IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2014] NZIPT 201890**

AT AUCKLAND

Appellant:	**GU (Skilled Migrant)**
Before:	A M Clayton (Member)
Counsel for the Appellant:	A McClymont
Date of Decision:	27 May 2014

DECISION

INTRODUCTION

[1] The appellant is a 32-year-old citizen of India whose application for residence under the Skilled Migrant category, based on her claim to have skilled employment as a Financial Institution Branch Manager, was declined by Immigration New Zealand.

[2] This is an appeal against that decision. The Tribunal finds that Immigration New Zealand did not gather sufficient relevant information before making its final determination about the appellant's employment. Consequently, it cancels the Immigration New Zealand decision and refers the application back for a correct and complete assessment.

BACKGROUND

[3] The appellant and her husband (who is included in her application for residence) travelled together to New Zealand in August 2008. The appellant was initially a student. In April 2010 she began as a customer service representative at the Post Shop/Kiwibank/retail .business for which she still works. In July 2012 she was promoted to Store Manager.

[4] On 11 October 2012 the appellant lodged an application for residence on the basis of her occupation as a Post Office Manager (*Australian and New Zealand Standard Classification of Occupations* (ANZSCO) 142115).

[5] As well as points for her current skilled employment, she claimed points for her age; her qualifications, a Bachelor of Commerce in Accounting and Auditing (India, 2004) and a Postgraduate Diploma in International Business (New Zealand, 2010); her work experience as a Customer Service Representative at the business; and her partner's qualifications, a Bachelor of Computer Application (India, 2002) and a Masters of Business Administration (India, 2005).

[6] On 12 April 2013 Immigration New Zealand conducted a telephone interview with the appellant's employer. The employer owns the business and holds separate franchises for the retail arm of the business and for Kiwibank and New Zealand Post. The employer confirmed that the appellant worked 50 hours per week and was paid $40,000 per annum. He said there were 11 employees in the business who worked as tellers, retailers, and in stocktaking and invoicing. By law, the business had to have a manager on duty at all times. He, his wife (whose title was General Manager), and the appellant discussed prices, specials, and product mix in the store. The owner had not had to hire anyone to date but he would ask the appellant's opinion if someone new had to be selected. In answer to various questions from the interviewing officer, the employer confirmed that the appellant also ordered supplies and kept records of sale. Immigration New Zealand logged the call as eight minutes in duration.

[7] On 16 April 2013 Immigration New Zealand wrote to the appellant noting that a telephone interview with her employer had revealed that the business employed a General Manager, in the same position as the appellant held; that the appellant did not control prices and product mix; that she did not do budgeting or develop marketing policies as these tasks were done by the owner; no staff had been hired; and the appellant did not formulate purchasing policies but contacted head office to order supplies. The employer's description of the appellant's role and her job description were consistent and, on that information, the appellant's tasks and duties did not appear to substantially match those of ANZSCO 142115 (Post Office Manager).

[8] On 26 June 2013 the appellant's counsel responded with an 11-page submission and requested that the appellant's position be re-assessed against the ANZSCO position of a Financial Institution Branch Manager (149914). Counsel produced a letter from the appellant's employer (14 June 2013) who first

commented on the telephone discussion he had had with the immigration officer. The employer stated that during the interview he had answered only basic questions about the appellant's tasks, "expecting that the real technical questions would eventually allow me to explain [her] involvement in the crucial banking side of this business …". However, he said, the interview was terminated by the immigration officer before he was given the opportunity to do so.

[9] In his letter, the employer confirmed that the appellant's role had developed in such a way over the past nine months of her employment (since he had bought the business) that she was now responsible for "organising and controlling the core operations of our Kiwibank and NZ Post division", whereas previously her role had covered all three parts of the business, which included retail. Now, for example, she had to be up-to-date with all legal financial requirements including the Financial Transaction and the Anti-Money Laundering Acts. She created and maintained customer bank accounts, ensuring compliance; managed paperwork and records relating to customer accounts; managed cash, tills and foreign exchange reconciliations; managed and administered manual cheque transactions; trained, supervised and monitored the performance of staff; proactively took action to implement sales; managed customer services and ensured that staff adhered to customer service policies; managed the actual premises ensuring that they were presentable and secure; dealt with security protocols; and also budgeted and ordered over 50 different items for NZ Post.

[10] The employer stated that his branch was "number one" in providing Kiwibank products and financial services and all credit should go to the appellant and her team. He believed it would take several months, if not years, to train another person to perform the same role that the appellant was performing and he could not imagine finding any better manager than the appellant.

[11] The employer explained that the three businesses were franchise-based and each individual franchise controlled its own marketing, which was implemented by the business as a branch.

[12] Evidence was lodged to support the employer's claim that the appellant was "ultimately responsible for organising and controlling the core operations of our Kiwibank division", for instance, copies of Travelex stock return forms, a photograph of a whiteboard as evidence of the appellant's training and performance monitoring of staff, copies of checklists as evidence of her management and administration of manual cheque transactions, copies of cash collection summaries as evidence of managing security policies, and a photocopy

of the appellant's diary showing a record of Kiwibank customers and tasks, to demonstrate her involvement with customers and management over the creation and maintenance of their accounts.

