



Decision to grant a ‘Post-Study work visa – open’ for a period of one year rather than three years

Legislation	Ombudsmen Act 1975; Immigration Act 2009
Agency	Immigration New Zealand
Ombudsman	Peter Boshier
Case number(s)	524384 and 533933
Date	October and November 2020

Immigration New Zealand — ‘Post-Study work visa – open’ — one year granted rather than three years — application of immigration instructions WD3.1 and WD3.5— immigration instructions did not accurately and consistently reflect Cabinet’s intention.

Background

This case note relates to two separate complaints received by the Chief Ombudsman, both of which concerned decisions by Immigration New Zealand (INZ) to grant the complainants a ‘Post-Study work visa – open’ for a period of one year, rather than for a total of three years under immigration instructions WD3.1 – ‘Determining and granting a Post-Study work visa’, and the transitional provisions outlined in immigration instructions WD3.5 – ‘Applicants who, on 8 August 2018, held a student visa or had made a student visa application’.

According to immigration instruction WD3.1.1, applicants may be granted a work visa if they held a qualification at level 7 to 10 on the New Zealand Qualifications Framework (NZQF) that had been studied full-time for at least 30 weeks in New Zealand. Furthermore, instruction WD3.5 provided that if an applicant met the requirements at WD3.1.1 (a) to (e) and, on 8 August 2018, held a student visa, they may be granted a work visa for three years if they had not previously held a ‘Post-Study work visa – open’.

Case number one

On arriving in New Zealand to study, the complainant's expectation, based on her understanding of the relevant immigration instructions in force at the time, was that she would be granted a three-year work visa following the completion of her studies.

At the time of applying to INZ, the complainant had recently completed a diploma – identified as a level 7 qualification on the NZQF – that had been studied full-time for at least 30 weeks in New Zealand. She also held a student visa on 8 August 2018. On this basis, she believed that she was eligible for a three-year work visa in accordance with WD3.5.1 (a)(ii).

However, INZ relied on an amendment circular to preclude her from being eligible for a three-year visa on the basis that her level 7 qualification was not a bachelor's degree. In this respect, the circular stated:

- A three-year post-study open work visa is available for bachelor's degree or above qualifications.
- A one-year post-study open work visa is available for students studying New Zealand Qualification Framework level 4 to 6, and non-degree level 7 qualifications, with an additional year available for Graduate Diploma students whose qualification and work experience are needed for registration with a professional or trade body.
- Students who held a student visa, or were in the process of applying for a student visa to study towards an eligible qualification as at 8 August 2018, will be able to apply for:
 - a three-year post-study open work visa on completion of their qualification(s)
 - a two-year post-study open work visa if they have previously held a one-year open post-study work visa on completion of their qualification(s).

Investigation

The Chief Ombudsman's investigation considered whether INZ's decision to grant a 'Post-Study work visa – Open' for a period of one year was reasonable in all the circumstances. In particular, he considered the way in which INZ had applied the relevant immigration instructions.

Provisional Opinion

In his provisional opinion, the Chief Ombudsman noted that INZ had confirmed that the complainant met the requirements of WD3.1.1(a) to (e).

He also considered that, on a plain reading of WD3.5, the complainant appeared to meet the criteria for a three-year visa, noting in particular that she had held a student visa on 8 August 2018, and that she had not previously held a Post-Study work visa – open. Accordingly, WD3.5.1 (a)(ii) seemed applicable, and she appeared eligible for a three year visa.

He further noted that while INZ appeared to consider '*eligible*' qualifications to be at bachelor degree level or above, this was not specified in WD3.1 or WD3.5.

Accordingly, the Chief Ombudsman formed the provisional opinion that INZ's decision to grant the complainant a one-year visa, rather than a three-year visa, was unreasonable, and said that he was inclined to recommend that INZ should extend, or reissue, the visa to reflect a three-year duration.

