



Migration Amendment (Skills Assessment) Regulation 2013

Select Legislative Instrument No. 233, 2013

I, Professor Marie Bashir AC CVO, Administrator of the Government of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulation under the *Migration Act 1958*.

Dated 17 October 2013

Marie Bashir
Administrator

By Her Excellency's Command

Scott Morrison
Minister for Immigration and Border Protection

OPC60268 - B

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No. 233, 2013 *Migration Amendment (Skills Assessment) Regulation 2013* i

OPC60268 - B

1 Name of regulation

This regulation is the *Migration Amendment (Skills Assessment) Regulation 2013*.

2 Commencement

This regulation commences on **28 October 2013**.

3 Authority

This regulation is made under the *Migration Act 1958*.

4 Schedule(s)

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1—Amendments

Migration Regulations 1994

1 At the end of regulation 2.26B

Add:

- (3) A relevant assessing authority may set different standards for assessing a skilled occupation for different visa classes or subclasses.

2 Subitem 1137(4) of Schedule 1 (table item 4, paragraph (c))

Repeal the paragraph, substitute:

(c) for which the applicant declares in the application that the applicant's skills have been assessed as suitable by the relevant assessing authority and that the assessment is not for a Subclass 485 (Temporary Graduate) visa

3 Subitem 1138(4) of Schedule 1 (table item 4, paragraph (c))

Repeal the paragraph, substitute:

(c) for which the applicant declares in the application that the applicant's skills have been assessed as suitable by the relevant assessing authority and that the assessment is not for a Subclass 485 (Temporary Graduate) visa

4 Subitem 1230(4) of Schedule 1 (table item 4, paragraph (c))

Repeal the paragraph, substitute:

(c) for which the applicant declares in the application that the applicant's skills have been assessed as suitable by the relevant assessing authority and that the assessment is not for a Subclass 485 (Temporary Graduate) visa

5 Subclause 186.234(2) of Schedule 2

Omit "Both", substitute "All".

6 After paragraph 186.234(2)(a) of Schedule 2

Insert:

- (aa) the assessment is not for a Subclass 485 (Temporary Graduate) visa;

7 Paragraph 187.234(b) of Schedule 2

After “authority for the occupation”, insert “and the assessment was not for a Subclass 485 (Temporary Graduate) visa”

8 Subclause 189.212(1) of Schedule 2

Repeal the subclause, substitute:

- (1) At the time of invitation to apply for the visa:
 - (a) the relevant assessing authority had assessed the applicant’s skills as suitable for the applicant’s nominated skilled occupation; and
 - (b) the assessment was not for a Subclass 485 (Temporary Graduate) visa.

9 Subclause 190.212(1) of Schedule 2

Repeal the subclause, substitute:

- (1) At the time of invitation to apply for the visa:
 - (a) the relevant assessing authority had assessed the applicant’s skills as suitable for the applicant’s nominated skilled occupation; and
 - (b) the assessment was not for a Subclass 485 (Temporary Graduate) visa.

10 Subclause 489.222(1) of Schedule 2

Repeal the subclause, substitute:

- (1) At the time of invitation to apply for the visa:
 - (a) the relevant assessing authority had assessed the applicant’s skills as suitable for the applicant’s nominated skilled occupation; and
 - (b) the assessment was not for a Subclass 485 (Temporary Graduate) visa.

11 Part 6D.11 of Schedule 6D (table item 6D111, paragraph (e))

After “for the occupation”, insert “and the assessment was not for a Subclass 485 (Temporary Graduate) visa”

12 At the end of Schedule 13

Add:

**Part 22—Amendments made by the Migration
Amendment (Skills Assessment)
Regulation 2013**

2201 Operation of Schedule 1

- (1) The amendments of these Regulations made by items [5] to [7] of Schedule 1 to the *Migration Amendment (Skills Assessment) Regulation 2013* apply in relation to an application for a visa made on or after 28 October 2013.
- (2) The amendments of these Regulations made by items [2] to [4] and [8] to [11] of Schedule 1 to the *Migration Amendment (Skills Assessment) Regulation 2013* apply in relation to an application for a visa made on or after 28 October 2013 as a result of an invitation in writing on or after 28 October 2013 by the Minister to apply for the visa.

