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NEW ZEALAND IMMIGRATION LAW: ENTREPRENEUR V INVESTOR

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NEW ZEALAND IMMIGRATION LAW AND POLICY ENTREPRENEUR V INVESTOR

Introduction

1. New Zealand has an Entrepreneur Work Visa Category which, after a business is established satisfactorily,¹ entitles the applicant to lodge residence under the Entrepreneur Residence Visa Category. This is a transitional process involving actively setting up a business, usually employing New Zealand citizens and residents, and then applying for residence. In its current format, the policy has a number of problems which will be discussed below. For those that qualify under Investor 1 or Investor 2, they are invariably better off using one of those categories. This paper will discuss the current entrepreneur settings (previously called Long-Term Business Visa (LTBV)) and then the current Investor 1 and Investor 2 settings, describing the most recent changes.

Entrepreneur Work/Residence (an active investment category)

2. New Zealand has had an active entrepreneur category for more than 18 years. It was previously called the Long Term Business Visa/Entrepreneur Residence Programme but was suspended and then reintroduced in 2014 as the Entrepreneur Work/Residence Category. Please note that as the first stage involves a temporary visa application there is no right of appeal to the Immigration Protection Tribunal. The second stage (two or three years later) is a residence visa application and so there is a right of appeal to the Tribunal.
3. The Entrepreneur Work Visa Category application involves a points system assessment. However, it is difficult to envisage a successful applicant having no prior business experience in running an enterprise if not identical to, at least similar to the proposed business. Further, it is difficult to envisage a successful business plan that does not

¹ This can involve either a start-up or the purchase of an existing business or a share of an existing business.

involve the investment of NZ \$200k to \$500k although smaller start-up businesses will be considered.

4. In a recent circular, Immigration New Zealand officials have commented that the quality of applications that are being filed remains poor. An application should be presented with a thought-through business plan setting out proposed costings and profits over a three year period. Residence cannot normally be granted unless the business has operated for at least 24 months and establishes self-employment. Tribunal case law looks carefully at “self-employment” as meaning sufficient profit on which to earn a living.
5. Both start-ups and buy-ins are feasible but with a buy-in, the number of New Zealand employees that are counted are the additional employees that are New Zealand citizens or residents, as a result of the *buy-in*. See table below.
6. A recent change to the rules is significant. In short, it restricts this category considerably. In Amendment Circular 2017-10 (17 August 2017) an amendment was made to Immigration Instruction BB3.15 of the Operational Manual concerning certain characteristics that businesses need to demonstrate in their business plans. In short, they must be high-growth, innovative *or* have export potential.
7. This probably puts an end to the purchase of franchise businesses or small retail-type projects, although these have always been difficult in the entrepreneur work/residence settings. The requirements for a business plan as set out in BB3.15 are now as follows:
 - i. The principal applicant’s financial forecasts are realistic; and
 - ii. The principal applicant has sufficient relevant knowledge about the proposed business in the New Zealand business environment; and
 - iii. The principal applicant has done sufficient market research into the New Zealand business environment and market for their proposed business, to optimise their chances of succeeding; and

- iv. The proposed business meets at least one of the following three business characteristics identified in the object of the Entrepreneur Work Visa Category (BB1):
- High growth
 - Innovative, or
 - Export potential; and ...

8. The requirement at BB3: 15(iv), previously illustrative is now mandatory (or at least, it is mandatory to come within one of the listed categories).

Entrepreneur Work Visa: Points settings

9. Annexed to this Paper please find BB3.10 which sets out the full table of the points settings. 120 points are needed and can be summarised as follows:

i.	Points for age varying between 24-59 (60 and over 0 points)	10-20 points
ii.	Relevant self-employment (business experience)	20-40 points
iii.	Relevant senior management experience (5-10 years)	05-10 points
iv.	Points for benefit to New Zealand ² (1 new position)	10 points
	(2 new positions)	20 points
	(3 new positions)	30 points etc
v.	Points for approved export businesses (based on annual turnover) \$200K	10 points
	\$300K	20 points etc
vi.	Unique or new product/service to New Zealand	30 points
vii.	Capital investment \$200K +	10 points
	\$300K +	20 points
	\$400K +	30 points etc
viii.	Bonus points for business outside Auckland	40 points

² I.e. employment of residents or citizens.

