



WORKFORCE (IMMIGRATION NEW ZEALAND)
INTERNAL ADMINISTRATION CIRCULAR (IAC) NO: 08/06

To: All INZ staff

Date: 10 April 2008

SECTION (s.)35A - IMMIGRATION ACT 1987

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: 04/33 dated 2 December 2004. Its purpose is to provide guidance to managers and staff involved in assessing and deciding if it is appropriate to grant a person a permit under s.35A of the Immigration Act 1987 - "Grant of permit in special case".

Background

2. The power to grant, or refuse to grant, a permit under s.35A is currently delegated to Immigration Officers holding Schedule 1 delegations as specified at A15.4.1 of the INZ Operational Manual. This means that the Minister and Associate Minister of Immigration have an expectation that officials will decide cases where section 35A applies by appropriately and flexibly exercising their delegated authority. Given that this power has been delegated to reduce Ministerial workload it is inappropriate to advise persons whose requests have been turned down to approach the Minister.
3. Please note that s.35A enables the grant of a permit of any type. Currently this allows for the grant of any type of Temporary permit (Visitor's, Work, or Student), a Limited Purpose permit, or a Residence permit.

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When does s.35A apply?

4. A permit can only be granted under s.35A to a person who is:
 - i. in New Zealand, and
 - ii. required to hold a permit to be in New Zealand, and
 - iii. not the holder of permit to be in New Zealand, and
 - iv. not subject to a deportation order, and
 - v. not subject to a removal order.
5. When deciding if a request received, or situation needing to be resolved, is one that can be dealt with under s.35A the first step is to be satisfied the person(s) involved meet the requirements in (4) above. Please refer to the "Assessment Guide and Template" at Appendix 'A' for further guidance on both this first step and the additional matters that should be taken into account when determining if it is appropriate to approve the grant of a permit under s.35A.

Implications of s.35A (2) – rights and obligations

6. No person has the right to request a permit under s.35A, and if a person attempts to do so:
 - i. the Minister or appropriate immigration officer is not obliged to consider the request, and
 - ii. whether a request is considered or not, the Minister or immigration officer is not obliged to give reasons for any decision on it, other than that s.35A(2) applies, and
 - iii. s.36 of the Immigration Act 1987 (concerning the reasons for refusing to grant a permit to be given in writing if requested) and s.23 of the Official Information Act 1982 (concerning the right of access to reasons for decisions) do not apply to the request.
7. In simple terms this means that s.35A 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 rejected they have no right to be told why it was rejected.

Despite this it is still an important avenue for INZ to facilitate the right outcome for someone wanting a permit and a lawful means of facilitating the grant of a permit if appropriate.

8. While theoretically s.35A allows for the making of totally arbitrary decisions it is essential there be transparency of process. This is why it is important to always take a standard approach when deciding if a permit ought to be granted under s.35A by completing the "Assessment Guide and Template" at Appendix 'A' and following the process set out in the Staff Toolkit.

Matters to be aware of when making s.35A decisions

- General principles
9. Decision makers must consider requests strictly on a case by case basis by taking into account the merits of each individual case balanced against the interests of New Zealand. If relevant any obligations New Zealand has under international law need also be taken into account e.g. United Nations Convention on the Rights of the Child (UNCROC). As there is no right to apply for a permit under S35A there is no specific policy criteria that must be met, meaning decisions are totally discretionary. While current government policy is relevant it should not be the only deciding factor, either for, or against, the grant of a permit. The high level framework for thinking about such requests can be categorised as "appropriate immigration outcomes for NZ and those who want to be here".
 10. While the title of s.35A is "Grant of permit in special case" this does not mean that a permit can only be granted if exceptional and/or humanitarian circumstances exist. 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. A person who approaches us 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 permit.
- Granting residence permits under s.35A
11. As noted in (3) above, s.35A enables the grant of a permit of any type including a Residence permit. While it is anticipated that the grant of residence under s.35A will be relatively rare, decision makers need to be open to the possibility of doing so if there is sufficient justification. Deserving cases involving persons who are prima facie eligible for residence under Government residence policy (GRP), but who are prevented from applying due to their unlawful status, should usually be granted a temporary permit of a type appropriate to their circumstances to enable them to test their eligibility for residence in the normal way. In cases of hardship a residence application fee waiver may be considered by an officer with Schedule 1 delegations.
 12. Deserving cases involving persons who are prima facie ineligible for residence under GRP, and/or where removal from New Zealand is not a viable option, need to be approached with considerably more caution. This is because granting residence potentially amounts to making an exception to Government Residence policy (GRP) which is normally the sole prerogative of the Minister. Delegated decision makers contemplating the grant of a residence permit in these circumstances therefore need to be completely satisfied the Minister would have no difficulty in defending a decision to grant residence. Decision makers should consider whether simply granting a temporary permit will just put the person back into a cycle of temporary/unlawful status with no meaningful or enduring outcome. Branch Managers must therefore be consulted before any decision is taken in such cases.

