

**OUYANG & LEE**

LAWYERS

**DN001 PARENT VISAS**

**Continuing Professional Development (CPD)  
For Registered Migration Agents**



**Ouyang & Lee Associates Pty Ltd**

**Parent Visas**

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## **Introduction**

### **Subject Outline**

This CPD activity is prepared in conformity with guidelines issued by the OMARA. The scope and intent of this activity is to develop existing professional and practice skills within the context of the Code of Conduct. This CPD paper is designed to provide a Core CPD in respect of Parent Visas; it sets out some basic information about the steps for applying for parent migration to Australia and different pathways for permanent migration through Parent Visas. We focus on different categories of Parent Visas, schedule 1 and schedule 2 criteria. It is intended to be delivered in a distance learning format with learning outcomes to assist in the understanding and comprehension.

This CPD activity will also look at the Migration Regulations in relation to definitions and legislative requirements relevant to Parent/Contributory Parent Visas, first and second stage Visa application charges and processing. This paper will also discuss the balance of family test and the options available if the balance of family test is not satisfied and issues in relation to the applicant's status at the time of application and at the time of the grant of a Parent Visa.

### **Learning Outcomes**

Upon completion, the agent will demonstrate a thorough knowledge and understanding of both the Parent visa and the Contributory Parent Visa criteria as contained in the Migration Act, Migration Regulations and the Policy Advice Manual. The agent will also demonstrate a thorough knowledge and understanding of the Parent Visa categories, difference between offshore and onshore Parent Visas, fee requirement for different categories, and assurance of support and sponsorship requirements.

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# **1 About all Parent visas**

## **1.1 Overview**

### **Parent visas**

Parent visas are accessible to persons seeking a permanent visa on the basis of being the parent of a child who is a settled Australian citizen, Australian permanent resident or eligible New Zealand citizen.

Parent visas are split into two categories and six visa subclasses. These are:

- Parent category visa and
- Contributory Parent category visa.

### **Parent category visa.**

The Parent category visa contains two visa subclasses:

- (offshore) - Parent (Class AX)(subclass 103) visa
- (onshore) - Aged Parent (Class BP)(subclass 804) visa.

### **Contributory Parent category visa**

The Contributory Parent category visa contains four visa subclasses:

#### Offshore

- Contributory Parent (Class CA) (subclass 143) visa
- Contributory Parent (Temporary) (Class UT) (subclass 173) visa;

#### Onshore

- Contributory Aged Parent (Class DG)(subclass 864) visa
- Contributory Aged Parent (Temporary) (Class UU) (subclass 884) visa



## 1.2 Differences between Parent and Contributory Parent category visas

Contributory Parent category visas are usually processed to grant consideration stage faster than Parent category visas as they are accorded a higher processing priority and there are more visa places available. This arrangement recognises that applicants for visas in the Contributory Parent category pay a significantly higher second visa application charge (VAC) as a contribution to their ongoing health costs.

The main differences between the Parent and Contributory Parent category visas are illustrated by the following table.

Parent category	Contributory Parent category
Significantly lower second VAC	Significantly higher second VAC
Lower assurance of support (AoS) bond	Higher AoS bond
Shorter AoS bond period	Longer AoS bond period
Lower cost/longer wait option	Higher cost/shorter wait option

## 1.3 Differences between onshore and offshore parent visas

Onshore	Offshore
The primary applicant must meet the aged requirement at time of application,	Do not have to be "aged parent"
Must meet health and character requirements prior to queuing	Do not have to meet health and character prior to queuing

If the applicant is in Australia and they are not "aged" and there is no bar on their applying, they may still be able to make a valid visa application for an offshore Parent (subclass 103) visa or an offshore Contributory Parent category visa whilst they remain in Australia. The application must however be sent to the Parent Visa Centre (PVC) in line with the legislative instrument under Schedule 1 item 1130(3)(b). In these circumstances, the applicant is not eligible for a Bridging visa and will need to obtain another type of visa to remain in Australia while their application is being processed.

If the applicant is in Australia and they hold (or last held) a visa subject to a "No Further Stay" condition 8503, 8534 or 8535, they will not be able to apply for any parent visa, including an offshore parent visa, whilst they remain in Australia with that condition.

## 1.4 s499 directions capping and queuing

All parent visa applications are subject to order of consideration s499 directions 43 and 44 respectively relating to:

- prioritising of family stream applications and
- order of consideration.

Applications are also subject to a s499 direction for the consideration of visa applications in the context of setting the planning levels for the annual Migration Program, particularly the capping of visas under s85 of the Act and the consequential queuing arrangements.

## **2 Contributory Parent category visas - two stage process**

### **2.1 History**

Subclass 143/173 visa, the Contributory Parent (Migrant) visa and the Contributory Parent (Temporary) visa, were inserted into the Regulations with effect from 23 June 2003.

Subclass 864/884 visa, the Contributory Aged Parent (Residence) visa and the Contributory Aged Parent (Residence) visa, were inserted into the Regulations with effect from 1 July 2003.

On 10 September 2007, the Regulations were amended to allow certain former holders of subclass 173/884 visa to pay lower VACs for subclass 143/864 visa and be assessed against less stringent criteria for the grant of the permanent visa. The Regulations also allow applicants who have held a 173/884 visa at any time since last entering Australia to be able to apply for a wider range of visas if they are outside Australia.

The amendments were intended to address the situation of people who, for a range of reasons, do not apply for a subclass 143/864 visa while still holding a subclass 173/884 visa. Their visa options are very limited. The amendment provides a 28-day period of grace, as well as discretion to consider compassionate and compelling circumstances.

### **2.2 Overview**

Contributory Parent category visa applicants can choose to apply directly for a permanent visa or to go through a two-stage process. Under the two-stage process, applicants initially apply for a temporary Contributory Parent category visa. The temporary visa is only valid for a period of two years and cannot be extended or renewed. At any time during the two-year validity period of the visa, the temporary visa holder can apply for the corresponding permanent visa. Applicants must pay a first and second instalment of the VAC for both temporary and permanent visas.

The net costs of the two-stage process are broadly similar to the option of applying directly for a permanent Contributory Parent category visa except that the costs are staggered across two applications. The first and second VAC payable are based on the charges in place at the time that the respective application is made.

Note: All VACs are subject to annual adjustment.

### **2.3 Main benefits**

The main benefits for applicants who undertake this two-stage process are that:

- they pay a lower second VAC at time of temporary visa grant, thereby mitigating the full second VAC required for the grant of the permanent visa
- when they apply for the subclass 173/884 visa, they pay a substantially lower first instalment of the VAC (1st VAC)
- at time of subclass 143/864 visa grant, they pay another lower 2nd VAC (which is subject to annual adjustment)
- an AoS bond is not required for the granting of the subclass 173/884 visa, however, it is required for the subclass 143/864 visa and
- the 173/884 visa holder will receive certain concessions when they apply for the corresponding subclass 143/864 visa.

For those parents who hold or have held a subclass 173/884, who wish to apply for the corresponding permanent subclass 143/864 visa, they must:

- be the holder of a current subclass 173/884 or
- have held a subclass 173/884 within the past 28 days or
- if 28 days have passed, provide the Department with evidence that compassionate and compelling circumstances exist for the person to be given the equivalent status to the subclass 173/884 visa holder.

## 2.4 Main detriments

The main detriments for applicants who undertake the two-stage process are that:

- the applicant will be required to undergo the application process twice, not once
- due to annual adjustment of charges, the applicant may end up paying slightly extra for their visa
- a 173/884 visa is valid for two years only and it cannot be extended or renewed
- whilst the holder of a 173/884 visa, the holder is subject to Regulation 2.07AI

## 2.5 Concessions

By applying for the corresponding permanent visa within the 2 years validity period of the temporary visa, applicants obtain certain concessions, such as:

- they pay a reduced 1st VAC on making the permanent visa application
- they are not re-assessed against the balance of family (BoF) test
- they may be taken to be sponsored for their permanent visa application if the person who sponsored them for the temporary visa dies before their temporary visa ceases and there are no other children able to meet the sponsorship requirements
- they are generally not required to undergo further health checks and
- a dependant who was included in their temporary visa application, who was subsequently granted the temporary visa and is no longer dependent on the main applicant, can still be included in the permanent visa application even though they are no longer dependent.

Applicants who do not apply for the corresponding permanent visa within the 2 year validity period of their temporary visa or in accordance with the provisions of Schedule 1 items 1130(5) and 1130A(5), will not be entitled to any of these concessions.

## 2.6 Application process

Subclass 173/884 visa holders who wish to apply for the corresponding permanent subclass 143/864 visa will need to:

- complete form 47PT *Application for migration to Australia by a Contributory (Temporary) or Contributory Aged Parent (Temporary) visa holder* and
- submit form 40 *Sponsorship for migration to Australia*, signed by their sponsor and
- pay the appropriate 1st VAC.

By applying for the permanent visa while the holder of a subclass 173/884 (temporary) visa, the applicant may obtain certain concessions in relation to the assessment of sponsorship. Certain restrictions apply to subclass 173/884 visa holders.

### **3 Applications by holders of a substituted Subclass 600 visa**

#### **3.1 Background**

On 1 March 2006, the Regulations were amended to make provision for holders of a ***substituted Subclass 600 visa***, granted following a decision by the Minister to substitute a more favourable decision, to enable them to apply for certain visas, including parent visa subclasses 143, 804, 864 and 884.

A substituted Subclass 600 visa, as defined by regulation 1.03, means a subclass 600 visa or a subclass 676 visa that was granted following a decision by the Minister to substitute a more favourable decision under section 345, 351, 391, 417, 454 or 501J of the Act. The parent visas to which these provisions apply are the:

- Aged Parent (Residence) visa (subclass 804)
- Contributory Parent (Migrant) visa (subclass 143)
- Contributory Aged Parent (Residence) visa (subclass 864) and
- Contributory Aged Parent (Temporary) visa (subclass 884).

Holders of a substituted class 600 visa who apply for one of the above parent visas are not required to satisfy:

- the age requirement
- the balance of family test
- PIC 4004 and
- PIC 4005 (must instead satisfy PIC 4007).

#### **3.2 Temporary to permanent Contributory Parent category visa applications**

Substituted Subclass 600 visa holder applicants are required to satisfy the delegate that they are a parent of a settled Australian citizen, an Australian permanent resident or an eligible New Zealand citizen.

## 4 Bridging visas

### 4.1 Regulation 2.07A

Under regulation 2.07A, a substantive visa application made in Australia by an applicant in Australia is not a valid bridging visa application unless the substantive visa is of a kind that can be granted if the applicant is in Australia.

### 4.2 Bridging B visa (subclass 020) (BVB)

Applicants who have applied for an onshore parent visa and have a compelling need to travel overseas while their substantive visa application is still being processed may consider applying for a BVB.

### 4.3 Bridging visas with nil conditions for certain onshore Parent visa applications

The instrument under clauses 010.611(1)(c) and 020.611(1)(b) was revised on 24 November 2012 to include applicants for the Aged Parent (Residence) Class BP, subclass 804, Contributory Aged Parent (Residence) Class DG, subclass 864 and Contributory Aged Parent (Temporary) Class UU, subclass 884 visas who are eligible for an associated BVA or BVB are to be granted that bridging visa with nil conditions imposed.

## 5 Other matters

### 5.1 Refusal on health grounds

If an applicant for a permanent parent visa (for example, BP-804 or DG-864):

- was in Australia at the time of that application
- is at least 50 years old
- has received a “Does not meet” opinion in relation to the health requirement

officers should treat the case with sensitivity. When undertaking the refusal for such cases, case officers should ensure that the refusal decision (and system notes) clearly indicates a refusal on **health** grounds (even if the refusal is due to **other** grounds **as well** as health).

In considering a refusal decision on health grounds, case officers should ensure that such applicants (or their sponsor) are aware of the provision for persons who:

- are in Australia
- at least 50 years old
- have been refused a permanent visa on health grounds and
- are found to be unfit to depart Australia

to be considered (on application) for a Medical Treatment visa (UB-602).

In these cases:

- it is not usually necessary for the applicant to undergo any further medical examination
- whether they are unfit to depart Australia is assessed initially “on the papers”, with a medical examination required only if necessary.

