or courses that were completed as a result of at least 2 academic years study. The term 'academic year' is defined in reg 1.03 to mean a period that is specified as an academic year in an instrument.[117] The relevant instrument can be located in the Register of Instruments: Skilled visas on the 'AcadYear' tab. See below regarding the relevant instrument.

The current instrument at the time of writing defines an academic year as at least a total of 46 weeks, being the duration of a course or courses registered under the ESOS Act.[118] For the purposes of this definition, as long as a course is registered under the ESOS Act as having a duration of 92 weeks, and an applicant has 'completed' that course (i.e. met the academic requirements for its award),[119] reg 1.15F(1)(c) will be satisfied, regardless of whether completion of the course involved benefit from credits, recognition of prior learning or the like.[120] The Court's reasoning in *Riaz v MIBP* suggests that this will be the case even if the prior study was not undertaken in Australia.[121] The Court held that 'study' in reg 1.15(1)(c) denotes the activities educational institutions prescribe for the award of a degree, diploma or trade qualification and it is for those institutions to specify what is

[115] *Sapkota v MIAC* [2012] FCA 981 at [23]; *Venkatesan v MIAC* [2008] FMCA 409 at [17].
[116] That is, the other course was a registered course, for which all instruction was conducted in English, that the applicant undertook while in Australia as the holder of a visa authorising the applicant to study: regs 1.15F(1)(a), (d) and (e).
[117] Inserted by SLI 2009, No 84. The definition applies to visa applications made on or after 15 May 2009. The Explanatory Statements to IMMI 09/040 at [3] and LIN 19/085 at [4] indicate that the purpose of the instruments is to 'remove any uncertainty as to the number of weeks a course must be registered on the Commonwealth Register of Institutions and Courses for Overseas Students.'
[118] LIN 19/085 pt 2 s 6. This instrument commenced on 3 April 2019.
[119] reg 1.15F(2).
[120] See *Riaz v MIBP* [2013] FCCA 2244.
[121] *Riaz v MIBP* [2013] FCCA 2244. In this case, the applicant had completed two registered courses, a certificate course and a diploma course, in a total of at least 16 calendar months, in English, while in Australia as the holder of a visa allowing him to study. The courses were registered for 52 and 40 weeks respectively. However, the diploma course included two subjects that were also included in the certificate course, and as the applicant had completed those subjects for the certificate course, his education provider did not require him to undertake them again for the diploma course. By reference to what was said in *Nayeem v MIAC* [2010] FMCA 980, the Tribunal found that because of this credit transfer the applicant did not complete the usual or normal or approved full-time workload of the courses, and so had not completed the courses as a result of 2 academic years study. The Court held that this approach involved jurisdictional error, and that following the introduction of a definition of 'academic year' the judgment in *Nayeem* was not determinative of the issue.

required for a person to complete a course that will result in the conferral of a relevant qualification, including the recognition of prior learning and course credits. Accordingly, the relevant question for reg 1.15F(1)(c) is whether an applicant for the visa had 'completed', as defined in reg 1.15F(2), a course or courses that had been registered under the ESOS Act as having a duration of at least 92 weeks.[122]

The registered duration of courses is recorded on CRICOS.

The relevant instrument

The instrument in effect at the time of writing is LIN 19/085. It commenced on 3 April 2019 and repealed the whole of IMMI 09/040.[123] In the absence of any transitional or savings provisions with respect to IMMI 09/040, it appears LIN 19/085 applies to all live applications. In any case, both instruments have maintained the policy standard which has been applied since 1 September 2007, that an academic year is at least a total of 46 weeks.[124]

Requirement to hold visa authorising study

Regulation 1.15F(1)(e) requires that the applicant undertook the relevant course or courses 'while in Australia as the holder of a visa authorising the applicant to study'.

It appears from the ordinary meaning of the provision that it requires that the applicant was the holder of a 'visa authorising study' throughout the time the applicant undertook the relevant course or courses. There is no definition of the term 'visa authorising study' in the legislation. A student visa would clearly come within the meaning of this term, but it may be inferred from the fact that the term 'student visa' was not used, that it includes visas other than student visas. To satisfy this requirement, the decision-maker will need to consider the visa history of the applicant during the period the relevant courses were undertaken and determine whether the visas held may be described as visas 'authorising study'.

For example, if the applicant held a student visa, but then held a bridging visa for a period while applying for further student visa, the decision-maker would need to consider the conditions attached to the bridging visa. A visa with a condition which permits a limited amount of study, such as 8201 (while in Australia the holder must not engage in studies or training for more than 3 months), could properly be described as a visa 'authorising the applicant to study' for the purposes of reg 1.15F(1)(e); but it would not authorise the applicant to study in excess of the specified period. Thus, an applicant who has engaged in study or training for the specified period would not be able to rely on any further study to satisfy the Australian study requirement, as the visa would not then be authorising the applicant to study.

[122] *Riaz v MIBP* [2013] FCCA 2244 at [41], [50].
[123] LIN 19/085 s 2 and sch 1 s 1.
[124] Explanatory Statements to IMMI 09/040 and LIN 19/085 at [4] and [3] respectively.

Study 'closely related' to nominated occupation

Except in limited circumstances that only apply to certain Subclass 485 visa applications, there is an additional requirement that each degree, diploma or trade qualification used to satisfy the requirement must be closely related to the applicant's nominated 'skilled occupation'.[125] The words 'closely related' are not defined in the legislation but they require and call attention to the connection between two things. They do not require an exact correspondence.[126] However, the relationship must be more than merely complementary.[127]

In making the assessment it is necessary to focus on the nominated occupation rather than on an applicant's claimed or proposed occupation or career path. In this context, decision-makers appear not only entitled to give substantial weight to the contents of the ANZSCO descriptions,[128] but current authority suggests that the nature of the nominated occupation *must* be determined by reference to ANZSCO.[129] The ANZSCO code also needs to be read as a whole with a view to identifying and applying information which is relevant to an understanding of the whole of the nominated occupation.[130] That is, it is necessary to have regard to all information that is potentially relevant, including not only the statement of tasks specified in the relevant unit group or at the lower level of the occupation itself, but also relevant information in the higher groupings into which the nominated occupation falls.[131] Consideration, however, of whether the applicant's studies were closely related to tasks set out under other Unit Groups and related ANZSCO hierarchies is not required.[132]

[125] This is a separate criterion to that which requires an applicant to satisfy the Australian study requirement – see e.g., cl 485.221 (which requires the applicant satisfied the Australian study requirement in the relevant period immediately before the day the application was made as discussed above) and cl 485.222 (which requires that each degree, diploma or trade qualification used to satisfy the Australian study requirement is closely related to the applicant's nominated skilled occupation). In *Singh v MICMSMA* [2021] FedCFamC2G 208 at [85] the Court made *obiter* comments that the qualifications used to satisfy the Australian study requirement in cl 485.221 must be the same qualifications used to satisfy the Australian study requirement in cl 485.222. Note that the requirement in cl 485.222 does not apply if the visa application was made in the period mentioned in Item 1229(3)(ka): see cl 485.222 as amended by F2022L00822.

[126] *MIBP v Dhillon* (2014) 227 FCR 525 at [20]; see also *Constantino v MIBP* [2013] FCA 1301 at [33] quoting with approval *Prasad v MIAC* [2012] FCA 591 at [33].

[127] *Uddin v MIAC* [2010] FCA 1281 at [10]–[12] where North J rejected the argument that the Tribunal misunderstood the term 'closely related' by departing from what was then set out in PAM3. The Tribunal in that case found that the language of the regulation required a closer relationship than that suggested by the words 'complementary' or 'useful' as used in PAM3 at that time. This approach was followed in *Prasad v MIAC* [2012] FCA 591 (special leave refused: *Prasad v MIAC* [2013] HCASL 34) and approved in *Constantino v MIBP* [2013] FCA 1301 and *MIBP v Dhillon* (2014) 227 FCR 525 at [20]. See also *Shafiuzzaman v MIAC* [2011] FMCA 874 at [37]–[38] and *Manik v MIAC* [2012] FMCA 149 at [13], upheld on appeal *Manik v MIAC* [2012] FCA 619 at [19]–[20].

[128] *Manik v MIAC* [2012] FMCA 149 citing Shukla v MIAC [2010] FMCA 625, *Kabir v MIAC* [2010] FMCA 577 and *Chawdhury v MIAC* [2010] FMCA 275.

[129] See *Talha v MIBP* [2015] FCAFC 115. The central question in this case was not whether the nominated occupation must necessarily be determined by reference to ANZSCO, but rather whether the Tribunal had incorrectly confined its consideration to the relevant ANZSCO occupation. However, the central significance of the ANZSCO Code is implicit in the Court's reasoning. See also *Kshatry v MICMA* [2022] FedCFamC2G 707 at [67] where the Court found ANZSCO is expressly adopted to apply by virtue of legislative instrument and rejected the argument that ANZSCO is not delegated legislation without the force of law. See also *Setiya v MICMSMA* [2021] FCCA 544 which at [37] noted the reference to ANZSCO in Column 2 of IMMI 17/072 must have some function, even if 'Note 1' in IMMI 17/072 suggests it is for 'information only' i.e. the 'information' the reference is intended to convey must be the specifications for that occupation in the ANZSCO code. See also *Wang v MIMIA* [2005] FCA 843, *MIAC v Kamruzzaman* [2009] FCA 1562 and *Seema v MIAC* (2012) 203 FCR 537 where the relevance of ASCO/ANZSCO was considered in the analogous context of whether the applicant's employment is closely related to the nominated occupation.

[130] *Talha v MIBP* [2015] FCAFC 115 at [56].

[131] *Talha v MIBP* [2015] FCAFC 115 at [52]. The judgment examines the structure of the ANZSCO code in detail (at [17]–[23]).

[132] *Setiya v MICMSMA* [2021] FCCA 544 at [29]. In *Setiya v MICMSMA* [2021] FCCA 544 the nominated skilled occupation was 'Chef', and at [27] the Court rejected a submission the Tribunal was obliged to consider a range of other groupings relevant to the occupation of 'Café and Restaurant Manager', noting at [29] that neither *MIBP v Dhillon* (2014) 227 FCR 525 or *Talha v MIBP* [2015] FCAFC 115 authorised the Tribunal to engage in a wide ranging inquiry across all of the occupations specified in the ANZSCO Code so as to identify skills that might have some connection with the skilled occupation and the courses of study relied upon to satisfy visa requirements.

It is also appropriate to objectively consider the relationship of the applicant's qualification to the ANZSCO definition of the occupation rather than relying on the applicant's own description of what the occupation entails or the applicant's own view of the proximity of the qualifications to the nominated occupation.[133]

Where more than one qualification is being relied on to meet the study requirement, all the courses must be closely related to the nominated skilled occupation. This requires a comparison between each qualification and the skilled occupation, not a comparison between the two or more qualifications.[134]

It is ultimately a matter for the decision-maker to decide whether an applicant's Australian studies are 'closely related' to the nominated skilled occupation.[135] In carrying out the evaluative exercise it is critical that the whole of the Australian studies be compared with the whole of the nominated occupation.[136] The wording of the criteria does not permit the relationship to be satisfied by asking whether some of the subjects studied are closely related to the nominated skilled occupation, or some part of it.[137]

The Federal Circuit Court in *Tobon v MIBP* appears to have taken a somewhat different approach, holding that for a qualification to be closely related to an applicant's nominated skilled occupation, the decision maker must be satisfied that the study or training for which the qualification was granted conferred on an applicant skills, all, or a substantial proportion of which, fall or falls within the set of skills associated with the carrying on of the occupation.[138] The Court held further that in order to determine in any given case whether a qualification (a diploma in that case) is closely related to an applicant's nominated skilled occupation, the decision maker must undertake the following steps:

- First, they must identify the study or training for which the diploma was granted, and the skills acquired as a result of such study or training ('acquired skills');
- Second, they must identify the set of skills that are associated with carrying on the nominated skilled occupation ('nominated skills');
- Third, they must determine whether all or a substantial proportion of the acquired skills are nominated skills. If the decision maker so determines, the diploma is closely related to the nominated skilled occupation.[139]

However, the Full Court in *Talha v MIBP* expressed reservation as to whether the 3rd step specified is a necessary part of the evaluative exercise in every case, and cautioned against attempting to be too prescriptive by substituting a formula for the terms of the provision.[140]

[133] *Chawdhury v MIAC* [2010] FMCA 275 at [12]. See also *Kabir v MIAC* [2010] FMCA 577 at [70], *Shafiuzzaman v MIAC* [2011] FMCA 874 at [48]–[67] where the Court held that the Tribunal was correct in applying an objective test instead of a subjective test by the applicant that the term 'closely related' should be read as 'complementary' or 'useful' to his nominated occupation; and *Manik v MIAC* [2012] FMCA 149 at [14], upheld on appeal in *Manik v MIAC* [2012] FCA 619.
[134] *Manik v MIAC* [2012] FMCA 149 at [23]–[24], upheld on appeal in *Manik v MIAC* [2012] FCA 619.
[135] *Talha v MIBP* [2015] FCAFC 115 at [53].
[136] *Talha v MIBP* [2015] FCAFC 115 at [53], endorsing *MIBP v Dhillon* (2014) 227 FCR 525 at [20] and *Constantino v MIBP* [2013] FCA 1301 at [26].
[137] *Constantino v MIBP* [2013] FCA 1301 at [27].
[138] *Tobon v MIBP* [2014] FCCA 2208 at [25].
[139] *Tobon v MIBP* [2014] FCCA 2208 at [25].
[140] *Talha v MIBP* [2015] FCAFC 115.

The Court also clarified that the findings in *Tobon* ought not to be read as derogating from the fundamental requirement that in conducting the evaluative exercise required by the criterion, consideration must be given to the whole of the Australian studies and the whole of the nominated skilled occupation.[141]

Relevant amending legislation

Title	Reference Number	Legislation Bulletin
Migration Amendment Regulations 2007 (No 7) (Cth)	SLI 2007, No 257	No 9/2007
Migration Amendment Regulations 2009 (No 15) (Cth)	SLI 2009, No 375	No 19/2009
Migration Amendment Regulations 2010 (No 6) (Cth)	SLI 2010, No 133	No 7/2010
Migration Amendment Regulations 2011 (No 3) (Cth)	SLI 2011, No 74	No 2/2011
Migration Amendment Regulation 2012 (No 2) (Cth)	SLI 2012, No 82	No 4/2012
Migration Legislation Amendment Regulation 2013 (No 1) (Cth)	SLI 2013, No 33	No 2/2013
Migration Legislation Amendment Regulation 2013 (No 3) (Cth)	SLI 2013, No 146	No 10/2013
Migration Amendment (Skills Assessment) Regulation 2013 (Cth)	SLI 2013, No 233	No 15/2013
Migration Legislation Amendment (2014 Measures No 1) Regulation 2014 (Cth)	SLI 2014, No 82	No 5/2014
Migration Amendment (Temporary Graduate Visas) Regulation 2014 (Cth)	SLI 2014, No 145	No 7/2014
Migration Amendment (New Skilled Regional Visas) Regulations 2019 (Cth)	F2019L00578	No 4/2019
Home Affairs Legislation Amendment (2020 Measures No 1) Regulations 2020 (Cth)	F2020L00281	
Migration Amendment (COVID-19 Concessions) Regulations 2020 (Cth)	F2020L01181	No 2/2020

[141] In *Walia v MIBP* [2015] FCCA 1949 the applicant argued unsuccessfully, with reference to *Tobon v MIBP* [2014] FCCA 2208, that the Tribunal had applied the wrong test in regard to whether her qualification (Diploma of Business Management) was 'closely related' to her nominated skilled occupation (pastry cook). It was submitted that the correct test was as stated in *Tobon*. The Court did not express any view as to the correctness or otherwise of *Tobon*, but in rejecting the applicant's contention, it referred to *MIBP v Dhillon* (2014) 227 FCR 525 as the leading authority on the issue.

Migration Amendment (Occupation Nomination and Skills Assessment for Subclass 485 Visas) Regulations 2022 (Cth)	F2022L00822	

Relevant case law

Judgment	Judgment summary
Akbar v MIBP [2019] FCA 515	
Ali v MICMSMA [2021] FCA 1311	Summary
Berenguel v MIAC [2010] HCA 8	Summary
Bhatt v MIAC [2012] FCA 918	Summary
Bhatt v MIAC [2012] FMCA 317	Summary
Brar v MIBP [2016] FCCA 951	
Chawdhury v MIAC [2010] FMCA 275	Summary
Chen v MIAC [2011] FMCA 859	Summary
Constantino v MIMAC [2013] FCCA 1178	Summary
Constantino v MIBP [2013] FCA 1301	Summary
MIBP v Dhillon (2014) 227 FCR 525	Summary
Hemlata v MIBP [2014] FCCA 968	
Kabir v MIAC [2010] FMCA 577	Summary
KC v MIAC [2013] FCCA 296	Summary
Kshatry v MICMA [2022] FedCFamC2G 707	
Manik v MIAC [2012] FCA 619	
Manik v MIAC [2012] FMCA 149	
Nayeem v MIAC [2010] FMCA 980	Summary
Parekh v MIAC [2007] FMCA 633	Summary
Patel v MIAC [2011] FMCA 399	Summary

Patel v MIAC (2011) 198 FCR 62	Summary
Pavuluri v MIBP [2014] FCA 502	Summary
Perumal v MIBP [2014] FCA 555	Summary
Prasad v MIAC [2012] FCA 591	Summary
Rai v MIAC [2010] FCA 1289	
Rai v MIAC [2010] FMCA 472	Summary
Riaz v MIBP [2013] FCCA 2244	Summary
Sandhu v MICMSMA [2021] FCCA 1299	Summary
Sapkota v MIAC [2012] FCA 981	Summary
Sapkota v MIAC [2012] FMCA 137	Summary
Seema v MIAC (2012) 203 FCR 537	Summary
Setiya v MICMSMA [2021] FCCA 544	
Shafiuzzaman v MIAC [2011] FMCA 874	Summary
Shukla v MIAC [2010] FMCA 625	Summary
Singh v MIBP [2014] FCCA 1666	Summary
Singh v MIBP (2015) 233 FCR 34	Summary
Singh v MIBP [2015] FCCA 2499	
Singh v MICMSMA [2021] FedCFamC2C 208	Summary
Talha v MIBP (2015) 235 FCR 100	Summary
Thapa v MICMSMA [2021] FCCA 686	Summary
Tobon v MIBP [2014] FCCA 2208	Summary
Uddin v MIAC [2010] FCA 1281	
Venkatesan v MIAC [2008] FMCA 409	Summary
Walia v MIBP [2015] FCCA 1949	Summary

Last updated/reviewed: 21 September 2022

Quick guide to skilled occupation list instruments

visa application date	invitation issue date	subclass	other condition	relevant instrument	relevant schedule or section for…				
					skilled occupation [r.1.15I]	Sch 6B class [r.2.26AA(2)(a)]	Sch 6C class [r.2.26AB(2)(a)]	assessing authorities / countries [r.2.26B(1)(a), (b)]	Schedule 1 [1136(3)(bb)(ii), (4)(b)(ii), (5)(b)(ii); (6)(b)(iii); 1137(4C); Item 4(a) of 1137(4), 1138(4), 1230(4); 1229(3)(ab)(ii), (3)(e), (3)(k), (4)(b)(ii), (5)(b)(ii), (6)(b)(iii), (7)(b)(ii)]
pre 01/07/10		All		IMM12/068	Schedule 1A			Schedule 1A	
1/07/10 - 30/06/11	N/A	175, 176, 475, 476, 485, 487, 885, 886, 887		IMM12/068	Schedule 3			Schedule 3	
		176, 475, 487, 886	applicant nominated by State / Territory		Schedule 4			Schedule 4	
1/7/10-30/06/12	N/A	487, 885, 886	held Subclass 485 on 08/02/10; or is spouse / de facto partner	IMM12/068	Schedule 2, Part A or B	**Schedule 2, Part A and B** unless nominated by State/Territory Govt under 1136(3A) or 1229(3A), or spouse /de-facto (then **Part C**)	**Schedule 2, Part A** unless nominated by State/Territory Govt under 1136(3A) or 1229(3A), or spouse /de-facto (then **Part C**)	Schedule 2, Parts A, B , C	Schedule 2, Parts A, B , C
			applied for Subclass 485 on or before 08/02/10 (+NFD at that date); or is spouse / de facto partner						
			held Subclass 572, 573 or 574 on 08/02/10 & applied for 485 on or after 01/07/10 but before 01/07/12						
		485	held Subclass 572, 573, 574 on 08/02/10						
1/07/11-30/06/12	N/A	175, 176, 475, 476, 485, 487, 885, 886, 887		IMMI12/023	Schedule 1			Schedule 1	Schedule 1
		176, 475, 487, 886	applicant nominated by State / Territory; or is spouse/ de facto		Schedules 1 & 2			Schedules 1 & 2	Schedules 1 & 2
			held Subclass 485 on 08/02/10; or is spouse / de facto partner						

visa application date	invitation issue date	subclass	other condition	relevant instrument	relevant schedule or section for…				
					skilled occupation [r.1.15I]	Sch 6B class [r.2.26AA(2)(a)]	Sch 6C class [r.2.26AB(2)(a)]	assessing authorities / countries [r.2.26B(1)(a), (b)]	Schedule 1 [1136(3)(bb)(ii), (4)(b)(ii), (5)(b)(ii); (6)(b)(iii); 1137(4C); Item 4(a) of 1137(4), 1138(4), 1230(4); 1229(3)(ab)(ii), (3)(e), (3)(k), (4)(b)(ii), (5)(b)(ii), (6)(b)(iii), (7)(b)(ii)]
1/7/12 - 31/12/12	N/A	487, 885, 886	applied for Subclass 485 on or before 08/02/10 (+NFD at that date); or is spouse / de facto partner	IMM12/065	Schedule 2, Part A or B	**Schedule 2, Part A and B** unless nominated by State/Territory Govt under 1136(3A) or 1229(3A), or spouse /de-facto (then **Part C**)	**Schedule 2, Part A** unless nominated by State/Territory Govt under 1136(3A) or 1229(3A), or spouse /de-facto (then **Part C**)	Schedule 2, Parts A, B , C	Schedule 2, Parts A, B , C
			held Subclass 572, 573 or 574 on 08/02/10 & applied for 485 on or after 01/07/12 but before 01/01/13						
		485	held Subclass 572, 573, 574 on 08/02/10						
N/A	1/7/12 - 22/03/13	189		IMMI 13/065	Schedule 1			Schedule 1	Schedule 1
		489	NOT nominated by State/Territory						
		190, 489	applicant nominated by State / Territory; or is spouse/ de facto		Schedules 1 & 2			Schedules 1 & 2	Schedules 1 & 2
1/7/12 - 22/03/13	N/A	485, 885		IMMI 13/065	Schedule 1			Schedule 1	Schedule 1
		487, 886	NOT nominated by State/Territory						
		487, 886	applicant nominated by State / Territory; or is spouse/ de facto		Schedules 1 & 2			Schedules 1 & 2	Schedules 1 & 2
N/A	23/03/13 - 30/6/13	189		IMMI 13/064	Schedule 1			Schedule 1	Schedule 1
		489	NOT nominated by State/Territory						
		190, 489	applicant nominated by State / Territory; or is spouse/ de facto		Schedules 1 & 2			Schedules 1 & 2	Schedules 1 & 2
		485, 885			Schedule 1			Schedule 1	Schedule 1

visa application date	invitation issue date	subclass	other condition	relevant instrument	relevant schedule or section for…				
					skilled occupation [r.1.15I]	Sch 6B class [r.2.26AA(2)(a)]	Sch 6C class [r.2.26AB(2)(a)]	assessing authorities / countries [r.2.26B(1)(a), (b)]	Schedule 1 [1136(3)(bb)(ii), (4)(b)(ii), (5)(b)(ii); (6)(b)(iii); 1137(4C); Item 4(a) of 1137(4), 1138(4), 1230(4); 1229(3)(ab)(ii), (3)(e), (3)(k), (4)(b)(ii), (5)(b)(ii), (6)(b)(iii), (7)(b)(ii)]
23/03/13 - 30/6/13	N/A	487, 886	NOT nominated by State/Territory	IMMI 13/064	Schedule 1			Schedule 1	Schedule 1
		487, 886	applicant nominated by State / Territory; or is spouse/ de facto		Schedules 1 & 2			Schedules 1 & 2	Schedules 1 & 2
N/A	1/7/13 - 30/6/14	189		IMMI 14/049	Schedule 1			Schedule 1	Schedule 1
		489	NOT nominated by State/Territory						
		190, 489	applicant nominated by State / Territory; or is spouse/ de facto		Schedules 1 & 2			Schedules 1 & 2	Schedules 1 & 2
1/7/13- 30/6/14	N/A	485		IMMI 14/049	Schedule 1			Schedule 1	Schedule 1
N/A	1/7/14 - 30/6/15	189	or is spouse/ de facto	IMMI 15/091	Schedule 1			Schedule 1	Schedule 1
		489	NOT nominated by State/Territory; or is spouse/ de facto						
		190, 489	applicant nominated by State / Territory; or is spouse/ de facto		Schedules 1 & 2			Schedules 1 & 2	Schedules 1 & 2
1/7/14-30/6/15	N/A	485		IMMI 15/091	Schedule 1			Schedule 1	Schedule 1
N/A	1/7/15-30/6/16	189	or is spouse/ de facto	IMMI 16/060	Schedule 1			Schedule 1	Schedule 1
		489	NOT nominated by State/Territory; or is spouse/ de facto						
		190, 489	applicant nominated by State / Territory; or is spouse/ de facto		Schedules 1 & 2			Schedules 1 & 2	Schedules 1 & 2

