Migration and Refugee Division Commentary

Skilled visas

Current as at 19 September 2019

Employment in a Skilled Occupation

CONTENTS

Overview

Prior employment experience in a skilled occupation is a qualification for the points test for a range of skilled visas. Broadly speaking, the applicant must have been employed in a skilled occupation for a specified period of time prior to the visa application being lodged in order to be given the prescribed points.

'Skilled occupation' is defined in reg 1.15I of the Regulations as meaning in relation to a person an occupation that is:

- specified by the Minister in an instrument in writing as 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
- is applicable to the person in accordance with the specification of the occupation.[1]

The current definition of 'skilled occupation' in reg 1.15I and the terms of the current legislative instrument have the effect that the relevant instrument is that in force at the time of decision.[2] The relevant instrument can be located on 'SOL-SSL' tab of the MRD Legal Services Register of Instruments: Skilled visas. For further information about the instruments and Schedules, see the MRD Legal Services Commentary Skilled Occupation / Australian study requirement.

This commentary focuses on employment in a skilled occupation within the context of the points test as it applies to General Skilled Migration visas (skilled visa applications made on or after 1 September 2007).[3]

Legislative requirements

Schedule 6B, 6C, and 6D Points Test

A number of skilled visa subclasses include a criterion to the effect that an applicant has a qualifying score when assessed against a points test, in accordance with Subdivision B of Division 3 of Part 2 of the *Migration Act 1958* (the Act). The applicable points test in a particular case will depend on the date of visa application and, in some cases, whether the applicant falls within a class of persons specified in written instruments.

For General Skilled Migration (GSM) visa applications made on or after 1 September 2007 the applicable points tests are set out in Schedules 6B, 6C and 6D, 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:

[1] reg 1.15I as inserted by Migration Amendment Regulations 2010 (No.6) (SLI 2010 No.133) which applied 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) (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.

[2] In *Aomatsu v MIMIA* (2005) 146 FCR 58 it was held that the relevant 'Skilled Occupation List' instrument was taken to be that in force at the time the visa application was made. However, the interpretation in *Aomastu* applied to the proper construction of Item 6A72 in Part 7 of Schedule A within a different statutory scheme, and can therefore be distinguished.

[3] 'General Skilled Migration visa' is defined by reg 1.03 as a Subclass 175, 176, 189, 190, 475, 476, 485, 487, 489, 885, 886 or 887 visa, granted at any time.

Operation of Schedules 6B, 6C and 6D

Visa	Visa application date	Class of applicant	Applicable schedule
Subclasses 175, 176, 475, 487, 885, 886	Before 01/07/11		6B
	01/07/11 – 31/12/12	• If in reg 2.26AA(2) class[4]	6B
	01/07/11 – 31/12/12	• **if not** in reg 2.26AA(2) class[5]	6C
	01/07/11 – 31/12/12	if • in reg 2.26AB(2) class[6] and • does not meet 6B pass mark	6C
Subclasses 189, 190 and 489	On or after 01/07/12		6D

Visa applications made 1 September 2007 – 30 June 2011

For GSM visa applications made on or after 1 September 2007 and before 1 July 2011, the points test is set out in Schedule 6B to the Regulations.[7] An applicant can obtain points under Parts 4, 5, or 7 of Schedule 6B if they have been employed in a skilled occupation prior to the application being made for a minimum period. Higher points are available if the employment is in the applicant's nominated skilled occupation or a closely related skilled occupation.

Visa applications made on or after 1 July 2011

The points test in Schedule 6B also applies to applications for the GSM visas listed above made on or after 1 July 2011 and before 1 January 2013 if the applicant is in a class of persons specified in an instrument under reg 2.26AA(2)(a).[8] The relevant instrument can be located on the 'Sch6B6Cclass' tab of the Register of Instruments: Skilled visas.

For applications made on or after 1 July 2011 where the applicant is not in a class of person specified for reg 2.26AA(2)(a), the points test in Schedule 6C of the Regulations will apply.[9] An applicant can obtain points under Parts 3, 4, or 5 of Schedule 6C if they have been employed in their nominated skilled occupation or a closely related skilled occupation for a prescribed minimum period prior to the application being made.

For visa applications made on or after 1 July 2011 and before 1 January 2013 where the applicant is in a class of persons specified for reg 2.26AB(2)(a)[10] *and* the applicant's score under Schedule 6B is less than the applicable pass mark when the score is assessed, the application will also fall to be

[4] reg 2.26AA(2) class is specified in Schedule 2 Part 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.
[5] reg 2.26AA(2) class is specified in Schedule 2 Part 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.
[6] reg 2.26AB(2) class is specified in Schedule 2 Part A (or C if applicant or partner state nominated) of relevant instrument. In contrast to reg 2.26AA(2), it does not include Part 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.
[7] reg 2.26AA(1) and (3) as amended by SLI 2011 No.74. reg 2.26AA was repealed with effect from 1 July 2013: Migration Amendment Regulation 2012 (No.2) (SLI 2012, No.82). r 2.26AA applies to 'points-tested General Skilled Migration visas': reg 2.26AA(1) as amended by SLI 2011, No.74. This term defined as meaning the Subclasses listed in r 2.26AA(8)(a)-(f), that is, Subclasses 175, 176, 475, 487, 885 and 886.
[8] reg 2.26AA(2) as substituted by SLI 2011, No.74.
[9] reg 2.26AB(1). Note that Subclasses 175, 176 and 475 were closed to new primary visa applications from 1 July 2012: Item 1135(3)(aa) and 1228(3)(aa) inserted by SLI 2012 No.82. Subclasses 487, 885, and 886 were closed to new primary visa applications from 1 January 2013: Items 1136(3)(aa) and 1229(3)(aaa) inserted by SLI 2012 No.82. These subclasses were repealed on 1 July 2013: SLI 2012, No.82.
[10] This will include classes of persons specified for reg 2.26AA(2)(a). reg 2.26AB(2)(a) classes are wider than, and include, classes of persons specified for r 2.26AA(2)(a).

assessed against Schedule 6C.[11] This means that in certain cases it will be necessary to first assess the applicant against Schedule 6B and, if the applicant is not successful, then assess the applicant against Schedule 6C.[12]

The points test in Schedule 6D applies to applications to the 'SkillSelect' program made on or after 1 July 2012 for Subclasses 189, 190 and 489.[13]

An applicant can obtain points under Parts 3, 4, or 5 of Schedule 6D if, at the time of the invitation to apply for the visa, they have been employed in their nominated skilled occupation or a closely related skilled occupation for prescribed minimum periods.[14]

Requisite employment

What does 'employed' mean?

For the points tests in Schedules 6B[15] and 6C,[16] where the visa application was made before 1 July 2012, the term 'employed' is defined by r 2.26A(7) as 'engaged in an occupation for remuneration for at least 20 hours weekly'.[17] For visa applications made on or after 1 July 2012 and the points test in Schedule 6D, the same definition is given in reg 2.26AC(6).[18]

This definition does not distinguish between full-time, part-time and casual employment. As such it would appear that all that is required is for the applicant to have been employed (for remuneration) for a period of at least 20 hours a week. Whether or not employment in a number of part-time or casual positions in the same skilled occupation held concurrently can be considered, providing they add up to 20 hours per week, is unclear and has not been the subject of any judicial consideration. Policy is also silent as to this issue.

'Remuneration' is not further defined in the legislation and so the ordinary meaning of the term as reward/pay for work or services would be relevant.[19] Policy indicates that for 'remuneration' the policy intention is that applicants have been engaged in the occupation on a paid basis, and that mere emotional or psychological satisfaction or the acquisition of useful, but unpaid, professional experience is not considered 'remuneration' for points tested GSM purposes.[20]

[11] reg 2.26AB(2) as inserted by SLI 2011, No.74.
[12] The Explanatory Statement to the legislation that introduced regs 2.266AA(2) and 2.26AB(2) explains that the amendment 'ensures that applicants who fall within the specified cohort will have the benefit of having a score assessed in accordance with Schedule 6B and, if they do not meet the relevant pass mark for Schedule 6B, then the applicant will be assessed in accordance with Schedule 6C for the purposes of s 93 of the Act. This amendment gives effect to the Government's announcement of 8 February 2011 which specified certain transitional arrangements for certain applicants for a GSM visa. These transitional arrangements ensure that the identified cohort of applicants continues to receive the benefit of the same legislative framework in effect on 8 February 2011, in the specified circumstances, for any GSM visa application made after 1 July 2011, but before 1 January 2013': Explanatory Statement to SLI 2011, No.74, Schedule 1 item [4]..
[13] reg 2.26AC as inserted by SLI 2012, No.82.
[14] Schedule 6D inserted by SLI 2012, No.82.
[15] See reg 2.26AA(9), which adopts the definition in reg 2.26A(7) or, for primary visa applications made on or after 1 July 2012, the definition in reg 2.26AC(6). reg 2.26AA(9) was amended in this way by SLI 2012, No.82. reg 2.26A was repealed by SLI 2012 No.82, the change applying to primary visa applications made on or after 1 July 2013.
[16] See reg 2.26AB(7) which adopts the definition in r 2.26A(7) or, for primary visa applications made on or after 1 July 2012, the definition in reg 2.26AC(6). r 2.26AB(7) was amended in this way by SLI 2012, No.82. reg 2.26AB was repealed by SLI 2012, No.82, the change applying to primary visa applications made on or after 1 July 2013.
[17] reg 2.26A was repealed by SLI 2012, No.82, the change applying to primary visa applications made on or after 1 July 2012.
[18] reg 2.26AC was inserted by SLI 2012, No.82, the change applying to primary visa applications made on or after 1 July 2012: Schedule 1 item [124].
[19] See for example the Macquarie Dictionary Online entry for remuneration: '2. That which remunerates; reward; pay'. www.macquarieonline.com.au accessed 28 June 2019.
[20] See Policy - Migration Regulations – Schedules – Sch6D – General Points test for the General Skilled Migration visas mentioned in subregulation 2.26AC(1) – The meaning of 'employed' - Remuneration [reissued 21/08/2016]. The Policy also

The term 'engaged in an occupation' for the purposes of reg 2.26A(7) means actively participating in or undertaking duties directly connected with the carrying out of the occupation concerned.[21] In *De Ronde v MIMA* the applicant claimed she was 'employed' for an overseas company whilst studying full-time in Australia holding a student visa with condition 8101 (must not engage in work in Australia). The Court rejected the applicant's argument that being subject to a contract of employment and being paid was sufficient to satisfy the requirement that she be engaged in employment for at least 20 hours per week.[22]

In determining whether an applicant has been employed in a skilled occupation for a certain period, a period of employment *in Australia* must not be counted unless the applicant, at the time, held a:

- substantive visa;
- Subclass 010 (Bridging A) visa; or
- Subclass 020 (Bridging B) visa;

authorising them to work during that period, *and* they complied with the conditions of that visa.[23] It should be noted that when considering whether the employment on which an applicant is seeking to rely involved non-compliance with visa condition 8104 or 8105 (work restrictions) it is necessary to consider whether the work engaged in is an activity that in Australia 'normally attracts remuneration'[24] having regard to the actual circumstances.[25] For further discussion of Conditions 8104 and 8105 see the MRD Legal Services commentary Visa Conditions 8104, 8105, 8607 and 8107 (work restrictions).

Employment *outside Australia* may also be counted for the purposes of determining if the applicant meets parts of the Schedules 6B, 6C and 6D points tests, but not for those parts of the points tests that specify employment in Australia.[26]

Requisite period of employment

In order to attain points under the points test, the applicant must have been employed in a skilled occupation for a specified length of time during a specified period before the visa application was made. The length of time and the period of time vary depending on the requirement being considered. Thus aside from determining the nature of the work and the duties undertaken, it is also necessary to determine the period or periods during which the applicant has claimed to undertake that work and

state that a person receiving minimal living allowances or scholarships to cover living expenses would not be considered to be 'remunerated'. Care should be taken in applying this interpretation as, to the extent of requiring financial benefit, it may go beyond the ordinary meaning of remuneration.

[21] *De Ronde v MIMA* [2004] FMCA 519 (Riethmuller FM, 25 August 2004) at [53].

[22] *De Ronde v MIMA* [2004] FMCA 519 (Riethmuller FM, 25 August 2004).

[23] reg 2.27C as amended by Migration Amendment Regulations 2005 (No.9) (SLI 2005 No.240) to include Subclasses 010 and 020, the changes apply to visa applications made on or after 1 November 2005. In relation to the reference in reg 2.27C to 'a criterion' within the points system, it has been held that the component parts of the points test do not constitute a 'specified criterion': *MIAC v Dhanoa* (2009) 180 FCR 510, per Jagot and Foster JJ at [67]. However, this should not be taken to mean that reg 2.27C does not apply in relation to an assessment under the points test. Their Honours were concerned only with the construction and scope of the remittal power in reg 4.15(1)(b). They went on to observe at [68] that cl 880.222A, which is in identical terms to reg 2.27C, is an interpretative provision which should not be used as a basis to construe reg 4.15(1)(b) other than in a manner which reflects the language of the statutory scheme as a whole.

[24] See reg 1 03 definition of 'work'.

[25] *Bhatia v MIBP* [2015] FCCA 409 (Judge Driver, 20 March 2015) at [10], referring to *Xu v MIAC* [2007] FMCA 285 (Smith FM, 26 March 2007). In *Bhatia* at [29] Judge Driver observed by way of example that while the work of a chef is usually remunerated, the circumstances in which the work is undertaken may have a bearing upon the relevant consideration. For example, such work undertaken at a charity event may well not be work which is usually remunerated. His Honour held that the Tribunal fell into error by treating the applicant's volunteer work as a chef as work which is usually remunerated without considering the particular circumstance, as asserted by the applicant, that the work was undertaken for the purpose of obtaining a TRA skills assessment, or the factual question whether work undertaken for that purpose is work which is 'usually remunerated'.

[26] See for example Part 5 of Schedule 6B and Part 4 of both Schedules 6C and 6D which specifically require the applicant to have been employed in their nominated skilled occupations *in Australia*.

performed such duties.[27]

In circumstances where the Tribunal has concluded that at no point during the specific period prior to the lodgement of the visa application was the applicant 'employed' in the prescribed sense, it is not obliged to make specific findings in relation to each week in the period of the claimed employment. It is sufficient to make an overall finding that, at no point, in that period, did the applicant satisfy the employment test prescribed.[28]

Nature of employment

For the points tests, it is possible to attain points on the basis of the applicant's nominated skilled occupation or a closely related occupation.[29]

Where the relevant part of the points test refers to the applicant being employed in 'a skilled occupation', the employment relied upon need not have been in the same skilled occupation as that which has been nominated in the visa application.[30] For example, an applicant who has nominated the skilled occupation of Accountant need not have been employed as an Accountant to satisfy this requirement, provided that the employment they are relying upon is an occupation specified as a 'skilled occupation' as defined by reg 1.15I, and they have been employed in that skilled occupation for and during the requisite period.

Although not free from doubt, it would also appear that the requisite period of employment in 'a skilled occupation' refers to the cumulative total of periods of employment in a single (i.e. one) skilled occupation for the relevant period, rather than the cumulative total of periods of work experience in different skilled occupations.

Where the relevant part of the points test refers to the applicant being employed in '*the* skilled occupation' or 'the applicant's nominated skilled application', the period of prior employment must be in the skilled occupation nominated by the applicant in the visa application. Applicants seeking to achieve the qualifying score under Schedule 6B are given higher points for the relevant part if the employment is in the nominated skilled occupation or a closely related occupation.[31] Applicants seeking to achieve the qualifying score under Schedule 6C or 6D are only given points for the relevant part if the employment is in the applicant's nominated skilled occupation or a closely related occupation.[32]

[27] *Martinez v MIAC* [2009] FCA 781 (Goldberg J, 23 July 2009) at [35]–[36]. This judgment concerned cl 136.213(1) but its reasoning would also be applicable to similarly worded provisions which require an assessment of the nature of the employment and the period of such employment.
[28] *Velusamy v MIAC* [2009] FMCA 879 (Cameron FM, 18 September 2009) at [29]. The Court was satisfied that the Tribunal had properly applied the test in *Martinez v MIAC* [2009] FCA 781 (Goldberg J, 23 July 2009) in relation to item 6A81(b) as it considered both the nature of the work performed by the applicant and the entirety of the period for which there was evidence of that work.
[29] Items 6B41, 6B42, 6B51, 6B52, 6B71 and 6B72 of Schedule 6B, items 6C31, 6C32, 6C33, 6C41, 6C42, 6C43, 6C44 of Schedule 6C and items 6D31, 6D32, 6D33, 6D41, 6D42, 6D43, 6D44 of Schedule 6D.
[30] There is some limited *obiter dicta* that suggests it has to be the nominated occupation. In *Shahid v MIMIA* [2004] FCA 1412 (Kiefel J, 2 November 2004) the applicant was seeking to establish experience in the occupation nominated. The Court stated that cl.138.216 was concerned with actual experience in the nominated occupation at [14] and that 'clause 138.216(1) requires that the applicant be employed for the relevant period in the skilled occupation nominated in the application' at [12]. However, Kiefel J was not required to make a finding on that issue, the Court's statement at [14] does not accurately reflect the wording of the provision and the use of the indefinite article, and there is no fuller consideration of the matter.
[31] Items 6B41, 6B51, 6B71 and 6B72.
[32] Items 6C31, 6C32, 6C33, 6C41, 6C42, 6C43, and 6C44 of Schedule 6C and items 6D31, 6D32, 6D33, 6D41, 6D42, 6D43, and 6D44 of Schedule 6D.

Assessing whether the employment is in a particular skilled occupation

'Skilled occupations' are specified by the Minister in legislative instruments, known as 'skilled occupations lists',[33] and are listed in these instruments by reference to 'ANZSCO' (Australian and New Zealand Standard Classification of Occupations), or for visa applications made before 1 July 2010, 'ASCO' (Australian Standard Classification of Occupations).[34] ANZSCO is available online.

Occupations are grouped by ANZSCO into five hierarchical levels – major group , sub-major group, minor group, unit group, and occupation – and classified by reference to a number of defining criteria including: a 'lead statement' which gives a concise description of the nature of the occupation, summarising the main activities undertaken; the 'skill level' which specifies the usual entry requirements, expressed in terms of educational qualification and/or experience; and 'tasks' specifying a representative list of the primary tasks performed in the occupation.[35]

By referring in the skilled occupation list instrument to the specific ANZSCO code in relation to each of the named occupations, 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'.[36] This means that in order to determine whether an applicant's employment fits into a particular ANZSCO classification, a decision maker is required to consider all of the details set out in that classification.[37]

Thus, in relation to 'skill level', the decision-maker is required to consider whether the applicant possessed the qualification and/or employment nominated by the ANZSCO classification system for the skilled occupation in question, and to discount any employment undertaken by an applicant prior to attaining that skill level.[38]

Similarly, it is necessary to examine the tasks actually performed by an applicant against the ANZSCO classifications to determine which classification most closely describes the applicant's actual employment.[39] For example, in *Wang v MIMIA* the delegate found that the applicant's work as a lecturer in architecture did not amount to work as an architect as described in the ASCO dictionary but as a 'university lecturer' and that she was therefore not employed in a skilled occupation.[40] The applicant had submitted that she was carrying out duties requiring skills the same as, or with extremely high relevance to, those of an architect actually designing buildings or otherwise engaging

[33] The relevant instrument can be located on 'SOL-SSL' tab of the Register of Instruments: Skilled visas.
[34] See for example IMMI 14/049. Authorities considering ASCO would be equally applicable in respect of ANZSCO. For further discussion of 'skilled occupation' and 'ANZSCO', see the MRD Legal Services Commentary Skilled occupation / Australian study requirement.
[35] See *Parekh v MIAC* [2007] FMCA 633 (Smith FM, 10 March 2007) at [11].
[36] *Seema v MIAC* (2012) 203 FCR 537 at [44], *Wang v MIMIA* (2005) 145 FCR 340 at [17] and *MIAC v Kamruzzaman* [2009] FCA 1562 (Greenwood J, 23 December 2009) at [64] are to similar effect. An earlier decision of the Federal Magistrates Court in *Parekh v MIAC* [2007] FMCA 633 (Smith FM, 10 March 2007) is consistent with these authorities. Having regard to the structure of the relevant instrument and the purpose of the references to ASCO, Smith FM held at [23] that the manner of specification of 'skilled occupation' was 'clearly one which adopted the ASCO definitions identified' in the instrument. He considered the purpose of the references to ASCO was 'to provide to the Minister's decision-makers a ready and authoritative source of definitional rules and descriptions for classifying occupations' and '[did] not accept that its author intended that decision-makers should be at large in deciding whether a person's occupation answered only the descriptive words of an occupation in column 1, and that they should treat the ASCO code only as an optional and inconclusive guide to those words'. In *Chawdhury v MIAC* [2010] FMCA 275 (Raphael FM, 23 April 2010) the Court at [12] similarly referred to the ASCO definitions as providing a useful and necessary guide which allows for consistency in decision-making; however to the extent that the Court's reasons suggest that the decision-maker is not restricted to consideration of the ASCO definition, and may replace them with an applicant's own definition, the judgment does not appear to be consistent with *Seema*, *Wang*, and *Kamruzzaman*.
[37] *MIAC v Kamruzzaman* [2009] FCA 1562 (Greenwood J, 23 December 2009) at [64].
[38] *MIAC v Kamruzzaman* [2009] FCA 1562 (Greenwood J, 23 December 2009) at [64]; *Seema v MIAC* (2012) 203 FCR 537 at [46] - [47]. Policy suggests that the relevant skill level is that set by the relevant assessing authority (defined in reg 1.03 as a person or body specified under r 2.26B). However this approach is not supported by judicial authority.
[39] *MIAC v Kamruzzaman* [2009] FCA 1562 (Greenwood J, 23 December 2009) at [55], [65].
[40] *Wang v MIMA* (2005) 145 FCR 340.

in activities that fall within the ASCO definition of an architect as a University Lecturer in Architecture. Having regard to the ASCO definitions of Architect and University Lecturer, the Court considered that the entire structure of the relevant criteria was to minimise qualitative arguments of that kind and concluded that there was no scope for going outside the ASCO definition of an architect.[41] In *MIAC v Kamruzzaman* the Court held that the Tribunal needed to examine the 'tasks' section of the classifications, as well as the 'skills' section, in order to determine the question before it, and observed that it did so in some detail before concluding that the applicant's tasks aligned more closely with those of a Bank Worker or Credit and Loans Officer which were not skilled occupations.[42]

However, the nature and extent of the enquiry will depend on the circumstances. While some occupations might need close examination of the listed 'tasks', application of the ANZSCO classifications does not, in all cases, require focusing the assessment upon this part of the definition. For example, in *Shukla v MIAC*, the Court found that the 'lead statements' provided an equally relevant, and clearer, distinction between the two occupations in question - 'shop manager' and 'office manager' – arising from the location in which their listed tasks would occur.[43]

When determining whether the applicant's occupation is a skilled occupation, it is open to a decision-maker to consider both the tasks listed for that occupation and also the extent to which another classification in ANZSCO appears more suited to the tasks performed;[44] however it is not necessary to undertake a comparison of that kind.[45]

In some cases it may be necessary to undertake an assessment of the extent of the duties of the nominated occupation which are involved in the employment in question; [46] however the extent of the comparison required will depend on the circumstances. For example, in *Shahid v MIMIA* it was sufficient for the Tribunal's purposes to observe that more was required of a hotel or motel manager than a restaurant manager, in terms of the areas of operation they are required to manage, including that of accommodation.[47]

Assessing whether the employment is in a 'closely related' skilled occupation

Under the Schedules 6B, 6C and 6D points tests, an applicant can earn points, or additional points, if their skilled occupation is 'closely related' to the nominated skilled occupation.[48] The question whether an applicant has been employed in a skilled occupation that is 'closely related' to his or her nominated skilled occupation requires the making of an evaluative judgement having regard to all of the facts in the individual case relating to the person's occupation as a whole.[49] It would therefore be wrong to

[41] *Wang v MIMIA* (2005) 145 FCR 340 at [15] and [17].
[42] *MIAC v Kamruzzaman* [2009] FCA 1562 (Greenwood J, 23 December 2009).
[43] *Shukla v MIAC* [2010] FMCA 625 (16 August 2010, Smith FM) at [27], [29]. The delegate in *Parekh v MIAC* [2007] FMCA 633 (Smith FM, 10 March 2007) also appears to have relied on the 'lead statement' for 'financial market dealer' as well as the 'tasks' when it found that the applicant was not a 'financial market dealer' as she was not trading stocks on behalf of financial institutions, or a group of clients but traded only within her own portfolio. The Court held that in so doing the delegate did not give the ASCO definition an incorrect status.
[44] *MIAC v Kamruzzaman* [2009] FCA 1562 (Greenwood J, 23 December 2009) at [69]; *Shukla v MIAC* [2010] FMCA 625 (16 August 2010, Smith FM) at [29].
[45] *Biswas v MIAC* [2009] FMCA 95 (Raphael FM, 17 February 2009) at [14].
[46] *Shahid v MIMIA* [2004] FCA 1412 (Kiefel J, 2 November 2004) at [16].
[47] *Shahid v MIMIA* [2004] FCA 1412 (Kiefel J, 2 November 2004) at [16].
[48] See items 6B41, 6B51, 6B71, 6B72; 6C31, 6C32, 6C33, 6C41, 6C42, 6C43, 6C44, 6D31, 6D32, 6D33, 6D41, 6D42, 6D43, and 6D44.
[49] *Bhanot v MIBP* [2014] FCA 848 (Perry J, 14 August 2014) at [28], referring to *Constantino v MIBP* [2013] FCA 1301 (Jacobson J, 4 December 2013) which involved what Perry J described as the 'closely analogous' question of whether the qualification used to satisfy the Australian study requirement for a skilled visa was 'closely related' to the nominated skilled occupation.

compare the nominated skilled occupation with only part of the applicant's actual occupation and disregard certain tasks because, for example, they were 'incidental' to the applicant's 'primary role'.[50]

Judicial consideration of the concept of 'closely related' in this context is limited. However in *Bhanot v MIBP*, the Federal Court referred with apparent approval to the primary judge's construction of the expression 'has been employed in … a closely related skilled occupation', summarising his Honour's approach as follows (paragraph references omitted):

> *a) the words "closely related" predicate a relation between two things being the skilled occupation in which an applicant has been employed and the nominated skilled application;*
>
> *b) the fact that the relation must be close means that the characteristics or elements that define the actual skilled occupation are substantially the same as those which defined the nominated skilled occupation, the latter being specified by the Minister, ie, which ANZSCO defines "Accountant (General)"; and*
>
> *c) this means the Tribunal was required to determine whether the services provided by the appellant while employed by Supabarn were substantially the same as the services ANZSCO stipulated a person must provide in order to be classified as an "Accountant (General)" and that the skills the appellant possessed were substantially the same skills which ANZSCO stipulated an "Accountant (General)" must possess.*[51]

Under Policy, closely related occupations are those that fall within one unit group as classified under ANZSCO.[52] For example, if an applicant's nominated occupation is Accountant (General), employment as a Management Accountant or Taxation Accountant may be regarded as closely related to that occupation.[53] However, as the evaluation requires consideration of all the tasks involved in the applicant's actual occupation, it should not be assumed that a particular occupation is not closely related to the nominated occupation just because it does not fall within the same unit group.[54] Employment outside the unit group may also be regarded as 'closely related' to the nominated occupation where, for example, it represents career advancement, or where the occupation has evolved in the relevant period. In relation to this, Policy relating to Schedule 6D states:

> *… Although skilled employment experience within the 10 years immediately before the time of invitation to apply for the visa may primarily involve work in the applicant's nominated skilled occupation, it is also policy to award points to applicants if their career has advanced or the occupation has evolved in the relevant period. In these circumstances, to be awarded points, the claimed employment will need to be related to the applicant's nominated skilled occupation, and at the skill level of the applicant's nominated occupation.*
> *…*
> *Career advancement would usually take the form of promotion to a senior role or higher level that relates to a field of expertise and incorporates greater responsibility. For example, it is possible that over a 10 year period an accountant or engineer could advance in their career to a chief accountant or chief engineer, or a chief executive officer. This type of career advancement may occur outside of the four digit ANZSCO unit group but can be considered an*

[50] In *Bhanot v MIBP* [2014] FCA 848 (Perry J, 14 August 2014) the Tribunal identified what it considered to be the applicant's 'primary role' as a Retail Customer Service Manager and then found that any tasks related to accounting were 'incidental' to that role. The Court held at [27] that by characterizing the accounting tasks as 'incidental' to that primary role, the Tribunal appeared then to have taken the performance of those tasks out of the equation in determining how the question posed by item 6B51 of Schedule 6B to the Regulations should be answered.

[51] *Bhanot v MIBP* [2014] FCA 848 (Perry J, 14 August 2014) at [22], referring to *Bhanot v MIAC* [2014] FCCA 864 (Judge Manousaridis, 29 April 2014) at [50], [52]-[53] and [55]. While his Honour allowed the appeal, he appears to have done so on the basis of a different interpretation of the critical passages in the Tribunal's reasons and a departure from Judge Manousaridis's conclusion, rather than disagreement with his approach to the legal question to be asked.

[52] Policy – Migration Regulations– Schedules - Sch6D - General points test for General Skilled Migration visas mentioned in subregulation 2.26AC(1) – Assessing employment claims – Closely related occupations [reissued 21/08/2016].

[53] Policy – Migration Regulations– Schedules - Sch6D - General points test for General Skilled Migration visas mentioned in subregulation 2.26AC(1) – Assessing employment claims – Closely related occupations [reissued 21/08/2016].

[54] See *Bhanot v MIBP* [2014] FCA 848 (Perry J, 14 August 2014) where the Court held that it was necessary for the Tribunal to consider all the tasks involved in the applicant's occupation of Retail Customer Service Manager, including accounting related tasks, to determine whether his occupation was closely related to his nominated skilled occupation of 'Accountant (General)'.

exception to the policy requirement that closely related occupations be in the same ANZSCO unit group if it follows a well-established path for career advancement.[55]

This Policy appears to be broadly consistent with the concept of 'closely related' as explained in the case law.

However Policy also states that for the purpose of awarding points under the points test, an applicant's skilled employment experience can be in the nominated occupation or any closely related skilled occupation and is not limited to an occupation on the Skilled Occupation List (SOL)[56] – it can also include occupations on the Consolidated Sponsored Occupation List (CSOL).[57] The stated intention of this policy is to ensure an applicant is not disadvantaged by limiting skilled employment experience to an occupation on the SOL, as the points test recognises extensive skilled employment as an important attribute for achieving good labour market outcomes.[58] To the extent that this suggests that an applicant can be awarded points for employment that is not specified for r 1.15I as a skilled occupation applicable to the applicant, it is inconsistent with the terms of the relevant points test provisions, which refer to 'a closely related skilled occupation'.[59] As 'skilled occupation' has the meaning given in reg 1.15I,[60] a closely related skilled occupation must be an occupation that is both specified as a skilled occupation for the applicant, and closely related to the nominated skilled occupation. In *Chalise v MIBP*,[61] the Federal Circuit Court confirmed that the policy on this point exceeds the scope of, and was thus inconsistent with, reg 1.15I(1).[62]

The question whether an applicant has been employed in an occupation that is closely related to the nominated skilled occupation is closely analogous to the question of whether the qualification used to satisfy the Australian study requirement for a skilled visa is 'closely related' to the applicant's nominated skilled occupationand as such, judicial consideration of that issue can provide guidance.[63] For discussion of the concept of 'closely related' in that context, see the MRD Legal Services commentary Skilled Occupation / Australian study requirement.

Can employment undertaken before applicant had the necessary qualification be counted?

In determining whether an applicant has been employed in a particular nominated skilled occupation, it is necessary to determine whether the applicant holds the qualifications and/or experience – i.e. the 'skill level' - nominated by the ANZSCO classification system for that occupation.[64] This general proposition would apply equally to claimed employment in a closely related skilled occupation. On that view, an applicant could not be regarded as having been employed in a 'closely related' occupation if

[55] Policy - Migration Regulations – Schedules Sch6D - General points test for General Skilled Migration visas mentioned in subregulation 2.26AC(1) – Assessing employment claims – Closely related occupations [reissued 21/08/2016].
[56] This refers to the list of occupations specified in Schedule 1 to the relevant skilled occupation instrument that applied to invitations issued and applications made before 19 April 2017. The reference to SOL in policy has not been updated to reflect the name of the new skilled occupation lists that apply to invitations issued and applications made on or after 19 April 2017. For more information, see the MRD Legal Services commentary Skilled Occupation / Australian Study requirement.
[57] Policy – Migration Regulations – Schedules - Sch6D - General points test for General Skilled Migration visas mentioned in subregulation 2.26AC(1) – Assessing employment claims – Closely related occupations [reissued 21/08/2016].The 'CSOL for these purposes' is the list of occupations specified in Schedule 2 to the relevant skilled occupation instrument that applied to invitations issued or applications made before 19 April 2017, and is applicable only to applicants who are nominated by a State or Territory government agency. As above, the reference to CSOL in Policy has not been updated to reflect the name of the new skilled occupation lists that apply to invitations issued and applications made from 19 April 2017.
[58] Policy - Migration Regulations – Schedules - Sch6D - General points test for General Skilled Migration visas mentioned in subregulation 2.26AC(1) – Assessing employment claims – Closely related occupations [reissued 21/08/2016].
[59] For example Schedule 6D items 6D31-33 and 6D41-44.
[60] Regulation 1.03.
[61] [2016] FCCA 1358 (Judge Driver, 1 August 2016).
[62] *Chalise v MIBP* [2016] FCCA 1358 at [47]-[52]. His Honour found that the phrase 'skilled occupation' should be interpreted in its defined sense, as the legislation did not express a contrary intention, the context did not suggest that the definition should not apply, the definition did not hamstring the operation of a particular provision, and it was parliament's intention to employ the phrase in its defined sense.
[63] *Bhanot v MIBP* [2014] FCA 848 (Perry J, 14 August 2014) at [29].
[64] *MIAC v Kamruzzaman* [2009] FCA 1562 (Greenwood J, 23 December 2009) at [64]; *Seema v MIAC* (2012) 203 FCR 537 at [46] - [47].

he or she did not hold the qualifications and/or experience specified by ANZSCO for *that* (closely related) occupation.

However, it is unclear whether an occupation requiring a lower skill level can be regarded as being 'closely related' to the nominated skilled occupation, for example, if it can be seen as a natural progression towards the nominated skilled occupation – such as cook (skill level 3) and chef (skill level 2) - or if it shares some of the tasks of the higher skill level nominated occupation. There has been no judicial consideration of this issue.

Relevant amending legislation

Title	Reference Number	Legislation Bulletin
Migration Amendment Regulations 2005 (No.9)	SLI 2005 No.240	No.5/2005
Migration Amendment Regulations 2010 (No.6)	SLI 2010, No.133	No.7/2010
Migration Amendment Regulations 2011 (No.3)	SLI 2011, No.74	No.2/2011
Migration Amendment Regulation 2012 (No.2)	SLI 2012, No.82	No.04/2012

Relevant case law

Aomatsu v MIMIA (2005) 146 FCR 48	Summary
Bhanot v MIBP [2014] FCCA 864	Summary
Bhanot v MIBP [2014] FCA 848	Summary
Bhatia v MIBP [2015] FCCA 409	Summary
Biswas v MIAC [2009] FMCA 95	
Chalise v MIBP [2016] FCCA 1358	Summary
Chawdhury v MIAC [2010] FMCA 275	Summary
Constantino v MIBP [2013] FCA 1301	Summary
De Ronde v MIMA [2004] FMCA 519	Summary
MIAC v Dhanoa (2009) 180 FCR 510	Summary
MIAC v Kamruzzaman [2009] FCA 1562	Summary
Martinez v MIAC [2009] FCA 781	Summary
Parekh v MIAC [2007] FMCA 633	Summary
Seema v MIAC (2012) 203 FCR 537	Summary
Shahid v MIMIA [2004] FCA 1412	Summary
Shukla v MIAC [2010] FMCA 625	Summary
Velusamy v MIAC [2009] FMCA 879	Summary

Xu v MIAC [2007] FMCA 285	Summary
Wang v MIMA (2005) 145 FCR 340	

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General Points Test (Schedule 6D)

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Overview

To facilitate the skilled migrant intake, aside from an assessment of an applicant's skills by an assessing authority, an applicant's skills and experience may be assessed under the 'points system', established in Part 2, Division 3, Subdivision B (ss.92-96) of the *Migration Act 1958* (the Act) and regulated under Division 2.6 of Part 2 of the Migration Regulations 1994 (the Regulations). The points system applies to visas, known as 'points-tested' visas, where one of the prescribed criteria is that the applicant receives the 'qualifying score' when assessed in accordance with the Act and Regulations. Under the points system, an applicant is allocated points based on a number of factors which are considered desirable in a skilled migrant.

The General Points Test in Schedule 6D applies to the skilled visa subclasses introduced on 1 July 2012: Subclasses 189 (Skilled – Independent) in the Points-tested stream,[1] 190 (Skilled – Nominated) and 489 (Skilled – Regional (Provisional)).[2] These visas are part of the 'SkillSelect' model by which applicants register an Expression of Interest and then may be issued an invitation to apply for a skilled visa.[3] It is a Schedule 2 criterion for these visas that the applicant's score under the points system is not less than the score stated in the invitation to apply for the visa, and not less than the prescribed qualifying score.[4]

A decision to refuse a Subclass 189, 190 or 489 visa on the basis that the applicant does not meet the points test criterion is reviewable by the Tribunal under Part 5 of the Act.[5] If no decision has been made to refuse the visa, a decision under s.93 as to an applicant's assessed score is not reviewable for these subclasses.[6]

The Points System

There are two relevant points test measurements for the 'SkillSelect' visas to which Schedule 6D applies. The first is by reference to the score stated in the invitation to apply for the visa. The second is by reference to the 'qualifying score'. For example, cl.189.224 states:

> *(1) The applicant's score, when assessed in relation to the visa under Subdivision B of Division 3 of Part 2 of the Act, is not less than the score stated in the invitation to apply for the visa.*

[1] From 1 July 2017, Subclass 189 has two streams: the Points-tested stream and the New Zealand stream. The General Points Test in Schedule 6D only applies to the Points-tested stream. Before 1 July 2017, the Subclass 189 visa operated in the same way as the Points-tested stream.
[2] r 2.26AC, inserted by item [35] of Schedule 1, Migration Amendment Regulation 2012 (No.2) (SLI 2012 No.82).
[3] For information on the 'SkillSelect' model see http://www.homeaffairs.gov.au/Trav/Work/Skil (accessed 29 July 2019).
[4] cll 189.224(1), 190.214(1) and 489.224(1); cll 189.224(2), 190.214(2) and 489.224(2).
[5] Note however that a decision made under s.501 on character grounds is not reviewable under Part 5 of the Act. Note too that for the purposes of r 4.15(1)(b) of the Regulations, a permissible direction on remittal is that the applicant satisfies a criterion for the visa (e.g. cl 175.221 - because the applicant has the qualifying score). It is not a permissible direction to state that the applicant meets some of the items of Schedule 6D. See *MIAC v Dhanoa* (2009) 180 FCR 510 in which the majority of the Court (Jagot and Foster JJ at [71]) held that the Tribunal could not remit a matter with a direction relating to the respondent having achieved 20 points for his IELTS test because the language skills component is not a 'specified criterion for the visa' within the meaning of r 4.15(1)(b). Moore J dissented on this point. All the judges of the Court were in agreement that the Tribunal had no power to remit without a direction or recommendation. This was consistent with the earlier authority of *Perkit v MIAC* [2009] FMCA 483 (Turner FM, 29 May 2009). Though these cases concerned the Schedule 6A points test, their reasoning is equally applicable to criteria related to the Schedule 6D points test.
[6] If no decision has been made to refuse the visa, a decision under s 93 as to an applicant's assessed score is reviewable under s 338(8) of the Act in certain cases but not in relation to the Subclasses to which Schedule 6D applies. These subclasses may be granted to persons in Australia and s 338(8)(a) limits merits review of assessed scores to visas which can only be granted outside Australia.

(2) The applicant's score, when assessed in relation to the visa under Subdivision B of Division 3 of Part 2 of the Act, is not less than the qualifying score for that Subdivision.[7]

While the requirement that the assessed score be at least equal to the qualifying score is common to all points-tested visas, the requirement that it be at least equal to the score stated in the invitation to apply applies only to SkillSelect visas. According to the Department's Procedural Instructions, its purpose is to preserve the integrity of the invitation process and to provide a disincentive for persons who may seek to overstate their expression of interest claims in order to obtain a higher ranking position in SkillSelect and ultimately an invitation to apply.[8]

Qualifying score

A person is taken to have received the **qualifying score** if their 'assessed score' is more than or equal to the applicable 'pass mark'.[9]

The **pass mark** is set by the Minister by legislative instrument, from time to time, for each visa class that has a requirement that the applicant have the qualifying score.[10] The relevant instruments specifying the pass marks can be accessed under the 'pass mark' tab of Register of Instruments - Skilled Visas.

The Minister also sets a '**pool mark**'. If a person receives less than the **pool mark**, then they are taken not to have received the 'qualifying score'.[11] The pool mark is set by the Minister, from time to time, by legislative instrument.[12] The instruments specifying the pool marks can be accessed under the 'PoolPassMark' tab of Register of Instruments - Skilled Visas. The pool and pass marks currently specified for the SkillSelect visas have been equal.[13]

Where there is a pool mark lower than the pass mark there is a process by which the visa application is placed in a pool. For a description of this process, see the MRD Legal Services commentary General Points Test Schedule 6C. As the pool and pass marks are equal for these visas (at all relevant times up to the time of writing), there does not appear to be any scope for these visa applications to be placed in a pool.

Assessed score

The **assessed score** is the assessment made by the Minister (or Tribunal on review) by giving an applicant the prescribed number of points for each 'prescribed qualification' in the points test that the

[7] cll 190.214 and 489.224 are in identical terms.
[8] Procedural Instruction [Sch2Visa189] Skilled – Independent (Permanent) (Class SI) (Subclass 189) visa (reissued 8 June 2017) at [7.9] explains that invitations are ranked and issued based on the declared skills and attributes and nominated occupations in the expressions of interest. Procedural Instructions for Subclasses 190 and 489 are to similar effect.
[9] s.94(1).
[10] s 96(2). Section 96(2) refers to specification of pass marks by notice in the Gazette. 'Gazette Notice' was defined in r 1.03 of the Regulations to mean a notice under r 1.17, which permitted the Minister to specify certain matters by notice published in the *Gazette*. However, since 1 January 2005, all legislative instruments made after that day are registered on the Federal Register of Legislation (formerly, the Federal Register of Legislative Instruments) (FRL) established and maintained under s 15A of the *Legislation Act 2003* (formerly under s 20 of the *Legislative Instruments Act 2003*), and are generally not required to be published in the Gazette: s 56 of the *Legislation Act 2003*. In effect, registration on the FRL substitutes for any pre 1 January 2005 statutory requirement for publication of a notice in the Gazette so that, in general, notification in the Commonwealth Gazette is no longer required. As r 2.26AC and Schedule 6D were introduced by SLI 2012, No.82, i.e. after 1 January 2005, those provisions use the terminology of instruments and the pass marks have been specified by instrument and the definition of 'gazette notice' was subsequently omitted by Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI 2014, No.30).
[11] s 94(2).
[12] s 96(1). While s 96(1) refers to specification of pool marks by notice in the Gazette, as r 2.26AC and Schedule 6D were introduced after the 1 January 2005 commencement of the *Legislative Instruments Act 2003* (Cth), all relevant pool marks have been specified by instrument.
[13] IMMI 18/067, commenced 1 July 2018.

applicant satisfies.[14]

The number of points for each qualification met is prescribed in the Regulations. The **prescribed qualifications** and the accompanying **points** are set out in Schedules 6, 6A, 6B, 6C and 6D of the Regulations. For a summary of the application of these points tests, see the MRD Legal Services commentary Skilled Visas – Overview.

This commentary focuses on Schedule 6D. MRD Legal Services also maintains commentary for the Schedule 6C Points test.

Schedule 6D

Schedule 6D is made up of 14 parts. Each part contains one or more 'qualifications' for which different points are awarded. The different parts are:

Part 6D.1 - Age qualifications
Part 6D.2 - English language qualifications
Part 6D.3 - Overseas employment experience qualifications
Part 6D.4 - Australian employment experience qualifications
Part 6D.5 - Aggregating points for employment experience qualifications under Part 6D.3 and Part 6D.4
Part 6D.6 - Australian professional year qualifications
Part 6D.7 - Educational qualifications
Part 6D.7A - Specialist educational qualifications
Part 6D.8 - Australian study qualifications
Part 6D.9 - Credentialled community language qualifications
Part 6D.10 - Study in regional Australia or a low-population growth metropolitan area qualifications
Part 6D.11 - Partner skill qualifications
Part 6D.12 - State or Territory nomination qualifications
Part 6D.13 - Designated area sponsorship qualifications

Each part is comprised of 3 columns, containing item numbers, prescribed 'qualifications', and for each item and qualification a specified number of points respectively. These parts are discussed below.

Application of Schedule 6D

As noted above, Schedule 6D applies to applications for the following visas which were introduced on 1 July 2012:[15]

- Skilled – Independent (Permanent) (Class SI) visa, (Subclass 189);
- Skilled – Nominated (Permanent) (Class SN) visa, (Subclass 190); and
- Skilled – Regional Sponsored (Provisional) (Class SP) visa, (Subclass 489).

[14] s 93(1).
[15] r 2.26AC(1) and (2).

Which parts of Schedule 6D must be assessed?

The applicant must be assessed against each part that applies to his/her visa subclass. Each qualification in column 2 of an item in Parts 6D.1 to 6D.13 is prescribed as a qualification in relation to the grant of a Subclass 189 (Skilled – Independent), Subclass 190 (Skilled-Nominated) or Subclass 489 (Skilled – Regional (Provisional)) visa.[16] However, Part 6D.12 (State or Territory nomination qualifications) provides only for the award of points to an applicant invited to apply for a Subclass 190 (Skilled-Nominated) visa, and Part 6D.13 (designated area sponsorship qualifications) provides only for the award of points to an applicant invited to apply for a Skilled – Regional Sponsored (Provisional) (Subclass 489) visa.

An applicant cannot be awarded points for more than one qualification within each part of Schedule 6D;[17] and if the applicant satisfies more than one qualification in a part, they must be given the points for the qualification satisfied that attracts the highest number of points.[18]

Part 6D.1 – Age qualifications

Part 6D.1 awards points depending on the age of the visa applicant at the time of invitation to apply for the visa. There are 4 items (6D11, 6D12, 6D13 and 6D14). The highest number of points (30) go to those in the 25 to 32 age group. Points are awarded on the following basis:

- Not less than 18 and under 25 - 25 points
- Not less than 25 and under 33 - 30 points
- Not less than 33 and under 40 - 25 points
- Not less than 40 and under 45 - 15 points

Part 6D.2 – English language qualifications

Part 6D.2 awards points for English language skills if the applicant has:

- 'superior English' - 20 points (item 6D21) or
- proficient English' - 10 points (item 6D22)

at the time of invitation to apply for the visa.