For these cases, s65 delegates can (if a successful UB-602 application is made) grant a UB-602 visa for longer stay than usual - for example, for stay longer than the standard 12 months for a Medical Treatment visa for applicants in Australia.

## 5.2 Parent visa applicants and Visitor visas

- From 24 November 2012, Parent (Subclass 103) visa applicants may be eligible for a 3 or 5-year validity multiple entry Visitor visa with a stay up to 12-months at a time.

## Applying for a visa

## 6 Schedule 1 and related requirements

### 6.1 Schedule 1

The requirements for making a valid application for each subclass are outlined in Schedule 1.

Schedule 1 items for parent visas are mostly self-explanatory.

There is only one visa subclass in each of the parent visa classes.

Subclass	103	143	173	804	864	884
Schedule 1 - Item	1124	1130	1221	1124A	1130A	1221A

### 6.2 Forms

The forms required for making a valid application are outlined in Schedule 1:

If applying for subclass	103	173	804	884
Schedule 1 - Item	1124(1)	1221(1)	1124A(1)	1221A(1)
All applicants	Form 47PA			
All sponsors	Form 40*			
If applying for subclass	143		864	
Schedule 1 - Item	1130(1)		1130A(1)	
173/884 visa holders	Form 47PT			

All applicants	Form 47PA
All sponsors	Form 40*

\* The completion of form 40 is not a Schedule 1 requirement for lodging a valid application for a parent visa. Under policy however, the completion of form 40 is required to ensure that the sponsor is aware of, and understands, their sponsorship undertaking.

Forms for application from 173/884 visa holder for a 143/864 visa

As provided for in Schedule 1 (items 1130(5) and 1130A(5)), a reference to an applicant who is the holder of a subclass 173/884 visa means a person, who as the case may be:

- currently holds a subclass 173/884 visa
- has held a subclass 173/884 visa at any time in the 28 days immediately before making a visa application for the corresponding permanent visa or
- has held a subclass 173/884 visa and provides the Department with evidence that compassionate and compelling circumstances exist for the person to be considered to be the holder of a subclass 173/884 visa for the purpose of the permanent visa application.

If a person is applying for a subclass 143/864 visa as a former holder of a subclass 173/884 visa who is seeking to regain their status as a subclass 173/884 visa holder by claiming compassionate and compelling circumstances (as specified in Schedule 1), along with the completed form 47PT and form 40, they must also provide evidence in the form of relevant documentation when they make their subclass 143/864 visa.

The assessment of those circumstances is provided for at clauses 143.111 and 864.111, which enable a delegated officer to assess if compassionate and compelling circumstances exist when determining whether or not a subclass 143/864 visa applicant is taken to be the holder of a subclass 173/884 visa at time of application.

### 6.3 Visa application charge (VAC)

Schedule 1 items prescribe the required amounts for the first and second instalments of the VAC. Acceptable methods of paying the VAC are by credit card, debit card in person, or by bank cheque or money order made payable to the "Department of Immigration and Citizenship".

#### VAC: MFU

Where a person has combined their application with the application of an applicant on the basis of their being a **member of the family unit**, under regulation 2.12E only one first instalment VAC payment is required. However, each person who combines their application



with another person is an applicant in their own right, so in law has made their own application. Therefore, each applicant must pay the relevant second instalment of the VAC.

### **Adding MFU to an application**

Under regulation 2.08A, a partner or dependent child can also be added to the primary applicant's application before it has been decided at the written request of the primary applicant. In these circumstances, the application is deemed to be a combined application providing it satisfies the Schedule 1 requirements. Under regulation 2.12E, a person whose application is added to another application under regulation 2.08A is not liable for the first instalment of the visa application charge.

### **Subsequent application**

In certain circumstances, an onshore member of the family unit can apply for a visa after the primary applicant has made their application and before it is decided - for example, where the member of the family unit is in Australia and the primary applicant has applied for an Aged Parent (subclass 804) or an Aged Contributory Parent visa (subclass 884 or 864).

Alternatively, if the member of the family unit is in Australia and the primary applicant:

- was the holder of a temporary Contributory Parent (subclass 173) or 'substituted Subclass 600 - visa holder and
- applied for a permanent Contributory Parent (subclass 143) while they were in Australia.

In these cases the family members are *not making a combined application* but are applying in their own right. As a result they must both pay the first and second instalment of the VAC.

VAC: From subclass 173/884 visa to subclass 143/864 visa

As provided for in Schedule 1 items 1130(5) and 1130A(5), a reference to an applicant who is the holder of a subclass 173/884 visa means a person, who as the case may be:

- holds a subclass 173/884 visa at the time of application
- held a subclass 173/884 visa at any time in the 28 days immediately before making a visa application for a subclass 143/864 visa or
- held a subclass 173/884 visa and provides the Department with evidence that compassionate and compelling circumstances exist for the person to be considered to be the holder of a subclass 173/884 visa for the purpose of the subclass 143/864 visa application.

However, there are different first and second instalments of the VAC depending on the actual status of the applicant:

Status of the applicant	Visa applied for:	First instalment	Second instalment
Applicant actually held a 173 visa at the time of application	143	1130(2)(a)(i)	1130(2)(b)(i)
Applicant held a 173 visa at any time within the 28 days immediately before making their application	143	1130(2)(a)(ib)	1130(2)(b)(iia)
Applicant held a 173 visa more than 28 days before making their application and provides evidence that compassionate and compelling circumstances exist for the person to be considered to be the holder of a 173 visa and the decision maker is satisfied that compassionate and compelling circumstances exist	143	1130(2)(a)(ic)	1130(2)(b)(iib)
Applicant held a 173 visa more than 28 days before making their application and provides evidence that compassionate and compelling circumstances exist for the person to be considered to be the holder of a 173 visa and the decision maker is <i>not</i> satisfied that compassionate and compelling circumstances exist	143	1130(2)(a)(ic)	1130(2)(b)(iv)
Applicant actually held an 884 visa at the time of application	864	1130A(2)(a)(ii)	1130(2)(b)(i)
Applicant held an 884 visa at any time within the 28 days immediately before making their application	864	1130A(2)(a)(iib)	1130A(2)(b)(iia)
Applicant held a 884 visa more than 28 days before making their application and provides evidence that compassionate and	864	1130A(2)(a)(iic)	1130A(2)(b)(iib)

compelling circumstances exist for the person to be considered to be the holder of a 884 visa and the decision maker is satisfied that compassionate and compelling circumstances exist			
Applicant held a 884 visa more than 28 days before making their application and provides evidence that compassionate and compelling circumstances exist for the person to be considered to be the holder of a 884 visa and the decision maker is <i>not</i> satisfied that compassionate and compelling circumstances exist	864	1130A(2)(a)(iic)	1130A(2)(b)(iv)

#### 6.4 Where the applicant must be

For all parent visas listed below, if the person is in Australia, the person's immigration status might affect whether they can make a valid visa application.

Visa:	Where the applicant must be:	Sch 1, item:
103	Applicants may be in or outside Australia at the time the application is made.	1124
143	An applicant who is in Australia, and <ul style="list-style-type: none"> <li>• is the holder of a subclass 173 visa or a substituted Subclass 600 visa or</li> <li>• is a member of the family unit of the holder a subclass 173 visa or a substituted Subclass 600 visa holder</li> </ul> must apply in Australia (but not in immigration clearance). Other applicants may be in or outside Australia at the time the application is made.	1130(3)
173	Applicants may be in or outside Australia at the time the application is made.	1221
804	Applicant must be in Australia but not in immigration clearance.	1124A(3)(b)
864	Applicant must be in Australia but not in immigration clearance.	1130A(3)(b)

884	Applicant (other than a CPNC) must be in Australia but not in immigration clearance.	1221A(3)(b)
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## 6.5 Members of the family unit - combined applications

Schedule 1 provides that certain applications by a person claiming to be a member of the family unit of an applicant for a parent visa may be made at the same time and place as, and combined with, the application of that person.

Subclass	103	143	173	804	864	884
Sch 1 - Item	1124(3)(b)	1130(3)	1221(3)(b)	1124A(3)(c)	1130A(3)(d)	1221A(3)(d)

For some visas, Schedule 2 prescribes that certain members of the family unit must make a combined application with the main applicant, while others may apply separately for these visas.

Subclass	103	143	173	864	884
Sch 2 - clause	103.311	143.311	173.311	864.311	884.311

Combined application from subclass 173/884 visa to subclass 143/864 visa

A temporary contributory parent visa holder applying for the corresponding permanent contributory parent visa on form 47PT is able to include members of the family unit (whether or not they hold a temporary contributory parent visa) in their application by having them complete a separate form 47PA. Both application forms 47PT and 47PA should be lodged together at the same time and same place. The application is taken to be a combined application.

A temporary contributory parent visa holder who has already applied for the corresponding permanent contributory parent visa on form 47PT can request to add a partner or dependent child to their application before it is finalised. The partner and/or children do not need to be holders of a temporary contributory parent visa and can be either in or outside of Australia. The application must be lodged in the same manner and place as the original application. If the partner and/or children are the holder of temporary subclass 173 visa, they should complete form 47PT, otherwise they should complete form 47PA. The application is taken to be a "combined application".

As outlined in regulation 143.311, members of the family unit of a person who:

- was a temporary contributory parent visa holder and has already applied for the corresponding permanent contributory parent visa and
- was in Australia at the time the application was made

can apply for a permanent contributory parent visa before the primary applicant's application is finalised. The family members do not need to be holders of a temporary contributory parent but must be in Australia at the time they make their permanent visa application. The application must be made in the same manner and place as the original application. If the partner and/or children are the holder of temporary subclass 173 visa, they should complete form 47PT , otherwise they should complete form 47PA. As each applicant is applying in their own right, it is *not a combined application*.

Under regulation 864.311, members of the family unit of a person who has applied for the corresponding permanent contributory aged parent visa, can also apply for a permanent contributory aged parent visa before the primary applicant's application is finalised. The family members do not need to be holders of a temporary contributory aged parent visa but must be in Australia. If they are the holder of temporary subclass 884 visa, they should complete form 47PT - otherwise they should complete form 47PA. The members of the family unit are applying for the visa in their own right so it is *not a combined application*.

Note: Regulation 2.12E provides that only one first instalment of the VAC is payable on *combined applications*. Members of the family unit applying in their own right will be required to pay the full first instalment of the VAC. Each person who is included in a Parent or Contributory Parent visa application must pay the second instalment of VAC.

Note: Separate arrangements apply where a child has been born to a 173/884 visa holder after grant of the temporary contributory parent visa, but before a decision has been made on the permanent contributory parent visa.

## **6.6 Where and how the application must be made**

### **Subclasses 103 and 173 visas**

For applications for a 103 visa or a 173 visa, Schedule 1 (items 1124(3)(aa) and 1221(3)(a) respectively) require that the application must be made by post or by courier to the addresses currently specified by legislative instrument.

### **Subclass 143 visas**

For the 143 visa, Schedule 1 item 1130(3)(a) requires that, if the applicant is in Australia and is the holder of:

- a subclass 173 visa or
- a substituted Subclass 600 visa

the application must be made in Australia but not in immigration clearance. These applications can be made at any office of the Department in Australia or at the address currently specified by legislative instrument.

For 143 visa applicants who *do not hold* either:

- a subclass 173 visa or
- a substituted Subclass 600 visa

Schedule 1 item 1130(3)(b) requires the application to be made by post or by courier to the addresses currently specified by legislative instrument.

#### **Subclasses 804, 864 and 884**

For 804, 864 and 884 visas, Schedule 1 (items 1124A(3)(a), 1130A(3)(a) and 1221A(3)(a) respectively) require the application to be made in Australia at any departmental office.

However, all new parent visa applications made at any STO are to be forwarded to PVC for processing.

### **6.7 No other parent visa applications**

Schedule 1 provides that a valid visa application cannot be made if the person has (whether as the main applicant or family member) any other unfinalised parent visa application with the Department - see:

Subclass	103	143	173	804	864	884
Sch1 item:	1124(3)(ab)	1130(3)(d)	1221(3)(c)	1124A(3)(ba)	1130A(3)(c)	1221A(3)(c)

"**Parent visa** application" includes applications for subclasses 103, 804, 143, 173, 864, and 884. Officers must check departmental records accordingly.

