

**RESIDENCE REVIEW BOARD
NEW ZEALAND**

AT WELLINGTON

RESIDENCE APPEAL NO: 16495

Before: J Donald (Member)

Representative for the Appellant: H Weischede

Date of Decision: 30 April 2010

Category: Skilled Migrant

Decision Outcome: Section 18D(1)(e)

DECISION

INTRODUCTION

[1] The appellant is a citizen of the Republic of the Philippines, aged 35 years. The application for residence includes his spouse, aged 36 years.

[2] This is an appeal against the decision of Immigration New Zealand (INZ) declining the application because the appellant did not have good employment prospects and was not considered to be well-prepared and familiar about settling in New Zealand. INZ was not satisfied that he had demonstrated that he could realise his potential to successfully settle in and contribute to New Zealand.

[3] The main issues for the Board are whether the INZ decision was arrived at following a proper process which should have included a correct application of the settlement and contribution requirements of policy and an interview which was properly focused on relevant issues, and whether it provided properly articulated reasons for its decision.

BACKGROUND

[4] The appellant's Expression of Interest was selected from the pool on 22 August 2008. He was invited to apply for residence on 18 September 2008 on the basis that he appeared to be entitled to 115 points, calculated as follows:

Age	25 points
Qualification	50 points
Work experience	30 points
Close family support	10 points

[5] The appellant made his application for residence on 13 October 2008. He did not claim points for skilled employment in New Zealand.

Recognised Qualifications

[6] The appellant holds a Bachelor of Science in Commerce, specialising in entrepreneurship and small business management, awarded in 1996 by a university in the Philippines.

[7] The appellant was awarded 50 points for his qualification.

Recognised Work Experience

[8] In his residence application, the appellant chose as his main occupation Accountant (General). He claimed 30 points for more than 10 years' work experience comprising roles as a bookkeeping supervisor with a merchandising business, a materials and quality controller with a construction company and an accounts and bookkeeper with a trading company.

[9] The appellant was awarded 30 points for his work experience.

Close Family Support

[10] The appellant was awarded 10 points for close family support. His brother, a New Zealand resident, has lived in New Zealand since March 2005.

Invitation to Attend an Interview

[11] By email dated 20 August 2009, INZ invited the appellant to attend a telephone interview on 4 September 2009. He was advised that because he did

not have an offer of skilled employment in New Zealand and had not obtained a Master's degree or higher qualification in New Zealand, his application needed to be further assessed to determine whether he could otherwise demonstrate an ability to successfully settle and contribute or could realise the potential to successfully settle in and contribute to New Zealand.

[12] INZ also asked that the appellant complete an enclosed questionnaire and return it by 28 August 2009. He did so. The questionnaire was seven pages long and divided into the following sections: Employment Prospects, Preparedness of Partner/Family, Familiarity with New Zealand and Linkages and Support.

Telephone Interview with the Appellant

[13] On the INZ file is a five-page document entitled "Shanghai Branch 2nd Tier Interview". It appears to consist of pre-prepared standard questions and very brief handwritten notes.

[14] The INZ file also includes a one-page document entitled "Interview Report and Decision Recommendation" which sets out matters in point form under the headings "Employment Prospects", "Preparation and Familiarity with NZ", and "Linkages and Support".

[15] There is no transcript of the telephone interview on the INZ file, but a CD of the interview was provided to the Board by the appellant's representative.

Potentially Prejudicial Information

[16] INZ wrote to the appellant on 9 September 2009 stating that following the telephone interview, it had thoroughly assessed his ability to successfully settle in and contribute to New Zealand. The policy at SM20.10 was cited and attached.

[17] Under the heading "Employment prospects", INZ stated [verbatim]:

"You advised that you would like to work as a Bookkeeper or Accountant in New Zealand, these occupations are not listed as skill shortages in New Zealand.

You are not aware of the current labour market in New Zealand. You have advised us that you have been actively seeking New Zealand employment in relation to your area of expertise. However, you have had no positive feedback from recruitment agencies or employers in New Zealand.