EXPLANATORY STATEMENT

Select Legislative Instrument No. 233, 2013

Issued by the Minister for Immigration and Border Protection

Migration Act 1958

Migration Amendment (Skills Assessment) Regulation 2013

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

In addition regulations may be made pursuant to the provisions listed in Attachment A.

The purpose of the *Migration Amendment (Skills Assessment) Regulation 2013* ('the Regulation') is to amend *Migration Regulation 1994* to put beyond doubt that assessments of the applicant's skills for a skilled visa may be applicable only to the visa applied for. The amendments in the Regulation will address any argument that a skills assessment might be used to permit the grant of a visa to which the assessment is not meant to apply. It is intended that a skilled visa shall not be granted as the result of a skills assessment that is restricted to another visa.

For these purposes, a 'skilled visa' is a Subclass 186 (Employer Nomination Scheme) visa, a Subclass 187 (Regional Sponsored Migration Scheme) visa, a Subclass 189 (Skilled-Independent) visa, a Subclass 190 (Skilled-Nominated) visa, a Subclass 485 (Temporary Graduate) visa or a Subclass 489 (Skilled Regional (Provision)) visa.

It is a criterion for the grant of a skilled visa that an 'assessing authority' or a 'relevant assessing authority' has assessed the applicant's skills as suitable for the occupation nominated in the application.

The assessing authority (both a 'relevant assessing authority' and an 'assessing authority') must be able to assess the suitability of an applicant's skills against different standards as the standards against which an applicant is assessed can vary depending on the visa applied for. The assessment may either be issued in respect of an application for a specific visa subclass or stream (for example, a Subclass 485 visa) or not be restricted by reference to a specific visa subclass or stream (i.e. an 'open' assessment).

The amendments in the Regulation clarify which skills assessments can be relied upon to either meet a requirement to make a valid visa application for, or to satisfy a criterion for the grant of, a skilled visa.

A Statement of Compatibility with Human Rights ('Statement') has been completed for the Regulation, in accordance with *Human Rights (Parliamentary Scrutiny)*

Act 2011. The Statement's overall assessment is that the amendments do not engage any of the applicable rights or freedoms as articulated in the seven core international human rights treaties. A copy of the Statement is at [Attachment B](#).

Details of the Regulation are set out in [Attachment C](#).

The Office of Best Practice Regulation ('the OBPR') has been consulted and advises that the measures do not have a regulatory impact on business or the not-for-profit sector and no further analysis (in the form of a Regulation Impact Statement) is required. The OBPR consultation reference is 2013/15217.

The Department has consulted with various stakeholders including Architects Accreditation Council of Australia, Australian Association of Social Workers, Australasian College of Physical, Scientists and Engineers in Medicine, Australian Computer Society, Australian Dental Council, Australian Institute of Management, Australian Institute of Medical Scientists, Australian Institute of Quantity Surveyors, Australian Institute of Radiography, Australian Institute of Teaching and School Leadership, Australia, Community Workers Association, Australian Maritime Safety Authority, Australian Nursing and Midwifery Accreditation Council, Australian and New Zealand Osteopathic Council, Australian and New Zealand Podiatry Accreditation Council, Australian and New Zealand Society of Nuclear Medicine, Australian Pharmacy Council, Australian Physiotherapy Council, Australian Psychological Society, Australasian Veterinary Boards Council, Certified Practising Accountants of Australia, Chinese Medicine Board of Australia, Council on Chiropractic Education Australasia, Civil Aviation Safety Authority, Dietitians Association of Australia, Engineers Australia, Institute of Chartered Accountants in Australia, Medical Board of Australia, National Accreditation Authority for Translators and Interpreters, Occupational Therapy Council, Optometry Council of Australia and New Zealand, Institute of Public Accountants, Speech Pathology Association of Australia, State Legal Admissions Authority, Surveying and Spatial Sciences Institute, Trades Recognition Australia and Vocational Education and Training Assessment Services.