If the person has an unfinalised parent visa application with the Department, they must withdraw that application before they can validly apply for another parent visa. If they have not already withdrawn the existing application/s, they can do so by completing the relevant parts of forms 47PA and 47PT when applying for the other parent visa.

#### **Cases under review (merits or judicial)**

At the time of decision, the applicant must have no unresolved parent visa application, that is no pending merits review (MRT/AAT) or judicial (court) review of a refusal decision in relation to a parent visa application.

## 6.8 Sponsorship

Schedule 1 does not prescribe sponsorship as a requirement for making a valid application. However, sponsorship is a schedule 2 time of application criterion. A validly made application will fail unless it is supported by acceptable sponsorship lodged either at the same time as or before a visa application is made.

## 6.9 Bars on applying

### Section 48

Parent visa classes are not prescribed by reg. 2.12 for s48 purposes. A person subject to a s48 bar cannot validly apply for *any* parent visa *while they are in Australia*.

Although clause 804.211 provides additional criteria to be satisfied by applicants who are subject to a s48 bar, the 804 visa is not a prescribed visa for the purposes of s48.

If a "no further stay" condition applies

Under s46(1A) of the Act, a valid parent visa application cannot be made if the person is in the migration zone and the visa currently held (or last held) by the person (whether seeking to apply as the main applicant or as a family unit member) has a "no further stay" condition (for example, 8503) unless that condition has been waived.

- **Reg. 2.07AI - Bar on further visa applications by subclass 173/884 visa holders**

Regulation 2.07AI prevents persons in Australia who have, since last entering Australia, held either a subclass 173 or 884 visa from validly applying for any visa other than:

- the corresponding permanent subclass 143/864 visa
- a Medical Treatment visa or
- a protection visa.

However, whether or not the person can make a valid application for one of these visas and meet the legal criteria for the grant of the visa will depend on all the facts of the case and is ultimately a matter for the decision maker.

## 7 Immigration status

### 7.1 Schedule 1 and immigration status

For visas 103, 173, 804 and 884, subject to section 6.9 Bars on applying and section 17

Eligibility to apply, applicants can be lawful or unlawful when making a valid visa application.

This is because nothing in Schedule 1 prevents an unlawful non-citizen from applying for these visas. However, for subclasses 143, 804, 864 and 884, Schedule 2 requires the applicant has to satisfy certain Schedule 3 criteria:

Subclass	143	804	864	884
Sch2 item:	143.211	804.213	864.211	884.211

**An applicant who is the holder of a subclass 173/884 visa**

For visas 143 and 864, Schedule 1 items 1130(5) and 1130A(5) provide that a reference to an applicant who is the holder of a subclass 173/884 visa means a person, who as the case may be:

- currently holds a subclass 173/884 visa
- has held a subclass 173/884 visa at any time in the 28 days immediately before making the subclass 143/864 visa application or
- has held a subclass 173/884 visa and provides the Department with evidence that compassionate and compelling circumstances exist for the person to be considered to be the holder of a subclass 173/884 visa for the purpose of the subclass 143/864 visa application.

Schedule 2 requires that applicants for a subclass 143/864 visa who were not the holders of a substantive visa at the time of application must satisfy certain Schedule 3 criterion 3002. If an applicant has held a subclass 173/884 visa and has not held a substantive visa for more than 12 months before applying for the permanent visa, they will not be able to satisfy the Schedule 2 criteria for the grant of a permanent visa.

**7.2 Schedule 2 and immigration status**

A Transit (subclass 771) visa holder, or a person whose last substantive visa was a Transit visa, cannot satisfy the Schedule 2 criteria time of application if they apply for a subclass 804, subclass 864 or subclass 884 visa. The application should therefore be refused in line with 804.211(1)/864.211(1)/884.211(1).

There are no immigration status requirements for an applicant who withdrew a subclass 804 visa application at the time of making an application for subclass 864/884 visa (that is, they are not required to satisfy criterion 3002).

**Subclasses 103 and 173**

There are no Schedule 3 requirements for these visa subclasses.

**Subclass 143**

Under clause 143.211, if the main applicant is not the holder of a substantive visa they are required to satisfy Schedule 3 criterion 3002.

**Subclass 804**



Under clause 804.213, if the main applicant is not the holder of a substantive visa they are required to satisfy Schedule 3 criterion 3002.

This means that an applicant who no longer holds a substantive visa and who decides to withdraw a Contributory Parent category visa and apply for a subclass 804 instead, will be required to meet criterion 3002.

#### **Subclasses 864 and 884**

Under clauses 864.211/884.211, if the main applicant is not the holder of a substantive visa they are required to satisfy Schedule 3 criterion 3002.

## **Balance of family test – regulation 1.05**

### **8 Overview**

The limited number of parent visas that can be granted in each Migration Program year necessitates prioritisation of eligibility for parent visas to be given only to parents who have close ties to Australia. To achieve this objective, the Balance of Family test is designed to determine the extent of the parent's links to their children in Australia and ensure only those with close ties to Australia are eligible for parent visas.

The balance of family test is concerned with the numeric distribution and geographical location of the children of the applicant and the applicant's partner and, if applicable, of the former partners of either the applicant. The test does not consider qualitative matters such as the closeness or the breakdown of the parent-child relationships or cultural factors dictating which child should take care of an aged parent.

The **balance of family test** applies to the offshore and onshore **parent visa** subclasses. The test must be met by the person who seeks to satisfy primary criteria (the parent).

Regulation 1.05 was amended on 1 July 2011 to ensure it supports the policy intention of the test. Among other things, the changes ensure that, with a few exceptions, all children and step-children of a visa applicant are counted when applying the 'balance of family' test and that a standard definition of 'step-child' is used.

The revised regulation 1.05 applies to visa applications made on or after 1 July 2011.

### **9 How the test is met**

A parent will meet the balance of family test if at least half of the parent's children and step-children are "eligible children" or there are more "eligible children" than children living in any other single country. In short, "eligible children" include:

- Australian citizens;

- Australian permanent residents usually resident in Australia; or
- eligible New Zealand citizens usually resident in Australia

compared to children who are resident in any other one country

For example:

- If a parent and their partner have four children, of whom two are Australian citizens and two reside overseas as foreign nationals, the parent will satisfy the test.
- If a parent and their partner have three children, of whom one is an Australian citizen, one is resident in Australia as a temporary visa holder and the third is resident overseas as a foreign national, the parent does not satisfy the test.

## 10 Visa eligibility

The circumstances in which a **parent** meets the balance of family test are prescribed in Regulations Schedule 2 for Parent visas. Generally the balance of family test must only be met at the time of application (reg 1.05).

There are 2 exceptions to the balance of family test requirement:

Subclass 143/864 Contributory Parent visa applicants	are not subject to the test (either at time of application or time of decision) if, at time of application, they held a <b>Subclass 173/884 Contributory Parent (Temporary) visa</b> or a <b>substituted Subclass 600 visa</b> .
Subclass 804/884 Aged Parent visa applicants	are not subject to the test (either at time of application or at time of decision) if, at time of application, they held a <b>substituted Subclass 600 visa</b> .

## 11 "Eligible" and "ineligible" children

Regulation 1.05(2) and (2A) specifies what kind of immigration status a child has in order to be considered eligible or ineligible.

### 11.1 Who is an eligible child?

Regulation 1.05(2)(a) defines an eligible child as a child of the parent who is:

- an Australian citizen;
- a permanent resident usually resident in Australia; or
- an eligible New Zealand citizen usually resident in Australia

There is no requirement that an Australian citizen has to be usually resident in Australia.

## **11.2 Usual residence for permanent residents and eligible New Zealand citizens**

All children who are not Australian citizens must demonstrate:

- lawful and permanent residence; or
- if an eligible New Zealand citizen, usual residence. Eligible New Zealand is defined in regulation 1.03.

Schedule 2 criteria requires that this "residential requirement" be met:

- if the applicant is offshore - at both time of application and time of decision and
- if the applicant is onshore - only at time of application.

## **11.3 Lawful and permanent residence**

Officers should be able to confirm a child's immigration status based on a certified copy of the child's passport and departmental records.

## **11.4 Assessing usually resident**

Officers need to be satisfied that each child who is an Australian permanent resident or eligible New Zealand citizen lives in Australia and intends to reside in Australia indefinitely. All circumstances of the child's life are potentially relevant in establishing whether or not the necessary "intention" exists. The mere physical presence in Australia does not in itself make a child permanently resident in Australia.

An extended period of unbroken permanent residence in Australia is *not* required for a child to be counted favourably in the balance of family test. They could spend periods outside Australia, (for example on holidays, business or employment) and still be assessed as usually resident in Australia.

If doubt exists in such cases, officers may request evidence that the child permanently resides in Australia.

If a child has resided in Australia for only a short period, officers should request evidence that permanent residence is intended, for example, through evidence of permanent employment, bank accounts, driver's licence, purchase of house or car or attendance at English language classes.

Where a person stays in Australia only casually or intermittently they would not normally be assessed as "usually resident" in Australia. .

## **11.5 Who is an ineligible child?**

If a child does not fall within any of the definitions specified in reg 1.05(2)(a), they are considered as an ineligible child, and therefore they are taken to be resident overseas. For

example, if a child is on a Student visa or another type of a temporary visa and residing in Australia, the child would be counted as an ineligible child for the BoF test.

### **11.6 A child's whereabouts unknown**

Under regulation 1.05(1)(b), if the child's whereabouts are unknown, the child is taken to be resident in the child's last known country of usual residence overseas:

- If the child has never travelled to Australia, this would be their last known overseas country of usual residence.
- If the child is believed to be in Australia but of unknown whereabouts, the child is an ineligible child. Under regulation 1.05(2A), ineligible children are taken to be resident overseas, normally in their last known country or usual residence or, alternatively, their country of citizenship (see regulation 1.05(2B)).

## **Children and the BoF test**

### **12 Which children are counted in the BoF test**

Under regulation 1.05(1)(a), children counted for the purpose of the balance of family test include all children and step-children of:

- the parent or
- the parent's *spouse* or *de facto partner*.

No assessment of the nature of the parent-child relationship is necessary.

#### **12.1 Establishing the existence (or not) of the child-parent relationship**

All children are counted, regardless of their relationship status or whether they are dependent, self-supporting or institutionalised. However, there are a few specific exceptions, as outlined in The exclusion clauses

Parent-child relationships are normally evidenced by full birth certificates or family books that give details of parents and all children. Officers should also check and verify family composition details given in any previous applications.

#### **12.2 Children born outside a partner relationship**

Children of the applicant (that is, the applicant who needs to satisfy primary criteria) born outside a partner relationship, such as a casual, polygamous or from one or more concurrent partner relationships, the primary applicant's children (natural and adopted) are counted in

the balance of family test as such children are still children of the applicant as defined by regulation 1.05(1)(a)(i).

However, children of partner of the applicant born under any kind of relationships described above are not counted in the BoF test.

### 13 Step-children and the BoF test

Where an applicant has a step-child, officers should use the table below to determine which regulations are applicable.

If the parent visa application was made:	
before 1 November 1999	officers need consider only reg. 1.05 (as in force at that time).
on or after 1 November 1999 but before 1 July 2011	officers must consider both reg. 1.05 (as in force at that time) and the reg. 1.03 definition of step-child, but under policy should apply the outcome that is most beneficial to the applicant.
on or after 1 July 2011	the reg. 1.03 definition of step-child applies to the application (together with current reg. 1.05) Adult step-children of former partners or former partners of the parent's current partner are not counted in the balance of family test, as they do not fall under the definition of step-child in regulation 1.03.

#### 13.1 Reg 1.03 definition

The regulation 1.03 definition of step-child specifies that a step-child is a person who is the child of the parent's current spouse or de facto spouse regardless of the age of the child (reg 1.03(a)). The child of the parent's former spouse or former de facto partner can be included in the BoF test if they are under 18 and the parent has a parenting, guardianship or a custody order (reg 1.03(b)).

The definition of step-child was inserted into the reg on 1 November 1999 and, for the purposes of the balance of family test, applies only to parent visa applications made on or after that date.

### **13.2 Reg 1.05 definition**

For applications lodged prior to 1 July 2011, the definition of step-child included in reg 1.05 also included children of a former partner of the parent if that child was born while the parent was in a partner relationship with that former partner or before the relationship was formed.