[13] As far as the Post Office part of the business was concerned, the appellant was the one who was responsible for a stocktake each week and budgeting for the next week to see what supplies were needed, and advising how many corporate as well as normal customers needed to be supplied. With 5,000 customers per week this was not a small job. The employer stated that it had been impossible to tell the immigration officer all this, and more, in the eight-minute discussion they had had.

Immigration New Zealand Decision

[14] On 11 September 2013 Immigration New Zealand declined the application. It set out its concerns (as in paragraph [7] above) and then summarised the submissions of the appellant's counsel and her employer. It noted that ANZSCO states that a Financial Institution Branch Manager "organises and controls the general operational activities of a bank, building society, credit union or similar financial institution". The employer's statement that the appellant was focusing on managing the Kiwibank part of the business was not confirmed by her job description or the new information provided. The job description did not indicate that the appellant's priority was to manage Kiwibank business and the relevant responsibilities outlined by the employer did not "appear to contain much managerial component". The establishment for which the appellant worked was "not a normal bank", in that banking was only one of three services provided.

[15] Immigration New Zealand advised that, while the appellant could be allocated 125 points (25 for age, 60 for her qualification, 20 for work experience and 20 points for her partner's qualification), without points for skilled employment her application had to be declined as she did not meet the relevant selection criteria.

GROUNDS OF APPEAL

[16] Section 187(1)(a)(i) of the Immigration Act 2009 (the Act) provides:

> (1) There is a right of appeal to the Tribunal against a decision concerning a residence class visa in the following circumstances:

> (a) an applicant for a residence class visa may appeal against—
>
> (i) a decision of an immigration officer to decline to grant the visa (including in the circumstances described in section 190(2)(b)):

[17] Section 187(4) of the Act further provides:

> (4) The grounds for an appeal under this section are that—
>
> (a) the relevant decision was not correct in terms of the residence instructions applicable at the time the relevant application for the visa was made; or
>
> (b) the special circumstances of the appellant are such that consideration of an exception to those residence instructions should be recommended.

[18] The appellant lodged her appeal on 14 October 2013 on the basis that the Immigration New Zealand decision was incorrect. Her counsel lodged a submission (9 October 2013) along with copies of relevant Immigration New Zealand correspondence.

ASSESSMENT

[19] The Tribunal has been provided with the Immigration New Zealand file in relation to the appellant's residence application and has considered the submissions provided on appeal. An assessment as to whether the Immigration New Zealand decision to decline the appellant's application was correct in terms of the applicable Government residence instructions is set out below.

Skilled Migrant Category Instructions

[20] The appellant's application was made on 11 October 2012 and the relevant instructions are those contained in Government residence instructions as at that date. Without points for skilled employment, the appellant's application could not succeed as it did not otherwise meet the selection criteria.

[21] SM7.10.1.a states that employment will be assessed as skilled if there is a substantial match between an applicant's employment and the relevant ANZSCO description for that occupation:

> **SM7.10.1 Assessment of whether employment is skilled**
>
> An offer of employment or current employment in New Zealand will be assessed as skilled if it meets the requirements of (a), (b) or (c) below.

a. The occupation is included in part A of the List of Skilled Occupations held at Appendix 6 and the principal applicant can demonstrate that their offer of employment or current employment substantially matches the description for that occupation (including core tasks) as set out in the ANZSCO and:

   i. the applicant holds a relevant recognised qualification which is at, or above, the qualification level on the NZQF (see SM14.5) that corresponds to the indicative skill level described for that occupation in the ANZSCO; or

   ii. the applicant has the relevant recognised work experience that the ANZSCO indicates may substitute the required qualification; or

   iii. the employment is in an occupation included on the Long Term Skill Shortage List and the applicant meets the relevant requirements specified in column three of the Long Term Skill Shortage List for that occupation.

   iv. notwithstanding (a) (ii), applicants with Skill Level One Occupations can substitute the required qualification with five years of relevant work experience.

…

Effective: 07/11/2011

[22] The position of Post Office Manager is included in Part A of the List of Skilled Occupations at Appendix 6 of Government residence instructions. It is included under the Unit Group of Retail Managers in ANZSCO and is defined as a person who "organises and controls the operations of a post office".

[23] The Unit Group occupation description for Retail Managers outlines eight core tasks:

- determining product mix, stock levels and service standards
- formulating and implementing purchasing and marketing policies, and setting prices
- promoting and advertising the establishment's goods and services
- selling goods and services to customers and advising them on product use
- maintaining records of stock levels and financial transactions
- undertaking budgeting for the establishment
- controlling selection, training and supervision of staff
- ensuring compliance with occupational health and safety regulations

[24] Immigration New Zealand began its investigation into the nature of the appellant's employment by telephoning her employer. A transcript of that interview is contained on the Immigration New Zealand file. It would appear that the immigration officer used the eight ANZSCO Retail Managers' tasks as a framework for her questions. That is, she asked in quick succession whether the appellant had any control over the business' product mix, budgeting, marketing, promotions and advertising, staff selection, ordering of supplies, and keeping records. After the employer had answered the last of these questions, he was asked whether he was happy with the appellant's performance, to which he replied

"she's fantastic". The employer was then asked to send copies of the appellant's payslips and the call is recorded by Immigration New Zealand to have been terminated after eight minutes.