'Superior English' and 'proficient English' are defined terms in r.1.15EA and r.1.15D respectively, as substituted on 18 April 2015.[19] Whether a person meets any of these standards depends upon the relevant test score received. Unlike the definition of 'competent English' in r.1.15C, the requirements of superior English and proficient English cannot be met by applicants who hold passports from certain prescribed countries. These standards can only be met (and points obtained) where the applicant has the specified test result.

For details on these standards, and their application in the context of Schedule 6D including when the test must be taken and the applicable instrument, see the MRD Legal Services Commentary English Language Ability - Skilled/Business visas.

[16] r 2.26AC(2).
[17] r 2.26AC(4)(a).
[18] r 2.26AC(4)(b).
[19] Migration Amendment (2015 Measures No.1) Regulation 2015 (SLI 2015, No.34).

Instruments relevant to Part 6D.2

The applicable instrument relevant to Part 6D.2 specifying the English language tests and corresponding scores for the purposes of 'superior English' (6D21) and 'proficient English' (6D22) can be accessed through the 'EnglishTests' tab of Register of Instruments – Skilled Visas.

The current instrument at the time of writing (IMMI 15/005) is the applicable instrument for this Part, even though Part 6D.2 awards points only if the applicant has the relevant standard of English at the time of invitation to apply for the visa.[20] This is because the instrument itself specifies different tests / scores depending upon when the invitation was made. While new testing systems have been progressively added since the SkillSelect visas were introduced, the scores for the relevant standards of English (superior and proficient) under the already existing testing systems have remained unchanged for the various points in time. This means that an applicant who met a particular standard at the time of invitation will continue to meet that standard.

For discussion of the issue of the relevant instrument more generally, see Written Instruments below.

Part 6D.3 – Overseas employment experience qualifications

Part 6D.3 awards points to an applicant for previous overseas work experience in the nominated 'skilled occupation' or a closely related 'skilled occupation'.

The applicant is eligible for the points if, *at the time of invitation to apply for the visa*, he or she had been employed overseas in the nominated skilled occupation, or a closely related skilled occupation, for a specified length of time in the 10 years immediately before the day on which the application was made. Higher points are available relative to the number of months of work experience the applicant has gained in that period. The specified number of months for which points are available are:

- Item 6D31 36 months 5 points
- Item 6D32 60 months 10 points
- Item 6D33 96 months 15 points

Note that Part 6D.5 (see below) recalculates an applicant's points if the applicant attains points in both Parts 6D.3 and 6D.4 (Australian employment experience) of Schedule 6D.

For discussion of the concepts of 'employed' and 'skilled occupation', and assessing the period of employment and whether the employment in question is in a particular skilled occupation or a closely related skilled occupation, see the MRD Legal Services Commentary Employment in a Skilled Occupation.

Instruments relevant to Part 6D.3

For both Parts 6D.3 and 6D.4, the question whether at the time of invitation the applicant had been employed in the nominated skilled occupation (or a closely-related skilled occupation) requires consideration of whether at that time the applicant had nominated a 'skilled occupation' (defined in r.1.15I) and had been assessed by a relevant assessing authority as having the skills for that occupation. To determine these matters, the 'Skilled Occupation List' instruments must be considered. These instruments can be accessed through the 'SOL' tab of Register of Instruments - Skilled Visas. The applicable instruments for this Part are the current instruments at the time of writing. There are

[20] By its terms, IMMI 15/005 applies to visa applications made on or after 1 July 2012. Item 3 specifies tests, test and scores for applications lodged on or after 1 July 2012 and before 23 November 2014; item 4 for applications lodged on or after 23 November 2014, and item 5 for applications lodged on or after 1 January 2015.

presently nine 'live' skilled occupation instruments, although only six of these are relevant to those visa classes to which Schedule 6D applies.[21] To identify the correct instrument for the particular case, see the MRD Legal Services Skilled Occupation List Instruments - Quick guide.

For discussion of the issue of identifying the relevant instrument(s), see Written Instruments below.

Part 6D.4 – Australian employment experience qualifications

Part 6D.4 provides for points to be awarded where an applicant has been employed in Australia in their nominated skilled occupation or a closely related skilled occupation.

Higher points are available relative to the number of months of work experience the applicant has gained in the 10 years immediately before the day on which the application was made. The applicant is eligible for the points if, at the time of invitation to apply for the visa, he or she had been employed in Australia in the nominated skilled occupation, or a closely related skilled occupation, for a period totalling the number of months specified for the item in the 10 years immediately before the day on which the application was made. The specified number of months for which points are available are:

- Item 6D41 – 12 months, 5 points
- Item 6D42 – 36 months, 10 points
- Item 6D43 – 60 months, 15 points; and
- Item 6D44 – 96 months, 20 points.

Note that Part 6D.5 (see below) recalculates an applicant's points if the applicant has qualifications specified in Parts 6D.3 (overseas employment experience) and 6D.4 of that Schedule.

For discussion of the concepts of 'employed' and 'skilled occupation', and assessing the period of employment and whether the employment in question is in a particular skilled occupation or a closely related skilled occupation, see the MRD Legal Services Commentary Employment in a Skilled Occupation.

Additional requirements relating to employment in Australia

When determining whether an applicant satisfies a criterion that the applicant had been employed in a skilled occupation for a certain period, a period of employment in Australia must not be counted unless the applicant held either a substantive visa or a Bridging visa A or Bridging visa B authorising him or her to work during that period, and he or she complied with the conditions of that visa.[22] For further discussion see the MRD Legal Services commentary Employment in a Skilled Occupation.

Instruments relevant to Part 6D.4

The instruments relevant to Part 6D.4 are the same as those that are relevant to Part 6D.3. For discussion, see above 'instruments relevant to Part 6D.3'.

[21] IMMI 13/065, IMMI 13/064, IMMI 14/049, IMMI 15/091, IMMI 16/060 and IMMI 16/059.

[22] r 2.27C. In relation to the reference in r 2.27C to 'a criterion' within the points system, it has been held that the component parts of the points test do not constitute a 'specified criterion' for the purposes of the Tribunal's remittal power under r 4.15(1)(b): *MIAC v Dhanoa* (2009) 180 FCR 510, per Jagot and Foster JJ at [67]. However, this should not be taken to mean that r 2.27C does not apply in relation to an assessment under the points test. Their Honours were concerned only with the construction and scope of the remittal power. They went on to observe at [68] that cl 880.222A, which is in identical terms to r 2.27C, is an interpretative provision which should not be used as a basis to construe r 4.15(1)(b) other than in a manner which reflects the language of the statutory scheme as a whole.

Part 6D.5 – Aggregating points for employment experience qualifications under 6D.3 and 6D.4

Part 6D.5 has the effect of aggregating and limiting the points available to an applicant for Australian and overseas work experience. This part is identical to Part 6C.5. It ensures there is a maximum number of points awardable for work experience qualifications, whether undertaken overseas or in Australia, or a combination of the two. The current prescribed number is 20 points.

Under Item 6D51, if an applicant has a combination of overseas and Australian work experience and the total number of points awardable under both Parts 6D.3 and 6D.4 is more than 20 points, the applicant must be awarded 20 points under Part 6D.5 and no points under Parts 6D.3 and 6D.4.

Part 6D.6 – Australian professional year qualifications

Part 6 provides for points to be awarded where at the time of invitation to apply for the visa, the applicant had completed a 'professional year' in Australia in their nominated occupation or in a closely related skilled occupation.

Item 6D61

Under Item 6D61, 5 points are awarded if the applicant had completed a 'professional year' in Australia comprising a total of 12 months in the 48 months immediately before the time of invitation to apply for the visa. 'Professional year' is defined in r.2.26AC(6) to mean a course specified by the Minister in an instrument in writing for this definition.

Instruments relevant to Part 6D.6

To identify the relevant courses specified for r.2.26AC(6), see the 'ProfYear' tab of Register of Instruments - Skilled Visas. For discussion of the issue of the relevant instrument generally, see Written Instruments below.

Part 6D.7 - Educational qualifications

Points are awarded under this Part for certain educational qualifications. Specifically if at the time of invitation to apply for the visa the applicant had:

- met the requirements for award of a doctorate by an Australian educational institution; or award of a doctorate, by another educational institution, that is of a recognised standard;[23]
- met the requirements for the award of at least a bachelor degree by an Australian educational institution; or the award of at least a bachelor qualification, by another educational institution, that is of a recognised standard;[24]
- met the requirements for the award of a diploma by an Australian educational institution;[25]
- met the requirements for the award of a trade qualification by an Australian educational institution;[26] or
- attained a qualification or award recognised by the relevant assessing authority for the applicant's nominated skilled occupation as being suitable for the occupation.[27]

[23] items 6D71(a) and (b). Note that items 6D71(b) and 6D72(b) were differently punctuated until amendments were made by the Migration Legislation Amendment (2016 Measures No.3) Regulation 2016 (F2016L01390), Schedule 5, item 29.
[24] items 6D72(a) and (b).
[25] item 6D73.
[26] Item 6D74.
[27] Item 6D75.

In addition, for items 6D71 and 6D72, r.2.26AC(5) requires that the Minister (or on review the Tribunal) must have regard to the following matters in determining whether a qualification is of a recognised standard:

- whether at the time of invitation to apply for the visa the qualification had been recognised by the relevant assessing authority for the applicant's nominated skilled occupation as being suitable for the occupation;
- whether the qualification is recognised by a body, specified by the Minister in an instrument in writing for this paragraph;
- the duration of the applicant's study towards the qualification; and
- any other relevant matter.

Meaning of 'met the requirements for the award'

Items 6D71, 6D72, 6D73 and 6D74 all require the applicant to have 'met the requirements for award' of a particular qualification. The words 'met the requirements for award' are also contained in the definition of 'completed' in relation to a degree, diploma or trade qualification for the purposes of the Australian study requirement in r.1.15F(2). In that context it has been held that a person has met the requirements for award of a qualification at the time when the education provider is satisfied that the requirements have been met, namely, when the results have been finalised, rather than when the student learns of the results.[28]

Meaning of 'doctorate' and 'degree'

'Doctorate' is not defined in the Regulations. However, 'degree' is defined in r.2.26AC(6) as follows:

> ***"degree"***
> *means a formal educational qualification, under the Australian Qualifications Framework, awarded by an Australian educational institution as a degree or a postgraduate diploma for which:*
>
> *(a) the entry level to the course leading to the qualification is:*
> *(i) in the case of a bachelor's degree — satisfactory completion of year 12 in the Australian school system or of equivalent schooling; and*
> *(ii) in the case of a master's degree — satisfactory completion of a bachelor's degree awarded at an Australian tertiary educational institution or of an equivalent award; and*
> *(iii) in the case of a doctoral degree — satisfactory completion of a bachelor's degree awarded with honours, or a master's degree, at an Australian tertiary educational institution or of an equivalent award; and*
> *(iv) in the case of a postgraduate diploma — satisfactory completion of a bachelor's degree or diploma awarded at an Australian tertiary educational institution or of an equivalent award; and*
>
> *(b) in the case of a bachelor's degree, not less than 3 years of full-time study, or the equivalent period of part-time study, is required.*

Additional requirements relating to educational qualifications

There are no relevant additional requirements for Part 6D.7. Regulation 2.27D imposes additional requirements relating to permission to study and compliance with visa conditions but only where a determination is required as to whether an applicant satisfies a criterion 'that the applicant has studied in Australia for a certain period'. This provision does not appear to be applicable to the criteria in Part 6D.7 because those criteria do not in terms require the applicant to have studied in Australia for a

[28] *Sapkota v MIAC* [2012] FCA 981 (Cowdroy J, 7 September 2012) at [26].

certain period.[29]

Instruments relevant to Part 6D.7

The instrument relevant to an assessment under r.2.26AC(5) for items 6D71 and 6D72 can be located on the 'EdQual6C&6D' tab of the Register of Instruments - Skilled Visas. At the time of writing there has been only one instrument of this type issued since the introduction of Schedule 6D. It specifies 'Vocational Education Training and Assessment Services' (VETASSESS) as another 'assessing authority' that may recognise a qualification for the purpose of r.2.26AC(5)(b).

For discussion of the issue of the relevant instrument generally, see Written Instruments below.

Part 6D.7A – Specialist educational qualifications

Part 6D.7A (item 6D7A1) awards an additional 5 points to an applicant who, at the time of invitation to apply for the visa, met the requirements for the award of a specialist educational qualification.[30] Although this Part commenced on 10 September 2016, it applies to all visa applications not finally determined by that date.[31] 'Specialist educational qualification' is defined in r.2.26AC(5A) as a person who has met the requirements for the award, by an Australian educational institution, of:

- a masters degree by research;[32] or
- a doctoral degree;[33] **and**
- the degree included study for at least 2 academic years at the institution in a field of education specified in an instrument.[34]

See discussion above for the meaning of 'met the requirements for the award' and 'degree'.

Academic year

The term 'academic year' is defined in r.1.03 to mean a period that is specified by the Minister as an academic year in an instrument in writing. The relevant instrument in writing can be located on the 'AcadYear' tab of the Register of Instruments: Skilled visas. For further information about academic year, see the MRD Legal Services Commentary Skilled occupation / Australian study requirement.

Instruments relevant to Part 6D.7A

The instrument relevant to this Part can be located on the 'SpecEdQual6D' tab of the Register of Instruments: Skilled visas. At the time of writing, only one instrument has been issued specifying fields of education for the purposes of Part 6D.7A. This instrument sets out both the 'Broad Field of Education' and the 'Narrow Field of Education'. Only the 'Narrow Field of Education' is specified for the purposes of r.2.26AC(5A)(b).

[29] In contrast to the Australian Study Requirement mentioned in Parts 6B.9 and 10, to which r 2.27D was originally intended to apply (see Explanatory Statement to SLI 2007 No. 257 Schedule 1, item [28]), Part 6D.7 does not specify the length of study but only requires the applicant to have met the requirements for the awards specified.
[30] Migration Amendment (Entrepreneur Visas and Other Measures) Regulation 2016 (F2016L01391), Schedule 2. These amendments were introduced to enhance pathways to permanent residency for PhD and masters by research graduates with qualifications in a prescribed Science, Technology, Engineering and Mathematics (STEM) or information and communications technology (ICT) field (see Attachment A to the Explanatory Statement to F2016L01391).
[31] No transitional arrangements are specified in Schedule 3 to the Migration Amendment (Entrepreneur Visas and Other Measures) Regulation 2016 (F2016L01391) in relation to the specialist educational qualifications amendments contained in Schedule 2 of those regulations.
[32] r 2.26AC(5A)(a)(i).
[33] r 2.26AC(5A)(a)(ii).
[34] rr 2.26AC(5A)(b) and 2.28AC(5B).

Part 6D.8 – Australian study qualifications

Part 6D.8 contains one item, 6D81 which provides an additional 5 points to an applicant who, at time of invitation to apply for the visa, met the Australian study requirement. 'Australian study requirement' is defined in r.1.15F.[35] Note that, unlike the Schedule 2 criteria relating to the Australian study requirement, there is no requirement in this Part that the qualifications used to meet the Australian study requirement be closely related to the nominated skilled occupation for the purposes of this item.

For further information about the Australian study requirement see the MRD Legal Services Commentary Skilled occupation / Australian study requirement.

Additional requirements relating to study in Australia

The 'Australian study requirement' mentioned in item 6D81 and defined in r.1.15F effectively imports a criterion that the applicant has studied in Australia for a certain period. Regulation 2.27D provides that, in determining whether an applicant satisfies a criterion for the grant of a General Skilled Migration visa that the applicant has studied in Australia for a certain period, a period of study cannot be counted unless the applicant held a substantive visa or a Bridging visa A or Bridging visa B authorising study during the period, and unless the applicant complied with the conditions of the visa.[36] Accordingly, for item 6D81 study undertaken in Australia cannot be counted unless it satisfies these requirements.

Note that the more detailed requirements of r.2.27D are additional to the requirement in the r.1.15F definition itself that the applicant must have undertaken the study while in Australia as the holder of a visa authorising him or her to study.

Instruments relevant to Part 6D.8

There are no instruments relevant to an assessment under Part 6D.8.

Part 6D.9 – Credentialled community language qualifications

Part 6D.9 (item 6D91) awards points to an applicant who has a qualification in a particular language:

- awarded or accredited by a body specified in the relevant instrument; and
- at a standard for the language specified in the instrument.

'Particular language' is not defined in the Regulations and would appear to leave the question of what languages can be accepted open, subject to the qualifiers in item 6D91.

Instruments relevant to Part 6D.9

The instrument relevant to Part 6D.9 can be accessed via the 'CommLang' tab of the Register of Instruments - Skilled Visas. At the time of writing, there has been only one instrument issued for the purposes of this part. For subitem 6D91(a), the National Accreditation Authority for Translators and Interpreters (NAATI) is specified as a credentialled community language body. For subitem 6D91(b)

[35] r 1.03.

[36] In relation to the reference in r 2.27D to 'a criterion' within the points system, it has been held that the component parts of the points test do not constitute a 'specified criterion' for the purposes of the r 4.15(1)(b) remittal power: *MIAC v Dhanoa* (2009) 180 FCR 510, per Jagot and Foster JJ at [67]. However, this should not be taken to mean that r 2.27C does not apply in relation to an assessment under the points test. Their honours were concerned only with the construction and scope of the remittal power. They went on to observe at [68] that cl 880.222A, which is in similar terms to r 2.27D (but in relation to employment rather than study) is an interpretative provision. It assists in determining whether the criterion in cl 880.222 is satisfied or not. Given its function in the clause it should not be used as a basis to construe r 4.15(1)(b) other than in a manner which reflects the language of the statutory scheme as a whole.

an accreditation of paraprofessional interpreter or translator level or above is specified.

For discussion of the issue of the relevant instrument generally, see Written Instruments below.

Part 6D.10 – Study in regional Australia or a low-population growth metropolitan area qualifications

Under Part 6D.10, points are awarded for study and residence in a regional or low population growth metropolitan area.

Under item 6D101, five (5) points are available where at the time of invitation to apply for the visa the applicant:

- met the 'Australian study requirement':[37]
- the location of the campus or campuses at which that study was undertaken is specified in an instrument;
- the applicant lived in a part of Australia the postcode of which is specified in that instrument while he or she undertook the course of study;
- none of the study undertaken constituted distance education.

See discussion of 'Australian study requirement' in Part 6D.8 above. The effect of the 'Australian study requirement' in item 6D101(a) is that if an applicant is not entitled to any points under Part 6D.8, the applicant is also not entitled to any points under Part 6D.10.

Instruments relevant to Part 6D.10

The relevant instrument to be considered when assessing item 6D101 sets out both the educational institutions (campuses) and postcodes applicable to Part 6D.10 assessments. The requirement must have been met at the time of invitation to apply for the visa.

At the time of writing there has been only one instrument issued since the introduction of Schedule 6D that is applicable to Part 6D.10. It can be accessed via the 'Reg&LowPop' tab of the Register of Instruments - Skilled Visas.

For discussion of the issue of the relevant instrument generally, see Written Instruments below.

Part 6D.11 – Partner skill qualifications

Item 6D111 provides for an additional 5 points if the primary applicant has a spouse or de facto partner who:

- is an applicant for the same subclass of visa as the primary applicant;
- is not an Australian permanent resident or citizen;
- was under a specified age at the time the invitation to apply for the visa was issued to the primary applicant;[38]
- at the time of invitation to apply for the visa nominated a skilled occupation, being an

[37] 'Australian study requirement' is relevantly defined in r 1.15F: r 1.03.
[38] If the visa application was made on or after 1 July 2018 in response to an invitation given by the Minister on or after that day, the specified age is 45: Part 6D.11 of Schedule 6D, table item 6D111 (c) amended by Home Affairs Legislation Amendment (2018 Measures No.1) Regulations 2018 (F2018L00741). If the invitation was given before 1 July 2018, the specified age is 50: see table item 6D111 (c) as in force before the amendment by F2018L00741.

occupation specified by the Minister under r.1.15I(1)(a) *at that time*;

- at the time of invitation to apply for the visa had been assessed by the relevant assessing authority for the nominated skilled occupation as having suitable skills for the occupation, and for applications made on or after 28 October 2013 where the invitation to apply for the visa was given on or after that date, this assessment was not for a Subclass 485 (Temporary Graduate) visa;[39] and
- at the time of invitation to apply for the visa, had competent English.

Where the spouse or de facto partner does not satisfy one or more of the above requirements, the applicant will receive no points under this Part.

Issues relating to partner skill qualifications

There are several issues that may arise when considering partner skill qualifications, including in relation to the partner relationship itself.

One issue is whether an applicant can claim points under this Part where the relevant relationship did not exist at the time of invitation and/or at the time of application. In practice, the expression of interest and visa application forms ask the non-citizen whether the applicant is claiming partner skills; however this is not grounded in legislation and there does not appear to be any statutory reason why points could not be awarded under this part where the spousal or de facto relationship was not in place at the time of invitation and/or at the time of application. While not free from doubt, for the purposes of the points test criterion, it would appear that the relevant relationship need only be in place at the time of decision, provided the partner can satisfy each of the requirements in item 6D111, including those that must be satisfied at the time of invitation.[40]

The focus on the time of invitation to apply may raise further issues, particularly in relation to nomination of a skilled occupation (item 6D111(d)) and English competency (item 6D111(f)).

For points under 6D111(d) and (e), the partner must have nominated a skilled occupation and been assessed as suitable for that occupation at the time of invitation to apply.[41] Whether the partner has nominated an occupation and, if so, what occupation and when this occurred are questions of fact. There is no definition in the Regulations for the word 'nominate', however written identification of an occupation, for example as part of the expression of interest process, would appear to be sufficient.

Item 6D111(f) also specifies the time of invitation to apply for the visa as the point at which the applicant's spouse or de facto partner must have had competent English. However, the definition of competent English requires the relevant test to have been conducted in the 3 years immediately before the day on which the application was made.[42] This gives rise to a possibility that a spouse or de facto partner may have had competent English at the time of the invitation to apply, but that at the time of the visa application, the test may be more than 3 years old and so not sufficient to meet the definition of competent English at that time. In these circumstances item 6D111(f) will not be satisfied and as the partner skill qualifications are cumulative the applicant will not be able to be awarded points under this Part. For further information about 'competent English', including its application in the context of Schedule 6D, see the MRD Legal Services Commentary English Language Ability -

[39] 6D111, table item (e) amended by Migration Amendment (Skills Assessment) Regulation 2013 (SLI 2013. No.233).
[40] For information about the requirements of a spousal or de facto relationship, see the MRD Legal Services commentary Spouse and de facto partner.
[41] While not stated, this should be taken to mean the time of the primary applicant's invitation, because secondary applicants are not required to be the subject of an invitation to apply: see Schedule 1 items 1137, 1138 and 1230 respectively, for the application requirements for visa classes SI (Subclass 189), SN (Subclass 190) and SP (Subclass 489).
[42] rr 1.15D(b) and 1.15EA(b).

Skilled/Business visas.

Instruments relevant to Part 6D.11

Subitems 6D111(d) and (e) require consideration of whether, at the time of invitation to apply for the visa, the spouse or de facto partner had nominated a skilled occupation and had been assessed by a relevant assessing authority as having the skills for that occupation. The instruments relevant to subitems 6D111(d) and (e) are the same as those that are relevant to Part 6D.3 and are discussed under 'instruments relevant to Part 6D.3' above. For discussion of the issue of the relevant instrument generally, see Written Instruments below.

Subitem 6D111(f) requires consideration of whether, at the time of invitation to apply for the visa, the spouse or de facto partner had competent English, which is defined in r.1.15C. The written instrument specifying the language tests, scores and passports for the purpose of r.1.15C can be accessed at the 'EngTests' tab on the Register of Instruments - Skilled visas.

The current instrument at the time of writing (IMMI 15/005) is the applicable instrument for this Part,[43] even though the partner (to be awarded points under item 6D111(f)) is required to have the relevant standard of English at the time of invitation to apply for the visa. However, while new testing systems have been progressively added since the SkillSelect visas were introduced, the scores for the relevant standards of English (superior and proficient) under the already existing testing systems have remained unchanged. This means that an applicant who met a particular standard of English at the time of invitation will continue to meet that standard.

For discussion of the issue of the relevant instrument more generally, see Written Instruments below.

Part 6D.12 – State or Territory nomination qualifications

Points can be awarded under this part to an applicant who has been invited to apply for a Subclass 190 (Skilled – Nominated) visa, and the nominating State or Territory government agency has not withdrawn the nomination.

Note that in contrast to the State or Territory nomination qualifications in Schedules 6B and 6C, this item does not involve consideration of whether a nomination has been accepted by the Minister but simply whether the nomination has been withdrawn.

Part 6D.13 – Designated area sponsorship qualifications

In contrast to most Schedule 6D qualifications, the qualifications in this Part are not referable to the time of invitation.

Ten points can be awarded under item 6D131 if the applicant has been invited to apply for a Subclass 489 (Skilled – Regional)(Provisional) visa and either:

- the nominating State or Territory government agency has not withdrawn the nomination; or
- if the applicant is sponsored by a family member, the Minister has accepted the sponsorship.

These alternative qualifications reflect the Schedule 2 criterion in cl.489.225 which require either that the nominating State or Territory government agency has not withdrawn the nomination or that the

[43] By its terms, IMMI 15/005 applies to visa applications made on or after 1 July 2012. Item 3 specifies tests, test and scores for applications lodged on or after 1 July 2012 and before 23 November 2014; item 4 for applications lodged on or after 23 November 2014, and item 5 for applications lodged on or after 1 January 2015.

Minister has accepted the sponsorship of the applicant by a person in specified circumstances.

Note that for applicants relying on a State or Territory government agency nomination, the question for subitem 6D131(a) (and cl.489.225(2)) is simply whether the nomination has been withdrawn.

For applicants relying on family sponsorship, a threshold question for subitem 6D131(b) is whether the applicant is sponsored by a family member. If so, the question is whether the sponsorship has been accepted by the Minister.

As to whether the applicant is sponsored by a family member, the terms of 6D131(b) and its cl.489.225(3) equivalent indicate that the sponsor need not be the relative that was specified in the visa application. However the equivalent Schedule 2 criterion in cl.489.225(3) indicates that at the time of decision the sponsor must be an eligible relative who has turned 18, is an Australian citizen or permanent resident or an eligible New Zealand citizen, and is usually resident in a designated area of Australia.[44]

As to whether the Minister has accepted the sponsorship, it is unclear whether the Tribunal's jurisdiction on review extends to assessing whether to accept a sponsorship that was not accepted by the Minister, or whether it is simply a question of past fact.

Instruments relevant to Part 6D.13

For applicants relying on family sponsorship, the sponsor must be usually resident in a designated area of Australia. 'Designated area' is defined in r.1.03 to mean an area specified as a designated area by the Minister in an instrument in writing for the definition. This instrument can be accessed via the 'DesgnAreas' tab in the Register of Instruments - Skilled Visas. For reasons explained above, it appears that the sponsorship mentioned in subitem 6D.131(b) is one that must be in place at the time of decision. This means that the relevant instrument is the one in force at that time.

At the time of writing only one instrument relevant to this part has been issued since the introduction of Schedule 6D. It designates specified New South Wales and Queensland postcodes, the entire Australian Capital Territory and Northern Territory, and the entire States of South Australia, Tasmania, Victoria and Western Australia.

Other issues relating to Schedule 6D

Which version of the legislation applies?

When undertaking a points test assessment, s.350 of the Act specifies which version of the legislation the Tribunal must apply.

Pool and pass mark

When determining the relevant pool and pass mark, the Tribunal must have regard to whichever is the more favourable to the applicant:

- the applicable pool/pass mark at the time of the Minister's s.93 points test assessment; OR
- the applicable pool/pass mark at the time of the Tribunal's points test assessment.[45]

[44] An eligible relative is a parent, child or step-child; sibling, aunt, uncle, niece or nephew including adoptive or step; grandparent; or first cousin.
[45] s 350(2).

Regulations

When reviewing a s.93 points test assessment, the regulations to which the Tribunal is to have regard is the more favourable of the following:

- the regulations that were in force at the time of the Minister's s.93 points test assessment; OR
- the regulations that were in force at the time of the Tribunal's decision.[46]

'Regulations' for these purposes includes Schedule 6D but does not refer to the instruments made under the regulations. Note that Schedule 6D was introduced on 1 July 2012.

Written instruments

There has been very limited judicial consideration of the question of which written instrument must be applied in particular circumstances, and none in relation to Schedule 6D.

In general, the applicable instrument will be determined by the statutory context and/or the terms of the instrument. In some cases the terms of the instrument itself may be determinative.[47] In other cases, the terms of the legislation may point to the applicable instrument. For example, if the instrument itself does not specify the applications to which it applies, and 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.[48]

Unlike previous general points tests, Schedule 6D specifies the *time of invitation to apply for the visa* as the point in time at which most of its qualifications must have been met. For these qualifications, in the absence of a contrary indication in other relevant provisions or in the instruments themselves, the relevant instrument will usually be the instrument in effect at that time.[49]

As discussed above in relation to Parts 6D.2 and 6D.11, a contrary indication is evident in the current instrument for English language proficiency which by its terms applies to all visa applications to which Schedule 6D applies.[50]

In relation to Part 6D.7A, which applies to all applications not finally determined by 10 September 2016, the current instrument applies as it is the only instrument that has been made specifying a field or fields of education for the purpose of a 'specialist educational qualification' as defined in

[46] s 350(1). For example, Part 6D.7A did not exist prior to 10 September 2016 and the points were therefore not available for primary decisions made before that date. In reviewing a points test assessment, the Tribunal will be required to assess the applicant's eligibility under Part 6D.7A.

[47] For example, IMMI 15/005 'Language tests, score and passports 2015 (Regulations 1.15B, 1.15C, 1.15D and 1.15EA) sets out its specifications by reference to the date of application, specifying tests, scores and passports for applications lodged before 1 July 2012 and different sets of tests, scores and passports for applications lodged on or after that date and before 23 November 2014, applications lodged on or after 23 November 2014, and applications lodged after 1 January 2015.

[48] 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 r 1.03 (MODL gazette notice) was to be applied when making an assessment under Part 7 of Schedule 6A. A majority of the Full Federal Court held that the relevant MODL for the purposes of Part 7 of Schedule 6A was 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 likely that the assessment required was by reference to a skilled occupation specified in an instrument at the time the application was made. Although the reasoning of the leading judgment turns on the particular statutory context in question, the judgment provides authority that an instrument may still have operation after it has been revoked.

[49] This is consistent with the reasoning of the majority in *Aomatsu v MIMIA* (2005) 146 FCR 58, 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 likely that the assessment required was by reference to a skilled occupation specified in an instrument at the time the application was made.

[50] IMMI 15/005. Item 3 specifies tests, test and scores for applications lodged on or after 1 July 2012 and before 23 November 2014; item 4 for applications lodged on or after 23 November 2014, and item 5 for applications lodged on or after 1 January 2015.

r.2.26AC(5A).[51]

A contrary indication is also evident in the provisions and instruments relating to 'skilled occupation' as defined in r.1.15I, relevant to Parts 6D.3, 6D.4 and 6D.11 of Schedule 6D. As discussed above, the current instruments made under that provision are expressed to apply to visa applications to which Schedule 6D applies.[52] However, in relation to these applications, the skilled occupations, assessing authorities and countries are specified by reference to the date of invitation to apply.[53] By contrast, in Part 6D.11 subitem 6D111(d) points unambiguously to the skilled occupation *specified* by the Minister under r.1.15I(1)(a) *at the time of invitation to apply* for the visa. While references to skilled occupation in other items in Schedule 6D would ordinarily require reference to the current instrument, this provision expressly refers to the specification, i.e. the instrument in effect, at the time of invitation to apply for the visa.

Relevant amending legislation

Title	Reference Number	Legislation Bulletin
Migration Amendment Regulations 2010 (No.6)	SLI 2010, No.133	No.7/2010
Migration Amendment Regulation 2012 (No.2)	SLI 2012, No.82	No.4/2012
Migration Amendment (Skills Assessment) Regulation 2013	SLI 2013 No.233	No.15/2013
Migration Amendment (2015 Measures No. 1) Regulation 2015	SLI 2015, No.34	No.1/2015
Migration Legislation Amendment (2016 Measures No.3) Regulation 2016	F2016L01390	No.03/2016
Migration Amendment (Entrepreneur Visas and Other Measures) Regulation 2016	F2016L01391	No.02/2016
Home Affairs Legislation Amendment (2018 Measures No. 1) Regulations 2018	F2018L00741	

Relevant case law

Aomatsu v MIMIA (2005) 146 FCR 58	Summary
MIAC v Dhanoa [2009] FCAFC 153	Summary
Manik v MIAC [2012] FMCA 149	
Parekh v MIAC [2007] FMCA 633	Summary
Perkit v MIAC [2009] FMCA 483	Summary

[51] IMMI 16/076.
[52] IMMI 13/065, IMMI 13/064, IMMI 14/049 and IMMI 14/048.
[53] See the Skilled Occupation List Instruments - Quick guide for details of their application.

Sapkota v MIAC [2012] FCA 981	Summary
Seema v MIAC [2012] FCA 257	Summary
Shukla v MIAC [2010] FMCA 625	Summary

Available decision templates / precedents

The following decision template/precedent is designed specifically for Schedule 6D Points Test reviews of visa refusals:

- **Subclass 189/190/489 – General Points Test – Schedule 6D** - suitable for use in reviewing Subclass 189, 190 or 489 visa applications where the primary issue in dispute is whether the applicant has the qualifying score when assessed against the General Points Test (Schedule 6D).
- **Optional Standard Paragraphs - Skilled Visas –** paragraphs addressing the relevant law for English language requirements are available for insertion into draft decisions.

Last updated/reviewed: 30 July 2019

General Points Test (Schedule 6C)

CONTENTS

Overview

The General Points Test in Schedule 6C to the Migration Regulations 1994 (the Regulations) is part of the assessment process for 'points tested' skilled visa subclasses in General Skilled Migration (GSM) visa[1] Classes VE,[2] VB,[3] VF[4] and VC[5] made on or after 1 July 2011.

The aim of the skilled visa categories is to allow and encourage migrants to Australia who have a certain minimum level of skills to contribute to the Australian economy. To facilitate the skilled migrant intake, aside from an assessment of an applicant's skills (conducted by an assessing authority), an applicant's skills and experience may be assessed under the 'points system'. For points based skilled visas, it is a Schedule 2 criterion that the applicant has the prescribed 'qualifying score' under the points system. Under this system, an applicant is allocated points based on a number of factors which are considered desirable in a skilled migrant.

Points Test issues may arise before the Tribunal in two ways: either as part of a visa refusal review where the delegate has found that the applicant does not meet the criterion requiring the qualifying score,[6] or as part of a review of a decision made under s.93 of the *Migration Act 1958* (the Act), where a decision to refuse the visa has not been made.[7]

The Points System

The points system is established in Part 2, Division 3, Subdivision B (ss.92-96) of the Act. It applies where one of the prescribed criteria for a visa is that the applicant receives the 'qualifying score' when assessed in accordance with ss.93-96. For example, the criterion in cl.885.221 (as in force before 1 July 2013) is that:

> *The applicant has the qualifying score when assessed in relation to the visa under Subdivision B of Division 3 of Part 2 of the Act.*

[1] 'General Skilled Migration' visa is defined in r.1.03 as meaning a Subclass 175, 176, 189, 190, 475, 476, 485, 487, 489, 885, 886 or 887 visa, granted at any time. Inserted by Migration Amendment Regulations 2007 (No.7) (SLI 2007, No.257) Schedule 1, Part 1 item [4] and as amended by Migration Amendment Regulation 2012 (No.2) (SLI 2012, No.82) Schedule 1 item [4], for visa applications made on or after 1 July 2012.

[2] From 1 July 2012, no further *primary* applications may be made for a Subclass 175 or 176 (Class VE) visa: SLI 2012, No.82. Schedule 1 Item 1135 and Schedule 2 Parts 175 and 176 are omitted from 1 July 2013 removing Subclasses 175 and 176: SLI 2012, No.82.

[3] From 1 January 2013, no further *primary* applications may be made for a Subclass 885 or 886 (Class VB): SLI 2012, No.82. Schedule 2 Parts 885 and 886 are omitted from 1 July 2013 removing Subclasses 885 and 886: SLI 2012, No.82. Subclass 887 remains unaffected, but is not subject to a points test.

[4] From 1 July 2012, no further applications may be made for a Subclass 475 (Class VF) visa: SLI 2012, No.82. Part 475 is omitted from 1 July 2013 removing Subclass 475: SLI 2012, No.82. Subclass 476 remains unaffected but is not subject to a points test.

[5] From 1 January 2013, no further *primary* applications may be made for a Subclass 487 (Class VC): Migration Legislation Amendment Regulation 2013 (No.1) (SLI 2013, No.33). Part 487 is omitted from 1 July 2013 removing Subclass 487 (Class VC): SLI 2012, No.82. Applications by persons seeking to satisfy the secondary criteria must be made before 1 July 2012: SLI 2013, No.33. Subclass 485 remains unaffected but is not subject to a points test.

[6] e.g. cl.885.221. Note that for the purposes of r.4.15(1)(b) of the Regulations, a permissible direction on remittal is that the applicant satisfies a criterion for the visa (e.g. cl.175.221 - because the applicant has the qualifying score). It is not a permissible direction to state that the applicant meets some of the items of Schedule 6C. See *MIAC v Dhanoa* (2009) 180 FCR 510 in which the majority of the Court (Jagot & Foster JJ at [71]) held that the Tribunal could not remit a matter with a direction relating to the respondent having achieved 20 points for his IELTS test because the language skills component is not a 'specified criterion for the visa' within the meaning of r.4.15(1)(b). Moore J dissented, at [14] on the basis that the Tribunal did have the power to remit the case with a direction that the respondent met specified component parts of the points test for the purposes of cl.880.222. All the judges of the Court were in agreement that the Tribunal had no power to remit without a direction or recommendation. This was consistent with the earlier authority of *Perkit v MIAC* [2009] FMCA 483 (Turner FM, 29 May 2009), in which the Court found that the Tribunal is not empowered to remit matters unless a specified criterion for the visa is met. Though these authorities were in relation to the Schedule 6A points test their reasoning would appear equally applicable to criteria related to the Schedule 6C points test.

[7] s.338(8).

Qualifying score

A person is taken to have received the **qualifying score** if their 'assessed score' is more than or equal to the applicable 'pass mark'.[8]

The **pass mark** is set by the Minister by legislative instrument, from time to time, for each visa class that has a requirement that the applicant have the qualifying score.[9] The pass mark instruments can be accessed under the 'PoolPassMark' tab of Register of Instruments - Skilled Visas.

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The Minister also sets a 'pool mark'. If a person receives less than the **pool mark**, then they are not taken to have received the 'qualifying score'.[10] The pool mark is set by the Minister, from time to time by legislative instrument.[11] The pool mark instruments can be accessed under the 'PoolPassMark' tab of Register of Instruments - Skilled Visas. In more recent instruments, the pool and pass mark have been equal, otherwise the pool mark would be below the pass mark.[12]

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If the assessed score is equal to or more than the pool mark but less than the pass mark, then unless the application is withdrawn, it must be set aside and placed in a 'pool'.[13] If the pass mark or pool mark changes within 24 months, then the Minister must compare the assessed score with the applicable pass and pool mark and if it is equal to or greater than the pass mark, the applicant will be taken to have received the qualifying score.[14] The application will stay in the pool if the score is equal to or greater than the current pool mark for up to 24 months.[15] During periods where the pool and pass mark are equal, if an applicant's score is less than the pool and pass mark he or she will not have received the qualifying score.[16] This will mean that the visa application must be refused by the delegate and it will not be possible for the matter to be reviewed by the Tribunal under ss.93 and 338(8) (i.e. where a points assessment has been made, but the visa has not been refused).

Assessed score

The **assessed score** is the assessment made by the Minister (or Tribunal on review) by giving an applicant the prescribed number of points for each 'prescribed qualification' in the points test that the applicant satisfies.[17]

The number of points for each qualification met is prescribed in the Regulations. The **prescribed**

[8] s.94(1).
[9] s.96(2). Section 96(2) refers to specification of pass marks by notice in the *Gazette*. 'Gazette Notice' was defined in r.1.03 of the Regulations to mean a notice under r.1.17, which permitted the Minister to specify certain matters by notice published in the *Gazette*. However, since 1 January 2005 all legislative instruments made after that day are registered on the Federal Register of Legislation (formerly, the Federal Register of Legislative Instruments) (FRL) established and maintained under s.15A of the *Legislation Act 2003* (formerly under s.20 of the *Legislative Instruments Act 2003*), and are generally not required to be published in the Gazette: s.56 of the *Legislation Act 2003*. In effect, registration on the FRL substitutes for any pre 1 January 2005 statutory requirement for publication of a notice in the Gazette so that, in general, notification in the Commonwealth Gazette is no longer required. As r.2.26AB and Schedule 6C were introduced by Migration Amendment Regulations 2011 (No.3) (SLI 2011, No.74), i.e. after 1 January 2005, those provisions use the terminology of instruments and the pass marks have been specified by instrument. The definition of 'gazette notice' was subsequently omitted by Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI 2014, No. 30).
[10] s.94(2).
[11] s.96(1). While section 96(1) refers to specification of pool marks by notice in the *Gazette*, as r.2.26AB and Schedule 6C were introduced after the 1 January 2005 commencement of the *Legislative Instruments Act 2003* (Cth), all relevant pool marks have been specified by instrument. See footnote 9 for further discussion.
[12] As permitted by s.96(5).
[13] s.94(3).
[14] ss.95(2), 95A. In *Xue Fan v MIAC* [2010] FMCA 490 (Burnett FM, 9 July 2010), the Court held that a score decision and a 'pool' decision are in reality two distinct decisions. The score decision is final and conclusive of the matters determined within it. The Court further held that the pool decision builds upon that decision but does not call for it to be revisited and that time in the pool does not bear upon the initial score.
[15] ss.95(3), 95A.
[16] s.94(2).
[17] s.93(1).

qualifications and the accompanying **points** are set out in Schedules 6, 6A, 6B, 6C and 6D to the Regulations. For a summary of the application of these points tests, see the MRD Legal Services commentary Skilled Visas – Overview.

For General Skilled Migration visas (first introduced on 1 September 2007), the applicable points tests are set out in Schedules 6B, 6C and 6D:

- **Schedule 6B** is relevant to Class VE, VB, VF and VC visa applications made between 1 September 2007 and 1 July 2011 AND certain specified applications made on or after 1 July 2011 and before 1 January 2013;[18]
- **Schedule 6C** applies to certain Class VE, VB, VF and VC visa applications made or after 1 July 2011;[19] and
- **Schedule 6D** is relevant to Class SI, SN, and SP visa applications made on or after 1 July 2012.[20]

The table below summarises which points test applies depending on the visa sought, and the visa application date:

Operation of Schedules 6B, 6C and 6D

Visa	Visa application date	Class of applicant	Applicable schedule
Subclass 175, 176, 475, 487, 885, 886	Before 01/07/11		6B
	01/07/11 – 31/12/12	• If in r.2.26AA(2) class[21]	6B
	01/07/11 – 31/12/12	• **if not** in r.2.26AA(2) class[22]	6C
	01/07/11 – 31/12/12	if • in r.2.26AB(2) class[23] and • in a r.2.26AA(2) class does not meet 6B pass mark	6C
Class SI, SN, SP	01/07/12 -		6D

This commentary focuses on the Schedule 6C points test. This points test (and associated regulations) was omitted from the Regulations from 1 July 2013 as it relates to skilled visas that closed to new visa applications from 1 July 2013.[24] Although it has been removed from the

[18] r.2.26AA(1) and (2) as amended by SLI 2011 No.74. Schedule 6B (and associated provisions) is omitted from the Regulations from 1 July 2013 as it relates to skilled visas that close to primary applications as of 1 July 2013: omitted by SLI 2012 No.82.
[19] r.2.26AB(1) and (2) as inserted by SLI 2011 No.74. Schedule 6C (and associated provisions) is omitted from the Regulations from 1 July 2013 as it relates to skilled visas that close to primary applications as of 1 July 2013: omitted by SLI 2012 No.82.
[20] r.2.26AC, which specifies that each qualification specified in Schedule 6D is prescribed as a qualification in relation to the grant of a Subclass 189, 190 and 489 visa: inserted by SLI 2012 No.82.
[21] r.2.26AA(2) class is specified in Schedule 2 Part A or B (or C if applicant or partner state nominated) of relevant instrument. It is wider than, and includes, r.2.26AB(2) class. The relevant instrument can be located on the 'Sch6B,6C Classes' tab of the Register of Instruments: Skilled visas.
[22] r.2.26AA(2) class is specified in Schedule 2 Part A or B (or C if applicant or partner state nominated) of relevant instrument. It is wider than, and includes, r.2.26AB(2) class. The relevant instrument can be located on the 'Sch6B,6C Classes' tab of the Register of Instruments: Skilled visas.
[23] r.2.26AB(2) class is specified in Schedule 2 Part A (or C if applicant or partner state nominated) of relevant instrument. In contrast to r.2.26AA(2), it does not include Part B and is thus narrower than r.2.26AA(2). The relevant instrument can be located on the 'Sch6B,6C Classes' tab of the Register of Instruments: Skilled visas.
[24] Regulation 2.26AB and Schedule 6C are omitted by SLI 2012, No.82.

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Regulations the Schedule 6C points test will continue to operate in respect of valid applications for the closed GSM visa subclasses to which it applies.[25]

MRD Legal Services also maintains commentary for the Schedule 6D Points Test.

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Schedule 6C

Schedule 6C is made up of 13 parts. They are:

- Part 6C.1 - Age qualifications
- Part 6C.2 - English language qualifications
- Part 6C.3 - Overseas employment experience qualifications
- Part 6C.4 - Australian employment experience qualifications
- Part 6C.5 - Aggregating points for employment experience qualifications under Part 6C.3 and Part 6C.4
- Part 6C.6 - Australian professional year qualifications
- Part 6C.7 - Educational qualifications
- Part 6C.8 - Australian study qualifications
- Part 6C.9 - Credentialled community language qualifications
- Part 6C.10 - Study in regional Australia or a low-population growth metropolitan area qualifications
- Part 6C.11 - Partner skill qualifications
- Part 6C.12 - State or Territory nomination qualifications
- Part 6C.13 - Designated area sponsorship qualifications

Each part is comprised of 3 columns with item numbers in column 1, prescribed 'qualifications' in column 2, and for each item and qualification a number of points specified in column 3. These parts are discussed below.