### **13.3 Referral to National Office**

Cases should be referred to Family Section, National Office if:

- the visa applicant is disadvantaged as a result of the reg 1.03 step-child definition; or
- the child in question is permanently and lawfully resident in Australia but does not meet the definition of step-child.

## **14 Which children are not counted in the BoF test**

### **14.1 Child deceased or claimed to be deceased**

Deceased children are not counted in the balance of family test. For the purpose of the test, officers must be satisfied on the evidence before them that the child is deceased.

In normal circumstances, the child's death is evidence by the child's death certificate or a court order declaring that the child is presumed dead. However, in countries where official documentation is unavailable or unreliable, officers are encouraged to seek evidence from a wide range of credible sources in order to determine whether the child is deceased.

#### **Presumption of death**

The applicant may, to support their claim that a child is deceased, include evidence that a court has applied the common law presumption of death.

In certain circumstances, a court may apply a legal presumption that a person is deceased although the death of the person cannot be proven as a matter of fact. Officers may use such evidence (a court declaration or other evidence that a court has applied the 'presumption of death') in coming to the conclusion that a child is deceased.

The court's presumption will be only one piece of evidence before the decision maker.

However, in the absence of any other evidence that the child is alive, it should generally be given significant weight.

### **14.2 Children born to a partner's polygamous or concurrent relationship**

Australia's migration legislation does not recognise polygamous or concurrent relationships as 'partner' relationships. Under s5F (Spouse) and s5CB (De facto partner) of the Act, for two

persons to be considered each other's partner, they must 'have a mutual commitment to a shared life to *the exclusion of all others*'. If a polygamous or other concurrent relationship exists, none of the relationships can be considered to be 'to the exclusion of all others' and none of the parties can meet s5F of the Act to be a spouse or s5CB of the Act to be a de facto partner.

Therefore, in cases of polygamous or concurrent relationships, the 'partners' cannot be recognised as a spouse or de facto partner under s5F or s5CB for the reasons outlined above. This means none of the partners' children can be counted in the balance of family test under regulation 1.05(1)(a)(ii) as the applicant is not in a partner relationship with that child's parent.

Generally, this would also result in the claimed partner being refused a visa on the basis of inability to satisfy parent visa secondary criteria because they could not be assessed as the partner of the primary applicant.

## **15 The exclusion clauses - Reg 1.05(3)**

There are three exceptions to the general rule that all children of the person must be counted in the Balance of Family test. The intention of the exclusions is to not unfairly disadvantage a parent who has children with whom they could not be expected to have a normal parent-child relationship.

### **Removed from parent - Reg 1.05(3)(a)**

Under reg 1.05(3)(a) a child who has been removed from the exclusive custody of the parent by court order, adoption or operation of law (other than in consequence of marriage) is not counted in the balance of family test.

This refers to a situation in which a person, in the first instance, had exclusive custody of the child (for example, as a result of the death of a partner or awarding of sole custody by a court order) and, subsequently, that custody is removed (for example, as a result of the child being adopted out or removed by court order).

However, in practice, it would be rare for a child to be excluded from the balance of family test on the grounds that they had been removed from the exclusive custody of the parent.

### **Exclusive custody**

A person will have had exclusive custody of the child if that person had:

the sole legal right to the daily care and control of the child and

the sole legal right and the sole legal responsibility to make decisions concerning the daily care and control of the child.

### **Sole custody**

If an applicant parent has divorced and sole custody of a child is granted to the other parent, the applicant is *not* considered to have had that child removed from their exclusive custody.

### **Custody in marriage and de facto relationships**

Custody of children in marriage and de facto relationships is considered to be shared custody in which both parents have a legal responsibility towards the children.

### **Adoption**

The removal of a child from a parent by adoption should be interpreted as removal from exclusive custody as the adoption has the effect in law of severing the legal relationship to the natural parent. The adoption is valid for visa-related purposes only if it occurred when the child was under 18 years old.

## **15.1 Human rights abuse situations - Reg 1.05(3)(b)**

A child is not counted in the balance of family test if

- the child resides in a country where they suffer persecution or abuse of human rights and
- it is not possible to reunite the child and the parent in another country.

To satisfy this clause, the applicant or sponsor needs to provide evidence that support such claims. Simply to claim that a child residing in a country where persecution or human rights abuse occur would not be sufficient to meet this requirement. Similarly, a claim that a child is being persecuted or suffering human rights abuses is insufficient if it is not supported by evidence.

If supporting information provided by the applicant/sponsor, it is advisable to check the relevant country situation in general on CISNET database. If the information cannot be verified through that source, it is advisable to contact the Country Information Services helpdesk for confirmation or advice.

## **15.2 Refugee child in specified refugee camp - Reg 1.05(3)(c)**

Under reg 1.05(3)(c) a child is not counted in the balance of family test if registered by the United Nations High Commissioner for Refugees (UNHCR) as a refugee and living in a camp operated by the UNHCR.

### **Verification**

Verification of the child's location and refugee status should be sought from the post in the camp's region. The request should include details such as: full name, date and place of birth,



country of last residence, camp of current residence, approximate date of arrival in camp, date the child obtained refugee status and details of any known contact with UNHCR.

The receiving post should seek verification of the child's circumstances through the local UNHCR representative; officers should *not* attempt to make personal contact with the child.

If no record

If there is no record of the child being registered as a refugee and living in a specified camp, the child should be regarded as being of unknown whereabouts and resident in the child's last known country of usual residence.

**Table summary - Disposition of children**

No. of children	Whereabouts						Parent meets test?	
	Australia	Other countries						
		A	B	C	D	E		F
1	1						Yes	
2	1	1					Yes	
2	2	–					Yes	
3	1	2					No	
3	1	1	1				No	
3	2	1					Yes	
3	3	–					Yes	
4	1	2	1				No	
4	1	1	1	1			No	
4	2	2					Yes	
4	3	1					Yes	
5	1	1	1	1			No	
5	1	2	1	1			No	
5	2	3					No	
5	2	2	1				No	
5	2	1	1	1			Yes	
5	3	2					Yes	

6	1	1	1	1	1	1		No
6	1	2	1	1	1			No
6	2	1	1	1	1			Yes
6	2	3	1					No
6	2	2	2					No
6	3	3						Yes
7	1	1	1	1	1	1	1	No
7	1	2	4					No
7	2	1	1	1	1	1		Yes
7	2	2	1	1	1			No
7	2	3	1	1				No
7	2	2	2	1				No
7	3	1	1	1	1			Yes
7	3	4						No
7	3	3	1					No
7	4	3						Yes

## The main applicant

Does the applicant hold a 173/884 visa

## 16 Compassionate and compelling circumstances

### 16.1 If a person is no longer a subclass 173/884 visa holder

Schedule 1 items 1130(5) and 1130A(5) provides a broad definition of when an applicant is the holder of a subclass 173/884 visa.

In order to meet the requirements of Schedule 1 items 1130(5) and 1130A(5), an applicant whose 173/884 visa had ceased more than 28 days before making their 143/864 application must provide, with their application, documentation setting out their compassionate and compelling circumstances.

Note: An applicant who does not satisfy Schedule 3 criterion 3002 will not satisfy the Schedule 2 requirements for a permanent visa.

**If the applicant re-gains their subclass 173/884 visa status**

Clauses 143.111(c)/864.111(c), which relate to compassionate and compelling circumstances, were inserted into the Regulations to allow certain persons, whose subclass 173/884 visa had ceased, to be able to regain the status of a holder of a subclass 173/884 visa for the purpose of being able to apply for a subclass 143/864 visa and consequently have certain visa processing concessions.

As such, if a person is able to regain their status as a subclass 173/884 visa holder at time of applying for the subclass 143/864 visa (although they might not be able to make a valid application for a bridging A visa at the same time, if they were unlawful at time of application) they will be eligible for certain Schedule 2 visa processing concessions when their subclass 143/864 visa is being processed, as provided in section 19.5 Continued eligibility at time of decision.

**If the applicant does not re-gain their subclass 173/884 visa status**

If a person is not able to regain their status as a holder of a subclass 173/884 visa, then they are only eligible to have their subclass 143/864 visa application processed as if they applied directly for *that* visa. The fact that they have previously held a 173/884 visa is not counted for the purposes of processing the subclass 143/864 visa application. For policy and procedures on immigration status.

## **16.2 Bridging visas**

Once a person is unlawful, for instance, if a person in Australia who previously held a subclass 173/884 visa that ceased before they applied for a subclass 143/864 visa, then the type of bridging visa that allows them to remain in Australia while their application is being processed is limited.

For example, if an unlawful non-citizen has already come to the attention of the Department and has consequently been granted a bridging E visa, then they cannot be granted any other type of bridging visa while they are in Australia and while their subclass 143/864 visa application is being processed. Alternatively, if an unlawful non-citizen has not yet come to the attention of the Department before they make their subclass 143/864 visa application, they may be eligible for a bridging C visa for the duration of the application processing.

## **16.3 Entitlements may be affected**

Applicants in Australia who regain the status of a "holder of a subclass 173/884 visa" may have their entitlements affected.

**Centrelink**

Applicants for a subclass 143/864 visa (even if they were a subclass 173/884 visa holder when they made their application) are not entitled to most social security payments made by Centrelink.

### **Work rights**

Depending on the type of bridging visa they are granted, such persons may not be granted work rights again. Work rights may be granted if the applicant applies to the Department on hardship grounds. Officers should refer to the relevant bridging visa PAM.

### **Medicare and reciprocal health care arrangements**

Medicare eligibility will have ceased once their subclass 173/884 visa ceased because that person did not apply for the subclass 143/864 visa while their subclass 173/884 visa was in effect. In accordance with the Health Insurance Act 1973, any applicant for a parent visa is not eligible for Medicare unless:

- they are a citizen of a country that has a reciprocal health care arrangement with Australia and consequently may have limited access to Medicare or
- they actually held the subclass 173/884 visa when they made their subclass 143/864 visa application, which even after their subclass 173/884 ceases will enable their Medicare access to continue while their subclass 143/864 visa application is processed.

However, if a person applies for a subclass 143/864 visa:

- within 28 days of their subclass 173/884 visa ceasing, they are able to regain eligibility for Medicare when they made their subclass 143/864 permanent visa application or
- more than 28 days after their subclass 173/884 visa has ceased and supplies information seeking to regain their subclass 173/884 visa status on compassionate and compelling grounds, it is not until a delegate has decided that compassionate and compelling circumstances do exist and has informed the applicant that they can regain eligibility to Medicare.

For more details about Medicare eligibility, see [www.medicareaustralia.gov.au](http://www.medicareaustralia.gov.au).

## **16.4 How to provide evidence of compassionate and compelling circumstances**

Generally, the evidence that a former holder of a subclass 173/884 visa should provide is to be attached to the subclass 143/864 application form. The evidence should be in the form of a statement requesting consideration of compassionate and compelling circumstances and is

to be accompanied by documentary evidence. For more information, see section 16.7 What are compassionate and compelling circumstances.

If this evidence is not attached, the application will be considered as if a person is applying directly for the subclass 143/864 visa and was not a subclass 173/884 visa holder at the time of application.

If the applicant has not held a substantive visa for more than 12 months before they applied for the permanent subclass 143/864 visa, they should be counselled that they are unlikely to satisfy the Schedule 3 requirements for the grant of a visa and given the option of not making the application. Should the applicant choose to continue with the application, it should be assessed against the relevant Schedule 3 requirements before any assessment is made of the claimed compelling and compassionate circumstances.

### **16.5 Who can consider compassionate and compelling circumstances**

Consideration of compassionate and compelling circumstance is not a decision that requires separate Ministerial delegation powers - it is part of the assessment process of the subclass 143/864 visa application. The assessment is undertaken by the s65 delegate who has power to make a decision on the visa application. However, under policy, the decision of whether or not compassionate and compelling circumstances exist should be made by the manager (EL1 level or equivalent).

### **16.6 When to consider**

A person who has made a subclass 143/864 visa application and has provided evidence of compassionate and compelling circumstances as to why they should be considered to have been the holder of a subclass 173/884 visa at the time of the application, would have made a valid visa application as long as they had met all the other legal requirements at Schedule 1 Items 1130/1130A - see section 6 Schedule 1 and related requirements.