The Department circulated information to the stakeholder above and explained that the amendments in the Regulation upholds the intention of the existing processes and will address any argument that a skills assessment might be used to permit the grant of a visa to which the assessment is not meant to apply. The Department has received 8 responses. In general, 100% of the responders are in agreement with the changes. No further external consultation was undertaken as the changes are of a minor nature and do not substantially alter existing arrangements.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation commences on **28 October 2013**.

ATTACHMENT A

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

In addition, the following provisions may apply:

- subsection 31(3), which provides that the regulations may prescribe criteria for a visa of a specified class (which, without limiting the generality of this subsection, may be a class provided for by section 32, 36, 37, 37A or 38B but not section 33, 34, 35, 38 or 38A).
- subsection 46(3), which provides that the regulations may prescribe criteria that must be satisfied for an application for a visa of a specified class to be a valid application.
- subsection 46(4), which provides that without limiting subsection 46(3), the regulations may also prescribe:
 - the circumstances that must exist for an application for a visa of a specified class to be a valid application; and
 - how an application for a visa of a specified class must be made; and
 - where an application for a visa of a specified class must be made; and
 - where an applicant must be when an application for a visa of a specified class is made.
- section 92, which provides that Subdivision B in Division 3 of Part 2 of the Act has effect where one of the prescribed criteria in relation to a visa of a particular class is the criterion that the applicant received the qualifying score when assessed as provided by this Subdivision B.
- subsection 93(1), which provides that the Minister shall make an assessment by giving the applicant the prescribed number of points for each prescribed qualification that is satisfied in relation to the applicant.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Migration Amendment (Skills Assessment) Regulation 2013

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

- **Schedule 1 – Amendment of the *Migration Regulations 1994***

Overview of the Legislative Instrument

The amendments are designed to ensure that skills assessments issued by assessing authorities (both an ‘assessing authority’ and a ‘relevant assessing authority’) for the purposes of an application for a visa of a particular class, subclass or stream are limited to those applications.

The authorities assess the suitability of an applicant's skills according to different criteria depending on the type of visa applied for. For example, they may issue a provisional skills assessment for a Subclass 485 (Temporary Graduate) visa (which does not require a skilled employment component) and a full or unrestricted skills assessment which can be used for a permanent or provisional skilled migration visa.

The amendments in the *Migration Amendment (Skills Assessment) Regulation 2013* ensure that **provisional skills assessments for Subclass 485 visas cannot be used to apply for one of the following skilled migration visa classes:**

- **Skilled – Independent (Permanent) (Class SI);**
- **Skilled – Nominated (Permanent) (Class SN);**
- **Skilled – Regional Sponsored (Provisional) (Class SP);**
- **Employer Nomination (Permanent) (Class EN); and**
- **Regional Employer Nomination (Permanent) (Class RN).**

Human rights implications

The amendments do not engage any of the applicable rights or freedoms as articulated in the seven core international human rights treaties.

The amendments commence on **28 October 2013.**

Conclusion(s)

- The amendments are compatible with human rights as they do not raise any human rights issues.
- The amendments support the Department's long standing position that an 'assessing authority' and a 'relevant assessing authority' may issue skills assessments in relation to an application for a visa or a particular class or subclass. **If the skills assessment is limited to a class, subclass or stream it follows that it will not be valid evidence of an applicant's skills if used in relation to an application for a different visa class, subclass or stream.**
- The amendments do not preclude persons who have obtained a qualification in Australia to obtain work experience in their nominated skilled occupation in Australia on a Subclass 485 (Temporary Graduate) visa before departing Australia from lodging an Expression of Interest in SkillSelect or applying for skilled migration.

