

VISA PAK ISSUE 435 — 13 MAY 2020

COVID-19 AND THE LABOUR MARKET TEST

Restrictions imposed in response to COVID-19 have significantly affected many sectors of the New Zealand economy. Unemployment has risen and is expected to rise further, and many businesses, such as those in tourism and hospitality, are likely to see reductions in income which may impact on the sustainability of any employment offered.

This item provides guidance to immigration officers when assessing Essential Skills work visa applications under these circumstances, especially when the duration and scale of restrictions and Government support is uncertain.

It advises that:

- immigration officers must be satisfied at the time of assessment that immigration instructions are met and that there are no suitable New Zealanders available (and this test does not anticipate future changes to the labour market);
- when an application is assessed, employers may be asked for updated information about the availability of New Zealanders for the role being offered;
- the genuineness and sustainability of employment must be assessed according to concrete information and evidence specific to the employment that is offered to a migrant worker;
- employers should be asked to confirm that a job offer remains valid, and whether they expect the employment to be sustainable over the duration of the employment offered; and
- Essential Skills work visa applications must be assessed against immigration instructions effective at the time an application is accepted (including immigration instructions relating to visa duration).

Advice

Labour Market Testing

An Essential Skills work visa may only be granted if the labour market test is met. The labour market test is met if an immigration officer is satisfied that:

- the employer has made a genuine attempt to attract and recruit suitable New Zealand citizens or residence class visa holder workers (see WK3.10.5); and
- New Zealand citizens or residence class visa holder workers are not available (WK3.10).



Despite this requirement, an Essential Skills work visa may be granted without the labour market test being satisfied where the applicant has applied for SMC (or been issued an invitation to apply) consistent with WK3.20.10.

No New Zealanders are considered available Factors an immigration officer may consider when determining if no suitable New Zealanders are available for the work include (but are not limited to):

- the employer's case in support of an individual worker's application;
- evidence of a genuine attempt (see WK3.10.5) by the employer to recruit New Zealanders by way of advertising and/or use of other appropriate avenues of recruitment likely to attract New Zealanders;
- advice from Work and Income about the availability of New Zealand citizens or residence class visa holder workers to do the work offered; and
- advice from relevant stakeholders within the particular industry, including unions.

Immigration officers are required to test the labour market at the time the application is assessed (and not anticipate changes to the labour market).

Genuine attempts to attract and recruit New Zealanders

Employers may advertise and recruit staff at any COVID-19 Alert Level. Higher alert levels require changes to how recruitment is carried out, including remote interviews and contactless recruitment. Other restrictions include those on movement between regions and on onsite training where this required close physical distance. These restrictions apply to both New Zealanders and overseas workers. In some cases there may be delays/challenges in the recruitment process if technology is not in place to facilitate contactless recruitment.

Claims that none of the New Zealanders who applied for a role are suitable should be supported by detailed information, such as:

- what steps the employer followed to recruit New Zealand workers;
- why exactly the New Zealanders who did apply were unsuitable; and
- evidence of job advertisement views and submissions (such as TradeMe and Seek reports of views and submissions) to confirm the volume and types of applicants.

It is not relevant to the determination of availability of New Zealanders whether those New Zealanders are prepared to do the work on the terms and conditions proposed by the employer (see WK 3.10 (c)).

Employers seeking to employ migrant workers for ANZSCO skill level 4 and 5 occupations must continue to provide Skills Match Reports (SMRs) as required by immigration instructions (WK3.10.1 (d)). Immigration officers should be aware that an SMR is not required for some occupations published on the Work and Income website, subject to any additional requirements (such as region) (WK3.10.1 (e) (ii)).

[Work and Income list of occupations not requiring an SMR](#)

No Essential Skills work visas will be granted for ANZSCO skill level 5 occupations unless an employer is able to demonstrate to the satisfaction of an immigration officer that no New Zealanders are able to be trained to do the work (suitable New Zealanders are generally considered available to be trained to work in ANZSCO skill level 5 occupations (WK3.10.15 (Note))

No New Zealanders are available at the time of assessment

In normal circumstances there are unlikely to be significant changes to the labour market in the time between an employer's attempts to attract and recruit suitable New Zealanders and an immigration officer's assessment whether it is likely that no New Zealanders are available.

Due to recent restrictions on travel to New Zealand and on business operations in New Zealand, unemployment rates have increased quickly. In the two months to 1 May April 2020, an estimated additional 38,425 people began receiving Jobseeker

Support. The total number of people receiving Jobseeker Support increased to 184,404 (as of 1 May 2020), representing 6.1% of the working-age population¹.

In addition to increasing numbers of people receiving Jobseeker Support, as of 1 May 2020, a further 1,720,008 people are associated with paid applications under the Wage Subsidy Scheme² (including employees and self-employed).