It may be that, in addition to providing evidence of compassionate and compelling circumstances at time of making a subclass 143/864 visa application, the applicant did not provide sufficient or clear information. If more information is required and/or needs to be clarified, a delegated officer could (in accordance with s56 of the Act) give the applicant and/or their sponsor a further opportunity to present information as to why they consider that compassionate and compelling circumstance exist as to why they should be considered to have been the holder of a subclass 173/884 visa at the time of the application. Officers are required under s54 of the Act to have regard to all the information in the application.

In Schedule 2 of the Regulations, clauses 143.111(c)/864.111(c) provide that a reference to a holder of a subclass 173/884 visa includes a person in relation to whom a delegated officer is satisfied that compassionate and compelling circumstances exist for the person to be considered to have been the holder of a subclass 173/884 visa at time of application. The delegated officer will actually assess time of application criteria sometime after the application has actually been made (possibly at the same time as they assess Schedule 2 time of decision criteria). They will be assessing whether or not they are satisfied that, at the time the person made the valid subclass 143/864 visa application in accordance with Schedule 1 items 1130/1130A, compassionate and compelling circumstances existed so that the person can be taken to be a holder of a subclass 173/884 visa for the purposes of the time of application criteria.

If the delegated officer is satisfied that compassionate and compelling circumstances exist in accordance with clause 143.111(c)/864.111(c), the applicant will be taken to have been the holder of a subclass 173/884 visa at time of application. If the delegated officer is not satisfied that compassionate and compelling circumstances exist, the applicant will not be taken to be the holder of a subclass 173/884 visa at time of application. This assessment will mean that the applicant will have to satisfy the legal criteria that apply to applicants who did not hold a subclass 173/884 visa at the time of application, for example, the balance of family test and payment of the full 2nd VAC.

## **16.7 What are compassionate and compelling circumstances**

When the delegated officer makes the assessment of whether or not compassionate and compelling circumstances existed at time of application, they are to take into account the circumstances that the Minister considers to be compassionate and compelling. Generally, these circumstances would include a situation that was beyond the person's control. Forgetting to apply in itself may not be considered a compassionate and compelling circumstance. However, the delegated officer would consider circumstances beyond the applicant's control that prevented them applying for the subclass 143/864 visa within the 2 year validity period of the subclass 173/884 visa, including but not limited to:

- medical reasons (for example, serious illness, hospitalisation, medically proven dementia or Alzheimer's disease, other psychological reasons) or
- family reasons (for example, unexpected serious or fatal family situations over which the applicant had no control, such as the incapacitation or death of a partner or child or another member of the family unit).

Along with a statement from the applicant requesting consideration of compassionate and compelling circumstances and the grounds for those claims, accompanying evidence to support these claims can include a doctor's certificate, other professional certifications or other documentary evidence.

The hardship that could result in not being able to satisfy the clause 143.111(c)/864.111(c) requirement of compassionate and compelling circumstances would not of itself be sufficient to justify assessment of meeting the criteria.

## **16.8 After assessment**

Once a delegated officer has assessed whether or not compassionate and compelling circumstances existed, the officer must contact the applicant and/or the sponsor to advise them of the consequences of that assessment:

- if the applicant *did* satisfy clause 143.111(c)/864.111(c) that compassionate and compelling circumstances existed at time of application, then their application is assessed as being made by the holder of a subclass 173/884 visa. Therefore, in addition to giving information to the applicant about their immigration status and the subclass 143/864 visa processing concessions (including VACs), they must also be advised that if their application is successful they can be either in or outside Australia when their visa is granted. (For details on processing concessions, see section 2.5 Concessions) or
- if the applicant did not satisfy clause 143.111(c)/864.111(c) that compassionate and compelling circumstances existed, then their application will continue to be processed, but will be assessed against the criteria applying to a person who is not the holder of a subclass 173/884 visa at time of application. The applicant and sponsor must be advised that that they did not satisfy the compassionate and compelling criterion at clause 143.111(c)/864.111(c) and that, therefore, they will need to meet all legal criteria for the grant of the subclass 143/864 visa, including the BoF test, PIC 4005 full health checks and payment of the full amount of the 2nd VAC. The applicant will then have the option of either continuing with their subclass 143/864 visa application or withdrawing that application should they so wish (but they will not be refunded the 1st VAC they paid when they made their subclass 143/864 visa application). In addition, the applicant must be advised about their immigration status and that they must be outside Australia when the visa is granted.

If the applicant wishes to continue with the processing of the subclass 143/864 visa application, the officer will then carry on assessing the applicant against the criteria applying to a person who is not the holder of a subclass 173/884 visa at the time of application (for policy and procedures. If the applicant satisfies all the criteria, then a subclass 143/864 visa will be granted (provided there are subclass 143/864 visa places available in the current Migration Program year). If the applicant does not satisfy any one of the criteria for the grant of the subclass 143/864 visa, the visa will not be granted.

### **16.9 Schedule 3 requirement**

Clauses 143.211 and 864.211 require that former 173/884 visa holders applying for a subclass 143/864 visa are subject to Schedule 3 criterion 3002.

This requires the 143/864 visa application to be made within 12 months of the date on which the applicant's last substantive visa ceased.

## **IF NOT A SUBCLASS 173/884 VISA HOLDER**

### **17 Eligibility to apply**

#### **17.1 If a person last held a subclass 173/884 visa**

See section 16.1 If a person is no longer a subclass 173/884 visa holder.

#### **17.2 Defined terms**

For the defined terms for parent visas, see

- the corresponding regulation 1.03 definitions

For balance of family test, see

- reg. 1.05
- Balance of family test – regulation 1.05.

#### **17.3 Relationship**

In assessing the relationship requirements, see:

- the regulation 5.1 definition of parent
- the regulation 1.03 definition of aged parent

Note: *Parent* is not limited to being a 'natural' (that is, blood-related) parent.

See the relevant 'sponsorship' section.

#### **Substituted subclass 676 visa holders**



Clauses 804.221(b), 864.212(ab) and 884.212(1)(a)(ii) provide that the holder of a **substituted Subclass 600 visa** is not required to meet the aged parent requirement. However, they are still required to be the parent of a person (the child) who is a settled Australian citizen, a settled Australian permanent resident, or a settled eligible New Zealand citizen.

In addition to the above, subclauses 143.211(b) and 864.212(b) provide that an applicant for the 143/864 visa who:

- held a substituted Subclass 600 visa at the time they applied for the subclass 143/864 visa and
- previously held a subclass 173/884 visa

does not need to be the parent of a settled Australian citizen, Australian permanent resident, or eligible New Zealand citizen if:

- the child with whom the applicant had such a relationship has died and
- there is no other child that would allow the applicant to meet that requirement.

#### **17.4 Balance of family (BoF) test**

Under clause 884.213, an applicant for a subclass 884 visa must satisfy the balance of family test unless they are the holder of a substituted Subclass 600 visa.

Under clauses 103.213, 143.213, 173.213, 804.214, 864.214, applicants for other Parent visas must satisfy the balance of family test unless, at the time of application, they were the holder of:

- a subclass 884 visa or
- a substituted Subclass 600 visa.

In assessing the balance of family test in the above clauses, see:

- reg. 1.05 - Balance of family test
- Balance of family test – regulation 1.05.

Substituted subclass 676 visa holders

The above clauses also provide (by omission) that the holder of a substituted Subclass 600 visa is not required to satisfy the BoF test - see section 3 Applications by holders of a substituted Subclass 600 visa.

#### **17.5 Continued eligibility at time of decision**

For clauses 103.221, 143.221, 173.221, 804.221, 864.221 and 884.221, as applicants are required under s104 of the Act to notify the Department of changes in their circumstances, (which includes changes in the composition of their family as a result of, for example, birth,

death or change in relationship status), officers may, without further enquiry, consider this s104 related Schedule 2 criterion satisfied provided:

- there is no evidence (or notification) to the contrary and
- no significant time has elapsed since the visa application was made; otherwise, officers should check that there has been no material change in the circumstances of the applicant, their family or their Australian relative/sponsor.

## **18 Generic criteria - if not a subclass 173/884 visa holder**

### **18.1 Character requirement**

Clauses 103.224, 143.224, 173.224, 804.225, 864.223 and 884.224 provide that the main applicant must satisfy the prescribed PICs.

### **18.2 Debts to the Commonwealth**

Clauses 103.224, 143.224, 173.224, 804.225, 864.223 and 884.224 provide that the applicant (who was not the holder of a substituted Subclass 600 visa at the time of application) must satisfy PIC 4004.

#### **For substituted Subclass 600 visa holders**

The above clauses also provide that if the main applicant is the holder of a substituted Subclass 600 visa, the applicant is not required to satisfy PIC 4004. However, they will still be required to make arrangements for repayment of the debt. Removal of the requirement to satisfy PIC 4004 does not mean that the debt itself is waived. Outstanding debts to the Commonwealth can only be waived by the Minister for Finance. If a waiver of the debt itself is not sought from the Minister of Finance, or the Minister for Finance refuses to waive the debt, it will remain at law and will continue to be recorded against the applicant's name on the Movement Alert List.

### **18.3 Health requirement**

#### **For other than substituted Subclass 600 visa holders**

Clauses 103.224(a), 143.225(1), 173.224(a), 804.225(1), 864.223(1)(b) and 884.224(1)(a) provide that if the main applicant is not the holder of a substituted Subclass 600 visa at the time of application they must satisfy PIC 4005.

Under current arrangements, applicants applying for an "offshore" visa (103, 143 or 173) do not have to undertake a health assessment before they are allocated a queue date.

However, they must satisfy the relevant health PIC prior to visa grant.

#### **For substituted Subclass 600 visa holders**

Under clauses 143.225(2)(b), 804.225(2), 864.223(2)(b) and 884.224(2)(a), if the main applicant was the holder of a substituted Subclass 600 visa at the time of application they are required to satisfy health PIC 4007 (instead of 4005).

In addition, clauses 143.225 and 864.223 also provide that if the main applicant was the holder of a substituted Subclass 600 visa at the time of application and has previously held a 173/884 visa, they are only required to undergo 'such health checks as the Minister considers appropriate.

#### **18.4 Settlement criteria**

Clauses 103.224, 143.225, 173.224, 804.225, 864.223 and 884.224 provide that the main applicant must satisfy PICs 4009 and 4010, which relate to the settlement of the applicant in Australia.

#### **18.5 Values Statement**

Schedule 2 provides that main applicants who have turned 18 years at the time of application must satisfy PIC 4019, which relates to the signing of a values statement see:

<b>Clauses:</b>	103.224	143.224	173.224	804.225	864.223	884.224
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#### **18.6 Special return criteria**

Clauses 103.225, 143.227, 173.225, 804.225 and 864.225 provide that, if the main applicant has previously been in Australia, they must satisfy the prescribed Schedule 5 special return criteria.

The 804 visa has no special return criteria.

#### **18.7 Required assurance of support (AoS)**

Clauses 103.226, 143.228, 804.224 and 864.226 provide that the main applicant must have an approved AoS. There is no discretion for officers to waive the AoS requirement. It is not necessary, however, for an AoS to be requested and accepted in order for the visa application to be queued.

##### **Subclass 173/884 visa**

There is no requirement for an AoS for these visa subclasses as they allow the visa holder only temporary residence status in Australia. The AoS is only required for the grant of a permanent 143 or 864 visa.

## **18.8 Additional applicants**

Clauses 103.228, 143.231, 173.228, 804.227, 864.229 and 884.228 provide that the main applicant cannot be granted a visa unless those members of the family unit who are under 18 and who are also visa applicants satisfy PICs 4015 and 4016. The main applicant cannot be granted a visa if granting a visa to a minor described in this provision would prejudice the custody (or similar) rights of another person.

## **18.9 "One fails, all fail" criteria**

"One fails, all fail" criteria relating to members of the family unit apply to the main applicant.

Clauses 103.227, 143.229, 143.230, 173.226, 173.227, 804.226, 864.227, 864.228, 884.226 and 884.227 provide that the main applicant generally cannot be granted a visa unless, as provided in the above clauses:

- those family unit members who are visa applicants satisfy the relevant PICs prescribed and
- those family unit members who are not visa applicants also satisfy the relevant PICs prescribed.

