IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2016] NZIPT 203162**

AT AUCKLAND

Appellant:	**BJ (Migrant Investor)**
Before:	M B Martin (Member)
Representative for the Appellant:	T Delamere
Date of Decision:	27 May 2016

RESIDENCE DECISION

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[1] The appellant is a 43-year-old citizen of China. His application for residence, made under the Business (Migrant Investment – Investor 2) category, includes his 43-year-old wife and their two children, aged 9 and 15 years.

THE ISSUE

[2] Immigration New Zealand declined the appellant's application because he did not satisfy the business experience requirements of Government residence instructions.

[3] The principal issue for the Tribunal is whether Immigration New Zealand conducted a fair and proper assessment of the appellant's claimed business experience. The Tribunal finds that it did not, for the reasons set out below. The decision to decline was not correct and so the application is returned to Immigration New Zealand for a correct assessment.

BACKGROUND

[4] On 3 March 2014, the appellant lodged an Expression of Interest under the Business (Migrant Investment – Investor 2) category. He claimed nine points for three years of business experience (March 2010 to March 2013). The appellant

relied on his role as the deputy general manager of an investment company ("the company") which employed in excess of five employees.

[5] The appellant declared that he would invest NZ$1.5 million in New Zealand. He owned an additional NZ$1 million which would be used as settlement funds. Immigration New Zealand's electronic records note the appellant's advice that, from 2009 to 2013, he received total income from employment of RMB500,000.

[6] On 6 March 2014, the appellant was invited to apply for residence.

Application for Residence

[7] On 12 June 2014, the appellant made his application for residence. He produced evidence in support of his nominated investment and settlement funds and the following evidence in support of his business experience:

(a) An "Enterprise Entity Business License" confirming the company was registered with the local "Market Supervision Administration".

(b) An employment certificate (10 April 2014) from the company's legal representative. The certificate recorded that the company was established in December 2009. It was a "comprehensive investment enterprise" with seven departments. There were 15 employees in the head office. The appellant was an excellent deputy general manager. Under his management, the company had established an internal management system and "optimised internal management processes". He had played a leading role in implementing a performance assessment system and "perfected the employee motivation and training system". His main duties included:

(i) Formulating the company's development strategies and plans, which included overall responsibility for formulating and implementing the company's annual operation plans and directing all departments to formulate their job objectives and plans.

(ii) Responsibility for the company's daily operation and management works, which included: assisting the general manager to adjust the internal management structure as required and improve the company's workflow; playing a leading role in personnel management and human resources;

developing the company's corporate culture and shaping its corporate values; assisting the general manager with day-to-day company tasks; signing off daily administrative and business documents; and assisting the general manager to carry out public relations activities.

(iii) Responsibility for the Project Department, which included: team building; making recommendations in respect of the appointment and dismissal of middle managers; overseeing the daily management works of the department; providing assistance to VIP customers and "key counterpart units"; and assisting the general manager with any incidents.

(c) "Social Insurance Employer Payment" statements in respect of the company dated March 2013 and March 2014. Both documents included the appellant as an employee and recorded his and his employer's contributions to the various insurances covered by the scheme. The 2013 document confirmed a total of eight employees. The 2014 document confirmed a total of 15 employees.

(d) A selection of commercial contracts entered into between the company and other parties between 2011 and 2014. Each contract was signed by the appellant on behalf of the company.

(e) A business card and photographs said to be of the appellant and his colleagues at the company headquarters.

Letter Containing Potentially Prejudicial Information

[8] On 7 July 2015, Immigration New Zealand advised the appellant that principal applicants under the Business (Migrant Investment – Investor 2) category must qualify for the points on the basis of which their Expression of Interest was selected and also must have a minimum of three years of recognised business experience. Business experience was recognised for the award of points if it was experience in planning, organisation, control, senior change-management, direction-setting and mentoring acquired through ownership of, or management-level experience in, a lawful business enterprise that had at least five full-time employees or an annual turnover of NZ$1 million.

[9] Immigration New Zealand advised the appellant that he had not produced a company audit report for the period 2010 to 2013 demonstrating the company had an annual turnover of NZ$1 million. There was also no evidence confirming the number of employees working for the company during each of 2010, 2011 and 2012. In addition, the evidence that had been produced did not confirm the appellant's "active" employment within the company.

[10] The appellant was invited to produce further evidence, including: audited financial reports for the company (2010 to 2013); further social insurance records confirming the number of employees from 2010 to 2012; his personal social insurance records confirming his employer's name; evidence of his employment; and personal income tax certificates.

[11] Immigration New Zealand also pointed to a lack of evidence demonstrating the appellant's nominated funds had been lawfully acquired. It is not necessary to set out this part of Immigration New Zealand's letter in any further detail.

