



File Ref: SDE-32

<p><b>WORKFORCE (IMMIGRATION NEW ZEALAND) INTERNAL ADMINISTRATION CIRCULAR (IAC) NO: 11/10</b></p>
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To: All INZ staff

Date: 14 November 2011

### **SECTION 61 - IMMIGRATION ACT 2009**

Please **READ** this information and ensure that all staff members who may be affected are aware of what is required of them.

#### **Introduction**

1. This circular supersedes IAC NO: 10/21 dated 22 December 2010. Its purpose is to provide information to all managers and staff in relation to section 61 of the Immigration Act 2009 – “Grant of a visa in special case”.

#### **Background**

2. The Ministerial power to grant, or refuse to grant, a visa under section 61 is delegated to immigration officers holding Schedule 3 delegations as specified at A15.5 of the Immigration New Zealand (INZ) Operational Manual. Ministerial expectations are that officials will decide cases where section 61 applies. Immigration officers should not advise persons whose requests have been declined to approach the Minister.
3. Section 61 enables the grant of **any** type of temporary entry class visa (visitor, work, student or limited visa), or a residence class visa.

## Implications of section 61

4. No person has the right to request a visa under section 61, and if a person purports to do so:
  - the Minister or delegated immigration officer is not obliged to consider the request, and
  - the Minister or delegated immigration officer is not obliged to inquire into the circumstances of the person or make any further inquiries regarding the information provided by the person, and
  - whether a request is considered or not, the Minister or delegated immigration officer is not obliged to give reasons for any decision on it, and
  - section 27 of the Immigration Act 2009 (concerning the reasons for refusing to grant a visa to be given in writing if requested) and section 23 of the Official Information Act 1982 (concerning the right of access to reasons for decisions) do not apply to the request.
5. In simple terms this means that section 61 does not confer any rights on people who attempt to apply under it:
  - they have **no right** to apply for a visa under it
  - they have **no right** to have their request considered
  - if their request is considered but declined they have **no right** to be told why it was declined
  - if their request is considered, they have **no right** to have it considered against any particular immigration instructions.

## Processing a section 61 request

### *When does section 61 apply?*

6. A visa can only be granted under section 61 to a person who is:
  - unlawfully in New Zealand, and
  - not subject to a deportation order, or otherwise excluded.
7. If the requestor is a person to whom section 61 does not apply, return the request with the template letter *V250: s61 request unable to consider*.

### *Refusing to consider a request*

8. There is no obligation to consider a request made under section 61. An immigration officer may refuse to consider the request rather than ask for more information or evidence to be provided.
9. An immigration officer should not record any reasons or rationale for refusing to consider the request in either AMS notes or in the communication with the client. The requestor should be sent the template letter *s61 Refuse to*

*consider*. The immigration officer must complete the section 61 template by indicating they have refused to consider the request, then sign it and attach it to the file.

10. If an immigration officer asks for more information or evidence then the request has been considered and the process set out below under *Considering a request* must be followed.

### ***Considering a request***

11. If the immigration officer decides to consider the request based on the evidence and submissions provided by the requester, he or she should consider the request in full, including:
  - information provided with the request
  - information in AMS and the EOI system, including previous visa applications, EOIs, health and character information, client notes, letters sent from INZ to the person and interactions with Border, Fraud or Compliance,
12. There are no specific immigration instructions that must be met as decisions are a matter of absolute discretion.
13. During the consideration of a section 61 request, an immigration officer is not obliged to request any further information or to seek comment prior to an adverse immigration decision being made. A decision can be made solely on the basis of the facts available and the submissions provided with the request. However, this does not preclude an immigration officer requesting further information (such as a medical or police certificate) or comment to assist him or her in considering the request.
14. Decision makers have very broad discretion so it is important to look at the circumstances of each case as a whole and in the widest possible context.

### ***Considering requests for residence class visas under section 61***

15. As noted in paragraph (3) above, section 61 enables the grant of a visa of **any** class or type including a residence class visa. Decision makers need to be open to the possibility of doing so if there is sufficient justification.
16. If an Officer with Schedule 3 delegations within a branch is proposing to grant a residence class visa to anyone who is *prima facie* ineligible for residence under residence instructions the case must be escalated to their Branch Manager in the first instance.
17. Where the grant of a residence class visa is being seriously contemplated in relation to any person with the issues or concerns described below, the Branch Manager must complete a Sensitive Issues Template and escalate it to their Regional Manager and Operations Support before a decision is made:
  - character issues, in particular any with criminal convictions and/or where a character waiver would not normally be granted; **or**
  - health issues, especially those where residence instructions do not allow for the grant of a medical waiver, or where a medical waiver would not normally be granted; **or**

- any other concerns not in the interests of New Zealand which include, but are not limited to, instances where:
  - there is a potential security risk, or
  - there is a risk to New Zealand's international reputation, or
  - the requestor has applied for and been granted welfare assistance under the Social Security Act 1964.

### ***Outcome of the decision***

18. The decision to grant or not to grant a visa should be clearly recorded on the section 61 template. If the request is approved, the type of visa to be granted should be stated.
19. The rationale and reasons for the decision should not be recorded, either on the template, in the notes or in communication with the client.
20. Once the decision has been entered onto the section 61 template, the immigration officer should sign the declaration at the bottom of the template.

### **General**

21. Immigration officers can help limit the likelihood of people becoming unlawful in New Zealand by ensuring that any visa granted does not expire on a Saturday or Sunday.
22. Immigration officers should now refer to the Staff Toolkit for further support.
23. If this IAC is inconsistent with any previous IAC, information or instruction, this IAC prevails.

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