Objectives of the Essential Skills Work Instructions require immigration officers to balance (among other factors):

- helping New Zealand firms maintain capacity and supporting the provision of services meeting important social needs; while
- not displacing New Zealanders from employment opportunities or hindering improvements to wages or working conditions.
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To balance these objectives immigration officers may request further information and evidence from employers to show that despite earlier attempts to recruit New Zealanders there are at the time of assessment no New Zealanders available to do the work being offered. The type of evidence or information that will show no New Zealanders are available to do the work will vary according to the role offered, the region of employment and the circumstances of the employer.

In some cases evidence of ongoing recruitment of New Zealanders for similar roles may show that available New Zealanders are likely to have been recruited by that employer. In other cases a role may require uncommon skills that continue to be unavailable among New Zealand workers. In some regions employers may be able to demonstrate that there remains a shortage of suitable New Zealanders for a particular occupation.

Immigration officers should be aware that while they may request any information they consider necessary to determine an application³ they must also assess applications based on the information provided by the applicant. Concerns that New Zealanders are available must be put to applicants and any relevant information provided by an applicant or their employer must be considered before a decision is made.

Immigration officers should not specifically request that employers re-advertise a role (as this is not a request for information) though employers may choose to do this if an immigration officer is not satisfied that there are no New Zealanders available and that immigration instructions are not met. Immigration officers must provide onshore applicants an opportunity to comment and provide any information the applicant thinks is relevant before an application may be declined. This includes where an immigration officer is not satisfied there are no New Zealanders available for the role.

Testing whether employment is genuine, sustainable and full-time

To grant an Essential Skills work visa, an immigration officer must be satisfied that the employment offered is genuine, sustainable and full-time for the duration of the employment period specified in the employment agreement (WK3.5 (a) (ii)).

The fact that an employer receives funding from the COVID-19 Wage Subsidy Scheme does not by itself indicate that the employment offered is non-genuine, unsustainable or not full-time. The subsidy provides support when many employers are unable to operate due to restrictions required to manage public health risks and not due to any concerns about the sustainability of a particular employer.

To mitigate any uncertainty about the employment offered, employers should be asked to confirm that a job offer remain valid and where appropriate whether they expect the employment to be sustainable over the duration of the employment offered. This

¹ Data table Income Support and Wage Subsidy Weekly Update - 1 May 2020

<http://msd.govt.nz/documents/about-msd-and-our-work/publications-resources/statistics/benefit/2020/income-support-and-wage-subsidy-weekly-update/data-table-income-support-and-wage-subsidy-weekly-update-1-may-2020.xlsx>

² The Wage Subsidy Scheme supports employers and their staff to maintain an employment connection and ensure an income for affected employees, even if the employee is unable to actually work any hours. The subsidy will be paid as a lump sum and covers 12 weeks per employee. <https://workandincome.govt.nz/covid-19/wage-subsidy/index.html>

³ Immigration (Visa, Entry Permission, and Related Matters) Regulations 2010: Regulation 10 (3) (b); Regulation 23A (5) (c).

may include information about whether an employer is currently operating and if not confirmation from the employer when they intend to resume. For some employers, for example District Health Boards, the sustainability of a job may be unaffected by recent disruptions to the NZ labour market and economy. Where there are specific concerns about a particular offer of employment, immigration officers are advised to seek guidance from technical advisors or specialist verification officers.

Visa duration

Consistent with (E7.10 (a)), immigration officers must first determine applications for temporary entry in accordance with:

- the requirements of the Immigration Act 2009; and
- the temporary entry instructions in force at the time the application is made or any general instructions given by the chief executive; and
- any relevant special directions.

Immigration instructions (WK4.1 (a)) state that Essential Skills work visas may be granted for the period for which the employment is offered, up to a maximum of:

- 5 years for employment assessed as higher-skilled; or
- 3 years for employment assessed as mid-skilled; or
- 1 year for employment assessed as lower-skilled, unless a 1 year visa would result in the holder exceeding the 3 year maximum period holding Essential Skills visas for lower-skilled employment (WK3.20.5); or
- 3 years for employment for an accredited labour hire company; or
- 1 year or 6 months if the applicant meets the requirements at WK3.20.10 for people also applying under the Skilled Migrant Category for a resident visa.

While this instruction is permissive ('may be granted'), immigration officers must continue to grant Essential Skills work visas for the duration set out in instructions, except where the particular circumstances of an application require a visa of a shorter duration. Any visa granted for a shorter duration than set-out in instructions must be fully explained in the rationale. An Essential Skills work visa may only be granted for a longer duration than set out in immigration instructions as an exception to immigration instructions (E7.25).

Immigration instructions are statements of government policy and must be followed except in individual cases where the use of discretion provided by the Immigration Act 2009 is appropriate. It is not appropriate to use discretion to apply rules or policy not provided for by immigration instructions.

This advice is provided to assist immigration officers assessing Essential Skills work visa applications under immigration instructions in effect at the time of publication of this Visa Pak. Any changes to immigration instructions will require further advice.