visa application date	invitation issue date	subclass	other condition	relevant instrument	relevant schedule or section for…				
					skilled occupation [r.1.15I]	Sch 6B class [r.2.26AA(2)(a)]	Sch 6C class [r.2.26AB(2)(a)]	assessing authorities / countries [r.2.26B(1)(a), (b)]	Schedule 1 [1136(3)(bb)(ii), (4)(b)(ii), (5)(b)(ii); (6)(b)(iii); 1137(4C); Item 4(a) of 1137(4), 1138(4), 1230(4); 1229(3)(ab)(ii), (3)(e), (3)(k), (4)(b)(ii), (5)(b)(ii), (6)(b)(iii), (7)(b)(ii)]
1/7/15-30/6/16	N/A	485		IMMI 16/060	Schedule 1			Schedule 1	Schedule 1
N/A	1/7/16-18/4/17	189	or is spouse/ de facto	IMMI 16/059	Schedule 1			Schedule 1	Schedule 1
		489	NOT nominated by State/Territory; or is spouse/ de facto						
		190, 489	applicant nominated by State / Territory; or is spouse/ de facto		Schedules 1 & 2			Schedules 1 & 2	Schedules 1 & 2
1/7/16-18/4/17	N/A	485		IMMI 16/059	Schedule 1			Schedule 1	Schedule 1
N/A	19/4/17-30/6/17	189	or is spouse/ de facto	IMMI 16/059* (as amended by IMMI 17/040)	Schedule 1			Schedule 1	Schedule 1
		489	NOT nominated by State/Territory; or is spouse/ de facto						
		190, 489	applicant nominated by State / Territory; or is spouse/ de facto		Schedules 1 & 2			Schedules 1 & 2	Schedules 1 & 2
19/4/17-30/6/17	N/A	485		IMMI 16/059* (as amended by IMMI 17/040)	Schedule 1			Schedule 1	Schedule 1
		189	or is spouse/ de facto						

visa application date	invitation issue date	subclass	other condition	relevant instrument	relevant schedule or section for…				
					skilled occupation [r.1.15l]	Sch 6B class [r.2.26AA(2)(a)]	Sch 6C class [r.2.26AB(2)(a)]	assessing authorities / countries [r.2.26B(1)(a), (b)]	Schedule 1 [1136(3)(bb)(ii), (4)(b)(ii), (5)(b)(ii); (6)(b)(iii); 1137(4C); Item 4(a) of 1137(4), 1138(4), 1230(4); 1229(3)(ab)(ii), (3)(e), (3)(k), (4)(b)(ii), (5)(b)(ii), (6)(b)(iii), (7)(b)(ii)]
N/A	1/07/17- 16/01/18	489	NOT nominated by State/Territory; or is spouse/ de facto	IMMI 17/072	Section 7			Section 7	Section 7
			applicant nominated by State / Territory; or is spouse/ de facto		Section 7 **except** items marked with "Y" in column 4; **and** Section 8.			Sections 7 & 8	Sections 7 & 8
		190			Sections 7 & 8 **except** items marked with "Y" in column 4.				
1/07/17 - 16/01/18	N/A	485		IMMI 17/072	Section 7			Section 7	Section 7
N/A	17/01/18 - 17/03/18	189	or is spouse/ de facto	IMMI 18/007	Section 8			Section 8	Section 8
		489	NOT nominated by State/Territory; or is spouse/ de facto						
			applicant nominated by State / Territory; or is spouse/ de facto		Section 8 **except** items marked with "Y" in column 4; **and** Section 9			Sections 8 & 9	Sections 8 & 9
		190			Sections 8 & 9 **except** items marked with "Y" in column 4.				
17/01/18 - 17/03/1	NA	485		IMMI 18/007	Section 8			Section 8	Section 8

visa application date	invitation issue date	subclass	other condition	relevant instrument	relevant schedule or section for…				
					skilled occupation [r.1.15I]	Sch 6B class [r.2.26AA(2)(a)]	Sch 6C class [r.2.26AB(2)(a)]	assessing authorities / countries [r.2.26B(1)(a), (b)]	Schedule 1 [1136(3)(bb)(ii), (4)(b)(ii), (5)(b)(ii); (6)(b)(iii); 1137(4C); Item 4(a) of 1137(4), 1138(4), 1230(4); 1229(3)(ab)(ii), (3)(e), (3)(k), (4)(b)(ii), (5)(b)(ii), (6)(b)(iii), (7)(b)(ii)]
N/A	18/03/18 - 10/03/19	189	or is spouse/ de facto	IMMI 18/051	Section 8			Section 8	Section 8
		489	NOT nominated by State/Territory; or is spouse/ de facto		Section 8			Section 8	Section 8
			applicant nominated by State / Territory; or is spouse/ de facto		Section 8 (**except** items marked with "A" in column 4), sections 9 & 10			Sections 8, 9 & 10	Sections 8, 9 & 10
		190			Section 8 (**except** items marked with "A" in column 4) & section 9			Sections 8 & 9	Sections 8 & 9
18/03/18 - 10/03/1	N/A	485		IMMI 18/051	Section 8			Section 8	Section 8
Pre 6/5/22	11/03/19 -	189	or is spouse/ de facto	LIN 19/051 (including amendments made by Sch 2 to LIN 19/243)	Section 8			Section 8 (and 10A where applicable)	Section 8
		190	applicant nominated by State / Territory; or is spouse / de facto		Sections 8 and 9			Sections 8 and 9 (and 10A where applicable)	Sections 8 and 9
	11/03/19 - 15/11/19 (**NOTE:** the application must also have been made before 16/11/19)	489	NOT nominated by State/Territory; or is spouse / de facto	LIN 19/051 (including amendments made by Sch 2 to LIN 19/243)	Section 8			Section 8 (and 10A where applicable)	Section 8
			applicant nominated by State / Territory; or is spouse / de facto		Sections 8, 9 and 10			Sections 8, 9, 10 (and 10A where applicable)	Sections 8, 9, 10
				LIN 19/051 (including					

visa application date	invitation issue date	subclass	other condition	relevant instrument	relevant schedule or section for…				
					skilled occupation [r.1.15I]	Sch 6B class [r.2.26AA(2)(a)]	Sch 6C class [r.2.26AB(2)(a)]	assessing authorities / countries [r.2.26B(1)(a), (b)]	Schedule 1 [1136(3)(bb)(ii), (4)(b)(ii), (5)(b)(ii); (6)(b)(iii); 1137(4C); Item 4(a) of 1137(4), 1138(4), 1230(4); 1229(3)(ab)(ii), (3)(e), (3)(k), (4)(b)(ii), (5)(b)(ii), (6)(b)(iii), (7)(b)(ii)]
11/03/19-5/5/22	N/A	485		amendments made by Sch 2 to LIN 19/243)	Section 8			Section 8 (and 10A where applicable)	Section 8
16/11/19-5/5/22	N/A	491	NOT nominated by State/Territory; or is spouse/ de facto	LIN 19/051 (including amendments made by LIN 19/243)	Section 8			Section 8 (and 10A where applicable)	Section 8
			applicant nominated by State/Territory; or is spouse/de facto		Sections 8, 9 and 10			Sections 8, 9, 10 (and 10A where applicable)	Sections 8, 9, 10
6/5/22-	N/A	485		LIN 19/051 (including amendments made by LIN 19/243 and LIN 22/053)	Section 8			Section 8 (and 10A & 15(3) where applicable)	Section 8
6/5/22-	11/03/19 -	189	or is spouse/ de facto	LIN 19/051 (including amendments made by LIN 19/243 and LIN 22/053)	Section 8			Section 8 (and 10A & 15(3) where applicable)	Section 8
6/5/22-	N/A	491	NOT nominated by State/Territory; or is spouse/ de facto	LIN 19/051 (including amendments made by LIN 19/243 and LIN 22/053)	Section 8			Section 8 (and 10A & 15(3) where applicable)	Section 8
			applicant nominated by State/Territory; or is spouse/de facto	LIN 19/051 (including amendments made by LIN 19/243 and LIN 22/053)	Sections 8, 9, and 10			Sections 8, 9, 10 (and 10A & 15(3) where applicable)	Sections 8, 9, and 10

visa application date	invitation issue date	subclass	other condition	relevant instrument	relevant schedule or section for…				
					skilled occupation [r.1.15I]	Sch 6B class [r.2.26AA(2)(a)]	Sch 6C class [r.2.26AB(2)(a)]	assessing authorities / countries [r.2.26B(1)(a), (b)]	Schedule 1 [1136(3)(bb)(ii), (4)(b)(ii), (5)(b)(ii); (6)(b)(iii); 1137(4C); Item 4(a) of 1137(4), 1138(4), 1230(4); 1229(3)(ab)(ii), (3)(e), (3)(k), (4)(b)(ii), (5)(b)(ii), (6)(b)(iii), (7)(b)(ii)]
6/5/22-	11/03/19 -	190	applicant nominated by State / Territory; or is spouse / de facto	LIN 19/051 (including amendments made by LIN 19/243 and LIN 22/053)	Sections 8 and 9			Sections 8, 9 (and 10A & 15(3) where applicable)	Sections 8 and 9

Invitation issue date = the date in which an invitation to make an application for a visa was issued

1. **reg 1.15I** = skilled occupation
2. **reg 2.26B** = relevant assessing authority
3. **reg 2.26AA(2)(a)** = visa applications made 1/7/10 - 31/12/12 to whom Schedule 6B Points Test applies
4. **reg 2.26AB(2)(a)** = visa applications made 1/7/10 - 31/12/12, if does not pass 6B points test, assess under 6C points test

Last reviewed 21/09/22

SKILLED VISAS - OVERVIEW

Last updated/reviewed: 18 November 2022

Introduction[1]

Skilled visas are for people who have skills in particular occupations required in Australia and do not require sponsorship by an employer. The points system provides a method of selecting skilled migrants with the skills and attributes needed in Australia.

The skilled visa program has been subject to several major revisions since its introduction. These changes have resulted in the introduction and phasing out of various visa classes and subclasses.

This commentary provides an overview of visa classes and subclasses within the General Skilled Migration (GSM) program, and the points system to which a number of those visas are subject.[2]

The GSM program includes:

- **Visa classes introduced 1 September 2007** – Classes VB, VC, VE, VF (Subclasses 885, 886, 887, 485, 487, 175, 176, 475 and 476)
- **Visa classes introduced 1 July 2012** – Classes SI, SN, SP (Subclasses 189, 190 and 489)
- **Visa class introduced 16 November 2019** – Class PS (Subclass 491)
- **Visa class introduced 5 March 2022** – Class PR (Subclass 191)

Decisions to refuse these visas are generally, but not always, reviewable under Part 5 of the *Migration Act 1958* (Cth) (the Act).[3]

A range of visa criteria and related definitions contain references to a specification by the Minister in an instrument in writing.[4] All instruments relevant to visas within the skilled migration program can be located on the Register of Instruments: Skilled visas.

More detail about other common legal issues in the skilled migration program can be found in the following commentaries: Bogus Documents, False or Misleading Information, PIC 4020, Employment in a Skilled Occupation, English Language Ability – Skilled/Business Visas and Skilled Occupation / Australian Study Requirement.

General skilled migration visa classes and subclasses

1 September 2007 visa classes

The GSM program was introduced on 1 September 2007. The features included independent and sponsored streams, a regional scheme, a two-stage processing system

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] 'General Skilled Migration visa' means a Subclass 175, 176, 189, 190, 475, 476, 485, 487, 489, 491, 885, 886 or 887 visa, granted at any time: reg 1.03 inserted by *Migration Amendment Regulations 2007 (No 7)* (Cth) (SLI 2007, No 257), amended by *Migration Amendment Regulations 2012 (No 2)* (Cth) (SLI 2012, No 82) and *Migration Amendment (New Skilled Regional Visas) Regulation 2019* (Cth) (F2019L00578). For information about skilled visa classes and subclasses introduced before 1 September 2007, please contact MRD Legal Services.
[3] Note that decisions made under s 501 on character grounds are not reviewable under pt 5.
[4] For example s 96 points test pool mark and pass mark; regs 1.03 and 2.26B definition of 'relevant assessing authority'; regs 1.03 and 1.15I definition of 'skilled occupation'; and regs 1.03 and 1.15D definition of 'proficient English'.

with a temporary or provisional visa potentially leading to a permanent visa, and a points test for some subclasses.

At this time, the GSM program consisted of two temporary visa classes (onshore and offshore) and two permanent visa classes (onshore and offshore). These are summarised in the table on pp.6 to 7 of this commentary. Of these, a number have since been repealed, and only the following are currently still open to new applications:

- **Skilled (Residence) (Class VB):** Subclass 887 (Skilled – Regional).
    - Subclass 887 is for holders of eligible provisional visas or related bridging visas who have lived for at least 2 years and worked for at least 1 year in a Specified Regional Area in Australia.[5]
- **Skilled (Provisional) (Class VF):** Subclass 476 (Skilled – Recognised Graduate).
    - Subclass 476 is for graduates (under the age of 31) of recognised educational institutions who have skills in demand in Australia. Applicants must hold a specified temporary skilled visa at the time of application.
- **Skilled (Provisional) (Class VC):** Subclass 485 (Temporary Graduate).
    - Since 23 March 2013, Subclass 485 has contained the Graduate Work stream and the Post-Study Work stream. The Graduate Work stream is for graduates with skills and qualifications considered to be in demand in Australia, whilst the Post-Study Work stream is for persons who have recently graduated in Australia with an eligible higher education degree who applied for and were granted their first student visa after 5 November 2011.[6] On 1 July 2022, a third stream, called the Replacement stream, was introduced to allow holders and former holders of a Subclass 485 visa to obtain another Subclass 485 visa if they were unable to stay in Australia for the full period of grant of their previous visa due to the international travel restrictions in force between 1 February 2020 and 14 December 2021.[7]

1 July 2012 visa classes

Changes were made to the GSM program on 1 July 2012, including the closure of certain skilled visa classes, the introduction of new skilled visas and a new points test in relation to the new visa classes. The new subclasses are part of the new 'SkillSelect' model which, with limited exceptions, requires an invitation from the Minister before a person can make an

[5] For applications made on or after 19 September 2020, applicants who have ceased to hold a qualifying visa in specific circumstances can make a valid application for a Subclass 887 visa; and applicants who apply for a Subclass 887 visa in specific circumstances receive a concession toward the requirement to live for two years or work full-time for one year in a specified regional area: see item 1136(7)(a), cls 887.212, 887.213 as amended by *Migration Amendment (COVID-19 Concessions) Regulations 2020* (Cth) (F2020L01181).

[6] For applications made on or after 20 January 2021, an applicant who has held a Subclass 485 visa in the Post-Study Work stream can, subject to meeting the requirements in cl 485.232 or 485.233, be granted a second Subclass 485 visa in the Post-Study Work stream: cls 485.232 and 485.233 inserted by the Migration Amendment (Temporary Graduate Visas) Regulations 2020 (F2020L01639).

[7] Introduced by the *Migration Amendment (Subclass 485 (Temporary Graduate) Visa Replacement Stream and Other Measures) Regulations 2022* (Cth) (F2022L00845). These amending regulations also allow applicants who hold a Subclass 485 visa in the Replacement stream and have previously held a visa in the Post-Study Work stream to be granted a second visa in the Post-Study Work stream, subject to meeting the requirements in cl 485.234 or 485.235, which were inserted by F2022L00845.

application.[8] Certain visas were replaced with new visa classes with fewer subclasses, some of which have alternative 'streams'.[9]

These visas do not have 'time of application' and 'time of decision' criteria. Instead there are common criteria and criteria specific to particular streams. Some criteria are linked to specific points in time, e.g. when the applicant was invited to apply for the visa, or the time of visa application.

The amendments introduced three visa classes:

- **Skilled – Independent (Permanent) (Class SI):** contains Subclass 189 (Skilled – Independent).
    - For applications made on or after 1 July 2017 until 4 March 2022, Subclass 189 is split into two streams: the Points-tested stream and the New Zealand Stream.[10]
        - The Points-tested stream is for applicants who have received an invitation from the Minister to apply. The applicant must nominate the skilled occupation that was identified in the invitation and for which the applicant has a suitable skills assessment. Visa criteria include English proficiency.
        - The New Zealand stream is for Subclass 444 (New Zealand Special Category) visa holders who have lived in and contributed to Australia for a number of years. Applicants do not need to be invited to apply.
    - For applications made on or after 5 March 2022, in addition to the Points-tested stream and the New Zealand stream described above, Subclass 189 includes a third stream, that is the Hong Kong stream.[11]
        - The Hong Kong stream is for Subclass 457, 482 and 485 visa holders from Hong Kong, who have held that visa for at least 4 years and are covered by the concessional arrangements for Hong Kong passport holders and British National (Overseas) passport holders.[12]
- **Skilled – Nominated (Permanent) (Class SN):** contains Subclass 190 (Skilled – Nominated).
    - Subclass 190 is for applicants who have received an invitation from the Minister to apply. The applicant must nominate the skilled occupation that was identified in the invitation and for which the applicant has a suitable skills assessment. Visa criteria include English proficiency.
- **Skilled – Regional Sponsored (Provisional) (Class SP):** contains Subclass 489 (Skilled – Regional (Provisional)). Subclass 489 is split into two streams.

[8] Explanatory Statement to SLI 2012, No 82, p.6.
[9] Explanatory Statement to SLI 2012, No 82, p.1, 6.
[10] The streams were introduced by the *Migration Legislation Amendment (2017 Measures No 2) Regulations 2017* (Cth) (F2017L00549). Before 1 July 2017, Subclass 189 operated in the same way as the Points-tested stream.
[11] The Hong Kong stream was introduced by the *Migration Legislation Amendment (Hong Kong) Regulations 2021* (Cth) (F2021L01479).
[12] Explanatory Statement to F2021L01479, p 2. The terms 'Hong Kong passport holder' and 'British National (Overseas) passport holder' are defined in reg 1.03. Concessional arrangements for these passport holders were introduced by the *Migration Amendment (Hong Kong Passport Holders) Regulations* 2020 (F2020L01047) and F2021L01479 respectively.

- The First Provisional visa stream has similar application requirements to Class SN. This stream remains open to applicants seeking to satisfy the secondary criteria, however it closed to applicants seeking to satisfy the primary criteria from 16 November 2019.[13]
- The Second Provisional visa stream does not require an invitation to apply. The applicant must hold a specified provisional regional skilled visa (Subclass 475 or 487) and have held the visa no more than once. They must have held it for the preceding 2 years, either as the primary applicant or a spouse/de facto partner.

16 November 2019 visa class

Changes were made to the GSM program on 16 November 2019, including the closure of Subclass 489 to applicants seeking to satisfy primary criteria in the First Provisional Visa stream and the introduction of a new regional provisional visa.[14]

The amendments introduced one visa class:

- **Skilled Work Regional (Provisional) (Class PS):** Subclass 491 (Skilled Work Regional (Provisional).
  - Subclass 491 is for applicants who have received an invitation from the Minister to apply. The applicant must nominate the skilled occupation that was identified in the invitation and for which the applicant has a suitable skills assessment. Visa criteria include English proficiency.

5 March 2022 visa class

Changes were made to the GSM program to introduce a new permanent visa from 5 March 2022.

The amendments introduced one visa class:

- **Permanent Residence (Skilled Regional) (Class PR):** Subclass 191 (Permanent Residence (Skilled Regional)).
  - Subclass 191 has two streams – the Regional Provisional stream and the Hong Kong Regional stream.[15]
    - The Regional Provisional stream provides a permanent residence pathway for Subclass 491 Skilled Work Regional (Provisional) and Subclass 494 Skilled Employer Sponsored Regional (Provisional) visa holders. An applicant must have held a regional provisional visa for at least three years, complied substantially with the conditions that applied to that visa and obtained a minimum level of income for at least three years as the holder that visa.[16]

[13]Item 1230(3)(a), inserted by item 18 of sch 1 to F2019L00578.
[14] Explanatory Statement to F2019L00578, p.1.
[15] Subclass 191 was introduced by F2019L00578 and amended by F2021L01479. By virtue of amendments made by F2021L01479, Subclass 191 commenced on 5 March 2022 and includes two streams.
[16] The term 'regional provisional visa' is defined in reg 1.03 to mean a Subclass 491 or Subclass 494 visa. Subclasses 491 and 494 did not commence until 16 November 2019, so no applicant will have held a regional provisional visa for at least 3 years

- The Hong Kong stream provides a permanent residence pathway for Subclass 457, 482 and 485 visa holders from Hong Kong who are covered by concessional arrangements for Hong Kong passport holders and British National Overseas (BNO) passport holders.[17] In addition to holding a Hong Kong passport or BNO passport, an applicant must have held a Subclass 457, 482 or 485 visa for at least three years, complied substantially with the conditions that applied to that visa, been usually resident in Australia for a continuous period of at least 3 years, and before applying lived, worked or studied exclusively in a designated regional area.[18]

Major features of the GSM visas are summarised in the tables at pp.7 to 10 of this commentary.

The following commentaries discuss jurisdiction, requirements, visa criteria and issues in relation to specific GSM visas: Subclass 887 - Skilled Permanent Onshore (Class VB), Subclass 485 (Temporary Graduate) (Class VC), Subclass 189 & 190 - Skilled Independent and Skilled-Nominated (Permanent) (Class SI and SN) and Subclass 489 – Skilled Regional (Provisional) (Class SP).

prior to 19 November 2022. Accordingly, no valid application for a Subclass 191 visa in the Regional Provisional stream can be made prior to 19 November 2022.

[17] The terms 'Hong Kong passport holder' and 'British National (Overseas) passport holder' are defined in reg 1.03. Concessional arrangements for these passport holders were introduced by F2020L01047 and F2021L01479 respectively.

[18] The term 'designated regional area' is defined in reg 1.03 to mean a 'designated city or major regional centre; or a 'regional centre or other regional area'. The terms 'designated city or major regional centre' and 'regional centre or other regional area' have the meaning given by reg 1.15M(1) and 1.15M(2) respectively.

Class Schedule 1 reference	Opened	Closed	Subclass	Permanent/ temporary	On/offshore	Sponsored or nominated?	Points test
Skilled (Migrant) (Class VE) Item 1135	1 September 2007	1 July 2012	175 (Skilled – Independent)	Permanent	Offshore (onshore for Subclass 444 (Special Category) visa holders)	No	Yes
			176 (Skilled – Sponsored)			Yes – eligible relative in Australia as sponsor, or nominated by State/ Territory government agency	Yes – lower points test
Skilled (Residence) (Class VB) Item 1136	1 September 2007	1 January 2013 (repealed 1 July 2013)	885 (Skilled – Independent)	Permanent	Onshore	No	Yes
			886 (Skilled – Sponsored)			Yes – eligible relative in Australia as sponsor, or nominated by State/ Territory government agency	Yes – lower points test
		Current	887 (Skilled – Regional)	Permanent	Onshore (offshore for applicants who apply from 19 Sep 2020 in specific circumstances)	No	No
Skilled (Provisional) (Class VF) Item 1228	1 September 2007	1 July 2012 (repealed 1 July 2013)	475 (Skilled – Regional Sponsored)	Temporary	Offshore	Yes – eligible relative living in a designated area of Australia as sponsor, or nominated by State/Territory government agency.	Yes – lower points test
		Current	476 (Skilled – Recognised Graduate)	Temporary	Offshore (onshore for Subclass 444 (Special Category) visa holders)	No	No
Skilled (Provisional) (Class VC) Item 1229	1 September 2007	Current	*Until 23 March 2013:* 485 (Skilled – Graduate) *From 23 March 2013:* 485 (Temporary Graduate)	Temporary	Onshore (offshore for applicants who apply from 19 Sep 2020 in specific circumstances)	No	No

		1 January 2013 (repealed 1 July 2013)	487 (Skilled – Regional Sponsored)	Temporary	Offshore	Yes – eligible relative living in a designated area of Australia as sponsor, or nominated by State/Territory government agency.	Yes

Class Schedule 1 reference	Opened	Closed	Subclass	Permanent/ temporary	On/offshore	Sponsored or nominated?	Points test
Skilled – Independent (Permanent) (Class SI) Item 1137	1 July 2012 (except the Hong Kong stream, which opened 5 March 2022)	Current	189 (Skilled – Independent) (Replaced Subclasses 175 and 885)	Permanent	Both	No	Yes - Points-tested stream and pre-1 July 2017 Subclass 189 No - New Zealand stream and Hong Kong stream
Skilled – Nominated (Permanent) (Class SN) Item 1138	1 July 2012	Current	190 (Skilled – Nominated) (Replaced Subclasses 176 and 886)	Permanent	Both	Yes – nominated by a State/Territory government agency	Yes
Skilled – Regional Sponsored (Provisional) (Class SP) Item 1230	1 July 2012	Closed: 16 November 2019 to applicants seeking to satisfy primary criteria in the First Provisional Visa stream. Current: for applicants seeking to satisfy secondary criteria in the First Provisional Visa stream and applicants seeking to satisfy primary or secondary criteria in the Second Provisional Visa stream.	489 (Skilled – Regional (Provisional)) (Replaced Subclasses 475 and 487)	Temporary	Both	Yes – nominated by a State/Territory government or sponsored by an eligible relative living in a designated area of Australia	Yes

Skilled Work Regional (Provisional) (Class PS) Item 1241	16 Nov 2019	Current	491 (Skilled Work Regional (Provisional) (Replaced Subclass 489 for applicants seeking to satisfy primary criteria in the First Provisional Visa stream)	Temporary	Both	Yes – nominated by a State/Territory government agency or sponsored by an eligible relative living in a designated regional area.	Yes
Permanent Residence (Skilled Regional) (Class PR) Item 1139	5 March 2022	Current	191 (Permanent Residence (Skilled Regional))	Permanent	Both	No	No

The skilled visa points test

To facilitate the skilled migrant intake, an applicant's skills and experience and other attributes may be assessed under the points system. Under this system, an applicant is allocated points based on a range of attributes, or 'qualifications', which are considered desirable in a skilled migrant, including age, language and employment experience.

