# Immigration Amendment Bill (No 2)

Government Bill

## Explanatory note

### General policy statement

This Bill amends the Immigration Act 1987 to enable the Department of Labour's New Zealand Immigration Service (**NZIS**) to globally prioritise the deciding of immigration applications. This will be achieved by providing the chief executive with the ability to give general instructions as to the order and manner of deciding applications.

Global prioritisation will enable residence applicants with, for example, high contribution and settlement potential to be given early consideration. This will ensure that residence approval places are allocated to applicants accorded priority and deliver the benefits from these migrants to New Zealand more quickly. Outcomes for New Zealand from immigration will therefore improve. By prioritising on a global basis, applications from those most likely to contribute to New Zealand and settle well in New Zealand will be decided first, rather than those who have lodged their application in a particular branch that may have more capacity or residence approval places available.

Some ordering of residence applications already takes place at a high level through the Government's annual New Zealand Immigration Programme, the financial appropriation for processing applications to meet the programme, and the allocation of places and resources to NZIS offices.

Provisions are also required to ensure that the Department of Labour has the legislative authority for ordering and deciding immigration applications and operating in accordance with the State Sector Act

1988 (in terms of the efficient, effective, and economical management of the activities of the Department). The need for these provisions has become more apparent with the high number of residence applications that are currently on hand waiting to be decided, including many applicants who are unlikely to deliver a high contribution to New Zealand.

The Bill also contains provision for lapsing certain applications made under the general skills category (GSC) of Government residence policy that are on hand awaiting decisions. High demand for residence, over and above the number of places available in the New Zealand immigration programme, has resulted in a queue of applications. This will delay the impact of policy changes designed to improve immigration outcomes both for New Zealand and for migrants.

Lapsing a proportion of those GSC applications currently queued will enable the remainder of applications with high contribution and settlement potential to be decided as a priority. This includes those applications involving opportunities in New Zealand that are available for a limited time. For example, where an employer has offered a position that must be taken up by a certain date. It will also mean that the effects of the new skilled policy changes take effect earlier in terms of improved outcomes for New Zealand. The Bill clarifies that lapsed applicants would not have a right of review of the lapsing of their application, but would receive a refund of the application fee paid.

As part of ensuring the flexibility of the legislative framework for the issue and grant of visas and permits the distinction between the effect of rules and criteria for temporary and limited purpose entry and those for residence is further clarified. Following the decision of the High Court in *New Zealand Association for Migration and Investments Incorporated* v *Attorney General* (unreported, M1700/02, 16 May 2003, Randerson J), the issue and grant of temporary and limited purpose visas and permits may be required as a matter of Government residence policy. The Bill ensures that in no circumstances does a decision on the issue or grant of a temporary or limited purpose visa or permit constitute a decision under Government residence policy. In all cases such a decision remains a matter of discretion for the Minister or appropriately delegated visa or immigration officer.

## Clause by clause analysis

*Clause 1* is the Title clause.

*Clause 2* provides that the Bill will come into force on the day on which it receives the Royal assent.

## Part 1
## Principal Act amended

*Clause 3* inserts a *new subsection (1A)* into section 13B of the Act that specifies that policy dealing with temporary or limited purpose visas and permits is not to be treated as Government residence policy even if the issue or grant of the visa or permit may affect eligibility for or otherwise relate to residence.

*Clause 4* inserts a *new section 13BA* into the Immigration Act 1987 that provides for the departmental prioritisation of the processing of applications for visas and permits.

## Part 2
## Validation of processing, and lapsing, of applications

*Clause 5* ensures that past prioritisation of the processing of applications for visas and permits cannot be challenged in the courts.

*Clause 6* provides for the lapsing of certain applications for residence visas or permits made under the general skills category before 20 November 2002. *Subclause (1)(a), (b), and (c)* set out the types of general skills category applications that will not be lapsed. Application fees must be returned where an application is lapsed, but no associated costs will be recoverable.

## Regulatory impact and compliance cost statement

### Nature and magnitude of the problem

There are currently around 20,000 general skills category (**GSC**) residence applications (involving approximately 46,000 applicants) on hand waiting to be processed. This equates to around 2 years of potential GSC residence approvals. Clarification is required that the NZIS can regulate the order and manner of processing these applications according to agreed Government and departmental priorities. Priorities include those applicants with high contribution and settlement potential who can make a greater and more immediate contribution to New Zealand's immigration policy objectives, and who are

themselves likely to obtain the greatest benefit from the decision to migrate.

## Public policy objective

The objective of the legislative provisions is to enhance immigration outcomes both for New Zealand and migrants by delivering the benefits of migrants with high contribution and settlement potential more quickly. The objective is also to clarify the chief executive's ability to determine the order and manner of processing applications in order to ensure the efficient, effective, and economical management of the activities of the Department of Labour. Empowering the lapsing of some applications lodged under pre-November 2002 policies will enhance the achievement of immigration outcomes by continuing to process only those applicants with high contribution and settlement potential.