The Ministry of Social Developments [sic], Work and Income website have more than 90 book keepers and 116 accountants listed as currently unemployed and seeking work in the Auckland region alone. What steps are you taking to secure employment when there are several registered unemployed New Zealander's [sic] seeking the same employment as you?

[18] Under the heading “Familiarity with New Zealand and preparedness for settlement”, INZ noted that neither the appellant nor his spouse had been to New Zealand and stated: “It therefore maybe difficult for you to settle well in New Zealand”.

[19] Under the heading “Linkages and support in New Zealand”, INZ noted that the appellant advised the interviewer he had a brother in New Zealand who will help with his initial settlement.

[20] The INZ case officer stated that she was not satisfied that the appellant would be able to obtain skilled employment in New Zealand; that he was not familiar with New Zealand and did not have strong linkages or support. She therefore considered that the appellant had not demonstrated the potential to settle in and contribute to New Zealand. He was invited to send additional comments or information by 17 September 2009.

The Appellant's Response – 17 September 2009

[21] By letter dated 17 September 2009, the appellant's representative made detailed submissions concerning INZ's telephone interview of the appellant, including the inability of the interviewer to communicate fairly and correctly, the relevance of some of the questions asked and the superficial nature of the interview. The representative went on to address the issues relating to employment prospects, familiarity and preparedness and linkages and support raised by INZ in its letter of 9 September 2009.

[22] With regard to the appellant's employment prospects, the representative referred INZ to 134 full-time accounting jobs in Auckland paying at least \$40,000 sourced using the SEEK job search engine. The representative also advised that the appellant was flexible about where in New Zealand he worked and, because he had no children, was flexible about what hours he worked. These factors gave the appellant an advantage in finding employment.

[23] Concerning the appellant's familiarity with New Zealand and preparedness for settlement, the representative stated that the fact the couple had not visited New Zealand did not reflect their knowledge of this country, the culture, or the social life. They had made a firm commitment to settling in New Zealand and benefited from the support and knowledge available to them through the appellant's New Zealand-resident brother.

[24] In relation to the appellant's linkages and support in New Zealand, the representative stressed both the wide-ranging support offered by the appellant's brother and also the fact that the representative's company provides ongoing support to its clients once they arrive in New Zealand.

The Branch Manager's Response

[25] By email dated 23 September 2009, the INZ branch manager responded to the appellant's representative's criticisms of the telephone interview with the appellant. She acknowledged the difficulties of using the telephone to conduct interviews. In response to the representative's comments concerning the interviewer's level of English, she asserted that that matter was irrelevant, but noted that the interviewer was a New Zealand citizen.

[26] The branch manager explained that, because the appellant had completed a questionnaire, the interview was limited to questions that INZ considered necessary to make a determination on the application, hence the limited focus of the interview.

[27] The branch manager granted a further extension of two weeks from the date of her letter to enable the appellant to submit any information or evidence to show that he had a high potential to settle in and contribute to New Zealand.

The Appellant's Response – 7 October 2009

[28] By letter dated 7 October 2009, the appellant's representative provided to INZ email correspondence received by the appellant from New Zealand-based recruitment agencies. The representative stated that the predominant response was that New Zealand employers prefer applicants that are already in New Zealand and have a work permit. Nevertheless, he asserted that the emails showed that recruiters were interested in the appellant's skills, that the New Zealand market was looking for skilled candidates, that recruiters would like the appellant to get back in contact once he has a work permit and that they are keen to secure employment roles for him.

Assessment of the Application

[29] The INZ case officer completed an assessment of the application on 25 November 2009. The appellant met the English language requirement of policy. He was awarded 115 points, comprising 25 for his age, 50 for his qualification, 30 for his work experience and 10 for close family support.

[30] In determining whether the appellant had the ability to realise his potential to successfully settle in and contribute to New Zealand, INZ recorded that it had considered the representative's comments, but [verbatim]:

"... no official evidence has been provided whether the applicant is able to demonstrate ability or can realise his potential to settle in and contribute to New Zealand."

INZ concluded that the appellant did not meet the requirements of SM20.10.