Final Opinion

Following receipt of the provisional opinion, INZ relied on further documents to support its interpretation of the immigration instructions, including an FAQ document; a copy of the relevant Cabinet Minutes regarding proposed changes to immigration instructions; and related VisaPak guidance.

The Chief Ombudsman considered this information. In his final opinion, he stated that where immigration instructions are unclear, VisaPak documents can be useful in expanding on those instructions and explaining more fully how they should be applied. In this case, however, he noted that the immigration instructions were clear, and that there was no apparent reason to refer to the VisaPak guidance. Furthermore, even if there was a question as to how to apply the immigration instructions, he considered that the complainant was still eligible for a three-year visa with reference to the relevant VisaPak.

The Chief Ombudsman noted that, as with the immigration instructions, the supporting VisaPak did not specify that a level 7 qualification must be an '*eligible*' one. Rather, the VisaPak stated that '*from 26 November 2018, current student visa holders will be eligible for a three-year post-study work visa upon successful completion of their qualification(s)*.' The VisaPak noted that '*current students*' included anyone who held a student visa on 8 August 2018 and whose visa was for a programme of study that met the standard requirements (NZQF level and duration). The VisaPak did not further define '*standard requirements*' for NZQF level and duration with respect to current students.

The Chief Ombudsman was of the opinion that, on the basis of these definitions, the complainant would be considered a current student as she held a student visa on 8 August 2018, and would, according to the VisaPak, have been '*eligible for a three-year post-study work visa upon successful completion of their qualification*'.

INZ had also advised that the immigration instructions (and VisaPak) did not accurately capture the '*intent*' of the changes to post-study work visa instructions, which was more clearly set out in the FAQ document and the Cabinet minutes. However, the Chief Ombudsman took the view that it would be '*highly unusual*' to expect an immigration officer to look past the immigration instruction and related VisaPak, and to make a decision based on a FAQ document, particularly where the instructions and the VisaPak were clear.

In light of the foregoing, the Chief Ombudsman recommended that:

- INZ should extend or reissue the complainant's visa to reflect a three-year duration; and

- INZ should amend the relevant immigration instructions and VisaPak to accurately and consistently reflect Cabinet's intention.

INZ accepted the Chief Ombudsman's recommendations and issued the complainant with a further two years on her visa.

Case number two

The Chief Ombudsman subsequently received a second complaint about INZ's decision to issue a 'Post-Study work visa – open' to another applicant for one year rather than three years.

As with the first complainant, the second complainant had, at the time of applying, recently completed a level 7 diploma, identified as a qualification at level 7 on the NZQF that had been studied full-time for at least 30 weeks in New Zealand. The complainant's representative claimed that she also met the requirements of WD3.1.1 and WD3.5.1.

On being apprised of the second complaint, INZ advised the Chief Ombudsman that in light of his recent opinion on the first complaint, the second complainant would be issued a further two-year visa.

The Chief Ombudsman asked INZ whether it had taken steps to determine whether and, if so, how many, other applicants had also been affected by its decision-making, and how it proposed to deal with any such cases.

INZ advised that it had identified an initial group of 498 potentially affected individuals. It stated that it would continue '*to analyse this group to consider who has been adversely affected and to assess what remedies might be appropriate...*'. INZ has advised:

'In the interests of fairness, INZ is assessing the impact on people who were granted one or two year visas during this period'. INZ has reviewed the applications for people individually and will contact them directly if they, and any partners and children dependent on the post study work visa, may be considered for the grant of a visa to reflect the duration they were entitled to.

In addition, INZ advised that the relevant immigration instructions had been amended in accordance with the Chief Ombudsman's recommendations. In particular, the wording of WD3.5.1(a) had been amended to clarify that, in order to be eligible for a transitional Post-Study work visa, an applicant must, on 8 August 2018, had held, or have applied for, a student visa based on a programme of study that meets the ordinary requirements of Post-Study work visa instructions (and not just any student visa). The relevant amendments came into effect on 16 November 2020.

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