13. The interests of New Zealand need to be a paramount consideration if the grant of residence is being seriously contemplated for any case which has:

i character issues, in particular any with criminal convictions involving fraud or violence and/or where a character waiver would not normally be granted; or

ii health issues, especially those where GRP does not allow for the grant of a medical waiver, or where a medical waiver would not normally be granted; or

iii. 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

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

i. review any existing escalation/consultation process within their branch intended to mitigate any risk in granting, or refusing to grant a permit under s.35A; or

ii assess and decide the need for, and structure of, such a process.

15. If an officer with Schedule 1 delegations within a branch is proposing to grant a residence permit to anyone who is prima facie ineligible for residence under GRP the case must be escalated to their Branch Manager in the first instance.

16. Where the grant of a residence permit is being seriously contemplated to any person with the issues or concerns described in (13) above the case must be escalated by the Branch Manager to their relevant Regional Manager in the first instance.

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General

17. If applicable it is important that during any interaction we always encourage people not to become unlawful in New Zealand. We can help limit the likelihood of this occurring by ensuring that any permit granted does not expire on a Friday or Saturday.
18. If this IAC is inconsistent with any previous IAC, the instructions contained here prevail.

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Section (s.) 35A Assessment Guide & Template

Requestor's name: _____
 Client number: _____
 AMS Application number: _____
 Date received: _____
 Date of Arrival: _____
 Date permit expired: _____
 Any prior s.35A requests: _____

1: Does s.35A apply?

Circle relevant answer in column 'A' or 'B' to the following questions:	A	B
a. Is the person currently in New Zealand? (If 'no', no need for request. If 'yes', proceed.)	NO	YES
b. Is the person required to hold a permit to be in New Zealand? (If 'no', no need for request. If 'yes', proceed.)	NO	YES
c. Does the person currently hold a permit to be in New Zealand? (If 'yes', no need for request. If 'no', proceed.)	YES	NO
d. Is there a deportation or removal order in force against the person? (If "yes", s.35A does not apply. If 'no', proceed.)	YES	NO

If all the answers to the 4 questions above are those in column 'B' above, then the grant of a permit under s.35A is possible. The next step is to decide if it is appropriate to:

- i. consider the request - (If so go to section 2); or
- ii. refuse to consider the request - (If so go to section 4)

It is important to note that a "refuse to consider" decision can only be made at this stage of the process. It may be used in situations where the person has recently had a s.35A request refused and their circumstances have not changed.

If the answer to questions (a), (b), or (c) are those in column 'A' above, then it is not necessary to consider the request under s.35A and the requestor should be advised of the alternative options available to them.

If the answer to question (d) is "yes", advise the requestor that s.35A does not apply to them.

Note:

- Removal order in force – ss.57, 58 - If, in all the circumstances, it is appropriate to grant a permit under s.35A immigration (compliance) officers who are designated to make removal orders may cancel the removal order. Consult the officer who served the removal order about the possibility of the order being cancelled enabling consideration under s.35A
- Refugee status claimants granted temporary permits - s.129U(2); and
- Limited purpose permit holders – s.34D(2) – are both subject to certain limitations under the Act. One limitation is that while in New Zealand they may not, whether before or after the expiry of their permit, request a permit

under s.35A. The inability to request a s.35A permit does not prevent officers exercising their delegated legislative power to grant a s.35A permit of their own volition. However, due weight needs to be given to the fact that these categories of permit holders pose immigration risks which are managed by restricting their ability to engage in any process that would enable them to remain in New Zealand.

- Prostitution Reform Act 2003 – s.19 - No permit (including a s.35A permit) may be granted to any person who has:
 - provided, or intends to provide, commercial sexual services; or
 - acted, or intends to act as an operator of a business of prostitution; or
 - invested, or intends to invest, in a business of prostitution.

2: Initial assessment and consideration

Having concluded that s.35A applies this step involves a preliminary assessment to determine if the request should be granted or not. In some cases completion of this step may be sufficient to make a decision to grant a temporary permit.

a. Initial fact gathering

Start by ensuring you have the full story from the person requesting the permit.

- Get them to explain why they don't have a current permit and why they think they should be given one.
- Confirm they have told you everything they think you need to know.
- Ask them about any other matter(s) you think might be relevant that they haven't dealt with, or dealt with fully.

b. Initial assessment

At this early stage you are looking at the case in general terms to see whether there is anything contained in the information in front of you that suggests the case warrants closer more detailed scrutiny.