INZ Decision

[31] In a letter dated 25 November 2009, INZ declined the appellant's application. In summary, INZ concluded that the appellant did not have good employment prospects and was not well prepared and familiar about settling in New Zealand. As a result of that assessment, he had not demonstrated that he could realise his potential to successfully settle in and contribute to New Zealand. The reasons given follow [verbatim]:

“Employment prospects

You advised that you would like to work as a Bookkeeper or Accountant in New Zealand, these occupations are not listed as skill shortages in New Zealand.

You are not aware of the current labour market in New Zealand. You have advised us that you have been actively seeking New Zealand employment in relation to your area of expertise. However, you have had no positive feedback from recruitment agencies or employers in New Zealand.

The Ministry of Social Developments, [sic] Work and Income website have more than 90 book keepers and 116 accountants listed as currently unemployed and seeking work in the Auckland region alone.

On 17 September 2009, your agent responded that you would consider jobs in New Zealand not only in Auckland and you currently do not have children which will enable you to have less of a barrier to find jobs than your competitors.

We sent a further letter on 23 September 2009. Your agent responded on 7 October 2009 and provided 4 emails from NZ recruitment agencies as evidence that you have the potential ability to find the skilled employment in New Zealand.

After reviewing the agent's comments and the correspondence of the recruitment agency, we note that you have contacted recruitment agencies/NZ employers and they confirmed the receipt of your job application. In some cases the recruitment agencies or New Zealand employers made brief contact with you after receiving your CV. However, there was no information to clarify that you were pursued by them.

Familiarity with New Zealand and preparedness for settlement

We note neither you nor your spouse has been to New Zealand. It therefore may be difficult for you to settle well in New Zealand.

Linkages and support in New Zealand

In your interview, you advised the interviewer that you have a brother in New Zealand and your brother will help you with your initial settlement in New Zealand. Your agent has also stated that they would provide the assistance to you.

However, there does not appear to be any evidence that your brother can assist with the employment aspect of your application.”

GROUNDINGS OF APPEAL

[32] Section 18C(1) of the Immigration Act 1987 (“the Act”) provides:

“Where a visa officer or immigration officer has refused to grant any application for a residence visa or a residence permit, being an application lodged on or after the date of commencement of the Immigration Amendment Act 1991, the applicant may appeal against that refusal to the Residence Review Board on the grounds that –

- (a) The refusal was not correct in terms of the Government residence policy applicable at the time the application for the visa or permit was made; or
- (b) The special circumstances of the appellant are such that an exception to that Government residence policy should be considered.”

[33] The appellant appeals on the ground that the decision of INZ was not correct in terms of the applicable Government residence policy and on the further ground that, if correct, his special circumstances are such that an exception to that policy should be considered.

[34] The representative provides submissions, dated 8 January 2010 and produces to the Board copies of documents and papers held on the appellant's INZ file and a CD of the audio file of the appellant's interview with INZ.

ASSESSMENT

[35] The Board has been provided with the INZ file in relation to the appellant and has also considered the submissions and documents provided on appeal. An assessment as to whether the INZ decision to decline the appellant's application was correct in terms of the applicable Government residence policy is set out below.

[36] The application was made on 13 October 2008 and the relevant policy criteria are those in Government residence policy as at that time.

Skilled Migrant Policy

[37] The Skilled Migrant category of Government residence policy provides a two-tiered process of assessment. In the first tier, the applicant's health, character and English language ability are assessed, followed by his/her qualifications, work

experience and skilled employment in New Zealand, and any criteria set from time to time by the Minister of Immigration that were the basis for selection from the pool (see SM2.m.i-iii inclusive, in effect 10 April 2007).

[38] This is followed by a second-tier assessment of an applicant against the settlement and contribution requirements of policy.