## Feasible options

*Status quo*

Under the status quo, the NZIS uses some ordering arrangements at a high level to manage immigration applications. This involves the Government's annual New Zealand Immigration Programme and the annual financial appropriation for processing applications to meet the programme. There is also *de facto* ordering through applications being processed by receiving offices and the allocation of approval places and resource to those offices. In addition, GSC applications with job offers are given priority over other applications on a branch-by-branch basis.

Despite this high level ability to order the processing of applications, the inability to explicitly ensure the order of processing according to agreed priorities in times of high demand for residence could result in some applicants (who may have experienced delays in having their application processed) compelling the assessment of their application. This could occur despite the fact that those applicants may not be considered a high priority in terms of ability to achieve outcomes for New Zealand. Current legislation does not allow for the management of immigration applications other than by assessing them fully to a final decision, even if the number of applications received is in excess of New Zealand's annual immigration programme.

*Legislative change*

The proposal is to amend the Immigration Act 1987 to improve overall immigration outcomes for New Zealand by enabling the chief executive to give general instructions as to the order and manner of processing immigration applications. This would clarify the chief executive's current ability to do so as part of operating and managing the activities of the Department of Labour, while incorporating government priorities. In turn, this would validate the existing ordering arrangements in place for residence applications. A lapsing provision would enable those applicants less likely to settle well and contribute to be lapsed, thus allowing the benefits of those applicants who will settle well and contribute to be realised more quickly. Specific legislative provision is the only feasible option to allow the lapsing of applications lodged under old GSC policy.

**Net benefit of the proposal**

The benefits and costs of the proposals have been weighed up with consideration to improved outcomes for New Zealand, impacts on prospective migrants, and business and employer needs. On balance, the benefits of the proposal are considered to outweigh the costs.

The main benefits to be gained are the achievement of outcomes for New Zealand more quickly by meeting identified needs and opportunities. This in turn will help to meet business and employer needs, particularly where a relevant offer of employment has been made.

Timely verification of job offers is important, particularly in terms of whether the offer of employment is held open for the applicant. The longer that an applicant with a job offer has to wait before their application is approved, the likelihood of that job offer being held open reduces. Not only does this affect whether an applicant can continue to qualify for residence but also their early contribution and settlement prospects. The lapsing of a number of older GSC applications will allow resources that would have been used on such assessments to be assigned to achieving outcomes under new policy.

In addition, the legislative amendments will clarify the chief executive's ability to operate and manage the activities of the Department of Labour in accordance with the State Sector Act 1988. In particular, the efficient, effective, and economical management of the department.

The main costs are associated with the disappointment that may be experienced by some applicants determined to be of low priority,

and who therefore do not have their applications processed as quickly as they expected or who have their applications lapsed. Financial costs primarily relate to the refunding of application fees to those who would have their applications lapsed (estimated at $10.374 million (GST inclusive), of which $4.572 million would need to be appropriated to cover the shortfall). No business compliance costs have been identified.

## Consultation undertaken

The following agencies have been consulted during the drafting of the legislation: the Ministries of Economic Development, Foreign Affairs and Trade, Justice, and Social Development; the Department of Internal Affairs (Ethnic Affairs); Treasury; and the Department of Prime Minister and Cabinet.

The following agencies were consulted during the development of the policy proposals: the Ministries of Economic Development, Foreign Affairs and Trade, Justice, Education, Health, Social Development and Pacific Island Affairs; the Department of Internal Affairs (Identity Services and Ethnic Affairs); Te Puni Kokiri; the New Zealand Qualifications Authority; and the Department of Prime Minister and Cabinet.

*Hon Lianne Dalziel*

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## Contents



**The Parliament of New Zealand enacts as follows:**

### 1 Title

(1) This Act is the Immigration Amendment Act **(No 2) 2003**.

(2) In this Act, the Immigration Act 1987[1] is called "the principal Act".

[1] 1987 No 74

### 2 Commencement

This Act comes into force on the day on which it receives the Royal assent.

## Part 1
## Principal Act amended

### 3 Government residence policy

Section 13B of the principal Act is amended by inserting, after subsection (1), the following subsection:

"(1A) To avoid doubt, any policy of the Government that relates to the issuing of any type of temporary visa or limited purpose visa or the granting of any type of temporary permit or limited

purpose permit is not Government residence policy, regardless of whether the issuing of the visa or the granting of the permit may affect eligibility for or otherwise relate to the issuing of a residence visa or the granting of a residence permit."

**4 New section 13BA inserted**

The principal Act is amended by inserting, after section 13B, the following section:

"13BA **Chief executive may give general instructions as to order and manner of processing applications for visas and permits**

"(1) The order and manner of processing any application for a visa or permit is a matter for the discretion of a visa officer or immigration officer.

"(2) The chief executive may, from time to time, give general instructions to visa officers and immigration officers as to the order and manner of processing any application for a visa or permit.

"(3) In giving any such general instructions, the chief executive may have regard to such matters as the chief executive thinks fit.