The Hon. Scott Morrison MP, Minister for Immigration and Border Protection

Details of the Migration Amendment (Skills Assessment) Regulation 2013

Section 1 – Name of Regulation

This section provides that the title of the Regulation is the *Migration Amendment (Skills Assessment) Regulation 2013* ('the Regulation').

Section 2 – Commencement

This section provides that the Regulation commences on 28 October 2013.

Section 3 – Authority

This section provides that this Regulation is made under the *Migration Act 1958* ('the Act').

The purpose of this section is to set out the Act under which the Regulation is made.

Section 4 – Schedule(s)

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

The purpose of this section is to provide for how the amendments in this Regulation operate.

Schedule 1 – Amendments

The purpose of these amendments is to put beyond doubt that assessments of the applicant's skills for a skilled visa may be applicable only to the visa applied for. The amendments in the Regulation address any argument that a skills assessment might be used to permit the grant of a visa to which the assessment is not meant to apply. It is intended that a skilled visa shall not be granted as the result of a skills assessment that is restricted to another visa.

For these purposes, a 'skilled visa' is a Subclass 186 (Employer Nomination Scheme) visa ('Subclass 186 visa'), a Subclass 187 (Regional Sponsored Migration Scheme) visa ('Subclass 187 visa'), a Subclass 189 (Skilled-Independent) visa ('Subclass 189 visa'), a Subclass 190 (Skilled-Nominated) visa ('Subclass 190 visa'), a Subclass 485 (Temporary Graduate) visa ('Subclass 485 visa') or a Subclass 489 (Skilled Regional (Provision)) visa ('Subclass 489 visa').

It is a criterion for the grant of a skilled visa that an 'assessing authority' or a 'relevant assessing authority' has assessed the applicant's skills as suitable for the occupation nominated in the application.

A person applying for a skilled visa nominates a skilled occupation and provides an assessment of their skills. The applicant's skills are assessed by the standards against their nominated occupation by either a 'relevant assessing authority' or an 'assessing authority' for the purpose of the visa that he or she is applying for. This is done by determining whether the applicant's educational qualifications and skills meet the standard of his or her nominated occupation.

An assessment of a visa applicant's skills may be required before the applicant applies for a class of skilled visa. An assessment is required before an applicant is invited by the Minister in writing to apply for a Subclass 189 visa, a Subclass 190 visa or a Subclass 489 visa. An assessment is required before the applicant can be granted a Subclass 186 visa in the Direct Entry stream, a Subclass 187 visa in the Direct Entry stream or a Subclass 485 visa in the Graduate Work stream.

The assessing authority (both a 'relevant assessing authority' and 'an assessing authority') must be able to assess the suitability of an applicant's skills against different standards as the standards against which an applicant are assessed can vary depending on the visa applied for or the visa that the applicant is invited to apply for. The assessment may either be issued in respect of an application for a specific visa subclass or stream (for example, Subclass 485 visa) or not be restricted by reference to a specific visa subclass or stream (i.e. an 'open' assessment).

An 'open' assessment may be relied upon to make a valid visa application for or to satisfy a criterion for the grant of a Subclass 186 visa, a Subclass 187 visa, a Subclass 189 visa, a Subclass 190 visa or a Subclass 489 visa. This is because an 'open' assessment is issued on the basis that the applicant's educational qualifications and skills meet the standard required for his or her nominated occupation.

In contrast, an assessment that is issued specifically for a Subclass 485 visa may only be relied upon to make a valid visa application, or to satisfy a criterion, for the grant of a Subclass 485 visa. This may be because the applicant has only met the educational qualifications of his or her nominated occupation and may not yet have the skills necessary for an 'open' assessment.