Application of Schedule 6C

As noted above, Schedule 6C applies to applications for the points-tested General Skilled Migration visas in Classes VE,[26] VB,[27] VF[28] and VC[29] made on or after 1 July 2011. They are:

- Skilled (Migrant) (Class VE)
  - Subclass 175 (Skilled - Independent)
  - Subclass 176 (Skilled – Sponsored)

[25] Including applications *deemed* to have been made under r.2.08, 2.08A and 2.08B (addition of newborn children, spouses, de facto partners, and dependent children to an application after an application is made): Schedule 13, items 101(2) and 102(2), inserted by SLI 2012, No.82.
[26] From 1 July 2012, no further *primary* applications may be made for a Subclass 175 or 176 (Class VE) visa: item 1135(3)(aa) as inserted by SLI 2012, No.82. Item 1135 and Parts 175 and 176 are omitted from the Regulations from 1 July 2013 removing Subclasses 175 and 176: SLI 2012, No.82.
[27] From 1 January 2013, no further *primary* applications may be made for a Subclass 885 or 886 (Class VB): item 1136(3)(aa) as inserted by SLI 2012, No.82. Parts 885 and 886 are omitted from the Regulations from 1 July 2013 removing Subclasses 885 and 886: SLI 2012, No.82. Subclass 887 remains unaffected, but is not subject to a points test.
[28] From 1 July 2012, no further applications may be made for a Subclass 475 (Class VF) visa: SLI 2012, No.82. Part 475 is omitted from the Regulations from 1 July 2013 removing Subclass 475: SLI 2012, No.82. Subclass 476 remains unaffected but is not subject to a points test.
[29] From 1 January 2013, no further *primary* applications may be made for a Subclass 487 (Class VC): SLI 2013, No.33. Part 487 is omitted from the Regulations from 1 July 2013 removing Subclass 487 (Class VC): SLI 2012, No.82. Applications by persons seeking to satisfy the secondary criteria must be made before 1 July 2012: item 1229(3)(b) as amended by SLI 2013, No.33. Subclass 485 remains unaffected but is not subject to a points test.

- Skilled – (Residence) (Class VB)
  - Subclass 885 (Skilled – Independent), and
  - Subclass 886 (Skilled – Sponsored)
- Skilled – (Provisional) (Class VF)
  - Subclass 475 (Skilled – Regional Sponsored)
- Skilled – Regional Sponsored (Provisional) (Class VC)
  - Subclass 487 (Skilled – Regional Sponsored).

Specified applicants who do not reach the applicable pass mark under Schedule 6B

Certain specified applications made on or after 1 July 2011 and before 1 January 2013 will need to be assessed under both Schedule 6B and Schedule 6C in certain circumstances.[30]

Subregulation 2.26AB(2) provides that applications specified under paragraphs 2.26AB(2)(a) and (b) who have been assessed in accordance with Schedule 6B and whose assessed score is less than the applicable pass mark for Schedule 6B are to be assessed in accordance with Schedule 6C.[31]

Applications that fall within this specified class can only be assessed under Schedule 6C after they fail to obtain the pass mark under Schedule 6B. It is not possible for these applicants to be assessed under Schedule 6C without the delegate or the Tribunal first undertaking an assessment under Schedule 6B.

Note that applications made on or after 1 July 2011 and to which r.2.26AA(2) does not apply are only to be assessed against Schedule 6C.[32]

Which parts of Schedule 6C must be assessed?

The applicant must be assessed against each part that applies to his/her visa subclass. Each qualification in column 2 of an item in Parts 6C.1 to 6C.11 is a prescribed qualification in relation to the grant of a points-tested General Skilled Migration visa (Subclass 175, 176, 475, 487, 885 or 886 visa) and the applicant must be assessed against each.[33] However, Part 6C.12 only provides for the award of points for State or Territory nomination qualifications to applicants for a Skilled – Sponsored (Subclass 176 or 886) visa, and Part 6C.13 only provides for the award of points for designated area sponsorship qualifications to Skilled – Regional Sponsored (Subclass 475 or 487) visa applicants.

An applicant cannot be awarded points for more than 1 qualification within each part of Schedule 6C;[34] and if the applicant's circumstances satisfy more than 1 such qualification they must be awarded the prescribed number of points for the qualification that attracts the highest number of points.[35] In relation to employment, if the applicant has qualifications in Parts 6C.3 and 6C.4 the points must be recalculated under Part 6C.5.

[30] r.2.26AA(2) as amended by SLI 2011, No.74.
[31] r.2.26AB(2) as inserted by SLI 2011, No.74. For the instrument specifying the class of GSM visa applicants for the purposes of r.2.26AB(2)(a) see the 'Sch6B, 6C classes' tab on the Register of Instruments-Skilled Visas.
[32] r.2.26AB(1) as amended by SLI 2011, No.74.
[33] r.2.26AB(3) and (6). Although the current definition of 'General Skilled Migration Visa' (r.1.03) also includes Subclass 189, 190 and 489 visas, points test qualifications for these subclasses are prescribed by r.2.26AC.
[34] r.2.26AB(5)(a).
[35] r.2.26AB(5)(b).

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Part 6C.1 – Age qualifications

Part 6C.1 awards points depending on the age of the visa applicant at the time of application. There are 4 items (6C11, 6C12, 6C13 and 6C14). The highest number of points (30) goes to those in the 25 to 32 age group. Points are awarded on the following basis:

- Not less than 18 and under 25 — 25 points — (item 6C11)
- Not less than 25 and under 33 — 30 points — (item 6C12)
- Not less than 33 and under 40 — 25 points — (item 6C13)
- Not less than 40 and under 45 — 15 points — (item 6C14)

Part 6C.2 – English language qualifications

Points are to be awarded under Part 6C.2 where the applicant has 'superior English' (item 6C21) or 'proficient English' (item 6C22). 'Superior English' and 'proficient English' are defined in rr.1.15EA and 1.15D, respectively. Whether a person meets either of these standards depends upon the applicant's score in specified English language tests.

Item 6C21 – Superior English

Item 6C21 awards 20 points to an applicant who has superior English as defined in r.1.15EA of the Regulations. As r.1.15EA has been subject to amendments the relevant definition depends on whether the visa application was made before 1 July 2012 or on or after that date. For details of this definition, see the MRD Legal Services Commentary English Language Ability - Skilled/Business visas.

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Item 6C22 – Proficient English

Item 6C22 awards 10 points to an applicant who has proficient English as defined in r.1.15D of the Regulations. For details of this definition, see the MRD Legal Services Commentary English Language Ability - Skilled/Business visas.

Field Code Changed

Instruments relevant to Part 6C.2

The relevant instrument for Part 6C.2 can be accessed through the 'English tests' tab of Register of Instruments – Skilled Visas. The current instrument at the time of writing is IMMI 15/005 '*Language Tests, Score and Passports 2015 (Regulations 1.15B, 1.15C, 1.15D and 1.15EA*)'. As relevant to Schedule 6C (for points tested skilled visa applications lodged on or after 1 July 2011 and before 1 January 2013), it specifies the IELTS test and the OET as the language tests and corresponding scores for the purposes of r.1.15EA 'superior English' (6C21) and r.1.5D 'proficient English' (6C22).

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For further information about the correct instrument for the purposes of an assessment under Part 6C.2, see the MRD Legal Services Commentary English Language Ability - Skilled/Business visas.

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Part 6C.3 – Overseas employment experience qualifications

Part 6C.3 awards points to an applicant for previous overseas work experience in the applicant's nominated 'skilled occupation' or a closely related 'skilled occupation'. 'Skilled occupation' is defined in r.1.15I of the Regulations as meaning, in relation to a person, an occupation of a kind:

- that is specified by the Minister in an instrument in writing; and
- if a number of points are specified in the instrument as available – for which the number of

points are available; and

- that is applicable to the person in accordance with the specification.[36]

Higher points are available relative to the number of months of work experience (36 months, 60 months or 96 months) the applicant has attained in the specified period. Thus, if the applicant has been employed outside Australia in the nominated skilled occupation or a closely related skilled occupation for at least 36 months, 60 months, or 96 months in the 10 years immediately before the day on which the application was made, points are to be given as follows:

- 36 months 5 points (Item 6C31)
- 60 months 10 points (Item 6C32)
- 96 months 15 points (Item 6C33)

Note that Part 6C.5 of Schedule 6C (see below) recalculates an applicant's points if the applicant attains points in both Parts 6C.3 and 6C.4 (Australian employment experience) of Schedule 6C.

For discussion of the concepts of 'employed' and 'skilled occupation', and assessing the period of employment and whether the employment in question is in a particular skilled occupation or a closely related skilled occupation, see the MRD Legal Services Commentary Employment in a Skilled Occupation.

Instruments relevant to Part 6C.3

Part 6C.3 requires consideration of whether the applicant is employed in the nominated 'skilled occupation' (or a closely-related skilled occupation). To determine this matter, the 'Skilled Occupation List', which specifies certain ANZSCO classifications, must be considered.[37] See the 'SOL' tab of Register of Instruments - Skilled Visas for the relevant instruments.

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For further information about the Skilled Occupation Lists and the relevant instrument for an assessment under this part, see the MRD Legal Services Skilled Occupation commentary and the Skilled occupation List – Quick Guide.

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Part 6C.4 – Australian employment experience qualifications

Part 6C.4 provides for points to be awarded where an applicant has been employed in Australia in their nominated skilled occupation or a closely related skilled occupation.

'Skilled occupation' is defined in r.1.15I of the Regulations as meaning, in relation to a person, an occupation of a kind:

- specified by the Minister in an instrument in writing; and
- if a number of points are specified in the instrument as available – for which the number of points are available; and

[36] r.1.15I as inserted by Migration Amendment Regulations 2010 (No.6) (SLI 2010, No.133), applicable to visa applications made on or after 1 July 2010 and applications not finally determined before that date, and amended by SLI 2011, No.74. There are no transitional provisions for this amendment, so it applies to all applications as of 1 July 2011.

[37] 'ANZSCO' is defined differently depending on the date of visa application. For visa applications made on or after 1 July 2010 but before 1 July 2013, and visa applications not finally determined on 1 July 2010, 'ANZSCO' is defined by r.1.03 to mean the Australian New Zealand Standard Classification of Occupations, published by the Australian Bureau of Statistics as current on 1 July 2010 (accessible here).

- is applicable to the person in accordance with the specification.[38]

Higher points are available relative to the number of months of work experience the applicant has attained in the specified period. If the applicant has been employed in Australia in the nominated skilled occupation or a closely related skilled occupation for at least 12 months, 36 months, 60 months, or 96 months in the 10 years immediately before the day on which the application was made, points are to be given as follows:

- 12 months 5 points (Item 6C41)
- 36 months 10 points (Item 6C42)
- 60 months 15 points (Item 6C43)
- 96 months 20 points (Item 6C44)

Note if the applicant has points awarded under Parts 6C.3 (overseas employment experience) and 6C.4, Part 6C.5 (see below) requires recalculation of those points.

For discussion of the concepts of 'employed' and 'skilled occupation', and assessing the period of employment and whether the employment in question is in a particular skilled occupation or a closely related skilled occupation, see the MRD Legal Services Commentary Employment in a Skilled Occupation.

Instruments relevant to Part 6C.4

Part 6C.4 requires consideration of whether the applicant is employed in the nominated 'skilled occupation' (or closely-related skilled occupation). To determine this matter, the 'Skilled Occupation List', which specifies certain ANZSCO classifications, must be considered.[39] See the 'SOL' tab of Register of Instruments - Skilled Visas.

Field Code Changed

For further information about the Skilled Occupation Lists and the relevant instrument for an assessment under this part, see the MRD Legal Services Skilled Occupation commentary and the Skilled occupation List – Quick Guide.

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Part 6C.5 – Aggregating points for employment experience qualifications under 6C.3 and 6C.4

Part 6C.5 has the effect of aggregating and limiting the points available to an applicant for Australian and overseas work experience. The effect of this part is that the maximum number of points awardable for work experience qualifications, whether undertaken overseas or in Australia or a combination of the two, is 20 points.

Under item 6C51, if an applicant has a combination of overseas and Australian work experience and the total number of points awardable under both Parts 6C.3 and 6C.4 is more than 20 points, the applicant must be awarded 20 points under Part 6C.5 and no points under Parts 6C.3 or 6C.4.

[38] r.1.15I as inserted by SLI 2010, No.133), applicable to visa applications made on or after 1 July 2010 and applications not finally determined before that date, and as amended by SLI 2011, No.74. There are no transitional provisions for this amendment, so it applies to all applications as of 1 July 2011: see r.3(2) and Note, SLI 2011, No.74.

[39] ANZSCO' is defined differently depending on the date of visa application. For visa applications made on or after 1 July 2010 but before 1 July 2013, and visa applications not finally determined on 1 July 2010, 'ANZSCO' is defined by r.1.03 to mean the Australian New Zealand Standard Classification of Occupations, published by the Australian Bureau of Statistics as current on 1 July 2010 (accessible here).

Part 6C.6 – Australian professional year qualifications

Part 6 of Schedule 6C provides for points to be awarded where an applicant has completed a professional year in Australia in their nominated or a closely related skilled occupation. 'Professional year' means a course specified by the Minister in an instrument in writing.[40] There is one item – 6C61.

Item 6C61

Under item 6C61, 5 points are awarded if the applicant has completed a 'professional year' in Australia comprising a total of 12 months in the 48 months immediately before the day on which their visa application was made. It is not sufficient that the course merely be of a kind specified by the Minister for the definition of 'professional year', if the course is not also for a period totalling at least 12 months in the 48 months immediately before the time of invitation to apply for the visa. Such an interpretation would leave the wording in item 6C61 with nothing to do.

Instruments relevant to Part 6C.6

To identify the relevant courses specified for 'professional year', see the 'ProfYear' tab of Register of Instruments - Skilled Visas. The instruments made under this provision do not themselves specify the applications to which they apply. Although not free from doubt, the reference in Part 6C.6 to the completion of the professional year in a period prior to the date of application would suggest that the relevant instrument is that in force at the time of application.[41]

Field Code Changed

Part 6C.7 - Educational qualifications

Points are awarded under Part 6C.7 for certain educational qualifications, specifically, to applicants who have:

- met the requirements for the award of a doctorate by an Australian educational institution; or award of a doctorate, by another educational institution, that the Minister is satisfied is of a recognised standard – 20 points (item 6C71);
- met the requirements for the award of at least a bachelor degree by an Australian educational institution; or the award of at least a bachelor degree by another educational institution, that the Minister is satisfied is of a recognised standard – 15 points (item 6C72);
- met the requirements for the award of a diploma by an Australian educational institution – 10 points (item 6C73);
- met the requirements for the award of a trade qualification by an Australian educational institution – 10 points (item 6C74);
- attained a qualification or award recognised by the relevant assessing authority for the applicant's nominated skilled occupation as being suitable for the occupation – 10 points (item 6C75).

For items 6C71 and 6C72, item 6C76 provides that the Minister must have regard to the following matters for the purpose of being satisfied that a qualification is of a recognised standard:

[40] rr.2.26AB(7) and 2.26A(7) for applications made before 1 July 2012. For applications made on or after 1 July 2012, rr.2.26AB(7) (as amended by SLI 2012, No.82) and 2.26AC(6). For applications made before 1 July 2012 the relevant instrument refers to the pre-amendment sub-clause r.2.26AA(6), however, it is clearly specified as the instrument for the *definition* of professional year.

[41] This is consistent with the majority decision in *Aomatsu v MIMIA* (2005) 146 FCR 58 where Moore and Gyles JJ held that the question of whether an occupation was a migration occupation in demand was to be determined by reference to the Gazette Notice in force 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 likely that the assessment required was by reference to a skilled occupation specified in an instrument at the time the application was made.

- whether the qualification has been recognised by the relevant assessing authority for the applicant's nominated skilled occupation as being suitable for the occupation;
- whether the qualification has been recognised by another body, specified by the Minister in an instrument in writing for this paragraph; and
- any other matter relevant to the consideration of the qualification, including the duration of the applicant's study.

Meaning of 'met the requirements for the award'

Items 6C71, 6C72, 6C73 and 6C74 all require the applicant to have 'met the requirements for' the award of a particular qualification. The words 'met the requirements for' would appear to allow applicants who are awaiting for the award of a qualification to be allocated the relevant points as long as there is evidence to substantiate that the requirements for the award have been met (e.g. completed all exams and assignments).

Meaning of 'doctorate' and 'degree'

'Doctorate' is not defined in the Regulations, however, for the purposes of Schedule 6C 'degree' is defined in r.2.26AB(7) which provides:[42]

> ***degree***
> *means a formal educational qualification, under the Australian Qualifications Framework, awarded by an Australian educational institution as a degree or a postgraduate diploma for which:*
>
> *(a) the entry level to the course leading to the qualification is:*
> *(i) in the case of a bachelor's degree — satisfactory completion of year 12 in the Australian school system or of equivalent schooling; and*
> *(ii) in the case of a master's degree — satisfactory completion of a bachelor's degree awarded at an Australian tertiary educational institution or of an equivalent award; and*
> *(iii) in the case of a doctoral degree — satisfactory completion of a bachelor's degree awarded with honours, or a master's degree, at an Australian tertiary educational institution or of an equivalent award; and*
> *(iv) in the case of a postgraduate diploma — satisfactory completion of a bachelor's degree or diploma awarded at an Australian tertiary educational institution or of an equivalent award; and*
>
> *(b) in the case of a bachelor's degree, not less than 3 years of full-time study, or the equivalent period of part-time study, is required.*

Additional requirements relating to study in Australia

There are no relevant additional requirements for Part 6C.7. Regulation 2.27D imposes additional requirements relating to permission to study and compliance with visa conditions but only where a determination is required as to whether an applicant satisfies a criterion 'that the applicant has studied in Australia for a certain period'. This provision does not appear to be applicable to the criteria in Part 6C.7 because those criteria do not in terms require the applicant to have studied in Australia for a certain period.[43]

[42] For applications made before 1 July 2012 r.2.26AB(7) specifies that for the purposes of Schedule 6C, 'degree' has the meaning given by r.2.26A(6). For applications made on or after 1 July 2012: r.2.26AB(7) (as amended by SLI 2012, No.82) specifies that for the purposes of Schedule 6C 'degree' has the meaning given by r.2.26AC(6). The definition, however, is the same.

[43] In contrast to the Australian Study Requirement mentioned in Parts 6B.9 and 10, to which r.2.27D was originally intended to apply (see Explanatory Statement to SLI 2007, No. 257) Schedule 1 item [28]), Part 6C.7 does not specify the length of study

Instruments relevant to Part 6C.7

The relevant instrument for 6C76(b) can be located on the 'EdQual6C&6D' tab of the Register of Instruments - Skilled Visas. At the time of writing two instruments had been made for this provision. Neither specifies the applications to which it applies. As the later instrument revokes the earlier one, and there is no indication in the qualification itself that it cannot be satisfied at any time up until the time of decision, it would appear to be the applicable instrument for decisions made on or after the date it commenced;[44] however on a practical level the two instruments are not materially different.[45] Both instruments specify 'Vocational Education Training and Assessment Services' (VETASSESS) as 'another body' that may recognise a qualification for the purpose of subitem 6C76(b).

Field Code Changed

Part 6C.8 – Australian study qualifications

Part 6C.8 provides additional points to an applicant where the applicant's Australian study qualifications are closely related to their nominated occupation. There is one item – 6C81.

Item 6C81

This item provides an additional 5 points to an applicant where each degree, diploma and trade qualification that has been:[46]

- awarded to the applicant by an Australian educational institution; and
- used by the applicant to meet the 'Australian study requirement';[47]

is closely related to the applicant's nominated skilled occupation.

For more information on the 'Australian study requirement' and being closely related to the nominated skilled occupation see the MRD Legal Services Commentary: Skilled Occupation / Study requirement.

Field Code Changed

Additional requirements relating to study in Australia

There are no relevant additional requirements for Part 6C.8. Regulation 2.27D imposes additional requirements relating to permission to study and compliance with visa conditions but only where a determination is required as to whether an applicant satisfies a criterion 'that the applicant has studied in Australia for a certain period'. This provision does not appear to be directly applicable to Part 6C.8 because item 6C81 does not in terms require the applicant to have studied in Australia for a certain period: it simply requires any qualification used by the applicant to meet the Australian study requirement to be closely related to the nominated occupation. However, r.2.27D has an indirect impact on this criterion because study that does not satisfy r.2.27D will not be able to be used to meet the Australian study requirement mentioned in item 6C81(b); and if the applicant does not meet the Australian study requirement there will be no relevant qualification for this Part.

Part 6C.9 – Credentialled community language qualifications

Part 9 of Schedule 6C awards points for qualifications in a particular language. There is one item – 6C91.

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but only requires the applicant to have met the requirements for the awards specified.

[44] It would appear that *Aomatsu v MIMIA* (2005) 146 FCR 58 is distinguishable in that, unlike the provisions in question in that case, Part 6C.7 is not linked to any time of application requirements.

[45] The only difference appears to be that the later instrument is extended to also apply to Schedule 6D (r.2.26AC(5)(b)).

[46] For applications made before 1 July 2012: r.2.26AB(7) specifies that for the purposes of Schedule 6C, 'degree', 'diploma' or 'trade qualification' has the meaning given by r.2.26A(6). For applications made on or after 1 July 2012: r.2.26AB(7) (as amended by SLI 2012, No.82) specifies that for the purposes of Schedule 6C, 'degree', 'diploma' or 'trade qualification' has the meaning given by r.2.26AC(6). The definitions, however, are the same.

[47] 'Australian study requirement' is relevantly defined in r.1.15F of the Regulations: r.1.03.

Item 6C91

Item 6C91 awards points to an applicant who has a qualification in a particular language:

- awarded or accredited by a body specified by the Minister in an instrument in writing for this item (item 6C91(a)); and
- at a standard for the language specified in the instrument (item 6C91(b)).

'Particular language' is not defined in the regulations and would appear to leave the question of what languages can be accepted open, subject to the qualifiers in item 6C91.

Instruments relevant to Part 6C.9

The relevant instrument relevant for item 6C91 can be accessed via the 'CommLang' tab of the Register of Instruments - Skilled Visas. At the time of writing two instruments had been made for this provision. The instruments themselves do not specify the applications to which they apply. As the later instrument revokes the earlier one, and there is no indication in the qualification itself that it cannot be satisfied at any time up until the time of decision, it would appear to be the applicable instrument for decisions made on or after the date it commenced; [48] however on a practical level the two instruments are not materially different.[49] Both specify, for 6C91(a), the National Accreditation Authority for Translators and Interpreters (NAATI) as a credentialed community language body and, for 6C91(b), an accreditation of paraprofessional interpreter or translator level or above.

Field Code Changed

Part 6C.10 – Study in regional Australia or a low-population growth metropolitan area qualifications

Under Part 6C.10, points are awarded for study and residence in a regional or low population growth metropolitan area. There is one item – 6C101.

Item 6C101

Under item 6C101, five (5) points are available where the applicant:

- meets the 'Australian study requirement':[50]
- the location of the campus or campuses at which that study was undertaken is specified in an instrument;
- the applicant lived in a part of Australia the postcode of which is specified in that instrument while undertaking the course of study;
- none of the study undertaken constituted distance education.

There has been no express judicial consideration of this qualification in Part 6C and neither the definition of 'Australian study requirement' nor the terms of item 6C101 requires the study/residence to have occurred at any particular point in time prior to time of decision. For discussion of the Australian study requirement see the MRD Legal Services commentary Skilled Occupation / Study requirement.

Field Code Changed

[48] It would appear that *Aomatsu v MIMIA* (2005) 146 FCR 58 is distinguishable in that, unlike the provisions in question in that case, Part 6C.9 is not linked to any time of application requirements.
[49] The only difference appears to be that the later instrument is extended to also apply to Schedule 6D.
[50] 'Australian study requirement' is relevantly defined in r.1.15F of the Regulations: r.1.03.

Additional requirements relating to study in Australia

The 'Australian study requirement' mentioned in item 6C101(a) and defined in r.1.15F effectively imports a criterion that the applicant has studied in Australia for a certain period. Regulation 2.27D provides that in determining whether an applicant satisfies a criterion for the grant of a General Skilled Migration visa that the applicant has studied in Australia for a certain period, a period of study cannot be counted unless the applicant held a substantive visa or a Bridging visa A or Bridging visa B authorising study during the period, and unless the applicant complied with the conditions of the visa.[51] Accordingly, for Item 6C101(a) study undertaken in Australia cannot be counted unless it satisfies these requirements.

Note that the more detailed requirements of r.2.27D are additional to the requirement in the r.1.15F definition itself that the applicant must have undertaken the study while in Australia as the holder of a visa authorising him or her to study.

Instruments relevant to Part 6C.10

The relevant instrument to be considered when assessing item 6C101 can be accessed via the 'Reg&LowPop' tab of the Register of Instruments - Skilled Visas. For visa applications made *before* 1 July 2012, item 6C101 specifies an instrument made under item 6A1001 of Schedule 6A. For visa applications made *on or after* 1 July 2012, the relevant instrument is one made under 6D101 of Schedule 6D.[52] Accordingly, it seems clear that for item 6C101 the relevant instrument will be Gazette Notice S185 for visa applications made before 1 July 2012 (the last instrument specified for 6A1001) and (at the time of writing) IMMI 12/015 for visa applications made on or after that date.

Field Code Changed

Part 6C.11 – Partner skill qualifications

Under Part 6C.11, five (5) points are awarded based on the skills and other characteristics of the visa applicant's spouse or de facto partner. There is one item – 6C111.

Item 6C111

Under item 6C111 points are available if the primary applicant has a spouse or de facto partner who:

- is an applicant for the same subclass of visa as the primary applicant (6C111(a)); and
- is not an Australian permanent resident or citizen (6C111(b)); and
- is under 50 at the time of application (6C111(c)); and
- has nominated a skilled occupation in his or her application, being an occupation that was specified in the same version of the instrument made by the Minister under paragraph 1.15I(1)(a) as was used when the primary applicant made his or her application (6C111(d));
- has been assessed by the relevant assessing authority for the nominated skilled occupation as having suitable skills for the occupation (6C111(e)); and
- has competent English (6C111(f)); and
- either:

[51] In relation to the reference in r.2.27D to 'a criterion' within the points system, it has been held that the component parts of the points test do not constitute a 'specified criterion' for the purposes of the r.4.15(1)(b) remittal power: *MIAC v Dhanoa* (2009) 180 FCR 510, per Jagot and Foster JJ at [67]. However, this should not be taken to mean that r.2.27C does not apply in relation to an assessment under the points test. Their Honours were concerned only with the construction and scope of the remittal power. They went on to observe at [68] that cl 880.222A, which is in similar terms to r.2.27D (but in relation to employment rather than study) is an interpretative provision. It assists in determining whether the criterion in cl 880.222 is satisfied or not. Given its function in the clause it should not be used as a basis to construe r.4.15(1)(b) other than in a manner which reflects the language of the statutory scheme as a whole.

[52] Item 6C101 as amended by SLI 2012. No.82.

- met the 'Australian study requirement'[53] in the period of 6 months ending immediately before the day the application was made; and in circumstances in which each degree, diploma or trade qualification used to satisfy the requirement is closely related to the applicant's nominated skilled occupation (6C111(g)(i)); or
- at the time of application had been employed in a skilled occupation for a period totalling at least 12 months in the 24 months immediately before that day (6C111(g)(ii)).

These requirements are cumulative, so that if the spouse or de facto partner does not satisfy any one of the requirements, the applicant will receive no points under this qualification.

In relation to subitem 6C111(g)(i), note that study in Australia that does not satisfy r.2.27D (applicant held a visa authorising study, and satisfied visa conditions) cannot be counted. See the discussion of r.2.27D under Part 6C10 above for further information.

In relation to subitem 6C111(g)(ii), as this refers to 'employed in *a* skilled occupation...', it would appear that the skilled occupation in which the applicant has been employed does not have to be the one nominated in the visa application or a closely related occupation, nor does the employment need to have been in Australia.

Instruments relevant to Part 6C.11

Subitems 6C111(d), (e) and (g)(ii) require consideration of whether the spouse or de facto partner has nominated a skilled occupation, has been assessed by a relevant assessing authority as having the skills for that occupation and has been employed in a skilled occupation. To determine these matters, the 'Skilled Occupation List' must be considered. See the 'SOL' tab of the Register of Instruments - Skilled Visas. For information about the Skilled Occupation Lists and the relevant instrument for an assessment under this part, see the MRD Legal Services commentary Skilled Occupation. For 6C111(d) note that its terms specify the relevant instrument.

Field Code Changed

Field Code Changed

In addition, the instrument for r.1.15C (competent English) will be relevant when determining whether the spouse or de facto partner has 'competent English'. The instruments specifying the language tests, scores and passports for the purpose of r.1.15C can be accessed at the 'Eng tests' tab on the Register of Instruments - Skilled visas. See the MRD Legal Services Commentary English Language Ability – Skilled/Business visas for further discussion of 'competent English' and relevant instruments.

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Part 6C.12 – State or Territory nomination qualifications

Five points can be awarded under this part (item 6C121) to an applicant for a Skilled – Sponsored (Subclass 176 or 886) visa, who has been nominated by a State or Territory government but only if the nomination has been accepted by the Minister.

Where a State / Territory government nomination has not been accepted by the Minister, it is unclear whether the tribunal's jurisdiction on review extends to assessing whether to accept the nomination, or whether it is simply a question of past fact.

Part 6C.13 – Designated area sponsorship qualifications

Applicants for a Skilled – Regional Sponsored visa (Subclass 475 or 487) who are nominated by a State or Territory government agency or sponsored by a family member may be awarded points under this part (item 6C131). Ten (10) points can be awarded but only if the nomination or sponsorship has

[53] 'Australian study requirement' is defined in r.1.15F of the Regulations: r.1.03.

been accepted by the Minister.

Thus, a threshold question for this item is whether the applicant has been either nominated by a State or Territory government agency or sponsored by a family member for the purposes of the application. If so, the question is whether the Minister has accepted the nomination / sponsorship. The content of this item is informed by its Schedule 2 equivalents:[54]

- if the applicant is nominated by a State or Territory government agency in accordance with Schedule 1, the Minister (or Tribunal) has accepted the nomination;[55] or
- if the applicant is sponsored by a relative in accordance with Schedule 1 – the applicant, and all persons included in the application, are sponsored by an eligible relative who is usually resident in a designated area of Australia, the sponsorship was made on the prescribed form, and the Minister has accepted the sponsorship.[56]

As to whether a nomination or sponsorship has been accepted by the Minister, it is unclear whether the tribunal's jurisdiction on review extends to assessing whether to accept the nomination or sponsorship, or whether it is simply a question of past fact.

Instruments relevant to Part 6B.13

To determine whether an eligible sponsor was living in a designated area at the relevant time, the instruments listing the places that are 'designated areas' can be located under the 'DesgnAreas' tab in the Register of Instruments - Skilled visas. For Schedule 6C Part 6C.13 the relevant instrument is the one in force at the time of decision. The current instrument at time of writing is IMMI 12/021.

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Other issues relating to Schedule 6C

Which version of the legislation applies?

When undertaking a points test assessment, s.350 of the Act specifies which version of the legislation the Tribunal must apply.

Pool and pass mark

When determining the relevant pool and pass mark, the Tribunal must have regard to whichever is the more favourable to the applicant:

- the applicable pool/pass mark at the time of the Minister's s.93 points test assessment; OR
- the applicable pool/pass mark at the time of the Tribunal points test assessment.[57]

Regulations

When reviewing a s.93 points test assessment, the regulations to which the Tribunal is to have regard is the more favourable of the following:

- the regulations that were in force at the time of the Minister's s.93 points test assessment; OR
- the regulations that were in force at the time of the Tribunal's decision.[58]

[54] For details, see the MRD Legal Services commentary Subclass 485 (Temporary Graduate) (Class VC).
[55] cl.475.222(1)(a), (2), 487.225.
[56] cl.475.222(1)(b), (3), 487.225.
[57] s.350(2).
[58] s.350(1).

Field Code Changed

'Regulations' for these purposes include Schedule 6C but not the instruments made under the regulations (such as an instrument in writing or a Gazette notice). Note that Schedule 6C was introduced on 1 July 2011 and, prior to its omission from the Regulations on 1 July 2013,[59] was amended only once.[60]

Relevant amending legislation

Title	Reference Number	Legislation Bulletin
Migration Amendment Regulations 2007 (No.7)	SLI 2007, No.257	No.9/2007
Migration Amendment Regulations 2010 (No.6)	SLI 2010, No.133	No.7/2010
Migration Amendment Regulations 2011 (No.3)	SLI 2011, No.74	No.02/2011
Migration Amendment Regulation 2012 (No.2)	SLI 2012, No.82	No.4/2012
Migration Legislation Amendment Regulation 2013 (No.1)	SLI 2013, No.33	No.2/2013

Field Code Changed

Relevant case law

Aomatsu v MIMIA [2005] FCAFC 139 (2005) 146 FCR 58	Summary
Biswas v MIAC [2009] FMCA 95	
De Ronde v MIAC [2004] FMCA 519	Summary
MIAC v Dhanoa [2009] FCAFC 153 (2009) 180 FCR 510	Summary
MIAC v Kamruzzaman [2009] FCA 1562	Summary
Manik v MIAC [2012] FMCA 149	
Perkit v MIAC [2009] FMCA 483	Summary
Parekh v MIAC [2007] FMCA 633	Summary
Seema v MIAC [2012] FCA 257 (2012) 203 FCR 537	Summary
Shukla v MIAC [2010] FMCA 625	Summary
Xue Fan v MIAC [2010] FMCA 490	Summary

Field Code Changed

[59] SLI 2012, No.82.
[60] The references in item 6C101(b) and (c) to 'item 6A1001 of Schedule 6A' was replaced with 'item 6D101 of Schedule 6D' by SLI 2012, No.82, for applications made on or after 1 July 2012.

Available decision precedents/templates

The following decision precedent/template is designed specifically for Schedule 6C Points Test reviews of visa refusals:

- **Subclass 175/176/475/487/885/886 – General Points Test – Schedule 6C** - suitable for use in reviewing certain GSM visa applications lodged on or after 1 July 2011 where the primary issue in dispute is whether the applicant has the qualifying score when assessed against the General Points Test (Schedule 6C).
- **Optional Standard Paragraphs - Skilled Visas –** paragraphs addressing the relevant law for English language requirements are available for insertion into draft decision templates.

Last updated/reviewed: 18 February 2019

Skilled visas - overview

CONTENTS

Last updated/reviewed: 22 March 2019

Introduction

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 a number of 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.[1]

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).

Decisions to refuse these visas are generally, but not always, reviewable under Part 5 of the Act.[2]

A range of visa criteria and related definitions contain references to a specification by the Minister in an instrument in writing.[3] All instruments relevant to visas within the skilled migration program can be located on the MRD Legal Services Register of Instruments: Skilled visas.

More detail about other common legal issues in the skilled migration program can be found in the following MRD Legal Services commentaries: Bogus Documents, False or Misleading Information, PIC 4020, Employment in a Skilled Occupation, English Language Ability – Skilled/Business Visas and Skilled Occupation / 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 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 p.5 of this commentary. Of these, a number have since been repealed, and only the following are currently still open to new applications:

[1] 'General Skilled Migration visa' means a Subclass 175, 176, 189, 190, 475, 476, 485, 487, 489, 885, 886 or 887 visa, granted at any time: r.1.03 of the Migration Regulations 1994 (the Regulations): inserted by Migration Amendment Regulations 2007 (No.7) (SLI 2007 No.257), as amended by Migration Amendment Regulations 2012 (No.2) (SLI 2012 No.82). For information about skilled visa classes and subclasses introduced before 1 September 2007, please contact MRD Legal Services.
[2] Note that decisions made under s.501 of the Act on character grounds are not reviewable under Part 5.
[3] For example s.96 points test pool mark and pass mark; rr.1.03 and 2.26B definition of 'relevant assessing authority'; rr.1.03 and 1.15I definition of 'skilled occupation'; and rr.1.03 and 1.15D definition of 'proficient English'.

- **Skilled (Residence) (Class VB):** Subclass 887 (Skilled – Regional).
    - Subclass 887 is for eligible provisional visa holders who have lived for at least 2 years and worked for at least 1 year in a Specified Regional Area in Australia. At the time of application, applicants are required to have held certain temporary skilled visas or a bridging visa granted in relation to an application for such a visa;
- **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).
    - Subclass 485 (Temporary Graduate) applies to both graduates with skills and qualifications considered to be in demand in Australia and also 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;

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 application.[4] Certain visas were replaced with new visa classes with fewer subclasses, some of which have alternative 'streams'.[5]

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). Subclass 189 is split into two streams: the Points-tested stream and the New Zealand Stream:[6]
    - 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.

[4] Explanatory Statement to SLI 2012, No.82, p.6.
[5] Explanatory Statement to SLI 2012, No.82, p.1, 6.
[6] The streams were introduced by the Migration Legislation Amendment (2017 Measures No.2) Regulations 2017 (F2017L00549).

- Before 1 July 2017, Subclass 189 operated in the same way as the Points-tested stream.

- **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.
    - First Provisional visa stream has similar application requirements to Class SN.
    - 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.

Major features of the GSM visas are summarised in the tables at p.5 and p.6 of this commentary.

The following MRD Legal Services commentaries discuss jurisdiction, requirements, visa criteria and issues in relation to specific GSM visas: Subclass 885-887 - 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).

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	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	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	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
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	Current	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

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 *Migration Act 1959* (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 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, 886	Before 01/07/11		6B
	01/07/11 – 31/12/12	• If in r.2.26AA(2) class[7]	6B
	01/07/11 – 31/12/12	• **if not** in r.2.26AA(2) class[8]	6C
	01/07/11 – 31/12/12	if • in r.2.26AB(2) class[9] and • does not meet 6B pass mark	6C
Subclass 189 (Points-tested stream and pre-1 July 2017 Subclass 189), 190, 489	On or after 01/07/12		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.[10]

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

For Subclass 189 (Points-tested stream and pre-1 July 2017 Subclass 189), 190 and 489 visas, which were introduced on 1 July 2012, the General Points Test in Schedule 6D applies.[11] 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 the MRD Legal Services Commentaries: General Points Test (Schedule 6C) and General Points Test Schedule 6D.

Relevant amending legislation

Title	Reference Number	Legislation Bulletin
Migration Amendment Regulations 2007 (No.7)	SLI 2007, No.257	No.9/2007
Migration Amendment Regulations (No.3)	SLI 2011, No.74	No.2/2011
Migration Amendment Regulations 2012 (No.2)	SLI 2012, No.82	No.4/2012
Migration Legislation Amendment (2017 Measures No.2) Regulations 2017	F2017L00549	No.2/2017

Last updated/reviewed: 22 March 2019

[10] r.2.26AA and 2.26AB omitted by SLI 2012 No.82 and item 102, Schedule 13 to the Regulations, inserted by SLI 2012 No.82.
[11] r.2.26AC, inserted by SLI 2012 No.82.

SKILLED VISAS - REGISTER OF INSTRUMENTS		
No.	**Tab name**	**Instrument Description**
1	SOL-SSL	Skilled Occupations and Assessing Authorities (rr.1.03, 1.15I, 2.26B, Sch 1, Sch 2, Sch 6A, Sch 6B)
2	MODL	Migration cccupations in demand (r.1.15H)
3	PoolPassMark	Pool Marks (s.96(1)) and Pass Marks (s.96(2)) for Visa Class SI, SN, SP, VB, VC, VE and VF
4	PoolPassMarkHistorical	Pool Marks (s.96(1)) and Pass Marks (s.96(2)) for Visa Class AT, AJ, BN, BQ, DB, DD, DE and UX
5	DesgnSec	Designated Securities (r.2.26C)
6	DesgnLang	Designated Languages (r.1.03, Sch 6A, Sch 6B)
7	DesgAreas	Designated Areas (Sch 2, Sch 6, Item 6701, r.1.03)
8	Reg&LowPop	Regional and low population growth metropolitan areas (Schedule 6A, Items 6A1001, 6A1002; Schedule 6D Item 6D101)
9	state-terr(Eng)	Specification of a State or Territory for English Language Training - Subclass 134, 139, 496, 863, 882, Sch 6B
10	EngTests	English language tests, Scores and Passports - r.1.15B, 1.15C, 1.15D, 1.15EA and cl.485.215 and 487.215
11	Eng476485	English language tests, Scores and Passports (cl.476.213 and 485.212)
12	FunctionalEng	Evidence of English Language Proficiency r.5.17
13	476Inst	Institutions and Disciplines (cl.476.212)
14	485Inst	Educational Institutions (cl.485.231(2))
15	485Qual	Qualifications (cl.485.231(1))
16	SkillsAss	Skilled occupations for skills assessments - Subclass 175, 176, 475
17	TEOL	Technical Equivalent Occupations (r.2.26(5), Sch 6)
18	PEOL	Professional Equivalent Occupations
19	VisaApp	Skilled visa applications – form, manner and place (Sch 1, Sch 2)
20	ProfYear	Professional Year Programs - r.2.26AA(6), 2.26AA(9), 2.26AB(7), 2.26AC(6)
21	AcadYear	Definition of Academic Year (r.1.03)
22	Cap	Determination of the Fixed Maximum Number of Specified Skilled Visas that may be Granted
23	Sch6B, 6C classes	Specification of persons/class of persons for r.2.26AA(2)(a) (Sch 6B) and 2.26AB(2)(a) (Sch 6C)
24	ORE	Occupations requiring English (r.1.19, Sch 6)
25	CommLang	Credentialled community language qualifcations (Schedule 6C and 6D)
26	EdQual 6C&6D	Recognition of Education Qualifications (Paragraph 6C.76(b), r.2.26AC(5)(b))
27	SpecEdQual6D	Specialist Educational Qualifications (r.2.26AC(5A)(b), r.2.26AC(5B), Item 6D7A1)
28	Forms	Visa application forms for Temporary Graduate (Subclass 485) visa - Subitem 1229(1) - before 18/4/15
29	189NZStream	Specification of Income Threshold and Exemptions for Subclass 189 Skilled - Independent Visa (New Zealand Stream)

Notes

1. All references to regulations are to the Migration Regulations 1994 unless otherwise stated.

2. References to a Gazette Notice are to that term as defined in r.1.03 before 22/3/14. '*Gazette Notice*' was relevantly defined in r.1.03 of the Regulations to mean a notice under r.1.17, which permitted the Minister to specify certain matters by notice published in the *Gazette*. Since 1/1/05, legislative instruments made after that day are registered on the Federal Register of Legislation (formerly, the Federal Register of Legislative Instruments) (FRL) established and maintained under s.15A of the Legislation Act 2003 (formerly under s.20 of the *Legislative Instruments Act 2003)*, and are generally not required to be published in the Gazette: s.56 of the Legislation Act. The definition of 'gazette notice' was repealed with effect on and from 22/3/14: SLI 2014, No. 30.

Last updated: 08/04/2019

Specification of Occupations and Assessing Authorities (rr.1.03, 1.15I, 2.26B)

Title	Gazette ref	Immi ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
				from	until			
Migration (LIN 19/051: Specification of Occupations and Assessing Authorities) Instrument 2019		19/051	F2019L00278	11/03/2019	Current	18/051	yes	Registered 10/03/19, commences 11/03/19. Applies to invitations issued to Subclass 189, 190 and 489 applicants on or after 11/03/19; and applications for a Subclass 485 visa made on or after 11/03/19.
Legislative instrument IMMI 18/051 'Specification of Occupations and Assessing Authorities' (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), subitem 1137(4C), Item 4 of the table in subitem 1138(4) and Item 4 of the table in subitem 1230(4), and paragraph 1129(3)(k)).	-	18/051	F2018L00299	18/03/2018	10/03/2019 (still current for relevant period)	18/007	yes	Registered 17/03/2018, commences 18/03/18. This instrument was repealed by LIN 19/051. However, it continues to apply to invitations issued to Subclass 189, 190 and 489 applicants on or after 18/03/18 but before 11/03/19; and applications for Subclass 485 visas made on or after 18/03/18 but before 11/03/19.
Legislative instrument IMMI 18/007 'Specification of Occupations and Assessing Authorities' (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), subitem 1137(4C), Item 4 of the table in subitem 1138(4) and Item 4 of the table in subitem 1230(4), and paragraph 1129(3)(k)).	-	18/007	F2018L00046	17/01/2018	17/03/2018 (still current for relevant period)	17/072	yes	Dated 15/01/2018, commences 17 January 2018.
Legislative instrument IMMI 17/072 'Specification of Occupations and Assessing Authorities' (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), subitem 1137(4C), Item 4 of the table in subitem 1138(4) and Item 4 of the table in subitem 1230(4), and paragraph 1129(3)(k)).	-	17/072	F2017L00850	1/07/2017	16/01/2018 (still current for relevant period)	-	yes	This instrument was repealed by IMMI 18/007. However, it continues to apply to invitations issued to subclass 189, 190 and 489 applicants between 1 July 2017 and before 17 January 2018; and applications for subclass 485 visas made between 1 July 2017 and 17 January 2018.

Legislative instrument IMMI 16/059 'Specification of Occupations, a Person or Body, a Country or Countries 2016/059' (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.72I(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k) and paragraph 186.234(2)(a))	-	16/059*	F2017L00840 (repealing instrument - IMMI 17/081)	1/07/2017	30/06/2017 (still current for relevant period)	16/059	yes	This instrument was repealed by IMMI 17/081 for invitations issued to subclass 189, 190 and 489 applicants from 1 July 2017, and for subclass 485 visa applications made from 1 July 2017. This instrument continues to apply to cases concerning invitations invitations issued to applicants for subclass 189, 190 and 489 visas between 19 April 2017 and 30 June 2017, and applications for subclass 485 visas made between 19 April 2017 and 30 June 2017.
			F2017C00352	19/04/17		*N/A compilation	n/a	Compilation dated 19 April 2017, incorporating amendments made by IMMI 17/040.
		16/059*	F2017L00450 (amending instrument - IMMI 17/040)	19/04/17		amends 16/059	yes	IMMI 17/040, dated 18/04/2017, commenced 19/04/2017. It replaces Schedules 1 and 2 to IMMI 16/059 for cases concerning invitations issued to applicants for subclass 189, 190 and 489 visas on or after 19 April 2017, and applications for subclass 485 visas made on or after 19 April 2017.
			F2016C01004	19/11/16		*N/A compilation	n/a	Compilation dated 19 November 2016, including amendments made by IMMI 16/118 to cease specifying skilled occupations in respect of nominations for subclass 402 visas and replace with skilled occupations in respect of nominations for subclass 407 visa applications.
		16/059	F2016L00800	1/07/16		15/092 and 15/108	yes	Dated 6/5/2016, commences 1/7/16 [Note: this is the instrument as originally made] This instrument continues to apply to cases concerning invitations issued to applicants for subclass 189, 190 and 489 visas between 1 July 2016 and 18 April 2017, and applications for subclass 485 visas made between 1 July 2016 and 18 April 2017.

