



27 July 2010

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By email: Stephanie.Coutts@dol.govt.nz

Dear Stephanie

Immigration Regulations 2010

Thank you for the opportunity to comment on the Immigration Regulations 2010. The members of the Society's Immigration and Refugee Law Committee have reviewed the regulations so far as possible in the very short time available and have assisted me in the development of the following comments.

Immigration (Visa, Entry Permission, and Related Matters) Regulations 2010

Regulation 5(1)(d)(i)

It would be desirable for immigration officers to have the power to accept a certified copy of the applicant's passport. There are times when applicants are frequently travelling abroad so cannot afford to lodge their original passport with INZ. It tends to be the very people New Zealand is seeking to attract as skilled migrants who may be in this position, and these are the very kinds of potential migrants New Zealand does not want to alienate.

Regulation 5(1)(d)(v)

The wording "*that the applicant considers*" is subjective and arguably too vague to be useful. Also, there is potential for the provision to be used to block an applicant from submitting further useful information later on.

It is understood that this wording is driven off s 58(1-2), but that section is essentially the same as s 17A of the Immigration Act (IA) 1987, which has not generally been used to block residence applicants from submitting further useful information. It is particularly important for INZ to treat residence applicants as clients, and use of this kind of provision would be perceived as bureaucratic and unfair.

The regulation does not take into account a residence visa issued under the 1987 IA.

Regulation 5(3)(a)

The regulation does not take into account a residence visa issued under the 1987 IA.

Regulation 6(2)(d)(vi)

The regulation does not take into account a residence visa issued under the 1987 IA.

Regulation 10(1)(d)(v)

The regulation does not take into account a residence visa issued under the 1987 IA.

Regulation 15

The regulation presumably refers to Schedule 3. There is not a second column in Schedule 2.

Regulation 16(1)

It would be desirable to change the wording to “*an application for reconsideration*”. The usual rule of interpretation is that headings do not form part of the substantive provision.

Regulation 16(1)(b)

The word “*full*” should be deleted. There is potential for the provision to be used to block an applicant from submitting further useful information later on.

Regulation 17(1)(e)(vii)

The regulation does not take into account a residence visa issued under the 1987 Act.

Regulation 17(2)

The language in regulation 17(2)(b) is extremely broad and subjective which may give too much discretion to immigration officers without any built-in safeguards for deterring discrimination.

Regulation 17(3)

The regulation incorrectly cross-refers to regulation 20, it should be regulation 21.

Regulation 18(d)

The regulation incorrectly cross-refers to Schedule 1, it should be Schedule 2.

Regulation 21(3-4)

Regarding when an application may or may not incorporate other family members. INZ needs to be sensible about allowing family residence applicants to lodge a single form otherwise there is substantial duplication of information. This is annoying for applicants and is presumably time wasting for INZ.

Regulation 22(2)(f-g)

Regulation 22(2)(f) is appropriate where the application is made without using the prescribed form.

Regulation 22(2)(g) should be reworded in line with regulation 5(2)(b) otherwise it reads as if the applicant is required to read the immigration officer’s mind as to “*the information and evidence that the immigration officer thinks necessary for him or her to determine*”.

Regulation 22(2)(g) could presumably be deleted altogether, because 22(5)(d) gives the immigration officer the power to require further information anyway.

Regulation 22(10)

The regulation incorrectly cross-refers to regulation 22, it should be regulation 23

The Society could not find where the “prohibition” is as referred to in the “Query”.

Regulation 26

The regulation incorrectly cross-refers to Schedule 2, presumably it should cross-refer to Schedule 3.

Regulation 28

The migrant levy should only be payable once a permanent residence visa is granted.

As to the “Query”, the Society does not believe that it would be *ultra vires* to grant a Special Direction. This is because the levy relates to a person, or persons as contemplated in s 378(1)(a) of the Act. Moreover, s 395(2) provides explicitly that “*the Minister may, by special direction, provide for an exemption from or refund of any prescribed fee or charge in whole or in part.*” Sections 399 (3) and section 400(f) also support this interpretation.