Settlement and Contribution Requirements

[39] The policy at SM4.20 sets out the framework and order of assessment of settlement and contribution requirements as follows:

“SM4.20 Settlement and contribution requirements (SM20)

- a. Principal applicants are assessed to determine whether they have a demonstrated ability or have the ability to realise their potential, to successfully settle in and contribute to New Zealand.
- b. Principal applicants who:
 - i. qualify for 50 points for an offer of skilled employment or current skilled employment in New Zealand for less than 12 months; or
 - ii. qualify for 60 points for current skilled employment in New Zealand for twelve months or more; or
 - iii. have undertaken full time study for at least two years in New Zealand that has resulted in:
 - the award of a Doctorate or Masters degree; or
 - a qualification in an area of identified future growth or relevant to an occupation in absolute shortage;
 have demonstrated the ability to successfully settle in and contribute to New Zealand.
- c. Principal applicants who do not have points for any of these factors will be further assessed.
- d. Where, following a further assessment, a principal applicant, despite not meeting the requirements of (b) above, is assessed as having a high potential to readily obtain skilled employment in New Zealand, they will be assessed as having demonstrated the ability to successfully settle in and contribute to New Zealand. Their application for residence may be approved subject to meeting any other relevant requirements.
- e. If, as a result of the further assessment, a principal applicant is assessed as having demonstrated an ability to successfully settle in and contribute to New Zealand (see (b) above), their application will be approved subject to meeting any other relevant requirements.
- f. If, as a result of the further assessment, a principal applicant is assessed as having demonstrated they can realise their potential to successfully settle in and contribute to New Zealand, a decision on residence will be deferred and the principal applicant will be eligible for the issue and/or grant of a work visa or permit for the purpose of obtaining an offer of skilled

employment in New Zealand that is ongoing. Principal applicants who obtain an offer of skilled employment during the deferral period will have their application for residence approved.

- g. If, as a result of the further assessment, a principal applicant has not demonstrated they can realise their potential to successfully settle in and contribute to New Zealand, their application for residence will be declined.

Effective 10/04/2007

[40] As the Board, variously constituted, has previously stated, there are four stages within the settlement and contribution requirements policy referred to as “a hierarchy of eligibility” (see *Residence Appeal No 14869* (28 June 2006)).

[41] The first stage of eligibility is set out at SM4.20.b. The appellant did not have an offer of, or current, skilled employment in New Zealand, nor had he undertaken at least two years’ study in New Zealand leading to a Masters degree or Doctorate. Therefore, INZ had to assess his application further pursuant to the policy at SM4.20.c.

[42] The three further stages of eligibility, in descending order, require an assessment of:

- SM4.20.d – whether an applicant has a high potential to readily obtain skilled employment in New Zealand;
- SM4.20.e – whether an applicant has demonstrated an ability to successfully settle in and contribute to New Zealand;
- SM4.20.f – whether an applicant has demonstrated they can realise their potential to successfully settle and contribute to New Zealand.

[43] Applicants who are assessed as meeting SM4.20.d or SM4.20.e may be granted residence subject to meeting other relevant requirements. Applicants who are assessed as meeting SM4.20.f may have their residence application deferred and be granted a work visa or permit for the purposes of obtaining skilled employment in New Zealand. The process through which INZ assesses settlement and contribution requirements is set out at SM20.10:

“SM20.10 Assessment of whether a principal applicant* can realise their potential to successfully settle and contribute

- a. Assessment of whether a principal applicant* can otherwise demonstrate an ability or can realise their potential to settle in and contribute to New Zealand will be based on:

- i information obtained during a structured interview with the principal applicant* and if required, other family members included in the application; and
 - ii all other information contained in the application for residence; and
 - iii any further verification of the application (including information provided at interview).
- b. That assessment will include consideration of the following factors:
 - i employment prospects;
 - ii familiarity with New Zealand and preparedness for settlement of the principal applicant* and, where relevant, the partner and dependent children included in the application; and
 - iii linkages and support in New Zealand, through networks and family.
- c. If a visa or immigration officer assesses that a principal applicant* has not demonstrated the ability to successfully settle and contribute but can realise their potential to successfully settle in and contribute to New Zealand the principal applicant* will be eligible for the issue and/or grant of a work visa and/or permit (subject to the requirements of WR6 being met) to enable them to realise their potential by obtaining an offer of skilled employment (see SM7) in New Zealand.
- d. Principal applicants* who are in New Zealand and are granted permits under this policy will have the decision on their SMC application deferred for a period of nine months.
- e. Principal applicants* who are not in New Zealand and are issued visas under this policy will have the decision on their SMC application deferred for a period of 12 months to enable travel to New Zealand and a stay in New Zealand of nine months (refer to WR6.5).
- f. Where, following a further assessment, a principal applicant*, despite not meeting the requirements of SM20.5(a), is assessed as having a high potential to readily obtain skilled employment in New Zealand, they will be assessed as having demonstrated the ability to successfully settle in and contribute to New Zealand. Where this occurs, subject to meeting other relevant requirements, the principal applicant* and their family members included in the application, may be issued and/or granted residence visas and/or permits.
- g. If a visa or immigration officer determines, as a result of the further assessment, that a principal applicant* has not demonstrated they can realise their potential to settle in and contribute to New Zealand, their application for residence in New Zealand under the Skilled Migrant Category will be declined.
- h. If (c) above applies, but a work visa and/or permit is not issued and/or granted, the application for residence will be declined.

Effective 10/04/2007"

[44] The policy at SM20.10 does not set out the assessment process in the same descending order of eligibility as the policy at SM4.20. For clarity, the policy at SM20.10.c relates to SM4.20.f (can realise potential to settle and contribute);

SM20.10.f relates to SM4.20.d (high potential to readily obtain skilled employment) and SM4.20.e (demonstrated an ability to settle and contribute).

[45] Assessment of an applicant's ability to settle and contribute is based on the factors set out in SM20.10.a & b. The list of factors for consideration set out in SM20.10.b is not exhaustive or closed; other matters may be taken into account.

The Telephone Interview

[46] INZ established that the appellant met the first tier requirements. As part of the second tier assessment, he was invited to complete a questionnaire which dealt with employment prospects, preparedness and familiarity with New Zealand by asking a series of detailed questions, and to attend a telephone interview (SM20.10.a.i).

[47] There is no transcript of the telephone interview on the INZ file. The appellant's representative has provided a CD of the interview. The Board has listened to the CD. The recording is approximately nine minutes long.

[48] It is obvious to the Board that the appellant and the interviewing officer had a great deal of difficulty hearing and understanding each other. This appears to stem primarily from the poor telephone connection and the use of a speaker phone (necessary to record the interview). The interviewing officer's accent, sentence structure and use of English also appear to have impaired the appellant's understanding of some of the questions he was asked.

[49] The first two minutes of the interview dealt with preliminary matters necessary to verify that the person being interviewed was the appellant and questions about the appellant's representative. These matters were not relevant to INZ's assessment of the appellant's ability to settle and contribute.

[50] The next two minutes of the interview were spent establishing the appellant's preferred employment (bookkeeper, accountant or account executive). The officer then asked whether the appellant had applied for any positions. The appellant replied that he had applied for positions online but employers prefer an applicant who is directly present in New Zealand.

[51] The appellant was then asked whether he knew about the current labour market in New Zealand. He responded "not really". The officer went on to tell him that lots of people were losing their jobs and asked why he thought employers would hire him and not those people with local experience. The appellant referred

to his experience and abilities. He was asked how many years he had been working as an accountant and responded "eight years". This discussion of his employment prospects took approximately three minutes.

[52] The officer then moved on to settlement in New Zealand, asking the appellant where in New Zealand he intended to settle. The appellant responded that he would stay in Auckland where his brother is located. The officer established that, with the exception of his brother and immigration advisor, the appellant had no other friends or family living in New Zealand. The appellant advised that his brother would provide his initial accommodation in New Zealand.

[53] The appellant was questioned as to what he expected to earn from his first couple of jobs in New Zealand and responded "\$30,000 to \$50,000 per annum". The interviewer then returned to the question of accommodation and the appellant confirmed that his brother has his own home in Auckland. The officer asked how many bedrooms the appellant's brother's home had and how many people were living in it. Other than having some potential bearing on the credibility of the appellant's claim that his brother was offering accommodation, these questions have little relevance to the appellant's ability to settle and contribute. The discussion of the appellant's familiarity and preparedness for settlement occupied approximately two minutes of the interview time.