Legislative instrument IMMI 16/060 'Specification of Occupations, a Person or Body, a Country or Countries 2016/060' (Regulation 1.03, subregulations 1.151(1) and 2.26B(1), paragraph 2.72I(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k) and paragraph 186.234(2)(a))	-	16/060	F2016L00801	1/07/16	current	-	yes	Dated 6/5/2016, commences 1/7/16
Legislative instrument IMMI 15/108 'Specification of Occupations, a Person or Body, a Country or Countries 2015' (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.72I(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k) and paragraph 186.234(2)(a))	-	15/108	F2015L01147	1/07/15	30/06/16	-	yes	Dated 6/7/15, commences 1/7/15, [supplementary to IMMI 15/092]
Legislative instrument IMMI 15/092 'Specification of Occupations, a Person or Body, a Country or Countries 2015' (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.72I(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k) and paragraph 186.234(2)(a))	-	15/092	F2015L01059	1/07/15	30/06/16	14/048	yes	Dated 25/6/15, commences 1/7/15, revokes IMMI 14/048
Legislative instrument IMMI 15/091 'Specification of Occupations, a Person or Body, a Country or Countries 2015' (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), paragraph 2.72I(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k) and paragraph 186.234(2)(a))	-	15/091	F2015L01057	1/07/15	current	-	yes	Dated 25/6/15, commences 1/7/15
Legislative instrument IMMI 14/049 'Specification of Occupations, a Person or Body, a Country or Countries' (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), paragraph 2.72I(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k) and paragraph 186.234(2)(a))	-	14/049	F2014L00753	1/07/14	current	-	yes	Dated 14/6/14, commences 1/7/14

Legislative instrumnet IMMI 14/048 'Specification of Occupations, a Person or Body, a Country or Countries' (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.72I(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k) and paragraph 186.234(2)(a))	-	14/048	F2014L00749	1/07/14	30/06/15	13/066	yes	Dated 14/6/14, commences 1/7/14, revokes IMMI 13/066
Legislative instrument IMMI 13/065 'Specification of Occupations, a Person or Body, a Country or Countries' (Subregulations 1.15I(1) and 2.26B(1), paragraph 2.72I(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii) and paragraph 186.234(2)(a))	-	13/065	F2013L01238	1/07/13	current	13/041	yes	Dated 28/6/13, commences 1/7/2013, revokes IMMI 13/041
Legislative instrument IMMI 13/064 'Specification of Occupations, a Person or Body, a Country or Countries' (Subregulations 1.15I(1) and 2.26B(1), paragraph 2.72I(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k), subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(3)(e)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii) and paragraph 186.234(2)(a))	-	13/064	F2013L01272	1/07/13	current	13/020	yes	Dated 28/6/13, commences 1/7/2013, revokes IMMI 13/020
Legislative Instrument IMMI 12/065 'Skilled Occupations, Relevant Assessing Authorities, Countries and Points for General Skilled Migration Visas and certain Other Visas (Regulation 1.15I, Subregulations 2.26AA(2), 2.26AB(2) and 2.26B(1), Subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii))'	-	12/065	F2012L01322	1/07/12	current	nil	yes	Dated 12/6/12, commences 1/7/2012.
Legislative Instrument IMMI 12/023 'Skilled Occupations, Relevant Assessing Authorities and Countries for General Skilled Migration Visas (Regulation 1.15I, Subregulation 2.26B(1), Subparagraphs 1136(3)(bb)(ii), 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(3)(ab)(ii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii))'	-	12/023	F2012L01320	1/07/12	current	11/069	yes	Dated 12/6/12, commences 1/7/2012, revokes IMMI 11/069

Legislative Instrument IMMI 12/068 'Skilled Occupations, Relevant Assessing Authorities, Countries and Points for General Skilled Migration Visas and Certain Other Visas (Regulation 1.15I, Subregulation 2.26AA(2), r.2.26AB(2) and 2.26B(1), Subparagraphs 1128BA(3)(j)(ii), 1136(3)(bb)(ii), 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1218A(5)(g)(ii), 1218A(5)(g)(iii), 1229(3)(ab)(ii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii), items 6A11, 6A12, 6A13)'	-	12/068	F2012L01314	1/07/12	current	11/068	yes	Dated 12/6/12, commences 1/7/2012, revokes IMMI 11/068
Legislative instrument IMMI 13/066 'Specification of Occupations, a Person or Body, a Country or Countries' (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.72I(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k) and paragraph 186.234(2)(a))	-	13/066	F2013L01240	1/07/13	30/06/14	nil	yes	Dated 28/6/13, commences 1/7/13, immediately after commencement of Migration Legislation Amendment Regulation 2013 (No.3)
Legislative instrument IMMI 13/020 'Specification of Occupations, a Person or Body, a Country or Countries' (Subregulations 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.72I(5)(ba), and sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraphs 1229(3)(e) and 1229(3)(k), subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii) and paragraph 186.234(2)(a))	-	13/020	F2013L00546	23/03/13	30/06/13	nil	yes	Dated 19/3/13, commences 23/3/13 immediately after commencement of Migration Legislation Amendment Regulation 2013 (No.1)
Legislative instrument IMMI 13/041 'Specification of Occupations, a Person or Body, a Country or Countries' (Subregulations 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.72I(5)(ba), and sub-subparagraph 5.19(4)(h)(i)(A), item 4(a) of the table in subitem 1137(4), item 4(a) of the table in 1138(4) and item 4(a) of the table in subitem 1230(4) and subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii) and paragraph 186.234(2)(a) of the Regulations)	-	13/041	F2013L00547	23/03/13	30/06/13	12/039	yes	Dated 19/3/13, commences 23/3/13 immediately after commencement of Migration Legislation Amendment Regulation 2013 (No.1), revokes immi12/039
Legislative Instrument IMMI12/039 'Specification of Occupations, a Person or Body, a Country or Countries' (Subregulations 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.72I(5)(ba) and sub-subparagraph 5.19(4)(h)(i)(A) and item 4(a) of the table in subitem 1137(4), item 4(a) of the table in 1138(4) and item 4(a) of the table in subitem 1230(4) and subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii) and paragraph 186.234(2)(a))	-	12/039	F2012L01451	1/07/12	22/03/13	nil	yes	Dated 28/6/12, commences 1/7/12 immediately after commencement of Migration Amendment Regulation 2012 (No.2)

Legislative Instrument IMMI 11/069 'Skilled Occupations, Relevant Assessing Authorities and Countries for General Skilled Migration Visas (Regulation 1.15I, Subregulation 2.26B(1), Subparagraphs 1136(3)(bb)(ii), 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(3)(ab)(ii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii))'	-	11/069	F2011L02010	1/10/11	30/06/12	11/035	yes	Signed 28/9/11, commences 1/10/11, revokes IMMI 11/035.
Legislative Instrument IMMI 11/068 'Skilled Occupations, Relevant Assessing Authorities, Countries and Points for General Skilled Migration Visas and Certain Other Visas (Regulation 1.15I, Subregulation 2.26AA(2), r.2.26AB(2) and 2.26B(1), Subparagraphs 1128BA(3)(j)(ii), 1136(3)(bb)(ii), 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1218A(5)(g)(ii), 1218A(5)(g)(iii), 1229(3)(ab)(ii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii), items 6A11, 6A12, 6A13)'	-	11/068	F2011L02011	1/10/11	30/06/12	11/034	yes	Signed 28/9/11, commences 1/10/11, revokes IMMI 11/034.
Legislative Instrument IMMI 11/035 'Skilled Occupations, Relevant Assessing Authorities, Countries and Points for General Skilled Migrations Visas (Regulation 1.15I, Subregulation 2.26B(1), Subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii))'	-	11/035	F2011L01242	1/07/11	30/09/11	n/a	yes	Made 16/6/11, registered 24/6/11, commences 1/7/11 immediately after commencement of Migration Amendment Regulations 2011 (No.3).
Legislative Instrument IMMI 11/034 'Skilled Occupations, Relevant Assessing Authorities and Countries for General Skilled Migrations Visas and Certain Other Visas (Regulation 1.15I, Subregulation 2.26AA(2), r.2.26AB(2) and 2.26B(1), Subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii), items 6A11, 6A12, 6A13)'	-	11/034	F2011L01227	1/07/11	30/09/11	10/079	yes	Made 16/6/11, registered 24/6/11, commences 1/7/11 immediately after commencement of Migration Amendment Regulations 2011 (No.3).
Legislative Instrument IMMI 10/079 'Skilled Occupations, Relevant Assessing Authorities, Countries and Points for General Skilled Migrations Visas and Certain Other Visas (Regulation 1.15I, Subregulation 2.26B(1), Subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii), items 6A11, 6A12, 6A13)'	-	10/079	F2010L03154	05/12/10	30/06/11	10/026	yes	Signed 2/12/10, commences 05/12/10, revokes IMMI 10/026; Different schedules apply to different classes of persons depending on date of visa application, visa status and visa sought.

Legislative Instrument IMMI 10/026 'Skilled Occupations, Relevant Assessing Authorities, Countries and Points for General Skilled Migrations Visas and Certain Other Visas (Regulation 1.15I, Subregulation 2.26B(1), Subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii), items 6A11, 6A12, 6A13)'	-	10/026	F2010LO1318	01/07/10	4/12/10	09/031	yes	Signed 17/05/10, commences 01/07/10, revokes IMMI 09/031; Different schedules apply to different classes of persons depending on date of visa application, visa status and visa sought.
Legislative Instrument IMMI 09/031 'Skilled Occupations, Relevant Assessing Authorities and Points for General Skilled Migration (regulation 1.03, subregulation 2.26B(1), subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii), 1229(7)(b)(ii), items 6A11, 6A12 and 6A13))'	-	09/031	F2009L01446	15/05/09	30/06/10	08/004	yes	Signed 09/04/09, commences 15/05/09, revokes IMMI 08/004
Legislative Instrument IMMI 08/004 'Skilled Occupations, Relevant Assessing Authorities and Points for General Skilled Migration (regulation 1.03, subregulation 2.26B(1), subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii), 1229(7)(b)(ii), items 6A11, 6A12 and 6A13))'	-	08/004	F2008L01127	26/04/08	14/05/09	07/058	yes	Signed 16/04/08, commences 26/04/08, revokes IMMI 07/058
Legislative Instrument IMMI07/058 'Skilled Occupations, Relevant Assessing Authorities and Points for General Skilled Migration (regulation 1.03, subregulation 2.26B(1), subparagraghs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii), 1229(7)(b)(ii) and items 6A11, 6A12, 6A13, 6B11, 6B12, 6B13))'	-	07/058	F2007L02690	01/09/07	25/04/08	06/090	yes	Signed 28/08/07, commences 01/09/07, revokes IMMI 06/090
Legislative Instrument IMMI06/090 'Residential Postcodes, Skilled Occupations, Relevant Assessing Authorities and Points (regulations 1.03 and 2.26B)'	-	06/090	F2007L01687	12/06/07	31/08/07	06/063	yes	Signed 7/6/07; commences 12/06/07; revokes IMMI 06/063. Explanatory statement available

Legislative Instrument IMMI06/063 'Residential Postcodes, Skilled Occupations, Relevant Assessing Authorities and Points (regulations 1.03 and 2.26B)'	-	06/063	F2006L03923	06/12/06	11/06/07	06/062	yes	Signed 30/11/06; Commences day after registeration on FRLI. Registered 5/12/06; Revokes IMMI 06/062; Explanatory statement available
Legislative Instrument IMMI 06/062, 'Residential Postcodes, Skilled Occupations, Relevant Assessing Authorities and Points (regulations 1.03 and 2.26B)'	-	06/062	F2006L03359	01/11/06	05/12/06	GN25	yes	Signed 25/10/06; effective 1/11/06; revokes IMMI 06/035 (ie GN25); Explanatory statement available
Legislative Instrument IMMI 06/035 (GN 25 of 28 June 2006), 'Residential Postcodes, Skilled Occupations, Relevant Assessing Authorities and Points (regulations 1.03 and 2.26B)'	GN 25	06/035		01/07/06	31/10/06	GN 55	no	Signed 19/06/06; revokes GN signed 30/11/05 (GN55, IMMI 05/095) effective 1 July 2006
Legislative Instrument IMMI 05/095 (GN 49 of 14 December 2005), 'Skilled Australian Sponsored (Migrant) visa: Residential Postcodes, "Skilled occupations" and points (regulations 1.03 and 2.26B)'	GN 49	05/095		15/12/05	30/06/06	S 190	no	Signed 30/11/05; effective 15/12/05; revokes GN signed 26/10/05 (S 190)
Legislative Instrument IMMI 05/067 (S190 of 1 November 2005) 'Skilled Australian Sponsored (Migrant) visa: Residential Postcodes, "Skilled occupations" and points (regulations 1.03 and 2.26B)'	S 190	05/067		01/11/05	14/12/05	GN 55, GN 36?	no	Signed 26/10/05, effective 1/11/05; Revokes GN signed on 31/8/04 and 29/03/05

S55 of 1 April 2005, 'Specification of skilled occupations for the purposes of the definition of "skilled occupation" in regulation 1.03 and the Relevant Assessing Authorities for the purposes of regulation 2.26B of the Migration Regulations 1994'	S 55	-		02/04/05	31/10/05	GN 36	no	Signed 29/3/05, effective 2/4/05. Revokes GN "signed 8/9/04" (GN36)
GN36 of 8 September 2004, 'Specification of Skilled Occupation and Relevant Assessing Authorities for the purposes of regulation 1.03 and regulation 2.26B of the Migration Regulations 1994'	GN 36	-		08/09/04	01/04/05	S 170	no	Signed 31/08/04, effective 08/09/04; revokes Gn signed 14/5/04 (S 170);**WARNING - paragragh 4 and Sch B (applicable to Class Bq visa applcaitions lodged on or after 1/9/04 was held to be invalid (Twinn v MIMIA [2005] FCAFC 242) and should not be relied upon.**
S170 of 20 May 2004, 'Specification of Skilled Occupations and Relevant Assessing Authorities for the purposes of regulations 1.03 and 2.26B of the Migration Regulations 1994'	S 170	-		20/05/04	07/09/04	GN 38	no	Signed 14/5/04; Revokes Gazetted Notice of 10/9/03 (GN 38)
GN 38 of 24 September 2003, 'Specification of Skilled Occupations and Relevant Assessing Authorities for the purposes of regulations 1.03 and 2.26B of the Migration Regulations 1994'	GN 38	-		24/09/03	19/05/04	GN 15	no	Signed 10/09/03, effective 24/9/03; revokes GN signed 26/3/02 (GN 15)
GN 15 of 17 April 2002, 'Specification of Skilled Occupations and Relevant Assessing Authorities for the purposes of regulations 1.03 And 2.26B(1)'	GN 15	-		17/04/02	23/09/03	GN 31	no	Signed 26/3/02, effective 17/4/02; revokes GN signed on 21/7/01 (GN 31)

GN 31 of 8 August 2001, 'Specification of Skilled Occupations and Relevant Assessing Authorities for the purposes of regulations 1.03 and 2.26B(1)'	GN 31	-		08/08/01	16/04/02	GN 10	no	Signed 21/7/01, effective 8/8/01; revokes GN 10
GN 10 of 14 March 2001, 'Specification of Skilled Occupations and Relevant Assessing Authorities for the purposes of regulations 1.03 and 2.26B(1)'	GN 10	-		01/03/01	07/08/01	GN 41	no	Signed 27/2/01, effective 1/3/01; revokes GN signed 19/8/00 (GN 41)
GN 41 of 18 October 2000, 'Specification of Skilled Occupations and Relevant Assessing Authorities for the purposes of regulations 1.03 and 2.26B(1)'	GN 41	-		01/11/00	28/02/01	GN 22	no	signed 19/8/00, effective 1/11/00; revokes GN signed 17/5/00 (GN 22)
GN 22 of 7 June 2000, 'Specification Of Skilled Occupations And Relevant Assessing Authorities for the purposes of regulations 1.03 and 2.26B(1)'	GN 22	-		01/07/00	31/10/00	GN 512	no	signed 17/5/00, effective 1/7/00; revokes GN signed 20/10/99 (GN 512)
S 512 of 28 October 1999, 'Specification of Skilled Occupations and Relevant Assessing Authorities for the purposes of regulations 1.03 and 2.26B(1)'	S 512	-		01/11/99	30/06/00	GN 26	no	signed 20/10/99, effective 1/11/99; revokes GN signed 23/6/99 (GN 26)

GN 26 of 30 June 1999, 'Specification of Skilled Occupations and Relevant Assessing Authorities for the purposes of regulations 1.03 and 2.26B(1)'	GN 26	-		01/07/99	31/10/99	n/a	no	Signed 23/6/99; effective 1/7/99

Notes

1. r.1.03 defines **'skilled occupation'** prior to 1/7/10 as 'an occupation that is specified by Gazette Notice as a skilled occupation for which a number of points specified in the Notice are available' and from 1/7/10 as having the meaning given by r.1.15I. r.1.03 defines **'ANZSCO'**, for visa applications made on or after 1/7/13, as having 'the meaning specified by the Minister in an instrument in writing for this definition'; and **'relevant assessing authority'** to mean a person or body specified under r.2.26B.

2. r.1.15I defines 'skilled occupation'. **r.1.15I(1)** provides that a *skilled occupation* , in relation to a person, means an occupation of a kind that is specified by the Minister in an instrument in writing to be a skilled occupation, for which a number of points specified in the instrument are available, and is applicable to the person in accordance with the specification of the occupation. **r.1.15I(2)** provides that, without limiting subregulation 1.15I(1) the Minister may specify in the instrument any matter in relation to an occupation, or to a class of persons to which the instrument relates, including that an occupation is a skilled occupation for a class of persons, and that an occupation is a skilled occupation for a person who is nominated by a State or Territory government agency.

3. r.2.26AA applies to an applicant for a points tested General Skilled Migration visa if the application is made on or after 1/7/11 but before 1/1/13 and the applicant is a person, or a person in a class of persons specified in an instrument in writing made by the Minister for r.2.26AA(2)(a). Regulation 2.26AA was omitted with effect from 1 July 2013 (SLI 2012, No.82).

4. r.2.26AB applies to an applicant for a points tested General Skilled Migration visa if the applicant is a person in a class of persons specified by the Minister in an instrument in writing for r.2.26AB(2) and the application is made on or after 1/7/11 but before 1/1/13 and the applicant's score is assessed in accordance with Schedule 6B and that score is less than the applicable pass mark at the time the score is assessed. r.2.26AB also applies to an applicant if the application is made on or after 1/7/11 and r.2.26AA(2) does not apply. Regulation 2.26AB and Schedule 6B were omitted with effect from 1/7/13 (SLI 2012, No.82).

5. r.2.26B(1) provides that the Minister may, by written instrument, specify a person or body as the **relevant assessing authority** for a skilled occupation (if the person or body is approved in writing by the Education Minister or the Employment Minister as the relevant assessing authority for the occupation) and one or more countries, for the purposes of a skills assessment application made by a resident of one of those countries. Under r.2.26B(1A) the Minister must not make such an instrument unless the person or body has been approved in writing as the relevant assessing authority for the occupation by the Education Minister or Employment Minister. The relevant assessing authority is specified in the same instrument as the skilled occupation list. ***Education Minister*** and ***Employment Minister*** are defined in r.1.03.

6. Items 1128BA(3)(j)(ii), 1136(3)(bb)(ii), 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1218A(5)(g)(ii), 1218A(5)(g)(iii), 1229(3)(ab)(ii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii) of Schedule 1 enable a skilled occupation to be specified by the Minister in an instrument in writing.

7. Items 6A11, 6A12 and 6A13 of Schedule 6A awarded points where the skilled occupation nominated by the applicant in his or her application was specified by an instrument in writing for the item as a skilled occupation for which at least 60, 50 and 40 points respectively were available. Schedule 6A was omitted with effect from 1/7/12 (SLI 2012, No. 82) in respect of applications made on and after that date.

8. The requirement to nominate a skilled occupation is a Schedule 2 'time of application' criterion (or for (skilled student) Class DD and, DE (skilled overseas student) and UQ (skilled graduate) visas, a Schedule 1 requirement). For guidance as to the relevant instrument, see the MRD Legal Services commentary 'Skilled Occupation', and the 'Skilled Occupation List Instruments – Quick guide'.

9. The Skilled Occupations / Assessing authorities List (SOL) is also relevant to an assessment of the applicant under the 'points test' as provided for in Subdivision B of Division 3 of Part 2 of the Act and Part 2 Division 2.6 of the Regulations: 'Prescribed qualifications – application of points system' as in force at the relevant time. For guidance on how the points system operates, see MRD Legal Services 'General Points Test' commentaries: Schedule 6A, 6B, 6C and 6D.

Migration Occupations in Demand (r.1.15H)

Title	Gazette	IMMI ref	FRLI ref	In force		revokes	Explanatory statement	Notes
				from	until			
Legislative Instrument IMMI/033, 'Migration Occupation in Demand (regulation 1.15H)'		11/033	F2011L01229	1/07/11	current	10/025	yes	Made 16/6/11, registered 24/6/11, revokes IMMI 10/025 signed 17/6/10, commences 1/7/11 immediately after commencement of Migration Amendment Regulations 2011 (No.3).
Legislative Instrument IMMI/025, 'Migration Occupation in Demand (regulation 1.15H)'	-	10/025	F2010L01308	01/07/10	30/06/11	10/001	yes	Signed 17/06/10, effective 1/07/10, revokes IMMI10/001 signed 04/02/10 Note - only applies to specific classes of persons. ie. (a) person who had an unresolved Subclass 861, 862, 880, 881, 495, 175, 176, 475, 487, 885, 886 application as at 08/02/10; or (b) person who held a Subclass 485 visa, or had an unresolved Subclass 485 application as at 08/02/10 AND who makes a Subclass 885, 886, 487 application before 01/01/13
Legislative Instrument IMMI 10/001, 'Migration Occupation in Demand (regulation 1.03)'	-	10/001	F2010L00297	08/02/10	30/06/10	08/034	yes	Signed 04/02/10, effective 08/02/10 revokes instrument signed 07/05/08 (08/034)
Legislative Instrument IMMI 08/034, 'Migration Occupations in Demand (regulation 1.03)'	-	08/034	F2008L01524	17/05/08	07/02/10	07/008	yes	Signed 07/05/08, effective 17/05/08 revokes instrument signed 27/07/07 (07/008)
Legislative Instrument IMMI 07/008, 'Migration Occupations in Demand (reguulation 1.03)'	-	07/008	F2007L02388	30/07/07	16/05/08	06/066	yes	Signed 27/07/07, effective 30/07/07 revokes GN signed 7/9/06 (GN 37)
Legislative Instrument IMMI 06/066 (GN 37 of 20 September 2006), 'Migration Occupations in Demand'	GN37	06/066		20/09/06	29/07/07	06/017	yes	Signed 7/9/06, effective 20/9/06 (day of registration of FRLI). Revokes GN signed 27/3/06 (GN13) Explanatory Statement available.

Legislative Instrument IMMI 06/017 (GN 13 of 5 April 2006), 'Migration Occupations in Demand'	GN13	06/017		28/03/06	19/09/06	05/094	no	Signed 27/3/96; effective 28/3/06 (day of registration of FRLI)
Legislative Instrument IMMI 05/094 (GN 49 of 14 December 2005) 'Migration Occupations in Demand'	GN 49	05/094		15/12/05	27/03/06	S 186	no	Signed 30/11/05; effective 15/12/05; revokes GN signed 21/10/05 (S 186)
S186 of 1 November 2005, 'Migration Occupations in Demand'	S 186	-		01/11/05	14/12/05	GN 17	no	Signed 21/10/05; effective 1/11/05; revokes GN signed 27/4/05 (GN 17)
GN 17 of 4 May 2005, 'Specification of a Migration Occupation in Demand for the purposes of regulation 1.03 of the Migration Regulations 1994'	GN 17	-		04/05/05	31/10/05	GN 36	no	Signed 27/04/05; revokes GN signed 31/8/04 (GN 36)
GN 36, 8 September 2004, 'Specification of Migration Occupations in Demand for the purposes of Regulation 1.03'	GN 36	-		08/09/04	03/05/05	S 171	no	Signed 31/8/04, effective 8/9/04; Revokes GN signed 14/5/04 (S 171)
S171 of 20 May 2004, 'Specification of Migration Occupations in Demand for the purposes of Regulation 1.03'	S 171	-		20/05/04	07/09/04	S 481	no	Signed 14/5/04, effective 20/5/04. Revokes GN signed 9/12/03 (S 481)
S481 of 17 December 2003, 'Specification of Migration Occupations in Demand for the purposes of Regulation 1.03'	S 481	-		17/12/03	19/05/04	GN 10	no	Signed 9/12/03, effective 17/12/03; Revokes Gnu signed 7/3/03 (GN 10)
GN 10 of 12 March 2003, 'Specification of Migration Occupations in Demand for the purposes of Regulation 1.03'	GN 10	-		12/03/03	16/12/03	S 364	no	signed 7/03/03; effective 12/3/03. Revokes GN signed 25/9/02 (S 364)
S364 of 2 October 2002, 'Specification of Migration Occupations in Demand for the purposes of Regulation 1.03'	S 364	-		02/10/02	11/03/03	GN 15	no	signed 25/9/02, effective 2/10/02; Revokes GN signed 26/3/02 (GN15)

GN 15 of 17 April 2002, 'Specification of Migration Occupations in Demand for the purposes of Regulation 1.03'	GN 15	-		19/04/02	01/10/02	GN 25	no	signed 26/3/02, effective 19/4/02, Revokes GN signed 28/4/01 (GN 25)
GN 18 of 9 May 2001, 'Specification of Migration Occupations in Demand for the purposes of Regulation 1.03'	GN 18	-		09/05/01	18/04/00	GN 15	no	Signed 28/4/01, effective 9/5/01; Revokes GN signed 5/4/00
GN 15 of 19 April 2000, 'Specification of Migration Occupations in Demand for the purposes of Regulation 1.03'	GN 15	-		19/04/00	08/05/01	GN 26	no	signed 5/4/00, effective 19/4/00; revokes GN signed 23/6/99 (GN 26)
GN 26 of 30 June 1999, 'Specification of Migration Occupations in Demand for the purposes of Regulation 1.03'	GN 26	-		01/07/99	18/04/00	nil	no	signed 23/6/99; effective 1 July 1999; revokes GN signed

Notes

1. r.1.03 and r.1.15H defined migration occupation in demand. Prior to 1/7/10, r.1.03 defined migration occupation in demand prior to 1/7/10 to mean a skilled occupation specified by the Minister in a written instrument as a migration occupation in demand (including an occupation that may be described by reference to characteristics in the instrument) and from 1/7/10 to have the meaning given by r.1.15H. From 1/7/10, r,1,15H defines **'Migration occupation in demand'**, in relation to a person to mean a skilled occupation of a kind that is (a) specified by written instrument to be a migration occupation in demand and (b) is applicable to the person in accordance with the specification. This instrument is commonly referred to as the MODL. The definition was omitted with effect on and from 1/7/13 (SLI2012, No.82).

2. The MODL is relevant to Schedules 6A, Part 7 (Skills targeting qualifications) and 6B, Part 7 (Occupation in demand qualifications). Points are available in specified circumstances where an applicant has nominated a MOD in his/her application.

3. For visa **applications lodged prior to 1/7/06**, the relevant MODL to apply is the instrument in force at time of application (See *Aomatsu v MIMIA* [2005] FCAFC 139).

4. For visa **applications lodged on or after 1/7/06**, the relevant MODL to apply is the more favourable of either (a) the instrument in force at time of application; or (b) the instrument in force at the time of the s.93(1) points assessment (ie on review, time of Tribunal's decision): r.2.26A(5AA) as in force before 1/7/12. Regulation 2.26A was omitted with effect on and from 1/7/12 (SLI 2012, No. 82), and applicable to visa applications made on or after that date.

Pool Marks (s.96(1)) and Pass Marks (s.96(2)) for Visa Class SI, SN, SP, VB, VC, VE and VF

Visa Class	Visa Subclass	Title	IMMI ref	Explanatory Statement	FRLI ref	Registered	In force		Revokes	Notes
							from	until		
SI, SN, SP	189, 190, 489	Migration (IMMI 18/067: Pool and Pass Marks for General Skilled Migration Visas) Instrument 2018	18/067	yes	F2018L00920	28/06/2018	01/07/18	current	12/017	Made 25/06/18; commenced 01/07/18. Applies in relation to GSM (Class SI/SN/SP) visa applications made in response to an invitation given on or after 1 July 2018: s.10.
	189, 190, 489	Pass Marks And Pool Marks in Relation to Applications for General Skilled Migration Visas (Classes VE, VC, VF, VB, SI, SN and SP) (Subsections 96(1) and 96(2))	12/017	yes	F2012L01317	25/06/2012	01/07/12	30/06/18	11/027	Made 12/06/12; commenced 01/07/12 immediately after commencement of Migration Amendment Regulation 2012 (No. 2).
VB, VC, VE, VF	175, 176, 475, 487, 885, 886	Migration (IMMI 18/067: Pool and Pass Marks for General Skilled Migration Visas) Instrument 2018	18/067	yes	F2018L00920	28/06/2018	01/07/18	current	12/017	Made 25/06/18; commenced 01/07/18. Applies in relation to former GSM (Subclass 175/176/475/487/885/886) visa applications if r.2.26AA as in force immediately before 1 July 2013 applies to the applicant: s.11.
	175, 176, 475, 487, 885, 886	Pass Marks And Pool Marks in Relation to Applications for General Skilled Migration Visas (Classes VE, VC, VF, VB, SI, SN and SP) (Subsections 96(1) and 96(2))	12/017	yes	F2012L01317	25/06/2012	01/07/12	30/06/18	11/027	Made 12/06/12; commenced 01/07/12 immediately after commencement of Migration Amendment Regulation 2012 (No. 2).
	175, 176, 475, 487, 885, 886	Pass Marks And Pool Marks in Relation to Applications for General Skilled Migration Visas (Classes VE, VC, VF and VB) (Subsections 96(1) and 96(2))	11/027	yes	F2011L01218	23/06/2011	01/07/11	30/06/12	07/056	Made 15/06/11; commenced 01/07/11.
	175, 176, 475, 487, 885, 886	Pass Marks And Pool Marks in Relation to Applications for GSM Skilled Visas (Classes VE, VC, VF and VB) (Subsections 96(1) and 96(2))	07/056	yes	F2007L02689	30/08/2007	01/09/07	30/06/11	n/a	Made 28/08/07; commenced 01/09/07.

Notes

1. Under s.96(1) the Minister may, by written instrument, specify, in relation to a class of visa, the relevant pool mark for the purposes of the points test as provided for in Subdivision B of Division 3 of Part 2 of the Act and Part 2 Division 2.6 of the Regulations: 'Prescribed qualifications – application of points system' as in force at the relevant time. For guidance on how the points system operates, see MRD Legal Services 'General Points Test' commentaries: Schedule 6A, 6B, 6C and 6D.

2.Under s.96(2), the Minister may, by written instrument, specify in relation to a class of persons, the pass mark for the purposes of the Act and Regulations. The pass park is the number of points needed to qualify for the visa. The points tests are set out in Scheudle 6A, 6B, 6C and 6D. For guidance on how the points system operates, see MRD Legal Services Points Test commentaries: Schedule 6A, 6B, 6C and 6D.

Pool Marks (s.96(1)) for Visa Class AT, AJ, BN, BQ, DB, DD, DE and UX

Visa Class	Subclass	Title	Gazette No	In force		Expressly applies to	Revokes	Notes
				from	until			
AT	126, 135	S 90 of 4 March 1998: Specification of pool mark in relation to applications for Independent (Migrant) (Class AT) Visas	S 90	4/03/1998	current		s 456	Signed 27/2/98; effective 4/3/98
	126, 135	S 456 of 1 December 1995: Specification of pool mark in relation to applications for Independent (Migrant) (Class AT) Visas	S456	1/12/1995	3/03/1998		GN 34	Signed 28/11/05; effective 1/12/95.
	126, 135	GN 34 of 31 August 1994: Specification of Pool Mark in Relation to Independent (Migrant) (Class AT) Visas	GN 34	1/09/1994	30/11/1995		-	Signed 22/8/94; effective 1/9/04
AJ	105,106	GN 25 of 25 June 1997: Specification of pool mark in relation to applications for Class AJ Visas (Skilled - Australian Linked (Migrant))	GN 25	1/07/1997	current		GN 31	Signed 16/06/97; effective 01/07/97; published in GN 25 of 25/06/97
	105	GN 31 of 7 August 1996: Specification of pool mark in relation to applications for Concessional Family (Migrant)(Class AJ) Visas	GN 31	1/11/1996	30/06/1997		GN 34	Signed 26/07/96; effective 01/11/96
	105	GN 34 of 31 August 1994: Specification of Pool Mark in Relation to Independent (Migrant) (Class AT) Visas	GN 34	1/09/1994	31/10/1996		-	Signed 22/08/94; effective 01/09/94
BN	136, 137	GN 26 of 30 June 1999: Specification of pool mark in relation to applications for Skilled - Independent (Migrant) Class BN visas	GN 26	1/07/1999	current		n/a	Signed 23/6/99; effective 1/7/99
BQ	138, 139	GN 26 of 30 June 1999: Specification of pool mark in relation to applications for Skilled - Australian -sponsored (Migrant) Class BQ visas	GN 26	1/07/1999	current		n/a	Signed 23/6/99; effective 1/7/99
DB	861 862	GN 15 of 14 April 2004: Specification of pool mark in relation to applications for Skilled - New Zealand Citizen (Residence) (Class DB) visas	GN 15	14/04/04*	current	861 Visa applications made (a) prior to 8/5/02; (b) between 8/5/02 - 31/4/04; (c) on or after 14/04/04; and 862 visa applications made on or after 14/4/04	GN 18	Signed 1/4/04; effective 14/4/04; does not expressly revoke GN 18 of 2002 but supersedes specifications for 861 visas. In respect of 862 visa specification, this notice does not appear to supersede GN 18, but operates only from 14/4/04.
	861 862	GN 18 of 8 May 2002: Specification of pool mark in relation to applications for Skilled - New Zealand Citizen (Residence) (Class DB) visas	GN 18	8/05/2002	13/04/2004	Specification re 861 visa Superseded by GN 15 which applies to pre 8/5/02 applications. However still applicable for 862 visas lodged	GN 10	Signed 2/5/02; effective 8/5/02
	861 862	GN 10 of 14 March 2001: Specification of pool mark in relation to applications for Skilled - New Zealand Citizen (Residence) (Class DB) visas	GN 10	14/03/2001	7/05/2002		-	Signed 27/2/01; effective 14/3/01
DD	880	GN 15 of 14 April 2004: Specification of pool mark in relation to applications for Skilled - Independent Overseas Student (Residence) (Class DD) visas	GN 15	14/04/04*	current	Visa applications made (a) prior to 8/5/02; (b) between 8/5/02 - 31/3/05; (c) on or after 1/4/05	GN 18	Signed 1/4/04; effective 14/4/04; supersedes GN 18 in relation to applications it deals with (ie pre 14/04/04 applications)
	880	GN 18 of 8 May 2002: Specification of pool mark in relation to applications for Skilled - Independent Overseas Student (Residence) (Class DD) visas	GN 18	8/05/2002	13/04/2004	Superseded by GN 15 which applies to pre 8/5/02 applications	S 250	Signed 2/5/02; effective 8/5/02; No longer operative, even in relation to pre 14/4/04 applications
	880	S 250 of 29 June 2001: Specification Of Pool Mark In Relation To Applications For Skilled – Independent Overseas Students (Residence) (Class DD) Subclass 880 Visas	S 250	29/06/2001	7/05/2002		-	Signed 28/6/01; effective 29/06/01
DE	881	S 249 of 29 June 2001: Specification of pool mark in relation to applications for Skilled - Australian-Sponsored Overseas Students (Residence) (Class DE) subclass 881 visas	S 249	29/06/2001	current		n/a	Signed 28/6/01; effective 29/6/01
UX	495	GN 26 of 30 June 2004: Specification of pool mark in relation to applications for Skilled - Independent Regional (Provisional)(Class UX) visas	GN 26	1/07/2004	1/07/2004		n/a	Signed 17 June 2004; effective 1/7/04

Pass Marks (s.96(2)) for Visa Class AT, AJ, BN, BQ, DB, DD, DE and UX

Visa Class	Visa Subclass	Title	Gazette No	In force		Expressly applies to	Revokes	Notes
				to	from			
AT	126	GN 17 of 28 April 1999: Specification of pass mark in relation to applications for Subclass 126 (Independent) Visas	GN 17	28/04/1999	current		S 91	Signed 16/4/99; effective 28/4/99
	126, 135	S 91 of 4 March 1998: Specification Of Pool Mark In Relation To Applications For Independent (Migrant) (Class AT) Visas	S 91	04/03/98	27/04/1999		S 288	Signed 27/2/98, effective 4/3/98; revokes GN in effect from 1/12/95
	126, 135	S 288 of 1 August 1996: Specification of pass mark in relation to applications for Independent (Migrant) (Class AT) Visa	S288	1/08/1996	3/03/1998		S456	Signed 26/7/96; effective 1/8/96
	126, 135	S 456 of 1 December 1995: Specification of pool mark in relation to applications for Independent (Migrant) (Class AT) Visa	S456	1/12/1995	31/07/1996		GN 34	Signed 28/11/95; effective 1/12/95
	126, 135	GN 34 of 31 August 1994: Specification of pool mark in relation to applications for Independent (Migrant) (Class AT) Visa	GN 34	1/09/1994	30/11/1995			Signed 22/8/04; effective 1/9/94
AJ	105, 106	GN 25 of 25 June 1997: Specification of pass mark in relation to applications for Class AJ Visas (Skilled - Australian Linked (Migrant))	GN 25	1/07/1997	current		GN 31	Signed 16/6/97; effective 1/7/97
	105	GN 31 of 7 August 1996: Specification of pass mark in relation to applications for Concessional Family (Migrant) (Class AJ) Visas	GN 31	1/11/1996	30/06/1997		GN 34	Signed 26/07/96; effective 1/7/96
	105	GN 34 of 31 August 1994: Specification of pass mark in relation to applications for Concessional Family (Migrant) (Class AJ) Visas	GN 34	1/09/1994	31/10/1996			Signed 22/08/94; effective 1/9/94
BN	136, 137	GN 15 of 14 April 2004: Specification of pass mark in relation to applications for Skilled - Independent (Migrant) (Class BN) visas	GN 15	14/04/2004	current	Visa applications made (a) prior to 8/5/02; (b) between 8/5/02 - 31/3/05; (c) on or after 1/4/05	GN 18	Signed 17/6/04; effective 1/7/04
	136, 137	GN 18 of 8 May 2002: Specification of pass mark in relation to applications for Skilled - Independent (Migrant) (Class BN) visas	GN 18	8/05/2002	13/04/2004	Superseded by GN 15 which applies to pre 8/5/02 applications	GN 26	Signed 2/5/02; effective 8/5/02
	136, 137	GN 26 of 30 June 1999: Specification of Pass Mark in relation to applications for Skilled-Independent (Migrant) (Class BN) visas	GN 26	1/07/1999	7/05/2002			Signed 23/6/99; effective 1/7/99
BQ	138, 139	GN 26 of 30 June 1999: Specification of pass mark in relation to applications for Skilled - Australian -sponsored (Migrant) Class BQ visas	GN 26	1/07/1999	current			Signed 23/6/99; effective 1/7/99
DB	861, 862	GN 15 of 14 April 2004: Specification of pass mark in relation to applications for Skilled - New Zealand Citizen (Residence) (Class DB) visas	GN 15	14/04/2004	1/10/2015	Visa applications made (a) prior to 8/5/02; (b) between 8/5/02 - 31/3/05; (c) on or after 1/4/05; and 862 visa applications made on or after	GN18	Signed 1/4/04; effective 14/4/04
	861, 862	GN 18 of 8 May 2002: Specification of pass mark in relation to applications for Skilled - New Zealand Citizen (Residence) (Class DB) visas	GN 18	8/05/2002	13/04/2004	Specification re 861 visa superseded by GN 15 which applies to pre 8/5/02 applications. However still applicable for 862 visas lodged	GN 10	Signed 3/5/02; effective 8/5/02
	861, 862	GN 10 of 14 March 2001: Specification of pass mark in relation to applications for Skilled - New Zealand Citizen (Residence) (Class DB) visas	GN 10	14/03/2001	7/05/2002			Signed 27/2/01; effective 14/3/01
DD	880	GN 15 of 14 April 2004: Specification of pass mark in relation to applications for Skilled - Independent Overseas Student (Residence) (Class DD) visas	GN 15	14/04/2004	current	Visa applications made (a) prior to 8/5/02; (b) between 8/5/02 - 31/3/05; (c) on or after 1/4/05	GN 18	Signed 1/4/04; effective 14/4/04
	880	GN 18 of 8 May 2002: Specification of pass mark in relation to applications for Skilled - Independent Overseas Student (Residence) (Class DD) visas	GN 18	8/05/2002	13/04/2004	Superseded by GN 15 which applies to pre 8/5/02 applications	S 247	Signed 2/5/02; effective 8/5/02
	880	S 247 of 29 June 2001: Specification of Pass Mark in Relation to Applications for Skilled – Independent Overseas Students (Residence) (Class DD) Subclass 880 Visas	S 247	29/06/2001	7/05/2002			Signed 28/6/01; effective 29/6/01
DE	881	S 248 of 29 June 2001: Specification of pass mark in relation to applications for Skilled - Australian-Sponsored Overseas Students (Residence) (Class DE) subclass 881 visas	S 248	29/06/2001	current			Signed 28/06/01; effective 29/06/01
UX	495	GN 26 of 30 June 2004: Specification of pass mark in relation to applications for Skilled - Independent Regional (Provisional)(Class UX) visas	GN 26	1/07/2004	current			Signed 17/6/04; effective 1/7/04

Notes

***** Note that these notices marked with a (*) are retrospective and specify a pool mark for visa applications lodged prior to this date.

1. Under s.96(1) the Minister may, by written instrument, specify, in relation to a class of visa, the relevant pool mark for the purposes of the points test as provided for in Subdivision B of Division 3 of Part 2 of the Act and Part 2 Division 2.6 of the Regulations: 'Prescribed qualifications – application of points system' as in force at the relevant time. For guidance on how the points system operates, see MRD Legal Services 'General Points Test' commentaries: Schedule 6A, 6B, 6C and 6D.

2.Under s.96(2), the Minister may, by written instrument, specify in relation to a class of persons, the pass mark for the purposes of the Act and Regulations. The pass park is the number of points needed to qualify for the visa. The points tests are set out in Scheudle 6A, 6B, 6C and 6D. For guidance on how the points system operates, see MRD Legal Services Points Test commentaries: Schedule 6A, 6B, 6C and 6D.

Designated Securities

Title	Gazette	immi ref	FRLI ref	In force		revokes	Explanatory statement	Notes
				from	until			
Legislative Instrument IMMI07/065, 'Desginated Securities (subregualtion 2.26C(1))'	-	07/065	F2007L02651	01/09/07	current	S258	yes	signed 28/08/07; effective 01/09/07; revokes instrument signed 19/06/01
S 258 of 29 June 2001, 'Specification of Designated Securities for the purposes of r.2.26C'	S 258			29/06/01	31/08/07	GN 26	-	Signed 19/06/01; effective 29/06/01; revokes GN 26
GN 26, 30 June 1999, 'Specification of Designated Securities for the purposes of r.2.26C'	GN 26			01/07/99	28/06/01	n/a	-	Signed 23/06/99; effective 1/7/99

Notes

1. r.2.26C provided that the Minister may, by written instrument, specify a security issued by an Australian State or Territory government authority as a security in which an investment is a designated security for the purposes of Part 8 of Schedule 6A.

2. Item 6A81 of Part 8 of Schedule 6A gave 'bonus points' to applicants for a Class BQ, DB, DD and DE visa if they had deposited at least AUD100,000 in a designated security for a term of not less than 12 months. Schedule 6A, and the visa classes to which it applied, were omitted on 1/7/12 (SLI 2012, No. 82).

Designated Languages (r.1.03; Schedules 6A & 6B)

Title	Gazette	Immi ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
				from	until			
GN 34 of 28 August 2002, 'Specification of Designated Languages for the purposes of regulation 1.03 of the Migration Regulations'	GN 34	-		28/08/02	current	GN 26	No	Signed 27/06/02; effective 28/08/02; revokes GN signed 23/6/99
GN 26 of 30 June 1999, 'Specification of Designated Languages for the purposes of regulation 1.03'	GN 26	-		01/07/99	27/08/02	n/a	No	Signed 23/06/99; effective 1/7/99

Notes

1. Regulation 1.03 defined 'designated language' to mean 'a language that is specified by Gazette Notice as a designated language'. Definition omitted with effect from 1/7/2013 (SLI 2012, No. 82)

2. 'Designated language' is relevant to the Schedules 6A and 6B General Points Tests. Item 6A81 of Schedule 6A gives 'bonus points' to applicants for a Class BQ, DB, DD and DE visa, and item 6B81 of Schedule 6B gives points to applicants to which Schedule 6B applies, if they hold a qualification (equivalent to an Australian tertiary degree) the tuition for which was conducted in a designated language; or are accredited as a professional interpreter or translator (level 3) in a designated language by NAATI. Schedules 6A and 6B were omitted with effect from 1/7/2013 (SLI 2012, No. 82).

Designated Areas (Schedule 6, Item 6701, r.1.03)

Title	Gazette	Immi ref	FRLI ref	In force		revokes	Explanatory statement	Notes
				from	until			
Legislative Instrument IMMI12/021, 'Designated Areas (r.1.03)'		12/021	F2012L01305	1/07/12	current	11/063	yes	Made 12/6/12, commences 1/7/12 immediately after commencement of Migration Amendment Regulations 2012 (no.2)
Legislative Instrument IMMI11/063, 'Designated Areas (item 6701 of Schedule 6)'	-	11/063	F2011L01886	12/09/11	30/06/12	07/060	yes	Signed 29/08/11, effective 12/09/11, revokes IMMI 07/060
Legislative Instrument IMMI07/060, 'Designated Areas (item 6701 of Schedule 6)'	-	07/060	F2007L02654	01/09/07	11/09/11	GN 34	yes	Signed 28/08/07, effective 01/09/07; revokes GN 34
GN 34 of 29 August 2001, 'Designated Areas for the purpose of Item 6701, Schedule 6'	GN 34	-	F2006B00554	29/08/01	31/08/07	S 601	-	Signed 23/08/01 effective 29/8/01; revokes S 601
S 601 of 21 December 1998, 'Designated Areas for the purpose of Item 6701, Schedule 6'	S 601	-		01/01/99	28/08/01	S 426	-	Signed 10/12/98; effective 1/1/99; revokes S 426
S 426 of 28 August 1998, 'Designated Areas for the purpose of Item 6701, Schedule 6'	S 426	-		01/09/98	31/12/98	GN 34	-	Signed 10/08/98; effective 1/9/98; revokes GN 34
GN 34 of 31 August 1994, 'Designated Areas for the purpose of Item 6701, Schedule 6'	GN 34	-		01/09/94	31/08/98	n/a	-	Signed 22/8/94; effective 1/9/94

Notes

1. Schedule 6 item 6701 provided that the sponsor must be resident in one or more of the designated areas specified in an instrument for this item. Schedule 6 set out the General Points Test for visa classes AT (Subclasses 126 and 135) and AJ (Subclasses 105 and 106). Those visa classes were closed to new applications on 1 July 1999. Schedule 6 and the visa classes to which it applied were omitted on 1/7/12 (SLI 2012, No. 82).

2. Regulation1.03 defines 'designated area' as 'an area specified as a designated area by the Minister in an instrument in writing for this definition', applicable to visa applications made on or after 1/7/12.

