

ASRC Afghanistan Legal Clinic - Who can you include in your offshore humanitarian visa application?



This fact sheet addresses the definitions of family unit in the *Migration Act 1958* (Cth) and the *Migration Regulations 1994* (Cth) in order to guide you as to who you can include in an 842 (Class XB) Offshore Refugee and Humanitarian visa application form. It may be that you can include all of your family members in the application, or that some family members may need to complete their own 842 application form as they are considered to be independent of your family unit.

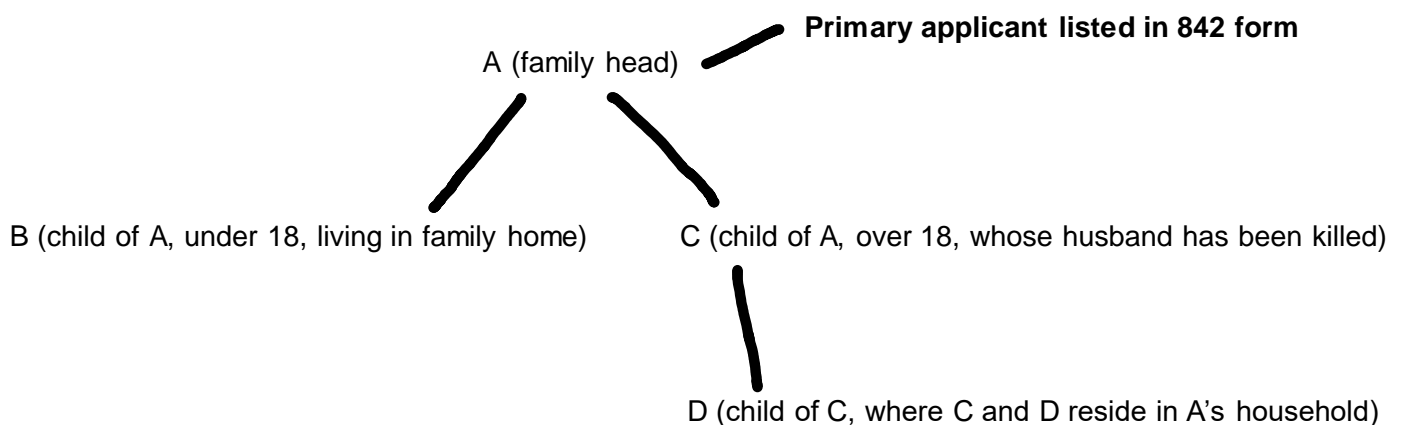
This fact sheet does not address the “split family provisions” whereby a Subclass 201, 202, 203 or 204 visa holder who came to Australia within the last five years can sponsor their immediate family members (i.e. spouse/partner, child or parent if the visa holder is under 18). For more information on those provisions, please refer to the ASRC factsheet – 842 form - Information for prospective applicants.

In order to include family members in your offshore humanitarian visa application, they must meet the definition “**member of the family unit.**” The meaning of “member of the family unit” is prescribed in the *Migration Act 1958* (Cth) at s 5(1) and the *Migration Regulations 1994* (Cth) at regulation 1.12.

Regulation 1.12(4) contains a broader definition of who is included in the family unit for protection and humanitarian visa applications than for other visa applications. It is set out as follows:

- (4) A person is a member of the family unit of another person (the family head) if the person is:
- (a) A spouse or de facto partner of the family head; or
 - (b) A *dependent child* of:
 - (i) The family head; or
 - (ii) A spouse or de facto partner of the family head; or
 - (c) A dependent child of a dependent child of:
 - (i) The family head; or
 - (ii) A spouse or de facto partner of the family head; or
 - (d) A relative, of the family head or of a spouse or de facto partner of the family head, who:
 - (i) Does not have a spouse or de facto partner; and
 - (ii) Is usually resident in the family head’s household; and
 - (iii) Is *dependent* on the family head.

For example, an application including dependent children might look like this:



“Dependent child” is also defined in the Regulations.

A dependent child, of a person, means the child or step-child of the person (other than a child or step-child who is engaged to be married or has a spouse or de facto partner), being a child or step-child who:

- (a) Has not turned 18; or
- (b) Has turned 18 and:
 - (i) Is dependent on that person; or
 - (ii) Is incapacitated for work due to the total or partial loss of the child’s or step-child’s bodily or mental functions.

This means that if you are planning to include children over 18 who are living independently OR earning an income OR have started their own families, that child should fill out and complete their own subclass 842 form.

Children who are under 18 years or children who have a disability, do not need to demonstrate dependency.

