

EXPLANATORY STATEMENT

Issued by authority of the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

Migration Act 1958

Migration Regulations 1994

Migration (Class of persons—Refugee and Humanitarian (Class XB) visa) Instrument (LIN 21/080) 2021

- 1 The instrument, Departmental reference LIN 21/080, is made under subsection 1402(3C) of the *Migration Regulations 1994* (the Regulations).
- 2 The instrument commences on the day after registration, and is a legislative instrument for the *Legislation Act 2003* (the Legislation Act).

Purpose

- 3 Subitem 1402(3B) of Schedule 1 to the Regulations was recently inserted by the *Migration Amendment (Humanitarian Response to Events in Afghanistan) Regulations 2021* for the specific purpose of enabling persons evacuated from Afghanistan to Australia commencing in August 2021 to make an application for a Refugee and Humanitarian (Class XB) visa (Class XB visa) in Australia. Under this provision, applications may be made in Australia where, at the time of application, the visa applicant:
 - holds a Subclass 449 (Humanitarian Stay (Temporary)) visa (Subclass 449 visa) (see paragraph 1402(3B)(a) of Schedule 1 to the Regulations); and
 - is in a class of persons specified by the Minister in a legislative instrument made under subitem 1402(3C) of Schedule 1 to the Regulations (see paragraph 1402(3B)(b) of Schedule 1 to the Regulations).
- 4 The purpose of the instrument is to specify a class of persons for paragraph 1402(3B)(b) of Schedule 1 to the Regulations. The instrument specifies as a class of persons, persons who were granted Subclass 449 visas due to the deteriorating security situation in Afghanistan. In practise, these are Afghan nationals who were evacuated from Afghanistan to Australia, who:
 - were locally engaged employees of the Australian Government;
 - had a strong connection to Australia; or
 - were particularly vulnerable or high profile and who may come to the attention of the Taliban because of that vulnerability or profile.
- 5 Family members of such persons may also have been granted a Subclass 449 visa in accordance with the grant criteria for that subclass. Those visa holders are also specified applicants for the class of persons.
- 6 By being prescribed for this purpose, Afghan evacuees may be permitted to apply for a Class XB visa in Australia (applications onshore being otherwise barred by paragraph 1402(3)(b) of Schedule 1).

7 Further, before specifying a class of persons for paragraph 1402(3B)(b) of Schedule 1 to the Regulations, the Minister must be satisfied that doing so is appropriate to assist persons residing temporarily in Australia as a result of Australia's response to the humanitarian crisis in Afghanistan in 2021. Before making the instrument, the Minister has given consideration to the following factors:

- the temporary nature of the Subclass 449 visa granted to these persons to facilitate their emergency evacuation from Afghanistan and lawful entry into Australia;
- it is appropriate for an assessment of the humanitarian need for resettlement, as well as assessment of health, character and security requirements to be undertaken for persons seeking permanent residence in Australia for humanitarian reasons, and specifying this class of persons in the instrument and enabling their application for a Class XB visa will allow for this to occur; and
- the requirement to provide appropriate settlement support and services to those who enter Australia for humanitarian reasons, which the grant of a permanent Class XB visa would facilitate.

8 After consideration of these factors, the Minister was satisfied that it is appropriate to specify the class of persons described in section 4 of the instrument for the purpose of paragraph 1402(3B)(b) of Schedule 1 to the Regulations.

9 An applicant who is covered by subitem 1402(3B) of Schedule 1 to the Regulations and makes a valid application for a Class XB visa in Australia, may be eligible for the grant of a Subclass 201 (In-country Special Humanitarian) visa in Australia, if they satisfy the relevant criteria prescribed in Schedule 2 to the Regulations.

Consultation

10 The Department of Home Affairs consulted broadly through the recently formed Ministerial Advisory Panel (the Panel), the Attorney-General's Department and Australian Afghan communities. Topics of consultation have included how best to support the settlement of those who were part of Australia's evacuation mission out of Afghanistan and have since arrived in Australia on Subclass 449 visas. The Panel is led by the Commonwealth Coordinator-General for Migrant Services, Alison Larkins, and a leading expert in refugee settlement, Paris Aristotle AO. The panel is supported by Afghan community leaders in Australia, leading refugee advocates and service providers who are recognised for their long-standing experience in refugee settlement and integration issues.

11 The Office of Best Practice Regulation (OBPR) was also consulted and considered that the instrument dealt with matters of a minor or machinery nature and no regulatory impact statement was required. The OBPR reference number is 44648.

Details of the instrument

12 Section 1 sets out the name of the instrument.

13 Section 2 provides the instrument commences on the day after registration.

14 Section 3 sets out definitions of terms used in the instrument.

15 Subsection 4(1) sets out that an applicant for a Class XB visa is in a class of persons for paragraph 1402(3B)(b) of Schedule 1 to the Regulations, if the applicant meets the circumstances in subsection 4(2) or (3).

16 Subsection 4(2) provides that an applicant is in a class of persons if they have been granted a Subclass 449 visa due to any of the following reasons:

- the applicant has been granted a Subclass 449 visa because of the deteriorating security situation in Afghanistan (referred to as the **main 449 visa holder**) (paragraph 4(2)(a));
- the applicant is a member of the immediate family of the main 449 visa holder at the time the main 449 visa holder was granted their 449 visa (paragraph 4(2)(b));
- the applicant is a member of the family unit of a main 449 visa holder (paragraph 4(2)(c));
- the applicant is a member of the immediate family of a person mentioned in paragraph 4(2)(b) (paragraph 4(2)(d)).

17 These four different limbs align with the four grounds upon which a person evacuated from Afghanistan may have been granted a Subclass 449 visa (see clauses 449.221 and 449.321 of Schedule 2 to the Regulations).

18 Subsection 4(3) provides that an applicant is in a class of persons if they are a child born in Australia who is taken to be granted a Subclass 449 visa by operation of section 78 of the *Migration Act 1958* and they are the child of an applicant mentioned in subsection (2).

Parliamentary scrutiny etc.

19 The instrument is exempt from disallowance under section 42 of the Legislation Act. This is because instruments made under Schedule 1 to the Regulations are prescribed as exempt in section 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015*.

20 The instrument was made by the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, in accordance with subitem 1402(3C) of Schedule 1 to the Regulations.

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