The points system is established in Part 2, Division 3, Subdivision B (ss 92–96) of the Act. It applies to visas for which a prescribed criterion is that the applicant receives the 'qualifying score' when assessed in accordance with ss 93–96 of the Act. These are known informally as points tested visas.

A person is taken to have received the qualifying score if their assessed score is more than or equal to the applicable pass mark. The pass mark is set by the Minister, from time to time, for each points tested visa class. The Minister also sets a pool mark. If a person receives less than the pool mark, they are taken not to have received the qualifying score. The pass mark and pool mark may be equal, otherwise the pool mark will be below the pass mark. The relevant pool and pass marks are specified by instrument. The relevant instrument can be located on the 'PoolPassMark' tab of the Register of Instruments: Skilled visas.

For GSM visa applications made on or after 1 September 2007, the applicable points tests are set out in Schedules 6B, 6C and 6D to the *Migration Regulations 1994* (Cth) (the Regulations), depending on a number of variables including the date of application and whether the applicant is in a specified 'class of persons'.

The table below summarises the application of each of these schedules:

Operation of Schedules 6B, 6C and 6D

Visa	Visa application date	Class of applicant	Applicable schedule
Subclass 175, 176, 475, 487, 885, and 886	Before 01/07/11		6B
	01/07/11 – 31/12/12	• If in reg 2.26AA(2) class[19]	6B
	01/07/11 – 31/12/12	• **if not** in reg 2.26AA(2) class[20]	6C
	01/07/11 – 31/12/12	if • in reg 2.26AB(2) class[21] and • does not meet 6B pass mark	6C

[19] reg 2.26AA(2) class is specified in sch 2 pt A or B (or C if applicant or partner state nominated) of relevant instrument. It is wider than, and includes, reg 2.26AB(2) class. The relevant instrument can be located on the 'Sch6B, 6C Classes' tab of the Register of Instruments: Skilled visas.

[20] reg 2.26AA(2) class is specified in sch 2 pt A or B (or C if applicant or partner state nominated) of relevant instrument. It is wider than, and includes, reg 2.26AB(2) class. The relevant instrument can be located on the 'Sch6B,6C Classes' tab of the Register of Instruments: Skilled visas.

[21] reg 2.26AB(2) class is specified in sch 2 pt A (or C if applicant or partner state nominated) of relevant instrument. In contrast to reg 2.26AA(2), it does not include pt B and is thus narrower than reg 2.26AA(2). The relevant instrument can be located on the 'Sch6B,6C Classes' tab of the Register of Instruments: Skilled visas.

Subclass 189 (Points-tested stream and pre-1 July 2017 Subclass 189), 190, 489	On or after 01/07/12		6D
Subclass 491	On or after 16/11/19		6D

The Schedule 6B and 6C points tests were removed from the Regulations from 1 July 2013, but they continue to operate in respect of valid applications for the closed GSM visa subclasses.[22]

For Subclass 189 (Points-tested stream and pre-1 July 2017 Subclass 189), 190 and 489 visas, which were introduced on 1 July 2012, and for Subclass 491 visas, which were introduced on 16 November 2019, the General Points Test in Schedule 6D applies.[23] The content of Schedule 6D is similar to that of Schedule 6C except that most of the qualifications are to be assessed in relation to the time the applicant received the Minister's invitation to apply for the visa, rather than the time of decision.

For more detailed discussion, see: General Points Test (Schedule 6D).

Relevant amending legislation

Title	Reference Number	Legislation Bulletin
Migration Amendment Regulations 2007 (No 7) (Cth)	SLI 2007, No 257	No 9/2007
Migration Amendment Regulations 2012 (No 2) (Cth)	SLI 2012, No 82	No 4/2012
Migration Legislation Amendment (2017 Measures No 2) Regulations 2017 (Cth)	F2017L00549	No 2/2017
Migration Amendment (New Skilled Regional Visas) Regulations 2019 (Cth)	F2019L00578	No 4/2019
Migration Amendment (COVID-19 Concessions) Regulations 2020 (Cth)	F2020L01181	No 2/2020
Migration Amendment (Hong Kong Passport Holders) Regulations 2020 (Cth)	F2020L01047	(see Legal Services Digest No 34/2020)
Migration Amendment (Temporary Graduate Visas) Regulations 2020 (Cth)	F2020L01639	No 1/2021

[22] regs 2.26AA–2.26AB omitted by SLI 2012, No 82 and item 102, sch 13 to the Regulations, inserted by SLI 2012, No 82.
[23] reg 2.26AC, inserted by SLI 2012 No 82, amended by F2019L00578.

Migration Legislation Amendment (Hong Kong) Regulations 2021 (Cth)	F2021L01479	No 6/2021
Migration Amendment (Subclass 485 (Temporary Graduate) Visa Replacement Stream and Other Measures) Regulations 2022	F2022L00845	No 2/2022

Last updated/reviewed: 18 November 2022

SUBCLASS 189 (SKILLED-INDEPENDENT)(CLASS SI) AND SUBCLASS 190 (SKILLED-NOMINATED)(CLASS SN) VISAS

Overview[1]

The Subclass 189 (Skilled–Independent)(Class SI) and Subclass 190 (Skilled–Nominated)(Class SN) visas are both permanent visas.[2] Subclass 189 has three streams:

- The Points-tested stream, which commenced on 1 July 2017;[3]
- The New Zealand stream, which also commenced on 1 July 2017[4] but closed to new primary applications between 10 December 2022 and 1 July 2023;[5] and
- The Hong Kong stream, which commenced on 5 March 2022. [6]

The Subclass 189 Points-tested stream is, like the Subclass 190, designed for skilled applicants who submitted an expression of interest in 'SkillSelect' (the online skilled migrant selection model) and have been invited by the Minister to apply for the visa.[7] The key difference between the two is that the Subclass 190 visa requires the applicant to be nominated by a State or Territory government agency. Subject to receiving an invitation to apply, applicants can make an application for these visas onshore or offshore.

The Subclass 189 New Zealand stream is for Subclass 444 (New Zealand Special Category) visa holders who have lived in and contributed to Australia for a number of years. Applicants do not need to be invited to apply.

The Subclass 189 Hong Kong stream is for Subclass 457, 482 and 485 visa holders from Hong Kong, who have held that visa for at least 4 years and are covered by the concessional arrangements (i.e. a visa that was extended to 8 July 2025 or granted for a period of five years) for Hong Kong passport holders and British National (Overseas) (BNO) passport holders.[8]

There are no distinct streams in the Subclass 190.

Tribunal's jurisdiction

A decision to refuse to grant a Subclass 189 or Subclass 190 visa is generally reviewable under Part 5 of the *Migration Act 1958* (Cth) (the Act).[9]

If the visa applicant made the visa application while in Australia (but not in immigration clearance), the decision is reviewable under s 338(2) of the Act. In these cases:

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations* 1994 (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] These subclasses were originally introduced on 1 July 2012, as part of the reforms to the General Skilled Migration program. See *Migration Amendment Regulation 2012 (No 2)* (Cth) (SLI 2012, No 82), and Explanatory Statement to SLI 2012, No 82 at page 1.
[3] Introduced by the *Migration Legislation Amendment (2017 Measures No 2) Regulations 2017* (Cth) (F2017L00549).
[4] Introduced by F2017L00549.
[5] Item 1137(4G)(aa) of sch 1, inserted by *Migration Amendment (Subclass 189 Visas—New Zealand Stream) Regulations 2022* (Cth) (F2022L01623).
[6] Introduced by the *Migration Legislation Amendment (Hong Kong) Regulations 2021* (Cth) (F2021L01479).
[7] See the Department's website for more information: https://immi.homeaffairs.gov.au/visas/working-in-australia/skillselect (accessed 9 January 2023).
[8] The terms 'Hong Kong passport holder' and 'British National (Overseas) passport holder' are defined in reg 1.03. Concessional arrangements for these passport holders were introduced by the *Migration Amendment (Hong Kong Passport Holders) Regulations* 2020 (F2020L01047) and F2021L01479 respectively.
[9] Note that decisions made under s 501 on character grounds are not reviewable under pt 5.

- the application for review must be lodged within 21 days after the notification is received by the visa applicant;[10]
- the visa applicant has standing to apply for review;[11]
- the visa applicant must be in the migration zone at the time of the AAT application.[12]

If the visa applicant made the visa application outside Australia, the decision is reviewable under s 338(7A) of the Act. In these cases:

- the application for review must be lodged within 21 days after the notification is received by the visa applicant;[13]
- the visa applicant has standing to apply for review;[14]
- the visa applicant must be in the migration zone at the time of both the primary decision and the AAT application.[15]

Applicants may combine their review applications where the visa applications have been combined in a way permitted by reg 2.08 (newborn child), reg 2.08A (addition of spouse, de facto partner or dependent children), or Schedule 1 (valid application by members of the same family unit made at the same time).[16]

The Tribunal has no jurisdiction regarding the pre-application SkillSelect process as no Part 5-reviewable decision is involved.[17]

Requirements for valid visa application

The requirements for making a valid application for a Subclass 189 and Subclass 190 visa are set out in items 1137 and 1138 respectively of Schedule 1 to the *Migration Regulations 1994* (Cth) (the Regulations). These include form, visa application charge and location requirements.[18] An application by a person claiming to be a member of the family unit of an applicant may be made at the same time as, and combined with, that person's application.[19]

Subclass 189 and 190 visas applied for in response to an invitation include additional requirements which are similar to each other. There are specific additional requirements for applications in the Subclass 189 New Zealand and Hong Kong streams.

[10] s 347(1)(b); reg 4.10(1)(a). However, an application by a detainee for review must be given to the Tribunal within 7 working days after the notification is received by the detainee: s 347(1)(b) and reg 4.10(2)(b).
[11] s 347(2)(a).
[12] s 347(3).
[13] s 347(1)(b) and reg 4.10(1)(a). However, an application by a detainee for review must be given to the Tribunal within 7 working days after the notification is received by the detainee: s 347(1)(b) and reg 4.10(2)(b).
[14] s 347(2)(a).
[15] s 347(3A).
[16] reg 4.12(2).
[17] While the SkillSelect process involves a decision to invite a person to apply for the visa, there is no clear 'decision' not to invite a person to make an application. Even if there were such a 'decision', it would not be a Part 5-reviewable decision as defined in s 338.
[18] Items 1137 and 1138 of sch 1. For Subclass 189 visa applications made on or after 18 April 2015, and for Subclass 190 visa applications made on or after 1 July 2017, certain requirements for making visa applications are specified by instrument. For the relevant instruments see the Register of Instruments: Skilled visas.
[19] Items 1137(4A)(d) (Subclass 189 Points-tested stream), 1137(4G)(e) (Subclass 189 New Zealand stream), 1137(4H)(f) (Subclass 189 Hong Kong stream), 1138(3)(d) (Subclass 190), and 1137(3)(d) (in force for pre-1 July 2017 Subclass 189). Note that to satisfy the sch 2 secondary criteria, the applications must have been combined: cls 189.311(b) and 190.311(b), discussed below.

Visas by invitation

For Subclass 190, Subclass 189 Points-tested stream and pre-1 July 2017 Subclass 189 visas, items 1137 and 1138 require an applicant seeking to satisfy the primary criteria to meet the following requirements:

- **invitation** – the applicant must have been invited in writing by the Minister to apply for the visa.[20]
- **time limits** – the application must be made within the period stated in the invitation.[21]
- **age** –
  - *for invitations issued on or after 1 July 2017:* the applicant must not have turned 45 at the time of invitation.[22]
  - *for invitations issued before 1 July 2017:* the applicant must not have turned 50 at the time of invitation.[23]
- **skilled occupation** – the applicant must nominate a skilled occupation:
  - that is specified in the relevant instrument as a skilled occupation at the time of invitation.[24]
  - that is specified in the invitation as the skilled occupation which the applicant may nominate.[25]
  - for which the applicant declares in the application that their skills have been assessed as suitable by the relevant assessing authority.[26] *For visa applications made on or after 28 October 2013 as a result of an invitation to apply for the visa given on or after 28 October 2013*, the assessment must not have been for a Subclass 485 (Temporary Graduate) visa.[27]
- *For Subclass 190 applicants* – the applicant must be nominated by a State or Territory government agency.[28]
- *For Subclass 189 Points-tested stream* – the applicant must not nominate the New Zealand stream.[29]

[20] Item 1137(4B), table item 1 (Subclass 189 Points-tested stream), item 1138(4), table item 1 (Subclass 190), and item 1137(4), table item 1 (in force for pre-1 July 2017 Subclass 189).
[21] Item 1137(4B), table item 2 (Subclass 189 Points-tested stream), item 1138(4), table item 2 (Subclass 190), and item 1137(4), table item 2 (in force for pre-1 July 2017 Subclass 189). Information on the Department's website provides that if an applicant is invited to apply for a visa, s/he will have 60 days to do so. See https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/skilled-nominated-190 (accessed 9 January 2023).
[22] Item 1137(4B), table item 3 as inserted by F2017L00549. Item 1138(4), table item 3 as amended by *Migration Legislation Amendment (2017 Measures No 3) Regulations 2017* (Cth) (F2017L00816).
[23] Item 1137(4), table item 3 and item 1138(4), table item 3, in force before 1 July 2017. For the relevant instrument, see the 'SOL-SSL' tab in the Register of Instruments – Skilled visas.
[24] Item 1137(4B), table item 4(a) and item 1138(4), table item 4(a).
[25] Item 1137(4B), table item 4(b) and item 1138(4), table item 4(b).
[26] Item 1137(4B), table item 4(c) and item 1138(4), table item 4(c).
[27] Item 1137(4), table item 4(c) and item 1138(4), table item 4(c), as amended by the *Migration Amendment (Skills Assessment) Regulation 2013* (Cth) (SLI 2013, No 233). Item 1137(4) has been replaced by item 1137(4B) for Subclass 189 Points-tested stream applicants.
[28] Item 1138(4), table item 5.
[29] Item 1137(4B), table item 5.

New Zealand stream visa

For the Subclass 189 New Zealand stream, item 1137 requires an applicant to have applied before 10 December 2022 or on or after 1 July 2023, hold a Subclass 444 (Special Category) visa, and not nominate the Points-tested stream.[30]

Hong Kong stream visa

For the Subclass 189 Hong Kong stream, item 1137 requires that the applicant must not nominate the Points-tested or New Zealand streams, and the primary applicant must:

- hold a Hong Kong Passport or BNO passport;[31]
- hold a Subclass 457, 482 or 485 visa that was either:
  - granted before 9 July 2020 and extended to 8 July 2025; or
  - granted on or after 9 July 2020 for a period of 5 years (unless the applicant holds a Subclass 457 visa);[32] and
- have held that visa for at least 4 years (unless the applicant holds a Subclass 457 visa granted on or after 9 July 2020).[33]

Visa criteria

The criteria for the grant of a Subclass 189 visa and a Subclass 190 visa are set out in Parts 189 and 190 of Schedule 2 to the Regulations.

Subclass 189 and 190 visas do not have 'time of application' and 'time of decision' criteria, although some, such as the skills assessment criteria, are expressed as applying at the 'time of invitation'.[34] Unless another temporal point is specified, the criteria must be satisfied at the time of decision.

Primary criteria

There are common primary criteria for all Subclass 189 and 190 applicants. These require the applicant and each member of their family unit to satisfy specified public interest and special return criteria.[35] These differ depending on whether the person has turned 18 or not, and whether or not they are themselves applicants. For members of the family unit who are applicants, these criteria are similar, but not identical, to those contained in the secondary

[30] Items 1137(4G)(aa), 1137(4G)(c) and 1137(4G)(b) respectively.
[31] Item 1137(4L)(e)(i).
[32] Items 1137(4L)(e)(ii) and 1137 (4M)(c). For the purpose of any Subclass 457 visa granted to a Hong Kong passport holder or BNO passport holder on or after 9 July 2020, the description of the qualifying visas covered by the Hong Kong concessions at paragraph 1137(4M)(c) can be disregarded: cl 10106(2), Part 101 to Sch 13 of the Regulations. This transitional provision is included because any Subclass 457 visas granted to Hong Kong passport holders or BNO passport holders on or after 9 July 2020 will have an end date of 8 July 2025 rather than being granted for a five year period.
[33] Item 1137(4L)(e)(iii). cl 10106(1), Part 101 of Sch 13 to the Regulations.
[34] In *Thapa v MICMSMA* [2021] FCCA 686, the Court held at [28] – [30] that the words 'at the time of invitation to apply for the visa' in cl 189.222(1) meant the period within which the invitation was valid or open, not the date the invitation to apply was made or given to an applicant. As the invitation expressed that it was valid for 60 days, it was open for the applicant to submit a skills assessment that had only been obtained during that period, even though it had not been in existence at the date the invitation was issued. The Court's reasoning would appear equally applicable to the similarly worded skills assessment requirement in cl 190.212(1).
[35] cls 189.211, 189.212, 190.216, 190.217.

criteria. The visas by invitation and New Zealand and Hong Kong stream visas each then have the following additional primary criteria.

Visas by invitation

The criteria for applicants seeking to satisfy the primary criteria for a Subclass 190, Subclass 189 Points-tested stream or pre-1 July 2017 Subclass 189 visa are:

- **invitation -** the applicant was invited in writing by the Minister to apply for the visa.[36]
- **skills assessment -** at the time of invitation to apply for the visa:
  - the relevant assessing authority had assessed the applicant's skills as suitable for the applicant's nominated skilled occupation.[37]
  - *for visa applications made on or after 28 October 2013 as a result of an invitation to apply for the visa on or after 28 October 2013*: the assessment was not for a Subclass 485 (Temporary Graduate) visa.[38]
  - *for visa applications made on or after 1 July 2014*: no more than 3 years had passed since the date of the assessment or, if a shorter period of validity was specified in the assessment, that shorter period has not ended.[39]
  - if the skills assessment was made on the basis of a qualification obtained in Australia while the applicant held a student visa, the qualification was obtained as a result of studying a registered course.[40]

In *Thapa v MICMSMA*, the Court held that the words 'at the time of invitation to apply' in cl 189.222(1) meant the period within which the invitation was valid or open, not the date the invitation itself was made or given to the applicant.[41] As the invitation to apply was expressed as being valid or open for 60 days, it was open for the applicant to submit a skills assessment that had only been obtained during that period, even though it had not been in existence on the date the invitation was issued. The Court's reasoning would appear equally applicable to the similarly worded skills criterion in cl 190.212(1) as well.

- **English language proficiency** - at the time of invitation to apply for the visa, the applicant had competent English.[42] see below.
- **points test** - the applicant's score, when assessed under Subdivision B of Division 3 of Part 2 of the Act (ss 92–96), is not less than the qualifying score and the score stated in the invitation to apply for the visa.[43] see below

[36] cls 189.221, 190.211.
[37] cl 189.212(1) for applications made before 1 July 2017; 189.222(1)(a) for applications made on or after 1 July 2017; 190.212(1)(a).
[38] cl 189.212(1)(b) for applications made before 1 July 2017; 189.222(1)(b) for applications made on or after 1 July 2017; 190.212(1)(b) inserted by SLI 2013, No 233.
[39] cl 189.212(1)(c)-(d) for applications made before 1 July 2017; 189.222(1)(c)–(d) for applications made on or after 1 July 2017; 190.212(1)(c)–(d) inserted by *Migration Legislation Amendment (2014 Measures No 1) Regulation 2014* (Cth) (SLI 2014, No 82).
[40] cl 189.212(2) for applications made before 1 July 2020; 189.222(2) for applications made on or after 1 July 2021; 190.212(2). 'Registered course' is defined in reg 1.03.
[41] *Thapa v MICMSMA* [2021] FCCA 686 at [28]-[30].
[42] cls 189.223, 190.213. Regulation 1.03 provides that 'competent English' has the meaning set out in reg 1.15C.
[43] cls 189.224, 190.214.

- **additional public interest and special return criteria** - *for Subclass 189 Points-tested stream visas*: the applicant and each member of their family unit satisfy additional specified public interest and special return criteria.[44]
- **current nomination** - *for Subclass 190 visas*: the nominating State or Territory government agency has not withdrawn the nomination.[45]

New Zealand stream visa

Consistent with this stream being closed to new visa applications between 10 December 2022 and 30 June 2023, concessions were also introduced regarding the primary criteria for visa applications made before 10 December 2022 where a decision has not been made to grant or refuse to grant the visa before that day.[46] In these circumstances, cl 189.231A requires that the applicant satisfies either, or both, cl 189.231B or cls 189.231, 189.232, 189.233 and 189.234.[47] These are:

- **applied before 10 December 2022 (cl 189.231B)** – the application must have been made before 10 December 2022.[48]
- **resident in Australia (cl 189.231)** – the applicant must have been usually resident in Australia continuously for at least 5 years immediately before the date of application, and that period of residence must have started on or before 19 February 2016.[49]
- **filed tax returns (cl 189.232)**
  - *for applications made before 1 July 2021* the applicant must provide notices of assessment from the Commissioner of Taxation for the 4 most recently completed income years before the date of the application (during the period of 5 years immediately before the application).[50]
  - *for applications made on or after 1 July 2021* the applicant must provide notices of assessment from the Commissioner of Taxation for 3 income years ending during the 5 years immediately before the date of the application;[51] and one of the income years must be the income year that ended most recently before the date of the application.[52]
- **minimum income (cl 189.233)** – the applicant's taxable income (in each of the notices of assessment provided) must be no less than the income specified by the

[44] cls 189.225, 189.226.
[45] cl 190.215.
[46] These concessions are to support faster visa processing of on-hand applications for certain New Zealand citizens living in Australia generally for a significant period and who continued to work in Australia during the Covid-19 pandemic: Explanatory Statement to F2022L01623, p 5.
[47] cls 189.231A and 189.231B, inserted by item 2 of Part 1 of Sch 1 and cl 11401(1) of Part 2 of Sch 1 to F2022L01623.
[48] cls 189.231B as inserted by item 2 of Part 1 of Sch 1 to F2022L01623.
[49] cl 189.231.
[50] cl 189.232(1) as inserted by F2017L00549.
[51] cl 189.232(1) as amended by the *Migration Amendment (Subclass 189 Visas) Regulations 2021* (Cth) (F2021L00668) for applications made on or after 1 July 2021.
[52] cl 189.232(1A) inserted by F2021L00668 for applications made on or after 1 July 2021.

Minister for that year, unless the applicant is exempt and has provided other specified evidence.[53]

- **additional public interest and special return criteria (cl 189.234)** – the applicant and each member of their family unit satisfy additional public interest and special return criteria.[54]

The practical result of this is that an applicant who applied before 10 December 2022 and did not have a decision to grant or to refuse to grant the visa made before that day will satisfy new cl 189.231B, and therefore new cl 189.231A(a), without needing to also satisfy the additional primary criteria in cls 189.231, 189.232, 189.233 and 189.234.

The current instrument specifying the minimum income, classes of exempt applicants and evidence required is located in the '189NZStream' tab of the Register of Instruments – Skilled visas.

Hong Kong visa stream

The criteria for applicants seeking to satisfy the primary criteria for a Subclass 189 Hong Kong stream visa are:

- **substantially complied with conditions** – the applicant must have substantially complied with the conditions of the Subclass 457 visa, Subclass 482 visa or Subclass 485 visa they held when they made the application, and any subsequent bridging visa they held.[55]
- **resident in Australia** – the applicant must have been usually resident in Australia for a continuous period of at least 4 years immediately before the date of application.[56]
- **additional public interest and special return criteria** – the applicant and each member of their family unit satisfy additional public interest and special return criteria.[57]

Secondary criteria

The secondary criteria, for applicants who are members of the family unit of a person who satisfies the primary criteria, require that the applicant is a member of the family unit of a person who holds a Subclass 189 or 190 visa granted on the basis of satisfying the primary criteria; and made a combined application with that person.[58] Secondary applicants must also satisfy specified public interest and special return criteria.[59]

[53] cl 189.233(1) as inserted by F2017L00549 for applications made before 1 July 2021; cl 189.233(1) as amended by F2021L00668 for applications made on or after 1 July 2021.
[54] cl 189.234
[55] cl 189.241.
[56] cl 189.242.
[57] cl 189.243.
[58] cls 189.311, 190.311. A secondary applicant cannot satisfy the secondary criteria by subsequently applying for a Subclass 189 or 190 visa on the basis of membership of the family unit of a person who holds a Subclass 189 or 190 visa.
[59] cls 189.312, 189.313, 190.312, 190.313. Clauses 189.312(1) and 190.312(1) were amended in respect of visa applications made on or after 24 November 2012, to include new PIC 4021 (passport requirements) and replace the omitted cls 189.314 and 190.314: *Migration Legislation Amendment Regulation 2012 (No 5)* (Cth) (SLI 2012, No 256).

For the Subclass 189 Hong Kong stream, secondary applicants may be regarded as a member of the family unit of an applicant for a Subclass 189 visa in the Hong Kong stream, if at the time of applying for that visa they hold a Subclass 457, 482 or 485 visa.[60]

Legal issues

The Act and Regulations provide a number of definitions which specifically relate to General Skilled Migration visas. The key definitions which apply to Subclass 189 and 190 visas are highlighted below.