The amendments in the Regulation clarify which skills assessments can be relied upon to either meet a requirement to make a valid visa application for, or to satisfy a criterion for the grant of, a skilled visa.

Item [1] – At the end of regulation 2.26B

This item inserts a new subregulation (3) into regulation 2.26B of Part 2 of the *Migration Regulations 1994* ('the Principal Regulations').

New subregulation 2.26B(3) provides that a relevant assessing authority may set different standards for assessing a skilled occupation for different visa classes or subclasses.

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. This amendment will combine with other amendments below to make it 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 a Subclass 485 visa) or stream or an ‘open’ skills assessment.

Items [2] to [4] – Subitem 1137(4) of Schedule 1 (table item 4, paragraph (c)), subitem 1138(4) of Schedule 1 (table item 4, paragraph (c)) and subitem 1230(4) of Schedule 1 (table item 4, paragraph (c))

These items repeal and substitute paragraph (c) in table item 4 of subitems 1137(4), 1138(4) and 1230(4) of Schedule 1 to the Principal Regulations.

Paragraph (c) in table item (4) in the previous subitems provides that the applicant must nominate a skilled occupation for which the applicant declares in the application that the applicant’s skills have been assessed as suitable by the relevant assessing authority. Substituted paragraph (c) in table item 4 maintains that requirement, but adds the requirement that the assessment is not for a Subclass 485 visa.

The purpose of these amendments is to ensure that skills assessments that are issued specifically for a Subclass 485 visa by a ‘relevant assessing authority’ cannot be relied upon to meet the requirement in table item 4 of subitems 1137(4), 1138(4) or 1230(4) of Schedule 1 to the Principal Regulations. If that requirement is not met, the applicant will not have made a valid application for a Skilled-Independent (Permanent)(Class SI) visa (item 1137), a Skilled-Nominated (Permanent)(Class SN) visa (item 1138) or a Skilled-Regional Sponsored (Provisional)(Class SP) visa (item 1230).

Item [5] – Subclause 186.234(2) of Schedule 2

This item omits the word ‘Both’ in the chapeau of subclause 186.234(2) of Schedule 2 to the Principal Regulation and substitutes it with the word ‘All’.

This amendment is consequential to the amendment below which inserts a paragraph 186.234(2)(aa) into subclause 186.234(2) of Schedule 2 to the Principal Regulations.

Item [6] – After paragraph 186.234(2)(a) of Schedule 2

This item inserts new paragraph 186.234(2)(aa) into Schedule 2 to the Principal Regulations.

New paragraph 186.234(2)(aa) provides that the assessment is not for a Subclass 485 visa.

The purpose of this amendment is to ensure that skills assessments that are issued specifically for a Subclass 485 visa application by an assessing authority cannot be relied upon to satisfy subclause 186.234(2) for the grant of a Subclass 186 visa in the Direct Entry stream.

This is because in order to obtain an ‘open’ assessment which the applicant could rely upon to satisfy a criterion for the grant of a Subclass 186 visa, the applicant must demonstrate that he or she has the educational qualifications and skills required for the nominated occupation. As skills assessments for a Subclass 485 visa are issued on the basis that the applicant may only have met the educational qualifications for the nominated occupation, the applicant will not necessarily have the requisite skills required for their nominated occupation.

Item [7] – Paragraph 187.234(b) of Schedule 2

This item inserts, after the words ‘authority for the occupation’ in paragraph 187.234(b) of Schedule 2 to the Principal Regulations, the words ‘and the assessment was not for a Subclass 485 visa’.

The purpose of this amendment is to ensure that skills assessments that are issued specifically for a Subclass 485 visa application by an assessing authority cannot be relied upon to satisfy paragraph 187.234(b) for the grant of a Subclass 187 visa in the Direct Entry stream.