Regional and Low Population Growth Metropolitan Areas (Schedule 6A, Items 6A1001, 6A1002 and Schedule 6D Item 6D101)

Title	Gazette	Immi ref	FRLI ref	In force		revokes	Explantory Statement	Notes
				from	until			
Location of Campuses and Postcodes (Schedules 6D101(b) and 6D101(c))		12/015	F2012L01444	1/07/2012	current	05/077	yes	Made 28/6/12, commences 1/7/12 immediately after Migration Amendment Regulation 2012 (No.2)
S185 of 1 November 2005, 'Educational Institutions in Regional and Low Population Growth Metropolitan Areas (Regulations 6A1001 and 6A1002)'	S 185	05/077		01/11/05	30/06/12	GN 28		Signed 21/10/05; effective 1/11/05; revokes GN signed 6/7/05
GN 28 of 20 July 2005, 'Specification of Regional and Low Population Growth Metropolitan Areas for the Purposes of Items 6A1001 and 6A1002 of Schedule 6A of the Migration Regulations 1994'	GN 28			20/07/05	31/10/05	GN 14		Signed 6/7/05; effective 20/7/05; revokes GN signed 31/3/05
GN 14 of 13 April 2005, 'Specification of Regional and Low Population Growth Metropolitan Areas for the Purposes of Items 6A1001 and 6A1002 of Schedule 6A of the Migration Regulations 1994'	GN 14			13/04/05	19/07/05	GN 28		Signed 31/3/05; effective 13/4/05; revokes GN signed 29/6/04
GN 28 of 14 July 2004, 'Specification of Regional and Low Population Growth Metropolitan Areas for the Purposes of Items 6A1001 and 6A1002 of Schedule 6A of the Migration Regulations 1994'	GN 28			14/07/04	12/04/05	GN 26		Signed 29/6/04; effective on gazettal - 14/7/04; revokes GN signed 17/6/04
GN 26 of 30 June 2004, 'Specification of Regional and Low Population Growth Metropolitan Areas for the Purposes of Items 6A1001 and 6A1002 of Schedule 6A of the Migration Regulations 1994'	GN 26			01/07/04	13/07/04	S 237		Signed 17/6/04; effective 1/7/04; revokes GN signed 26/6/03
S237 of 27 June 2003, 'Specification of Regional and Low Population Growth Metropolitan Areas for the Purposes of Items 6A1001 and 6A1002 of Schedule 6A of the Migration Regulations 1994'	S 237			01/07/03	30/06/04	n/a		Signed 26/06/03; effective 1/7/03

Notes

1. Items 6A1001 and 6A1002 of Schedule 6A provided that an applicant be awarded points under the General Points Test for study and residence in regional and low population growth metropolitan areas specified in an instrument for those items. Schedule 6A was repealed on 1/7/12 (SLI 2012, No. 82).

2. Item 6D101 provides for points where, at time of invitation to apply for the visa, the applicant (a) met the Australian study requirement; (b) the location of the campus/es at which that study was undertaken is specified by the Minister in an instrument in writing;(c) while undertaking the course of study the applicant lived in a part of Australia the postcode of which is specified by the Minister in an instrument in writing; and (d) none of the study constituted distance education.

Specification of as State or Territory - English Language Training

Title	Gazette	Immi ref	FRLI ref	In force		revokes	Explanatory statement	Notes
				from	until			
Legislative Instrument IMMI 09/124, 'English Language Training arrangements (paragraphs 134.222C(2)(a), 139.226(b), 496.226(b), 863.226(b), 882.225(b), 6B34(a) and (b) and subparagraphs 6B103(g)(ii) and (iii))'	-	09/124	F2009L04517	01/01/10	current	09/078	yes	Signed 15/12/09; effective 01/01/10; revokes IMMI 09/078 signed 25/06/09.
Legislative Instrument IMMI09/078, 'English Language Training arrangements (paragraphs 134.222C(2)(a), 139.226(b), 496.226(b), 863.226(b), 882.225(b), 6B34(a) and (b) and 6B101(f) and subparagraphs 475.214(b)(i) and (c)(i), 487.215(b)(i) and (c)(i) and 487.224(b)(i) and (c)(i))'	-	09/078	F2009L02546	01/07/09	31/12/09	n/a	yes	Signed 25/06/09; effective 01/07/09. This instrument applied in relation to visa applications made on or after 1 July 2009.
Legislative Instrument IMMI09/072, 'States and Territories with English Language Training arrangements (paragraphs 134.222C(2)(a), 139.226(b), 496.226(b), 863.226(b), 882.225(b), 6B34(a) and (b) and 6B101(f) and subparagraphs 475.214(b)(i) and (c)(i), 487.215(b)(i) and (c)(i) and 487.224(b)(i) and (c)(i))'	-	09/072	F2009L02537	11:59pm 30/06/09	-	-	yes	Signed 25/06/09; effective 30/06/09 at 23.59; revokes IMMI 07/054 signed 28/08/07. This instument does not apply in relation to a visa application made on or before 23.59 on 30/6/09. Note this instrument only revokes the previous instrument - it does not specify any matters for the purpose of the regulations - see instead 09/078.
Legislative Instrument IMMI07/054, 'States and Territories with English Language Training arrangements (paragraphs 134.222C(2)(a), 139.226(b), 475.214(b)(i) and (c)(i), 487.215(b)(i) and (c)(i), 487.224(b)(i) and (c)(i), 496.226(b), 863.226(b), 882.225(b), 6B34(a) and (b) and 6B101(f)))'	-	07/054	F2007L02670	01/09/07	30/06/09	06/048	yes	Signed 28/08/07; effective 1/9/07; revokes IMMI 06/048 (GN S121) signed 29/06/06
S121 of 3 July 2006 (Legislative Instrument IMMI06/048), 'States and Territories with English Language Training arrangements (regulations 134.222C(2)(a), 139.226(b), 863.226(b) and 882.225(b))'	S 121	06/048	F2006L01865	01/07/06	31/08/07	S 237	yes	Signed 29/06/06; effective 1/7/06; revokes GN signed 15/12/05 (S237 - IMMI 05/098)
S237 of 21 December 2005, 'States and Territories with English Language Training arrangements (regulations 134.222C(2)(a), 139.226(b), 863.226(b) and 882.225(b))'	S 237	05/098		21/12/05	30/06/06	GN 49		Signed 15/120/05; effective 21/12/05; revokes GN signed 23/11/05
GN 49 of 8 December 2004, 'Specification of a State or Territory for the purposes of paragraphs 134.22C(2)(a), 139.226(b), 863.226(b) and 882.225(b) of the Migration Regulations 1994'	GN 49	-		08/12/04	20/12/05	GN 50		Signed 23/11/04; effective on gazettal - 8/12/04; revokes GN signed 10/12/02
GN 50 of 18 December 2002, 'Specification of a State or Territory for the purposes of paragraphs 134.22C(2)(a), 139.226(b), 863.226(b) and 882.225(b) of the Migration Regulations 1994'	GN 50	-		18/12/02	07/12/04	GN 15		Signed 10/12/02; effective 18/12/02; revokes GN signed 5/4/02

GN 15 of 17 April 2002, 'Specification of a State or Territory for the purposes of paragraphs 139.226(b), 863.226(b) and 882.225(b) of the Migration Regulations 1994'	GN 15	-		17/04/02	17/12/02	GN 34		Signed 5/4/02; effective on gazettal - 17/4/02; revokes GN signed 8/08/01
GN 34 of 29 August 2001, 'Specification of a State or Territory for the purposes of paragraph 139.226(b) of the Migration Regulations 1994'	GN 34	-		29/08/01	16/04/02	GN 41		Signed 8/08/01; effective on gazettal - 29/08/01; NB GN states that it revokes GN signed 27/2/01but GN was not signed on that date - rather signed 7/10/00
GN 41 of 18 October 2000, 'Specification of a State or Territory for the purposes of paragraph 139.226(b) of the Migration Regulations 1994'	GN 41	-		18/10/00	28/08/01	GN 35		Signed 7/10/00; revokes GN signed 7/8/00
GN 33 of 23 August 2000, 'Specification of a State or Territory for the purposes of paragraph 139.226(b) of the Migration Regulations 1994'	GN 33	-		23/08/00	17/10/00	GN 27		Signed 7/8/00; effective on gazettal - 23/8/00; revokes GN signed 28/6/99
GN 27 of 7 July 1999, 'Specification of a State or Territory for the purposes of paragraph 139.226(b) of the Migration Regulations 1994'	GN 27	-		01/07/99	22/08/00	n/a		Signed 28/6/99; effective 1/7/99

Notes

1. Clauses 134.222C(2)(a), 139.226(b), 475.214(b)(i), 475.214(c)(i), 487.215(b)(i), 487.215(c)(i),487.224(b)(i), 487.224(c)(i), 496.226(b), 863.226(b), 882.225(b) of Schedule 2 as in force at the relevant times, and items 6B34(a)(i), 6B34(b)(i), 6B101(f), 6B103(g)(ii) and 6B103(g)(iii) of Schedule 6B as in force at the relevant times, enabled a State or Territory to be specified by the Minister as one in which arrangements were established for suitable English language training. Subclasses 134, 139, 496, 863, 882 were omitted with effect from 1/7/12 and Subclasses 475 and 487 and Schedule 6B with effect from 1/7/13 (SLI 2012, No. 82).

2. IMMI 09/124, which commenced on 1/1/10, has no operation in relation to item 6B34, as this provision was omitted on that date (SLI 2009, No. 144).

English Language Tests, Score and Passports (r.1.15B, 1.15C, 1.15D, 1.15E, 1.15EA, cl.485.215, 487.215)

Title	Gazette	Immi	FRLI ref	In force		revokes	Explanatory Statement	Notes
				from	until			
Legislative Instrument IMMI 15/005, 'Language Tests, Score and Passports 2015 (Regulations 1.15B, 1.15C, 1.15D and 1.15EA)'	-	15/005	F2014L01666	11/12/14	current	14/076	yes	Made 3/12/14, commences 11/12/14
Legislative Instrument IMMI 14/076, 'Language Tests, Score and Passports (Regulations 1.15B, 1.15C, 1.15D and 1.15EA)'	-	14/076	F2014L01538	23/11/14	10/12/14	12/018	yes	Made 12/11/14, commences 23/11/14
Legislative Instrument IMMI 12/018, 'Language Tests, Score and Passports (Regulations 1.15B, 1.15C, 1.15D, 1.15E and 1.15EA)'	-	12/018	F2012L01287	1/07/12	22/11/14	11/036	yes	Made 12/6/12, commences 1/7/12 immediately after commencement of Migration Amendment Regulations 2012 (No.2)
Legislative Instrument IMMI 11/036, 'Language Tests, Score and Passports for General Skilled Migration (Regulations 1.15C, 1.15D, 1.15E and 1.15EA and cl.487.215)'	-	11/036	F2011L01233	1/07/11	30/06/12	09/073	yes	Made 16/6/11, registered 24/6/11, commences 1/7/11 immediately after commencement of Migration Amendment Regulations 2011 (No.3).
Legislative Instrument IMMI 09/073, 'English Language Tests for General Skilled Migration (Regulations 1.15C, 1.15D and Schedule 2, clauses 485.215 and 487.215)'	-	09/073	F2009L02575	1/07/09	30/06/11	08/084	yes	Signed 25/06/09, commences 01/07/09. Applies to GSM (post 1 September 2007)
Legislative Instrument IMMI 08/084, 'English Language Tests and Level Of English Ability for General Skilled Migration (Regulations 1.15C, 1.15D and clauses 485.215 and 487.215)'	-	08/084	F2008L03768	27/10/08	30/06/09	07/055	yes	Signed 10/10/08, commences 27/10/08. Applies to GSM (post 1 September 2007)
Legislative Instrument IMMI 07/055, 'English Language Tests and Level Of English Ability for General Skilled Migration (Regulations 1.15C, 1.15D and clauses 485.215 and 487.215)'	-	07/055	F2007L02688	1/09/07	26/10/08	n/a	yes	Signed 28/08/07, commences 01/09/07. New provisions operative 1/9/07 - no previous instruments

Notes

1. Templates referring to instruments: 485 English proficiency 1/9/07-30/6/11 - ref to IMMI in relevant law. Post 1/7/11 references to contents of IMMI incorporated into relevant law and findings and reasons; 487 English proficiency post 1/7/11 references to contents of IMMI incorporated into relevant law and findings and reasons; 885/886 English proficiency post 1/7/11 references to contents of IMMI incorporated into relevant law and findings and reasons.

2. r.1.15B sets out the definition of Vocational English. For guidance as to the relevant definition and relevant instrument at different points in time see MRD Legal Services Commentary 'English Language ability – Skilled/Business visas'.

3. r.1.15C sets out the definition of 'competent English'. For guidance as to the relevant definition and relevant instrument at different points in time see MRD Legal Services Commentary 'English Language ability – Skilled/Business visas'.

4. r.1.15D sets out the definition of 'proficient English'. For guidance as to the relevant definition and relevant instrument at different points in time see MRD Legal Services Commentary 'English Language ability – Skilled/Business visas'.

5. r.1.15E sets out the definition of 'concessional competent English'. This definition was omitted with effect from 1/7/13 (SLI 2012 No. 82). For guidance as to the relevant definition and relevant instrument at different points in time see MRD Legal Services Commentary 'English Language ability – Skilled/Business visas'.

6. r.1.15EA defines 'superior English'. For guidance as to the relevant definition and relevant instrument at different points in time see MRD Legal Services Commentary 'English Language ability – Skilled/Business visas'

7. cl.485.215 and 487.215 required evidence of arrangements to undergo a language test specified by the Minister in an instrument in writing for the paragraph: cl.485.215(c), applicable to visa applications made before 27/10/08, was omitted with effect from that date (SLI 2011 No. 74); cl.487.215(e) for visa applications made before 1/1/10 and 487.215(b) for visa applications made on or after that date and before 1/7/11, omitted with effect from 1/7/11 (SLI 2011 No. 74). For further guidance, see MRD Legal Services Commentary 'Subclass 485 & 487 – Skilled Temporary Onshore Visas (Class VC)' and 'English Language ability – Skilled/Business Visas'.

English Language Tests, Scores and Passports (cl. 476.213 and 485.212)

Title	Gazette	Immi	FRLI ref	In force		revokes	Explanatory Statement	Notes
				from	until			
Legislative Instrument IMMI 15/062, 'English Language Tests, Scores and Passports 2015 (Clauses 476.213 and 485.212)'	-	15/062	F2015L00564	18/04/15	current	n/a	yes	Made 16/4/2015, commences 18/4/2015

Notes

1. For visa applications made on or after 18/4/2015, cl.476.213 and 485.212 specify that the language test, test scores, the period in which the scores must be achieved and the passport type, are specified by the Minister in a legislative instrument in writing.

Evidence of Functional English Language Proficiency (r.5.17)

Title	Immi	FRLI ref	In force		revokes	Explanatory Statement	Notes
			from	until			
Legislative Instrument IMMI15/004, 'Evidence of Functional English Language Proficiency 2015 (Regulation 5.17)'	15/004	F2014L01668	1/01/15	current	14/055	yes	Made 3/12/14, commences 1/1/15
Legislative Instrument IMMI14/055, 'Evidence of Functional English Language Proficiency (Regulation 5.17)'	14/055	F2014L01551	23/11/14	31/12/14	12/073	yes	Made 12/11/14, commences 23/11/14
Legislative Instrument IMMI12/073, 'Evidence of Functional English Language Proficiency (Regulation 5.17)'	12/073	F2012L01447	1/07/12	22/11/14	nil	yes	Made 28/6/12, commences 1/7/12 immediately after commencement of Migration Amendment Regulations 2012 (no.3)

Notes

1. r. 5.17(a) (as substituted on 1/7/12: SLI 2012, No. 105) provides that, for the purposes of s.5(2)(b) of the Act, evidence specified by the Minister in an instrument in writing is prescribed evidence of the English language proficiency of a person.

2. s.5(2)(b) of the Act provides that, for the purposes of the Act, a person has functional English at a particular time if the person provides the Minister with prescribed evidence of the person's English language proficiency.

Institutions and Disciplines (cl.476.212)

Title	Gazette ref	Immi ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
				from	until			
Legislative Instrument IMMI14/010, 'Institutions and Disciplines for Subclass 476 (Skilled-Recognised Graduate) Visas (Clause 476.212)'	-	14/010	F2014L00130	14/02/14	currrent	12/105	yes	Dated 04/02/14, commences 14/02/14.
Legislative Instrument IMMI12/105, 'Institutions and Disciplines for Subclass 476 (Skilled-Recognised Graduate) Visas (Clause 476.212)'	-	12/105	F2012L01948	01/10/12	13/02/2014	10/053	yes	Dated 21/09/12, commences 1/10/12.
Legislative Instrument IMMI10/053, 'Institutions and Disciplines for Subclass 476 (Skilled-Recognised Graduate) Visas (Clause 476.212)'	-	10/053	F2010L02496	30/10/10	30/09/12	08/059	yes	Dated 17/09/10, commences 30/10/10.
Legislative Instrument IMMI07/062, 'Institutions and Disciplines Clause 476.212)'	-	08/059	F2008L03008	09/08/08	29/10/10	07/062	yes	Dated 5/08/08, commences 09/08/08.
Legislative Instrument IMMI07/062, 'Institutions and Disciplines (Regulation 476.212)'	-	07/062	F2007L02652	01/09/07	08/08/08	n/a	yes	Signed 28/08/07, commences 01/09/07. New provisions operative 1/9/07 - no previous instruments

Notes

1. Clause 476.212(b) requires the applicant for a Subclass 476 visa to have completed a course at institution specified by the Minister in an instrument in writing, for the ward of a degree or higher qualification in a discipline specified in an instrument in writing. At present, the institution and discipline are specified in the same instrument.

Educational Institutions (cl.485.231)								
Title	Gazette	Immi ref	FRLI Ref	in force		revokes	Explanatory statement	Notes
				from	to			
Legislative Instrument IMMI 13/031, 'Educational Institutions (Clause 485.231)'	-	13/031	F2013L00529	23/03/13	current	-	yes	Dated 19/03/13, commences 23/03/13 immediately after commencement of Migration Legislation Amendment Regulations 2013 (No.1)

Notes

1. **Subclause 485.231(2)** (for the Post-Study Work stream) requires each qualification that the applicant must hold under 485.231(1) was conferred or awarded by an educational institution specified by the Minister in an instrument in writing for the subclause.

Qualifications (cl.485.231)								
Title	Gazette	Immi ref	FRLI Ref	in force		revokes	Explanatory statement	Notes
				from	to			
Legislative Instrument IMMI 13/013, 'Qualifications (Clause 485.231)'	-	13/013	F2013L00528	23/03/13	current	-	yes	Dated 19/03/13, commences 23/03/13 immediately after commencement of Migration Legislation Amendment Regulations 2013 (No.1)

Notes

1.Subclause 485.231(1) (for the Post-Study Work stream) requires that the applicant holds a qualification or qualifications of a kind specified by the Minister in an instrument in writing for the subclause.

Skilled Occupations for Skilled Assessments

Title	Gazette ref	Immi ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
				from	until			
Legislative Instrument IMMI 10/027, Skilled Occupations for Skills Assessments (Subclause 175.211(1), subclause 176.211(1) and subclause 475.211(1))	-	10/027	F2010L01326	01/07/10	current	10/012	yes	Signed 17/06/10. Commences 01/07/10. Revokes IMMI 10/012.
Legislative Instrument IMMI 10/012, Skilled Occupations for Skills Assessments	-	10/012	F2010L00657	12/03/10	30/06/10	09/143	yes	Signed 09/03/10. Commences 12/03/10. Revokes IMMI 09/0143.
Legislative Instrument IMMI 09/143, Skilled Occupations for Skills Assessments, (subparagraph 1136(3)(bb)(ii), 1229(3)(ab)(ii) and subclauses 175.211(1), 176.211(1) and 475.211(1))	-	09/143	F2009L04521	01/01/10	11/03/10	n/a	yes	Signed 15/12/09. This applies in relation to application for visas made on or after 1 January 2010.

Notes

1. Items 1136 and 1229 of Schedule 1 set out the visa application requirements for Class VB (subclasses 885, 886 and 887) and VC (subclasses 485 and 487) respectively. **Paragraphs 1136(3)(bb) and 1229(3)(ab)** (applicable to visa applications made on or after 1/1/2010) provide that, if the applicant is not seeking to satisfy the criteria for the grant of a subclass 887 or 485 visa respectively, and has nominated a skilled occupation specified by the Minister in an instrument in writing for the purposes of this paragraph, then the applicant's skills must have been assessed by the relevant assessing authority, on or after 1 January 2010, as suitable for the applicant's nominated skilled occupation.

2. Subclauses 175.211(1), 176.211(1) and 475.211(1) (applicable to visa applications made on or after 1/1/2010) provide that, if an applicant has nominated a skilled occupation, which is specified by the Minister in an instrument in writing for these subclauses, the applicant must have been employed in the skilled occupation for at least 12 months in the period of 24 months ending immediately before the day on which the application was made.

Technical Equivalent Occupations (r.2.26(5), Sch 6)

Title	Gazette	immi ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
				from	until			
GN 1 of 7 January 1998, 'Specification of technical equivalent occupations under subregulation 2.26(5)'	GN 1		F2006B00551	07/01/98	current	GN 34		Signed 12/12/97; effective on Gazettal, 7/1/98
GN 34 of 31 August 1994, 'Specification of technical equivalent occupations under subregulation 2.26(5)'	GN 34			01/09/94	06/01/98	-		Signed 22/8/94; effective 1/9/94

Notes

1. The Technical Equivalent Occupation list (TEOL) is relevant to the Employment Qualification assessment in Part 1 of Schedule 6 to the Regulations which set out the General Points Test for Visa Classes AT (Subclasses 126 and 135) and AG (Subclasses 105 and 106). These visas were closed to new applications in 1999 and Schedule 6 was omitted with effect from 1/7/12 (SLI 2012, No. 82).

2. Regulation 2.26C(5) defined 'technical equivalent **occupation**' to mean an occupation specified by written instrument for this definition as a technical-equivalent occupation. This provision was omitted with effect from 1/7/12 (SLI 2012, No. 82).

Professional Equivalent Occupations (r.2.26(5), Sch 6)

Title	Gazette	Immi ref	FRLI ref	In force		revokes	Explantory Statement	Notes
				from	until			
GN 1 of 7 January 1998, 'Specification of professional-equivalent occupations under subregulation 2.26(5)'	GN 1			07/01/98	current	GN 34	-	Signed 5/12/97, effective on gazettal, 7/1/98; revokes GN 34
GN 34 of 31 August 1994, 'Specification of professional-equivalent occupations under subregulation 2.26(5)'	GN 34			01/09/94	06/01/98	-	-	Signed 22/8/94; effective 1/9/94

Notes

1. The Professional Equivalent Occupation list (PEOL) is relevant to the Employment Qualification assessment in Part 1 of Schedule 6 to the Regulations which set out the General Points Test for Visa Classes AT (Subclasses 126 and 135) and AG (Subclasses 105 and 106). These visas were closed to new applications in 1999 and Schedule 6 was omitted with effect from 1/7/12 (SLI 2012, No. 82).

2. r.2.26C(5) defined 'professional equivalent **occupation**' to mean an occupation specified by written instrument for this definition as a professional-equivalent occupation. This provision was omitted with effect from 1/7/12 (SLI 2012, No. 82).

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Skilled visa applications – form, manner and place (specifications under various items of Schedules 1 and 2)

Visa Class	Title	Gazette ref	Immi ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
					from	until			
VB, VC, VF, SI, SN, SP	Legislative Instrument IMMI15/035, 'Arrangements for Skilled and Temporary Graduate Visa Applications 2015 (Items 1136, 1137, 1138, 1228, 1229 and 1230)'	-	15/035	F2015L00556	18/04/15	current	14/071 and 13/014 (see 'Forms' tab)	yes	Dated 16/04/15, commences 18/04/15; revokes IMMI14/071 and IMMI13/014
VC, VF	Legislative Instrument IMMI14/071, 'Post Office Box and Courier Addresses (Paragraphs 1228(3)(a) and 1229(3)(c))'	-	14/071	F2014L01031	28/07/14	17/04/15	13/144	yes	Dated 18/07/14; commences 28/07/14; revokes IMMI13/144
VB, VC, VE, VF	Legislative Instrument IMMI13/144, 'Post Office Box and Courier Addresses (various provisions of Schedules 1 and 2 to the Regulations)'	-	13/144	F2013L02046	01/01/14	27/07/14	13/034	yes	Dated 28/11/13; commences 01/01/14; revokes IMMI13/034
VB, VC, VE, VF	Legislative Instrument IMMI13/034, 'Post Office Box and Courier Addresses (various provisions of Schedules 1 and 2 to the Regulations)'	-	13/034	F2013L00532	23/03/13	31/12/13	07/057	yes	Signed 19/03/13; commences 23/03/13, immediately after commencement of Migration Legislation Amendment Regulation 2013 (No.1); revokes IMMI07/057
BN, BR, BQ, CC, DD, DE, UQ, UX, UZ, VB, VC, VE, VF	Legislative Instrument IMMI07/057, 'Post Office Box and Courier Addresses (various provisions of Schedule 1 and 2 to the Regulations)'	-	07/057	F2007L02691	01/09/07	22/03/13	06/040	yes	Signed 28/08/07; effective 01/09/07; revokes IMMI06/040
BN, BR, BQ, CC, DD, DE, UQ, UX	Legislative Instrument IMMI06/040, 'Post Office Box and Courier Addresses (various provisions of Schedule 1 and 2 to the Regulations)'	-	06/040	F2006L01836	01/07/06	31/08/07	05/078	yes	Signed 22/06/06; Effective 1/7/06; revokes IMMI 05/078
	Legislative Instrument IMMI05/078, 'Specification Of Post Office Box Address And Address For Courier Delivery Under Various Provisions Of Schedule 1 To The Migration Regulations 1994'	-	05/078	-	22/10/05	30/06/06	GN26 (see line 8); GN26 (line 7) and GN43 (line 9)	yes	Signed 10/10/05; effective 22/10/05; revokes instrument signed 17/06/04
UX	GN26 of 2004, 'Specification for the purposes of subparagraphs 1218A(3)(b)(i) and 1218A(3)(b)(ii) of Schedule 1 - Post Office Box Address and Address for Courier Delivery'	GN26	-	-	01/07/04	21/10/05	-		Signed 17/06/04; effective 1/7/04
UQ	GN26 of 2004, 'Specification of Post Office Box Addresses for Courier Delivery for the purpoSes of paragragh 1212A(3)(j) of Schedule 1 to the Migration Regulations'	GN26	-	-	30/06/04	21/10/05	all existing re 1212A(3)(j)	-	Signed 17/06/04; effective on publication; revokes all previous

	GN43 of 2001, 'Approval for the purposes of Schedule 1 subparagraphs 1128AA(3)(aa), 1128B(3)(aa), 1128BA(3)(h), 1128C(3)(aa), 1128CA(3)(c) and 1128D(3)(aa) - of Post Office Box and Courier Delivery Address'	GN43	-		16/10/01	21/10/05	-		Signed 16/10/01; published 31/10/01

Notes

1. For instruments and Gazette Notices in force before 18/4/2015, they specify post office box and courier addresses for various items of Schedule 1 and Schedule 2 each of which provides that an application for a Skilled visa class to which it applies, or a sponsorship associated with an application for the Skilled visa subclass to which it applies, must be made by posting the application, or sponsorship, to the post office box address specified by the Minister, or by having the application delivered to the address specified by the Minister.

2. IMMI 15/035 specifies approved forms, and the place and manner for making Subclass 189, 190, 476, 485, 489 and 887 visa applications.

Professional Year Programs(Specification under r.2.26AA(6), 2.26AA(9), 2.26AB(7), 2.26AC(6))								
Title	Gazette / Registered	Ref	FRLI ref	In force		revokes	Explanatory statement	Notes
				from	until			
Migration (LIN 18/170: Professional Year Programs) Instrument 2018	14/12/2018	LIN 18/170	F2018L01758	15/12/2018	current	12/029	yes	Made 06/12/2018, commences 15/12/2018.
Legislative Instrument IMMI 12/029, 'Professional Year Programs (subregulations 2.26AA(9), 2.26AB(7) and 2.26AC(6)'		IMMI 12/029	F2012L01290	1/07/12	14/12/2018	08/074	yes	Made 12/06/12, commences 01/07/12 immediately after commencement of Migration Amendment Regulations 2012 (No.2).
Legislative Instrument IMMI 08/074, 'Professional Year Programs (subregulation 2.26AA(6) definition of "Professional Year")'	-	IMMI 08/074	F2008L03767	27/10/08	30/06/12	08/011	yes	Made 01/10/08, commences 27/10/08.
Legislative Instrument IMMI 08/011, 'Professional Year Programs (subregulation 2.26AA(6) definition of "Professional Year")'	-	IMMI 08/011	F2008L01012	4/04/08	26/10/08	08/002	yes	Made 01/04/2008, commences 04/04/2008.
Legislative Instrument IMMI 08/002, 'Professional Year Programs (subregulation 2.26AA(6) definition of "Professional Year")'	-	IMMI 08/002	F2008L00487	15/02/08	03/04/08	-	yes	Made 14/02/2008, commences 15/02/2008.

Notes

1. r.2.26AA(6) for pre 1/7/12 visa applications and r.2.26AA(9), 2.26AB(7) and 2.26AC(6) for post 1/7/12 visa applications, provide that 'professional year' in Schedule 6B, 6C and 6D respectively means a course specified by the Minister in an instrument in writing for this definition.

2. Schedules 6B, 6C and 6D set out the Points Test for certain General Skilled Migration visas. Parts 6B.5, 6C.6 and 6D.6 award points where an applicant has completed a 'professional year' in Australia. Schedules 6B and 6C were omitted with effect from 1/7/13 (SLI 2012, No. 82).

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Definition of Academic Year (r.1.03)								
Title	Gazette	Immi ref	FRLI ref	In force		revokes	Explanatory statement	Notes
				from	until			
Migration (LIN 19/085: Academic Year) Instrument 2019		LIN19/085	F2019L00508	3/04/2019	current	09/040	yes	Signed 26/03/2019, registered 02/04/2019, commences 03/04/2019
Legislative Instrument IMMI 09/040, 'Definition of "Academic Year" (regulation1.03)'	-	09/040	F2009L01654	15/05/09	2/04/2019	-	yes	Signed 14/05/09, commences 15/05/09.

Notes

1. r.1.03 defines 'academic year' to mean a period that is specified by the Minister as an academic year in an instrument in writing for the definition. The definition applies only to visa applications made on or after 15/5/09 (SLI 2009, No.84).

Determination of the Fixed Maximum Number of Specified Skilled Visas that may be Granted / Maximum Number of Visas that may be Granted (s.39; cl.134.228(b), 136.231(b), 137.230(b), 138.233(b), and 139.234(b))								
Title	Gazette	Immi ref	FRLI ref	in force		revokes	Explanatory statement	
				from	to			
Legislative Instrument IMMI 15/112, Determination of the Fixed Maximum Number of Specified Skilled Visas that may be granted in the 2015-2016 Financial Year.	-	15/112	F2015L01455	22/09/15	current	10/023	yes	Signed 14/09/15, registered 18/09/15; commences 22/09/15.
Legislative Instrument IMMI 10/023, Determination of the Maximum Number of Certain Skilled Visas that may be granted in the 2009-10 Financial Year.	-	10/023	F2010L01599	25/06/10	21/09/15	-	yes	Signed 23/06/10, registered 24/06/10; commences 25/06/10.

Notes

1. Paragraphs 175.228(a), 176.229(a) and 475.229(a) of Schedule 2 (referred to in IMMI 15/112) provided that the approval of the application must not result in the number of visas of particular classes (including the relevant subclass) granted in a financial year exceeding the maximum number of visas of those classes, as determined by an instrument in writing for the relevant paragraph, that may be granted in that financial year. Parts 175, 176 and 475 were omitted with effect from 1/7/13 (SLI 2012, No. 82).

2. Paragraphs 134.228(b), 136.231(b), 137.230(b), 138.233(b) and 139.234(b) of Schedule 2 (referred to in IMMI 10/023) provided that the approval of the application must not result in the number of visas of particular classes (including the relevant subclass) granted in a financial year exceeding the maximum number of visas of those classes, as determined by an instrument in writing for the relevant paragraph, that may be granted in that financial year. Parts 134, 136, 137, 138 and 139 were omitted with effect from 1/7/12 (SLI 2012, No. 82).

3. The power to cap the number of visas that may be granted in a financial year is conferred by s.85 of the Act; in addition, s.39(1) confers power to prescribe by regulation a criterion for visas, other than protection visas, which operates by reference to a legislative instrument made under s.85: see *Plaintiff S297/2013 v MIBP* [2014] HCA 24 and *Plaintiff M150 of 2013 v MIBP* [2014] HCA 24. Under s.39(2), when a criterion allowed by subsection (1) prevents the grant in a financial year of any more visas of a particular class, any outstanding applications for the grant in that year of visas of that class are taken not to have been made.

Class of Persons for r.2.26AA(2) and r.2.26AB(2)

Title	Gazette	Immi ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
				from	until			
Legislative Instrument IMMI 12/068 'Skilled Occupations, Relevant Assessing Authorities, Countries and Points for General Skilled Migration Visas and Certain Other Visas (Regulation 1.15I, Subregulation 2.26AA(2), r.2.26AB(2) and 2.26B(1), Subparagraphs 1128BA(3)(j)(ii), 1136(3)(bb)(ii), 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1218A(5)(g)(ii), 1218A(5)(g)(iii), 1229(3)(ab)(ii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii), items 6A11, 6A12, 6A13)'		12/068	F2012L01314	1/07/12	current	11/068	yes	Dated 12/6/12, commences 1/7/2012, revokes IMMI11/068
Legislative Instrument IMMI 12/065 'Skilled Occupations, Relevant Assessing Authorities, Countries and Points for General Skilled Migration Visas and certain Other Visas (Regulation 1.15I, Subregulations 2.26AA(2), 2.26AB(2) and 2.26B(1), Subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii))'		12/065	F2012L01322	1/07/12	current		yes	Dated 12/6/12, commences 1/7/2012.
Legislative Instrument IMMI 11/068 'Skilled Occupations, Relevant Assessing Authorities, Countries and Points for General Skilled Migration Visas and Certain Other Visas (Regulation 1.15I, Subregulation 2.26AA(2), r.2.26AB(2) and 2.26B(1), Subparagraphs 1128BA(3)(j)(ii), 1136(3)(bb)(ii), 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1218A(5)(g)(ii), 1218A(5)(g)(iii), 1229(3)(ab)(ii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii), items 6A11, 6A12, 6A13)'		11/068	F2011L02011	1/10/11	30/06/12	11/034	yes	Signed 28/9/11, commences 1/10/11, revokes IMMI11/034.
Legislative Instrument IMMI 11/034 'Skilled Occupations, Relevant Assessing Authorities, Countries and Points for General Skilled Migrations Visas and Certain Other Visas (Regulation 1.15I, Subregulations 2.26AA(2), r.2.26AB(2) and 2.26B(1), Subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii), items 6A11, 6A12, 6A13)'		11/034	F2011L01227	01/07/11	30/09/11	n/a	yes	Made 16/6/11, registered 24/6/11, commences 1/7/11 immediately after commencement of Migration Amendment Regulations 2011 (No.3).

Notes

1. r.1.15I defines 'skilled occupation'. **r.1.15I(1)** provides that a *skilled occupation* , in relation to a person, means an occupation of a kind that is specified by the Minister in an instrument in writing to be a skilled occupation, for which a number of points specified in the instrument are available, and is applicable to the person in accordance with the specification of the occupation. **r.1.15I(2)** provides that, without limiting subregulation 1.15I(1) the Minister may specify in the instrument any matter in relation to an occupation, or to a class of persons to which the instrument relates, including that an occupation is a skilled occupation for a class of persons, and that an occupation is a skilled occupation for a person who is nominated by a State or Territory government agency.

2. Regulation 2.26AA applies to an applicant for a points tested General Skilled Migration visa if the application is made on or after 1/7/11 but before 1/1/13 and the applicant is a person, or a person in a class of persons specified in an instrument in writing made by the Minister for r.2.26AA(2)(a). Regulation 2.26AA was omitted with effect from 1/7/13 (SLI 2012, No.82).

3. Regulation 2.26AB applies to an applicant for a points tested General Skilled Migration visa if the applicant is a person in a class of persons specified by the Minister in an instrument in writing for r.2.26AB(2) and the application is made on or after 1/7/11 but before 1/1/13 and the applicant's score is assessed in accordance with Schedule 6B and that assessed score is less than the applicable pass mark at the time the score is assessed. r.2.26AB also applies to an applicant if the application is made on or after 1/7/11 and r.2.26AA(2) does not apply. Regulation 2.26AB and Schedule 6B were omitted with effect from 1/7/13 (SLI 2012, No.82).

4. r. 2.26B(1) provides that the Minister may, by an instrument in writing, specify a person or body as the relevant assessing authority for a skilled occupation (if the person or body is approved in writing by the Education Minister or the Employment Minister as the relevant assessing authority for the 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. ***Education Minister*** and ***Employment Minister*** are defined in r.1.03.

5. Items 1128BA(3)(j)(ii), 1136(3)(bb)(ii), 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1218A(5)(g)(ii), 1218A(5)(g)(iii), 1229(3)(ab)(ii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii) of Schedule 1 enable a skilled occupation to be specified by the Minister in an instrument in writing.

6. Items 6A11, 6A12 and 6A13 of Schedule 6A awarded points where the skilled occupation nominated by the applicant in his or her application was specified by an instrument in writing for the item as a skilled occupation for which at least 60, 50 and 40 points respectively were available. Schedule 6A was omitted with effect from 1/7/12 (SLI 2012, No. 82) in respect of applications made on and after that date.

Occupations Requiring English (r.1.19, Schedule 6)

Title	Gazette	Immi ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
				from	until			
GN 6 of 11 Fedbruary 1998, 'List of Occupations Requiring English - regulation 1.19'	GN 6			11/02/98	current	GN 50		Signed 2/2/98; effective 11/2/98; revokes all earlier notices made under r.1.19.
GN 50 of 18 December 1996, 'List of Occupations Requiring English - regulation 1.19'	GN 50			01/07/97	10/02/98	GN 34		Signed 12/12/96; effective 1/7/97; revokes all earlier notices made under r.1.19.
GN 34 of 31 August 1994, 'Occupations requiring English List - regulation 1.19'	GN 34			01/09/94	30/06/97	N/A		Signed 22/8/94; effective 1/9/94.

Notes

1. Regulation 1.19 provides that the Minister may publish by Gazette notice, a list of occupations requiring proficiency in English of at least the standard required for the award of 15 points under Part 3 of Schedule 6 (the Occupations Requiring English (ORE) List). r.1.19 was omitted on 1/7/12 (SLI 2012, No. 82).

2. Schedule 6 set out the General Points Test for visa Classes AT (Subclasses 126 and 135) and AJ (Subclasses 105 and 106). Part 3 of Schedule 6 dealt with the award of points on the basis of an applicant's language skills Visa classes AT and AJ were closed to new applications on 1 July 1999. Schedule 6 and the visa classes to which it applied were omitted on 1/7/12 (SLI2012, No. 82).

Credentialled Community Language Qualifications (Items 6C91(a),(b), 6D91(a), (b))

Title	Immi ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
			from	until			
Credentialled Community Language Qualifications (Paragraphs 6C91(a) and (b) and 6D91(1) and (b))	12/020	F2012L01285	1/07/12	current	11/038	yes	Made 12/6/12, commences 1/7/12 immediately after commencement of Migration Amendment Regulations 2012 (no.2)
Credentialled Community Language Qualifications (Subitems 6C91(a) and (b))	11/038	F2011L01225	01/07/11	30/06/12	n/a	yes	Made 16/6/11, registered 24/6/11, commences 1/7/11 immediately after commencement of Migration Amendment Regulations 2011 (No.3).

Notes

1. Items 6C91 and 6D91 in Schedules 6C and 6D to the Regulations provide that the applicant has a qualification in a particular language awarded or accredited by a body specified by the Minister in an instrument in writing and at a standard for the language specified in the instrument. Schedule 6C was omitted with effect from 1/7/13 (SLI 2012, No. 82).

2. Schedule 6C is the General Points Test specified in r.2.26AB for certain General Skilled Migration visas for applications made on or after 1/7/11 and other specified applications. Schedule 6C and r.2.26AB were omitted with effect from 1/7/13 (SLI 2012, No.82).

3. Schedule 6D is the General Points Test specified in r.2.26AC for General Skilled Migration visa classes SI, SN and SP, Subclasses 189, 190 and 489 respectively.

Educational Qualifications (Item 6C.76(b), r.2.26AC(5)(b))

Title	Immi ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
			from	until			
Specification of Assessing Body for Certain Educational Qualifications (paragraph 6C76(b) and r.2.26AC(5)(b))	12/019	F2012L01282	1/07/12	current	11/037	yes	Made 12/6/12, commences 1/7/12 immediately after commencement of Migration Amendment Regulations 2012 (no.2)
Educational Qualifications (paragraph 6C.76(b))	11/037	F2011L01239	01/07/11	30/06/12	n/a	yes	Made 16/6/11, registered 24/6/11, commences 1/7/11 immediately after commencement of Migration Amendment Regulations 2011 (No.3).

Notes

1. Paragraph 6C76(b) in Schedule 6C to the Regulations provides that, for items 6C71 and 6C72, for the purpose of being satisfied that a qualification is of a recognised standard, the Minister must have regard to whether the qualification has been recognised by another body, specified by the Minister in an instrument in writing. Schedule 6C was the General Points Test specified in r.2.26AB for certain General Skilled Migration visas for applications made on or after 1/7/11 and other specified applications. Schedule 6C and r.2.26AB were omitted with effect from 1/7/13 (SLI2012, No. 82).

2. r.2.26AC(5)(b) provides that for Schedule 6D items 6D71 and 6D72, in determining whether an educational qualification is of a recognised standard, the Minister must have regard to whether the educational qualification is recognised by a body specified in an instrument in writing. r.2.26AC specifies Schedule 6D as the General points Test for General Skilled visa classes SI, SN and SP, subclasses 189, 190 and 489 respectively.

Specialist Educational Qualifications (r.2.26AC(5A)(b), r.2.26AC(5B), Item 6D7A1)

Title	Immi ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
			from	until			
Specification of Fields of Education 2016/076 (Subregulation 2.26AC(5B))	16/076	F2016L01412	10/09/16	current	n/a	yes	Dated 7/9/16, registered 9/9/16, commences 10/9/16 immediately after commencement of Migration Amendment (Entrepreneur Visas and Other Measures) Regulation 2016.

Notes

1. r.2.26AC(5A) defines 'specialist educational qualification' for Schedule 6D item 6D7A1 as a person satisfying the Minister that they have met the requirements for the award, by an Australian educational institution, of a masters degree by research or a doctoral degree, which included study for at least 2 academic years at the institution in a field of education specified in an instrument under **r.2.26AC(5B)**. r.2.26AC specifies Schedule 6D as the General points Test for General Skilled visa classes SI, SN and SP, subclasses 189, 190 and 489 respectively.

Visa Application Forms for Temporary Graduate (Subclass 485) Visa (item 1229(1)) - before 18 April 2015

Title	Gazette	Immi ref	FRLI Ref	in force		revokes	Explanatory statement	Notes
				from	to			
Legislative Instrument IMMI 13/014, 'Forms for the Temporary Graduate (Subclass 485) Visa (Subitem 1229(1))'	-	13/014	F2013L00533	23/03/13	17/04/2015	-	yes	Dated 19/03/13, commences 23/03/13 immediately after commencement of Migration Legislation Amendment Regulations 2013 (No.1). Revoked by IMMI15/035 (see 'VisaApp' tab).

Notes

1. Subitem 1229(1) as substituted on 23/3/13 provides that the form or forms for Skilled (Provisional) (Class VC) visa are the form or forms specified by the Minister in an instrument in writing for the subitem. Applies to visa applications made on or after 23/3/13 (SLI 2013, No. 33).

2. From 18/4/15, item 1229 as further amended provides that the approved form, the place and the manner for making a visa application are specified by the Minister in an instrument in writing. Applies to visa applications made on or after 18/4/15 (SLI2015, No.34). For relevant instrument, see 'VisaApp' tab.

Specification of Income Threshold and Exemptions for Subclass 189 Skilled - Independent Visa (New Zealand Stream) (cl.189.233)

Title	Ref	FRLI Ref	in force		revokes	Registered	Explanatory statement	Notes
			from	to				
Migration (LIN 18/138: Specification of Income Threshold and Exemptions for Subclass 189 (Skilled - Inependent) Visa (New Zealand Stream)) Instrument 2018	LIN 18/138	F2018L01738	12/12/2018	current	IMMI 17/035	12/12/2018	yes	Dated 06/12/2018, commences 12/12/2018. Applies to all applications for a Subclass 189 (Skilled - Independent) visa (New Zealand Stream) made but not finally determined.
Migration (IMMI 17/035: Specification of Income Threshold and Exemptions for Subclass 189 Skilled - Independent Visa (New Zealand Stream)) Instrument 2017	IMMI 17/035	F2017L00723	01/07/17	11/12/2018	-	22/06/2017	yes	Dated 21/06/2017, commences 01/07/17.

Notes

1 Cl.189.233(1)(a) provides the minimum amount of taxable income for the income year

2 Cl.189.233(1)(b) provides the classes of exempt applicants and evidence required for exempt applicants

Skilled occupation / Australian study requirement

CONTENTS

Overview

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.[1]

To make a valid application for most GSM visas, the applicant must nominate a skilled occupation in the visa application form.[2] Criteria for these visas 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.[3] Broadly speaking, a person satisfies the requirement by completing a course or courses of specified kinds, over a specified period. 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.[4]

Skilled occupation

Key concepts and definitions

Skilled occupation

'Skilled occupation' is defined in r.1.15I of the Migration Regulations 1994 (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

[1] 'General Skilled Migration visa' is defined in r 1.03 to mean a Subclass 175, 176, 189, 190, 475, 476, 485, 487, 489, 885, 886 or 887 visa, granted at any time: inserted by Migration Amendment Regulations 2007 (No.7) (SLI 2007, No.257), amended by Migration Amendment Regulations 2012 (No.2) (SLI 2012, No.82).

[2] 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; 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) (SLI 2013, No.33). There are some exceptions, e.g. where the applicant already holds a relevant temporary skilled visa: see e.g. item 1230(5).

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

[4] Prior employment in a skilled occupation for a specified period is a Schedule 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

- that is applicable to the person in accordance with the specification of the occupation.[5]

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'.[6] Occupations are grouped by ANZSCO into five hierarchical levels and classified by reference to defining criteria including a 'lead statement', 'skill level' and 'tasks'.[7]

For visa applications made on or after 1 July 2013 'ANZSCO' has the meaning specified by the Minister in an instrument in writing.[8] 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 Australian Bureau of Statistics, and may also specify a currency date. ANZSCO is available online.