[54] The interviewing officer concluded the interview and asked the appellant whether he had anything else he wished to tell her. The appellant asked the officer whether she was going to interview his wife. She responded that she did not have any concerns about the wife at that time. The appellant also asked whether this was the last interview and the officer confirmed that it was.

[55] The Board considers that the telephone interview added almost nothing to the information that INZ already had about the appellant from his application and the questionnaire he completed. The interview was INZ's opportunity to explore in detail with the appellant any issues that had arisen from his responses given in the questionnaire or from his application.

[56] While it is for the appellant to demonstrate that he can realise his potential to settle in and contribute to New Zealand, policy required that INZ conduct a structured interview with him in order to obtain information. The interview was brief and elicited very little relevant information. The Board finds that the difficulties the appellant and the interviewing officer experienced in communicating with each other and the fact that detailed information relevant to

the appellant's employment prospects, familiarity and preparedness, and linkages and support was not sought, meant that INZ failed to properly implement the policy at SM20.10.a.i.

The Level of Eligibility Being Assessed

[57] To be eligible for a Work to Residence visa, the appellant need only satisfy the lowest level in the eligibility hierarchy (SM4.20.f) for settlement and contribution. As the Board has stated in other appeals, this level of eligibility requires the *realising of potential only*. In *Residence Appeal No 16492* (21 April 2010) the Board, differently constituted, explained [verbatim]:

“[74] The Board considers that ‘realising the potential to settle and contribute in New Zealand’ may be achieved when, among other things, an applicant provides credible evidence of having: thought about how to obtain employment in a field or fields related to their work experience and qualifications; attempted to obtain employment; a realistic appreciation of the opportunities and barriers to employment in their particular field; understood occupational licensing requirements (if applicable); a basic understanding about New Zealand and its way of life either through first hand experience or by obtaining information in relation to a range of matters directly related to settlement such as housing, transport, education, the climate, medical facilities and the like.

[...]

[78] It is evident that INZ required the appellant to have demonstrated that she had either been interviewed for employment in New Zealand by recruitment agencies of New Zealand employers, or had actually obtained an offer of employment. INZ was in effect requiring the appellant to demonstrate that she had a high potential to readily obtain skilled employment (SM4.20.d as assessed in terms of SM20.10.f). Whereas, it had said it was assessing her against the lowest level of eligibility SM4.20.f via an assessment at SM20.10.c. At this lowest level the appellant did not have to demonstrate that she already had employment or was being considered by an employer for a position here.”

[58] Reviewing the reasons given by INZ for declining the appellant's residence application (see [31] above), the Board finds that INZ failed to test the appellant against the lowest level in the eligibility hierarchy (SM4.20.f). The appellant did not need to demonstrate that he had received “positive feedback” from New Zealand recruitment agencies or employers, or that he was “pursued by them”. Nor was it necessary for the appellant or his spouse to have visited New Zealand in order to be familiar with aspects of the New Zealand way of life relevant to settlement; or to provide evidence that his brother could assist him in finding employment.

Relevance of Labour Market Information

[59] In its reasons for declining the appellant's application, INZ referred to information on the Work and Income website concerning the number of unemployed persons in the Auckland region who state their occupation as bookkeepers and accountants.

[60] In *Residence Appeal No 16492* (21 April 2010) at [81], the Board, differently constituted, observed that while INZ is entitled to have regard to general labour market conditions in New Zealand and to factors which influence employment opportunities and employability in particular occupations, such information cannot be determinative of whether an applicant will obtain skilled employment.

[61] Further, with regard to information from the Work and Income website, like that relied upon by INZ in the appellant's case, the Board stated at [82]:

“... without knowing the characteristics of those who are unemployed as to their skills, qualifications and work experience, it is hard to see how a valid comparison can be made between the raw information provided and the appellant's circumstances.”

Those observations apply equally to this appellant.

Familiarity, Preparedness, Linkages and Support

[62] INZ's assessment of the appellant's familiarity and preparedness for settlement and his linkages and support was inadequate and no valid reasons were given for its findings. INZ did not engage with the information provided by the appellant in his completed questionnaire and did not explore these matters with him in the telephone interview.