English language proficiency

Clauses 189.223 and 190.213 require the applicant to have competent English *at the time of the invitation* to apply for the visa.

'Competent English' is defined in reg 1.15C. For Subclass 189 and 190 applications, a person has competent English if:

- the person undertook a language test, specified in the relevant instrument; and
- the person is an applicant for a visa; and
- for a person who was invited (or whose spouse or de facto partner was invited) by the Minister under the Regulations, in writing, to apply for the visa - the test was conducted in the 3 years immediately before the date of the invitation; and
- the person achieved a score specified in the instrument.

or alternatively:

- the person holds a passport of a type specified in the relevant instrument.[61]

For more information regarding English language proficiency, see English Language Ability – Skilled/Business Visas.

Skilled occupation

The concept of 'skilled occupation' is relevant to both making a valid visa application and satisfying the substantive criteria for the grant of a Subclass 189 or 190 visa.

'Skilled occupation' in relation to a person is defined in reg 1.15I, as meaning an occupation of a kind:

- that is specified in the relevant instrument to be a skilled occupation; and
- if a number of points are specified in the instrument as being available – for which the number of points are available; and
- that is applicable to the person in accordance with the specification of the occupation.[62]

[60] reg 1.12(5).
[61] reg 1.15C as amended by SLI 2015, No 34, sch 2 item 5, repealing paragraph 1.15C(1)(b) and substituting paragraphs (b), (ba) and (bb), applicable to applications made on or after 1 July 2012 but not finally determined before 18 April 2015, and applications made on or after 18 April 2015: see item 4102 of sch 13 as substituted by *Migration Legislation Amendment (2015 Measures No 3) Regulation 2015* (Cth) (SLI 2015, No 184) sch 7. For the relevant instrument specifying language tests, scores and passports, see the 'EngTests' tab in the Register of Instruments – Skilled visas.

Refer to the 'SOL-SSL' (skilled occupation list) tab for the relevant instruments listing skilled occupations in the Register of Instruments - Skilled Visas. For further information about 'skilled occupation' and the relevant instruments, see Skilled Occupation and Skilled Occupation List Instruments - Quick guide.

Qualifying score and the points test

An applicant is taken to have received the qualifying score referred to in cls 189.224(2) and 190.214(2) if their assessed score is equal to or more than the applicable pass mark.[63] The assessed score for applicants for a Subclass 189 or 190 visa is determined in accordance with the points test in Schedule 6D. In addition to having the 'qualifying score', the applicant's score when assessed against Schedule 6D must not be less than the score stated in the invitation to apply for the visa. For more information about the Schedule 6D points test, please see General Points Test (Schedule 6D).

Relevant amending legislation

Title	Reference Number	Legislation Bulletin
Migration Amendment Regulations 2011 (No 3) (Cth)	SLI 2011 No 74	No 2/2011
Migration Amendment Regulation 2012 (No 2) (Cth)	SLI 2012, No 82	No 4/2012
Migration Legislation Amendment Regulation 2012 (No 5) (Cth)	SLI 2012, No 256	No 7/2012
Migration Amendment (Skills Assessment) Regulation 2013 (Cth)	SLI 2013, No 233	No 15/2013
Migration Legislation Amendment (2014 Measures No 1) Regulation 2014 (Cth)	SLI 2014, No 82	No 5/2014
Migration Amendment (2015 Measures No 1) Regulation 2015 (Cth)	SLI 2015, No 34	No 1/2015
Migration Legislation Amendment (2015 Measures No 3) Regulation 2015 (Cth)	SLI 2015, No 184	No 10/2015
Migration Legislation Amendment (2017 Measures No 2) Regulations 2017 (Cth)	F2017L00549	No 2/2017
Migration Legislation Amendment (2017 Measures No 3) Regulations 2017 (Cth)	F2017L00816	No 4/2017

[62] reg 1.15I.
[63] s 94(1). See further the 'PoolPassMark' tab in the Register of Instruments - Skilled Visas.

Migration Amendment (Subclass 189 Visas) Regulations 2021 (Cth)	F2021L00668	
Migration Amendment (Hong Kong Passport Holders) Regulations 2020 (Cth)	F2020L01047	(see Legal Services Digest No 34/2020)
Migration Legislation Amendment (Hong Kong) Regulations 2021 (Cth)	F2021L01479	No 6/2021
Migration Amendment (Subclass 189 Visas—New Zealand Stream) Regulations 2022 (Cth)	F2022L01623	

Relevant case law

Judgment	Judgment Summary
Thapa v MICMSMA [2021] FCCA 686	Summary

Available decision precedents

The following decision precedents are available:

- **Subclass 189 General** – suitable for Subclass 189 (pre 1 July 2017) or Subclass 189 (Points-tested stream) cases where the issue is satisfaction of the skills assessment criterion (cl 189.212), or the English language criterion (cl 189.213). It can also be used as a 'shell' for other Subclass 189 or Subclass 189 (Points-tested stream) issues by selecting the 'other criteria' option.
- **Subclass 189/190/489/491 Visa Refusal – General Points Test (Sch 6D)** – suitable for Subclass 189 (pre 1 July 2017) or Subclass 189 (Points-tested stream) or Subclass 190 cases where the issue in dispute is whether the applicant has the qualifying score when assessed against the points test in Schedule 6D.
- **PIC 4020** – suitable for any visa subclass where the issue in dispute is whether the applicant meets public interest criterion 4020 (false / misleading information / bogus documents).

There are also optional standard paragraphs available for skilled visas addressing relevant law for English language requirements.

Last updated/reviewed: 23 January 2023

SUBCLASS 485 (TEMPORARY GRADUATE) (CLASS VC)

Overview[1]

The Skilled (Provisional) Class VC visa is a temporary visa and one of four General Skilled Migration (GSM) visa classes introduced on 1 September 2007.[2]

For primary visa applications made before 1 July 2013, it contained two subclasses:

- Subclass 485 (Skilled – Graduate)
- Subclass 487 (Skilled – Regional Sponsored).[3]

Subclass 487 closed to primary applications from 1 January 2013 and to secondary applications from 1 July 2012.[4] It was repealed on 1 July 2013, so for applications made from that date Subclass 485 is the only visa subclass within Class VC.[5]

Subclass 485 (Skilled - Graduate) underwent significant amendments from 23 March 2013.[6] It was renamed 'Temporary Graduate' for visa applications made on or after 23 March 2013. It was also restructured to create two alternative visa 'streams' upon which the visa could be granted:

- the Graduate Work stream, which reflects the previous criteria for the grant of a Subclass 485 visa; and
- the Post-Study Work stream, a new stream that does not require the applicant to have particular skills.[7]

From 20 January 2021, applicants who have held a Subclass 485 visa in the Post-Study Work stream can, in specific circumstances, apply for and be granted a second Subclass 485 visa in the Post-Study Work stream.[8]

This legal commentary considers the requirements, visa criteria and issues relevant to applications for Subclass 485 visas made from 23 March 2013.

For queries in relation to Subclass 487 visas, or Subclass 485 visas where the visa application was made before 23 March 2013, please contact MRD Legal Services.

Merits review

If an application for a Subclass 485 visa was made onshore, a decision to refuse the application will generally be reviewable under s 338(2) of the *Migration Act 1958* (Cth) (the

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] The other three visa classes introduced on 1 September 2007 were Skilled (Migrant)(Class VE), Skilled (Residence)(Class VB) and Skilled (Provisional)(Class VF) visas.
[3] Item 1229(10).
[4] Items 1229(3)(a)–(b) as amended by *Migration Legislation Amendment Regulation (2013) (No 1)* (Cth) (SLI 2013, No 33)
[5] *Migration Amendment Regulation 2012 (No 2)* (Cth) (SLI 2012, No 82), sch 2, items [21]–[23], [29]. Note: Amendments at SLI 2012, No 82, sch 2, item [21] which were to commence on 1 July 2013 could not be effected as item 1229(3) was substituted by SLI 2013, No 33, sch 2, item [5]. Items 1229(3)(i) and (n) were later repealed by *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (Cth) (SLI 2014, No 30).
[6] SLI 2013, No 33.
[7] SLI 2013, No 33, sch 2. See also Explanatory Statement to SLI 2013, No 33 at pp.6–20.
[8] Item 1229(4)(a)(v), cls 485.232 and 485.233 inserted by *Migration Amendment (Temporary Graduate Visas) Regulations 2020* (Cth) (F2020L01639).

Act).[9] Applications for review of these decisions must be made by the visa applicant and the applicant must be in the migration zone when the review application is made.[10]

If an application for a Subclass 485 visa was made offshore, a decision to refuse the visa application is not reviewable.

Requirements for making a valid application

The requirements for making a valid application for a Class VC visa are contained in item 1229 of Schedule 1 to the *Migration Regulations 1994* (Cth) (the Regulations). The Schedule 1 requirements differ depending on the time of visa application.

The requirements for lodging a valid Class VC visa application on or after 23 March 2013 are:

- **form, place, manner, and charge** - the visa application must be made on the specified form;[11] at the place and in the manner specified;[12] and the visa application charge payable at the time the application is made must be paid.[13]
- **location**
  - For applications made *before 19 September 2020* - applicants must be in Australia when the application is made, unless claiming to be a member of the family unit of a Class VC visa holder, in which case they may be in or outside Australia.[14]
  - For applications made *on or after 19 September 2020 and before 20 January 2021* – an applicant claiming to be a member of the family unit of a Class VC visa holder may be in or outside Australia when the application is made;[15] all other applicants must be in Australia, unless the application is made during a concession period, in which case they may be in or outside Australia, but not in immigration clearance.[16]

[9] Decisions made under s 501 of the Act on character grounds are not reviewable under pt 5.
[10] ss 347(2)(a), 347(3).
[11] For visa applications made before 18 April 2015, the form is specified in item 1229(1); for visa applications made on or after 18 April 2015, the form is specified in an instrument made under reg 2.07(5): item 1229(1) as substituted by *Migration Amendment (2015 Measures No 1) Regulation 2015* (Cth) (SLI 2015, No 34). The relevant instruments are available under the 'VisaApp' tab in the Register of Instruments – Skilled visas.
[12] For applications made before 18 April 2015: by internet or sent to a specified address: item 1229(3)(c) as amended by SLI 2013, No 33. For visa applications made on or after 18 April 2015, the application must be made at the place and in the manner (if any) specified by the Minister in a legislative instrument made for item 1229(3)(c) by reg 2.07(5): item 1229(3)(c) as substituted by SLI 2015, No 34. For the relevant instrument, see the 'VisaApp' tab in the Register of Instruments – Skilled visas.
[13] Item 1229(2) as substituted by SLI 2013, No 33 for applications made before 20 January 2021; item 1229(2)(a) as substituted by F2020L01639 for applications made on or after 20 January 2021. Also, for visa applications made from 1 July 2013, item 1229(2) was further amended by *Migration Amendment (Visa Application Charge and Related Matters) Regulation 2013* (Cth) (SLI 2013, No 118). Note: the amendments to item 1229(2) in SLI 2013, No 118 overrode the amendments to items 1229(2)(a) and (b) by SLI 2012, No 82, sch 2, items [19] – [20] which were to commence on 1 July 2013.
[14] Items 1229(3)(f) and (g) as substituted by SLI 2013, No 33. In *Luk v MIBP* [2018] FCCA 2740 the Court considered the requirement in Item 1229(3)(g) and rejected the claim that the application lodged when the applicant was outside Australia was an 'inchoate application' that was completed and became a valid application when the applicant entered the migration zone.
[15] Item 1229(3)(f).
[16] Item 1229(3)(g) as substituted by the Migration Amendment (COVID-19 Concessions) Regulations 2020 (F2020L01181) for applications made on or after 19 September 2020. The term 'concession period' is defined in reg 1.15N as the period commencing on 1 February 2020 and ending on a day specified by the Minister in an instrument (*'initial concession period'*), as well as a period determined by the Minister under an instrument for the purposes of a specified provision of the Regulations in which the expression 'concession period' is used, beginning not before the initial concession period ends: inserted by F2020L01181. An instrument providing these specifications is intended to ensure flexibility since it is not known when the travel restrictions and economic disruptions caused by the COVID-19 pandemic will end and there may be resurgences at some point

  - For applications made *on or after 20 January 2021* – an applicant claiming to be a member of the family unit of a Class VC visa holder who satisfied the primary criteria may be in or outside Australia, but not in immigration clearance, when the application is made;[17] all other applicants must be in Australia, unless:
    - » the application is made during a concession period; and
    - » the applicant is not applying for a second Subclass 485 visa in the Post-Study Work stream, or as a member of the family unit of an applicant for a second Subclass 485 visa in the Post-Study Work stream

    in which case they may be in or outside Australia, but not in immigration clearance.[18]
  - An application by a member of the family unit may be made at the same time and place and combined with the primary application.[19]

- **nomination of applicable stream for Subclass 485 visa** - primary applicants for a Subclass 485 visa must nominate only one stream to which the application relates.[20]
- **primary applicants in Subclass 485 Graduate Work stream** - must nominate a skilled occupation specified in the relevant instrument.[21]
- **primary applicants in Subclass 485 Post-Study Work stream** - must hold or have held their first Student visa granted on the basis of a post 5 November 2011 application;[22] or if seeking the grant of a second Subclass 485 visa in the Post-Study Work stream, must hold a Subclass 485 visa in the Post-Study Work stream.[23]
- **age** - primary Subclass 485 applicants must be less than 50.[24]
- **visa status**
  - for applications made *before 19 September 2020*, and applications made *on or after 19 September 2020 but before 20 January 2021* by an applicant who is in Australia when making the application, one of the following requirements must be met:
    - » hold an eligible student visa;[25] or

after the initial concession period: Explanatory Statement to F2020L01181 at p.12. There is no instrument for these purposes at time of writing (December 2020).
[17] Item 1229(3)(f) as substituted by F2020L01639.
[18] Item 1229(3)(f) and 1229(3)(g) as substituted by F2020L01639 for applications made on or after 20 January 2021. The term 'concession period' is defined in reg 1.15N as the period commencing on 1 February 2020 and ending on a day specified by the Minister in an instrument ('*initial concession period*'), as well as a period determined by the Minister under an instrument for the purposes of a specified provision of the Regulations in which the expression 'concession period' is used, beginning not before the initial concession period ends: inserted by F2020L01181. An instrument providing these specifications is intended to ensure flexibility since it is not known when the travel restrictions and economic disruptions caused by the COVID-19 pandemic will end and there may be resurgences at some point after the initial concession period: Explanatory Statement to F2020L01181 at p.12. There is no instrument for these purposes at the time of writing (May 2021).
[19] Item 1229(3)(h) as substituted by SLI 2013, No 33.
[20] Item 1229(3)(j) inserted by SLI 2013, No 33. For further discussion of issues arising from this requirement, see below.
[21] Item 1229(3)(k) inserted by SLI 2013, No 33. For the relevant instrument, see the 'SOL-SSL' tab in the Register of Instruments – Skilled visas.
[22] Item 1229(3)(l) substituted by SLI 2013, No 33.
[23] Item 1229(3)(la) inserted by F2020L01639 for applications made on or after 20 January 2021.
[24] Item 1229(4)(b) substituted by SLI 2013, No 33.

- » hold a Bridging A or B visa granted on the basis of a valid application for a visa and also have held an 'eligible student visa' in the previous 6 months;[26] or
- » hold a substantive visa and have held an 'eligible student visa' in the previous 6 months;[27] or
- » have been notified of a decision by the Tribunal to set aside and substitute a decision not to revoke the cancellation of the eligible student visa not more than 28 days prior to the visa application date.[28]

– for applications made *on or after 20 January 2021* by an applicant who is in Australia when making the application, the applicant must meet one of the 4 requirements listed above, or if the applicant is applying for a second Subclass 485 visa in the Post-Study Work stream, must hold a Subclass 485 visa in the Post-Study Work stream.[29]

Visa Criteria – Schedule 2 requirements

The criteria for the grant of a Subclass 485 visa are prescribed in Part 485 of Schedule 2 to the Regulations. The primary criteria must be satisfied by at least 1 applicant. Any other applicants for a visa of this subclass need to satisfy only the secondary criteria but need to be members of the family unit.[30]

For visa applications made on or after 23 March 2013, the Subclass 485 visa was restructured to introduce two 'streams': a 'Graduate Work stream' formed from the previous provisions that requires an assessment of the applicants' skills, and a new 'Post-Study Work stream' which does not require a skills assessment.[31] There are criteria specific to each stream, as well common criteria that must be satisfied regardless of the stream.

From 20 January 2021, applicants who hold a Subclass 485 visa in the Post-Study Work stream can, subject to meeting common criteria and stream specific criteria, access a second Subclass 485 visa in the Post-Study Work stream.[32]

The criteria are not structured as 'time of application' and 'time of decision', although some criteria are expressly linked to the time when the visa application was made. Unless another

[25] Item 1229(4)(a)(i) substituted by SLI 2013, No 33 for applications made before 19 September 2020; item 1229(4)(a) as amended by F2020L01181 for applications made on or after 19 September 2020. The term 'eligible student visa' is defined in reg 1.03 for applications made before 1 July 2016; for applications made on or after 1 July 2016 the term is defined in item 1229(11) inserted by the Migration Legislation Amendment (2016 Measures No 1) Regulation 2016 (Cth) (F2016L00523).
[26] Item 1229(4)(a)(ii) substituted by SLI 2013, No 33 for applications made before 1 July 2016; item 1229(4)(a)(ii) substituted by F2016L00523 for applications made on or after 1 July 2016 and before 19 September 2020; item 1229(4)(a) as amended by F2020L01181 for applications made on or after 19 September 2020. For applications made before 1 July 2016, item 1229(4)(a)(ii) prevented an applicant from holding a Bridging Visa A or B on the basis of a valid application for a number of student visas which were not eligible student visas as defined in reg 1.03.
[27] Item 1229(4)(a)(iii) substituted by SLI2013, No 33 for applications made before 1 July 2016; item 1229(4)(a)(iii) as amended by F2016L00523 for applications made on or after 1 July 2016 and before 19 September 2020; item 1229(4)(a) as amended by F2020L01181 for applications made on or after 19 September 2020. For applications made before 1 July 2016, item 1229(4)(a)(iii)(A) prevented an applicant from holding certain student visas.
[28] Item 1229(4)(a)(iv) substituted by SLI 2013, No 33 for applications made before 19 September 2020; item 1229(4)(a) substituted by F2020L01181 for applications made on or after 19 September 2020.
[29] Item 1229(4)(a) as amended by F2020L01181 for applications made on or after 19 September 2020 and item 1229(4)(a)(v) inserted by F2020L01639 for applications made on or after 20 January 2021.
[30] See note to div 485.2 as amended by *Migration Amendment Regulations 2009 (No 7)* (Cth) (SLI 2009, No 144).
[31] Explanatory Statement to SLI 2013, No 33 at p.12.
[32] cls 485.232 and 485.233 inserted by F2020L01639 for applications made on or after 20 January 2021.

temporal point is specified within the criterion itself, the criteria must be satisfied at time of decision.

Primary criteria

All primary applicants must meet common criteria that apply to all applicants seeking to satisfy the primary criteria for the grant of a Subclass 485 visa. In addition, primary applicants must meet the criteria in one of the two alternative streams:

- the Graduate Work stream; or
- the Post-Study Work stream.

Common criteria

The common criteria that must be met by all primary applicants are set out in sub-division 485.21. These are:

- **visa history**
  - for applications made *before 20 January 2021* the applicant has not previously held a primary Subclass 476 visa or 485 visa.[33]
  - for applications made *on or after 20 January 2021* the applicant:
    - » has not previously held a primary Subclass 476 visa granted on the basis that the applicant satisfied the primary criteria;
    - » has not previously held a Subclass 485 visa in the Graduate Work stream;
    - » unless the applicant has nominated the Post-Study Work stream in the application and meets the requirements of cl 485.232 or 485.233, has not held a Subclass 485 visa in the Post-Study Work stream;
    - » has not previously held 2 Subclass 485 visas in the Post-Study Work stream.[34]
- **English language proficiency**
  - for applications made *before 18 April 2015*, when the application was made, it must have been accompanied by evidence that the applicant had competent English.[35]
  - for applications made *on or after 18 April 2015* (subject to the exception below for applications made *on or after 20 January 2021*), the application must be accompanied by evidence that the applicant:
    - » has undertaken a language test specified by instrument, and has achieved the specified score, within the period specified in the instrument, in accordance with any specified requirements; or

[33] cl 485.211 substituted by SLI 2013, No 33.
[34] cl 485.211(a) substituted by SLI 2013, No 33 and cls 485.211(b), 485.211(c), 485.211(d) substituted by F2020L01639.
[35] cl 485.212 substituted by SLI 2013, No 33.

  - » holds a passport of a type specified by instrument.[36]
- for applications made *on or after 20 January 2021*, the above requirement does not apply to an applicant who meets the requirements of cl 485.232 or 485.233 (i.e. the requirement for a second Subclass 485 visa in the Post-Study Work stream).[37]

For information on the standards of English language proficiency, including 'competent English', see: English Language Ability – Skilled/Business Visas.

- **police check**
  - when the application was made, it was accompanied by evidence that the applicant and each person included in the application who is at least 16, has applied for an Australian Federal Police check during the 12 months immediately before the day the application is made.[38]
  - for applications made *on or after 20 January 2021*, the above requirement does not apply to an applicant who meets the requirements of cl 485.232 or 485.233 (i.e. the requirement for a second Subclass 485 visa in the Post-Study Work stream).[39]

For further discussion of issues arising from this criterion, see below.

- **health insurance**
  - when the application was made, it was accompanied by evidence that the applicant had adequate arrangements in Australia for health insurance.[40] The applicant must also have had adequate arrangements in Australia for health insurance since that time.[41]

For further discussion of issues arising from this criterion, see below.

- **public interest and special return criteria**
  - the applicant and members of the family unit need to satisfy specified public interest (PIC) and special return criteria.[42] For further detail on PIC 4020 see: PIC 4020, bogus documents and false or misleading information.

[36] For applications made on or after 18 April 2015 but before 20 January 2021, cl 485.212 substituted by SLI 2015, No 34; for applications made on or after 20 January 2021, cl 485.212(1) as amended by F2020L01639. The relevant instrument can be located on the 'Eng476485' tab of the Register of Instruments - Skilled visas. In *Baig & Ors v MIBP* [2018] FCCA 2986 the Court considered cl 485.212 and in particular the requirement in IMMI 15/062 that an English language test 'must have been undertaken within the three years before the day on which the application was made'. The Court held that the language of IMMI15/062 provides no scope for consideration by the Tribunal of why an English test was not undertaken within the prescribed period. Similarly, in *George v MICMSMA* [2020] FCCA 2161 it was held that the requirement in cl 485.212 and in particular IMMI 15/062 that an English test 'must have been undertaken within the three years before the day on which the application was made', could not be satisfied on the basis an applicant had booked a test prior to lodging the visa application, but had not in fact taken the test.

[37] cl 485.212(2) inserted by F2020L01639.

[38] For applications made before 20 January 2021, cl 485.213 substituted by SLI 2013, No 33; for applications made on or after 20 January 2021, cl 485.213(1) as amended by F2020L01639.

[39] cl 485.213(2) inserted by F2020L01639.

[40] cl 485.215(1) substituted by SLI 2013, No 33.

[41] cl 485.215(2) substituted by SLI 2013, No 33. In *Ahmed v MIBP* [2020] FCCA 622 the Court accepted that the requirements in cls 485.215(1) and 485.215(2) are cumulative, in the sense that to meet cl 485.215, these two separate subclauses must be satisfied.

[42] cls 485.216, 485.217 substituted by SLI 2013, No 33. As cl 485.216 requires an applicant to satisfy PIC 4001 and 4002, the criterion in reg 2.03AA(2) is prescribed: reg 2.03AA(1). Regulation 2.03AA(2) requires that if the Minister has requested a completed approved Form 80 and/or a statement (however described) provided by an appropriate authority in a country where

- **visa cap** - the grant of the visa would not result in the number of Subclass 485 visas in a financial year exceeding the visa cap as specified in a relevant written instrument.[43]

Note that a criterion requiring evidence of arrangements for a medical examination was removed, applicable to applications made but not finally determined before 18 April 2015 and applications made on or after that date.[44]

Stream specific criteria – Graduate Work stream

The criteria for Graduate Work stream largely replicate the requirements in Part 485 pre-23 March 2013. They are set out in sub-division 485.22 as follows:

- **Australian study requirement**
  - for applications made *before 19 September 2020* - the applicant satisfied the Australian study requirement in the 6 months immediately before the day the application was made.[45]
  - for applications made *on or after 19 September 2020* - the applicant satisfied the Australian study requirement in the 6 months immediately before the day the application was made; or in the period of 12 months immediately before the day the application was made if the Minister is satisfied the applicant was unable to apply for the visa within 6 months of satisfying the Australian study requirement because they were outside Australia during all or part of the period 1 February 2020 and 19 September 2020.[46]

  For further discussion of issues arising from this criterion, see below.
- **closely related study** - each degree, diploma or trade qualification used to satisfy the Australian study requirement is closely related to the applicant's nominated skilled occupation.[47] For further discussion of issues arising from this criterion, see below.
- **skills assessment application** - when the application was made, it was accompanied by evidence that the applicant had applied for an assessment of his/her skills for the nominated skilled occupation by a relevant assessing authority.[48] For further details relating to this criterion, see below.
- **suitable skills assessment** -
  - for visa applications made *before 1 July 2014* - the applicant has a suitable skills assessment by the relevant assessing authority in relation to the

the person resides, or has resided, that provides evidence about whether or not the person has a criminal history, the person has provided the documents or information. Given the wording, purpose and context of reg 2.03AA(2), a request made pursuant to reg 2.03AA(2)(a) could require an applicant to provide a statement from an appropriate authority in a particular form (e.g. a 'Complete Disclosure' check from the Australian Federal Police). This can be contrasted with the requirement in cl 485.213 which can be satisfied by evidence of having applied for a police check in any form from the Australian Federal Police: *Singh v MICMSMA* [2021] FCCA 905 at [38].