Relevant assessing authority

'Relevant assessing authority' is defined in r.1.03 as a person or body specified under r.2.26B. Under r.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 can not specify a person or body as a relevant assessing authority unless the Education or Employment Minister has approved the person or body in writing.[9] The instrument for the purposes of r.2.26B(1) is also the instrument which specifies skilled occupations for the purposes of r.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 r.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* (ESOS Act), to

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Language Ability. An applicant's nominated skilled occupation is also relevant to a number of qualifications under the points test – see the Commentaries: Skilled Visas – overview, General Points Test (Schedule 6C) and General Points Test (Schedule 6D).

[5] Reg 1.15I(1)(a), (b) and (c) respectively, as inserted by Migration Amendment Regulations 2010 (No.6) (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) (SLI 2011, No.74). There are no transitional provisions for this amendment, so it applies to all applications as of 1 July 2011: see r 3(2) and Note.

[6] *Seema v MIAC* (2012) 203 FCR 537 at [44].

[7] See *Parekh v MIAC* [2007] FMCA 633 (Smith FM, 10 March 2007) at [11].

[8] Reg 1.03 as amended by Migration Legislation Amendment Regulation 2013 (No.3) (SLI 2013, No.146). For applications made before 1 July 2013 'ANZSCO' was defined by r 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*.

[9] Reg 2.26B(1A) as amended by Migration Amendment Regulations 2007 (No.1) (SLI 2007 No.69). 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.

provide the course to overseas students.[10] 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.[11] 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 r.1.15I(1)(a). These occupations apply 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 r.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).[12] For invitations issued and applications made from 19 April 2017 until 17 March 2018, there were two lists called the MLTSSL and the STSOL.[13] 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

LIN 19/051 applies to applications made or invitations issued from 11 March 2019 and IMMI 18/051 applies to applications made or invitations issued from 18 March 2018 to 10 March 2019.[14]

The MLTSSL, STSOL and ROL are in tables in each instrument.[15] A further table sets out which list applies to which applicants.[16] The MLTSSL generally applies to all persons invited to apply for subclass 189, 190 and 489 visas, applicants for subclass 485 visas, and their spouses or de facto partners.[17] The STSOL is only available to government nominated subclass 190/489 invitees and partners.[18] The ROL is only available to government nominated subclass 489 invitees and partners.[19]

[10] The definition was amended by SLI 2013 No.33 to reflect changes to the ESOS Act made by the *Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Act 2012* (Act No.9 of 2012). Section 9 was replaced by Division 3 of Part 2 (ss 9AA to 9AH), which now provides for a similar system of course registration.
[11] 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.
[12] 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.
[13] 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.
[14] IMMI 18/051 was repealed by LIN 19/051. LIN 19/051 Part 3 s 13 provides that IMMI 18/051 continues to apply to applications made or invitations issued from 18 March 2018 to 10 March 2019.
[15] Sections 8, 9 and 10(1) of LIN 19/051; ss 8(1), 9(1) and 10(1) of IMMI 18/051.
[16] Section 7(1) of LIN 19/051; s 7(1) of IMMI 18/051.
[17] Items 1, 2, 3 and 4 of the table in s 7(1) of LIN 19/051; Items 1, 2, 3 and 4 of the table in s 7(1) of IMMI 18/051.
[18] Item 3 of the table in s 7(1) of LIN 19/051; Item 3 of the table in s 7(1) of IMMI 18/051.
[19] Item 4 of the table in s 7(1) of LIN 19/051; Item 4 of the table in s 7(1) of IMMI 18/051.

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.[20]

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.[21]

The MLTSSL and STSOL are in tables in each instrument.[22] A further table sets out which list applies to which applicants.[23] 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.[24] The STSOL is only available to government nominated subclass 190/489 invitees and their partners.[25]

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;[26]
- STSOL – these occupations apply only to government nominated subclass 489 applicants.[27]

IMMI 16/059

This instrument applies to visa applications made and invitations issued from 1 July 2016 to 30 June 2017.[28] There are two versions of the lists in this instrument applicable, depending on the time that invitations were issued or visa applications made.

Applications / invitations from 19 April 2017 to 30 June 2017

IMMI 16/059 was amended by IMMI 17/040 on 19 April 2017.[29] These amendments renamed the former SOL to the MLTSSL and the former CSOL to the STSOL and removed a number of occupations.[30] 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, and their partners, and also to persons who make an application for a Subclass 485 visa.[31] Occupations

[20] Section 8(2) of IMMI 18/051.
[21] IMMI 17/072 was repealed by IMMI 18/007. IMMI 18/007 Part 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 Part 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.
[22] Sections 8(1) and 9(1) of IMMI 18/007; ss 7(1) and 8(1) of IMMI 17/072
[23] Section 7(1) of IMMI 18/007; s 6(1) of IMMI 17/072.
[24] 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.
[25] 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.
[26] s 8(2) of IMMI 18/007; s 7(2) of IMMI 17/072.
[27] s 9(2) of IMMI 18/007; s 8(2) of IMMI 17/072.
[28] 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) Part 2 of sch 1 to IMMI 17/081.
[29] 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].
[30] Explanatory Statement to IMMI 17/040 at [3]-[4].
[31] Items 3-5 of IMMI 16/059 as amended by IMMI 16/118 and IMMI 17/040.

marked ‘see note 25’ are restricted to applications for subclass 189, subclass 485, and non-government-nominated subclass 489 visas.[32]

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.[33]

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.[34] 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.[35] 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.

Nominating a skilled occupation

With limited exceptions,[36] 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.[37]

In relation to applications for Subclasses 189, 190 and 489, 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.[38] 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.

[32] Item 10 and note 25 of IMMI 16/059 as amended by IMMI 16/118 and IMMI 17/040.
[33] Item 10 and note 26 of IMMI 16/059 as amended by IMMI 16/118 and IMMI 17/040.
[34] 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).
[35] 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.
[36] E.g. where the applicant already holds a relevant temporary skilled visa: see e.g. item 1230(5).
[37] 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; 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.
[38] 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.

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.[39]

For subclass 189, 190 and 489 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.[40]

For other GSM visas, there is no clear answer as to whether an applicant can *correct a mistake* in the nominated occupation.[41] There are several cases in which applicants have alleged they had mistakenly nominated the wrong occupation, however in each of these cases, the Tribunal rejected at a factual level the assertion that the nominated occupation was incorrect.[42]

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.[43] 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).[44]

For example, in *Pavuluri* 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.[45] 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.[46]

[39] *Patel v MIAC* (2011) 198 FCR 62 at [53] – [61], and *Pavuluri v MIBP* [2014] FCA 502 (Mortimer J, 16 May 2014) at [9] and [35] agreeing with what Robertson J said in *Patel*. In *Akbar v MIBP* [2019] FCA 515 (Collier J, 16 April 2019) 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.

[40] Items 1137(4) table item 4; 1138(4) table item 4; 1230(4) table item 4 First Provisional visa stream of Sch 1. Sub-cls 189.212(1), 190.212(1) and 489.222(1) of Sch 2; Sch 6D Parts 6D.3, 6D.4, 6D.6, 6D.7 and 6D.11.

[41] E.g. Subclass 485, 487, 885 and 886 visas.

[42] E.g. *Patel v MIAC* [2011] FMCA 399 (Nicholls FM, 1 June 2011) upheld on appeal in *Patel v MIAC* (2011) 198 FCR 62; *Chen v MIAC* [2011] FMCA 859 (Lloyd-Jones FM, 8 November 2011); *Shafiuzzaman v MIAC* [2011] FMCA 874 (Nicholls FM, 15 November 2011); *KC v MIAC* [2013] FCCA 296 (Cameron J, 17 May 2013); and *Pavuluri v MIBP* [2014] FCA 502 (Mortimer J, 16 May 2014). In *Hemlata v MIBP* [2014] FCCA 968 (Judge Turner, 29 May 2014) it is not apparent whether the Tribunal 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*.

[43] [2011] FMCA 859 (Lloyd-Jones FM, 8 November 2011) at [58].

[44] [2011] FMCA 399 (Nicholls FM, 1 June 2011), upheld on appeal: *Patel v MIAC* (2011) 198 FCR 62; [2011] FMCA 874 (Nicholls FM, 15 November 2011); [2014] FCA 502 (Mortimer J, 16 May 2014). For detailed consideration of the applicability of ss.104-105 of the Act in this context, see *Pavuluri v MIBP* [2014] FCA 502 (Mortimer J, 16 May 2014) at [41]-[49]. Mortimer J's reasoning in *Pavuluri* regarding ss.104-105 of the Act was adopted in *Akbar v MIBP* [2019] FCA 515 (Collier J, 16 April 2019) at [57]-[58].

[45] *Pavuluri v MIBP* [2014] FCA 502 (Mortimer J, 16 May 2014) 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.

[46] *Pavuluri v MIBP* [2014] FCA 502 (Mortimer J, 16 May 2014) at [33].

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.[47] 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.[48] However a finding that the 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.[49]

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 and 489 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 and 489 visa applications (other than applications in the 'Second Provisional visa' stream of Subclass 489) the applicant must *declare* in the application that the applicant's skills have been assessed as suitable by the relevant assessing authority.[50] For applications made on or after 28 October 2013 where the invitation to apply was given on or after that date, the declaration must include that this assessment was not for a Subclass 485 (Temporary Graduate) visa.[51] 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.[52]

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

[47] In *obiter* comments the Court in *KC v MIAC* [2013] FCCA 296 (Cameron J, 17 May 2013) 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.
[48] E.g. *Chen v MIAC* [2011] FMCA 859 (Lloyd-Jones FM, 8 November 2011) and *Pavuluri v MIBP* [2014] FCA 502 (Mortimer J, 16 May 2014).
[49] See the example provided in *Pavuluri v MIBP* [2014] FCA 502 (Mortimer J, 16 May 2014) at [49], of a wrong skills assessment receipt number or reference number entered because of a typographical error.
[50] 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.
[51] 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 (SLI 2013, No.233).
[52] Sub-cls 189.212(1), 190.212(1) and 489.222(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.[53]

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 and 489 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

For Subclass 485 applications made on or after 23 March 2013, the application, when made, 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.[54]

For Subclasses 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.[55] As this must be satisfied at the time of application, it cannot be met by a skills assessment application made after the date of application.[56]

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

[53] 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) (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 1136(3)(ba) and (bb) as inserted by SLI 2009, No.375. 'Relevant assessing authority' is defined in r 1.03 as a person or body specified under r 2.26B. For further information see Relevant assessing authority in this commentary.

[54] Clause 485.223 as inserted by SLI 2013, No.33. This criterion applies only to the Graduate Work stream. Although Part 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.

[55] Clause 485.214 as in force before 23 March 2013; cl 487.214; and for visa applications made prior to 1 January 2010, cll 885.212 and 886.212. Departmental guidelines 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. Procedural Instruction – Migration Regulations – Schedules – Sch2 Visa 485-Skilled-Graduate – Skills Assessment at [8.1]: 15/02/2013 – 22/03/2013). However, having regard to r 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 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

[56] *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 (French CJ, Gummow and Crennan JJ, 5 March 2010) 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 (Cameron FM, 1 July 2010), where the Federal Magistrates Court applied *Berenguel* and observed that cll 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 Tribunal had erred in its application of *Berenguel*: *Rai v MIAC* [2010] FCA 1289 (Moore J, 2 December 2010) at [13].

Register of Instruments – Skilled visas.

Skills assessment

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

- time of invitation to apply (Subclasses 189, 190 and 489);[57]
- time of application (Subclasses 175, 176 and 475);[58] or
- time of decision (Subclasses 485,[59] 487, 885 and 886).[60]

The skills assessment criterion contains several elements:[61]

- the applicant's skills must have been assessed by the relevant assessing authority as suitable for the nominated skilled occupation; and
- *for Subclass 189, 190 and 489 visa applications made on or after 28 October 2013*, the assessment must not have been for a Subclass 485 (Temporary Graduate) visa;[62] and
- *for Subclass 189, 190, 485 and 489 visa applications made on or after 1 July 2014*, 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.[63] The requirement varies for the different subclasses, in the way it is expressed and the time it must be satisfied:
    - *for Subclass 189, 190 and 489* – **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;[64]
    - *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

[57] Clauses 189.212, 190.212 and 489.222.
[58] Clauses 175.212(1), 176.212(1), 475.212(1).
[59] Clause 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 (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. Sub-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 (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.
[60] Clauses 487.223, 885.222 and 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.
[61] Clauses 175.212(1), 176.212(1), 189.212, 190.212 and 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; and cll 487.223, 489.222, 885.222 and 886.223. For Subclass 485 visa applications made on or after 23 March 2013, this criterion applies only to the Graduate Work stream. Sub-cl 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.
[62] Clauses.189.212(1), 190.212(1) and 489.222(1) as substituted by SLI 2013 No.233.
[63] Explanatory Statement to SLI 2014, No.82.
[64] Clauses 189.212(1)(c) and (d), 190.212(1)(c) and (d), 485.224(1)(b) and (c) and 489.222(1)(c) and (d) as inserted by SLI 2014, No.82, applicable to visa applications made on or after 1 July 2014.

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;[65] 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.

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, this skills assessment must not have been one for a Subclass 485 (Temporary Graduate) visa.[66] 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 visa applications made on or after 1 July 2014 for these subclasses and for Subclass 485, the assessment must be no more than 3 years old, and current, at the relevant time, that is, for Subclasses 189, 190 and 489 the time of invitation to apply, for Subclass 485, the time of decision.

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.[67]

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

[65] Clause 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.

[66] Clauses.189.212(1), 190.212(1) and 489.222(1) as substituted by SLI 2013 No.233. Under r 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.

[67] *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.

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.

Based on a qualification obtained in Australia

The second part of the skills assessment criterion is that if the assessment was based on a qualification obtained in Australia while the applicant was the holder of a student visa, that qualification was obtained as a result of studying a registered course.[68] 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 or not 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 in order 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 was the holder of 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.

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.[69] Additionally, whilst the

[68] 'Registered course' is defined in r 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 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 Division 3 of Part 2 (instead of s 9), reflecting changes made to that Act (SLI 2013 No.33).

[69] 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, cll 487.223, 885.222, 886.223. For Subclass 485 visa applications made on or after 23 March 2013 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.[70]

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.[71] 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. 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 and 489), the relevant skills assessment must exist at the time of invitation.[72] 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 relevant assessing authority.[73] 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.

<u>Can an applicant rely on a further skills assessment?</u>

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'.[74] The time of decision criterion requires that the applicant's skills 'have been assessed by the relevant assessing

criteria are not divided into time of application and time of decision but the structure of Part 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.

[70] Subclasses 175, 176 and 475. See cll 175.212, 176.212, 475.212.

[71] *Berenguel v MIAC* [2010] HCA 8 (French CJ, Gummow and Crennan JJ, 5 March 2010). 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.

[72] Clauses 189.212, 190.212, 489.222.

[73] Items 1137(4) table item 4(c); 1138(4) table item 4(c) and 1230(4) table item 4(c) First Provisional visa stream of Sch 1 to the Regulations.

[74] Clauses 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, cll 885.212 and 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 Part 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

authority as suitable for that occupation'.[75] 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 r.1.15F of the Regulations, 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 and each degree, diploma or trade qualification used to satisfy the study requirement must be 'closely related' to the nominated skilled occupation. Certain applicants for Subclass 487, 885 and 886 visas must also satisfy the study requirement.[76] The requirement is also relevant to certain qualifications in the points test.[77] For Subclass 175, 176 and 475, the study requirement is an alternative to having work experience for a specified period before making the visa application.[78]

'Australian study requirement' is defined in r 1.15F.[79] 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:[80]

- that are 'registered courses' (as defined in r.1.03): r.1.15F(1)(a);
- that were completed in a total of at least 16 calendar months: r.1.15F(1)(b);
- that were completed as a result of at least 2 academic years study: r.1.15F(1)(c);[81]
- for which all instruction was conducted in English: r.1.15F(1)(d); and
- that the applicant undertook while in Australia as the holder of a visa authorising the applicant to study: r.1.15F(1)(e).

[75] Clauses 485.224 as inserted by SLI 2013, No.33 or cl 485.221 for visa applications made before 23 March 2013; and cll 487.223(1), 885.222(1) and 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 Part 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.
[76] Clauses 487.212(2), 487.212(3); cll 885.211(2), 885.211(3); cll 886.211(2), 886.211(3).
[77] For discussion of the points system, see the MRD Legal Services Commentaries: Skilled Visas – Overview, General Points Test (Schedule 6C) and General Points Test Schedule 6D.
[78] Clauses 175.211, 176.211, 475.211.
[79] Reg 1.03 as amended by SLI 2009, No.84.
[80] 'Degree', 'diploma' and 'trade qualification' is defined in r 2.26AC(6) for visa applications made on or after 1 July 2012 following the omission of r 2.26A by SLI 2012, No.82. 'Completed' is defined in r 1.15F(2) as, in relation to a degree, diploma or trade qualification, having met the academic requirements for its award.
[81] The term 'academic year' is defined in r.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.

The elements of r.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 r.2.26AC(6) for visa applications made on or after 1 July 2012.[82] 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 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.[83]

The links to the AQF in r.2.26AC(6) do not import the entirety of the AQF into the Regulations.[84] 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.[85] 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'.[86] 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

[82] Reg 1.15F(2). Regulation 2.26A omitted and r 2.26AC inserted by SLI 2012 No.82. Sub-reg 2.26A(6) provided the same definition of these terms for the purpose of the '2 year study requirement'.
[83] The definition of 'trade qualification' was substituted by item [10] of Schedule 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 (Judge Reithmuller, 23 March 2016) suggests otherwise, it should be treated with caution.
[84] *Bhatt v MIAC* [2012] FMCA 317 (Nicholls FM, 24 April 2012) at [50], upheld on appeal: *Bhatt v MIAC* [2012] FCA 918 (Buchanan J, 28 August 2012). This case concerned r 2.26A(6) but the reasoning would apply equally to r 2.26AC(6).
[85] The Department has taken the view that a graduate diploma does not meet the definition of 'degree' in r 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* and is also not supported by the wording in r 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 r 2.26AC(6).
[86] [2012] FMCA 317 (Nicholls FM, 24 April 2012) at [51], upheld on appeal in *Bhatt v MIAC* [2012] FCA 918 (Buchanan J, 28 August 2012). Buchanan J held that graduate certificates are not in name, recognition or significance the same qualification as

judgment or discretion'.[87] 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 r.1.15F because associate degrees are essentially the same as diplomas as both are included in the AQF at the same level and have the same entry requirements and study outcomes.[88] The Department's Policy Instruction provides that in some circumstances, an associate degree that has been suitably awarded does not meet the definition of 'diploma' as defined in r.2.26AC(6)(b), however the policy instruction does not elaborate on what is meant by 'in some circumstances'.[89] Overall, having regard to the reasoning in *Bhatt* 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.[90]

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 r.2.26AC(6) definition of 'degree' or 'diploma' even if that qualification is not mentioned in those definitions.[91]

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 r.2.26B(c).[92]

'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

postgraduate diplomas and there was no basis for concluding that omission of reference to graduate certificate in r.2.26A(6) was inadvertent. This appears equally applicable to the replacement r 2.26AC(6).

[87] *Bhatt v MIAC* [2012] FCA 918 (Buchanan J, 28 August 2012) at [12].

[88] This was the argument put to the Tribunal in MRT decision 1318631 (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 [2012] FCA 918.

[89] Procedural Instruction – Migration Regulations – Divisions – Div1.2-Interpretation – [Div1.2/reg1.15F] Reg 1.15F – Australian Study Requirement: issued 01/07/2019).

[90] *Bhatt v MIAC* [2012] FMCA 317 (Nicholls FM, 24 April 2012). 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.

[91] For example, in MRT decision 0906621 (Richard Derewlany, 31 August 2011) the delegate was not satisfied that the applicant's Associate Degree met any of the definitions in r 2.26A(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*, but does not appear to be inconsistent with the reasoning in those cases.

courses of a specified kind that were completed in a specified way.[93] 'Completed' in relation to a degree, diploma or trade qualification is defined to mean 'having met the academic requirements for its award'.[94] It is a finding of fact for the decision-maker whether a course has been completed.

In *Sapkota v MIAC,* Cowdroy J held 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 been met, namely, the date on which the results are finalised by the institution.[95] 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.[96]

The Court in *Sapkota* was concerned with the definition of 'completed' as it first appears in r.1.15F(1). However, the reasoning would appear to be equally applicable to the term as it appears in r.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.[97]

While r.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.[98] 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.[99]

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[92] E.g. in MRT decision 1411024, 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.
[93] Reg 1.15F(1).
[94] Reg 1.15F(2), introduced by SLI 2008, No.56.
[95] *Sapkota v MIAC* [2012] FCA 981 (Cowdroy J, 7 September 2012) at [26], dismissing an appeal from *Sapkota v MIAC* [2012] FMCA 137 (Cameron FM, 1 March 2012). Although 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. *Sapkota* was followed in *Bhagat v MIBP* [2014] FCCA 2198 (Judge Hartnett, 23 September 2014) where the Court rejected the applicant's contention that the relevant date for the 6 months requirement was the day on which he received confirmation that he had successfully completed and met the requirements of his Diploma, holding that the applicant was required to have completed the academic requirements of his diploma in the relevant period and did so outside that time constraint.
[96] Justice Cowdroy cited with approval the decision of Burchardt FM in *Venkatesan v MIAC* [2008] FMCA 409 (Burchadt FM, 10 April 2008) concerning an identically worded definition of 'completed' in item 1128CA(3)(l) of Sch 1 to the Regulations. 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'.
[97] Reg 1.15F(1).
[98] *Singh v MIBP* [2014] FCCA 1666 (Judge Riley, 14 July 2014). 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 Tribunal'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

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.[100]

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 r.1.03.

Course completion - when and how

The course or courses must have been completed

- in a total of 16 calendar months (r.1.15F(1)(b)); and
- as a result of a total of at least 2 academic years study (r.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.[101]

In other words, the '16 months' requirement in r.1.15F(1)(b) is a temporal requirement and the '2 academic years' requirement in r.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 r.1.15F(1)(b).[102]

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

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 r.1.15F(1), would appear to be equally

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.

[99] [2014] FCCA 1666 (Judge Riley, 14 July 2014).

[100] See also *Singh v MIBP* [2015] FCCA 2499 (Judge Hartnett, 14 September 2015) 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.

[101] *Perumal v MIBP* [2014] FCA 555 (Bromberg J, 16 May 2014). 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 r 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.

[102] *Nayeem v MIAC* [2010] FMCA 980 (Smith FM, 23 December 2010) at [21]-[22].

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 r.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.[103] 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 r.1.15F.[104] However, it is unclear whether this interpretation of 'completed' in r.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 r.1.03 to mean a period that is specified as an academic year in an instrument.[105] 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.[106] 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),[107] r.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.[108] 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.[109] The Court held that 'study' in r.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 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 r.1.15F(1)(c) is whether an applicant for the visa had 'completed', as defined in r.1.15F(2), a course or courses that had been registered under the ESOS Act as having a duration of at least 92 weeks.[110]

The registered duration of courses is recorded on CRICOS.

[103] *Sapkota v MIAC* [2012] FCA 981 (Cowdroy J, 7 September 2012) at [23]; *Venkatesan v MIAC* [2008] FMCA 409 (Burchardt FM, 10 April 2008) at [17].
[104] 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: r.1.15F(1)(a), (d) and (e).
[105] 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.'
[106] LIN 19/085 Part 2 s 6. This instrument commenced on 3 April 2019.
[107] Reg 1.15F(2).
[108] See *Riaz v MIBP* [2013] FCCA 2244 (Manousaridis J, 20 December 2013).
[109] *Riaz v MIBP* [2013] FCCA 2244 (Manousaridis J, 20 December 2013). 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 (Smith FM, 23 December 2010), 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.
[110] *Riaz v MIBP* [2013] FCCA 2244 (Manousardis J, 20 December 2013) at [41] & [50].

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.[111] 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.[112]

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 r.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.

Study 'closely related' to nominated occupation

Linked to the study requirement itself is the 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'.[113] 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.[114] However, the relationship must be more than merely complementary.[115]

[111] LIN 19/085 s 2 and Sch 1 s 1.
[112] Explanatory Statements to IMMI 09/040 and LIN 19/085 at [4] and [3] respectively.
[113] This is a separate criterion – see e.g. cl 485.222 of Sch 2.
[114] *MIBP v Dhillon* (2014) 227 FCR 525 at [20]; see also *Constantino v MIBP* [2013] FCA 1301 (Jacobson J, 4 December 2013) at [33] quoting with approval *Prasad v MIAC* [2012] FCA 591 (Logan J, 17 May 2012) at [33].
[115] *Uddin v MIAC* [2010] FCA 1281 (North J, 8 November 2010) 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 (Logan J, 17 May 2012) (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 (Nicholls FM, 15 November 2011) at

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. It has been held in this context that the decision maker is entitled to give substantial weight to the contents of the ANZSCO descriptions.[116] More recent authority suggests that the nature of the nominated occupation *must* be determined by reference to ANZSCO,[117] and further, that the ANZSCO Code 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.[118] 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.[119]

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.[120]

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.[121]

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.[122] 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.[123] The wording of that 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.[124]

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

[37]-[38] and *Manik v MIAC* [2012] FMCA 149 (Smith FM, 28 February 2012) at [13], upheld on appeal *Manik v MIAC* [2012] FCA 619 (Cowdroy J, 15 June 2012) at [19]-[20].

[116] *Manik v MIAC* [2012] FMCA 149 (Smith FM, 28 February 2012) citing Shukla v MIAC [2010] FMCA 625 (Smith FM, 16 August 2010), *Kabir v MIAC* [2010] FMCA 577 (Scarlett FM, 3 September 2010) and *Chawdhury v MIAC* [2010] FMCA 275 (Raphael FM, 23 April 2010).

[117] See *Talha v MIBP* [2015] FCAFC 115 (Griffiths, Mortimer and Beach JJ, 25 August 2015). 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 *Wang v MIMIA* [2005] FCA 843 (Madgwick J, 8 June 2005), *MIAC v Kamruzzaman* [2009] FCA 1562 (Greenwood J, 23 December 2009) 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.

[118] *Talha v MIBP* [2015] FCAFC 115 (Griffiths, Mortimer and Beach JJ) at [56].

[119] *Talha v MIBP* [2015] FCAFC 115 (Griffiths, Mortimer and Beach JJ) at [52]. The judgment examines the structure of the ANZSCO code in detail (at [17]-[23]).

[120] *Chawdhury v MIAC* [2010] FMCA 275 (Raphael FM, 23 April 2010) at [12]. See also *Kabir v MIAC* [2010] FMCA 577 (Scarlett FM, 2 August 2010) at [70], *Shafiuzzaman v MIAC* [2011] FMCA 874 (Nicholls FM, 15 November 2011) 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 (Smith FM, 28 February 2012) at [14], upheld on appeal in *Manik v MIAC* [2012] FCA 619 (Cowdroy J, 15 June 2012).

[121] *Manik v MIAC* [2012] FMCA 149 (Smith FM, 28 February 2012) at [23]-[24], upheld on appeal in *Manik v MIAC* [2012] FCA 619 (Cowdroy J, 15 June 2012).

[122] *Talha v MIBP* [2015] FCAFC 115 (Griffiths, Mortimer and Beach JJ, 25 August 2015) at [53].

[123] *Talha v MIBP* [2015] FCAFC 115 (Griffiths, Mortimer and Beach JJ, 25 August 2015) at [53], endorsing *MIBP v Dhillon* (2014) 227 FCR 525 at [20] and *Constantino v MIBP* [2013] FCA 1301 (Jacobson J, 4 December 2013) at [26].

[124] *Constantino v MIBP* [2013] FCA 1301 (Jacobson J, 4 December 2013) at [27].

skills associated with the carrying on of the occupation.[125] 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.[126]

However, the Full Court in *Talha* 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. 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.[127]

Relevant amending legislation

Title	Reference Number	Legislation Bulletin
Migration Amendment Regulations 2007 (No.1)	SLI 2007 No.69	No.1/2007
Migration Amendment Regulations 2007 (No.7)	SLI 2007, No.257	No.9/2007
Migration Amendment Regulations 2009 (No.15)	SLI 2009, No.375	No.19/2009
Migration Amendment Regulations 2010 (No.6)	SLI 2010, No.133	No.7/2010
Migration Amendment Regulations 2011 (No.3)	SLI 2011, No.74	No.2/2011
Migration Amendment Regulation 2012 (No.2)	SLI 2012, No.82	No.4/2012
Migration Legislation Amendment Regulation 2013 (No.1)	SLI 2013, No.33	No.2/2013
Migration Legislation Amendment Regulation 2013 (No.3)	SLI 2013, No.146	No.10/2013
Migration Amendment (Skills Assessment) Regulation 2013	SLI 2013, No.233	No.15/2013
Migration Legislation Amendment (2014 Measures No.1) Regulation 2014	SLI 2014, No.82	No.5/2014
Migration Amendment (Temporary Graduate Visas) Regulation 2014	SLI 2014, No.145	No.7/2014

[125] *Tobon v MIBP* [2014] FCCA 2208 (Judge Manousaridis, 26 September 2014) at [25].
[126] *Tobon v MIBP* [2014] FCCA 2208 (Judge Manousaridis, 26 September 2014) at [25].
[127] In *Walia v MIBP* [2015] FCCA 1949 (Judge Emmett, 20 July 2015) the applicant argued unsuccessfully, with reference to *Tobon*, 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 *Dhillon* as the leading authority on the issue.

Relevant case law

Akbar v MIBP [2019] FCA 515	
Berenguel v MIAC [2010] HCA 8	Summary
Bhagat v MIBP [2014] FCCA 2198	
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
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
Sapkota v MIAC [2012] FCA 981	Summary
Sapkota v MIAC [2012] FMCA 137	Summary
Seema v MIAC (2012) 203 FCR 537	Summary
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	
Talha v MIBP (2015) 235 FCR 100	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

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Subclass 189 (Skilled-Independent)(Class SI) and Subclass 190 (Skilled-Nominated)(Class SN) visas

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CONTENTS

Overview

The Subclass 189 (Skilled–Independent)(Class SI) and Subclass 190 (Skilled–Nominated)(Class SN) visas are both permanent visas.[1]

From 1 July 2017, Subclass 189 has two streams: the Points-tested stream and the New Zealand stream.[2]

The Subclass 189 Points-tested stream, like the Subclass 190, is designed for skilled applicants who submitted an expression of interest (EoI) in 'SkillSelect' (the online skilled migrant selection model) and have been invited by the Minister to apply for the visa.[3] 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.

Before 1 July 2017, the Subclass 189 visa operated in the same way as the Points-tested stream.

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* (the Act).[4]

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;[5]
- the visa applicant has standing to apply for review;[6]
- the visa applicant must be in the migration zone at the time of the AAT application.[7]

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;[8]

[1] 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 (SLI 2012, No.82), and Explanatory Statement to SLI 2012, No.82 at page 1.
[2] The streams were introduced by the Migration Legislation Amendment (2017 Measures No.2) Regulations 2017 (F2017L00549).
[3] See the Department of Home Affairs website for more information: https://www.homeaffairs.gov.au/Trav/Work/Skil (accessed 19 February 2019).
[4] Note that decisions made under s.501 on character grounds are not reviewable under Part 5.
[5] s.347(1)(b) of the *Migration Act 1958* (the Act) and r.4.10(1)(a) of the Migration Regulations 1994 (the Regulations). 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 r.4.10(2)(b).
[6] s.347(2)(a).
[7] s.347(3).

- the visa applicant has standing to apply for review;[9]
- the visa applicant must be in the migration zone at the time of both the primary decision and the AAT application.[10]

Applicants may combine their review applications where the visa applications have been combined in a way permitted by r.2.08 (new born child), r.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).[11]

The Tribunal has no jurisdiction regarding the pre-application SkillSelect process as no Part 5-reviewable decision is involved.[12]

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 (the Regulations). These include form, visa application charge, and location requirements.[13] 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.[14]

The Subclass 189 and 190 visas by invitation include additional requirements which are similar to each other, while additional requirements for the Subclass 189 New Zealand stream are different.

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** – he or she must have been invited in writing by the Minister to apply for the visa;[15]
- **time limits** – the application must be made within the period stated in the invitation;[16]
- **age** –
  - *for invitations issued on or after 1 July 2017:* the applicant must not have turned 45 at the time of invitation;[17]

[8] s.347(1)(b) and r.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 r.4.10(2)(b).
[9] s.347(2)(a).
[10] s.347(3A).
[11] r.4.12(2).
[12] 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 of the Act.
[13] Items 1137 and 1138 of Schedule 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 MRD Legal Services Register of Instruments: Skilled visas.
[14] Items 1137(4A)(d) (Subclass 189 Points-tested stream), 1137(4G)(d) (Subclass 189 New Zealand stream), 1138(3)(d) (Subclass 190), and 1137(3)(d) (in force for pre 1-July 2017 Subclass 189). Note that to satisfy the Schedule 2 secondary criteria, the applications must have been combined: cl.189.311(b) and cl.190.311(b), discussed below.
[15] 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).
[16] 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 19 February 2019).

- *for invitations issued before 1 July 2017:* the applicant must not have turned 50 at the time of invitation;[18]

- **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;[19]
  - that is specified in the invitation as the skilled occupation which the applicant may nominate;[20]
  - for which the applicant declares in the application that his/her skills have been assessed as suitable by the relevant assessing authority.[21] *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.[22]
- *For Subclass 190 applicants* – the applicant must be nominated by a State or Territory government agency;[23]
- *For Subclass 189 Points-tested stream* – the applicant must not nominate the New Zealand stream.[24]

New Zealand stream visa

For the Subclass 189 New Zealand stream, item 1137 requires an applicant to hold a Subclass 444 (Special Category) visa and not nominate the Points-tested stream.[25]

Visa criteria

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

The Subclass 189 and 190 visas do not have 'time of application' and 'time of decision' criteria, although some criteria are linked to the time of invitation as a specific point in time. 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 her or his family unit to satisfy specified public interest and special return criteria.[26] These differ depending on whether the person has turned 18 or not, and whether or

[17] 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(F2017L00549).
[18] 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' tab in the Register of Instruments – Skilled visas.
[19] Item 1137(4B), table item 4(a) and Item 1138(4), table item 4(a).
[20] Item 1137(4B), table item 4(b) and Item 1138(4), table item 4(b).
[21] Item 1137(4B), table item 4(c) and Item 1138(4), table item 4(c).
[22] 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 (SLI 2013, No.233). Item 1137(4) has been replaced by item 1137(4B) for Subclass 189 Points-tested stream applicants.
[23] Item 1138(4), table item 5.
[24] Item 1137(4B), table item 5.
[25] Items 1137(4G)(c) and 1137(4G)(b) respectively.
[26] cl.189.211 and cl.189.212; cl.190.216 and cl.190.217.

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 criteria. The visas by invitation and New Zealand stream visa 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, 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;[27]
- **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;[28]
    - *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;[29]
    - *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.[30]
    - 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;[31]
- **English language proficiency** - at the time of invitation to apply for the visa, the applicant had competent English;[32] 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 of Act), is not less than the qualifying score and the score stated in the invitation to apply for the visa;[33] see below
- **additional public interest and special return criteria** - *for Subclass 189 Points-tested stream visas*: the applicant and each member of her or his family unit satisfy additional specified public interest and special return criteria;[34]
- **current nomination** - *for Subclass 190 visas*: the nominating State or Territory government agency has not withdrawn the nomination.[35]

New Zealand stream visa

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

[27] cl.189.221 and cl.190.211.
[28] cl.189.222(1)(a) and cl.190.212(1)(a).
[29] cl.189.212(1)(b) and cl.190.212(1)(b) inserted by SLI 2013, No.233. The revised r.2.26B provides that a relevant assessing authority may set different standards for assessing a skilled occupation for different visa classes or subclasses. This remains the same for Subclass 189 Points-tested stream applicants: cl.189.222(1)(b).
[30] cl.189.212(1)(c)-(d) and cl.190.212(1)(c)-(d) inserted by Migration Legislation Amendment (2014 Measures No.1) Regulation 2014 (SLI 2014, No.82). This remains the same for Subclass 189 Points-tested stream applicants: cl.189.222(1)(d).
[31] cl.189.222(2) and cl.190.212(2). 'Registered course' is defined in r.1.03.
[32] cl.189.223 and cl.190.213. Regulation 1.03 provides that 'competent English' has the meaning set out in r.1.15C.
[33] cl.189.224 and cl.190.214.
[34] cl.189.225 and cl.189.226.
[35] cl.190.215.

- **resident in Australia** – 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;[36]
- **filed tax returns** – 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);[37]
- **minimum income** – the applicant's taxable income (in each of the notices of assessment provided) must be no less than the income specified by the Minister for that year, unless the applicant is exempt and has provided other specified evidence;[38]
- **additional public interest and special return criteria** – the applicant and each member of her or his family unit satisfy additional public interest and special return criteria.[39]

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

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.[40] Secondary applicants must also satisfy specified public interest and special return criteria.[41]

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 the 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 r.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;[42] and
- the person is an applicant for a visa; and

[36] cl.189.231.
[37] cl.189.232.
[38] cl.189.233.
[39] cl.189.234
[40] cl.189.311 and cl.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.
[41] cl189.312 and cl. 189.313; cl.190.312 and 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 cl.189.314 and cl.190.314: Migration Legislation Amendment Regulation 2012 (No.5) (SLI 2012, No.256).
[42] For the relevant instrument specifying language tests, scores and passports, see the 'EngTests' tab in the Register of Instruments – Skilled visas.

- 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.[43]

For more information regarding English language proficiency, see the MRD Legal Services Commentary 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 r.1.15I of the Regulations, 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.[44]

Refer to the 'SOL' (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 the MRD Legal Services commentary 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 cl.189.224(2) and cl.190.214(2) if her or his assessed score is equal to or more than the applicable pass mark.[45] 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 the MRD Legal Services commentary General Points Test (Schedule 6D).

[43] r.1.15C as amended by SLI 2015, No.34, Schedule 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 Schedule 13 to the Regulations as substituted by Migration Legislation Amendment (2015 Measures No. 3) Regulation 2015 (SLI 2015, No.184) Schedule 7. For the relevant instrument specifying language tests, scores and passports, see the 'EngTests' tab in the Register of Instruments – Skilled visas.
[44] r.1.15I.
[45] s.94(1) of the Act. See further the 'PoolPassMark' tab in the Register of Instruments - Skilled Visas.

Relevant amending legislation

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

Relevant case law

There is no case law specific to these visas.

Available decision templates / precedents

The following decision templates / 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 Visa Refusal – Points test (Sch 6D)** – suitable for Subclass 189 (pre 1 July 2017) or Subclass 189 (Points-tested stream) or 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: 19 February 2019

Subclass 489 Skilled-Regional Sponsored (Provisional) (Class SP)

CONTENTS

Overview

This commentary provides an overview of the Skilled – Regional Sponsored (Provisional) (Class SP) Subclass 489 visa.

The Subclass 489 visa is a provisional visa (for up to 4 years). It effectively replaced the Subclass 475 (Skilled – Regional Sponsored) and Subclass 487 (Skilled – Regional Sponsored) visas. The Subclass 489 visa is one of the visas that were introduced to support 'SkillSelect', the skilled migration selection model that requires an applicant to be invited by the Minister to apply for the visa.[1] There are two streams in the Subclass 489 visa: the First Provisional Visa stream and the Second Provisional Visa stream.

Applicants for the First Provisional Visa stream are required to have been invited to apply for that visa stream.[2]

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.[3] 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* (the Act).[4] 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;[5]
- the visa applicant has standing to apply for review;[6] and
- the applicant must be in the migration zone at time of review application.[7]
- applicants may combine their review applications where the visa applications have been combined in a way permitted by r.2.08 (new born child); r.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).[8]

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

[1] See Explanatory Statement to Migration Amendment Regulation 2012 (No.2) (SLI 2012, No.82) at p.1.
[2] Item 1230(4) of Schedule 1 to the Regulations, and cl.489.221.
[3] Item 1230(5), and cl.489.231.
[4] A decision made under s.501 on character grounds is not reviewable under Part 5.
[5] s.347(1)(b) and r.4.10(1)(a).
[6] s.347(2)(a).
[7] s.347(3).
[8] r.4.12(2).
[9] For primary decisions made before 13 December 2018, r.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: r.4.02(4)(la) inserted by SLI 2012, No.256. For primary decisions made on or after 13 December 2018, r.4.02(4)(la)(ii) requires that the non-citizen was sponsored

standing to apply for review, and the application for review must be lodged within 21 days of notification of the primary decision.[10] Note that for these offshore cases, review applications of 2 or more members of a family unit cannot be combined by the sponsor / nominator.[11]

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 visa application requirements for a Subclass 489 visa are set out at item 1230 of Schedule 1 to the Migration Regulations 1994 (the Regulations). In addition to form,[12] visa application charge,[13] and location requirements,[14] Item 1230 requires:

- **an applicant seeking to satisfy the primary criteria for the First Provisional Visa stream**:
  - must have been invited in writing by the Minister to apply for a visa in that stream;[15]
  - must apply for that visa within the period stated in the invitation;[16]
  - must not have turned 45 at the time of invitation (*for invitations issued on or after 1 July 2017*),[17] or must not have turned 50 at the time of invitation (*for invitations issued before 1 July 2017*)[18], or
  - must nominate a skilled occupation:
    - that is specified in the relevant instrument as a skilled occupation at the time of invitation;[19] and

or nominated, as required by a criterion for the grant of the visa, by a person, company or partnership referred to in subregulation (4AA): as amended by F2018L01707. Subregulation (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.

[10] r.4.02(5)(ka) inserted by SLI 2012, No.256; r.4.10(1)(d)

[11] This is because r.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.

[12] For visa applications made before 18 April 2015, the approved form (Form 1393 (Internet)) is specified in item 1230(1); for visa applications made on or after that date, it is specified by the Minister in a legislative instrument: item 1230(1) as substituted by Migration Amendment (2015 Measures No. 1) Regulation 2015 (SLI 2015, No.34). For the relevant instrument see the MRD Legal Services Register of Instruments: Skilled visas.

[13] Item 1230(2).

[14] For visa applications made before 18 April 2015, Item 1230(3)(a) specifies that the application must be made as an 'Internet application', defined in r.1.03 to mean an application for a visa made using a form mentioned in r.1.18(2)(b) that is sent to Immigration by electronic transmission using a facility made available at an Internet site mentioned in r.1.18(2)(b)(ii), in a way authorised by that facility. For visa applications made on or after 18 April 2015, item 1230(3)(a) requires that an application must be made at the place, and in the manner, (if any) specified by instrument: SLI 2015, No.34. For the relevant instrument see the MRD Legal Services Register of Instruments: Skilled visas. An applicant may be in or outside Australia, but not in immigration clearance: item 1230(3)(b); and an applicant in Australia must hold a substantive visa or a Subclass 010 (Bridging A) or Subclass 020 (Bridging B) or Subclass 030 (Bridging C) visa: Item 1230(3)(c).

[15] Item 1230(4), table item (1).

[16] Item 1230(4), table item (2). The information on the Department's webpage states that if an applicant is invited to apply for a visa, s/he will receive an invitation from SkillSelect, and will then have 60 days to do so. See http://www.homeaffairs.gov.au/trav/visa-1/489-?modal=/visas/supporting/Pages/489/receive-invitation-to-apply.aspx. (accessed 2 November 2018).

[17] Item 1230(4), table item (3) as amended by Migration Legislation Amendment (2017 Measures No.3) Regulations 2017.

[18] Item 1230(4), table item (3), in force before 1 July 2017.

[19] Item 1230(4), table item (4)(a). For the relevant instrument, see the 'SOL' tab in the Register of Instruments – Skilled visas.

- that is specified in the invitation as the skilled occupation which the applicant may nominate;[20] and
- for which the applicant declares in the application that his/her skills have been assessed as suitable by the relevant assessing authority.[21] 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.[22]

- must meet the nomination / sponsorship requirements – that is either:
  - be nominated by a State or Territory government agency;[23] or –
  - declare in the application that s/he is sponsored by a person who has turned 18 and is an Australian citizen, permanent resident or eligible New Zealand citizen.[24] If the applicant makes such a declaration, he or she must also declare that:
    - the sponsor is usually resident in a designated area of Australia.[25] (see below), and
    - the sponsor is related to the applicant, or the applicant's spouse or de facto partner (if the applicant's spouse or de facto partner is an applicant for the visa) as a relevant relative;[26] and
    - each member of the family unit applicant is sponsored by that person;[27]

- **an applicant seeking to satisfy the primary criteria for the Second Provisional Visa stream**:
  - must hold a specified regional provisional skilled visa (i.e. Subclass 475 or 487) visa,[28] and
  - for at least 2 years immediately before the application is made, the applicant must 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;[29] and
  - the applicant must not have held more than one of a particular kind of those visas.[30]
- an application by an applicant claiming to be a member of the family unit may be made at the same time and place and combined with the primary application.[31]

Visa criteria – Schedule 2 requirements

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

[20] Item 1230(4), table item (4)(b).
[21] Item 1230(4), table item (4)(c).
[22] item 1230(4), table item (4)(c) amended by by Migration Amendment (Skills Assessment) Regulation 2013 (SLI 2013, No.233).
[23] Item 1230(4), table item(5)(a).
[24] Item 1230(4), table item (5)(b).
[25] Item 1230(4), table item (6)(a).
[26] Item 1230(4), table item (6)(b). The relevant relative being either a parent, child, sibling, aunt or uncle or nephew or niece (including adoptive or step), grandparent or first cousin.
[27] Item 1230(4), table item (6)(c).
[28] Item 1230(5), table item (1).
[29] Item 1230(5), table item (2).
[30] Item 1230(5), table item (3).
[31] Item 1230(3)(d).

The Subclass 489 visa does not have 'time of application' and 'time of decision' criteria although some criteria are linked to the time of invitation as a specific point in time. Unless another temporal point is specified, the criteria must be satisfied at the time of decision.[32]

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 or Second Provisional).

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[33] on the basis of satisfying the primary criteria.[34] 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;[35]
- **special return criteria -** the applicant, and members of the family unit of the applicant who are also visa applicants, satisfy certain special return criteria;[36]

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;[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]
    - *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]
    - *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;[40]

[32] See Note to Division 489.2, which states that 'all criteria must be satisfied at the time a decision is made on the application'.
[33] The prescribed provisional skilled visas are: a Skilled – Independent Regional (Class UX) visa, a Skilled – Designated Area-Sponsored (Provisional) (Class UZ) visa, a Subclass 475 (Skilled – Regional Sponsored) visa; or a Subclass 487 (Skilled – Regional Sponsored) visa.
[34] See Note to Division 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.
[35] cl.489.211(1)-(6).
[36] cl.489.212.
[37] cl.489.221.
[38] cl.489.222(1).
[39] cl.489.222(1)(c) and (d) inserted by by Migration Legislation Amendment (2014 Measures No.1) Regulation 2014 (SLI 2014, No.82).

