



File Ref: SDE-32

**WORKFORCE (IMMIGRATION NEW ZEALAND)
INTERNAL ADMINISTRATION CIRCULAR (IAC) NO: 10/21**

To: All INZ staff

Date: 22 December 2010

SECTION S.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: 08/06 dated 10 April 2008. Its purpose is to provide information to all managers and staff in relation to section 61 (s.61) of the Immigration Act 2009 – “Grant of a visa in special case”.

Background

2. The power to grant, or refuse to grant, a visa under s.61 is delegated to Immigration Officers holding Schedule 3 delegations as specified at A15.5 of the Immigration New Zealand (INZ) operational manual. This means that the Minister and Associate Minister of Immigration have an expectation that officials will decide cases where s.61 applies. It is inappropriate to advise persons whose requests have been declined to approach the Minister.
3. S.61 enables the grant of **any** type of temporary entry class visa (Visitor’s, Work, Student or Limited visa), or a Residence class visa.

When does s.61 apply?

4. A visa can only be granted under s.61 to a person who is:

- unlawfully in New Zealand, and
- not subject to a deportation order.

Implications of s.61

5. No person has the right to request a visa under s.61, and if a person purports to do so:

- the Minister or appropriate immigration officer is not obliged to consider the request, and
- whether a request is considered or not, the Minister or 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.

6. In simple terms this means that s.61 does not confer any rights on people who attempt to apply under it:

- they have **no right** to apply 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.

Matters to be aware of when making s.61 decisions

General principles

7. As there is no right to apply for a visa under s.61 there are no specific immigration instructions that must be met; meaning decisions are totally discretionary. Immigration instructions are relevant but should not be determinative of, either for, or against, the grant of a visa. The high level framework for thinking about such requests can be categorised as “appropriate immigration outcomes for New Zealand and those who want to be here”.
8. Any obligations New Zealand has under international law must be taken into account.
9. S.61 provides for the “grant of visa in special case” but this does not mean that a visa can only be granted if exceptional and/or humanitarian circumstances exist.
10. 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.
11. A person who approaches INZ in a genuine effort to remedy their unlawful situation may well meet the interests of New Zealand if enabled to re-enter the immigration system by the grant of a visa.

Granting residence visas under s.61

12. As noted in (3) above, s.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.
13. Deserving cases involving persons who are *prima facie* eligible for residence under residence instructions, but who are prevented from applying due to their unlawful status, should usually be granted a temporary entry class visa of a type appropriate to their circumstances to enable them to test their eligibility for residence in the normal way.
14. Deserving cases involving persons who are *prima facie* ineligible for residence under residence instructions, and/or where deportation from New Zealand is not a viable option, need to be approached with considerably more caution because granting residence potentially amounts to making an exception to residence instructions which is normally the sole prerogative of the Minister. Decision makers need to be completely satisfied the Minister would have no difficulty in defending a decision to grant residence. Branch Managers must therefore be consulted before any decision is taken in such cases.
15. The interests of New Zealand need to be a paramount consideration if the grant of a residence class visa is being seriously contemplated for any case which has:
 - character issues, in particular any with criminal convictions involving fraud or violence 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.

Escalation processes

16. To ensure the instructions contained in this IAC are implemented effectively Branch Managers should:

- review any existing escalation/consultation process within their branch intended to mitigate any risk in granting, or refusing to grant a visa under s.61; or
- assess and decide the need for, and structure of, such a process.

17. 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.

18. Where the grant of a residence class visa is being seriously contemplated to any person with the issues or concerns described in (15) above the case must be escalated by the Branch Manager to their relevant Regional Manager in the first instance.

General

19. We 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.

20. Officers should now refer to the staff Toolkit for further support.

21. If this IAC is inconsistent with any previous IAC, information or instruction, the instructions contained here prevail.

George Hickton
 General Manager
 Visa Services