



Tier 1 (Entrepreneur) migrants affected by Covid-19

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The coronavirus emergency has caused significant concern for UK businesses. This is particularly so for Tier 1 (Entrepreneur) migrants whose customers and employment of resident workers not only affects their revenue, but also the security of their UK immigration status. Failure to satisfy the requirements of the immigration rules can lead to a refusal and possibly having to close the business and leave the UK. Given the severity of the implications, clear guidance from the Home Office is necessary, but sadly lacking so far.

Employees

A key requirement of an application to extend a Tier 1 Entrepreneur visa or apply for Indefinite Leave to Remain (ILR) is that you have employed two settled workers for 12 months each.

The Home Office guidance states that due to Covid-19 disruption:

“You no longer need to employ at least 2 people for 12 consecutive months each. The 12 month period you are required to employ someone for can be made up of multiple jobs across different months.”

This is helpful where employees have had to be laid off due to a downturn in business before they completed 12 months employment, as it allows you to rely on for example a receptionist working for 4 months combined with an analyst working for 8 months to equate to one job.

However, there has never been a requirement for 12 consecutive months of employment, as this would penalise Tier 1 Entrepreneurs whose employees resigned. It is permitted to rely on for example the employment of a receptionist who works for 4 months then leaves, then there is a gap whilst a replacement is hired and then another person works as a receptionist for 8 months. It has also always been possible to have multiple employees doing one full time job (for example, several part time waiting staff who together work 30 hours a week).

Coronavirus Job Retention Scheme

Many businesses have applied for government support to pay employees' wages through the Coronavirus Job Retention Scheme, also called 'furlough'. The government has confirmed that employees who are sponsored migrants or other visa holders can be furloughed and that grants made are not considered as 'recourse to public funds'.

However, the Home Office has also stated that Tier 1 Entrepreneurs will not be able to rely on periods when employees were furloughed to meet the 12 months' employment for job creation.

This seems unfair as an employee is still considered to remain employed during a period of furlough.

Temporary extension

If you have not been able to employ two settled workers for 12 months and so are unable to meet the requirements for an extension or ILR now because of the impact Covid-19 has had on your business, the Home Office guidance states that you will be able to apply to temporarily extend your leave to provide more time to meet the requirement.

It is not clear what evidence might be required of the disruption to your business caused by Covid-19. Would you need to show that an employee has been furloughed, that your sales or income have been affected, or will the Home Office accept that many businesses have been affected by Covid-19?

Details of the application process for the temporary extension and period of leave that will be granted have not yet been confirmed, although the Home Office has clarified that applications can be made after 31 May 2020. We expect that you would be able to combine employment of settled workers during your previous period of your leave and during your temporary extension.

Knowledge of Language and Life requirement

Applicants for ILR and their adult dependants must usually pass the Life in the UK test and meet an English language requirement. The Life in the UK test centres are currently closed, as are the approved English language test centres in the UK. If your visa is expiring imminently and you or your partner has not been able to take the Life in the UK test or an approved English language test (if required), you may need to submit an application without these documents and request that the Home Office hold the applications until you are able to take the required tests.

This will likely delay the processing of the ILR application.

Processing times

Even before Covid-19 the processing times for Tier 1 Entrepreneur extension applications and ILR applications were long, with no priority service available. The Home Office processing time for Tier 1 Entrepreneur applications is up to 8 weeks and up to 6 months for ILR applications.

We assume that applications could take even longer due to a backlog caused by Covid-19. The Home Office seems to recognise this and is actively contacting those with pending applications asking them to submit their documents so they can begin considering applications.

Refusals

Careful scrutiny of Home Office decisions will be necessary where an applicant is refused based on the failure to satisfy a requirement of the rules, which is caused by the coronavirus emergency. It may be possible in some cases to rely on a general Home Office discretion to depart from the rules, and to challenge any refusal to do so.

If you require further information on making an application or on your personal circumstances, please contact by email either Kathryn Bradbury or Alexandra Lane.