- 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]

- **English language proficiency** - at the time of invitation to apply for the visa, the applicant had competent English (see below);[42]
- **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);[43]
- **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,[44] and each member of the family unit is sponsored by that person.[45] (see below).
- **health criteria** the applicant and member of the family unit must satisfy public interest criteria 4005 (health, no waiver).[46]

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:
  - 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;[47]
- **health criteria -** the applicant and member of the family unit must satisfy public interest criterion 4007 (health, waiver).[48]

[40] cl.489.222(1)(b) inserted by inserted by SLI 2013, No.233.
[41] cl.489.222(2).
[42] cl.489.223.
[43] cl.489.224.
[44] The relevant relative being either a parent, child, sibling, aunt or uncle or nephew or niece (including adoptive or step), grandparent or first cousin.
[45] cl.489.225.
[46] cl.489.226.
[47] cl.489.231.
[48] cl.489.232.

Key Legal Issues

English language proficiency

For Subclass 489 First Provisional Visa stream visas, it is a criterion that the applicant *at the time of invitation* to apply for the Subclass 489 visa, had competent English.[49] 'Competent English' is defined in r.1.15C.[50]

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

Skilled occupation

Skilled occupation in relation to a person is defined in r.1.15I.[51]

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 MRD Legal Services commentary 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).[52] An applicant will have met this if they achieve at least the 'pass mark' when assessed against the Points Test.[53] The relevant points test is Schedule 6D.[54] 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.[55]

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

See the MRD Legal Services Commentary Schedule 6D for further information.

[49] cl.489.223.
[50] s.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 Schedule 13 to the Regulations as substituted by Migration Legislation Amendment (2015 Measures No. 3) Regulation 2015 SLI 2015, No.184 Schedule 7.
[51] r.1.15I as inserted by Migration Amendment Regulations 2010 (No.6) (SLI 2010, No.133), Schedule 1, item [7] (which applied to visa applications made on or after 1 July 2010 and applications not finally determined before that date: r.3(4) SLI 2010, No.133) and as amended by Migration Amendment Regulations 2011 (No.3) (SLI 2011, No.74), Schedule 1, item [3]. There are no transitional provisions for this amendment, so it applies to all applications as of 1 July 2011: see r.3(2) and Note, SLI 2011, No.74.
[52] cl.489.224(2).
[53] s.94(1) of the Act. See further the 'PassPassMark' tab of the Register of Instruments - Skilled Visas.
[54] r.2.26AC as inserted by SLI2012, No.82.
[55] cl.489.224(1).

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'.[56] 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.[57]

'Designated area' is defined in r.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 the MRD Legal Services Commentary 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.[58] 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 guidelines,[59] 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.[60]

This view finds some indirect support in the decision in *Hooda v MIAC*[61] 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. The acceptance of the proposed sponsor was regarded, in effect, as part of the substantive determination of the visa eligibility at time of decision'.[62] 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'.[63] 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.

[56] Item 1230(4), table item 6(a).
[57] cl.489.225(3)(c).
[58] The Tribunal has taken different approaches on this issue: compare 1212136 (N Burns, 31 October 2012), 1209328 (Kira Raif, 25 March 2013), 1207303 (Kira Raif, 14 December 2012) and 1203486 (Wan Shum, 16 May 2013).
[59] For example, Procedural Instruction Sch2Visa489 – Skilled – Regional (Provisional) at 13.1 (compilation 21/09/2018).
[60] For example, MRT decision 1311426 (Belinda Mericourt, 1 October 2014) and 1309572 (D Smyth, 16 September 2014) (cl.300.222 'The sponsorship of the applicant under clause 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 r.1.20J, 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.
[61] [2012] FMCA 1018 (Smith FM, 21 November 2012).
[62] *Hooda v MIAC* [2012] FMCA 1018 (Smith FM, 21 November 2012) at [36].
[63] *Hooda v MIAC* [2012] FMCA 1018 (Smith FM, 21 November 2012) at [42].

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)[64] would include the power to consider whether to accept a sponsorship.

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.[65] Secondly, there are no criteria or guiding principles or procedures in the legislation dealing with the consideration and approval of such sponsorships.[66] 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 these and other respects, the provisions in question do not appear to be relevantly distinguishable from the provisions under consideration in *Suh v MIAC* where 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.[67] 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.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.[68] 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,[69] although it would not be compelled to do so.[70]

[64] 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.
[65] See *Hooda v MIAC* [2012] FMCA 1018 (Smith FM, 21 November 2012) 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 (Goldberg J, 4 April 2001).
[66] 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.
[67] (2009) 175 FCR 515, followed in *Hu v MIAC* [2009] FCA 1288 (Flick J, 12 November 2009). The Court in *Suh* followed the approach taken by Lander J in *Kim v MIAC* [2007] FCA 138 (Lander J, 9 March 2007) and distinguished *Tvarkovski v MIMA* [2001] FCA 375 (Goldberg J, 4 April 2001) where Goldberg J had held that the Tribunal had power to consider the issues raised by r.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 subregulation 5.19(2)…'; cl.805.222 required that 'the appointment is an approved appointment under regulation 5.19'; and (critically) r.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].
[68] See *Suh v MIAC* (2009) 175 FCR 515 at [15] and [21].
[69] This is what happened in 1203486 (Wan Shum, 16 May 2013). 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.
[70] See *Kim v MIAC* [2007] FCA 138 (Lander J, 9 March 2007).

Relevant amending legislation

Title	Reference Number	Legislation Bulletin
Migration Amendment Regulations 2010 (No.6)	SLI 2010, No.133	LB
Migration Amendment Regulations 2011 (No.3)	SLI 2011 No.74	LB
Migration Amendment Regulation 2012 (No.2)	SLI 2012, No.82	LB
Migration Legislation Amendment Regulation 2012 (No 5)	SLI 2012, No.256	LB
Migration Amendment (Skills Assessment) Regulation 2013	SLI 2013, No.233	LB
Migration Legislation Amendment (2014 Measures No.1) Regulation 2014	SLI 2014, No.82	LB
Migration Amendment (2015 Measures No. 1) Regulation 2015	SLI 2015, No.34	LB
Migration Legislation Amendment (2015 Measures No. 3) Regulation 2015	SLI 2015, No.184	LB
Migration Legislation Amendment (2017 Measures No. 3) Regulations 2017	F2017L00816	LB
Migration Legislation Amendment (2017 Measures No. 4) Regulations 2017	F2017L01425	LB
Migration Amendment (Enhanced Integrity) Regulations 2018	F2018L01707	LB

Field Code Changed

Field Code Changed

Relevant case law

There has been no judicial consideration of this Subclass.

Available decision precedents

These are no decision precedents available for this particular 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 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: 18 December 2018

Class VB: Skilled Permanent Onshore Visas

(Subclass 885, 886, 887)

CONTENTS

Relevant amending legislation

Relevant Case Law

Available Decision Templates

Overview

This commentary provides an overview of the permanent onshore Class VB visa in the current General Skilled Migration program as provided for under the Migration Regulations 1994 (the Regulations). The skilled migration program has been subject to a number of major revisions since its introduction. These changes have resulted in the introduction, and phasing out of various visa classes and subclasses. See the MRD Legal Services commentary Overview - Skilled Visas for details.

Class VB is one of 4 visa classes - two temporary (onshore and offshore) and two permanent (onshore and offshore) - introduced on 1 September 2007. It is a permanent visa which when introduced contained three subclasses:

- Subclass 885 (Skilled – Independent)
- Subclass 886 (Skilled – Sponsored)
- Subclass 887 (Skilled – Regional)

The applicant must be onshore when making the application for this class of visa.[1]

Changes to the skilled migration program were made on 1 July 2012, with the effect that Subclasses 885 and 886 were closed to primary applications from 1 January 2013,[2] and repealed from 1 July 2013.[3] Subclass 887 remains as the only subclass within Class VB.

The subclasses at a glance

Subclass 885 (Skilled – Independent)

Subclass 885 (Skilled – Independent) is a permanent visa for eligible overseas students who have obtained an Australian qualification in Australia as a result of at least 2 years study and for holders of certain temporary visas with skills in demand in Australia. The applicant must have strong English language skills and pass a points test. Subclass 885 effectively replaced Subclass 880 (Skilled – Independent Overseas Student) for visa applications made on or after 1 September 2007.

Subclass 886 (Skilled – Sponsored)

Subclass 886 (Skilled – Sponsored) is a permanent visa for eligible overseas students who have obtained an Australian qualification in Australia as a result of at least 2 years study and for holders of certain temporary visas with skills in demand in Australia. It is an onshore visa for applicants not able to meet the Skilled – Independent pass mark, who have either a relative in Australia to sponsor them or a nomination from a State or Territory government. Applicants must meet a points test pass mark that is lower than that for the Skilled – Independent visa. Subclass 886 effectively replaced Subclass 881 (Skilled – Australian-sponsored Overseas Student) for visa applications lodged on or after 1 September 2007.

[1] item 1136(3)(b) of Schedule 1 to the Regulations.
[2] item 1136(3)(aa), inserted by Migration Amendment Regulation 2012 (No.2) (SLI 2012, No.82).
[3] items 1136(3)(ba), (bb), (ca), (d), (3A), (3B), (4), (5) and (6) omitted and Item 1136(8) amended by SLI 2012 No.82. See also item 101 of Schedule 13 to the Regulations.

Subclass 887 (Skilled - Regional)

Subclass 887 (Skilled - Regional) is a permanent visa for eligible provisional visa holders who have lived for at least 2 years and worked for at least 1 year in a Specified Regional Area in Australia. It is for onshore applicants, and no points test applies. Applicants are required to have held a specified skilled visa, or bridging visa granted in relation to an application for such a visa, at the time of application.[4] Subclass 887 effectively replaced Subclass 137 (Skilled - State/Territory nominated Independent) visa and Subclass 883 (Skilled – Designated Area-sponsored (Residence)) visa for visa applications lodged on or after 1 September 2007.

Merits review

A decision to refuse a Subclass 885, 886 or 887 visa is generally reviewable under Part 5 of the *Migration Act 1958* (the Act),[5] under s.338(2) as an applicant must be onshore at time of grant and must be in Australia when making the visa application.[6] Applications for review of these decisions must be made by the visa applicant.[7]

Requirements for making a valid application - Schedule 1

The requirements for making a valid application for a Class VB visa are contained in item 1136 of Schedule 1 to the Regulations.[8] Applications by persons seeking to satisfy primary criteria for grant of a Subclass 885 or 886 visa must be made before 1 January 2013.[9]

The Schedule 1 requirements are:

- **form, fee place and manner** – the visa application must be made on the approved form;[10] in the prescribed way;[11] and accompanied by the prescribed charges;[12] and the primary applicant must be in Australia[13] (secondary applicants may combine an application);[14]
- **Subclass 885 and 886 specific requirements** - *for visa applications made on or after 1 January 2010*, where the applicant is **not** seeking to satisfy the criteria for the grant of a Subclass 887 visa;[15] and

[4] cl.887.211 of Schedule 2 to the Regulations.
[5] Note that decisions made under s.501 on character grounds are not reviewable under Part 5.
[6] cll.885.411, 886.411 and 887.411; item 1136(3)(b).
[7] s.347(2)(a) of the Act.
[8] See s.46 of the Act and r.2.07.
[9] item 1136(3)(aa) inserted by SLI 2012, No.82.
[10] item 1136(1). For visa applications made from 1 July 2013 and before 18 April 2015, Class VB visa applications must be made on 1276 (Internet): item 1136(1) as substituted by SLI 2012, No.82. For applications made on and after 18 April 2015 (Subclass 887 only), the approved form is as specified by instrument: item 1136(1) as substituted by SLI 2015, No.43. Regulation 2.07(5) was inserted by SLI 2015, No.34 and prescribes the form, manner, and place requirements for making a valid visa application by reference to a legislative instrument made under the provision. The relevant instruments are available in the Register of Instruments – Skilled visas.
[11] For visa applications made before 1 January 2013, the application must be made either as an Internet application, or by post or by courier service to a specified address: item 1136(3)(a). Addresses are specified by instrument. For the relevant instrument, see the 'POBox' tab in the Register of Instruments – Skilled visas. For visa applications made on or after 1 January 2013 and before 18 April 2015, it must be made as an internet application: item 1136(3)(ab) inserted by SLI 2012, No.82; item 1136(3)(a) as substituted from 1 July 2013 by SLI 2012, No.82. For visa applications made on or after 18 April 2015 (Subclass 887 only), the application must be made at the place and in the manner (if any) specified by instrument: item 1136(3)(a) as substituted by SLI 2015, no.36. The relevant instruments are available in the Register of Instruments – Skilled visas.
[12] item 1136(2).
[13] item 1136(3)(b).
[14] item 1136(3)(c).

- has ***not*** nominated a skilled occupation specified in the relevant instrument[16] - the applicant's skills must have been assessed by the relevant assessing authority as suitable for the nominated skilled occupation;[17] *or*

- ***has*** nominated a skilled occupation specified in the relevant instrument[18] - the applicant's skills must have been assessed by the relevant assessing authority, on or after 1 January 2010, as suitable for the applicant's skilled occupation.[19]

- **Subclass 886 specific requirements** - *for visa applications made on or after 1 July 2010,* either:[20]

  - the applicant is nominated by a State or Territory government agency;[21] OR

  - the applicant is sponsored by a specified relative[22] who has turned 18 and is an Australian citizen, permanent resident or an eligible New Zealand citizen whom the applicant has declared is usually resident in Australia.[23] Each person who is an applicant and claims to be a member of the family unit of the applicant must be sponsored by the same person[24] and the sponsorship must be made on the prescribed form.[25]

- **visa status, age and skilled occupation –** the requirements depend on the date of application.

  - *for visa applications made before 1 July 2013*, the applicant must hold a visa of a type specified in one of four alternative clauses, and in some cases there are also age and skilled occupation requirements:[26]

    - Item 1136(4) – current / recent student visa holders, the applicant:

      - holds an eligible student visa or held one within the previous 6 months,[27] or has been notified of a decision by the Tribunal to set aside and substitute a

[15] Note that each of these requirements (items 1136(3)(ba), (bb), (bc)) were omitted from the Regulations from 1 July 2013 by SLI 2012, No.82, consistent with the repeal of subclasses 885 and 886 from that date.
[16] For the relevant instrument, see the 'SOL' tab (for visa applications made on or after 1 July 2010) and the 'SkillAss' tab (for visa applications made in the period 1 January 2010 - 30 June 2010) in the Register of Instruments – Skilled visas.
[17] item 1136(3)(ba) inserted by Migration Amendment Regulations 2009 (No.15) (SLI 2009, No.375), and omitted from 1 July 2013 by SLI 2012, No.82.
[18] For the relevant instrument, see the 'SOL' tab (for visa applications made on or after 1 July 2010) and the 'SkillAss' tab (for visa applications made in the period 1 January 2010 - 30 June 2010) in the Register of Instruments – Skilled visas.
[19] item 1136(3)(bb) inserted by SLI 2009, No.375, and omitted from 1 July 2013 by SLI 2012, No.82.
[20] item 1136(3)(ca) inserted by Migration Amendment Regulations 2010 (No.6) (SLI 2010, No.133). Note that items 1136(3)(ca), 1136(3A) and 1136(3B) were all omitted from the Regulations from 1 July 2013 by SLI 2012, No.82, consistent with the repeal of Subclass 886 from that date.
[21] item 1136(3A) inserted by SLI 2010, No.133, and omitted from 1 July 2013 by SLI 2012, No.82.
[22] either the parent, child, sibling, aunt or uncle or nephew or niece (including adoptive or step) of the applicant or his/her spouse or de facto partner.
[23] item 1136(3B)(a) and (b) inserted by SLI 2010, No.133. Item 1136(3B) was omitted from the Regulations from 1 July 2013 by SLI 2012, No.82.
[24] item 1136(3B)(c) inserted by SLI 2010, No.133. Item 1136(3B) was omitted from the Regulations from 1 July 2013 by SLI 2012, No.82.
[25] item 1136(3B)(d) inserted by SLI 2010, No.133. Item 1136(3B) was omitted from the Regulations from 1 July 2013 by SLI 2012, No.82. The prescribed form is Form 1277 (Internet) or 1277. In *Hooda v MIAC* [2012] FMCA 1018 (Smith FM, 21 November 2012) the Court found that the delegate erred in finding that the visa application was invalid on the ground that the Form 1277 did not accompany the lodgment of the visa application in a proximate temporary sense. The Court held that the validity requirements of item 1136(3B)(d) are referring to 'sponsorship entered into on Form 1277' in an inchoate sense, not in the sense of a 'legally effective' sponsorship entered into on that Form; and these words refer to no more than a Form 1277 which has been completed and executed by the proposed sponsor with an intention of being bound by it, if and when it is ultimately submitted to, and accepted by the Minister when granting the visa: at [52] - [53]. See also *Amodi v MIAC* [2013] FMCA 70 (Cameron FM, 11 February 2013), where the Court considered the identically worded provision in item 1229(3B)(d). Consistently with *Hooda,* the Court held that an application becomes valid upon completion and execution of a Form 1277.
[26] item 1136(3)(d). This provision was omitted from the Regulations by SLI 2012, No.82 for visa applications made on or after 1 July 2013.
[27] For visa applications made on or after 26 April 2008, an amendment was made to refer to the applicant having held an eligible student visa 'at any time during the period of 6 months' ending immediately before the day on which the application was made rather than 'during the period of 6 months': SLI 2008, No.56. 'Eligible student visa' is defined in r.1.03 (as inserted by Migration Amendment Regulations 2007 (No.7) (SLI 2007, No.257), for visa applications made on or after 1 September 2007 and amended by SLI 2008, No.56 for visa applications made on or after 26 April 2008).

decision not to revoke the cancellation of the applicant's eligible student visa; and

- *for visa applications made before 1 July 2011* - is less than 45 and has nominated a skilled occupation for which at least 50 points are available as specified in the relevant instrument;[28] *for visa applications made on or after 1 July 2011* the applicant must be less than 50 and have nominated a specified skilled occupation.[29]

- Item 1136(5) – certain Subclass 476 and 485 visa holders, the applicant:
  - holds a Subclass 476 (Skilled – Recognised Graduate) or 485 (Skilled – Graduate) visa granted on the basis of satisfying the primary criteria and
  - *for visa applications made before 1 July 2011*, nominated a skilled occupation for which at least 50 points are available in the relevant instrument;[30] *For visa applications made on or after 1 July 2011*, the applicant must have nominated a skilled occupation specified in the relevant instrument.[31]

- Item 1136(6) – Subclass 471 visa holders:
  - each applicant for the visa held a Subclass 471 (Trade Skills Training) visa, and
  - the primary applicant held the Subclass 471 visa at least 2 years preceding the visa application date, and
  - *for visa applications made before 1 July 2011*, be less than 45 and must have nominated a skilled occupation for which at least 50 points are available as specified in the relevant instrument.[32] *For visa applications made on or after 1 July 2011,* the applicant must be less than 50 and have nominated a skilled occupation specified in the relevant instrument.[33]

- Item 1136(7) – provisional skilled visa or bridging visa holders, the applicant;
  - holds a specified provisional skilled visa or bridging visa granted on the basis of a valid application for a Class UX, Class VC or Class SP visa, and
  - the primary applicant held one of those visas for at least 2 years preceding the visa application date;[34]

- *for visa applications made on or after 1 July 2013*, item 1136(7) (as outlined above) must be satisfied.[35]

[28] item 1136(4)(b)(i) and (ii). For visa applications made on or after 1 July 2010, this requirement was amended to clarify that the nominated occupation must *be for the applicant:* item 1136(4)(b)(ii) as amended by SLI 2010 No.133. Item 1136(4) was omitted from the Regulations by SLI 2012, No.82 for visa applications made on or after 1 July 2013.
[29] item 1136(4)(b)(1) and (ii) amended by Migration Amendment Regulations 2011 (No.3) (SLI 2011, No.74). For the relevant instrument specifying skilled occupations see the 'SOL' tab of the Register of Instruments - Skilled visas. Item 1136(4) was omitted from the Regulations by SLI 2012, No.82 for visa applications made on or after 1 July 2013.
[30] item 1136(5)(b)(ii). For visa applications made on or after 1 July 2010, this requirement was amended to clarify that the nominated occupation must *be for the applicant:* item 1136(5)(b)(ii) as amended by SLI 2010, No.133. For the relevant instrument specifying skilled occupations see the 'SOL' tab of the Register of Instruments - Skilled visas. Item 1136(5) was omitted from the Regulations by SLI 2012, No.82 for visa applications made on or after 1 July 2013.
[31] item 1136(5)(b)(ii) amended SLI 2011, No.74. For the relevant instrument specifying skilled occupations see the 'SOL' tab of the Register of Instruments - Skilled visas. Item 1136(5) was omitted from the Regulations by SLI 2012, No.82 for visa applications made on or after 1 July 2013.
[32] item 1136(6)(b)(ii) and (iii). For visa applications made on or after 1 July 2010, this requirement was amended to clarify that the nominated occupation must *be for the applicant:* item 1136(6)(b)(iii) as amended by SLI 2010 No.133. For the relevant instrument specifying skilled occupations see the ''SOL' tab of the Register of Instruments - Skilled visas. Item 1136(6) was omitted from the Regulations by SLI 2012, No.82 for visa applications made on or after 1 July 2013.
[33] item 1136(6)(b)(ii) and (iii) amended by SLI 2011 No.74. For the relevant instrument specifying skilled occupations see the ''SOL' tab of the Register of Instruments - Skilled visas. Item 1136(6) was omitted from the Regulations by SLI 2012, No.82 for visa applications made on or after 1 July 2013.
[34] item 1136(7), amended by Schedule 1 to SLI 2012, No.82 to include Class SP for visa applications made on or after 1 July 2012.

Visa Criteria - Schedule 2 requirements

Subclass 885 – Skilled Independent

Time of application criteria

The primary criteria must be satisfied by at least one 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 (or, for applications lodged prior to 1 July 2009, a member of the family unit or an interdependent partner or the dependent child of the interdependent partner).[36]

The primary criteria to be met at the time of application are:[37]

- **study and related requirements -** the applicant meets one of three alternative criteria that relate to the basis on which s/he satisfied the Schedule 1 requirements. These are:
  - the applicant met the requirements of item 1136(4) of Schedule 1 (see above) and satisfied the 2 year study requirement / Australian study requirement[38] in the 6 months immediately preceding the day on which the application was made and each degree, diploma or trade qualification used to satisfy the 2 year study requirement / Australian study requirement is closely related to the nominated skilled occupation;[39] **or**
  - the applicant met the requirements of item 1136(5) (see above) and
    - if s/he holds a Subclass 476 visa, the qualification used to obtain that visa is closely related to the applicant's nominated skilled occupation, or
    - if s/he holds a Subclass 485 visa,[40] each degree, diploma or trade qualification used to satisfy the 2 year study requirement / Australian study requirement[41] to obtain that visa is closely related to the nominated skilled occupation;[42] or
  - the applicant met the requirements of item 1136(6) (see above) and s/he has completed the apprenticeship for which the Subclass 471 visa was granted and the apprenticeship is closely related to the nominated skilled occupation;[43]
- **skills assessment -** *for visa applications made prior to 1 January 2010* - the decision maker is satisfied the applicant has applied for an assessment of the applicant's skills for the nominated skilled occupation by a relevant assessing authority;[44]

[35] The alternatives in item 1136(4), (5) and (6), along with item 1136(3)(d), were omitted from the Regulations by SLI 2012, No.82 for visa applications made on or after 1 July 2013. Accordingly, for visa applications made on or after 1 July 2013, which must be for Subclass 887, item 1136(7) must be met – there are no alternatives. This is consistent with the repeal of Subclasses 885 and 886 from 1 July 2013 and the Schedule 2 requirement for Subclass 887 that item 1136(7) must be met.
[36] See note, cl.885.2 as amended by Migration Amendment Regulations 2009 (No.7) (SLI 2009, No.144). For visa applications made on or after 1 July 2009, 'member of the family unit' in r.1.12 includes a reference to 'de facto partner' as defined in s.5CB. The definition in s.5CB covers same sex partners.
[37] The date of a visa application is the date it is lodged, provided that at that time it was a valid application: *Jahangir v MIBP* (2014) FCR 91 at [51] citing *MIAC v Chan* (2008) 172 FCR 193.
[38] For visa applications lodged on or after 1 September 2007 but prior to 15 May 2009, the applicant has satisfied the '2 year study requirement': cl.885.211(2). For visa applications lodged on or after 15 May 2009, the applicant has satisfied the Australian study requirement: cl.885.211(2) as amended by SLI 2009, No.84.
[39] cl.885.211(2).
[40] Subclass 485 (Skilled – Graduate) was replaced by Subclass 485 (Temporary Graduate) on 23 March 2013 in respect of visa applications made on or after that date: Migration Legislation Amendment Regulation 2013 (No.1)(SLI 2013, No.33).
[41] For visa applications lodged on or after 1 September 2007 but prior to 15 May 2009, the applicant has satisfied the 2 year study requirement:cl.885.211(3). For visa applications lodged on or after 15 May 2009, the applicant has satisfied the Australian study requirement: cl.885.211(3) as amended by SLI 2009, No.84.
[42] cl.885.211(3).
[43] cl.885.211(4).

- **English language proficiency –**
  - *for visa applications made prior to 1 January 2010* - either the applicant's nominated skilled occupation is in Major Group IV in the Australian Standard Classification of Occupations (ASCO)[45] and the applicant has 'vocational English', or the applicant has 'competent English';[46]
  - *for visa applications made on or after 1 January 2010* - the applicant has 'competent English';[47]
- **police check -** the application is 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 in the 12 months immediately before the day when the application is made;[48]
- **medical examination** - the application is accompanied by evidence that the applicant and each person included in the application has made arrangements to undergo a medical examination for the purposes of the application.[49]

The secondary time of application criteria require the family applicant to be a member of the family unit (or, for applications lodged before 1 July 2009, a member of the family unit or an interdependent partner or the dependent child of the interdependent partner[50]), and have made a combined application with, a person who satisfies the primary criteria in Subdivision 885.21 (time of application criteria for primary applicants).[51]

Time of decision criteria

The primary criteria to be met at time of the decision are:

- **points test –**
  - *for visa applications made before 1 July 2011*: the applicant has the qualifying score when assessed in relation to the points test in Schedule 6B to the Regulations;[52]
  - *for visa applications made on or after 1 July 2011:* the applicant has the qualifying score when assessed in relation to the applicable points test (Schedule 6B or 6C). For information on determining the applicable points test see below;[53]
- **skills assessment** - the applicant has a suitable skills assessment by the relevant assessing authority in relation to the nominated skilled occupation, and if the assessment is made on

[44] cl.885.212. This requirement was omitted for visa applications made on or after 1 January 2010: SLI 2009, No.375. The identical requirement for Subclass 886 visas was also removed. For these visa applications, the requirement is now located in Schedule 1, meaning the skills assessment must now be provided with the application for it to be a valid application.
[45] For visa applications made on or after 26 April 2008, 'Australian Standard Classification of Occupations' is defined as 'the standard published by the Australian Bureau of Statistics on 31 July 1997': SLI 2008, No.56.
[46] cl.885.213. For visa applications made before 1 July 2011 the High Court in *Berenguel v MIAC* (2010) 264 ALR 417 held that this criterion could be satisfied by a test undertaken after the application has been made. For visa applications made on or after 1 July 2011 the definition of 'competent English' in r.1.15C has been amended such that *Berenguel* is no longer applicable: SLI 2011, No.74.
[47] cl.885.213 as substituted by SLI2009, No.144. For visa applications made before 1 July 2011 the High Court in *Berenguel v MIAC* (2010) 264 ALR 417 held that this criterion could be satisfied by a test undertaken after the application has been made. For visa applications made on or after 1 July 2011 the definition of 'competent English' in r.1.15C has been amended such that *Berenguel* is no longer applicable: SLI 2011, No.74.
[48] cl.885.214.
[49] cl.885.215.
[50] References to 'interdependent partner' and 'dependent child of an interdependent partner' were removed by SLI 2009, No.144. For visa applications made on or after 1 July 2009, 'member of the family unit' in r.1.12 includes a reference to 'de facto partner' as defined in s.5CB of the Act. The definition in s.5CB covers same sex partners.
[51] cl.885.311 as amended by SLI 2009, No.144.
[52] cl.885.221 and note.
[53] cl.885.221 as amended by SLI 2011, No.74.

the basis of a qualification obtained in Australia while the applicant was the holder of a student visa, the qualification was obtained as a result of studying a registered course;[54]

- **visa cap -** the grant of the visa would not result in the number of Subclass 885 visas in a financial year exceeding the visa cap as specified by the Minister in an instrument in writing;[55]
- **passport -** *for visa applications made prior to 24 November 2012:* the applicant is the holder of a valid passport or it would be unreasonable to require the applicant to be the holder of a passport;[56]
- **public interest and special return criteria -** the applicant and members of the family unit (or, for visa applications made prior to 1 July 2009, a member of the family unit or an interdependent partner or the dependent child of the interdependent partner) need to satisfy certain public interest and special return criteria.[57]

The criterion in cl.885.223, which related to there being no evidence that information given or used to meet requirements of Item 1136 of Schedule 1 or to obtain the skills assessment was false or misleading in a material particular, was omitted on 2 April 2011.[58] A new public interest criterion (PIC) 4020 dealing with information that is false or misleading in a material particular was inserted in the relevant criteria.[59] These amendments apply to applications made, but not finally determined, before 2 April 2011 (i.e. all live applications before the tribunal as at 2 April 2011) and applications made on or after 2 April 2011.[60] However, there is an issue as to the applicability of PIC 4020 for visa applications made between 1 September 2007 and 14 October 2007.[61] For further detail on PIC 4020 see the MRD Legal Services Commentary PIC 4020, bogus documents and false or misleading information.

The secondary time of decision criteria require the family applicant to continue to be a member of the family unit of a person who has satisfied the primary criteria and is the holder of a Subclass 885 visa.[62] Family applicants are also required to satisfy certain public interest criteria and special return criteria at the time of decision,[63] and passport requirements.[64]

[54] cl.885.222.
[55] cl.885.229.
[56] cl.885.230. The passport must have been issued to the applicant by an official source and be in the form issued by that source. This criterion was omitted, and the requirement replaced by the broadly similar PIC 4021 (passport requirements) which was incorporated into cl.885.224(a) (see below): Migration Legislation Amendment Regulation 2012 (No.5) (SLI 2012, No.256).
[57] cl.885.224, 885.225, 885.226, 885.227 and 885.228. References to 'interdependent partner' and 'dependent child of an interdependent partner' were removed from cl.885.226, 885.228(a) by SLI 2009, No.144. For visa applications made on or after 1 July 2009, 'member of the family unit' in r.1.12 includes a reference to 'de facto partner' as defined in s.5CB of the Act. The definition in s.5CB covers same sex partners. Clause 885.224(a) was amended in respect of visa applications made on or after 24 November 2012, to include new PIC 4021 (passport requirements) and replace the omitted cl.885.230: SLI 2012, No.256.
[58] Migration Amendment Regulations 2011 (No.1) (SLI 2011, No.13).
[59] SLI 2011, No.13. PIC 4020 was inserted in cl.885.224(a) and 885.226(d).
[60] r.5 SLI 2011, No.13.
[61] cl.885.224 was substituted to introduce cl.885.224(a), but this amendment applied to visa applications made on or after 15 October 2007: Migration Amendment Regulations 2007 (No.12) (SLI 2007, No.314). Consequently, the insertion of PIC 4020 in cl.885.224(a) is not effective for visa applications made between 1 September 2007 and 14 October 2007 as there was no cl.885.224(a). As the omission of cl.885.223 is effective for all applications not finally determined, it appears that no relevant criterion relating to false or misleading information will apply to a primary visa applicant for a visa application made between 1 September 2007 and 14 October 2007. There is no such problem for cl.885.226(d) which relates to family members.
[62] cl.885.321 as amended by SLI 2009, No.144.
[63] cl.885.322, 885.323, and 885.324. Clause 885.322(a), amended to include PIC 4020, applies to all live applications as at 2 April 2011: r.5 and Item [4] of Schedule 3 to SLI 2011, No.13. However, for the same reasons as apply to cl.885.224(a), PIC 4020 does not apply to visa applications made between 1 September 2007 and 14 October 2007. There is no such problem for primary criterion cl.885.226(d) which relates to family members. Clause 885.322(a) was further amended in respect of visa applications made on or after 24 November 2012, to include new PIC 4021 (passport requirements) and replace the omitted cl.885.325: SLI 2012, No.256.
[64] cl.885.325 for visa applications made prior to 24 November 2012. This criterion was omitted, and the requirement replaced by the broadly similar PIC 4021 (passport requirements) which was incorporated into cl.885.322(a) (see above): SLI 2012, No.256.

Circumstances for grant of visa

The applicant must be in Australia when the visa is granted.[65]

Subclass 886 – Skilled Sponsored

Time of application criteria

The primary criteria must be satisfied by at least one 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 (or, for applications lodged before 1 July 2009, a member of the family unit or an interdependent partner or the dependent child of the interdependent partner).[66]

The primary time of application criteria for a Subclass 886 visa are identical to those for a Subclass 885 visa (see above). The secondary time of application criteria require the family applicant to be a member of the family unit (or, for applications lodged prior to 1 July 2009, a member of the family or an interdependent partner or the dependent child of the interdependent partner) of, and have made a combined application with, a person who satisfies the primary criteria in Subdivision 886.21 (time of application criteria for primary applicants).[67]

Time of decision criteria

The time of the decision criteria for a Subclass 886 visa are also similar to those for a Subclass 885 visa but contain an additional sponsorship requirement. The common criteria are:

- **points test –**
  - *for visa applications made before 1 July 2011*: the applicant has the qualifying score when assessed in relation to the points test in Schedule 6B to the Regulations;[68]
  - *for visa applications made on or after 1 July 2011:* the applicant has the qualifying score when assessed in relation to the applicable points test (Schedule 6B or 6C). For information on determining the applicable points test see below;[69]
- **skills assessment -** suitable skills assessment by relevant assessing authority and, if the assessment is made on the basis of a qualification obtained in Australia while the applicant was the holder of a student visa, the qualification was obtained as a result of studying a registered course;[70]
- **public interest and special return criteria -** the special return and public interest criteria in relation to the applicant and members of the family unit, interdependent partner or dependent child of the interdependent partner (for pre-1 July 2009 applications);[71]
- **visa cap -** cap on grant of visas;[72] and

[65] cl.885.411.
[66] See note, cl.886.2 as amended by SLI 2009, No.144.
[67] cl.886.311. References to 'interdependent partner' and 'dependent child of an interdependent partner' were removed from cl.886.311 by SLI 2009, No.144. For visa applications made on or after 1 July 2009, 'member of the family unit' in r.1.12 includes a reference to 'de facto partner' as defined in s.5CB of the Act. The definition in s.5CB covers same sex partners.
[68] cl.886.221.
[69] cl.886.221 as amended by SLI 2011, No.74.
[70] cl.886.223.
[71] cl.886.225, 886.226, 886.227, 886.228 and 886.229. References to 'interdependent partner' and 'dependent child of an interdependent partner' were removed from cl.886.227 and 886.229(a) by SLI 2009, No.144. For visa applications made on or after 1 July 2009, 'member of the family unit' in r.1.12 includes a reference to 'de facto partner' as defined in s.5CB of the Act. The definition in s.5CB covers same sex partners. Clause 886.225(a) was amended in respect of visa applications made on or after 24 November 2012, to include new PIC 4021 (passport requirements) and replace the omitted cl.886.231: SLI 2012, No.256.

- **passport -** *for visa applications made prior to 24 November 2012:* passport requirements.[73]

The criterion in cl.886.224, which related to there being no evidence that information given or used to meet visa application requirements, time of application criteria, assessed score requirements or to obtain the skills assessment was false or misleading in a material particular, was omitted on 2 April 2011.[74] A new public interest criterion (PIC) 4020 dealing with information that is false or misleading in a material particular was inserted in the relevant criteria.[75] These amendments apply to applications made, but not finally determined, before 2 April 2011 (i.e. all live applications before the tribunal as at 2 April 2011) and applications made on or after that date.[76] However, there is an issue as to the applicability of PIC 4020 for visa applications made between 1 September 2007 and 14 October 2007.[77] For further detail on PIC 4020 see the MRD Legal Services Commentary PIC 4020, bogus documents and false or misleading information.

The additional **sponsorship/nomination criterion** differs slightly depending upon whether the application was made before or after 1 July 2010:

- *for applications made prior to 1 July 2010*, the applicant must be:
  - nominated by a State or Territory government agency and the Minister has accepted the nomination, **or**
  - sponsored by a relevant relative[78] who has turned 18, is an Australian citizen, permanent resident or an eligible New Zealand citizen, who is usually resident in Australia **and** the sponsorship was made on the prescribed form[79] by post or courier and the Minister has accepted the sponsorship. All persons included in the application must be sponsored.[80]
- *for applications made on or after 1 July 2010*, the applicant must be:
  - if the applicant is nominated by a government agency as required by Schedule 1 - the Minister (or tribunal) must have accepted the nomination; **or**
  - if the applicant is sponsored by a relative as required by Schedule 1 - that person is a relevant relative[81] who has turned 18, is an Australian citizen, permanent resident or an eligible New Zealand citizen, is usually resident[82] in Australia **and** the sponsorship was

[72] cl.886.230.
[73] cl.886.231. This criterion was omitted, and the requirement replaced by the broadly similar PIC 4021 (passport requirements) which was incorporated into cl.886.225(a) (see above): SLI 2012, No.256.
[74] SLI 2011, No.13.
[75] Migration Amendment Regulations 2011 (No.1) (SLI 2011, No.13). PIC 4020 was inserted in primary criteria cl.886.225(a) and 886.227(d).
[76] r.5, SLI 2011, No.13.
[77] cl.886.225 was substituted to introduce cl.886.225(a), but this amendment applied to visa applications made on or after 15 October 2007: SLI 2007, No.314. Consequently, the insertion of PIC 4020 in cl.886.225(a) is not effective for visa applications made between 1 September 2007 and 14 October 2007 as there was no cl.886.225(a). As the omission of cl.886.224 is effective for all applications not finally determined, it appears that no relevant criterion relating to false or misleading information will apply to a primary applicant for a visa application made between 1 September 2007 and 14 October 2007. There is no such problem in relation to cl.886.227(d) which relates to family members.
[78] Either the parent, child, brother or sister, aunt or uncle or nephew or niece (including adoptive or step) of the applicant or his/her spouse or de factor partner (or spouse or interdependent partner, for pre 1 July 2009 applications) if they are also an applicant for a Subclass 886 visa.
[79] Form 1277 (Internet) or Form 1277.
[80] cl.886.222. References to 'interdependent partner' and 'dependent child of an interdependent partner' were removed by SLI 2009, No.144. For visa applications made on or after 1 July 2009, 'member of the family unit' in r.1.12 includes a reference to 'de facto partner' as defined in s.5CB of the Act. The definition in s.5CB covers same sex partners.
[81] The parent, child, sibling, aunt or uncle or nephew or niece (including adoptive or step) of the applicant or his/her spouse or interdependent or de facto partner (if also an applicant for a Subclass 886 visa). For visa applications made before 1 July 2009, the criterion refers to 'spouse or interdependent partner' (as defined in r.1.15A and 1.09A to include married and opposite sex couples). For visa applications made on or after 1 July 2009, the criterion refers to 'spouse or de facto partner' (as defined in ss.5F and 5CB of the Act to include married and same/opposite sex de facto couples), SLI 2009, No.144.
[82] For further information on the meaning of 'usually resident', see MRD Legal Services Commentary: Usually Resident.

made on the prescribed form[83] and the Minister has accepted the sponsorship. All persons included in the application must be sponsored.[84]

The secondary time of decision criteria require the family applicant to continue to be a member of the family unit (or, for applications lodged prior to 1 July 2009, a member of the family unit or an interdependent partner or the dependent child of the interdependent partner) of a person who has satisfied the primary criteria and is the holder of a Subclass 886 visa.[85] Family applicants are also required to satisfy certain public interest and special return criteria at the time of decision[86] and passport requirements.[87]

Circumstances for grant of visa

The applicant must be in Australia when the visa is granted.[88]

Subclass 887 – Skilled Regional

The Subclass 887 differs from the other two subclasses as it requires the applicant to have previously held certain skilled regional visas and lived and worked in a 'specified regional area' prior to the application for the visa. 'Specified regional area' is defined in cl.887.111. The applicable provisions depend on the basis on which the previous visa was held:[89]

- *for visa applications made before 1 July 2012*, it is an area specified by the Minister in an instrument in writing under item 6A1001 of Schedule 6A or 6701 of Schedule 6 to the Regulations (depending on the circumstances);

- *for visa applications made on or after 1 July 2012,* it is an area specified by the Minister in an instrument in writing under item 6701 of Schedule 6 or under item 6A1001 of Schedule 6A or under item 6D101 of Schedule 6D, or a 'designated area' (depending on the circumstances).[90]

These instruments are available at the 'Designated Areas' and 'Reg. & low pop areas' tabs in the Register of Instruments - Skilled visas.

[83] Form 1277 (Internet) or Form 1277 by post or courier.
[84] cl.886.222 as amended by SLI 2010, No.133.
[85] cl.886.321. References to 'interdependent partner' and 'dependent child of an interdependent partner' were removed by SLI 2009, No.144. For visa applications made on or after 1 July 2009, 'member of the family unit' in r.1.12 includes a reference to 'de facto partner' as defined in s.5CB of the Act. The definition in s.5CB covers same sex partners.
[86] cl.886.322, 886.323, and 886.324. Clause 886.322(a), amended to include PIC 4020, applies to all live applications as at 2 April 2011: SLI 2011, No.13. However, for the same reasons as apply to cl.886.225(a), PIC 4020 does not apply to visa applications made between 1 September 2007 and 14 October 2007. There is no such problem in relation to primary criterion cl.886.227(d) which relates to family members. Clause 886.322(a) was amended in respect of visa applications made on or after 24 November 2012, to include new PIC 4021 (passport requirements) and replace the omitted cl.886.325: SLI 2012, No.256.
[87] cl.886.325 for visa applications made prior to 24 November 2012. This criterion was omitted, and the requirement replaced by the broadly similar PIC 4021 (passport requirements) which was incorporated into cl.886.322(a) (see above): SLI2012, No.256.
[88] cl.886.411.
[89] The defined term of 'specified regional area' was amended for visa applications made on or after 1 January 2011 by Migration Legislation Amendment Regulations 2010 (No. 2) (SLI 2010, No.297). According to the accompanying Explanatory Statement, this amendment was to rectify an error caused by earlier amending regulations (SLI 2010, No.133) which resulted in Subclass 475 and Subclass 487 visas not being subject to condition 8539 or 8549 where the visa application was made on or after 1 July 2010 and the visa was approved between that date and 31 December 2010. This amendment thus allows persons who held a Subclass 475 or 487 visa to satisfy the definition even though the visa held was not subject to either condition 8539 or 8549. The defined term was further amended to include reference to Class SP visas, Schedule 6D and 'designated area' (defined in r.1.03) following the repeal of Schedule 6 SLI 2012, No.82.
[90] 'Designated area' is defined in r.1.03 as an area specified as a designated area by the Minister in an instrument in writing for this definition: SLI 2012, No.82.

Additionally, there is no points test and there are no English language requirements. Nor is there any requirement of having applied for a police check or medical check.

Time of application criteria

The primary criteria must be satisfied by at least one 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.[91]

The time of application primary criteria require that:

- **provisional skilled / bridging visa holder -** the applicant met the requirements of item 1136(7) (see above) of Schedule 1;[92]
- **residence location -** the applicant lived in a specified regional area (defined in cl.887.111) for a total of at least 2 years as the holder of one or more of the following visas: Class UX, Class UZ, Subclass 475, Subclass 487; Class SP or a Bridging A (Class WA) or Bridging B (Class WB) visa granted on the basis of an application for Class UX visa, Class VC visa or Class SP visa;[93]
- **employment location -** the applicant worked full-time in a specified regional area (defined in cl.887.111) for a total of at least 1 year as the holder of one of the visas mentioned above.[94]

The secondary time of application criteria require the family applicant to be a member of the family unit of, and have made a combined application with, a person who satisfies the primary criteria in Subdivision 887.21 (time of application criteria for primary applicants).[95]

Time of decision criteria

The primary criteria at the time of the decision require that:

- **substantially complied with conditions -** the applicant and persons included in the application must have substantially complied with the conditions of the skilled regional visa previously held;[96]
- **visa cap -** the grant of the visa would not result in the number of Subclass 887 visas in a financial year exceeding the visa cap as determined by the Minister in an instrument in writing;[97]
- **passport -** *for visa applications made prior to 24 November 2012:* either the applicant is the holder of a valid passport, or it would be unreasonable to require the applicant to be the holder of a passport.[98]

The criterion in cl.887.222, which related to there being no evidence that information given or used to meet visa application requirements, the requirements for certain Skilled visas, or to obtain the skills assessment was false or misleading in a material particular, was omitted on 2 April 2011.[99] A new public interest criterion (PIC) 4020 dealing with information that is false or misleading in a material

[91] See note, cl.887.2. For visa applications made on or after 1 July 2009, 'member of the family unit' in r.1.12 includes a reference to 'de facto partner' as defined in s.5CB of the Act. The definition in s.5CB covers same sex partners.
[92] cl.887.211.
[93] cl.887.212, amended by SLI 2012 No.82, to include reference to Class SP for visa applications made on or after 1 July 2012.
[94] cl.887.213.
[95] cl.887.311. For visa applications made on or after 1 July 2009, 'member of the family unit' in r.1.12 includes a reference to 'de facto partner' as defined in s.5CB of the Act. The definition in s.5CB covers same sex partners.
[96] cl.887.221, amended by SLI 2012, No.82, to include reference to Class SP for visa applications made on or after 1 July 2012.
[97] cl.887.228.
[98] cl.887.229. The passport must have been issued to the applicant by an official source and be in the form issued by that source. This criterion was omitted, and the requirement replaced by the broadly similar PIC 4021 (passport requirements) which was incorporated into cl.887.223(a) (see below): SLI 2012, No.256.
[99] SLI 2011, No.13.

particular was inserted in the relevant criteria.[100] These amendments apply to applications made, but not finally determined, before 2 April 2011 (i.e. all live applications before the tribunal as at 2 April 2011) and applications made on or after that date.[101] However, there is an issue as to the applicability of PIC 4020 for visa applications made between 1 September 2007 and 14 October 2007.[102] For further detail on PIC 4020 see the MRD Legal Services Commentary PIC 4020, bogus documents and false or misleading information.

Also, applicants and members of the family unit need to satisfy certain public interest and special return criteria.[103]

The secondary time of decision criteria require the family applicant to continue to be a member of the family unit of a person who has satisfied the primary criteria and is the holder of a Subclass 887 visa.[104] Family applicants are also required to satisfy certain public interest and special return criteria at the time of decision,[105] and the passport requirement.[106]

Circumstances for Grant

The applicant must be in Australia when the visa is granted.[107]

Key Issues

The Act and Regulations provide a number of definitions which specifically relate to skilled visas. The definitions which apply to the subclasses in this class of visa are highlighted below.