"(4) Unless otherwise expressed by the chief executive, any general instructions as to the order and manner of processing applications, as given by the chief executive from time to time under this section, may apply to any or all applications for visas or permits regardless of the fact that—

"(a) the general instructions may be different from those existing at the time that the applications were made; or

"(b) the general instructions may result in applications being processed in a different order or manner than would otherwise have occurred; or

"(c) any application may have been made before the commencement of the Immigration Amendment Act **(No 2) 2003**.

"(5) The general instructions, as given by the chief executive from time to time, are matters of departmental rules and practice, and do not form part of Government immigration policy under section 13A or Government residence policy under section 13B.

"(6) Nothing in this Act, or in any other law or enactment, requires a visa officer or an immigration officer to process an application for a visa or permit in any particular order or manner, whether or not consistent with any general instructions given by the chief executive from time to time.

"(7) The question whether or not an application is processed in an order and manner consistent with any general instructions given by the chief executive from time to time is a matter for the discretion of a visa officer or immigration officer, and—

"(a) no appeal lies against the decision of the officer concerned, whether to an Authority, the Tribunal, the Minister, any court, or otherwise; and

"(b) no review proceedings may be brought in any court in respect of—

"(i) any general instructions as to the order and manner of processing applications as given by the chief executive from time to time; or

"(ii) the application of any such general instructions; or

"(iii) any failure by the Minister or a visa officer or immigration officer to process or to continue to process an application for a visa or a permit; or

"(iv) any decision by the Minister or a visa officer or immigration officer to process (including a decision to continue to process), or any decision not to process (including a decision not to continue to process), an application for a visa or permit."

# Part 2
# Validation of processing, and lapsing, of applications

## 5 Past order and manner of processing applications deemed valid

(1) Any—

(a) failure by a visa officer or an immigration officer or the Minister to process an application for a visa or permit (including a residence visa or residence permit); or

(b) decision by a visa officer or an immigration officer or the Minister to process or not to process an application for a visa or permit (including a residence visa or residence permit)—

occurring or made before the commencement of this Act is deemed to have been validly done in accordance with the discretion of a visa officer or immigration officer to determine the order and manner of processing an application.

(2) No appeal lies against any decision to process or not to process an application for a visa or permit (including a residence visa or a residence permit, and including any such decision made before the commencement of this Act), whether to an Authority, the Tribunal, the Minister, any court, or otherwise.

(3) No review proceedings may be brought in any court in respect of any failure to process, or any decision to process or not to process, an application for a visa or permit (including a residence visa or a residence permit, and including any such failure or any such decision occurring or made before the commencement of this Act).

(4) In this section,—

(a) a reference to a failure to process an application includes a reference to a failure to continue to process an application:

(b) a reference to a decision to process an application includes a reference to a decision to continue to process an application:

(c) a reference to a decision not to process an application includes a reference to a decision not to continue to process an application.

### 6 Lapsing of certain applications made before 20 November 2002

(1) All applications for residence visas or residence permits made before 20 November 2002 under the general skills category of Government residence policy that have not been decided as at the commencement of this Act are treated as lapsed, except where, as at the beginning of 1 July 2003 in respect of any such application,—

(a) the principal applicant—

(i) had claimed points for an offer of employment classed as "relevant" under the Government residence policy applying to that application; or

(ii) had claimed 28 or more points under the Government residence policy applying to that application; or

(iii) had been issued a work visa or granted a work permit for the purpose of obtaining an offer of employment in New Zealand; or

(iv) had been invited in writing by a visa officer or an immigration officer to apply for a work visa or work permit for the purpose of obtaining an offer of employment in New Zealand; or

(b) the application had been processed by a visa officer or an immigration officer to the point where the officer was satisfied that—

(i) the principal applicant and all other applicants included in the application met the health, character, and English language requirements applying to that application; and

(ii) the application had been awarded sufficient points to meet or exceed the points passmark applying to that application; and

(iii) all evidential and verification requirements necessary to demonstrate eligibility under the general skills category were met; or

(c) the application has been the subject of a decision by the Residence Appeal Authority made under section 18D(1)(d), (e), or (f) of the principal Act.

(2) The effect of an application being treated as lapsed is that no further processing or decision in respect of the application is required.

(3) Where an application is lapsed under this section, the chief executive must refund any application fee paid in respect of the application to the person who paid it, or a person authorised by that person to receive it.

(4) Nothing in this Act or the principal Act or in any other law or enactment entitles a person whose application is lapsed under this section to recover from the Minister or the Department or any visa officer or immigration officer any costs associated with the application, other than the prescribed application fee.

(5) Section 13C of the principal Act does not apply to the lapsing of an application under this section.

(6) The question whether or not an application meets the criteria set out in **subsection (1)** is a matter for the discretion of a visa officer or immigration officer, and no appeal lies against the

decision of the officer concerned, or the lapsing of the application, whether to an Authority, the Minister, any court, or otherwise.

(7) No review proceedings may be brought in any court in respect of the lapsing under this section of an application for a residence visa.

(8) In this section, **decided**, in relation to an application for a visa or a permit, means that a decision whether or not to issue the visa or grant the permit has been made by the Minister or a visa officer or immigration officer, whether or not that decision has been communicated to the applicant and whether or not any associated visa or permit has been issued or granted.

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