10. The fact that the first stage, i.e. the work visa stage, is a temporary visa *only* is not often understood by applicants when considering their options. This will only lead to student visas for primary and secondary school aged dependent children and not tertiary level dependants. Dependants of residence Investor 1 or 2 category applicants themselves gain residence (with conditions), and so can attend tertiary level study as domestic students.
11. A dependent spouse who is employed in the business itself will not count as a fulltime position of a New Zealand citizen or resident (and attract points). An open work visa however will be available to the spouse to work in any field, or for any employer.
12. The applicant must identify not only their business experience but also the origins of their funds. Although this process will not be a full audit, it is nevertheless a detailed process. Clients planning an Entrepreneur Work Visa/Residence Visa project are better to engage with an immigration law specialist before they engage with real estate agents or business agents endeavouring to promote the sale of a particular business. There are few real estate agents who understand the Entrepreneur Work Visa/Residence Visa process fully and accordingly time and expenditure is frequently wasted on projects that are not viable, particularly now given the above restriction that the business plan *must* involve a business that will be either high-growth, innovative or have export potential, or at least one of these characteristics. In addition processing time is significant and not something that happens while a contract is left pending.

Investor 1 and Investor 2: Residence categories

13. These two policies have recently been enhanced. Whereas the Entrepreneur Work Visa/Residence Visa applies to immigrants who are able to remain in New Zealand permanently to actively run a business, the Investor Categories (1 and 2), do not require such a high degree of presence in the country.

14. A competitive point in favour of New Zealand's Investor Categories is that they are residence categories. When the visa is granted, it is not a temporary entry visa but a Temporary Residence visa, with conditions. The investment requirements must be completed. In the case of Investor 1, this is for three years and in the case of Investor 2, this is for four years. At the end of the investment period and provided that the presence requirement imposed on the principal applicant is met, the whole family will have permanent residence without any further presence requirement in New Zealand, *at any time* in the future.
15. Unlike most of the policies in other competing jurisdictions, the golden carriage does not turn into a pumpkin at some future point at the strike of the midnight hour (four or five years later). This makes New Zealand's Investor 1 Category in particular quite popular. It is also the one factor that is not understood.
16. The Investor 2 Policy is a point system policy (the Investor 1 policy is not) and the number of points required will fluctuate. However, currently selections are made with proposals involving an investment of \$2.5 million (see details below). The category is age restricted at 65, English at IELTS 3.0 or equivalent or above is required for the principal applicant and funds for investment must be sourced, though not at the level of an audit.
17. In May 2017, an enhancement was made to the presence requirement settings. For Investor 1, the investment of \$10 million required a trip to New Zealand to uplift the visas within 12 months of the grant of visa and a presence requirement of 44 days (principal applicant only) in years two and three of the investment period i.e. a total of 88 days but in two separate years. Provided that 25% of the investment is in non-bonds (see below) the 88 days can now be spent at any period of time during the three year investment period, thus giving flexibility, although the applicants may still be required, in order to fulfil banking requirements, to travel to New Zealand prior to the investment process being finalised. In some circumstances, it may be possible now for

Investor 1 clients to spend their 88 days in New Zealand on one trip. The family must enter the country to “uplift” their visas, but the total day requirement applies only to the principal applicant.

18. The presence requirements in the Investor 2 Category probably make the category non-competitive however. For those who genuinely wish to take up residence in New Zealand, and have sufficient funds to invest, this is however a far better option than the above described Entrepreneur Work-to-Residence program. The presence requirement is 146 days in years two, three and four although this becomes movable i.e. a total of 430 days to anywhere within the investment period as long as the investment involves 25% or more in growth investments (i.e. non-bonds, non-philanthropic investments). Again the whole family must fly in during the first 12 months to uplift the visas, but thereafter the presence requirement lies with the principal applicant. Business experience is a prerequisite.
19. When discussing the points below, please note that a reduction from \$3 million to \$2.5 million is also available where the applicant agrees to an investment of at least \$1.5m in growth investments (non-bonds, non-philanthropic).
20. The points system is briefly as follows:
- | | | | |
|-----|-----------------------------------------------|----------------|---------------|
| i. | English language ability, principal applicant | 3.0 IELTS | 1 point |
| | | 4.0 IELTS | 4 points |
| | | 5.0 IELTS | 10 points |
| | | 6.0 IELTS | 13 points |
| | | 7.0 IELTS | 17 points |
| | | 8.0 IELTS | 20 points |
| ii. | Investment funds | \$3 million | 10 points |
| | | \$3.25 million | 15 points |
| | | \$3.5 million | 20 points |
| | | \$3.75 million | 25 points |
| | | \$4 million | 30 points etc |