General Skilled Migration visa

'General Skilled Migration visa' (GSM visa) is a definition inserted to describe the Subclasses of skilled visa which replaced all other skilled visa Subclasses on 1 September 2007 and the new skilled visa Subclasses introduced on 1 July 2012. References to the phrase 'General Skilled Migration visa' can be found in the English language ability definitions as in force immediately before 1 July 2012,[108]

[100] SLI 2011, No.13. PIC 4020 was inserted in cl.887.223(a) and 887.225(a).
[101] r.5, SLI 2011, No.13.
[102] cl.887.223 was substituted to introduce cl.887.223(a), but this amendment applied to visa applications made on or after 15 October 2007: SLI 2007, No.314. Consequently, the insertion of PIC 4020 in cl.887.223(a) is not effective for visa applications made between 1 September 2007 and 14 October 2007 as there was no cl.886.223(a). As the omission of cl.887.222 is effective for all applications not finally determined, it appears that no relevant criterion relating to false or misleading information will apply to a primary applicant for a visa application made between 1 September 2007 and 14 October 2007. There is no such problem affecting cl.887.225(a) which relates to family members.
[103] cl.887.223, 887.224, 887.225, 887.226 and 887.227. For visa applications made on or after 1 July 2009, 'member of the family unit' in r.1.12 includes a reference to 'de facto partner' as defined in s.5CB of the Act. The definition in s.5CB covers same sex partners. See above footnotes relating to insertion of PIC 4020 into cl.887.223(a) and 887.225(a). Clause 887.223(a) was amended in respect of visa applications made on or after 24 November 2012, to include new PIC 4021 (passport requirements) and replace the omitted cl.887.229: SLI 2012, No.256.
[104] cl.887.321. For visa applications made on or after 1 July 2009, 'member of the family unit' in r.1.12 includes a reference to 'de facto partner' as defined in s.5CB of the Act. The definition in s.5CB covers same sex partners.
[105] cl.887.322, 887.323 and 887.324. Clause 887.322(a), amended to include PIC 4020, applies to all applications not finally determined before 2 April 2011: SLI 2011, No.13. However, for the same reasons as apply to cl.887.223(a), PIC 4020 does not apply to visa applications made between 1 September 2007 and 14 October 2007. There is no such problem affecting primary criterion cl.887.225(a) which relates to family members. Clause 887.322(a) was further amended in respect of visa applications made on or after 24 November 2012, to include new PIC 4021 (passport requirements) and replace the omitted cl.887.325: SLI 2012, No.256.
[106] cl.887.325 for visa applications made prior to 24 November 2012. This criterion was omitted, and the requirement replaced by the broadly similar PIC 4021 (passport requirements) which was incorporated into cl.887.322(a) (see above): SLI 2012, No.256.
[107] cl.887.411.
[108] r.1.15B to 1.15D and r.1.15EA were amended to remove references to GSM visas for visa applications made on or after 1 July 2012: SLI 2012, No.82.

and in r.2.26AA and r.2.26AB which specify the prescribed qualifications and number of points to be given to an applicant.

Regulation 1.03 provides that a 'General Skilled Migration visa' means a visa of this class (Subclasses 885, 886 or 887) or a Subclass 175, 176, 189, 190, 475, 476, 485, 487 or 489 visa, granted at any time. That is, a reference to a 'General Skilled Migration visa' is a reference to a skilled visa available from 1 September 2007.

English language proficiency

The Schedule 2 visa criteria for a Subclass 885 and 886 visa (cl.885.213 and 886.213) require a prescribed level of English language proficiency. The Regulations refer to a number of different standards of English language proficiency in the context of skilled visas. As relevant to Class VB visa applications, they are:

- Vocational English - r.1.15B;
- Competent English - r.1.15C;
- Proficient English - r.1.15D; and
- Superior English – r.1.15EA.

For visa applications made *before* 1 January 2010, the minimum requirement for Subclasses 885 and 886 is that the applicant has 'competent English' unless the applicant's nominated skilled occupation is in Major Group IV in ASCO,[109] in which case 'vocational English' is sufficient to meet the relevant criterion.[110]

For visa applications made *on or after* 1 January 2010, applicants for Subclasses 885 and 886 visas must have 'competent English'.[111]

Note that although these criteria are 'time of application' criteria, for visa applications made before 1 July 2011 they may be satisfied by a test undertaken after the application has been made.[112] For visa applications made on or after 1 July 2011, the criteria can only be satisfied by a test conducted before the application was made.[113] In these cases the criteria cannot be met by a language test undertaken after the application has been made.

For further information on these standards see the MRD Legal Services Commentary: English Language Ability - Skilled/Business Visas.

Qualifying score and the Points test

A criterion for the Subclass 885 and 886 visas 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 Act).[114] An applicant will have met this if they achieve at least the 'pass mark' when assessed against the Points Test.[115] The

[109] Major Group IV refers to Tradespersons and Related Workers.
[110] cl.885.213 and 886.213.
[111] cl.885.213 and 886.213 as amended by SLI 2009 No.144.
[112] *Berenguel v MIAC* (2010) 264 ALR 417 in relation to cl.885.213. As cl.886.213 is identically worded this conclusion would appear equally applicable to it.
[113] For visa applications made on or after 1 July 2011 the definition of 'competent English' in r.1.15C was amended such that *Berenguel* is no longer applicable. For visa applications made on or after 1 July 2011, the test must have been conducted in a specified period immediately before the application was made.
[114] cl.885.221 and 886.221.
[115] s.94(1), the Act.

relevant points test for these visas depends on the date of the visa application and whether the applicant is a person or in a class of persons specified by the Minister for r.2.26AA(2).

For 'points-tested General Skilled Migration visa'[116] applications made before 1 July 2011, the relevant points test is contained in Schedule 6B.[117]

Schedule 6B also applies to 'points-tested GSM visa' applications made on or after 1 July 2011 and before 1 January 2013 if the applicant is in a class of persons specified in an instrument under r.2.26AA(2)(a).[118] The relevant instrument in writing can be located on the 'Class Sch6B' tab of the Register of Instruments - Skilled visas. In all other cases, for GSM visa applications made on or after 1 July 2011 the General Points Test in Schedule 6C of the Regulations will apply. For more information about the class of persons specified for r.2.26AA(2)(a) and for whom Schedule 6B will continue to apply, see Legal Service Commentary on Schedule 6B.

For visa applications made on or after 1 July 2011 and before 1 January 2013 where the applicant is in a class of persons specified for r.2.26AA(2)(a) *and* the applicant's score under Schedule 6B is less than the applicable pass mark when the score is assessed, *and* the applicant is in a class of person specified for r.2.26AB(2), the application will also fall to be assessed against Schedule 6C.[119] Therefore, in certain cases it will be necessary to first assess the applicant against Schedule 6B and, if the applicant is not successful, then assess the applicant against Schedule 6C. The table below illustrates which schedule applies in different circumstances:

Visa application date	Class of applicant	Applicable schedule
Before 01/07/11		6B
01/07/11 – 31/12/12	If in r.2.26AA(2) class[120]	6B
01/07/11 – 31/12/12	**if not** in r.2.26AA(2) class[121]	6C
01/07/11 – 31/12/12	if • in r.2.26AB(2) class[122] and • does not meet 6B pass mark (ie also in a r.2.26AA(2) class)	6B and 6C

Points are awarded for applicable 'qualifications' specified in Parts 1 to 12 of Schedule 6B or Parts 1 to 13 of Schedule 6C. The qualifications for Schedule 6B are: skilled occupation; age; English language; employment; Australian employment; Australian education; occupation in demand; designated language; study requirement in regional Australia/low population growth areas; partner skill; nomination; and sponsorship. The qualifications for Schedule 6C are: age; English language; overseas employment; Australian employment; aggregated employment; Australian professional year;

[116] Defined in r.2.26AA(8) as a Subclass 175, 176, 475, 487, 885 or 886 visa.
[117] r.2.26AA(1) as amended by SLI 2011, No.74, and r.2.26AA omitted by SLI 2012, No.82 in relation to a visa application made on or after 1 July 2013.
[118] r.2.26AA(2) as amended by SLI 2011, No.74.
[119] r.2.26AB(2) as amended by SLI 2011, No.74.
[120] r.2.26AA(2) class is specified in Schedule 2 Part A or B (or C if applicant or partner state nominated) of relevant instrument. It is wider than, and includes, r.2.26AB(2) class. The relevant instrument can be located on the 'Sch6B,6C Classes' tab of the Register of Instruments - Skilled visas.
[121] r.2.26AA(2) class is specified in Schedule 2 Part A or B (or C if applicant or partner state nominated) of relevant instrument. It is wider than, and includes, r.2.26AB(2) class. The relevant instrument can be located on the 'Sch6B,6C Classes' tab of the Register of Instruments - Skilled visas.
[122] r.2.26AB(2) class is specified in Schedule 2 Part A (or C if applicant or partner state nominated) of relevant instrument. In contrast to r.2.26AA(2), it does not include Part B and is thus narrower than r.2.26AA(2). The relevant instrument can be located on the 'Sch6B,6C Classes' tab of the Register of Instruments - Skilled visas.

education; Australian study; credentialed community language; study in regional/low population growth metropolitan area; partner skill; State or Territory nomination; and designated area sponsorship.

There is no points test for Subclass 887 applicants.

For further information on the points tests applicable to Subclasses 885 and 886, see the Legal Service Commentary Schedule 6C.

Skilled occupation

Applicants seeking to satisfy the criteria for the grant of either the Subclass 885 or 886 visa must:

- *For applications made before 1 July 2011*: nominate a skilled occupation in the application for which at least 50 points are available as specified in the relevant instrument.[123]

- *For applications made on or after 1 July 2011*: nominate a skilled occupation that is specified in the relevant instrument.[124]

'Skilled occupation' in relation to a person is defined in r.1.15I, as meaning 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 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.[125]

The relevant instrument specifying skilled occupations for these purposes can be located on 'SOL' tab of the Register of Instruments - Skilled visas. Whilst in the past, the relevant 'Skilled Occupation List' instrument has been taken to be that in force at the time the visa application was made,[126] under the current definition of 'skilled occupation' in r.1.15I the relevant instrument is presently that in force at the time of decision. The current legislative instruments are consistent with this approach. There are four current instruments specifying occupations for the purposes of r.1.15I; the relevant instrument depends on the date of visa application and other specified circumstances. For further information on Skilled Occupations and the relevant instrument, see the MRD Legal Services Commentary: Skilled Occupation and Skilled Occupation List Instruments – Quick guide.

'Skilled occupation' arises in particular in the following contexts:

Nominating a 'skilled occupation'

For visa applications made on or after 1 January 2010, where the applicant is *not* seeking to satisfy the criteria for the grant of a Subclass 887 visa, the visa application will only be valid if at that time: the applicant's skills have been assessed by the relevant assessing authority as suitable for the

[123] items 1136(4)(b)(ii); (5)(b)(ii) and (6)(b)(ii). For visa applications made on or after 1 July 2010, these requirements were amended by SLI 2010, No.133, to clarify that the nominated occupation must be *for the applicant*.
[124] items 1136(4)(b)(ii); (5)(b)(ii) & (6)(b)(ii), as amended by SLI 2011 No.74.
[125] r.1.15I as inserted by SLI 2010 No.133, (which applied to visa applications made on or after 1 July 2010 and applications not finally determined before that date: r.3(4) and as amended by SLI 2011 No.74. There are no transitional provisions for this amendment, so it applies to all applications as of 1 July 2011: see r.3(2) and Note (SLI 2011, No.74).
[126] In *Aomatsu v MIMIA* (2005) 146 FCR 58, Moore J (Gyles J agreeing) at [24]-[27] in *obiter*, suggested that the relevant 'Skilled Occupation List' instrument for the purposes of Part 1 of Schedule 6A was that in force at time of application. Justice Moore stated that the information supplied by the applicant in relation to his application would be rendered meaningless, or its analysis impossible, if the assessment was not done by reference to skilled occupations (and the points they attract) identified in an instrument in force at the time the application was made.

nominated skilled occupation.[127] For certain specified occupations, this assessment must have occurred on or after 1 January 2010.[128]

In Schedule 1, the need to nominate a skilled occupation also arises in items 1136(4), 1136(5) and 1136(6). See Requirements for making a valid application – Schedule 1 above for details.

Applying for a skills assessment

For visa applications made prior to 1 January 2010, for both the Subclass 885 and 886 visas, the decision-maker must be satisfied that the applicant has applied for an assessment of the applicant's skills for the nominated skilled occupation by a relevant assessing authority.[129] This criterion appears under the heading 'Criteria to be satisfied at time of application'. In *Berenguel*, the High Court examined the purpose of cl.885.213 (relating to competent English) and whether there was grammatically any connection between the 'Time of application' heading under which the criterion appeared, and the terms of the criterion itself. It noted that the text of Division 885.2 (Primary criteria) did not support any general conclusion that the criteria in that division speak exclusively to satisfaction at the time of application.[130] Although the High Court referred to the 'skills assessment' criterion (cl.885.212) as an example of a criterion that did not of itself contain language connecting it to a temporal limit, it did not examine the purpose and context of the criterion or conclusively determine whether it must be satisfied after the time of application. However, the Federal Court in *Patel v MIAC* distinguished *Berenguel v MIAC,* observing that the language, context, and purpose of cl.485.214 (identical to the criteria in cl.885.212 and 886.212) required that the criterion be met at the time of application and not a later date.[131]

Suitable skills assessment

For both the Subclass 885 and 886 visas, there are time of decision criteria that the applicant must have a suitable skills assessment by the relevant assessing authority in relation to his or her nominated skilled occupation.[132] Under r.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' tab in the Register of Instruments – Skilled visas.

Two year study requirement / Australian study requirement

It is a time of application criteria for a Subclass 885 and 886 visa that the applicant has satisfied the '2 year study requirement' / 'Australian study requirement' in the 6 months before the application was made and each degree, diploma or trade qualification is closely related to the applicant's nominated skilled occupation.[133] The requirement is also relevant to certain qualifications in the points test. The

[127] item 1136(3)(ba), (bb). This requirement is intended to require that all Class VB applicants, with the exception of those for a Subclass 887 visa must have been assessed as holding suitable skills for the nominated skilled occupation *prior* to lodging the visa application. This would ensure that a consistent standard of skills and competencies are held by all applicants for a Class VC visa: Explanatory Statement to SLI 2009, No.375, p.4.
[128] The relevant instrument specifying the affected occupations can be located under the 'SOL' tab (for visa applications made on or after 1 July 2010) and the 'SkillAss' tab (for visa applications made in the period 1 January 2010 – 30 June 2010) in the Register of Instruments – Skilled visas.
[129] cl.885.212 and 886.212. These requirements were omitted for visa applications made on or after 1 January 2010: SLI 2009, No.375. For these visa applications, the requirement is now located in Schedule 1, meaning the skills assessment must now be provided with the application for it to be a valid application.
[130] *Berenguel v MIAC* (2010) 264 ALR 417 at [26].
[131] *Patel v MIAC* (2011) 198 FCR 62 (Robertson J) at [41]-[51]. The Court did not expressly refer to the contrary view in the *obiter* comments in *Rai v MIAC* [2010] FMCA 472 (Cameron FM, 1 July 2010), where the Federal Magistrates Court applied *Berenguel* and observed that cl.485.214 and 487.214 could be satisfied anytime up until the decision on the application.
[132] cl.885.222 and 886.223.
[133] cl.885.211(2) and (3) and cl.886.211(2) and (3), as amended by Migration Amendment Regulations 2009 (No.4) (SLI 2009, No.84).

'Australian study requirement' commenced on 15 May 2009 and applies to visa applications made on or after this date.[134] It replaced the former '2 year study requirement' which applies to visa applications made on or after 1 September 2007 but prior to 15 May 2009.[135] They are essentially the same, although one aspect of 'Australian study requirement' is further defined in the Regulations.

'2 year study requirement'

Under r.1.15F, a person meets the '2 year study requirement' if they have completed one or more degrees, diplomas or trade qualifications[136] for award by an Australian educational institution as a result of at least two years of academic study in Australia. The study must have been completed in a total of at least 16 calendar months on a visa that allowed study. Further, the courses must be registered courses, for which all instruction was conducted in English, and that the applicant undertook while in Australia as the holder of a visa authorising the applicant to study.[137] For visa applications made on or after 26 April 2008, 'completed' is defined as meaning 'having met the academic requirements for its award'.[138]

'Australian study requirement'

Regulation 1.03 provides that 'Australian study requirement' has the meaning given in r.1.15F.[139] Under r.1.15F, a person meets the 'Australian study requirement' if they have completed one or more degrees, diplomas or trade qualifications[140] for award by an Australian educational institution as a result of at least two academic years of study in Australia. The study must have been completed in a total of at least 16 calendar months on a visa that allowed study. Further, the courses must be registered courses, for which all instruction was conducted in English, and that the applicant undertook while in Australia as the holder of a visa authorising the applicant to study.[141] 'Completed' is defined as meaning 'having met the academic requirements for its award'.[142]

For the purposes of the 'Australian study requirement', the term 'academic year' is defined in r.1.03 to mean a period that is specified by the Minister as an academic year in an instrument in writing.[143] The relevant instrument in writing can be located on the 'AcadYear' tab on the Register of Instruments - Skilled visas.

The time of application requirement applies only to applicants who met the requirements of either item 1136(4) or (5).

For further information on the '2 year study requirement' / 'Australian study requirement' see the MRD Legal Services commentary Skilled Occupation / Study Requirement.

[134] r.2 of SLI 2009, No.84.
[135] r.4 of SLI 2009, No.84.
[136] Degree, diploma and trade qualification are defined in r.2.26A(6) for visa applications made before 1 July 2012, and in r.2.26AC(6) for visa applications made on or after 1 July 2012: amended by SLI 2012, No.82.
[137] r.1.15F.
[138] r.1.15F(2), introduced by SLI 2008, No.56.
[139] SLI 2009, No.84.
[140] Degree, diploma and trade qualification are defined in r.2.26A(6) for visa applications made before 1 July 2012, and in r.2.26AC(6) for visa applications made on or after 1 July 2012: amended by SLI 2012, No.82.
[141] r.1.15F.
[142] r.1.15F(2), introduced by SLI 2008, No.56.
[143] item [1] of Schedule 1 to SLI 2009, No.84.

Closely related to the applicant's nominated skilled occupation

The phrase 'closely related to the applicant's nominated skilled occupation' appears in a number of time of application criteria for the class.[144] For further information in relation to this requirement, see the MRD Legal Services commentary: Skilled Occupation / Study Requirement.

Police check and medical examination

It is a time of application criterion for a Subclass 885 and 886 visa that *the application is accompanied by evidence* that:

- the applicant (and each person 16 years and over) has applied for an Australian Federal Police check during the 12 months immediately preceding the visa application;[145] and
- the applicant and each person included in the application has made arrangements to undergo a medical examination.[146]

'Application' in this context means the application for the visa;[147] and 'accompanied by' means supplied with or near the time of application. In *Anand v MIAC* the Federal Court, considering the similarly worded police check requirements in cl.485.216 accepted that evidence accompanying an application could be supplied after the application is lodged although there must still be a temporal connection with the application, and evidence supplied around the time of application may be sufficient.[148] While the Court was considering cl.487.216, its reasoning has been applied in the context of cl.885.214[149] and would appear to be equally applicable to cl.886.214 and the similar criteria related to arrangements to undergo a medical examination.

The interpretation in *Anand* is an expansion on that of the Federal Magistrates Court in *Panchal v MIAC*[150] where it was held that the expression '[t]he application is accompanied by evidence' contemplates evidence being provided at the same time as the application form is lodged, whether that be simultaneously or on the same day.[151]

Note that it has also been held that statements contained within the application cannot be described as 'accompanying' the application.[152]

[144] cl.885.211(2), cl.885.211(3), cl.885.211(4) cl.886.211(2), cl.886.211(3), cl.886.211(4).
[145] cl.885.214 and 886.214.
[146] cl.885.215 and 886.215.
[147] *Anguralia v MIBP* [2014] FCCA 2027 (Judge Lloyd Jones, 10 September 2014) at [32] following *Anand v MIAC* [2013] FCA 1050 (Katzmann J, 16 October 2013) at [29].
[148] *Anand v MIAC* [2013] FCA 1050 (Katzmann J, 16 October 2013) at [28]. By way of example of evidence provided around the time of application, the court referred to the situation where accompanying evidence which had inadvertently not been attached to the application, but which was forwarded a day or so later, and stated that it may even extend beyond that. For example, where an applicant indicated in their application or a document submitted with it that the evidence would be forwarded within the week and they did so, it might be said that evidence accompanied the application.
[149] *Anguralia v MIBP* [2014] FCCA 2027 (Judge Lloyd Jones, 10 September 2014).
[150] [2012] FMCA 562 (Scarlett FM, 29 June 2012)
[151] *Panchal v MIAC* 2012] FMCA 562 (Scarlett FM(, 29 June 2012) at [85]. This case considered cl.485.216, but the reasoning appears equally applicable to other identically worded criteria and criteria relating to arrangements to undergo medical checks which also require that the 'application is accompanied by evidence': cl.485.217, 487.217, 885.215 and 886.215.
[152] In *Panchal v MIAC* [2012] FMCA 562 (Scarlett FM, 29 June 2012) at [82] and [85], the Court accepted that the phrase 'the application is accompanied by evidence' in cl.485.216 refers to something other than that which is contained in the online application form. The applicant in that case had provided his name and the date of his request for a police check in his on-line application form, gave no other material, being unable to upload it at that time. The applicant provided a copy of the postal receipt for his police check application some 11 months later. While this case considered the requirements of cl.485.216, the reasoning appears applicable to identically worded criteria in cl.487.216, 885.214 and 886.214, as well as for similarly worded criteria relating to arrangements to undergo medical checks: cl.485.217, 487.217, 885.215 and 886.215.

Medical examination

The criterion that the application is accompanied by evidence that each applicant has made arrangements to undergo a medical examination involves similar considerations to those for the police check criterion discussed above. That is, following *Anand v MIAC,* the evidence of arrangements may be submitted after the application was lodged, although there must still be a temporal connection with the application, and evidence supplied around the time of application may be sufficient.[153] Although the Court was considering the police check criterion for Subclass 485, the similarities between that criterion and the medical examination criteria for Subclass 885 and 886 mean that the reasoning would be equally applicable.

This criterion also requires that the arrangements have been made prior to the visa application being made. In *Gill v MIAC,* the Court considered the meaning of the term 'is accompanied by evidence'.[154] Having considered the High Court's reasoning in *Berenguel v MIAC*[155], the Court held that the purpose of the criterion was to ensure that when a decision is made, the decision-maker will have an up-to-date medical report before them. The Court found that the criterion imposed a substantive requirement, in relation to there being arrangements in place to undergo a medical examination, which could only be achieved if the criterion was understood to apply at the time of application.[156] The Court concluded that the English language requirement in cl.885.213 considered in *Berenguel* could be distinguished from the medical examination requirement.

Police check

As noted above, following *Anand v MIAC,* the requirement that the application must be *accompanied* by evidence of an application for a police check may be satisfied by evidence submitted after the application was lodged, although there must still be a temporal connection with the application.[157] Although *Anand* concerned consideration of the police check requirement for a Subclass 485 visa, the close similarities between that criterion and the police check criteria for a Subclass 885 and 886 visa mean that the reasoning is equally applicable. In light of this, the earlier lower court authority of *Singh v MIAC*,[158] that held that the police check criterion for a Subclass 485 visa cannot be satisfied at some time after the lodging of the application should not be followed on this point.

The requirement that the application for the police check was made in the 12 months preceding the visa application remains unaffected by the question as to whether the application is 'accompanied by' the relevant evidence.[159]

[153] *Anand v MIAC* [2013] FCA 1050 (Katzmann J, 16 October 2013) at [28].
[154] [2010] FMCA 587 (4 August 2010, Lloyd-Jones, FM) at [22].
[155] (2010) 264 ALR 417.
[156] *Gill v MIAC* [2010] FMCA 587 (4 August 2010, Lloyd-Jones, FM) at [22].
[157] *Anand v MIAC* [2013] FCA 1050 (Katzmann J, 16 October 2013) at [28].
[158] *Singh v MIAC* [2011] FMCA 982 (Emmett FM, 14 December 2011) at [52]. The Court considered cl.485.216 which is expressed in the same terms as cl.885.214 and cl.886.214.
[159] See *Anguralia v MIBP* [2014] FCCA 2027 (Judge Lloyd-Jones, 10 September 2014) at [33].

Relevant amending legislation

Title	Reference Number	Legislation Bulletin
Migration Amendment Regulations 2007 (No.7)	SLI 2007, No.257	No.9/2007
Migration Amendment Regulations 2007 (No.12)	SLI 2007, No.314	No.15/2007
Migration Amendment Regulations 2008 (No.2)	SLI 2008, No.56	No.2/2008
Migration Amendment Regulations 2009 (No.4)	SLI 2009, No.84	No.6/2009
Migration Amendment Regulations 2009 (No.7)	SLI 2009, No.144	No.9/2009
Migration Amendment Regulations 2009 (No.15)	SLI 2009, No.375	No.19/2009
Migration Amendment Regulations 2010 (No.6)	SLI 2010, No.133	No.7/2010
Migration Amendment Regulations 2010 (No.2)	SLI 2010, No.297	No.10/2010
Migration Amendment Regulations 2011 (No.1)	SLI 2011, No.13	No.1/2011
Migration Amendment Regulations 2011 (No.3)	SLI 2011, No.74	No.2/2011
Migration Amendment Regulation 2012 (No.2)	SLI 2012, No.82	No.4/2012
Migration Amendment Regulations 2012 (No.5)	SLI 2012, No.256	No.10/2012
Migration Legislation Amendment Regulation 2013 (No.1)	SLI 2013, No.33	No.2/2013
Migration Amendment (2015 Measures No.1) Regulation 2015	SLI 2015, No.34	No.1/2015

Relevant Case Law

Amodi v MIAC [2013] FMCA 70	Summary
Anand v MIAC [2013] FCA 1050	Summary
Anguralia v MIBP [2014] FCCA 2027	
Aomatsu v MIMIA [2005] FCAFC 139; (2005) 146 FCR 58	Summary
Berenguel v MIAC [2010] HCA 8; (2010) 264 ALR 417	Summary
MIBP v Mon Tat Chan [2008] FCAFC 155 (2008) 172 FCR 193	Summary
Gill v MIAC [2010] FMCA 587	Summary
Hooda v MIAC [2012] FMCA 1018	Summary
Jahangir v MIBP [2014] FCA 218 (2014) 222 FCR 91	Summary

Panchal v MIAC [2012] FMCA 562	Summary
Patel v MIAC [2011] FCA 1220; (2011) 198 FCR 62	Summary
Rai v MIAC [2010] FMCA 472	Summary
Singh v MIAC [2011] FMCA 982	Summary

Available Decision Precedents/Templates

The following decision precedents/templates and optional standard paragraphs for Subclasses 885, 886 and 887 are available:

- **Subclass 885 Visa Refusal - General** - suitable for all Subclass 885 cases where the issue is not English language proficiency, the points test, PIC 4020 or the health criterion.
- **Subclass 886 Visa Refusal - General** - suitable for all Subclass 886 cases where the issue is not English language proficiency, the points test PIC 4020 or the health criterion.
- **Subclass 887 Visa Refusal - General** - suitable for all Subclass 885 cases where the issue is not PIC4020 or the health criterion.
- **Subclass 885 Visa Refusal - English language requirement** - suitable for Subclass 885 cases where the issue is whether the applicant has the minimum standard of English required for the grant of the visa.
- **Subclass 886 Visa Refusal - English language requirement** - suitable for Subclass 886 cases where the issue is whether the applicant has the minimum standard of English required for the grant of the visa.
- **Subclass 175/176/475/487/885/886 Visa Refusal – General Points Test (Sch 6B)** – suitable for use in reviewing decisions for visa applications lodged between 1 September 2007 and 31 December 2012 where the primary issue is whether the applicant has the qualifying score when assessed against Schedule 6B (General Points Test).
- **Subclass 175/176/475/487/885/886 Visa Refusal – Points Test (Sch 6C)** - suitable for use in reviewing decisions for visa applications lodged on or after 1 July 2011 where the primary issue is whether the applicant has the qualifying score when assessed against Schedule 6C (Points Test).
- **PIC 4020 –** suitable for any subclass where the issue 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 PIC 4020 (false or misleading information) are available for insertion into draft decision templates.

Last updated/reviewed: 15 February 2019

Subclass 485 (Temporary Graduate) (Class VC)

CONTENTS

Overview

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

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

- Subclass 485 (Skilled – Graduate)
- Subclass 487 (Skilled – Regional Sponsored).[2]

Subclass 487 closed to primary applications from 1 January 2013 and to secondary applications from 1 July 2012.[3] It was repealed on 1 July 2013, so for applications made from that date Subclass 485 is the only visa subclass within Class VC.[4]

Subclass 485 (Skilled - Graduate) underwent significant amendments from 23 March 2013.[5] 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.[6]

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

A decision to refuse a Subclass 485 visa is generally reviewable under s.338(2) of the *Migration Act 1958* (the Act) as an applicant must be in Australia at time of grant and when making the visa application.[7] Applications for review of these decisions must be made by the visa applicant.[8] Decisions in relation to secondary applicants who make a separate application outside Australia are not reviewable.

[1] 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.
[2] Item 1229(10) of Schedule 1 to the Migration Regulations 1994 (the Regulations).
[3] Items 1229(3)(a) and (b) as amended by Migration Legislation Amendment Regulation (2013) (No.1) (SLI 2013, No.33)
[4] Migration Amendment Regulation 2012 (No.2) (SLI 2012, No.82), Schedule 2, items [21] to [23] and [29]. Note: Amendments at SLI 2012, No 82, Schedule 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, Schedule 2, item [5]. Items 1229(3)(i) and (n) were later repealed by Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI 2014, No.30).
[5] SLI 2013, No.33.
[6] SLI 2013, No.33, Schedule 2. See also Explanatory Statement to SLI 2013, No.33 at pp.6 – 20.
[7] Item 1229(3)(g) and cl.485.411(1). Decisions made under s.501 of the Act on character grounds are not reviewable under Part 5.
[8] s.347(2)(a).

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 (the Regulations).

The Schedule 1 requirements differ depending on the time of visa application. The most significant difference is between visa applications made before 23 March 2013, and those made from that date when the Class underwent a major overhaul. There are however some additional variations within each of those points in time.

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;[9] at the place and in the manner specified;[10] and the visa application charge payable at the time the application is made must be paid;[11]
- **location -** applicants must be in Australia unless claiming to be a member of the family unit of a Class VC holder, in which case they can be in or outside Australia.[12] An application by a member of the family unit may be made at the same time and place and combined with the primary application.[13]
- **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.[14]
- **primary applicants in Subclass 485 Graduate Work stream** - must nominate a skilled occupation specified in the relevant instrument.[15]
- **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.[16]
- **visa status and age -** Primary Subclass 485 applicants must be less than 50 and must either:
    - hold an eligible student visa (as defined in r.1.03); or

[9] 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 r.2.07(5): Item 1229(1) as substituted by Migration Amendment (2015 Measures No.1) Regulation 2015 (SLI 2015, No.34). The relevant instruments are available under the 'VisaApp' tab in the Register of Instruments – Skilled visas.
[10] 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 r.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.
[11] Item 1229(2) as substituted by SLI 2013, No.33. 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 (SLI 2013, No.118). Note: the amendments to item 1229(2) in SLI 2013, No.118 overrode the amendments to item 1229(2)(a) and (b) by SLI 2012, No.82, Schedule 2, items [19] – [20] which were to commence on 1 July 2013.
[12] Items 1229(3)(f) and (g) as substituted by SLI 2013, No.33. In *Luk v MIBP* [2018] FCCA 2740 (Street J, 24 September 2018) 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.
[13] Item 1229(3)(h) as substituted by SLI 2013, No.33.
[14] Item 1229(3)(j) inserted by SLI 2013, No.33. Although the intention of this item appears to be to restrict the applicant from satisfying the criteria for the stream that was not nominated in the application form, it is unclear that this item achieves that intention. For example, if an applicant erroneously selected the Graduate Work stream in the application form but otherwise met the Schedule 1 and 2 criteria for the Post-study Work stream, nothing in the terms of the Regulations appears to restrict the applicant from being granted a visa in the Post-study Work stream. See further discussion below.
[15] 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.
[16] Item 1229(3)(l), inserted by SLI 2013, No.33.

- hold a Bridging A or B visa granted on the basis of a valid application for a visa other than for certain student visas and also have held an 'eligible student visa' in the previous 6 months; or
- hold a substantive visa other than certain student visas and have held an 'eligible student visa' in the previous 6 months; 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.[17]

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.[18]

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.[19] There are criteria specific to each stream, as well common criteria that must be satisfied regardless of the stream.

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 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 cl.485.21. These are:

- **visa history -** the applicant has not previously held a primary Subclass 476 visa or 485 visa.[20]
- **English language proficiency –** the applicant meets English language requirements - these vary depending upon when the application was made:
  - For visa applications made before 18 April 2015, when the application was made, it must have been accompanied by evidence that the applicant had competent English.[21]

[17] Item 1229(4), substituted by SLI 2013, No.33.
[18] See note to Division.485.2, as amended by Migration Amendment Regulations 2009 (No.7) (SLI 2009, No.144).
[19] Explanatory Statement to SLI 2013, No.33 at p.12.
[20] cl.485.211, substituted by SLI 2013, No.33.
[21] cl.485.212, substituted by SLI 2013, No.33.

- For visa applications made on or after 18 April 2015, 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
    - holds a passport of a type specified by instrument.[22]

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

Field Code Changed

- **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.[23] 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.[24] The applicant must also have had adequate arrangements in Australia for health insurance since that time.[25] 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.[26] For further detail on PIC 4020 see the MRD Legal Services Commentary: PIC 4020, bogus documents and false or misleading information.

Field Code Changed

- **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.[27]

  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.[28]

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 cl.485.22 as follows:

- **Australian study requirement -** the applicant satisfied the Australian study requirement in the period of 6 months preceding the day the application was made.[29] For further discussion of issues arising from this criterion, see below.

[22] cl.485.212, substituted by SLI 2015, No.34. The relevant instrument can be located on the 'Eng476485' tab of the MRD Legal Services Register of Instruments - Skilled visas. In *Baig & Ors v MIBP* [2018] FCCA 2986 (Dowdy J, 17 October 2018) 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.
[23] cl.485.213, substituted by SLI 2013, No.33.
[24] cl.485.215(1), substituted by SLI 2013, No.33.
[25] cl.485.215(2), substituted by SLI 2013, No.33.
[26] cl.485.216 and 485.217, substituted by SLI 2013, No.33.
[27] cl.485.218 substituted by SLI 2013, No.33.
[28] cl.485.214, repealed by SLI 2015, No.34.
[29] cl.485.221 substituted by SLI 2013, No.33.

- **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.[30] 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.[31] 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 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.[32]
  - *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;[33] 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.[34]

Stream specific criteria – Post-Study Work stream

The 'Post-Study Work stream' is for graduates who studied at eligible educational institutions and at a specified academic level.[35] Unlike the 'Graduate Work stream', it does not require the applicant to have particular skills or a suitable skills assessment.[36] The criteria for the 'Post – Study Work stream' are set out in cl.485.23 as follows:

- **specified qualification -** the applicant holds a qualification of a kind specified in a relevant written instrument.[37]
- **specified institution** - each qualification was conferred or awarded by an educational institution specified in a relevant written instrument.[38]
- **Australian study requirement -** the applicant's study for the qualification(s) satisfied the Australian study requirement in the period of 6 months ending immediately before the day the application was made.[39] For further discussion of issues arising from this criterion, see below.

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.[40] The current instruments reflect this intention.

[30] cl.485.222 as amended by SLI 2013, No.33.
[31] cl.485.223 substituted by SLI 2013, No.33.
[32] cl.485.224 substituted by SLI 2013, No.33, .
[33] cl.485.224(1) and (1A) as substituted by SLI 2014, No.145.
[34] cl.485.224 (2) as substituted by SLI 2013, No.33.
[35] Explanatory Statement to SLI 2013, No.33, at p.17.
[36] Explanatory Statement to SLI 2013, No.33, at p.17.
[37] cl.485.231(1). See the 'Qual' tab in the Register of Instruments - Skilled visas for the relevant instrument.
[38] cl.485.231(2). See the '485Inst' tab in the Register of Instruments - Skilled visas for the relevant instrument.
[39] cl.485.231(3).
[40] Explanatory Statement to SLI 2013, No.33, at p.17.

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.[41] 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.[42] Family applicants are also required to satisfy certain public interest and special return criteria.[43]

Circumstances for grant of visa

Primary applicants, and family applicants who made a combined application with such applicant, must be in Australia when the visa is granted.[44] In any other case, the applicant may be in or outside Australia when the visa is granted. For practical purposes, only applicants who did not make a combined application and satisfy the secondary criteria may be outside Australia when the visa is granted.[45]

Key Issues

Subclass 485: Can the applicant change streams / does the Tribunal need to consider both streams?

The Explanatory Statement to the amending regulation that introduced the two streams in Subclass 485 said that the intention was to ensure that applicants are only assessed against the criteria specific to the stream that was selected.[46] However, this intention is not apparent in the express terms of the Regulations, and it is arguable that an applicant could be considered against a stream that differs from the one apparently indicated on the application form. There has been no judicial consideration of this issue but one matter was remitted by consent from the Federal Circuit Court.

'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 r.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'.[47]

An application for a visa must be made for a particular class and only valid applications can be considered by the Minister.[48] 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

[41] cl.485.311, substituted by SLI 2013, No.33.
[42] cl.485.312 substituted by SLI 2013, No.33.
[43] cl.485.313 and 485.314 substituted by SLI 2013, No.33.
[44] cl.485.411(1) and (2) substituted by SLI 2013, No.33.
[45] cl.485.411(3).
[46] Explanatory Statement to SLI 2013, No.33 at p.8.
[47] r.2.03(1A). See also r.2.03(1B), which says that a visa with criteria set out in a stream may be called '[the Subclass of the visa] in the [name of the stream]'
[48] ss.45 and 47.

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.[49]

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). Therefore, if an applicant nominates one stream to which the application relates, and meets either item 1229(3)(k) or 1229(3)(l), the applicant will have made a valid visa application[50] and the Minister must consider whether the criteria for the visa have been satisfied.

Substantial compliance with visa application form

The Federal Circuit Court remitted by consent the matter of BRG368/2017 (Tribunal decision 1611832), and 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).[51] Consistent with the reasons for remittal endorsed by the Court in this matter, 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 that the applicant intended to apply for that stream, substantially complied with the visa application form and met the Schedule 1 requirements for that stream. However, an applicant would 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).

Interaction between Schedule 1 and Schedule 2 requirements

It is unclear how the Schedule 1 requirements for the different streams affect the assessment of the visa criteria in Schedule 2, but it appears arguable that once a valid visa application is made, the applicant can later be assessed against either stream.

Notes appearing in Part 485 of Schedule 2 indicate that the primary criteria are different depending on which stream the application is made in, and in respect of which stream the applicant is seeking to satisfy the criteria, consistent with the requirement in Schedule 1 item 1229(3)(j) that the applicant nominate only one stream to which the application relates.[52] However, the terms of Schedules 1 and 2 do not expressly prohibit an applicant from being considered against the criteria in either stream, or from changing streams after the initial application.

Nevertheless, an applicant who applied in the Post-Study Work stream may not be able to meet the primary criteria for the Graduate Work stream which refer to the applicant's 'nominated skilled occupation' which appears linked to the Schedule 1 requirement in item 1229(3)(k).[53] On the other hand, an applicant who applied in the Graduate Work stream could probably meet the criteria for the Post-Study Work stream, because none of those criteria relate to Schedule 1 requirements.

[49] s.65(1)(a)(ii).
[50] As long as the remaining Schedule 1 requirements have been met.
[51] Before the Department refused the visa, 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.
[52] Notes to Div.485.2, Sudiv.485.22 and Subdiv.485.23.
[53] cls.485.222, 485.223 and 485.224.

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.[54] This criterion was considered by the Federal Circuit Court in *Nguyen v MIBP*.[55] The Court applied *Berenguel v MIAC*[56] and *Anand v MIAC*[57] to find that a measure of flexibility applies to the words 'accompanied by' such that the evidence is not required to be provided with the application itself.[58] The Court did not identify the possible outer limits of when an application may be considered to be 'accompanied by' the relevant evidence.

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.[59]

Under r.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' 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 occupation.[60] A relevant assessing authority may set different standards for assessing a skilled occupation for different visa classes or subclasses.[61]

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 the MRD Legal Services Commentary: Skilled Occupation / Study Requirement.

[54] cl.485.223 substituted by SLI 2013, No.33.
[55] [2016] FCCA 1523 (Judge Burchardt, 8 July 2016).
[56] [2010] HCA 8 (French CJ, Gummow and Crennan JJ, 5 March 2010).
[57] [2013] FCA 1050 (Katzmann J, 16 October 2013).
[58] In this case, the applicant provided a copy of her skills assessment to the delegate 29 days after her visa application. Judge Burchardt held that it was plainly open for the Tribunal to conclude that the delay meant the evidence did not accompany the application. At [39]-[40], his Honour rejected the Minister's submission that the words 'when the application was made, it was accompanied by' should be taken at its most literal sense, given it would be unworkable as it was not possible to send accompanying documentation with the online application. His Honour held that *Anand* was applicable notwithstanding the difference in terminology used.
[59] cl.485.224.
[60] r.2.26B(2).
[61] r.2.26B(3) inserted by Migration Amendment (Skills Assessment) Regulation 2013 (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).

Australian study requirement

It is a criterion for a Subclass 485 visa application in the Graduate Work stream made on or after 23 March 2013, that the applicant has satisfied the 'Australian study requirement' in the 6 months before the application was made.[62] For Subclass 485 visa applications made from 23 March 2013, it is a criterion for the 'Post-Study Work stream' that the applicant's study for the relevant qualifications satisfied the Australian study requirement in the 6 months ending immediately before the day the application was made.[63]

This requires the applicant to have 'completed' the relevant qualification(s) within the 6 months before lodging the application, although the decision maker may reach the necessary state of satisfaction at some later point.[64] For the purpose of cl.485.221 and cl.485.231(3), 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.[65]

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

Closely related to the applicant's nominated skilled occupation

In addition to satisfying the Australian study requirement, the qualifications used to satisfy that requirement must be 'closely related to the applicant's nominated skilled occupation'. For Subclass 485 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, please see the MRD Legal Services commentary: Skilled Occupation / 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);[66] and
- the applicant had adequate arrangements in Australia for health insurance.[67]

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.[68]

These criteria are significantly different from the criterion considered in *Anand*.[69] In that case, the 'time of application' requirement came under the cl.487.21 heading and not the criterion itself which simply required that '[t]he application is accompanied by' the specified evidence. While the heading informs

[62] cl.485.221 substituted by SLI 2013, No.33.
[63] cl.485.231(3) as amended by SLI 2013, No.33.
[64] cl.485.221, and r.1.15F(1)(b).
[65] *Venkatesan v MIAC* [2008] FMCA 409 (Burchardt FM, 14 March 2008) at [15]; *Sapkota v MIAC* [2012] FCA 981 (Cowdroy J, 7 September 2012) at [25]; *Llanos & Anor v MIBP* [2018] FCCA 2148 (Vasta J, 30 July 2018) at [9] to [10].
[66] cl.485.213 as substituted on 23 March 2013: SLI 2013, No.33.
[67] cl.485.215(1) as substituted on 23 March 2013: SLI 2013, No.33.
[68] cl.485.215(2) as substituted on 23 March 2013: SLI 2013, No.33.
[69] [2013] FCA 1050.

the criterion, it is not determinative, as the High Court made clear in *Berenguel*.[70] By contrast, 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. Despite the difference in wording, the decision in *Nguyen v MIBP*[71] (discussed above) suggests a Court is likely to apply *Anand*[72] when considering the expression 'accompanied by'.[73]

An 'Australian Federal Police check' means a check issued by the Australian Federal Police, not a document issued by a private organisation.[74]

Relevant amending legislation

Title	Reference Number	Legislation Bulletin
Migration Amendment Regulations 2007 (No.12)	SLI 2007, No.314	No.15/2007
Migration Amendment Regulations 2008 (No.2)	SLI 2008, No.56	No.2/2008
Migration Amendment Regulations 2008 (No.6)	SLI 2008, No.189	No.6/2008
Migration Amendment Regulations 2008 (No.7)	SLI 2008, No.205	No.8/2008
Migration Amendment Regulations 2009 (No.4)	SLI 2009, No.84	No.6/2009
Migration Amendment Regulations 2009 (No.7)	SLI 2009, No.144	No.9/2009
Migration Amendment Regulations 2009 (No.15)	SLI 2009, No.375	No.19/2009
Migration Amendment Regulations 2010 (No.6)	SLI 2010, No.133	No.7/2010
Migration Amendment Regulations 2011 (No.1)	SLI 2011, No.13	No.1/2011
Migration Amendment Regulations 2011 (No.3)	SLI 2011, No.74	No.2/2011
Migration Amendment Regulation 2012 (No.2)	SLI 2012, No.82	No.4/2012
Migration Amendment Regulations 2012 (No.3)	SLI 2012, No.105	No.4/2012
Migration Legislation Amendment Regulation 2012 (No.5)	SLI 2012, No.256	No.10/2012
Migration Legislation Amendment Regulation 2013 (No.1)	SLI 2013, No.33	No.2/2011
Migration Amendment (Visa Application Charge and Related Matters) Regulation 2013	SLI 2013, No.118	No.9/2013
Migration Amendment (Skills Assessment) Regulation 2013	SLI 2013, No.233	No.15/2013
Migration Amendment (Redundant and Other Provisions) Regulation 2014	SLI 2014, No.30	No.2/2014
Migration Legislation Amendment (2014 Measures No.1) Regulation 2014	SLI 2014, No.82	No.5/2014
Migration Amendment (Temporary Graduate Visas) Regulation 2014	SLI 2014, No.145	No.7/2014
Migration Amendment (2015 Measures No.1) Regulation 2015	SLI 2015, No.34	No.1/2015

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[70] [2010] HCA 8.
[71] [2016] FCCA 1523.
[72] [2013] FCA 1050.
[73] cl.485.223, considered by the Court in *Nguyen*, is structured in the same way as cl.485.213 and cl.485.215.
[74] *Rahim v MIBP* [2018] FCCA 1814 (Riethmuller J, 21 June 2018); upheld on appeal *Rahim v MIBP* [2018] FCA 1736.

Relevant case law

Judgment	Judgment Summary
Anand v MIAC [2013] FCA 1050	Summary
Baig & Ors v MIBP [2018] FCCA 2986	
Berenguel v MIAC [2010] HCA 8; (2010) 264 ALR 417	Summary
Llanos & Anor v MIBP [2018] FCCA 2148	
Luk v MIBP [2018] FCCA 2740	
Nguyen v MIBP [2016] FCCA 1523	Summary
Rahim v MIBP [2018] FCCA 1814	Summary
Sapkota v MIAC [2012] FCA 981	Summary
Singh v MIAC [2011] FMCA 982	Summary
Venkatesan v MIAC [2008] FMCA 409	Summary

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Available decision templates / precedents

The following decision templates/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; 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 cl.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 (cl.485.214 and cl.485.221 for pre 23 March 2013 visa applications, and cl.485.223 and cl.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 cl.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.

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