[25] The appellant's employer later complained that the telephone call was too short, that he was waiting to be asked more particular questions about the appellant's tasks, and he was not asked in any open way to explain about the appellant's position. While Immigration New Zealand told the appellant's counsel that the questions were "focused", the Tribunal agrees there was no invitation, let alone opportunity, for the appellant's employer to give a full description of the appellant's tasks. And from a review of the transcript of the telephone call, it is clear that the interview came to an abrupt end.

[26] Having said that, the Tribunal notes that Immigration New Zealand gave the appellant an opportunity to comment on its initial assessment that her employment was not skilled. It sent her a detailed letter on 16 April 2013.

[27] The appellant's counsel replied in an equally detailed letter on 26 June 2013. In this letter, he expressly requested Immigration New Zealand to assess the appellant's position against the ANZSCO occupation of Financial Institution Branch Manager. Counsel explained that, since the business had changed hands, the appellant's role had gradually focused more on the management of the Kiwibank side of the business, something that had become plain to counsel after he had spoken with the appellant and her employer. A letter from the employer outlined the appellant's responsibilities and it was submitted that this amply showed that she organised and controlled the general operational activities of a branch of a bank.

[28] Having received the request to assess the appellant's position in terms of her being a Financial Institution Branch Manager, rather than a Post Office Manager, together with new evidence from her employer to support such an assessment, Immigration New Zealand should have re-visited its assessment of the appellant's employment. The most obvious thing to do was to visit the appellant's workplace or, at the very least, talk at more length to her and her employer about the actual responsibilities of her position.

[29] Instead, in its decline letter, Immigration New Zealand relied on three matters to find that the appellant's employment did not substantially match the classification of either a Post Office Manager or a Financial Institution Branch Manager. First, Immigration New Zealand stated that the appellant's job

description (which was appended to her employment contract as a Store Manager and lodged with her application some nine months earlier) did not support the claim that she was acting as a Financial Institution Branch Manager. However, it had been expressly highlighted by the appellant's employer and by her counsel that her role had changed since the employer had taken over the franchise nine months earlier. He had relied more and more on her expertise in the Kiwibank segment of his business.

[30] Second, Immigration New Zealand recorded that the new information provided by the employer "did not appear to have much of a managerial component". On the evidence available to Immigration New Zealand, and without further explanation, this conclusion cannot be justified.

[31] Third, Immigration New Zealand noted that the business for which the appellant worked was "not a normal bank and banking is only one of three services provided". This was an irrelevant consideration. Kiwibank is a bank and therefore a financial institution. It is quite possible for the appellant to be a person who organises and controls the operation of the banking part of the business, if that occupies the majority of her working hours, even though that is only a part of the business.

[32] The appellant's counsel submits that Immigration New Zealand failed to provide adequate reasons for its decision. The principal reason the decision cannot be confirmed is that Immigration New Zealand plainly had insufficient information upon which to make a final determination about whether the appellant's role substantially matched that of a Financial Institution Branch Manager. The fact that it failed to give adequate reasons simply reflects that.

[33] For the foregoing reasons, the Immigration New Zealand decision to decline the appellant's application was incorrect and the application must be the subject of a fresh assessment. Nonetheless, the appellant must understand that the eventual success of her application is not guaranteed.

STATUTORY DETERMINATION

[34] This appeal is determined pursuant to section 188(1)(e) of the Immigration Act 2009. The Tribunal considers the decision to refuse the visa was made on the basis of an incorrect assessment in terms of the applicable Government residence instructions. However, the Tribunal is not satisfied the appellant would, but for that

incorrect assessment, have been entitled in terms of those instructions to the immediate grant of a visa.

[35] The Tribunal therefore cancels the decision of Immigration New Zealand. The appellant's application is referred back to the chief executive of the Ministry of Business, Innovation and Employment for a correct assessment in terms of the applicable Government residence instructions, in accordance with the directions (which are not exhaustive) below.

Directions

1. The appellant's application is to be reassessed by an immigration officer who has had no previous association with the application, in accordance with the residence instructions in existence at the time the application was made. No further lodgement fee is payable by the appellant.

2. Immigration New Zealand is to give the appellant an opportunity to update her current position, salary, and job description. The appellant should supply evidence from her employer on all these matters plus any further matters which might assist her claim to have an employment position which substantially matches an ANZSCO occupation. The appellant is also to confirm against which ANZSCO classification she wishes her occupation to be assessed.

3. The Tribunal recommends that Immigration New Zealand conduct a workplace visit at which time it can also talk to the appellant and her employer and thereby obtain a clear picture of the appellant's role.

4. Immigration New Zealand is then to determine whether the appellant's employment position substantially matches that of the ANZSCO classification she has chosen. It shall put any potentially prejudicial information to the appellant and give her an opportunity to make submissions or present information in regard to any of its concerns.

"A M Clayton"
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Member