iii.	Age	60 - 65	0 points
		50 - 59	5 points
		40 - 49	10 points
		30 - 39	15 points
		Less than 30	20 points
iv.	Recognised business experience	3 years	9 points
		4 years	12 points
		5 years	15 points
		...	
		15 +	45 points

21. Business experience requires either ownership or management of a business that has at least five fulltime employees or an annual turnover of NZ \$1million or more.
22. English language testing can be through other methods other than IELTS and the above is a brief overview only i.e. TOEFL iBT score 31-34 = IELTS 4.0-5.0.
23. It is important when setting a proposed application, which is first done by way of an Expression of Interest (without any evidence accompanying the application) to check the current pool draws. On 2 November 2017, the selections were for those with an Expression of Interest at 33 points or above. On 19 October 2017 only those with 76 points or above were selected. On 5 October 2017, the selection included an application at 30 points. The draw occurs every 2 weeks. The above suggests that currently applicants with a low score will be able to succeed at the lower settings i.e. with either \$3 million or reduced to \$2.5 million with an investment of \$1.5m in non-bonds, non-philanthropic. As the policy settings are new however, a rise is predicted. Clients should consider filing with 70 or more points to be on the safe side. The recent draws must be checked, before filing an Expression of Interest, if the client is interested in the outcome.

Approved investment

24. It is important to realise that funds must reach New Zealand through the banking system. It is surprising how many cases go on an appeal concerning this point. In particular, funds cannot come in to New Zealand in a manner that avoids central bank regulations in the home country (especially the People's Republic of China).
25. Annexed to this Paper is the full set of approved investment possibilities set out in the Immigration rules at BJ3.10.25.
26. The investment cannot include a residential property used by the investor (in fact any investors purchasing a residence for personal use should first obtain tax advice and in particular specialist advice concerning double tax agreements), as the maintenance of a home will make the person subject to tax on a worldwide basis.
27. Note however BJ3.10.25(vi) "residential property development property(s)". It is important to obtain specialist immigration and legal advice when planning for an application involving particular investments.
28. The introduction of an option involving philanthropic investment and angel funds or network investments is new. Special conditions will apply, but note that like bonds, a philanthropic investment will not count towards the total required for the "growth investment" requirement if the reduction from \$3 million to \$2.5 million is sought, or where flexibility concerning the presence requirements is needed (in either Investor 1 or 2). A word of warning: there is no flexibility to presence or investment deadline dates. If deadlines are not met, you start all over again.

Summary

29. In short, New Zealand's Entrepreneur Work/Residence Visa is only suitable for those who have past business experience and who are willing to spend at least 80% of each year in New Zealand running a business as a set-up or where their investment expands an existing business.

30. The Investor 2 Category has an onerous presence requirement whereas the setting under the Investor 1 Category requiring only 88 days during the investment period is competitive, particularly given that the project itself, once the investment is completed, results in residence without *any* future presence requirement at all. This compares favourably against other jurisdictions.

31. In essence, investor residence gives an *indefinite* status, which can then be activated throughout the grantee's lifetime, even into their dotage when they will not meet health requirements. It is a long-term investment for a right to reside in one of the most beautiful countries in the world. Essentially it is a halfway house somewhere between residence and citizenship.

