

VISA PAK ISSUE 459 — 22 JANUARY 2021

## SECTION 49 CONDITIONS ON RESIDENT VISAS UNDER THE SKILLED MIGRANT CATEGORY

Conditions can be imposed on a resident visa in accordance with section 49(1) of the Immigration Act 2009 (s49) and the relevant immigration instructions. This article focusses on conditions imposed under the Skilled Migrant Category (SMC) and should be read in conjunction with the general advice *'Section 49 conditions on resident visas – requests for varying or removing, and further advice on breaches.'*

### SMC conditions

Under the SMC, a visa must have s49 conditions imposed (see [SM11.5](#)) if the principal applicant either:

- a) has been in **current** skilled employment but has not been in it for three months or more; or
- b) has an **offer** of skilled employment but has not yet taken up that offer.

Where an RV is approved based on **current** employment, the RV holder need only **remain** in that employment (or a similar job) for 3 or 12 months. The holder has five years to complete this condition.

Where a resident visa (RV) is approved based on an **offer** of employment, the RV holder is required to **take up** that offer of employment within the first three months of first entry into New Zealand, or the grant of their RV (if granted onshore). Compared to **'remain condition'** (which this RV holder also must comply with), this is a very short timeframe within which the holder has to meet this condition, and so this is the condition which is breached more often.

The following table compares the conditions imposed on the **'offer'** RV holders and the **'current'** RV holders at the time they were granted residence.

<b>IF</b> ↓	<b>THEN →</b>	A condition imposed that the person <b>take up</b> that job offer <u>within 3 months</u>	A condition imposed that the person <b>remain</b> in that (or a similar) job for 3 months (if in Auckland) or 12 months (if outside Auckland).  <b>Important:</b> applicant has <u>5 years</u> to complete this condition; see <a href="#">SM11.15(a)(ii)</a>
Applicant had job <b>offer</b> only (not current skilled employment)	✓	✓	✓
Applicant had <b>current</b> skilled employment of less than 3 months	✗	✓	✓

### What happens when SMC conditions are not met

Understanding the difference in s49 conditions when an applicant had a job offer only, or was in skilled employment at the time of the SMC decision, assists in taking the appropriate action, as the three examples illustrate.

Situation	Analysis regarding conditions	Action
RV granted on 7/5/2018 offshore based on an offer of skilled employment outside Auckland. The applicant arrived in NZ on 24/09/2018 and did not take up that offer of skilled employment. In July 2019, he called ICC and asked if working as an independent contractor would meet the conditions on his visa. He was informed that this would not meet the conditions as his visa had been assessed and approved based on an offer of skilled employment, not on an assessment of contract work. The applicant continued to work as a contractor and has recently applied for a 'removal of conditions' based on this contract work.	He was required to take up the original offer within 3 months. INZ has confirmed he did not take up that offer. Therefore a breach has occurred.	Refer to Resolutions.
RV granted on 1/10/2019 offshore based on an	She was required to	Consider whether to

<p>offer of skilled employment as an IT Engineer with ABC company, outside Auckland. The applicant arrived on 5/10/19 but was advised by ABC the next day that the company had to shut down due to financial difficulties. She finds a similar job offer with DEF Company (also outside Auckland), starts working on 8/10/19, and on 10/10/19 requests that INZ vary her conditions.</p>	<p>take up the original offer within 3 months, Unlike case above, however, a breach has not yet occurred (as of 'today').<sup>1</sup></p>	<p>vary conditions such that she should remain in the new job for 12 months from 8/10/19.</p>
<p>RV granted onshore on 13/12/2019 based on current skilled employment of less than 3 months. After the grant of residence, applicant had stayed in the job for 3 months, but he then resigned from employment due to a workplace injury. Applicant then formed a company where he was the director and major shareholder of that company. Applicant has lodged a RoC application.</p>	<p>Applicant had to stay in the same or similar employment for at least 12 months. He hasn't <b>yet</b> done so. The condition has not been met yet, but neither has a breach yet occurred.</p>	<p>Consider whether to vary or cancel conditions; if you decide not do either, decline the application but advise client he has until Dec 2024 to be employed at a similar job for 12 months.</p>

In the second example, it is important for the INZ processing office, if they are inclined to grant the request to vary conditions, to do so prior to 5 January 2020 (three months from when the applicant arrived in New Zealand). This is because a variation cannot be granted once the condition has been breached.

<sup>1</sup> The situation assumes that 'today' is 12 October 2019, two days after she put in her request on 10/10/19. The officer, on 12/10/19, sees that a breach has not yet occurred, because the applicant has until 5 January 2020 to meet the 3 month 'taking up' condition. However, of course, the officer also cannot say that the applicant has met the condition of 'taking up' the job offer. This is because the 'taking up' condition does not include taking up a similar job; only the original job offer can be taken up. In sum, there is no 'meeting', and there is no 'breaching' as of today (12/10/19).