The Appellant's Qualification

[63] It appears to the Board that INZ incorrectly concluded that the appellant's qualification was included in the List of Qualifications Exempt from Assessment (Appendix 5) at the time his residence application was made (13 October 2008). At that time, the awarding university was on the List, but policy recognised:

“A four-year Bachelor degree awarded by an institution listed below with an average grade either between 1.00 and 2.00, or between A and B, or of 85% or better, depending on the grading system used, is assessed as occupying Level 7 or Level 5 of the Register and will therefore qualify for 50 points.”

From the transcript provided by the appellant, it does not appear that he obtained the minimum average grade. As such he needed to provide a New Zealand

Qualifications Authority (NZQA) assessment in order to be awarded points for his qualification. The Board notes that the appellant's qualification is recognised by the *current* List as comparable to a level 7 qualification; this strongly suggests that his qualification would be assessed as such by NZQA.

Conclusion on Correctness

[64] The Board finds that INZ did not properly apply the settlement and contribution policy to the appellant's application. He was not assessed against the lowest level in the eligibility hierarchy, the telephone interview was inadequate, and the conclusions drawn about the appellant's employment prospects and his familiarity and preparedness for settlement were reached after a process which did not properly explore these matters and were not supported by the evidence and information available to INZ.

STATUTORY DETERMINATION

[65] This appeal is determined pursuant to section 18D(1)(e) of the Immigration Act 1987. The Board considers the decision to refuse the visa was made on the basis of an incorrect assessment in terms of the applicable Government residence policy. However, the Board is not satisfied the appellant would, but for that incorrect assessment, have been entitled in terms of that policy to the immediate issue of a visa.

[66] The Board therefore cancels the decision of INZ. The appellant's application is referred back to the Secretary of Labour for a correct assessment in terms of the applicable Government residence policy, in accordance with the directions set out below.

Directions

[67] It should be noted that while these directions must be followed by INZ, they are not intended to be exhaustive and there may be investigations of other aspects of the application which remain to be completed or which require updating.

1. This application is to be reassessed by a different INZ officer in accordance with policy in existence at the date the application was made and without payment of a further lodgement fee.

2. INZ is to invite the appellant to provide an NZQA assessment of his qualification within a reasonable timeframe set by INZ (see paragraph [63] above). INZ shall continue to reassess his application in the interim.
3. On the basis that the appellant had the requisite points for employability and capacity building factors and therefore met the first-tier requirements in policy at SM2.m.i, ii & iii (in effect 10 April 2007), INZ is to consider if he meets the settlement and contribution requirements in SM2.m.iv.
4. INZ shall arrange for a different interviewing officer to re-interview the appellant. It shall be mindful of the Board's criticisms of the initial interview set out at paragraphs [48] and [56]. Fairness requires that the interview be conducted on a clear telephone line which enables the parties to properly communicate.
5. The appellant is to be given an opportunity to provide further information to demonstrate he meets the settlement and contribution requirements of policy.
6. The application is to then be correctly assessed in terms of whether the appellant meets the settlement and contribution requirements. If the appellant is to be "further assessed" under SM4.20.c, the eligibility hierarchy in SM4.20.d to f (in effect 10 April 2007) must be followed.
7. The Board emphasises that INZ is to ensure that it has taken into account all relevant information and that it is correctly considered in terms of SM4.20.d to SM4.20.f inclusive.
8. If INZ raises any issues of concern with the appellant, including issues as to his potential employability in New Zealand, they are to be correctly related to the eligibility hierarchy in SM4.20.d to SM4.20.f inclusive. The concerns themselves must be set out clearly with reasons. Any response by the appellant is to be considered and assessed against that eligibility hierarchy.
9. INZ shall not finally determine the appellant's application until he has provided an NZQA assessment of his qualification, or indicated that he does not wish to do so, or failed to do so within a reasonable time (see the Board's second direction, above).

[68] The appeal is allowed in the above terms. The appellant is to understand that the reassessment of the application does not guarantee a successful outcome.

.....
J Donald
Member
Residence Review Board