[43] cl 485.218 substituted by SLI 2013, No 33.
[44] cl 485.214 repealed by SLI 2015, No 34.
[45] cl 485.221 substituted by SLI 2013, No 33.
[46] cl 485.221 substituted by F2020L01181 for applications made on or after 19 September 2020.
[47] cl 485.222 as amended by SLI 2013, No 33.
[48] cl 485.223 substituted by SLI 2013, No 33.

nominated skilled occupation; and if the assessment was made on the basis of a qualification obtained in Australia while the applicant held a student visa, the qualification was obtained as a result of studying a registered course.[49]

- for visa applications made on or after *1 July 2014* - the applicant's skills for the nominated skilled occupation have been assessed by a relevant assessing authority as suitable for that occupation, and if the assessment specifies a validity period, that period has not ended;[50] and if the assessment was made on the basis of a qualification obtained in Australia while the applicant held a student visa, the qualification was obtained as a result of studying a registered course.[51]

Stream specific criteria – Post-Study Work stream

The 'Post-Study Work stream' was inserted from 23 March 2013 for graduates who studied at eligible educational institutions and at a specified academic level.[52] Unlike the 'Graduate Work stream', it does not require the applicant to have particular skills or a suitable skills assessment.[53]

From 20 January 2021, applicants who have held a Subclass 485 visa in the Post-Study Work stream can, in specific circumstances, access a second Subclass 485 visa in the Post-Study Work stream.[54] Prior to 20 January 2021, it was not possible to be granted more than one Subclass 485 visa on the basis of satisfy the primary criteria for the grant of the visa.[55]

The criteria for the 'Post-Study Work stream' are set out in sub-division 485.23.

For applications made *before 20 January 2021*, the only criteria set out in sub-division 485.23 is cl 485.231 which requires:

- **specified qualification** - the applicant holds a qualification of a kind specified in a relevant written instrument.[56]
- **specified institution** - each qualification was conferred or awarded by an educational institution specified in a relevant written instrument.[57]
- **Australian study requirement**
  - for applications made *before 19 September 2020* - the applicant's study for the qualification(s) satisfied the Australian study requirement in the 6 months immediately before the day the application was made.[58]

[49] cl 485.224 substituted by SLI 2013, No 33, .
[50] cls 485.224(1), (1A) as substituted by SLI 2014, No 145.
[51] cl 485.224 (2) as substituted by SLI 2013, No 33.
[52] Explanatory Statement to SLI 2013, No 33, at p.17.
[53] Explanatory Statement to SLI 2013, No 33, at p.17.
[54] Item 1229(4)(a)(v), cls 485.232 and 485.233 inserted by F2020L01639.
[55] cl 485.211(b) as in force prior to 20 January 2021.
[56] cl 485.231(1) substituted by SLI 2013, No 33. According to the Explanatory Statement to the amending legislation it was intended that the qualifications would be a Bachelor degree, Bachelor degree with Honours, Masters by Coursework, Masters (Extended), Masters by Research or Doctoral degree from an eligible Australian educational institution.. See the 'Qual' tab in the Register of Instruments - Skilled visas for the relevant instrument.
[57] cl 485.231(2) substituted by SLI2013, No 33. See the '485Inst' tab in the Register of Instruments - Skilled visas for the relevant instrument.
[58] cl 485.231(3) substituted by SLI 2013, No 33.

- for applications made *on or after 19 September 2020* - the applicant satisfied the Australian study requirement in the 6 months immediately before the day the application was made; or in the period of 12 months immediately before the application was made if the Minister is satisfied the applicant was unable to apply for the visa within 6 months of satisfying the Australian study requirement because they were outside Australia during all or part of the period 1 February 2020 and 19 September 2020.[59]

For further discussion of issues arising from this criterion, see below.

For applications made *on or after 20 January 2021*, there are three alternative criteria in sub-division 485.23 that may apply, depending upon whether it is an application for a first or second Subclass 485 visa.

- **Clause 485.231** applies to an applicant who does not meet the requirements of cl 485.232 or 485.233 (i.e. the requirements for a second Subclass 485 visa in the Post-Study Works stream).[60] It requires as follows:
  - **specified qualification** - the applicant holds a qualification of a kind specified in a relevant written instrument.[61]
  - **specified institution** - each qualification was conferred or awarded by an educational institution specified in a relevant written instrument.[62]
  - **Australian study requirement** - the applicant satisfied the Australian study requirement in the 6 months immediately before the day the application was made; or in the period of 12 months immediately before the application was made if the Minister is satisfied the applicant was unable to apply for the visa within 6 months of satisfying the Australian study requirement because they were outside Australia during all or part of the period 1 February 2020 and 19 September 2020.[63]

  For further discussion of issues arising from this criterion, see below.
- **Clause 485.232** applies to an applicant for a second Subclass 485 visa in the Post-Study Work stream who held a Subclass 485 visa in the Post-Study Work stream (the first visa) when the application for the second visa was made; was granted the first visa on the basis of study undertaken in a *regional centre or other regional area* at an educational institution located in the *regional centre or other regional area*; and declared in the application for the second visa that the applicant, and any member of the applicant's family unit who made a combined application, intend to live (or if they

[59] cl 485.231(3) substituted by F2020L01181 for applications made on or after 19 September 2020.
[60] cl 485.231(1A) inserted by F2020L01639 for applications made on or after 20 January 2021. The effect of cl 485.231(1A) is that the criteria for the grant of a first Subclass 485 visa in the Post-Study Work stream, set out in cl 485.231, do not apply to an applicant who satisfies the criteria in cl 485.232 or 485.233 for the grant of a second Subclass 485 visa in the Post-Study Work stream: Explanatory Statement to F2020L01639, p 18.
[61] cl 485.231(1) substituted by SLI 2013, No 33. According to the Explanatory Statement to the amending legislation it was intended that the qualifications would be a Bachelor degree, Bachelor degree with Honours, Masters by Coursework, Masters (Extended), Masters by Research or Doctoral degree from an eligible Australian educational institution.. See the 'Qual' tab in the Register of Instruments - Skilled visas for the relevant instrument.
[62] cl 485.231(2) substituted by SLI 2013, No 33. See the '485Inst' tab in the Register of Instruments - Skilled visas for the relevant instrument.
[63] cl 485.231(3) substituted by F2020L01181 for applications made on or after 19 September 2020.

intend to work or study – to work or study) only in a *regional centre or other regional area*.[64]

- It requires:
  - **area of residence during relevant study** – the applicant must have lived only a *regional centre or other regional area* while undertaking the study on which their first visa grant was based;[65] and
  - **duration of residence** – the applicant must have lived (and worked or studied, if relevant) in a *regional centre or other regional area* for at least 2 years immediately before applying for the second visa.[66]
  - **area of residence at time of decision** – at the time of decision on the second visa, the applicant lives (and works or studies, if relevant) only in a *regional centre or other regional area*.[67]

For discussion of the term *regional centre or other regional area* see below.

- **Clause 485.233** applies to an applicant for a second Subclass 485 visa in the Post-Study Work stream who held a Subclass 485 visa in the Post-Study Work stream (the first visa) when the application for the second visa was made; was granted the first visa on the basis of study undertaken in a *designated reginal area* at an educational institution located in the *designated regional area*; and to whom cl 485.232 does not apply.[68] It requires:
  - **area of residence during relevant study** – the applicant must have lived only a *designated reginal area* while undertaking the study on which their first visa grant was based;[69] and
  - **duration of residence** – the applicant must have lived (and worked or studied, if relevant) only in a *designated regional area* for at least 2 years immediately before applying for the second visa.[70]
  - **area of residence at time of decision** – at the time of decision on the second visa, the applicant lives (and works or studies, if relevant) only in a *designated regional area*.[71]

[64] cl 485.232(1) inserted by F2020L01639 for applications made on or after 20 January 2021. The intention of these requirements is to maximise incentives for international students to live and study in a *regional area or other regional area* and to reinforce the need for an ongoing commitment to live in a *regional centre or other regional area*: Explanatory Statement to F2020L01639, p 19. The term *regional centre or other regional area* has the meaning given by reg 1.15M(2): reg 1.03 inserted by F2020L01639 for applications made on or after 20 January 2021. Reg 1.15M(2) provides that the Minister may, by legislative instrument, specify a part of Australia to be a *regional centre or other regional area*: reg 1.15M as substituted by F2020L01639 for applications made on or after 20 January 2021. See the 'DesRegArea' tab in the Register of Instruments - Skilled visas for the relevant instrument.

[65] cl 485.232(2)(a) inserted by F2020L01639 for applications made on or after 20 January 2021..

[66] cls 485.232(2)(b), 485.232(2)(c) inserted by F2020L01639 for applications made on or after 20 January 2021..

[67] cl 485.232(3) inserted by F2020L01639 for applications made on or after 20 January 2021.

[68] cl 485.233(1) inserted by F2020L01639. The term *designated regional area* means a *designated city or major regional area*, or a *regional centre or other regional centre*: reg 1.03 as substituted by F2020L01639 for applications made on or after 20 January 2021. The terms *designated city or major regional centre* and *regional centre or other regional area* have the meaning given by regs 1.15M(1) and 1.15M(2) respectively. The Minister may by legislative instrument specify a part of Australia to be a *designated city or major regional centre* under reg 1.15M(1), or a *regional centre or other regional area* under reg 1.15M(2): see reg 1.15M as substituted by F2020L01639 for applications made on or after 20 January 2021. See the 'DesRegArea' tab in the Register of Instruments - Skilled visas for the relevant instrument.

[69] cl 485.233(2)(a) inserted by F2020L01639 for applications made on or after 20 January 2021..

[70] cls 485.233(2)(b), 485.233(2)(c) inserted by F2020L01639 for applications made on or after 20 January 2021. These criteria require a demonstrated commitment to a *designated regional area:* Explanatory Statement to F2020L01639, p 22..

- **declaration** – the applicant declared in the application for the second visa that the applicant, and any member of the applicant's family unit who made a combined application, intend to live (or if they intend to work or study – to work or study) only in a *designated regional area.*[72]

For discussion of the term *designated regional area* see below.

Secondary criteria

The secondary criteria for family applicants are set out in cl 485.31. It requires the family applicant to be a member of the family unit of a person who holds a Subclass 485 on the basis of satisfying the primary criteria for the grant of the visa, and have made a combined application with that person; or be a member of the family unit of a person who holds a Class VC visa granted on the basis of satisfying the primary criteria for the grant of a Subclass 485 visa.[73] The application must also be accompanied by evidence of having adequate health insurance arrangements in Australia, and there must be adequate health insurance arrangements since the time the application was made.[74] Family applicants are also required to satisfy certain public interest and special return criteria.[75]

When visa is in effect

For applications made *before 20 January 2021*, Subclass 485 visas are valid until a date specified by the Minister.[76] An exception to this validity period applies to certain Hong Kong passport holders and British National (Overseas) passport holders from 9 July 2020.[77]

For applications made *on or after 20 January 2021*, a second Subclass 485 visa in the Post-Study Work stream granted on the basis of meeting the requirements in cl 485.232 is valid for two years, whilst a second Subclass 485 visa in the Post-Study Work stream granted on the basis of meeting the requirements in cl 485.233 is valid for one year.[78] Other Subclass 485 visas are valid until a date specified by the Minister.[79] An exception to this validity period

[71] cl 485.233(3) inserted by F2020L01639 for applications made on or after 20 January 2021.
[72] cl 485.233(4) inserted by F2020L01639 for applications made on or after 20 January 2021.
[73] cl 485.311 substituted by SLI 2013, No 33.
[74] cl 485.312 substituted by SLI 2013, No 33.
[75] cls 485.313, 485.314 substituted by SLI 2013, No 33.
[76] cl 485.511 as substituted by SLI No 33, 2013 for applications made before 20 January 2021.
[77] For Subclass 485 visas in effect on 9 July 2020, if the primary visa holder holds a Hong Kong passport or a British National (Overseas) passport on the date of grant of the Subclass 485 visa, the validity period of the visa held by the primary visa holder and their family members who were granted a Subclass 485 visa on the basis of satisfying the secondary criteria, will end on 8 July 2025: 9004 of Part 90, Schedule 13 to the Regulations, inserted by item 3 of Schedule 1 to the *Migration Amendment (Hong Kong Passport Holders) Regulations 2020* (Cth) (F2020L01047) and 10105 of Part 101, Schedule 13 to the Regulations, inserted by item 4 of Schedule 1 to the *Migration Legislation Amendment (Hong Kong) Regulations 2021* (Cth) (F2021L01479). The definitions of 'Hong Kong passport' and 'British National (Overseas) passport' for this purpose are inserted in reg 1.03 by the same amending regulations and respectively mean 'a Hong Kong Special Administrative Region of the People's Republic of China passport' and 'a passport issued by the United Kingdom of Great Britain and Northern Ireland to a person who is identified in the passport as having a form of British nationality described as British National (Overseas)'. Subclass 485 visas granted after 9 July 2020 to Hong Kong passport holders, and Subclass 485 visas granted on or after 3 November 2021 to British National (Overseas) passport holders – other than those that were granted a Subclass 485 visa on the basis of having satisfied cl 485.232 or 485.233 – will be granted for a period of five years under policy pursuant to cl 485.511 (for applications made before 20 January 2021) and cl 485.513 (for applications made on or after 20 January 2021): p 1, 12 Explanatory Statement to F2020L01047 and p 13 Explanatory Statement to F2021L01479. Subclass 485 visas granted on or after 9 July 2020 and before 3 November 2021, to primary applicants who hold a British National (Overseas) passport at the time of grant (other than those that were granted a Subclass 485 visa on the basis of having satisfied cl 485.232 or 485.233) will be granted for 5 years: 10105 of Part 101, Schedule 13 to the Regulations, inserted by item 4 of Schedule 1 to F2021L01479. Equivalent concessions apply to the primary visa holder's family members who satisfied the secondary criteria, regardless of the passport they hold.
[78] cls 485.511 and 485.512 inserted by F2020L01639 for applications made on or after 20 January 2021.
[79] cl 485.513 inserted by F2020L01639 for applications made on or after 20 January 2021.

applies to certain Hong Kong passport holders and British National (overseas) passport holders.[80]

Circumstances for grant of visa

Applicants who satisfy the primary criteria for the grant of the visa may be in or outside Australia when the visa is granted if the visa is granted during a concession period, or if the applicant applied for the visa outside Australia during a concession period and the concession period has ended at the time the visa is granted.[81] In any other case, primary applicants must be in Australia when the visa is granted.[82] In all cases, regardless of whether it is a concession period, family members who satisfy the secondary criteria may be in or outside Australia when the visa is granted.[83]

Key Issues

Subclass 485: Can the applicant change streams / can the Tribunal consider both streams?

It does not appear that an applicant can change the stream they have applied in once their application has been made or that the Tribunal can consider any stream other than the one applied in.[84] This was confirmed in *Singh v MICMSMA* which held that the Minister (or the Tribunal on review) had no power to grant the applicant a Subclass 485 visa in the Post-Study Work stream in circumstances where the application made was in the Graduate Work stream.[85]

However the issue of which stream an application was made in is a question of fact for the Tribunal. While it will often be apparent from the face of the application which stream an applicant is applying in, conflicting material or statements accompanying an application that cast doubt on stream that appears selected in an application form should also be considered. If the Tribunal were to find as a question of fact that an application was made in a particular stream notwithstanding how the application form itself had been completed, the Tribunal would be obliged to consider the application against that stream. In doing so

[80] Subclass 485 visas granted after 9 July 2020 to Hong Kong passport holders, and Subclass 485 visas granted on or after 3 November 2021 to British National (Overseas) passport holders – other than those that were granted a Subclass 485 visa on the basis of having satisfied cl 485.232 or 485.233 – will be granted for a period of five years under policy pursuant to cl 485.511 (for applications made before 20 January 2021) and cl 485.513 (for applications made on or after 20 January 2021): p 1, 12 Explanatory Statement to F2020L01047 and p 13 Explanatory Statement to F2021L01479. Subclass 485 visas granted on or after 9 July 2020 and before 3 November 2021, to primary applicants who hold a British National (Overseas) passport at the time of grant (other than those that were granted a Subclass 485 visa on the basis of having satisfied cl 485.232 or 485.233) will be granted for 5 years: 10105 of Part 101, Schedule 13 to the Regulations, inserted by item 4 of Schedule 1 to F2021L01479. Equivalent concessions apply to the primary visa holder's family members who satisfied the secondary criteria, regardless of the passport they hold.

[81] cls 485.411(1)(b), 485.411(1)(c) as substituted by F2020L01181 for applications made, but not finally determined, before 19 September 2020, or made on or after 19 September 2020: cl 9102(2) inserted by F2020L01181 and amended by the *Home Affairs Legislation Amendment (2020 Measures No.2) Regulations 2020* (F2020L01427).

[82] cl 485.411(1)(a) as substituted by F2020L01181 for applications made, but not finally determined, before 19 September 2020, or made on or after 19 September 2020: cl 9102(2) inserted by F2020L01181 and amended by the F2020L01427.

[83] cl 485.411(3).

[84] The Explanatory Statement to the amending regulations that introduced the two streams in Subclass 485 said the intentions was to ensure that applicants are only assessed against the criteria specific to the stream that was selected: Explanatory Statement to SLI 2013, No 33 at p.8.

[85] *Singh v MICMSMA* [2020] FCA 774 at [66]-[67]. The Court's reasoning in *Singh* was based on the assumption that the Graduate Work stream and the Post-Study Work stream are to be regarded as being within the same class, but noted that there is a real question as to whether visas in separate streams are visas within the same class or in different classes: see [59]-[60]. In the absence of argument, the Court preferred not to determine that issue.

however, the Tribunal should be clear in its decision record that it is not the stream that has changed, rather it is the determination of which stream the application has actually been made in.[86]There has been no judicial consideration of this issue but two matters (discussed below) have been remitted by consent from the Federal Circuit Court.[87]

'Streams' in the visa framework

Section 29 of the Act empowers the Minister to grant a non-citizen permission, in the form of a visa, to enter and stay in Australia. Section 31 provides for prescribed classes of visas and the prescription of visa criteria in Regulations. Regulation 2.01 provides that the prescribed classes of visas are set out in the respective items in Schedule 1, and reg 2.03 provides that the prescribed criteria are those set out in a relevant Part of Schedule 2. This includes criteria set out in a 'stream'.[88] Under reg 2.03(1B), if criteria are set out as a 'stream', the visa to which the Part relates may be described as '[the Subclass of the visa] in the [name of the stream]'.

An application for a visa must be made for a particular class and only valid applications can be considered by the Minister.[89] The requirements for a valid application are specified in s 46 and relevantly include satisfying the requirements prescribed in the Regulations and payment of any required fees or charges. Regulation 2.07 outlines a number of requirements including payment of any visa application charge, completion of an approved form, and satisfaction of any matters set out in Schedule 1. After considering a valid visa application, the Minister must grant it if satisfied, among other things, that the criteria for the visa have been satisfied.[90]

Valid application for a Subclass 485 visa

To make a valid visa application for a Subclass 485 visa, item 1229(3)(j) in Schedule 1 requires an applicant to nominate only one stream to which the application relates. Once the applicant nominates a stream, item 1229(3)(k) requires an applicant to nominate a skilled occupation (if seeking to satisfy the primary criteria in the Graduate Work stream) and item 1229(3)(l) requires an applicant to have held a student visa at a particular time (if seeking to satisfy the primary criteria in the Post-Study Work stream). If an applicant nominates the Graduate Work stream and nominates a skilled occupation in accordance with item 1229(3)(k), then provided other Schedule 1 requirements are met, they will have made a valid application for a Subclass 485 visa in the Graduate Work stream. In the alternative, if an applicant nominates the Post-Study Work stream and held a student visa at a particular time in accordance with item 1229(3)(l), then provided other Schedule 1 requirements are met, they will have made a valid application for a Subclass 485 visa in the

[86] Before determining that an application is made in a different stream to the one selected in the application it would be prudent to seek submissions for the applicant on which stream they considered their application had actually been made in.
[87] It should be noted that these remittals by consent were made prior to *Singh v MICMSMA* [2020] FCA 774, however unlike the circumstances in that matter, the applicants raised claims at the Tribunal that they had intended to apply for a stream other than the one indicated on their visa application form, had substantially complied with the visa application form and met Schedule 1 requirements for the alternative stream.
[88] reg 2.03(1A).
[89] ss 45, 47.
[90] s 65(1)(a)(ii).

Post-Study Work stream. If a valid visa application has been made, the Minister must consider whether the criteria for the visa applied for have been satisfied.[91]

The starting point for the Tribunal in relation to a review of a Subclass 485 visa refusal is to make a factual finding about which application has been made, that is did the applicant apply for a Subclass 485 visa in the Graduate Work stream or did they apply for a Subclass 485 visa in the Post-Study Work stream. Claims with respect to an applicant's intention may be relevant to this factual finding, although not necessarily determinative of it.[92] The Tribunal then needs to consider whether a valid application for that particular visa has been made, and if so, whether the criteria prescribed for the particular visa that is the subject of the valid application are satisfied.[93]

Substantial compliance with visa application form

The Federal Circuit Court remitted by consent the matters of [redacted] (Tribunal decision [redacted] and [redacted] (Tribunal decision [redacted] and in each matter noted that the Tribunal committed jurisdictional error in finding that it was confined to considering the applicant's application for a Subclass 485 visa only against the stream nominated in the visa application (the Graduate Work stream), in circumstances where the applicant substantially complied with the visa application form for the intended stream (the Post-Study Work stream).[94]

Consistent with the reasons for remittal endorsed by the Court in [redacted] and [redacted] and noting it is unclear why in *Singh* the Court did not have regard to the applicant's claimed intention to have applied in the alternate stream, it appears open to the Tribunal to consider an applicant who has selected the Graduate Work stream against the Post-Study Work stream, if it is satisfied on the evidence that the application made was in fact an application for a Subclass 485 visa in the Post-Study Work stream, it substantially complied with the visa application form and met the Schedule 1 requirements for that stream.[95] Following *Singh*, it appears the Tribunal then cannot consider the application against the stream that was 'incorrectly' stated in the form.[96] However, an applicant would

[91] s 65(1).
[92] It is unclear in *Singh v MICMSMA* [2020] FCA 774 why the Court did not have regard to the applicant's claimed intention to have applied for a Subclass 485 visa in the alternate stream. Whilst this may have been because the Court considered it irrelevant, it may also have been because the applicant made no claim to have intended to apply for the alternate stream prior to making an application for judicial review to the Federal Circuit Court. In the absence of certainty about this issue, it appears open to the Tribunal to consider claims about an applicant's 'intention' when making a factual finding as to which application was made.
[93] *Singh v MICMSMA* [2020] FCA 774 at [65].
[94] It should be noted that these remittals by consent were made prior to *Singh v MICMSMA* [2020] FCA 774, however unlike the circumstances in that matter, the applicants raised claims at the Tribunal that they had intended to apply for a stream other than the one indicated on their visa application form, had substantially complied with the visa application form and met Schedule 1 requirements for the alternative stream. In each matter, the Tribunal appeared not to consider claims raised in relation to the stream in which the application was in fact made. Before the Department refused the visa in [redacted], it had contacted the applicant for evidence of her skills assessment (which was required for the Graduate Work stream). The applicant then realised she had applied for the wrong stream and tried to correct the error with the Department, which the Department did not accept. With respect to [redacted], in a submission to the Tribunal the first applicant claimed he had completed "2 years of academic study …" and was eligible to apply for a "Temporary Graduate (Class VC) Post Study Work stream (Subclass 485) visa" but as he had completed his visa application himself and "due to lack of knowledge and misinterpreting the stated subclass" and "human error" he chose the wrong "subclass". The Tribunal did not consider or decide the first applicant's express claim that he had always intended to apply for the Post-Study Work stream.
[95] It is unclear in *Singh v MICMSMA* [2020] FCA 774 why the Court did not have regard to the appellant's claimed intention to apply for the Subclass 485 visa in the alternate stream. Whilst this may have been because the Court considered it irrelevant, it may also have been because the applicant made no claim to have intended to apply for the alternate stream prior to making an application for judicial review to the Federal Circuit Court. In the absence of certainty about this issue, it appears open to the Tribunal to consider claims about an applicant's 'intention' when making a factual finding as to which application was made.
[96] *Singh v MICMSMA* [2020] FCA 774.

not meet the Schedule 1 requirements for the Graduate Work stream if they selected the Post-Study Work stream and did not nominate a skilled occupation as required by item 1229(3)(k) (e.g. because the application form did not prompt them to do so).