### **"One fails, all fail" criteria - Health Requirement for non- substituted Subclass 600 visa holders**

Clauses 103.227(1)(a) and 103.227(2)(b), 143.229(1)(a) and 143.230(1)(b), 173.226(a) and 173.227(b), 804.226(1)(1)(a) and 804.226(2)(1)(b), 864.227(1)(a) and 864.228(1)(b) and 884.226(1)(a) and 884.227(1)(b) provide that the main applicant (who was not the holder of a substituted Subclass 600 visa at the time of application - by omission) must satisfy PIC 4005.

Refer to Health Policy Section for policy advice on the health requirement prescribed in the above clauses ('unless the Minister is satisfied that it would be unreasonable to require the person to undergo assessment').

### **"One fails, all fail" criteria - Health requirement for substituted Subclass 600 visa holders**

Under clauses 143.229(2)(b) and 143.230(2)(b), 804.226(1)(2)(a) and 804.226(2)(2)(b), 864.227(2)(b) and 864.228(2)(b) and 884.226(2)(a) and 884.227(2)(b), if the main applicant was the holder of a substituted Subclass 600 visa at the time of application they are required to satisfy health PIC 4007 (instead of 4005).

Refer to Health Policy Section for policy advice on the health requirement prescribed in the above clauses ('unless the Minister is satisfied that it would be unreasonable to require the person to undergo assessment').

In addition, clauses 143.225 and 864.223 also provide that if the main applicant was the holder of a substituted Subclass 600 visa at the time of application and has previously held a subclass 173/884 visa, they are only required to undergo 'such health checks as the Minister considers appropriate.'

### **18.10 Finalisation of any other parent visa applications**

Under clauses 103.229, 143.232, 173.229, 804.228, 864.230 and 884.229 provide that other parent visa applications must be finalised. See section 6.7 No other parent visa applications.

### **18.11 The passport requirement**

Clauses 103.224(a), 143.224(a), 173.224(a), 804.225, 864.223, 864.224(a) and 884.224 require the applicant to satisfy PIC 4021, that is, either the applicant holds a valid passport or it would be unreasonable for the applicant to hold a valid passport. For policy and procedure.

### **18.12 Main applicant must be visaed first**

The main applicant's secondary criteria prevent members of the family unit from being granted their visa unless/until the main applicant has been granted their visa first - see section 23.3 Continued eligibility at time of decision.

## **If a subclass 173/884 visa holder**

## **19 Eligibility to apply - if a subclass 173/884 visa holder**

### **19.1 Visa status**

See DOES THE APPLICANT HOLD A 173/884 VISA.

### **19.2 Relationship**

143.211/864.212: See section 17.2 Defined terms.

For the defined terms in clauses 103.1, 143.1, 173.1, 804.1, 864.1 and 884.1, see:

- the corresponding regulation 1.03 definitions

For balance of family test, see

- reg. 1.05
- Balance of family test – regulation 1.05.

### **19.3 If the child has died**

Clauses 143.212(4)/864.213(4) provide for circumstances where the child from whom the parent derived their subclass 173/884 visa relationship eligibility dies before the parent's subclass 173/884 visa ceases and before they apply for a 143/864 visa, and there is no other child who can meet the relationship requirements prescribed in 143.212(2) and (3) and 864.213(2) and (3). In such cases, the subclass 173/884 visa holder is not required to meet the relationship or sponsorship requirements.

#### **19.4 No balance of family (BoF) test**

Clauses 143.213, 143.223, 864.214 and 864.223 provide that persons who, at time of application for subclass 143/864 visa, hold a subclass 173/884 visa are not subject to the BoF test.

#### **19.5 Continued eligibility at time of decision**

If not a subclass 173/884 visa holder, for clauses 143.221 and 864.221 see section 17.5 Continued eligibility at time of decision.

Subclass 173/884 visa holder applicants receive certain concessions at Schedule 2 time of decision assessment of their subclass 143/864 visa application. These concessions include those related to:

- sponsorship
- debts to the Commonwealth - see section 20.2 Debts to the Commonwealth
- health - see section 20.3 Health requirement
- settlement - see section 20.4 Settlement criteria
- minors - see section 20.8 If a minor.

Clauses 143.231 and 864.229 provide that the subclass 173/884 visa holder main applicant for a subclass 143/864 visa cannot be granted a visa unless those members of the family unit who are under 18 and who are also visa applicants satisfy PICs 4015 and 4016. The main applicant cannot be granted a visa if granting a visa to a minor described in this provision would prejudice the custody (or similar) rights of another person.

"One fails, all fail" criteria cessation of dependency of members of the family unit - see section 2.5 Concessions.

## **20 Generic criteria - if a subclass 173/884 visa holder**

### **20.1 Character requirement**

143.224(a)/864.224(a): provide that a subclass 173/884 visa holder main applicant for a subclass 143/864 visa must satisfy the prescribed character PICs.

## **20.2 Debts to the Commonwealth**

A subclass 173/884 visa holder who is the main applicant for a subclass 143/864 visa is not required (by omission) to satisfy PIC 4004. However, they will still be required to make arrangements for repayment of the debt. Removal of the requirement to satisfy PIC 4004 does not mean that the debt itself is waived. Outstanding debts to the Commonwealth can only be waived by the Minister for Finance. If a waiver of the debt itself is not sought from the Minister of Finance, or the Minister for Finance refuses to waive the debt, it will remain at law and will continue to be recorded against the applicant's name on the Movement Alert List.

## **20.3 Health requirement**

Clauses 143.226 and 864.224(b) provide that the 173/884 visa holder main applicant for a 143/864 visa has undergone health checks the decision maker considers appropriate.. Applicants for a temporary Contributory Parent visa (173/884) would have undertaken full health examinations for a permanent visa. As they have already undertaken health examinations for a permanent visa, 173/884 visa holders are generally not required to undertake additional health checks for the grant of a subclass 143/864 visa. If a concern arises about the applicant's health during the processing of the permanent visa application, decision-makers must contact Health Policy for advice before proceeding to finalise the application.

## **20.4 Settlement criteria**

A subclass 173/884 visa holder main applicant for a subclass 143/864 visa is not required (by omission) to satisfy PICs 4009 and 4010, which relate to the settlement of the applicant in Australia.

## **20.5 Values statement**

Clauses 143.224(b) and 864.224(aa) provide that a subclass 173/884 visa holder main applicant for a subclass 143/864 visa, who has turned 18 years at the time of application must satisfy PIC 4019 which relates to the signing of a values statement.

## **20.6 Special return criteria**

Clauses 143.227 and 864.225 provide that, if the 173/884 visa holder main applicant for a subclass 143/864 visa has previously been in Australia, they must satisfy the prescribed Schedule 5 special return criteria.

## **20.7 Required assurance of support (AoS)**

Clauses 143.228 and 864.226 provide that the subclass 173/884 visa holder main applicant for a subclass 143/864 visa must have an approved AoS. An AoS is required by law for the 143/864 visas. There is no discretion for officers to waive the AoS requirement. It is not necessary, however, for an AoS to be requested and accepted in order for the visa application to be queued.

## **20.8 If a minor**

Clauses 143.231 and 864.229 provide that the 173/884 visa holder main applicant for a 143/864 visa cannot be granted a visa unless those members of the family unit who are under 18 and who are also visa applicants satisfy PICs 4015 and 4016. The main applicant cannot be granted a visa if granting a visa to a minor described in this provision would prejudice the custody (or similar) rights of another person.

## **20.9 "One fails, all fail" criteria**

Clauses 143.229 and 143.230 provide that the 173/884 visa holder main applicant for a subclass 143/864 visa is not subject to the "one fails, all fail" criteria prescribed in 143.229 and 143.230 (through omission) relating to members of the family unit (both applicants and non-applicants).

Therefore, even if one of the members of the family unit of the main applicant do not satisfy a criterion or criteria in 143.324, if applicable, the subclass 143 visa main applicant as well as other members of the family unit applicants can still be granted a subclass 143 visa.

Under clauses 864.227 and 864.228, the same principle applies to subclass 884 visa holders who apply for a subclass 864 visa.

## **20.10 Finalisation of any other parent visa applications**

143.232/864.230, provide that other parent visa application must be finalised. See

- section 6.7 No other parent visa applications
- section 27.10 Finalisation of any other parent visa applications.

## **20.11 Applicant to hold a valid passport**

For clauses 143.233 and 864.231, see PAM3: Act - Passports, travel documents & visa evidencing - Travel documents.

## **20.12 Main applicant must be visaed first**



The secondary criteria for a subclass 173/884 visa holder main applicant for a subclass 143/864 visa prevent their members of the family unit from being granted their subclass 143/864 visa unless/until the main applicant has been granted their subclass 143/864 visa first. See section 27.12 Main applicant must be visaed first.

## **Sponsorship**

This part discusses sponsorship limitations, sponsorship requirements, change in sponsor, death of sponsor and sponsorship on behalf of minor children.

More generic advice on sponsorship for parent visas is located in the form 40 PAM, and this section should be read in conjunction with that instruction.

## **21 Sponsorship limitations and requirements**

### **21.1 Sponsorship limitation**

Regulation 1.20LAA imposes a sponsorship limitation to any parent, contributory parent or aged dependent relative (ADR) visa application made on or after 26 April 2008, where the sponsor is a holder or former holder of a subclass 802 visa whose application for that visa was supported by a letter of support from a state or territory government welfare authority (STGWA).

### **21.2 Sponsorship requirements**

The sponsorship requirements for primary applicants are prescribed in clauses:

103.212 and 103.222	143.212 and 143.222	173.212 and 173.222	804.212 and 804.222	864.213 and 864.222	884.212 and 884.222
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The sponsorship requirements for subclass 173/884 visa holders are prescribed in clauses:

- 143.212 and 143.222
- 864.213 and 864.222.

Note: Subclass 173/884 visa holders receive certain concessions at time of decision assessment of their subclass 143/864 visa application. For details of these concessions, see section 19.5 Continued eligibility at time of decision.

These regulations provide that a sponsor must be:

- the child of the applicant or the child's cohabiting partner
- aged 18 years or over and
- a settled Australian citizen, Australian permanent resident or an eligible New Zealand citizen.

For policy and procedure on the sponsorship obligations and undertaking, including assessing the information in the Sponsorship form (Form 40)

### **21.3 Sponsorship on behalf of children under 18 years of age**

If the child or child's cohabiting partner is unable to sponsor the applicant because they are under 18 years of age, the regulations provide for a relative, guardian or community organisation to sponsor on their behalf. However, the relative or guardian must also be aged 18 years or over and be a settled Australian citizen, Australian permanent resident or eligible New Zealand citizen.

For policy and procedure on sponsorship by community organisations, see section 22 Sponsorship by a community organisation.

### **21.4 Sponsorship of step-parents**

Generally, a settled Australian citizen child, permanent resident or an eligible New Zealand citizen can sponsor their parents. If sponsorship is provided by a step-child, officers may refer these cases to the Family Section, National Office for advice.

### **21.5 Change in sponsor**

The time of decision sponsorship clauses (103.222, 143.222, 173.222, 804.222, 864.222 and 884.222) provide that the approved sponsor does not need to be the same sponsor at time of application and at time of decision.

However, the new sponsor will still need to meet the sponsorship requirements and will need to submit a completed form 40 to the Department. See section 21.2 Sponsorship requirements.

### **21.6 If the sponsor dies**

For all Parent visa applicants, if the sponsor at time of application dies, and the applicant can arrange a suitable new sponsor, change of sponsorship may be approved - see section 21.5 Change in sponsor.

However, if the sponsor of a 173/884 visa holder dies before the 143/864 visa application is made and decided, see:

- section 21.7 If the sponsor of a 173/884 visa holder dies before the 143/864 visa application is made and
- section 21.8 If the sponsor of a 143/864 visa applicant dies before the application is decided.

## **21.7 If the sponsor of a 173/884 visa holder dies before the 143/864 visa application is made**

Clauses 143.212(4) and 864.213(4) provide that the applicant is taken to have met the sponsorship requirement for the purposes of the subclass 143/864 visa application if:

- the applicant is the holder of a subclass 173/884 visa at the time of application
- the person who sponsored the applicant for the subclass 173/884 visa dies before the subclass 173/884 visa ceases to be in effect and
- there is no other available sponsor (as described in 143.212 and 864.213) who could meet sponsorship requirements.