The Society has not had time to review carefully whether the Special Direction powers in the Regulations fully reflect the Act, but believes that it is very important that the Regulations should not limit the power to make a Special Direction. They give the Minister (and by delegated authority, senior immigration officers) power to make common sense decisions in situations where the wording of the regulation may cause an injustice or an unjustifiable inconvenience to an INZ client. Accordingly, it is important for New Zealand’s reputation with INZ clients (and it has to be remembered that those clients speak with other people who may be interested in emigrating to New Zealand) that the Special Direction powers are broader rather than narrower.

Regulation 29

The practice of not charging fees to persons granted refugee status and their family members should continue. Regulation 29(c) appears to limit this exemption, so the words “*under the family category of immigration instructions*” should be deleted from regulation 29(c).

Regulation 30(2)

It is unclear what the repercussions are for those entering the border where no immigration officer is present. This is creating a potentially dangerous situation if our border is too porous and there are no repercussions.

Regulation 35

To avoid this regulation being *ultra vires* by purporting to limit the Minister’s Special Direction powers, it would be desirable to preface it with the words “*Without limiting the Minister’s Special Direction powers contained in the Act or regulations made under it ...*”.

Schedule 2, regulation 8

It is stated that citizens of certain countries have a visa waiver if the person is seeking entry permission and a visitor’s visa current for not more than 3 months “*and the purposes of the visit is not for medical consultation or treatment*”.

The regulations should merely state that citizens of certain countries have a visa waiver if the person is seeking entry permission and a visitor’s visa current for not more than 3 months. The words “*and the purposes of the visit is not for medical consultation or treatment*” should be deleted.

Immigration (Certificate and Warrant Forms) Regulations 2010

Forms 1 and 2 should provide for the Immigration Officer to record his/her warrant number, or their delegated authority, otherwise there would appear to be a breach of s 388 (“Designation of Immigration Officers”).

The Society considers that it should be mandatory for a Notice of Basic Rights to be given to the detainee. That would ensure compliance with s 23(1)(b) of the New Zealand Bill of Rights Act 1990, which states:

“Everyone who is arrested or who is detained under any enactment -

... (b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right ...”.

See the Summary Proceedings Regulations 1958 SR1958/38 Form 5B (Traffic Summons to Defendant in Relation to Breath Alcohol Offence) for a typical wording. There is also an appropriate wording in the Domestic Violence Rules 1996.

The Committee also notes that the UK Border Agency’s Detention Services Order 01/2010 “Notification of Removal Directions to Detainees” contain an appropriate form of notice, eg see clause 19(ii):

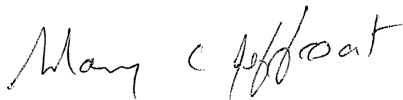
“The legal representative is to be notified by fax and where possible the matter brought to his/her attention as soon as the detainee has been told of Removal Directions”.

The Society would be happy to assist in formulation of an appropriate notice, if given time, but recommends that the certificates and warrant forms do need to have a notice of a detainee’s right to counsel and (if available for the particular step) legal aid.

Given the tight timeframe for input, a pragmatic solution right now would be to take the same approach as in Regulation 3 of the Summary Proceedings Regulations 1958 (copy attached), and provide in the operative provisions of the Certificate and Warrant forms Regulations that the forms in the Schedule “*may be used ... with additional information*”. This would give flexibility, including adding appropriate “rights” notices once the question of legal aid regarding the detention process has been resolved.

The Society hopes that the above comments are of assistance to the Department of Labour. If you wish to discuss this submission further please contact the convener, John McBride, through the Immigration and Refugee Law Committee secretary, Rhyn Visser phone (04) 463 2962 or email rhyn.visser@lawsociety.org.nz.

Yours sincerely



Mary Jeffcoat
Vice President