Skilled occupation

Applying for a skills assessment

For Subclass 485 visa applications in the Graduate Work stream made on or after 23 March 2013, it is a criterion that when the application was made, it was accompanied by evidence that the applicant had applied for an assessment of the applicant's skills for the nominated skilled occupation by a relevant assessing authority.[97]

The proper construction of cl 485.223 was considered by the Full Court of the Federal Court in *Khan v MIBP* in which it was held that the clause 'accompanied by' establishes an objective temporal test, that is, an application is either accompanied by the necessary evidence or it is not.[98] In *Anand v MIAC* it was held that there was some elasticity to the words "accompanied by" such that evidence supplied around the time of application may be sufficient.[99] In considering Katzmann J's view of the word "accompanied" in *Anand*, the Full Court of the Federal Court in *Khan* noted that the stretching of the concept may give rise to difficulties in determining how far a departure from the temporal requirement may be permitted, and that there would seem no need to stretch the concept.[100] In any event, the Full Court of the Federal Court held that whether or not there is some flexibility in the test, nothing decided in *Anand* permits the temporal requirement to import notions of fairness so as to avoid what might otherwise be an apparently harsh outcome for the visa applicant.[101]

Clause 485.223 requires an applicant for such visa to furnish evidence of the application for the skills assessment. This evidentiary requirement is not satisfied merely by the applicant saying that he or she has made the relevant application, and something more than an affirmative answer on the application form is required.[102]

Suitable skills assessment

It is a criterion in the Graduate Work stream for post 23 March 2013 Subclass 485 visa applications that the applicant must have a suitable skills assessment by a relevant assessing authority in relation to his or her nominated skilled occupation.[103]

Under reg 2.26B(1), the Minister may by instrument specify a person or body as the relevant assessing authority for a skilled occupation and one or more countries for the purposes of an application for a skills assessment made by a resident of one of those countries. For the relevant instrument, see the 'SOL-SSL' tab in the Register of Instruments – Skilled visas. The standards against which the skills of a person are assessed by a relevant assessing authority must be the standards set by the relevant assessing authority for the skilled

[97] cl 485.223 substituted by SLI 2013, No 33.
[98] *Khan v MIBP* [2018] FCAFC 85 at [15]. See also *Shrestha v MHA* [2019] FCA 1843.
[99] *Anand v MIAC* [2013] FCA 1050 at [28].
[100] *Khan v MIBP* [2018] FCAFC 85 at [14].
[101] *Khan v MIBP* [2018] FCAFC 85 at [15].
[102] *Bussa v MIBP* [2019] FCA 1994 at [18]. Note however that in *Bussa* it was unnecessary for the Court to determine whether reference to a receipt number was sufficient to meet the requirement in cl 485.223.
[103] cl 485.224.

occupation.[104] A relevant assessing authority may set different standards for assessing a skilled occupation for different visa classes or subclasses.[105]

Whether an applicant's skills have been assessed by a relevant assessing authority as suitable for the applicant's nominated skilled occupation is a question of fact for the decision maker. In the circumstances where an applicant has provided a suitable skills assessment, but the relevant assessing authority has subsequently advised that it has revoked or withdrawn the assessment, it is unlikely that the assessment can be relied upon to satisfy the requirements of cl 485.224 for post 23 March 2013 visa applications.

Further information about the instrument is available in Skilled Occupation / Australian Study Requirement.

Australian study requirement

For applications made on or after 23 March 2013 in the Graduate Work stream, an applicant is required to have satisfied the 'Australian study requirement' in the 6 months immediately before the day the application was made.[106] For applications made on or after 19 September 2020, the period in which an applicant in the Graduate Work stream must satisfy the Australian study requirement is qualified, so that the requirement can be satisfied within 12 months immediately before the day the application was made if the Minister (or the Tribunal on review) is satisfied that the applicant was unable to apply within 6 months of satisfying the Australian study requirement because they were outside Australia for all or part of the period commencing on 1 February 2020 and ending on 19 September 2020.[107]

For applications made in the Post-Study Work stream on or after 23 March 2013 and before 19 September 2020, the applicant's study for the qualification or qualifications must have satisfied the Australian study requirement in the 6 months ending immediately before the day the application was made.[108] For applications made on or after 19 September 2020 in the Post-Study Work stream, the applicant must have satisfied the Australian study requirement in the 6 months immediately before the day the application was made; or in the 12 months immediately before the day the application was made if the Minister (or the Tribunal on review) is satisfied the applicant was unable to apply within 6 months of satisfying the Australian study requirement because they were outside Australia during all or part of the period commencing on 1 February 2020 and ending on 19 September 2020.[109]

[104] reg 2.26B(2).
[105] reg 2.26B(3) inserted by *Migration Amendment (Skills Assessment) Regulation 2013* (Cth) (SLI 2013, No 233) which commenced on 28 October 2013. The Explanatory Statement explains the purpose of this amendment is to put beyond doubt that a relevant assessing authority may assess the suitability of an applicant's skills for the nominated occupation against different standards, and combined with other amendments, it makes clear that a relevant assessing authority may, with consideration to assessing standards, issue skills assessments for either an application for a specific visa subclass (specifically, Subclass 485) or stream or an 'open' skills assessment (Explanatory Statement, p.3).
[106] cl 485.221 substituted by SLI 2013, No 33 for applications made on or after 23 March 2013 and before 19 September 2020; cl 485.221 substituted by F2020L01181 for applications made on or after 19 September 2020. 'Australian study requirement' is defined in reg 1.15F.
[107] cl 485.221 substituted by F2020L01181. This concession ensures that applicants who satisfied the Australian study requirement in late 2019 or early 2020 are able to satisfy cl 485.221 if they apply from outside Australia from 19 September 2020 and they were affected by COVID-19 travel restrictions: Explanatory Statement to F2020L01181, p 28.
[108] cl 485.231(3) as amended by SLI 2013, No 33.
[109] cl 485.231(3) substituted by F2020L01181 for applications made on or after 19 September 2020. This concession ensures that applicants who satisfied the Australian study requirement in late 2019 or early 2020 are able to satisfy cl 485.221 if they apply from outside Australia from 19 September 2020 and they were affected by COVID-19 travel restrictions: Explanatory Statement to F2020L01181, p 28.

Each of the abovementioned criteria require the applicant to have 'completed' the qualification (or at least one of the qualifications if relying on multiple qualifications to satisfy the Australian study requirement) within a specific period immediately before the day the application was made. An applicant completes the academic requirements for a course when the applicant achieves the necessary results or credits to enable the applicant to be awarded the degree or diploma.[110] The period 'immediately before the day the application was made' does not include the day of the application.[111]

For further information and discussion of common issues arising in relation to the Australian study requirement please see: Skilled Occupation / Australian Study Requirement.

Closely related to the applicant's nominated skilled occupation

In addition to satisfying the Australian study requirement, cl 485.222 requires that each qualification used to satisfy that requirement must be 'closely related to the applicant's nominated skilled occupation'.[112] For Subclass 485 applications in the Graduate Work stream, this refers to the applicant's degree, diploma or trade qualification.

For information in relation to the 'closely related to the applicant's nominated skilled occupation' requirement, see: Skilled Occupation / Australian Study Requirement.

Police check and health insurance

The common criteria for a post 23 March 2013 Subclass 485 visa application include that *when the application was made, it was accompanied by evidence* that:

- the applicant (and each person 16 and over) had applied for an Australian Federal Police check during the 12 months immediately before the day the application is made (cl 485.213);[113] and
- the applicant had adequate arrangements in Australia for health insurance.[114]

For the health insurance requirement there is a related requirement that the applicant has had adequate arrangements in Australia for health insurance since the time the application was made.[115]

In each of these post 23 March 2013 provisions, the criterion itself specifies that 'when the application was made' it 'was accompanied by' the specified evidence such that there is no latitude as to the relevant time.[116] In *Khan* the Full Court of the Federal Court held that the

[110] *Venkatesan v MIAC* [2008] FMCA 409 at [15]; *Sapkota v MIAC* [2012] FCA 981 at [25]-[26]; *Ali v MICMSMA* [2021] FCA 1311 at [46]. In *Ali v MICMSMA* [2021] FCA 1311 the Court relied on existing authority in *Venkatesan v MIAC* [2008] FMCA 409 and *Sapkota v MIAC* [2012] FCA 981 and at [39] held that the date of completion is not what the university considers it should be, yet rather what Parliament says it is. Accordingly, at [48] the Court in *Ali v MICMSMA* [2021] FCA 1311 accepted that the language of reg 1.15F(2) referring to the 'academic requirements' of a degree, is comfortably met by study assessed as satisfactory and grounding the award of a degree.
[111] *Mahohoma v MICMSMA* [2020] FCCA 2206 at [36] and [40].
[112] In *Singh v MICMSMA* [2021] FedCFamC2G 208 at [85] the Court made *obiter* comments that the qualifications used to satisfy the Australian study requirement in cl 485.221 must be the same qualifications used to satisfy the Australian study requirement in cl 485.222.
[113] cl 485.213 as substituted on 23 March 2013: SLI 2013, No 33.
[114] cl 485.215(1) as substituted on 23 March 2013: SLI 2013, No 33.
[115] cl 485.215(2) as substituted on 23 March 2013: SLI 2013, No 33. In *Ahmed v MIBP* [2020] FCCA 622 the Court accepted that the requirements in cls 485.215(1) and 485.215(2) are cumulative, in the sense that to meet cl 485.215, these two separate subclauses must be satisfied.
[116] *Boddu v* MIBP [2019] FCCA 879 at [27]; upheld on appeal Boddu *v MIBP* [2019] FCA 1340 at [13]. This is in contrast to the criterion considered in *Anand v MIAC* [2013] FCA 1050, in which case the 'time of application' requirement came under the

clause 'accompanied by' establishes an objective temporal test, that is, an application is either accompanied by the necessary evidence or it is not.[117] Whilst the criterion being construed in *Khan* was cl 485.223, cls 485.213 and 485.215(1) are structured in the same way, and the Federal Court has followed *Khan* when construing cl 485.213.[118] In *Anand* it was held that there was some elasticity to the words "accompanied by" such that evidence supplied around the time of application may be sufficient.[119] In considering Katzmann J's view of the word "accompanied" in *Anand*, the Full Court of the Federal Court in *Khan* noted that the stretching of the concept may give rise to difficulties in determining how far a departure from the temporal requirement may be permitted, and that there would seem no need to stretch the concept.[120] In any event, the Full Court of the Federal Court held that whether or not there is some flexibility in the test, nothing decided in *Anand* permits the temporal requirement to import notions of fairness so as to avoid what might otherwise be an apparently harsh outcome for the visa applicant.[121]

The term 'Australian Federal Police check' means a check issued by the Australian Federal Police, not a document issued by a private organisation.[122] Whilst Policy requires the Australian Police check to be in the form of a 'Complete Disclosure Certificate', cl 485.213 clearly stipulates only 'an Australian Federal Police check'.[123] For this reason, evidence an applicant had applied for any form of an Australian Police check is sufficient to satisfy cl 485.213.[124]

Whilst the evidence of having applied for an Australian Federal Police check must accompany the visa application, the evidence itself may take a variety of forms and is not restricted to an AFP check application receipt. In Singh v MICMSMA, for example, providing a reference number for an AFP check application was held to be sufficient evidence that had accompanied the visa application, with the Court noting that nowhere in the visa application form did it direct the applicant to attach a copy of the actual receipt.[125].

'Designated regional area' and 'regional centre or other regional area'

From 20 January 2021, the holder of a Subclass 485 visa in the Post-Study Work stream (the first visa) who has lived (and worked or studied, if relevant) only in a *designated regional area* can apply for, and be granted, a second Subclass 485 visa for up to two years if they meet the eligibility requirements.

The term '*designated regional area*' is defined to mean *a 'designated city or major regional centre*' or a '*regional centre or other regional area'*.[126] The terms '*designated city or major regional centre*' and '*regional centre or other regional area*' have the meaning given by reg

cl 487.21 heading and not the criterion itself which simply required '[t]he application is accompanied by the specified evidence. While the heading informs the criterion, it is not determinative, as the High Court made clear in *Berenguel v MIAC* (2010) 264 ALR 417.

[117] *Khan v MIBP* [2018] FCAFC 85 at [15]. See also *Shrestha v MHA* [2019] FCA 1843.

[118] *Tauqueer v MICMSMA* [2019] FCA 1883 at [26] and [27].

[119] *Anand v MIAC* [2013] FCA 1050 at [28].

[120] *Khan v MIBP* [2018] FCAFC 85 at [14].

[121] *Khan v MIBP* [2018] FCAFC 85 at [15].

[122] *Rahim v MIBP* [2018] FCCA 1814; upheld on appeal *Rahim v MIBP* [2018] FCA 1736. See also *Tauqueer v MHA* [2019] FCCA 1343; upheld on appeal *Tauqueer v MICMSMA* [2019] FCA 1883.

[123] *Singh v MICMSMA* [2021] FCCA 905 at [38].

[124] *Singh v MICMSMA* [2021] FCCA 905 at [35] and [38].

[125] *Singh v MICMSMA* [2021] FCCA 905 at [37]. The Court considered *Panchal v MIAC* (2012) 265 FLR 144 that 'accompanied by' refers to something other than that which is within the online application form, but was of the view that this was to draw a distinction without a difference.

[126] reg 1.03 as amended by F2020L01639 for applications made on or after 20 January 2020.

1.15M(1) and 1.15M(2) respectively.[127] The Minister may, by legislative instrument, specify a part of Australia to be a '*designated city or major regional centre*' under reg 1.15M(1), or a '*regional centre or other regional area*' under reg 1.15M(2).[128]

Areas specified as a *regional centre or other regional area* on 20 January 2021, are also taken to be a *regional centre or other regional area* for all purposes relating to the assessment of where an applicant was living, working or studying before 20 January 2021.[129] Similarly, whilst the definition of the term *designated regional area* was repealed and substituted from 20 January 2021, an area that was a designated regional area under the old definition continues to be a designated regional area under the new definition, for the purposes of assessing where the applicant lived, worked or studied before 20 January 2021.[130]

For the relevant instrument see the 'DesRegArea' tab in the Register of Instruments – Skilled visas.

Relevant amending legislation

Title	Reference Number	Legislation Bulletin
Migration Amendment Regulations 2007 (No 12) (Cth)	SLI 2007, No 314	No 15/2007
Migration Amendment Regulations 2008 (No 2) (Cth)	SLI 2008, No 56	No 2/2008
Migration Amendment Regulations 2008 (No 6) (Cth)	SLI 2008, No 189	No 6/2008
Migration Amendment Regulations 2008 (No 7) (Cth)	SLI 2008, No 205	No 8/2008
Migration Amendment Regulations 2009 (No 4) (Cth)	SLI 2009, No 84	No 6/2009
Migration Amendment Regulations 2009 (No 7) (Cth)	SLI 2009, No 144	No 9/2009
Migration Amendment Regulations 2009 (No 15) (Cth)	SLI 2009, No 375	No 19/2009
Migration Amendment Regulations 2010 (No 6) (Cth)	SLI 2010, No 133	No 7/2010
Migration Amendment Regulations 2011 (No 1) (Cth)	SLI 2011, No 13	No 1/2011
Migration Amendment Regulations 2011 (No 3) (Cth)	SLI 2011, No 74	No 2/2011
Migration Amendment Regulation 2012 (No 2) (Cth)	SLI 2012, No 82	No 4/2012

[127] reg 1.03 as inserted by F2020L01639 for applications made on or after 20 January 2020.
[128] reg 1.15M as substituted by F2020L01639 for applications made on or after 20 January 2020.
[129] cl 9303 of Sch 13 inserted by F2020L01639. See also Explanatory Statement to F2020L01639, p 24-25.
[130] cl 9304 of Sch 13 inserted by F2020L01639. See also Explanatory Statement to F2020L01639, p 25. Prior to 20 January 2021, the term *designated regional area* was is defined to mean a part of Australia specified in an instrument under reg 1.15M: regs 1.03 and 1.15M as inserted by the *Migration Amendment New Skilled Regional Visas) Regulations 2019* (Cth) (F2019L00578).

Migration Amendment Regulations 2012 (No 3) (Cth)	SLI 2012, No 105	No 4/2012
Migration Legislation Amendment Regulation 2012 (No 5) (Cth)	SLI 2012, No 256	No 10/2012
Migration Legislation Amendment Regulation 2013 (No 1) (Cth)	SLI 2013, No 33	No 2/2011
Migration Amendment (Visa Application Charge and Related Matters) Regulation 2013 (Cth)	SLI 2013, No 118	No 9/2013
Migration Amendment (Skills Assessment) Regulation 2013 (Cth)	SLI 2013, No 233	No 15/2013
Migration Amendment (Redundant and Other Provisions) Regulation 2014 (Cth)	SLI 2014, No 30	No 2/2014
Migration Legislation Amendment (2014 Measures No 1) Regulation 2014 (Cth)	SLI 2014, No 82	No 5/2014
Migration Amendment (Temporary Graduate Visas) Regulation 2014 (Cth)	SLI 2014, No 145	No 7/2014
Migration Amendment (2015 Measures No 1) Regulation 2015 (Cth)	SLI 2015, No 34	No 1/2015
Migration Legislation Amendment (2016 Measures No 1) Regulation 2016 (Cth)	F2016L00523	
Migration Amendment (Hong Kong Passport Holders) Regulations 2020 (Cth)	F2020L01047	
Migration Amendment (COVID-19 Concessions) Regulations 2020 (Cth)	F2020L01181	No 2/2020
Home Affairs Legislation Amendment (2020 Measures No.2) Regulations 2020 (Cth)	F2020L01427	No 3/2020
Migration Amendment (Temporary Graduate Visas) Regulations 2020 (Cth)	F2020L01639	No 1/2021
Migration Legislation Amendment (Hong Kong) Regulations 2021 (Cth)	F2021L01479	No 6/2021

Relevant case law

Judgment	Judgment Summary
Ali v MCMSMA [2021] FCA 1311	Summary
Anand v MIAC [2013] FCA 1050	Summary
Ahmed v MICMSMA [2020] FCCA 622	
Baig & Ors v MIBP [2018] FCCA 2986	
Berenguel v MIAC (2010) 264 ALR 417	Summary
Boddu v MIBP [2019] FCCA 879	
Boddu v MIBP [2019] FCA 1340	
George v MICMSMA [2020] FCCA 2161	
Khan v MIBP [2018] FCAFC 85	
Luk v MIBP [2018] FCCA 2740	
Mahohoma v MICMSMA [2020] FCCA 2206	
Nguyen v MIBP [2016] FCCA 1523	Summary
Panchal v MIAC [2012] FMCA 562	Summary
Rahim v MIBP [2018] FCCA 1814	Summary
Rahim v MIBP [2018] FCA 1736	
Sapkota v MIAC [2012] FCA 981	Summary
Shrestha v MHA [2019 FCA 1843	
Singh v MIAC [2011] FMCA 982	Summary
Singh v MICMSMA [2020] FCA 774	Summary
Singh v MICMSMA [2021] FCCA 905	Summary
Singh v MICMSMA [2021] FedCFamC2G 208	Summary

Tauqueer v MHA [2019] FCCA 1343	
Tauqueer v MICMSMA [2019] FCA 1883	
Venkatesan v MIAC [2008] FMCA 409	Summary

Available decision precedents

The following decision precedents are available on CaseMate for Subclasses 485. Samples of these can be viewed on the Decision Precedents Index.

- **Subclass 485 Visa Refusal – General** – suitable for Subclass 485 cases where the visa application was lodged on or after 1 September 2007. It asks users to select the criteria in issue (no previous Subclass 476 / 485 visas / visa history requirements; police check application; medical examination arrangements; health insurance arrangements), and will adjust the content accordingly. Not suitable for English language proficiency, skills assessment, study requirement and PIC 4005, 4020 issues, for which there are specific decision templates.
- **Subclass 485 Visa Refusal - English proficiency –** suitable for Subclass 485 cases where the visa application was lodged on or after 1 September 2007. It specifically considers the issue of whether the applicant has the relevant standard of English for the grant of the visa (cl 485.215, or 485.212 where the visa application date is on or after 23 March 2013).
- **Subclass 485 Visa Refusal – Skills Assessment –** suitable for use where the visa application was lodged on or after 1 September 2007 and the primary issue in dispute is the Skills Assessment (cls 485.214 and 485.221 for pre 23 March 2013 visa applications, and cls 485.223 and 485.224 for post 23 March 2013 visa applications).
- **Subclass 485 Visa Refusal - Study Requirement –** suitable for Subclass 485 cases where the visa application was lodged on or after 1 September 2007 and the primary issue in dispute is the Study Requirement (cl 485.213, or cls 485.221 and 485.222 where visa application date is on or after 23 March 2013).
- **PIC 4020 -** suitable for any visa subclass where the issue in dispute is whether the applicant meets public interest criterion 4020 (false or misleading information / bogus documents).
- **Optional Standard Paragraphs - Skilled Visas –** paragraphs addressing relevant law for English language requirements, and Schedule 6C (points test) are available for insertion into draft decision templates.

Last updated/reviewed: 27 January 2022

SUBCLASS 489 SKILLED-REGIONAL SPONSORED (PROVISIONAL) (CLASS SP)

Overview[1]

Subclass 489 is the only subclass within Skilled – Regional Sponsored (Provisional) (Class SP). It is a provisional visa for either four[2] or seven[3] years and was introduced as a part of 'SkillSelect', the skilled migration selection model that requires an applicant to be invited by the Minister to apply for the visa.[4] It effectively replaced the Subclass 475 (Skilled – Regional Sponsored) and Subclass 487 (Skilled – Regional Sponsored) visas.

There are two streams in the Subclass 489 visa: the First Provisional Visa stream and the Second Provisional Visa stream.

The First Provisional Visa stream, which requires an applicant to have been invited by the Minister to apply for the visa, closed to applicants seeking to satisfy the primary criteria from 16 November 2019.[5]

The Second Provisional Visa stream is for persons who have already held one provisional regional skilled visa on the basis of satisfying the primary criteria or being the spouse or de facto partner of the person who satisfied the primary criteria for at least two years before the date of the application.[6] An invitation is not required when applying under this stream.

Tribunal's jurisdiction

A decision to refuse a Subclass 489 visa is generally reviewable under Part 5 of the *Migration Act 1958* (Cth) (the Act).[7] If the visa applicant made the visa application while in Australia (but not in immigration clearance), the decision is reviewable under s 338(2) of the Act. In these cases:

- the application for review must be lodged within 21 days after the notification is received by the visa applicant;[8]
- the visa applicant has standing to apply for review;[9]

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] cl 489.511(1), if the visa is in the First Provisional Visa stream and cl 489.511(2) does not apply; cl 489.512(1), if the visa is in the Second Provisional Visa stream and cl 489.512(2) does not apply.
[3] cl 489.511(2), if the visa is in the First Provisional Stream, the visa was in effect on any day between 1 February 2020 and 14 December 2021 and the holder of the visa was outside of Australia on that day; cl 489.512(2), if the visa is in the Second Provisional Stream, the visa was in effect on any day between 1 February 2020 and 14 December 2021 and the older of the visa was outside Australia on that day. Clauses 489.511(2) and 489.512(2) were inserted by *Migration Amendment (Extension of Temporary Graduate and Skilled Regional Provisional Visas) Regulations 2022* (Cth) (F2022L00151) and apply to any Subclass 489 visa granted before, on or after 31 January 2020, other than a visa that is cancelled before the earlier of 18 February 2022 and the last date on which, disregarding the amendments, the holder of the visa could travel to, enter and remain in Australia under the visa: reg 6 of F2022L00151.
[4] Explanatory Statement to *Migration Amendment Regulation 2012 (No 2)* (Cth) (SLI 2012, No 82), p.1.
[5] Item 1230(4) table item 1 and cl 489.221; item 1230(3)(aa) inserted by *Migration Amendment (New Skilled Regional Visas) Regulations 2019* (Cth) (F2019L00578).
[6] Item 1230(5), cl 489.231.
[7] A decision made under s 501 on character grounds is not reviewable under pt 5.
[8] s 347(1)(b), reg 4.10(1)(a). Note, if the applicant was in detention at the time of primary decision then the review application must be made within 7 working days after notification is received: reg 4.10(2)(b).
[9] s 347(2)(a).

- the applicant must be in the migration zone when the review application is made;[10]
- applicants may combine their review applications where the visa applications have been combined in a way permitted by reg 2.08 (newborn child); reg 2.08B (addition of dependent children); and combined under Schedule 1 (valid application by members of the same family unit made at the same time and place).[11]

If the visa applicant made the visa application while outside of the migration zone and is sponsored or nominated in accordance with reg 4.02(4)(la)(ii) of the *Migration Regulations 1994* (Cth) (the Regulations), the decision is reviewable under s 338(9) of the Act.[12] In these cases:

- the application for review must be lodged within 21 days after the notification is received by the visa applicant;[13]
- the sponsor / nominator has standing to apply for review;[14]
- review applications of 2 or more members of a family unit cannot be combined by the sponsor/nominator.[15]

While the SkillSelect process involves a decision to invite a person to apply for the visa, there is no clear 'decision' not to invite a person to make an application. Even if there were such a 'decision', this would not be a reviewable decision under s 338.

Requirements for making a valid visa application

The requirements for making a valid Subclass 489 visa application are set out in item 1230 of Schedule 1 to the Regulations.