## **21.8 If the sponsor of a 143/864 visa applicant dies before the application is decided**

Under clauses 143.222A/864.222(b), if:

- the subclass 143/864 visa applicant was a subclass 173/884 visa holder at time of their subclass 143/864 visa application
- their approved sponsor dies after the subclass 143/864 visa application is made, but before it is decided and
- there is no other eligible person (as described in clause 143.212/864.213) available to sponsor

the applicant is taken to still be sponsored for the subclass 143/864 visa application.

## **21.9 Sponsorship of member of family unit**

Sponsorship of MFU is specified in the following clauses:

103.312 and 103.322	143.312 and 143.322	173.312 and 173.322	804.312 and 804.325	864.312 and 864.322	884.312 and 884.322
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For 143.312 and 143.322, 864.312 and 864.322, see:

- section 21.7 If the sponsor of a 173/884 visa holder dies before the 143/864 visa application is made and
- section 21.8 If the sponsor of a 143/864 visa applicant dies before the application is decided.

## **22 Sponsorship by a community organisation**

### **22.1 Sponsorship by a community organisation on behalf of a minor child.**

If the person who would otherwise (by direct relationship to the visa applicant) be the sponsor is under 18 years old, Schedule 2 provides for a community organisation to be the sponsor.

### **22.2 Which community organisations are acceptable**

The Regulations neither define "community organisation", nor prescribe further requirements that the organisation must meet. The types of organisations that, under policy, may be approved under regulation 1.20 as sponsors include, but are not limited to, community-based organisations, ethnic organisations or church-based groups, with which the minor has affiliation or which are assisting the minor in settling.

The organisation should establish that it has a relationship with the person under 18 years old or that it is willing to support the application by, for example, a local senior member of the organisation who is authorised to speak on behalf of the organisation providing a statutory declaration to this effect.

### **22.3 Establishing the legitimacy of a community organisation**

To establish whether a community organisation is eligible to sponsor an applicant, a decision maker needs to be satisfied that the organisation:

- has been lawfully established in Australia
- has been actively operating in Australia for a period of at least one year and
- has the capacity to meet its financial commitments.

Decision makers may consider requesting the following documents to assist them in establishing the legitimacy and financial capacity of the Australian organisation:

- certificate of registration for tax purposes (Australian Business Number)
- certificate of registration of business name (if operating under a trading name)
- relevant pages of the trust deed specifying the parties to the trust (for a trust)
- relevant pages of the franchise agreement specifying the franchise arrangements (for a franchise/franchisor)
- financial or annual report including profit and loss statement and balance sheet. (If operating as a trust, financial statements must be in the name of the trust or the trustee for the trust)

- Business Activity Statements (BAS) for the last financial year
- bank statements.

## **22.4 Evidence of meeting sponsorship obligations by a community organisation**

Decision makers need to be satisfied that the organisation is financially capable to provide financial support to an applicant during the time their application is being processed and within two years after the visa is granted.

Evidence that sponsorship obligations can be met may include but is not limited to the below documentation:

- statutory declarations
- financial statements such as bank statements or letters from a bank
- most recent tax assessments
- evidence of the availability and adequacy evidence of accommodation for the applicant or
- any other documents relevant to these requirements.

Any statutory declarations should be completed by a local senior member of the organisation who has a legal capacity to act on behalf of the organisation outlining their agreement to the sponsorship undertaking. The organisation's representative must complete and sign the relevant parts of the Sponsorship form (Form 40), including signing the undertaking at Part M.

## **22.5 Evidence of the relationship between the organisation and the family**

It is also important for the decision-maker to consider the strength of the relationship between the community organisation and the family. This could be assessed by considering the duration, frequency and type of contact the community organisation has had with the family. The decision maker would also need to take into account the reasons why the community organisation is prepared to sponsor the applicant.

## Family unit members

If MFU not a subclass 173/884 visa holder

### 23 Eligibility to apply - if MFU not a subclass 173/884 visa holder

#### 23.1 Relationship

Clauses 103.311, 143.311, 173.311, 804.311(a), 864.311 and 884.311 require the applicant to be a member of the family unit of the person seeking to satisfy primary criteria. See regulation 1.12(1) and regulation 1.12(4) definitions of member of the family unit.

For guidelines on establishing the composition of the family unit, see:

- section 17.3 Relationship.

Note: For subclasses 804, 864 and 884 the aged parent requirement does not apply to members of family unit of a person seeking to satisfy the primary criteria.

#### 23.2 Combined application

Provided the main applicant has not yet been granted or refused their visa:

- regulation 2.08 adds newborn children to the application (they are taken to have applied for a visa at time of birth) and
- regulation 2.08A allows a partner or dependent child (only) to be added to the application at the main applicant's written request.

In either situation, the relevant regulation states that the family member is taken to have applied with the main applicant and, therefore, are deemed to have made a combined application. Each person who is eligible to make a combined application with another person is an applicant in their own right so in law has made their own application.

Under clauses 103.311 and 173.311, members of the family unit who are not covered by regulations 2.08 or 2.08A (that is, a partner or dependent child/ren) must make a combined application with the main applicant - they cannot successfully apply separately for this visa.

Under clause 804.311, 864.311 and 884.311, members of the family unit who are not covered by regulations 2.08 or 2.08A (that is, a partner or dependent child/ren) may still apply separately from (that is, later than) the main applicant. However, for this criterion to be satisfied:

- the main applicant's application must still be undecided and
- the main applicant must appear to satisfy the corresponding criteria in 804.21, 864.21 and 884.21.

In certain circumstances, clause 143.311 allows members of the members of the family unit who are not covered by regulations 2.08 or 2.08A (that is, a partner or dependent child/ren) to apply separately from (that is, later than) the main applicant. However, for this criterion to be satisfied:

- the main applicant must have held a substituted Subclass 600 visa or a subclass 173 visa
- the main applicant's application must have been made while they were in Australia
- the main applicant's application must not have been decided
- the main applicant must appear to satisfy the corresponding criteria in 143.21 and
- the member of the family unit must be in Australia at the time they make their application.

In all other cases, members of the family unit who are not covered by regulations 2.08 or 2.08A (that is, a partner or dependent child/ren) must make a combined application with the main applicant for the Subclass 143 visa - they cannot successfully apply separately for this visa.

### **23.3 Continued eligibility at time of decision**

Under clauses 103.321, 143.321, 804.321 and 864.321, a family member who is a visa applicant must still, at time of decision, continue to be a member of the family unit of the visa main applicant.

Under clauses 173.321 and 884.321, unless the applicant is a Contributory Parent Newborn Child, a family member applicant must still, at time of decision, continue to be a member of the family unit of the visa main applicant.

These regulations also prevent members of the family unit from being granted their visa unless/until the main applicant has been granted their visa first. See:

- section 18.12 Main applicant must be visaed first

## **24 Sponsorship - if MFU not a subclass 173/884 visa holder**

### **24.1 Sponsorship**

Clauses:

143.312 and 143.322	103.312 and 103.322	173.312 and 173.322	804.312 and 804.325	864.312 and 864.322	884.312 and 884.322
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## **25 Generic criteria - if MFU not a subclass 173/884 visa holder**

### **25.1 Character requirement**

Clauses 103.323(a), 143.323(a), 173.323(a), 804.322, 864.323(a) and 884.323 provide that the secondary applicant must satisfy the prescribed character PICs.

### **25.2 Debts to the Commonwealth**

Clauses 103.323(a), 143.324(1), 173.323(a), 804.322(1)(a), 864.324(1) and 884.323(1)(a) provide that if the secondary applicant (who was not the holder of a substituted Subclass 600 visa at the time of application - by omission) must satisfy PIC 4004.

#### **Substituted subclass 676 visa holders**

The above clauses also provide that if the secondary applicant is the holder of a substituted Subclass 600 visa, the secondary applicant is not required to satisfy PIC 4004. However, they will still be required to make arrangements for repayment of the debt. Removal of the requirement to satisfy PIC 4004 does not mean that the debt itself is waived. Outstanding debts to the Commonwealth can only be waived by the Minister for Finance. If a waiver of the debt itself is not sought from the Minister of Finance, or the Minister for Finance refuses to waive the debt, it will remain at law and will continue to be recorded against the applicant's name on the Movement Alert List.

### **25.3 Health requirement**

#### **For non-substituted Subclass 600 visa holders**

Clauses 103.323(a), 143.324(1), 173.323(a), 804.322(1)(a), 864.324(1) and 884.323(1)(a) provide that the secondary applicant (who was not the holder of a substituted Subclass 600 visa at the time of application - by omission) must satisfy PIC 4005.

#### **For substituted Subclass 600 visa holders**

Under clauses 143.324(2)(b), 804.322(2)(a), 864.324(2)(b) and 884.323(2)(a), if the secondary applicant was the holder of a substituted Subclass 600 visa at the time of application they are required to satisfy health PIC 4007 (instead of 4005).

In addition, clauses 143.324 & 864.324 also provide that if the secondary applicant was the holder of a substituted Subclass 600 visa at the time of application and has previously held a subclass 173/884 visa, they are only required to undergo 'such health checks as the Minister considers appropriate.



## **25.4 Settlement criteria**

Clauses 103.323(a), 143.324, 173.323(a), 804.322, 864.324 and 884.323 provide that the secondary applicant must satisfy PICs 4009 and 4010, which relate to the settlement of the applicant in Australia.

## **25.5 Values statement**

Clauses 103.323(b), 143.323(b), 173.323(b), 804.322, 864.323(b) and 884.323 provide that secondary applicants who have turned 18 years at the time of application must satisfy PIC 4019, which relates to the signing of a values statement.

## **25.6 Special return criteria**

Clauses 103.324, 143.326, 173.324, 884.326 and 864.326 provide that, if the secondary applicant has previously been in Australia, they must satisfy the prescribed Schedule 5 special return criteria.

For the 804 visa, there are no special return criteria for this visa subclass.

## **25.7 Required assurance of support (AoS)**

Under clauses 103.325, 143.327, 804.323 and 864.327, the secondary applicant must be included in the main applicant's AoS or have an individual AoS that has been accepted by the Secretary of the Department of Family, Housing, Community Services and Indigenous Affairs (FaHCSIA).

An AoS is required by law for the above visas; there is no discretion for officers to "waive" the AoS requirement. It is not necessary, however, for an AoS to be requested and accepted in order for the visa application to be queued.

There is no requirement for an AoS for the temporary Contributory Parent category visa subclasses (173 and 884) as the AoS is only required for the grant of a permanent visa.

## **25.8 If a minor**

Clauses 103.326, 143.328, 173.325, 804.324, 864.328 and 884.324 provide that secondary applicants who are under 18 years of age must satisfy PICs 4017 and 4018.

## **25.9 "One fails, all fail" criteria**

See section 18.9 "One fails, all fail" criteria.

## **25.10 Finalisation of any other parent visa applications**

Clauses 103.327, 143.329, 173.326, 804.326, 864.329 and 884.325 provide that other parent visa applications must be finalised - see section 6.7 No other parent visa applications.

### **25.11 The passport requirement**

Clauses 103.323, 143.323(a), 173.328, 804.322, 864.323(a) and 884.328 require the applicant to satisfy PIC 4021, that is, either the applicant holds a valid passport or it would be unreasonable for the applicant to hold a valid passport.

### **25.12 Main applicant must be visaed first**

Clauses 103.321, 143.321, 173.321, 804.321, 864.321 and 884.321 prevent a secondary applicant from being granted their visa unless/until the main applicant has been granted their visa first.

**If MFU a subclass 173/884 visa holder**

## **26 Eligibility to apply - if MFU a subclass 173/884 visa holder**

### **26.1 Relationship**

143.311/864.311: See section 23.1 Relationship.

### **26.2 Combined application**

To satisfy clause 1143.311/864.311, members of the family unit may make a combined application with the main applicant - see section 23.2 Combined application.

Regulation 2.08A allows subclass 173/884 visa holders to add a partner or dependent child to their subclass 143/864 visa application. However, note that separate arrangements apply for CPNCs.

Under 864.311, members of the family unit who are not covered by regulations 2.08 or 2.08A may still apply separately from (that is, later than) the main applicant. However, for this criterion to be satisfied:

- the main applicant's application must not have been decided and
- the main applicant must appear to satisfy the corresponding criteria in 864.21.