Dependent is defined in regulation 1.05A. As with the definition of member of the family unit, the definition of dependency for refugee and humanitarian visa applications is broader than other visa subclasses. For example, reg. 1.05A(2) states that:

(2) A person (the first person) is dependent on another person for the purposes of an application for:

A protection visa; or

(ea) a Refugee and Humanitarian (Class XB) visa; or

(i) a Temporary Safe Haven (Class UJ) visa;

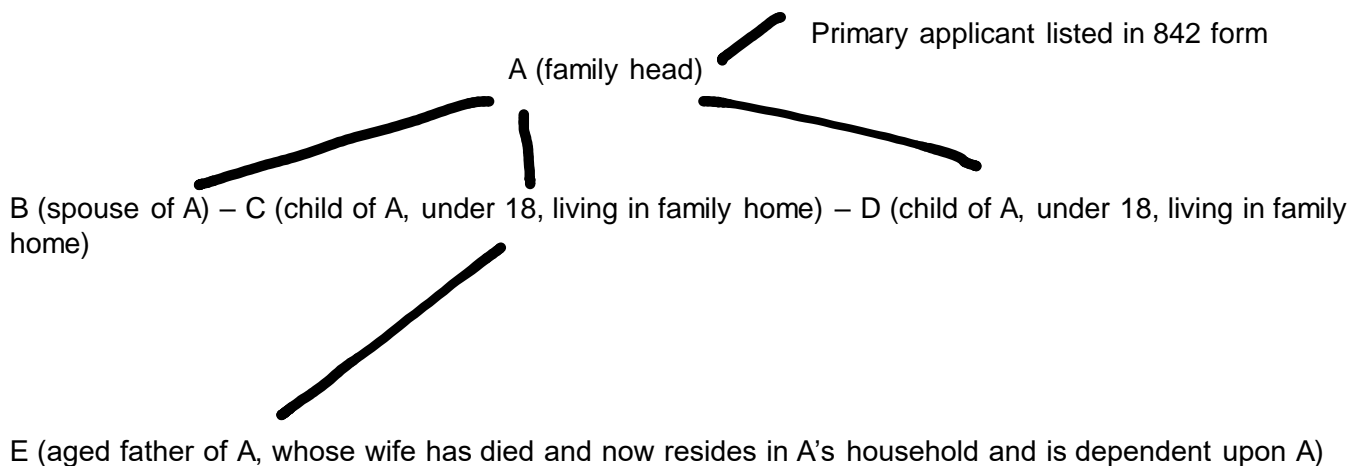
if the first person is wholly or substantially reliant on the other person for financial, psychological or physical support.

Who is a relative?

The definition of “relative” in member of the family unit is not defined in the Migration Regulations. However, it is quite broad. For offshore humanitarian visa applications being considered for a Subclass 202 Global Special Humanitarian visa, relative can be a spouse or de facto partner of the primary applicant, child, parent, sibling, grandparent, aunt, uncle niece, nephew (including step-relationships), first or second cousin.

For other offshore applications being considered for a subclass other than a Subclass 200 Refugee visa, a relative can be any of the above other than a first or second cousin. Remember, you will need to provide evidence of your familial relationship and the relative must be *dependent* upon you if you are the primary applicant. Generally, this means they will not be partnered and will be reliant upon you for financial, physical or psychological support.

An application including a “relative” family member might look like this:



Remember the primary applicant does not need to be the male head of household. For applications from Afghanistan, the female spouse will sometimes have the stronger claims of discrimination, abuse of human rights or persecution.

If a claimed family member does not meet the definition of “member of the family unit” or “member of the immediate family”, that applicant may be separated from the application by the departmental delegate considering the application and given their own file to be considered against the primary criteria in their own right (i.e. the extent to which they will be subject to persecution, substantial discrimination or a gross abuse of human rights in Afghanistan). However, the Department is first required to consider the applicant against the dependency criteria including requesting further information from the primary applicant about their dependent’s financial, physical and psychological support if necessary.

How do you provide evidence your familial relationship?

The 842 application form requests applicants to provide evidence that they are related to the people included in the application. Policy states that this evidence would usually be documents such as passports, identity cards, birth certificates, marriage certificates, family registers etc. If such official evidence is unavailable or insufficient, policy suggests that hospital, school or church records can be provided.

The Department is aware that in many cases, applicant will not be able to produce documentary evidence to provide the familial relationship between the applicants in the 842 form. For this reason, it is policy that all offshore humanitarian visa applicants be interviewed prior to visa grant, in order to verify identity and establish the familial link between applicants. However, if an application is deemed prima facie not to meet the criteria, applicant/s will not be interviewed.

NOTE: Do not attempt to include applicants who are not your relatives as this may jeopardise the application and DNA testing may be required. The exception to this is where you may have adopted a child who is not biologically yours and formal adoption procedures are not available in your home country. If this is your situation, you should seek external legal advice as it may be complicated for you to evidence your customary adoption.

NOTE: If you are seeking to sponsor your wife, child or parent and you are an Australian citizen or permanent resident, you may have a more viable visa pathway by lodging a partner, child or parent visa. You should seek external legal advice if this is your situation.

The rules around family composition in the migration scheme are complicated and if you are unsure, please seek legal advice.