An application must be made in the approved form and in the place and manner specified.[16] An applicant may be in or outside Australia at the time of visa application, but not in

[10] s 347(3).
[11] reg 4.12(2).
[12] For primary decisions made before 13 December 2018, reg 4.02(4)(la)(ii) requires that the non-citizen was sponsored or nominated, as required by a criterion for the grant of the visa, by an Australian citizen or permanent resident, a company / partnership that operates in the migration zone, or the holder of a special category visa: reg 4.02(4)(la) inserted by *Migration Legislation Amendment Regulation 2012 (No 2)* (Cth) (SLI 2012, No 256). For primary decisions made on or after 13 December 2018, reg 4.02(4)(la)(ii) requires that the non-citizen was sponsored or nominated, as required by a criterion for the grant of the visa, by a person, company or partnership referred to in sub-reg (4AA): as amended by *Migration Amendment (Enhanced Integrity) Regulations 2018* (Cth) (F2018L01707). Sub-reg (4AA) includes an Australian citizen or permanent resident, a company / partnership that operates in the migration zone, a special category visa holder or a Commonwealth agency: inserted by F2018L01707.
[13] s 347(1)(b), reg 4.10(1)(d).
[14] s 347(2)(d), reg 4.02(5)(ka) inserted by SLI 2012, No 256.
[15] This is because reg 4.12(2) is only applicable where the visa applicants are also the review applicants as it specifically provides that it is the applicants who have been refused the visa who can combine their applications for review (and not another type of review applicant such as a sponsor or relative). Therefore, it does not extend to decisions reviewable under s 338(9) where a sponsor or nominator has standing to apply for review because the sponsor or nominator is not the person who has been refused the visa. In these instances, separate review applications would need to be lodged by the sponsor or nominator.
[16] Items 1230(1), (3)(a). For visa applications made on or after 18 April 2015, the approved form and the place and manner for the purpose of items 1230(1) and (3)(a) are specified by the Minister in a legislative instrument: items 1230(1) and (3)(a) as substituted by *Migration Amendment (2015 Measures No 1) Regulation 2015* (Cth) (SLI 2015, No 34). For the relevant instrument see the 'VisaApp' tab in the Register of Instruments – Skilled visas.

immigration clearance.[17] An applicant in Australia must hold a substantive visa, or a Bridging Visa A, B or C.[18]

An applicant seeking to satisfy the primary criteria for the grant of a Subclass 489 in the First Provisional Visa stream must be made before 16 November 2019;[19] have been invited by the Minister to apply for a visa in that stream and apply for that visa within the period stated in the invitation;[20] not have turned 45 at the time of invitation (*for invitations issued on or after 1 July 2017*), or not have turned 50 at the time of invitation (*for invitations issued before 1 July 2017*);[21] meet nomination/sponsorship requirements;[22] nominate a skilled occupation specified in the relevant instrument and invitation;[23] and declare their skills have been assessed as suitable by the relevant assessing authority.[24]

An applicant seeking to satisfy the primary criteria for the Second Provisional Visa stream must hold a specified regional provisional skilled visa;[25] for at least 2 years immediately before the application is made, have held one of those visas, granted on the basis of being a primary applicant or the spouse or de facto partner of the primary applicant;[26] and not have held more than one of a particular kind of those visas.[27]

Visa criteria – Schedule 2 requirements

The visa criteria are set out in Part 489 of Schedule 2 to the Regulations.

The Subclass 489 visa does not have 'time of application' and 'time of decision' criteria although some, such as the skills assessment criteria, are expressed as applying at the 'time of invitation'.[28] Unless another temporal point is specified, the criteria must be satisfied at the time of decision.[29]

The criteria are divided into common criteria and stream specific criteria. Applicants seeking to satisfy the primary criteria for a Subclass 489 visa are required to satisfy the common criteria and the criteria for the specific stream in which they have applied (i.e. First Provisional Visa or Second Provisional Visa).

[17] Item 1230(3)(b).
[18] Item 1230(3)(c).
[19] Item 1230(3)(aa) inserted by F2019L00578.
[20] Item 1230(4) table items 1 and 2.
[21] Item 1230(4) table item 3; as amended by *Migration Legislation Amendment (2017 Measures No 3) Regulations 2017* (Cth) (F2017L00816) for invitations issued on or after 1 July 2017.
[22] Items 1230(5) and (6).
[23] Item 1230 table items 4(a) and (b). For the relevant instrument see the 'SOL-SSL' tab in the Register of Instruments – Skilled visas.
[24] Item 1230(4) table item 4(c). Note that for visa applications made on or after 28 October 2013 where the invitation to apply was given on or after that date, this assessment must not have been one for a Subclass 485 (Temporary Graduate) visa: item 1230(4) table item 4(c) amended by *Migration Amendment (Skills Assessment) Regulation 2013* (Cth) (SLI 2013, No 233)
[25] Item 1230(5) table item 1.
[26] Item 1230(5) table item 2.
[27] Item 1230(5) table item 3.
[28] In *Thapa v MICMSMA* [2021] FCCA 686, the Court held at [28]-[30] that the words 'at the time of invitation to apply for the visa' in cl 189.222(1) meant the period within which the invitation was valid or open, not the date the invitation to apply was made or given to an applicant. As the invitation expressed that it was valid for 60 days, it was open for the applicant to submit a skills assessment that had only been obtained during that period, even though it had not been in existence at the date the invitation was issued. The Court's reasoning would appear equally applicable to the similarly worded skills assessment requirement for Subclass 489 in the First Provisional Stream i.e. cl 489.222.
[29] See Note to div 489.2, which states that 'all criteria must be satisfied at the time a decision is made on the application'.

Primary criteria must be satisfied by at least one member of a family unit, except where a member of the family unit holds a prescribed provisional skilled visa on the basis of satisfying the primary criteria.[30] All other members of the family unit need only satisfy the secondary criteria. The secondary criteria are not discussed in this commentary.

Common criteria

The common criteria in Division 489.21 are for all applicants seeking to satisfy the primary criteria for a Subclass 489 visa. They require that:

- **public interest criteria -** the applicant and members of the family unit of the applicant satisfy certain public interest criteria.[31]
- **special return criteria -** the applicant, and members of the family unit of the applicant who are also visa applicants, satisfy certain special return criteria.[32]

First Provisional Visa stream criteria

In addition to satisfying the common criteria, applicants in the First Provisional Visa stream must satisfy the following criteria in Division 489.22:

- **invitation to apply -** the applicant was invited in writing by the Minister to apply for the visa.[33]
- **skills assessment -** at the time of invitation to apply for the visa:
  - the relevant assessing authority had assessed the applicant's skills as suitable for the applicant's nominated skilled occupation (see below);[34] and
  - *for visa applications made on or after 1 July 2014* - no more than 3 years had passed since the date of the assessment or, if a shorter period of validity was specified in the assessment, that shorter period has not ended.[35]
  - *for visa applications made on or after 28 October 2013 as a result of an invitation to apply for the visa on or after 28 October 2013*, this assessment must not have been for a Subclass 485 (Temporary Graduate) visa.[36]
  - if the skills assessment was made on the basis of a qualification obtained in Australia while the applicant held a student visa, the qualification was obtained as a result of studying a registered course.[37]

[30] See Note to div 489.2. The purpose of this note is to allow a person who is a member of the family unit of a person who holds a provisional skilled visa that is no longer open to new applications, to apply for the Subclass 489 visa on the basis of satisfying only the secondary criteria: see Explanatory Statement SLI 2012, No 82 at p.64.
[31] cls 489.211(1)–(6).
[32] cl 489.212.
[33] cl 489.221.
[34] cl 489.222(1).
[35] cls 489.222(1)(c)–(d) inserted by by *Migration Legislation Amendment (2014 Measures No 1) Regulation 2014* (Cth) (SLI 2014, No 82).
[36] cl 489.222(1)(b) inserted by inserted by SLI 2013, No 233.

In *Thapa v MICMSMA*, the Court held that the words 'at the time of invitation to apply' in cl 189.222(1) meant the period within which the invitation was valid or open, not the date the invitation itself was made or given to the applicant.[38] As the invitation to apply was expressed as being valid or open for 60 days, it was open for the applicant to submit a skills assessment that had only been obtained during that period, even though it had not been in existence on the date the invitation was issued. The Court's reasoning would appear equally applicable to the similarly worded skills assessment criterion in cl 489.222(1) as well.

- **English language proficiency -** at the time of invitation to apply for the visa, the applicant had competent English (see below).[39]

- **points test -** the applicant's score when assessed in relation to the applicable points test (Schedule 6D), is not less than the qualifying score, or the score stated in the invitation to apply for the visa (see below).[40]

- **current nomination/sponsorship -** certain nomination / sponsorship requirements are met, that is, either:

  - the nominating State or Territory government agency has not withdrawn the nomination; or

  - the Minister has accepted the sponsorship of the applicant by a person who has turned 18, and is an Australian citizen, permanent resident or eligible New Zealand citizen who is usually resident in a designated area of Australia, and the person is related to the applicant or the applicant's spouse or de facto partner (if the spouse or de facto partner is an applicant for a Subclass 489 visa) as a relevant relative and each member of the family unit is sponsored by that person (see below).[41]

- **health criteria -** the applicant and each member of their family unit must satisfy public interest criterion 4005 (health, no waiver).[42]

Second Provisional Visa stream criteria

The criteria in Division 489.23 are only for applicants seeking to satisfy the primary criteria in the Second Provisional Visa stream and are generally less onerous than those for the First Provisional Visa stream. These criteria are:

- **substantial compliance with visa conditions -** the applicant, and each member of the family unit who is an applicant, has substantially complied with the conditions to which the visa was subject if s/he has previously held one of the following visas:

[37] cl 489.222(2).
[38] *Thapa v MICMSMA* [2021] FCCA 686, at [28]-[30].
[39] cl 489.223.
[40] cl 489.224.
[41] cl 489.225; the relevant relative being either a parent, child, sibling, aunt or uncle or nephew or niece (including adoptive or step) grandparent or first cousin.
[42] cl 489.226. Note this includes members of the family unit of the applicant who are not an applicant for a Subclass 489 visa unless it would be unreasonable to require the member to undergo assessment in relation to the criterion: cl 489.226(3).

- a Skilled – Independent Regional (Provisional) (Class UX) visa
- a Skilled – Designated Area – Sponsored (Provisional) (Class UZ) visa
- a Subclass 475 (Skilled – Regional Sponsored) visa
- a Subclass 487 (Skilled – Regional Sponsored) visa.[43]

- **health criteria -** the applicant and each member of their family unit must satisfy public interest criterion 4007 (health, waiver).[44]

Key Legal Issues

English language proficiency

For Subclass 489 First Provisional Visa stream visas, it is a criterion that the applicant had competent English *at the time of invitation* to apply for the Subclass 489 visa.[45] 'Competent English' is defined in reg 1.15C.[46]

For more information regarding English language proficiency, see English Language Ability – Skilled/Business Visas.

Skilled occupation

Skilled occupation in relation to a person is defined in reg 1.15I.[47]

Refer to the 'SOL-SSL' tab for the relevant instruments listing skilled occupations in the Register of Instruments - Skilled Visas. For further information about 'skilled occupation' and the relevant instruments, see Skilled Occupation and Skilled Occupation List Instruments - Quick guide.

Qualifying score and the Points Test

A criterion for the Subclass 489 visa in the First Provisional Visa stream is that the applicant has the 'qualifying score' when assessed under Subdivision B of Division 3 of Part 2 of the Act (ss 92–96 of the Act).[48] An applicant will have met this if they achieve at least the 'pass

[43] cl 489.231. For further discussion of this requirement, see Substantial Compliance with Visa Conditions.
[44] cl 489.232. Note this includes members of the family unit of the applicant who are not an applicant for a Subclass 489 visa unless it would be unreasonable to require the member to undergo assessment in relation to the criterion: cl 489.232(3).
[45] cl 489.223.
[46] reg 1.15C as amended by SLI 2015, No 34, repealing paragraph 1.15C(1)(b) and substituting paragraphs (b), (ba) and (bb) applicable to applications made on or after 1 July 2012 but not finally determined before 18 April 2015, and applications made on or after 18 April 2015: see item 4102 of sch 13 to the Regulations as substituted by *Migration Legislation Amendment (2015 Measures No 3) Regulation 2015* (Cth) (SLI 2015, No 184) sch 7.
[47] reg 1.15I as inserted by *Migration Amendment Regulations 2010 (No 6)* (Cth) (SLI 2010, No 133), sch 1, item [7] (which applied to visa applications made on or after 1 July 2010 and applications not finally determined before that date: reg 3(4) SLI 2010, No 133) and as amended by *Migration Amendment Regulations 2011 (No 3)* (Cth) (SLI 2011, No 74), sch 1, item [3]. There are no transitional provisions for this amendment, so it applies to all applications as of 1 July 2011: see reg 3(2) and Note, SLI 2011, No 74.
[48] cl 489.224(2).

mark' when assessed against the Points Test.[49] The relevant points test is Schedule 6D.[50] In addition to having the 'qualifying score', the applicant's score when assessed against Schedule 6D, must be no less than the score stated in the invitation to apply for the visa.[51]

There is no points test for Second Provisional Visa stream applicants.

See General Points Test (Schedule 6D) for further information.

Nomination, Sponsorship and Designated area

For Subclass 489 visas in the First Provisional Visa stream, it is a Schedule 1 requirement for a valid visa application that the applicant is either nominated by a State or Territory government agency or declares that he or she is sponsored by an eligible relative who is usually resident in a 'designated area'.[52] The corresponding Schedule 2 criterion for the grant of a visa in this stream is that the nominating government agency has not withdrawn the nomination, or that the Minister has accepted the sponsorship of the applicant by a person in specified circumstances, which include that the relative is usually resident in a 'designated area' of Australia.[53]

'Designated area' is defined in reg 1.03 to mean an area specified as a designated area by the Minister in an instrument in writing for this definition. The relevant instrument for 'designated area' can be located under the 'DesgnAreas' tab in the Register of Instruments - Skilled visas.

For information on 'usually resident', see Usually Resident.

Can the Tribunal accept a sponsorship on review?

If a sponsorship by a relative has not been accepted by the Minister for the purpose of the time of decision criteria, and the points test qualifications relating to designated area sponsorship, there is a question as to whether the Tribunal has jurisdiction on review to accept the sponsorship.[54] There is no clear answer to this question.

On one view, assessing whether a sponsorship should be accepted is essential to determining whether the applicant meets the relevant time of decision criteria. That is, it is essential to the exercise of the decision-making power in s 65 of the Act to grant or refuse to grant a visa. This is the Department's view as reflected in its Policy,[55] and has been the Tribunal's approach to similar criteria in the context of family and partner visas, and it has not been challenged in those contexts.[56]

[49] s 94(1) of the Act. See further the 'PoolPassMark' tab of the Register of Instruments - Skilled Visas.
[50] reg 2.26AC as inserted by SLI2012, No 82.
[51] cl 489.224(1).
[52] Item 1230(4) table item 6(a).
[53] cl 489.225(3)(c).
[54] The Tribunal has taken different approaches on this issue: compare [redacted], [redacted], [redacted] and [redacted].
[55] For example, Policy – Migration Regulations - Schedules – [Sch2Visa489] Sch2Visa489 - Skilled - Regional (Provisional) – 13 Sponsorship – 13.1 Evidence of Sponsorship (reissued 18/11/2017).
[56] For example, MRT decision [redacted] and [redacted] (cl 300.222 'The sponsorship of the applicant under cl 300.213 has been approved by the Minister and is still in force'). The discretion in cl 300.213 to approve a sponsorship is limited by regs 1.20J,

This view finds some indirect support in the decision in *Hooda v MIAC* where Smith FM observed, in relation to the 'time of decision' sponsorship criterion in cl 886.222 as in force after 1 July 2010, that the criterion required that the Minister 'has accepted the sponsorship' before time of decision, but that 'it was administrative practice for the acceptability of the proposed sponsorship to be determined by a delegate at the same time when addressing the other visa criteria.[57] The acceptance of the proposed sponsor was regarded, in effect, as part of the substantive determination of the visa eligibility at time of decision.[58] Although this observation arguably raised some doubt as to the correctness of the Department's approach, that approach was not challenged, and his Honour subsequently described cl 886.222(3)(b) as involving an 'implied power of the Minister to decide whether he is willing to 'accept the sponsorship'.[59] However as this was not the subject of argument it does not provide clear authority on the scope of decision maker's task when considering this criterion.

On that view, the Tribunal's review powers under s 349(1) (which include all of the powers and discretions conferred by the Act on the person who made that decision) would include the power to consider whether to accept a sponsorship.[60]

The alternative view is that the Tribunal does not have jurisdiction to consider whether a sponsorship should be accepted. On this view, the question before the Tribunal is whether as a matter of fact the sponsorship has been accepted by the Minister or his or her delegate. Several factors support this view. First, the criterion itself appears to be expressed in terms of whether the sponsorship has in fact been accepted and not whether it should be, or is, accepted.[61] Secondly, there are no criteria or guiding principles or procedures in the legislation dealing with the consideration and approval of such sponsorships.[62] Thirdly, in contrast to the business visa regime, a decision to refuse a sponsorship is not specified in the legislation as a reviewable decision.

In *Suh v MIAC* the Full Federal Court unanimously held that a decision not to approve an occupational training nomination for cl 442.222(1) was not reviewable by the Tribunal.[63] For the reasons above, there does not appear to be any relevant textual distinction between the cl 442.222 requirement considered in *Suh*, that 'a nomination in respect of the occupational training has been lodged and has been approved by the Minister', and the Skilled visa

1.20KA and 1.20KB. The Tribunal's approach to this limitation was challenged in *Babicci v MIMIA* [2005] FCAFC 77 (2005) 141 FCR 285 however no issue was taken with the Tribunal's power to consider the issue.

[57] *Hooda v MIAC* [2012] FMCA 1018.

[58] *Hooda v MIAC* [2012] FMCA 1018 at [36].

[59] *Hooda v MIAC* [2012] FMCA 1018 at [42].

[60] s 349(1) confers on the Tribunal, for the purposes of the review of a pt 5 reviewable decision, all the powers and discretions that are conferred by the Act on the person who made the decision. The decision, for these purposes, is the decision to refuse to grant the visa.

[61] See *Hooda v MIAC* [2012] FMCA 1018 at [36] in relation to the equivalent sponsorship requirement for Subclass 886, and contrast the criteria under consideration in *Tvarkovski v MIMA* [2001] FCA 375.

[62] This could arguably support the contrary view, i.e. that acceptance of a nomination or sponsorship is simply part of the s 65(1) power. However a similar point was one factor that persuaded the Full Federal Court in *Suh v MIAC* (2009) 175 FCR 515 that in the context of a decision to refuse a Subclass 442 (Occupational Trainee) visa a decision not to approve an occupational training nomination made for the purpose of cl 442.222 was not reviewable by the Tribunal.

[63] *Suh v MIAC* (2009) 175 FCR 515, followed in *Hu v MIAC* [2009] FCA 1288. The Court in *Suh* followed the approach taken by Lander J in *Kim v MIAC* [2007] FCA 138 and distinguished *Tvarkovski v MIMA* [2001] FCA 375 where Goldberg J had held that the Tribunal had power to consider the issues raised by reg 5.19 as part of its review of the decision to refuse a Subclass 805 Business visa, as the provisions in question in that case were significantly different. Clause 805.213(1)(a) required that 'the applicant has been nominated in accordance with sub-reg 5.19(2)…'; cl 805.222 required that 'the appointment is an approved appointment under reg 5.19'; and (critically) reg 5.19 provided what the Court described as dictionary and definitional provisions, not a separate and distinct process for determining whether an employer nomination should be accepted: *Tvarkovski* at [22].

requirements that 'the Minister has accepted' the sponsorship. Applying the reasoning in *Suh* to, for example, cl 489.225(3), if a sponsorship has not been accepted the Tribunal would be bound to affirm the delegate's decision on the basis that cl 489.225 is not satisfied.

However, while the judgment in *Suh* might raise a doubt as to whether the power in s 65 (and the Tribunal's s 349(1) power on review) includes a power to approve the sponsorship, it has not been applied in contexts other than cl 442.222. Further, the outcome in that case appears to have been heavily influenced by departmental practice whereby the nomination was assessed separately and in advance of the merits of the visa application.[64] There is therefore some question as to whether it would be applied in other legal and factual contexts.

If the Tribunal does not in fact have the relevant power, the lack of an accepted sponsorship at the time of the delegate's decision would not necessarily be fatal to the application. A sponsorship might be accepted by the Department during the course of the review; and it would be open to the Tribunal to make inquiries of the Department, or to invite the applicant to do so, as to the status of the sponsorship,[65] although it would not be compelled to do so.[66]

Relevant amending legislation

Title	Reference Number	Legislation Bulletin
Migration Amendment Regulations 2010 (No 6) (Cth)	SLI 2010, No 133	No 7/2010
Migration Amendment Regulations 2011 (No 3) (Cth)	SLI 2011, No 74	No 2/2011
Migration Amendment Regulation 2012 (No 2) (Cth)	SLI 2012, No 82	No 4/2012
Migration Legislation Amendment Regulation 2012 (No 5) (Cth)	SLI 2012, No 256	No 10/2012
Migration Amendment (Skills Assessment) Regulation 2013 (Cth)	SLI 2013, No 233	No 15/2013
Migration Legislation Amendment (2014 Measures No 1) Regulation 2014 (Cth)	SLI 2014, No 82	No 5/2014
Migration Amendment (2015 Measures No 1) Regulation 2015 (Cth)	SLI 2015, No 34	No 1/2015
Migration Legislation Amendment (2015 Measures No 3)	SLI 2015, No 184	No 10/2015

[64] See *Suh v MIAC* (2009) 175 FCR 515 at [15], [21].
[65] This is what happened in [redacted]. In that case the Tribunal received confirmation from the State agency that during the course of its review the nomination had been approved by the General Skilled Migration Section of the Department, because the applicant had moved to the region and had been living and working there for six months. On that basis the Tribunal found that the applicant satisfied cl 487.225.
[66] See *Kim v MIAC* [2007] FCA 138.

Regulation 2015 (Cth)		
Migration Legislation Amendment (2017 Measures No 3) Regulations 2017 (Cth)	F2017L00816	No 4/2017
Migration Legislation Amendment (2017 Measures No 4) Regulations 2017 (Cth)	F2017L01425	No 5/2017
Migration Amendment (Enhanced Integrity) Regulations 2018 (Cth)	F2018L01707	No 5/2018
Migration Amendment (New Skilled Regional Visas) Regulations 2019 (Cth)	F2019L00578	No 4/2019
Migration Amendment (Extension of Temporary Graduate and Skilled Regional Provisional Visas) Regulations 2022 (Cth)	F2022L00151	

Relevant case law

Judgment	Judgment Summary
Hooda v MIAC [2012] FMCA 1018	Summary
Suh v MIAC [2009] FCAFC 42*;* (2009) 175 FCR 515	Summary
Thapa v MICMSMA [2021] FCCA 686	Summary

Available decision precedents

These are no decision precedents available for this visa subclass. However, the following generic decision precedents may be used:

- **Generic –** this precedent is suitable for any MRD reviewable visa refusal decisions.
- **PIC 4020 –** this precedent is suitable for any visa subclass where the issue in dispute is whether the applicant meets public interest criterion 4020 (false or misleading information / bogus documents).
- **Subclass 189/190/489/491 Visa Refusal – Points test (Sch 6D)** - this precedent is suitable for a Subclass 489 visa decision where the issue in dispute is whether the applicant has the qualifying score when assessed against the points test in Schedule 6D.

- **Optional Standard Paragraphs - Skilled Visas –** paragraphs addressing relevant law for English language requirements are available for insertion into draft decision precedents.

Last updated/reviewed: 31 October 2022

SUBCLASS 491 (SKILLED WORK REGIONAL (PROVISIONAL)) (CLASS PS) VISA

Overview[1]

Subclass 491 commenced on 16 November 2019 and is the only subclass within Skilled Work Regional (Provisional) (Class PS).[2] It supersedes Subclass 489.[3]

Designed to assist regional Australia, Subclass 491 is a provisional visa for skilled workers who want to live, work and study in a 'designated regional area' of Australia.[4] It is in effect for 5 years[5] or, in some circumstances, 8 years.[6]

Those who want to apply for a Subclass 491 visa must first submit an expression of interest in SkillSelect and then be invited by the Minister to apply for the visa.[7]

Tribunal's jurisdiction

A decision to refuse a Subclass 491 visa is reviewable under Part 5 of the *Migration Act 1958* (Cth) (the Act).[8] If the visa applicant made the application while in Australia (but not in immigration clearance), the decision is reviewable under s 338(2) of the Act. In these cases:

- the application for review must be lodged within 21 days after the notification is received by the visa applicant[9]
- the visa applicant has standing to apply for review[10]
- the applicant must be in the migration zone when the review application is made[11]

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] Subclass 491 was introduced by *Migration Amendment (New Skilled Regional Visas) Regulations 2019* (Cth) (F2019L00578).
[3] Explanatory Statement to F2019L00578, p 1.
[4] Explanatory Statement to F2019L00578, p 1. Item 1241(4) table item 7 requires that an applicant declare in the application for a Subclass 491 visa that the applicant and each person who is an applicant for the grant of a Subclass 491 and claims to be a member of the family unit of the applicant, has a genuine intention to live, work and study in a 'designated regional area'. Further, Subclass 491 visa holders are subject to condition 8579, which requires that they live, work and study only in a part of Australia that was a 'designated regional area' at the time the visa was granted: cl 491.612. For applications made before 20 January 2021, the term 'designated regional area' is defined to mean a part of Australia specified in an instrument under reg 1.15M: regs 1.03 and 1.15M inserted by F2019L00578. For applications made on or after 20 January 2021, the term 'designated regional area' is defined to mean a 'designated city or major regional centre' or a 'regional centre or other regional area': reg 1.03 as amended by the *Migration Amendment (Temporary Graduate Visas) Regulations 2020* (Cth) (F2020L01639). The terms 'designated city or major regional centre' and 'regional centre or other regional area' have the meaning given by reg 1.15M(1) and 1.15M(2) respectively: reg 1.03 inserted by F2020L01639. The Minister may, be legislative instrument, specify a part of Australia to be a 'designated city or major regional centre' under reg 1.15M(1), or a 'regional centre or other regional area' under reg 1.15M(2): reg 1.15M as substituted by F2020L01639. For the relevant instrument see the 'DesRegArea' tab in the Register of Instruments – Skilled visas.
[5] cls 491.511(1) and 491.512(1).
[6] Primary visa holders can travel to, enter, and remain in Australia for 8 years from the date of grant if the visa was in effect on any day between 1 February 2020 and 14 December 2021, the holder of the visa was outside Australia on that day and, disregarding cl 491.511, the visa was in effect on 18 February 2022: cl 491.511(2) inserted by the *Migration Amendment (Extension of Temporary Graduate and Skilled Regional Provisional Visas) Regulations 2022* (Cth) (F2022L00151). A similar provision applies to secondary visa holders: see cl 491.512(2) inserted by F2022L00151.
[7] SkillSelect is the skilled migration selection model that requires an applicant to be invited by the Minister to apply for the visa.
[8] A decision made under s 501 on character grounds is not reviewable under Part 5.
[9] s 347(1)(b), reg 4.10(1)(a). Note, if the applicant was in detention at the time of primary decision then the review application must be made 7 working days after notification is received: reg 4.10(2)(b).
[10] s 347(2)(a).
[11] s 347(3).