Closer scrutiny is more likely to be required if:

- The justification put forward for needing a permit rings true.
- The person's circumstances have changed in a significant way since they last held a permit.
- The request has been prompted by some particular circumstances relating to the person that are unusual.
- The case involves NZ citizen or resident children or immediate family resident in New Zealand.
- You can understand their predicament and circumstances.

Further scrutiny is less likely to be required if:

- The requestor (having been given the opportunity) has given no good reason why think they should be given a permit.
- The person has previously been granted a permit under s.35A, and has no good reason for not maintaining a lawful status, and/or being in New Zealand.

c. Overall initial assessment

- i. Can you grant a permit without further scrutiny? – (If so go to section 4 and do so!); or
- ii. Can you refuse to grant a permit without further scrutiny? - (If so go to section 4 and do so!); or
- iii. Does the case require closer scrutiny? – (If so, continue at section 3.)

3: Collate all relevant information and consider

The following matters are just examples of what might require consideration when making a decision.

a. Previous immigration history

Consideration may include [but is not limited to] the following:

- Client's full family circumstances. Identify information revealed in first visa application and note family and status of family from the family tab in AMS, as well as family ties in New Zealand and/or third countries.
- How long has the requestor been in New Zealand?
- What kind of permits have they held?
- What applications have they made and why have they been approved or declined?
- Are there any current or previous Ministerials/appeals to consider?

b. Reason for request/ current situation

Consideration may include [but is not limited to] the following:

- What is the client's reason for needing to stay in New Zealand?
- What is their reason for not currently being on a valid permit?
- How long have they been unlawfully in New Zealand?
- Does their unlawful status date back to a previous INZ decision that may be questionable?
- Is their unlawful status due to their own failure to act?
- Does their unlawful status include factors beyond their control?

c. Character and Health

Record following details from information supplied/obtained, previous immigration records, and AMS warnings/alerts

- Details of police records (in New Zealand and home country)
- (If appropriate obtain NZ police check or update from Compliance Officer regarding any outstanding AMS warning)
- Declarations about character and health made in any accompanying application form supplied (or in any supporting information)
- Health status as recorded in AMS (health certificate or warning) or in any medical certificates provided

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d. Other Factors

Consideration may include [but is not limited to] the following:

- Does the requestor have a legitimate pathway to residence under current government policy?
- Is the requestor 'well settled' in NZ with a strong family nexus here (consider overall family circumstances including the family situation in the home country, skills including employment history, integration into the community)
- Is there a real risk that granting this permit would be against the interests of New Zealand?
- Does this person pose a security risk? (Do a MATCH check if necessary.)
- How do public interest considerations weigh against the merits of the case?
- Are there any international obligations which may be relevant? Consider New Zealand's obligations under international law (International Convention of Civil and Political Rights, Convention on the Rights of the Child, etc).
- Is the requestor claiming they are unable to leave New Zealand due to fear of persecution in their home country, possibility of torture etc? If so making a claim for refugee status may be appropriate, unless they have already done so unsuccessfully and there has been no significant change in circumstances. (Seek guidance from Refugee Status Branch.)
- Have the rights and interests of any child/ren especially any who have lived in New Zealand all their lives been considered? (In the case of unlawful school-age children refer to IACs 07/18 and 08/02 for guidance.)
- How will a decision to decline the request affect the client's family in New Zealand and overseas?

[Empty box for notes or additional information]

List Documents Supplied:

[Empty box for listing documents supplied]

Summary

Summarise/outline the relevant facts and information collated above.

Note: In the interests of fairness requestors should be informed of any potentially prejudicial information and given a reasonable opportunity to respond before the request is decided.

[Empty box for summary text]

4: Decision

[To be completed by an Immigration Officer holding Schedule 1 delegations].

If the decision is 'Refuse to Consider', simply select that option below. No explanation is required.

Taking into account all of the facts in the summary, identify the key factors both for, and against, the grant of a permit. Weigh up all the relevant factors you have identified so as to see where the balance of competing interests lies. That will tell you whether or not to grant a permit under s35A. Record the relevant factors you have identified and your conclusion below.

Select your final decision

- Refuse to consider request
- Refuse to grant request
- LPP UNCROC
- Approve request in principle

(State below type of permit, currency [if applicable] and any conditions to be met before permit is granted. Conditions may include, but are not limited to:

- Application form appropriate to the type of permit - fully completed and signed, including current photo
- Evidence of health and/or character
- Identity - unless satisfactory evidence already supplied
- Fee payment)

Signature: _____

Date: _____

Name of officer: _____

An Immigration Officer with Schedule 1 delegations

Tick as appropriate to show you have:

- Pasted this form onto client's AMS notes
- Added a Warning to AMS
- Referred to BSG

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