In certain circumstances, clause 143.311 allows members of the members of the family unit who are not covered by regulations 2.08 or 2.08A to apply separately from (that is, later than) the main applicant. However, for this criterion to be satisfied:

- the main applicant must have held a substituted Subclass 600 visa or a subclass 173 visa
- the main applicant's application must have been made while they were in Australia
- the main applicant's application must not have been decided
- the main applicant must appear to satisfy the corresponding criteria in 143.21 and

- the members of the family unit must be in Australia at the time they make their application.

In all other cases, members of the family unit who are not covered by regulations 2.08 or 2.08A must make a combined application with the main applicant for the subclass 143 visa - they cannot successfully apply separately for this visa.

### **26.3 Continued eligibility at time of decision**

For clauses 143.321 and 864.321, see section 23.3 Continued eligibility at time of decision.

In relation to cessation of dependency, regulation 1.12(3) and (4) specifically provides for a subclass 173/884 visa holder, where family members who have otherwise ceased to be dependent on the family head (the subclass 143/864 visa main applicant) since they were granted the subclass 173/884 visa, are still counted as being a member of the family unit for the purposes of the subclass 143/864 visa. Therefore, dependency does not have to be re-considered for the purposes of clause 143.321/864.321.

## **27 Generic criteria - if MFU a subclass 173/884 visa holder**

### **27.1 Character requirement**

143.323(a)/864.323(a) provide that the subclass 173/884 visa holder secondary applicant for a subclass 143/864 visa must satisfy the prescribed character PICs.

### **27.2 Debts to the Commonwealth**

A subclass 173/884 visa holder secondary applicant for a subclass 143/864 visa is not required (by omission) to satisfy PIC 4004. However, they will still be required to make arrangements for repayment of the debt. Removal of the requirement to satisfy PIC 4004 does not mean that the debt itself is waived. Outstanding debts to the Commonwealth can only be waived by the Minister for Finance. If a waiver of the debt itself is not sought from the Minister of Finance, or the Minister for Finance refuses to waive the debt, it will remain at law and will continue to be recorded against the applicant's name on the Movement Alert List.

### **27.3 Health requirement**

143.325/864.325 provide that the subclass 173/884 visa holder secondary applicant for a subclass 143/864 visa has undergone health checks the Minister considers appropriate. In line with the Health PAM, subclass 173/884 visa holders will only be required to undertake a new health assessment if the subclass 173/884 visa holder has:

- resided in a high risk or very high risk country for a specified period of time and/or

- health integrity concerns

This means that subclass 173/884 visa holders do not have to undertake a new health assessment for the subclass 143/864 visa application if there is:

- a deterioration in their health and/or
- a new medical condition

which have occurred following the granting of their subclass 173/884 visa.

#### **27.4 Settlement criteria**

A subclass 173/884 visa holder secondary applicant for a subclass 143/864 visa is not required (by omission) to satisfy PICs 4009 and 4010 which relate to the settlement of the applicant in Australia.

#### **27.5 Values statement**

143.323(b)/864.323(b): provide that a subclass 173/884 visa holder secondary applicant for a subclass 143/864 visa, who has turned 18 years at the time of application, must satisfy PIC 4019 which relates to the signing of a values statement.

#### **27.6 Special return criteria**

143.326/864.326: provide that if the subclass 173/884 visa holder secondary applicant for a subclass 143/864 visa has previously been in Australia, they must satisfy the prescribed Schedule 5 special return criteria.

#### **27.7 Required assurance of support (AoS)**

143.327/864.327: provide that the subclass 173/884 visa holder secondary applicant for a subclass 143/864 visa must be included in the main applicant's AoS or have an individual AoS that has been accepted by the Secretary of the Department of Family, Housing, Community Services and Indigenous Affairs (FaHCSIA).

An AoS is required by law for the above visas; there is no discretion for officers to "waive" the AoS requirement. It is not necessary, however, for an AoS to be requested and accepted in order for the visa application to be queued.

#### **27.8 If a minor**

143.328/864.328: provide that a subclass 173/884 visa holder secondary applicant for a subclass 143/864 visa, who is under 18 years of age, must satisfy PICs 4017 and 4018.

#### **27.9 "One fails, all fail" criteria**

143.229 and 143.230

864.227 and 864.228

A subclass 173/884 visa holder secondary applicant for a subclass 143/864 visa is not (by omission) subject to the "one fails, all fails" criteria relating to members of the family unit (both applicants and non-applicants). See section 14.9 - "One fails, all fail" criteria.

### **27.10 Finalisation of any other parent visa applications**

For clauses 143.329 and 864.329, which provide that other parent visa applications must be finalised, see section 6.7 No other parent visa applications.

### **27.11 Applicant to hold valid passport**

For clauses 143.330 and 864.330,

require the applicant to satisfy PIC 4021, that is, either the applicant holds a valid passport or it would be unreasonable for the applicant to hold a valid passport. For policy and procedure.

### **27.12 Main applicant must be visaed first**

Clauses 143.321 and 864.321 prevent the subclass 173/884 visa holder secondary applicant for a subclass 143/864 visa from being granted their subclass 143/864 visa unless/until the main applicant has been granted their subclass 143/864 visa first.

**Visa grant**

## **28 Finalisation of other Parent visa applications**

### **28.1 Requirements**

Subclass	103	143	173	804	864	884
Sch2 clause:		143.232				

Before a parent visa can be granted, officers must ascertain whether there are any unresolved parent visa (or associated review) applications in respect of the applicant. This is because, for all applicants (whether or not main applicant or member of the family unit or subclass 173/884 visa holder), the relevant clauses in Schedule 2 require all other parent visa applications to have been finalised or withdrawn. If there is another parent visa application before the Department, see

- section 6.7 No other parent visa applications

The requirement to have no unresolved parent visa application includes merits review (MRT/AAT) or judicial (court) review of a refusal decision in relation to a parent visa

application. Any such review applications must be withdrawn or finalised (which includes the period on which to seek review having passed) before the subclass 143 visa can be granted.

See

- IF A SUBCLASS 173/884 VISA HOLDER
- section 18.10 Finalisation of any other parent visa applications
- section 20.10 Finalisation of any other parent visa applications
- section 25.10 Finalisation of any other parent visa applications
- section 27.10 Finalisation of any other parent visa applications.

## **28.2 Applications at merits or judicial review**

The requirement to have no unfinalised parent visa application includes those applicants under merits review (MRT/AAT) or judicial (court) review for a parent visa application. Any such review applications must be withdrawn or finalised (which includes the period in which to seek review having passed) before an applicant (whether or not main applicant or member of the family unit or subclass 173/884 visa holder) can be granted a parent visa.

See:

- Migration Act, Part 7, Division 8 - Referral of decisions to Administrative Appeals Tribunal
- Migration Act, Part 8, Division 2 - Jurisdiction and procedure of courts.

## **28.3 Withdrawal**

Completing the relevant part of forms 47PA and 47PT withdraws only an application before the Department. It does not withdraw any merits or judicial review application. The applicant is required to contact the relevant review body (merits or judicial) to arrange for withdrawal of that application and provide evidence of that withdrawal to the Department.

## **28.4 Combined applications**

Officers should take care to only withdraw the application that has been requested to be withdrawn. An applicant who has made a combined application can withdraw from that application leaving their partner as the main applicant. While policy recommends that couples apply together, there is currently no legal impediment to couples pursuing separate parent applications.

## **28.5 First entry date**

In determining the first entry date, see

- section 32 Visa grant or refusal.

## 29 Where the applicant must be at time of visa grant

Visa	Clause		Where the applicant must be:
103	103.411	All applicants	<i>must be outside</i> Australia at time of visa grant.
143	143.411	Applicants who, at the time of application, were the: <ul style="list-style-type: none"> <li>• holder of a 173 visa</li> <li>• holder of a substituted Subclass 600 visa or</li> <li>• member of the family unit of a holder of a substituted Subclass 600 visa or</li> <li>• member of the family unit of a 173 visa holder and both the 173 visa holder and the member of the family unit were in Australia at the time of application</li> </ul>	may be in or outside Australia, but not in immigration clearance
143	143.412	All other applicants not covered by 143.411.	<i>must be outside</i> Australia at time of visa grant.
173	173.411	Applicants other than CPNCs	<i>must be outside</i> Australia at time of visa grant.
173	173.412	CPNCs	may be in or outside placecountry-regionAustralia, but not in immigration clearance
804	804.411	All applicants	<i>must be in</i> Australia at time of visa grant, but not in immigration clearance
864	864.411	All applicants	<i>must be in</i> Australia at time of visa grant, but not in immigration clearance

884	884.411	Applicants other than CPNCs	<i>must be in</i> Australia at time of visa grant, but not in immigration clearance
884	884.412	CPNCs	may be in or outside Australia, but not in immigration clearance

### 30 Payment of the second instalment of the VAC

Schedule 1 specifies that the second instalment of the VAC must be paid before the visa can be granted (s65(1)(a)(iv) of the Act). See

- Schedule 1
- regulation 2.12C

### 31 When visa is in effect

#### Permanent visas

Clauses 103.511, 143.511, 804.511 and 864.511 provide that the permanent visa permits the holder to travel to and enter Australia for 5 years after the date of visa grant.

#### Temporary visas

Clauses 173.511 and 884.511 provide that, if the applicant is not a CPNC, a temporary visa will be granted permitting the holder to travel to, enter and remain in Australia for 2 years from a date specified by the Minister for that purpose.

For a subclass 173 visa holder, the temporary visa is in effect for a period of 2 years from the date of initial entry into Australia. This means that the visa will allow the subclass 173 holder to travel to, enter and remain lawfully in Australia for 2 years from the date of initial entry to Australia.

- Note: When granting subclass 173 visas in the system, the “Entry Expiry” (travel facility) field is a mandatory field and must have a date entered into it. It currently should default to a date 2 years from the date of grant. Processing officers must not alter this date. Upon initial entry into Australia, the travel facility of the subclass 173 visa in IT systems will automatically set to 2 years from the initial entry date, allowing a full 2 years from the date of initial entry to Australia for the subclass 173 visa holder to travel to, and enter, Australia.
- In addition, when entering the length of stay for a subclass 173 visa in the system, processing officers must always use “Y02” in the “Stay” field.



For a subclass 884 visa holder, the temporary visa is in effect for a period of 2 years from the date of visa grant.

### **CPNC**

Clauses 173.512 and 884.512 provide that, if the applicant is a CPNC, a temporary visa will be granted permitting the holder to travel to, enter and remain in Australia from a date specified by the Minister.

## **32 Visa grant or refusal**

### **32.1 Notification**

For the requirements of s66 of the Act relating to notification of a decision, see:

- PAM3: Act - Code of procedure - Notification requirements
- PAM3: GenGuideA - All visas - Visa application procedures - Notification of decisions.

If the visa is granted, see also PAM3: Div5.3/reg5.17 for policy and procedures for informing visa holders of their entitlement (if any) to AMEP English tuition.

Under policy, officers should also advise applicants who are granted a subclass 173/884 visa of the effect of regulation 2.07AI - see Reg. 2.07AI - Bar on further visa applications by subclass 173/884 visa holders.

### **32.2 Merit review**

Decisions to refuse to grant a parent visa are ***MRT-reviewable decisions*** under:

- s338 of the Act and
- in relation to CPNCs, regulation 4.02(4)(j) or (k).

Section 347 of the Act prescribes:

- how a review application is made
- who may apply for the review and
- whether the visa applicant must be in Australia when the review application is made.

## **33 If an applicant dies**

### **33.1 If an applicant dies**

If a visa applicant dies before a visa application is finally determined, there is no longer an application for that person. The application must be finalised on the system as "Otherwise finalised".

### **33.2 If the main applicant dies**

If the main applicant dies, the processing office would normally request:

- a certified true copy of the death certificate (or confirm otherwise that the applicant is deceased) and
- a letter from the secondary applicant confirming that they wish to continue with the visa application.

The secondary applicant and sponsor are not requested to provide other forms or documents.

Once the above documents are received by the processing office, the role of the secondary applicant will be changed to a primary. The application stays in its position in the queue until visa grant consideration.

Note: For onshore parent visas, if the secondary applicant is not "aged", they remain in their queue position still, until their application is due for visa grant consideration. Once their visa application is considered for finalisation, if the "new" primary applicant (who was previously a secondary applicant) is still not an "aged parent", the application will be refused as the "time of decision" criteria, including "aged parent", are not met.

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# Ouyang & Lee Lawyers