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BB3.10 Points scale for an Entrepreneur Work Visa

- a. Applications must meet a minimum score of 120 points in order to be granted an Entrepreneur Work Visa. Applications not meeting the minimum score of 120 points will be declined.
- b. Applicants must be able to demonstrate to the satisfaction of a business immigration specialist why they should be awarded the points they have claimed.
- c. Business immigration specialists must give written reasons for declining the application and not awarding any points claimed.
- d. The following table outlines the points that can be awarded for an Entrepreneur Work Visa application:

Points for business experience (can be awarded in only one category)	
Relevant self-employment	
10 years +	40
5 years +	30
3 years +	20
Other self-employment	
10 years +	20
5 years +	15
3 years +	5
Relevant senior management experience	
10 years +	10
5 years +	5
Points for benefit to New Zealand (can be awarded in up to two categories)	
New full time employment creation	
10+ new full time positions for New Zealand citizens or residents	80
5 or more new full time positions for New Zealand citizens or residents	50
3 or more new full time positions for New Zealand citizens or residents	30
2 new full time positions for New Zealand citizens or residents	20
1 new full time position for a New Zealand citizen or resident.	10

Points for approved export businesses (based on annual turnover)	
\$1,000,000 + turnover a year	80
\$750,000 + turnover a year	60
\$500,000 + turnover a year	40
\$400,000 + turnover a year	30
\$300,000 + turnover a year	20
\$200,000 + turnover a year	10
Points for unique or new products or services to New Zealand	
A credible business proposal that provides unique or new products/ services to New Zealand, or to a particular region.	30
Points for capital investment	
\$1,000,000 +	80
\$750,000 +	60
\$500,000 +	50
\$400,000 +	30
\$300,000 +	20
\$200,000 +	10
under \$200,000	0
Points for age of prospective applicant (at date of lodging application)	
24 and under	15
25-29	20
30-39	20
40-49	20
50-59	10
60 and over	0
Bonus points	
Business based outside Auckland as defined in BB6.1.35.	40

Note: For definitions of terms for the purposes of the Entrepreneur Work Visa and Entrepreneur Residence Visa Categories, see the Definitions section at BB6. The criteria for recognising capital investment is outlined at BB3.5.10.

Effective 07/12/2015

BJ3.10.25 Definition of 'acceptable investment'

- a. An acceptable investment means an investment that:
- i. is capable of a commercial return under normal circumstances; and
 - ii. is not for the personal use of the applicant(s) (see BJ3.10.30); and
 - iii. is invested in New Zealand in New Zealand currency; and
 - iv. is invested in lawful enterprises or managed funds (see BJ3.10.35) that comply with all relevant laws in force in New Zealand; and
 - v. has the potential to contribute to New Zealand's economy; and
 - vi. is invested in either one or more of the following:
 - bonds issued by the New Zealand government or local authorities; or
 - bonds issued by New Zealand firms traded on the New Zealand Debt Securities Market (NZDX); or
 - bonds issued by New Zealand firms with at least a BBB- or equivalent rating from internationally recognised credit rating agencies (for example, Standard and Poor's); or
 - equity in New Zealand firms (public or private including managed funds and venture capital funds); or
 - bonds issued by New Zealand registered banks; or
 - equities in New Zealand registered banks; or
 - residential property development(s) (see BJ3.10.40); or
 - commercial property (see BJ3.15.5); or
 - bonds in finance companies (see BJ3.10 (d)); or
 - eligible New Zealand venture capital funds (see BJ3.10.45); or
 - philanthropic investment (see BJ3.15.10); or
 - 'Angel funds or networks' investments.

Note: New Zealand registered banks are defined by the New Zealand Reserve Bank Act 1989.

- b. For private equity investments to be acceptable, the business immigration specialist must be satisfied that the funds being invested are to be actively used by the company to, for example, fund company growth, pay down company debt or purchase capital items.
- c. Notwithstanding (a) above, where an investment fails to meet one of the acceptable investment requirements, a business immigration specialist may consider, on a case by case basis, whether the failure was beyond the control of the principal applicant and if satisfied that this was the case, may consider the investment acceptable.
- d. A Business Immigration Specialist may consider bonds in finance companies as an acceptable investment where the finance company:
 - i. is a wholly-owned subsidiary of,
 - ii. raises capital solely for, and
 - iii. has all its debt securities unconditionally guaranteed by a New Zealand Stock Exchange listed company or a local authority.

Note: The value of an investment is based on the net purchase price (for example, less any accrued interest, commission, brokerage and/or trade levy), not on the face value of the investment.