- applicants may combine their review applications where the visa applications have been combined in a way permitted by reg 2.08 (newborn child); reg 2.08B (addition of dependent children); or Schedule 1.[12]

If the visa applicant made the visa application while outside of the migration zone and is sponsored or nominated in accordance with reg 4.02(4)(la)(ii) of the *Migration Regulations 1994* (Cth) (the Regulations), the decision is reviewable under s 338(9) of the Act.[13] In these cases:

- the application for review must be lodged within 21 days after the notification is received by the visa applicant[14]
- the sponsor / nominator has standing to apply for review[15]
- review applications of 2 or more members of a family unit cannot be combined by the sponsor/nominator.[16]

While the SkillSelect process involves the Minister inviting a person to apply for the visa, the 'decision' whether or not to invite someone to apply is not a Part 5-reviewable decision under the Act as it is not a decision to refuse or cancel a visa, is not a points score decision made under s 93 of the Act and is not prescribed for the purposes of s 338(9).[17]

Requirements for making a valid application

The requirements for making a valid Subclass 491 visa application are set out in item 1241 of Schedule 1 to the Regulations.[18]

An application must be made in the approved form, at the place and in the manner specified.[19] An applicant may be in or outside Australia at the time of application, but not in immigration clearance.[20] An applicant in Australia must hold a substantive visa, or a Bridging Visa A, B or C.[21]

If seeking to satisfy the primary criteria for Subclass 491, an applicant must:

[12] reg 4.12(2).
[13] reg 4.02(4)(la)(ii) requires that the non-citizen was sponsored or nominated, as required by a criterion for the grant of the visa, by a person, company or partnership referred to in sub-reg (4AA): as amended by *Migration Amendment (Enhanced Integrity) Regulations 2018* (Cth) (F2018L01707). Regulation 4.02(4AA) includes an Australian citizen or permanent resident, a company / partnership that operates in the migration zone, a special category visa holder or a Commonwealth agency: inserted by F2018L01707.
[14] s 347(1)(b), reg 4.10(1)(d).
[15] s 347(2)(d), reg 4.02(5)(ka).
[16] This is because reg 4.12(2) is only applicable where the visa applicants are also the review applicants as it specifically provides that it is the applicants who have been refused the visa who can combine their applications for review (and not another type of review applicant such as a sponsor or relative). Therefore, it does not extend to decisions reviewable under s 338(9) where a sponsor or nominator has standing to apply for review because the sponsor or nominator is not the person who has been refused the visa. In these instances, separate review applications would need to be lodged by the sponsor or nominator.
[17] s 338, reg 4.02(4).
[18] Item 1241 inserted by F2019L00578.
[19] Items 1241(1), 1241(3)(a). The approved form and the place and manner for the purposes of items 1241(1) and 1241(3)(a) are specified by the Minister in a legislative instrument: items 1241(1), 1241(3)(a). For the relevant instrument see the 'VisaApp' tab in the Register of Instruments – Skilled visas.
[20] Item 1241(3)(b).
[21] Item 1241(3)(c).

- have been invited by the Minister to apply for a visa and apply for that visa within the period stated in the invitation[22]
- not have turned 45 at the time of invitation[23]
- meet nomination/sponsorship requirements[24]
- nominate a skilled occupation that is specified in the invitation and in the relevant instrument at the time of invitation[25]
- declare in the application their skills have been assessed as suitable by the relevant assessing authority and that the assessment is not for a Subclass 485 (Temporary Graduate) visa[26]
- declare in the application that they and each person who is an applicant for a Subclass 491 visa and claims to be a member of the family unit of the applicant has a genuine intention to live, work and study in a 'designated regional area'.[27]

For applications made *before 20 January 2021*, the term 'designated regional area' is defined to mean a part of Australia specified in an instrument under reg 1.15M.[28] For applications made *on or after 20 January 2021*, the term 'designated regional area' is defined to mean a 'designated city or major regional centre' or a 'regional centre or other regional area'.[29] The terms 'designated city or major regional centre' and 'regional centre or other regional area' have the meaning given by reg 1.15M(1) and 1.15M(2) respectively.[30] The Minister may, by legislative instrument, specify a part of Australia to be a 'designated city or major regional centre' under reg 1.15M(1), or a 'regional centre or other regional area' under reg 1.15M(2).[31]

For the relevant instrument see the 'DesRegArea' tab in the Register of Instruments – Skilled visas.

Visa criteria – Schedule 2 requirements

The visa criteria are set out in Part 491 of Schedule 2 to the Regulations.[32] Primary criteria must be satisfied by at least one member of a family unit.[33] All other members of the family unit need only satisfy the secondary criteria.[34]

[22] Item 1241(4) table items 1, 2.
[23] Item 1241(4) table item 3.
[24] Item 1241(4) table items 5, 6.
[25] Item 1241(4) table items 4(a)-(b). For the relevant instrument see the 'SOL-SSL' tab in the Register of Instruments – Skilled visas.
[26] Item 1241(4) table item 4(c).
[27] Item 1241(4) table item 7.
[28] regs 1.03 and 1.15M as inserted by F2019L00578.
[29] reg 1.03 as amended by F2020L01639.
[30] reg 1.03 as inserted by F2020L01639.
[31] reg 1.15M as substituted by F2020L01639.
[32] pt 491 inserted by F2009L00578.
[33] See Note 1 to div 491.2.
[34] See Note 1 to div 491.2. Secondary criteria are not discussed in this commentary.

The criteria are not structed as 'time of application' and 'time of decision', although some, such as the skills assessment criteria, are expressed as applying at the 'time of invitation'.[35] Unless another temporal point is specified within the criterion itself, the criteria must be satisfied at the time of decision.[36]

The primary criteria in Division 491.2 must be satisfied by all applicants seeking to meet the primary criteria. These include:

- **invitation to apply**
  - The applicant was invited in writing by the Minister to apply for the visa.[37]
- **skills assessment** – at the time of invitation to apply for the visa:
  - the relevant assessing authority had assessed the applicant's skills as suitable for the applicant's nominated skilled occupation (see below);[38] and
  - The assessment was not for a Subclass 485 (Temporary Graduate) visa;[39] and
  - Not more than 3 years had passed since the date of the assessment or, if a shorter period of validity was specified in the assessment, that shorter period has not ended.[40]
  - If the skills assessment was made on the basis of a qualification obtained in Australia while the applicant held a student visa, the qualification was obtained as a result of studying a registered course.[41]

  In *Thapa v MICMSMA*, the Court held that the words 'at the time of invitation to apply' in cl 189.222(1) meant the period within which the invitation was valid or open, not the date the invitation itself was made or given to the applicant.[42] As the invitation to apply was expressed as being valid or open for 60 days, it was open for the applicant to submit a skills assessment that had only been obtained during that period, even though it had not been in existence on the date the invitation was issued. The Court's reasoning would appear equally applicable to the similarly worded skills assessment criterion in cl 491.214(1) as well.
- **English language proficiency**

[35] In *Thapa v MICMSMA* [2021] FCCA 686, the Court held at [28]-[30] that the words 'at the time of invitation to apply for the visa' in cl 189.222(1) meant the period within which the invitation was valid or open, not the date the invitation to apply was made or given to an applicant. As the invitation expressed that it was valid for 60 days, it was open for the applicant to submit a skills assessment that had only been obtained during that period, even though it had not been in existence at the date the invitation was issued. The Court's reasoning would appear equally applicable to the similarly worded skills assessment requirement for Subclass 491 i.e. cl 491.214.
[36] See Note 2 to div 491.2.
[37] cl 491.213.
[38] cl 491.214(1)(a).
[39] cl 491.214(1)(b).
[40] cls 489.214(1)(c)-(d).
[41] cl 491.214(2).
[42] *Thapa v MICMSMA* [2021] FCCA 686, at [28]-[30].

- At the time of invitation to apply for the visa, the applicant had competent English (see below).[43]

- **points test**

  - The applicant's score when assessed in relation to the applicable points test (Schedule 6D), is not less than the qualifying score and the score stated in the invitation to apply for the visa (see below).[44]

- **current nomination / sponsorship**

  - The nominating State or Territory government agency has not withdrawn the nomination;[45] or

  - the Minister has accepted the sponsorship of the applicant by a person who has turned 18, and is an Australian citizen, permanent resident or eligible New Zealand citizen who is usually resident in a 'designated regional area', and the person is related to the applicant or the applicant's spouse or de facto partner (if the spouse or de facto partner is an applicant for a Subclass 491 visa) as a relevant relative and each member of the family unit is sponsored by that person (see below).[46]

- **public interest criteria**

  - The applicant and members of the family unit of the applicant satisfy certain public interest criteria including character (PIC 4001) and health (PIC 4005).[47]

- **special return criteria**

  - The applicant, and members of the family unit of the applicant who are also applicants for a Subclass 491 visa, satisfy certain special return criteria.[48]

Secondary criteria to be satisfied at time of decision by applicants who are members of the family unit of a person satisfying the primary criteria include being a member of the family unit of a person who holds a Subclass 491 visa granted on the basis of satisfying the primary criteria[49] and satisfying certain public interest[50] and special return criteria.[51]

[43] cl 491.215.
[44] cl 491.216.
[45] cl 491.217(1).
[46] cl 491.217. The relevant relative can be a parent; child or step-child; sibling, aunt or uncle or nephew or niece (including adoptive or step); grandparent or first cousin. For applications made before 20 January 2021, the term 'designated regional area' is defined to mean a part of Australia specified in an instrument under reg 1.15M: regs 1.03 and 1.15M inserted by F2019L00578. For applications made on or after 20 January 2021, the term 'designated regional area' is defined to mean a 'designated city or major regional centre' or a 'regional centre or other regional area': reg 1.03 as amended by F2020L01639. The terms 'designated city or major regional centre' and 'regional centre or other regional area' have the meaning given by reg 1.15M(1) and 1.15M(2) respectively: reg 1.03 inserted by F2020L01639. The Minister may, be legislative instrument, specify a part of Australia to be a 'designated city or major regional centre' under reg 1.15M(1), or a 'regional centre or other regional area' under reg 1.15M(2): reg 1.15M as substituted by F2020L01639. For the relevant instrument see the 'DesRegArea' tab in the Register of Instruments – Skilled visas.
[47] cl 491.211. Note this includes members of the family unit of the applicant who are not an applicant for a Subclass 491 visa: see cl 491.211(6).
[48] cl 491.212.
[49] cl 491.311.

Key Legal Issues

English language proficiency

It is a criterion for Subclass 491 that the applicant had competent English *at the time of invitation* to apply for the visa.[52] 'Competent English' is defined in reg 1.15C.[53] For Subclass 491, a person has competent English if:

- the person undertook a language test, specified in the relevant instrument; and
- the person is an applicant for a visa; and
- for a person who was invited (or whose spouse or de facto partner was invited) by the Minister under the Regulations, in writing, to apply for the visa - the test was conducted in the 3 years immediately before the date of the invitation; and
- the person achieved a score specified in the instrument.

or alternatively:

- the person holds a passport of a type specified in the relevant instrument.[54]

For more information regarding English language proficiency, see English Language Ability – Skilled/Business Visas.

Skilled occupation

The concept of 'skilled occupation' is relevant to both making a valid visa application and satisfying the substantive criteria for the grant of a Subclass 491 visa.[55] 'Skilled occupation' in relation to a person is defined in reg 1.15I, as meaning an occupation of a kind:

- that is specified in the relevant instrument to be a skilled occupation; and
- if a number of points are specified in the instrument as being available – for which the number of points are available; and
- that is applicable to the person in accordance with the specification of the occupation.[56]

For the relevant instruments listing skilled occupations refer to the 'SOL-SSL' tab in the Register of Instruments - Skilled Visas. For further information about 'skilled occupation' and

[50] cl 491.312, Additional criteria apply if the applicant had turned 16 at the time of application or had not turned 18.
[51] cl 491.313.
[52] cl 491.215.
[53] reg 1.15C as amended by *Migration Amendment (2015 Measures No 1) Regulation 2015* (Cth) (SLI 2015, No 34).
[54] reg 1.15C as amended by SLI 2015, No 34. For the relevant instrument specifying language tests, scores and passports, see the 'EngTests' tab in the Register of Instruments – Skilled visas.
[55] See item 1241(4) table item 4, cl 491.214.
[56] reg 1.15I as amended by *Migration Amendment Regulations 2011 (No 3)* (Cth) (SLI 2011, No 74).

the relevant instruments, see Skilled Occupation / Australian study requirement and Skilled Occupation List Instruments - Quick guide.

Qualifying score and the Points Test

A criterion for Subclass 491 is that the applicant has the 'qualifying score' when assessed under Subdivision B of Division 3 of Part 2 of the Act (ss 92–96 of the Act).[57] An applicant will have met this if they achieve at least the 'pass mark' when assessed against the points test.[58] The relevant points test is in Schedule 6D.[59] In addition to having the 'qualifying score', the applicant's score when assessed against Schedule 6D must be no less than the score stated in the invitation to apply for the visa.[60]

For further information about the points test in Schedule 6D, see General Points Test (Schedule 6D).

Nomination, sponsorship and 'designated regional area'

It is a Schedule 1 requirement for a valid Subclass 491 visa application that the applicant is either nominated by a State or Territory government agency and that nomination has not been withdrawn, or declares that he or she (and each member of their family unit who is also an applicant for a Subclass 491 visa) is sponsored by an eligible relative who is usually resident in a 'designated regional area'.[61] The corresponding Schedule 2 criterion is that the nominating government agency has not withdrawn the nomination, or that the Minister has accepted the sponsorship of the applicant by a person in specified circumstances, which include that the relative is usually resident in a 'designated regional area'.[62]

For applications made *before 20 January 2021*, the term 'designated regional area' is defined to mean a part of Australia specified in an instrument under reg 1.15M.[63] For applications made *on or after 20 January 2021*, the term 'designated regional area' is defined to mean a 'designated city or major regional centre' or a 'regional centre or other regional area'.[64] The terms 'designated city or major regional centre' and 'regional centre or other regional area' have the meaning given by regs 1.15M(1) and 1.15M(2) respectively.[65] The Minister may, by legislative instrument, specify a part of Australia to be a 'designated

[57] cl 491.216(2).
[58] s 94(1). See further the 'PoolPassMark' tab of the Register of Instruments - Skilled Visas.
[59] reg 2.26AC as amended by F2019L00578.
[60] cl 491.216(1).
[61] Item 1241(4) table items 5, 6. An elig ble relative is one who has turned 18; is an Australian citizen or permanent resident or an eligible New Zealand citizen; usually resident in a designated regional area; and related to the primary applicant, or the primary applicant's spouse or de facto partner (if the spouse or de facto partner is also an applicant for a Subclass 491 visa) as a parent, child or step-child, grandparent, first cousin, brother or sister (including adoptive and step), aunt or uncle (including adoptive or step), nephew or niece (including adoptive or step): item 1241(4) table items 5(b), 6.
[62] cl 491.217. The specified circumstances in which the Minister can accept the sponsorship are that the sponsor has turned 18; is an Australian citizen or permanent resident or an eligible New Zealand citizen; usually resident in a designated regional area; related to the primary applicant, or the primary applicant's spouse or de facto partner (if the spouse or de facto partner is also an applicant for a Subclass 491 visa) as a parent, child or step-child, grandparent, first cousin, brother or sister (including adoptive and step), aunt or uncle (including adoptive or step), nephew or niece (including adoptive or step); and each member of the family unit of the applicant who is an applicant for a Subclass 491 visa is sponsored by the sponsor: cl 491.217(2).
[63] regs 1.03 and 1.15M as inserted by F2019L00578.
[64] reg 1.03 as amended by F2020L01639.
[65] reg 1.03 as inserted by F2020L01639.

city or major regional centre' under reg 1.15M(1), or a 'regional centre or other regional area' under reg 1.15M(2).[66]

For the relevant instrument see the 'DesRegArea' tab in the Register of Instruments – Skilled visas.

For information on 'usually resident', see Usually Resident.

Can the Tribunal accept a sponsorship on review?

If a sponsorship by a relative has not been accepted by the Minister for the purpose of the time of decision criteria, and the points test qualifications relating to designated regional area sponsorship, there is a question as to whether the Tribunal has jurisdiction on review to accept the sponsorship.[67] There is no clear answer to this question.

On one view, assessing whether a sponsorship should be accepted is essential to determining whether the applicant meets the relevant time of decision criteria. That is, it is essential to the exercise of the decision-making power in s 65 of the Act to grant or refuse to grant a visa. This is the Department's view as reflected in its policy;[68] and has been the Tribunal's approach to similar criteria in the context of family and partner visas, and it has not been challenged in those contexts.[69]

This view finds some indirect support in the decision in *Hooda v MIAC* where Smith FM observed, in relation to the 'time of decision' sponsorship criterion in cl 886.222 as in force after 1 July 2010, that the criterion required that the Minister 'has accepted the sponsorship' before time of decision, but that 'it was administrative practice for the acceptability of the proposed sponsorship to be determined by a delegate at the same time when addressing the other visa criteria'.[70] The acceptance of the proposed sponsor was regarded, in effect, as part of the substantive determination of the visa eligibility at time of decision.[71] Although this observation arguably raised some doubt as to the correctness of the Department's approach, that approach was not challenged and his Honour subsequently described cl 886.222(3)(b) as involving an 'implied power of the Minister to decide whether he is willing to 'accept the sponsorship'.[72] However as this was not the subject of argument it does not provide clear authority on the scope of decision maker's task when considering this criterion.

[66] reg 1.15M as substituted by F2020L01639.
[67] The Tribunal has taken different approaches on this issue: compare [redacted], [redacted], [redacted], [redacted], 1[redacted] and [redacted].
[68] e.g. Policy – Migration Regulations - Schedules – [Sch2Visa489] Sch2Visa489 - Skilled - Regional (Provisional) – 13 Sponsorship – 13.6 Acceptance of a sponsorship (reissued 18/11/2017); Policy – Migration Regulations - Schedules – [Sch2Visa491] Skilled Work Regional (Provisional) visa - Subclass 491 – 7.5 Nomination or sponsorship – 7.5.7 Acceptance of a sponsorship (issued 16/11/2019).
[69] For example, MRT decision [redacted] and [redacted] (cl 300.222 'The sponsorship of the applicant under cl 300.213 has been approved by the Minister and is still in force'). The discretion in cl 300.213 to approve a sponsorship is limited by regs 1.20J, 1.20KA, 1.20KB. The Tribunal's approach to this limitation was challenged in *Babicci v MIMIA* (2005) 141 FCR 285 however no issue was taken with the Tr bunal's power to consider the issue.
[70] *Hooda v MIAC* [2012] FMCA 1018 at [36].
[71] *Hooda v MIAC* [2012] FMCA 1018 at [36].
[72] *Hooda v MIAC* [2012] FMCA 1018 at [42].

On that view, the Tribunal's review powers under s 349(1) (which include all the powers and discretions conferred by the Act on the person who made that decision) would include the power to consider whether to accept a sponsorship.[73]

The alternative view is that the Tribunal does not have jurisdiction to consider whether a sponsorship should be accepted. On this view, the question before the Tribunal is whether as a matter of fact the sponsorship has been accepted by the Minister or his or her delegate. Several factors support this view. First, the criterion itself appears to be expressed in terms of whether the sponsorship *has* in fact been accepted and not whether it should be, or is, accepted.[74] Secondly, there are no criteria or guiding principles or procedures in the legislation dealing with the consideration and approval of such sponsorships.[75] Thirdly, in contrast to the business visa regime, a decision to refuse a sponsorship is not specified in the legislation as a reviewable decision. In *Suh v MIAC,* the Full Federal Court unanimously held that a decision not to approve an occupational training nomination for cl 442.222(1) was not reviewable by the Tribunal.[76] There does not appear to be any relevant textual distinction between the cl 442.222 requirement considered in *Suh*, that 'a nomination in respect of the occupational training has been lodged and has been approved by the Minister', and the Skilled visa requirements that 'the Minister has accepted' the sponsorship. Applying the reasoning in *Suh* to, for example, cl 491.217(2), if a sponsorship has not been accepted the Tribunal would be bound to affirm the delegate's decision on the basis that cl 491.217 is not satisfied.

However, while the judgment in *Suh* might raise a doubt as to whether the power in s 65 (and the Tribunal's s 349(1) power on review) includes a power to approve the sponsorship, it has not been applied in contexts other than cl 442.222. Further, the outcome in that case appears to have been heavily influenced by departmental practice whereby the nomination was assessed separately and in advance of the merits of the visa application.[77] There is therefore some question as to whether it would be applied in other legal and factual contexts.

If the Tribunal does not in fact have the relevant power, the lack of an accepted sponsorship at the time of the delegate's decision would not necessarily be fatal to the application. A sponsorship might be accepted by the Department during the course of the review; and it

[73] s 349(1) confers on the Tribunal, for the purposes of the review of a Part 5-reviewable decision, all the powers and discretions that are conferred by the Act on the person who made the decision. The decision, for these purposes, is the decision to refuse to grant the visa.
[74] See *Hooda v MIAC* [2012] FMCA 1018 at [36] in relation to the equivalent sponsorship requirement for Subclass 886, and contrast the criteria under consideration in *Tvarkovski v MIMA* [2001] FCA 375.
[75] This could arguably support the contrary view, i.e. that acceptance of a nomination or sponsorship is simply part of the s 65(1) power. However a similar point was one factor that persuaded the Full Federal Court in *Suh v MIAC* (2009) 175 FCR 515 that in the context of a decision to refuse a Subclass 442 (Occupational Trainee) visa a decision not to approve an occupational training nomination made for the purpose of cl 442.222 was not reviewable by the Tribunal.
[76] *Suh v MIAC* (2009) 175 FCR 515, followed in *Hu v MIAC* [2009] FCA 1288. The Court in *Suh* followed the approach taken by Lander J in *Kim v MIAC* [2007] FCA 138 and distinguished *Tvarkovski v MIMA* [2001] FCA 375 where Goldberg J had held that the Tribunal had power to consider the issues raised by reg 5.19 as part of its review of the decision to refuse a Subclass 805 Business visa, as the provisions in question in that case were significantly different. Clause 805.213(1)(a) required that 'the applicant has been nominated in accordance with sub-reg 5.19(2)…'; cl 805.222 required that 'the appointment is an approved appointment under reg 5.19'; and (critically) reg 5.19 provided what the Court described as dictionary and definitional provisions, not a separate and distinct process for determining whether an employer nomination should be accepted: *Tvarkovski* at [22].
[77] See *Suh v MIAC* (2009) 175 FCR 515 at [15], [21].

would be open to the Tribunal to make inquiries of the Department, or to invite the applicant to do so, as to the status of the sponsorship,[78] although it would not be compelled to do so.[79]

Relevant amending legislation

Title	Reference number	Legislation Bulletin
Migration Amendment Regulations 2011 (No 3) (Cth)	SLI 2011, No 74	No 2/2011
Migration Amendment (2015 Measures No 1) Regulation 2015 (Cth)	SLI 2015, No 34	No 1/2015
Migration Amendment (Enhanced Integrity) Regulations 2018 (Cth)	F2018L01707	No 3/2018
Migration Amendment (New Skilled Regional Visas) Regulations 2019 (Cth)	F2019L00578	No 4/2019
Migration Amendment (Temporary Graduate Visas) Regulations 2020 (Cth)	F2020L01639	No 1/2021
Migration Amendment (Extension of Temporary Graduate and Skilled Regional Provisional Visas) Regulations 2022 (Cth)	F2022L00151	

Relevant case law

Judgment	Judgment summary
Babicci v MIMIA (2005) 141 FCR 285	Summary
Hooda v MIAC [2012] FMCA 1018	Summary
Hu v MIAC [2009] FCA 1288	
Kim v MIAC [2007] FCA 138	Summary
Suh v MIAC (2009) 175 FCR 515	Summary
Thapa v MICMSMA [2021] FCCA 686	Summary

[78] This is what happened in [redacted]. In that case the Tribunal received confirmation from the State agency that during the course of its review the nomination had been approved by the General Skilled Migration Section of the Department, because the applicant had moved to the region and had been living and working there for six months. On that basis the Tribunal found that the applicant satisfied cl 487.225.
[79] See *Kim v MIAC* [2007] FCA 138.

Tvarkovski v MIMA [2001] FCA 375	Summary

Available decision precedents

These are no decision precedents available for this visa Subclass. However, the following generic decision precedents may be used:

- **Generic –** suitable for any MRD reviewable visa refusal decisions.
- **PIC 4020 –** suitable for any visa subclass where the issue in dispute is whether the applicant meets public interest criterion 4020 (false or misleading information / bogus documents).
- **Optional Standard Paragraphs - Skilled Visas –** paragraphs addressing relevant law for English language requirements are available for insertion into draft decision precedents.

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