This is because in order to obtain an ‘open’ assessment which the applicant could rely upon to satisfy a criterion for the grant of a Subclass 187 visa, applicants must demonstrate that they have the educational qualification and skills required for their nominated occupation. As skills assessments for a Subclass 485 visa are issued on the basis that the applicant may have only met the educational qualifications for the nominated occupation, the applicant will not necessarily have the requisite skills required for their nominated occupation.

Items [8] to [10] – Subclauses 189.212(1), 190.212(1) and 489.222(1) of Schedule 2

These items repeal and substitute subclauses 189.212(1), 190.212(1) and 489.222(1) of Schedule 2 to the Principal Regulations.

The previous subclauses provide that 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. The substituted subclauses maintain those requirements, but add the requirement that the assessment was not for a Subclass 485 visa.

The purpose of these amendments is to ensure that skills assessments that are issued specifically for a Subclass 485 visa application by a relevant assessing authority cannot be relied upon to satisfy a criterion for the grant of a Subclass 189 visa, a Subclass 190 visa or the First Provisional Visa stream in the Subclass 489 visa.

This is because in order to obtain an ‘open’ assessment which the applicant could rely upon to satisfy a criterion for the grant of a Subclass 189 visa, a Subclass 190 visa or the First Provisional Visa stream in the Subclass 489 visa, the applicant must demonstrate that he or she has the educational qualifications and skills required for the nominated occupation. As skills assessments for a Subclass 485 visa are issued on the basis that the applicant may only have met the educational qualifications for the nominated occupation, the applicant will not necessarily have the requisite skills required for their nominated occupation.

Item [11] – Part 6D.11 of Schedule 6D (table item 6111, paragraph (e))

This item inserts, after the words ‘for the occupation’ in paragraph (e) of table item 6111 in Part 6D.11 of Schedule 6D to the Principal Regulations, the phrase ‘and the assessment was not for a Subclass 485 visa’.

The effect of this amendment is to ensure that skills assessments that are issued specifically for a Subclass 485 visa application cannot be relied upon by the spouse or de facto partner of the visa applicant to satisfy the requirement set out in paragraph (e) of table item 6111 in Part 6D.11.

This is because in order to apply for a class of skilled migration visa, applicants must obtain at least the score set out in their invitation to be granted that visa. The requisite score is set by the Minister by way of a gazette notice under section 96 of the Act. The components that an applicant could obtain certain scores against are set out in Schedule 6D of the Principal Regulations, which includes paragraph (e) of table item 6111 in Part 6D.11.

Accordingly, in order to obtain an ‘open’ assessment which the applicant could rely upon to make an application for a class of skilled migration visa, the applicant must demonstrate that he or she has the educational qualifications and skills required for the nominated occupation. As skills assessments for Subclass 485 visas are issued on the basis that the applicant may only have met the educational qualifications for the nominated occupation, the applicant will not necessarily have the requisite skills required for their nominated occupation. Consistent with this reasoning, it is intended that an applicant’s spouse or de facto partner’s must also demonstrate that they have the relevant skills in addition to the requisite educational qualifications for the nominated occupation.

The purpose of this amendment is to ensure that an assessment issued specifically for a Subclass 485 visa application can only be relied upon to make a valid visa application for or to satisfy a criterion for the grant of that visa.

Item [12] – At the end of Schedule 13

This item inserts new Part 22 into Schedule 13 of the Principal Regulations.

Part 22 includes item 2201 (‘Operation of Schedule 1’), which provides that:

- the amendments of these Regulations made by items [5] to [7] of Schedule 1 to the Regulation apply in relation to an application for a visa made on or after 28 October 2013.
- the amendments of these Regulations made by items [2] to [4] and [8] to [11] of Schedule 1 to the Regulation apply in relation to an application for a visa made on or after 28 October 2013 as a result of an invitation in writing on or after 28 October 2013 by the Minister to apply for the visa.

The purpose of this amendment is to provide for the transitional provisions, which set out the visa applicants to whom the Regulation applies.