The Appellant Produces Further Evidence

[12] On 5 August 2015, the appellant's then representative produced the following evidence in support of the appellant's business experience:

(a) Social insurance records for the company which confirmed the appellant was working for the company between August 2010 and May 2014, and that throughout that period the company's number of employees had grown from eight (in August 2010) to 15 (by May 2014).

(b) Six additional commercial contracts executed by the company and other parties between 2010 and 2013, each signed by the appellant on behalf of the company.

(c) Two letters of recommendation. The first (undated) was from a friend confirming that the appellant worked for the company as deputy general manager. The second letter (15 July 2015) was from the director of a business that had a commercial relationship with the appellant's company. The director advised he had a very good relationship with the appellant in his capacity as deputy general manager of the company.

(d) Eight expense reimbursement and internal payment documents approved by the appellant between 2010 and 2013.

[13] The representative also responded to Immigration New Zealand's concerns about the lawfulness of the nominated funds, producing supporting evidence.

Immigration New Zealand Decision

[14] On 24 August 2015, Immigration New Zealand declined the appellant's application because he did not satisfy the business experience requirements of instructions. It accepted his nominated funds had been lawfully acquired.

STATUTORY GROUNDS

[15] The appellant's right of appeal arises from section 187(1) of the Immigration Act 2009 (the Act). Section 187(4) of the Act 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.

[16] The residence instructions referred to in section 187(4) are the Government residence instructions contained in Immigration New Zealand's Operational Manual (see www.immigration.govt.nz).

THE APPELLANT'S CASE

[17] On 8 October 2015, the appellant lodged this appeal on the ground that the decision of Immigration New Zealand was not correct in terms of the applicable residence instructions.

[18] The appellant's new representative makes submissions on appeal and provides copies of documents contained on Immigration New Zealand's residence files. He also produces copies of correspondence with Immigration New Zealand in respect of two complaints he had previously lodged about the way in which the appellant's application was assessed. Both complaints were dismissed, with

Immigration New Zealand advising that the Tribunal was the appropriate body to address the representative's concerns.

ASSESSMENT

[19] The Tribunal has considered the submissions and documents provided on appeal and the files in relation to the appellant's residence application which have been provided by Immigration New Zealand. The Tribunal records that, while the files appear to be almost complete, the Expression of Interest form is not on any of the files. This has not impacted, however, on the Tribunal's ability to conduct a full and proper assessment of Immigration New Zealand's determination, relying in part on Immigration New Zealand's electronic records.

[20] An assessment as to whether the Immigration New Zealand decision to decline the appellant's application was correct in terms of the applicable residence instructions is set out below.

Whether the Decision is Correct

[21] The application was made on 12 June 2014 and the relevant criteria are those in residence instructions as at that time. Immigration New Zealand declined the application because the appellant did not satisfy the business experience requirements of instructions. The relevant instructions are set out below.

Business (Migrant Investment – Investor 2) category instructions

[22] The appellant made his application for residence under the Business (Migrant Investment – Investor 2) category. Instruction BJ5.5.b.iv, effective 29 November 2010, and BJ5.30.a, effective 25 July 2011, state that principal applicants under the Investor 2 category must have a minimum of three years of recognised business experience.

[23] Instruction BJ5.30.1 is relevant and provides:

> **BJ5.30.1 Basic rules for business experience**
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> a. Business experience is recognised for the award of points if it is experience in planning, organisation, control, senior change-management, direction-setting and mentoring acquired through ownership of, or management level experience in, a lawful business enterprise that has at least five full-time employees or an annual turn-over of NZ$1 million.
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> b. A principal applicant is considered to own a business if they own at least 25 percent of a business.

c. A lawful business enterprise is an organisation that:

i. operates lawfully in a commercial environment with the goal of returning a profit; and

ii. is not set up primarily for passive or speculative purposes.

…

Effective 25/07/2011

[24] The evidence provision is contained at BJ5.30.10 and provides:

BJ5.30.10 Evidence of the principal applicant's business experience

a. Documents submitted as evidence of the principal applicant's business experience must show the position(s) and the responsibilities held.

b. Evidence of the principal applicant's business experience can include, but is not limited to, original or certified copies of the following documents as are necessary to allow a business immigration specialist to make a decision:

i. business registration
ii. company financial accounts
iii. company tax returns and tax records
iv. shareholder certificates or proof of ownership of business
v. job specifications
vi. job assessments
vii. personal tax returns
viii. letters of appointment
ix. certificates of service
x. strategic planning documents
xi. references from employers on company letterhead, stating the occupation and dates of employment, and giving the contact phone number and address of the employer.

c. A business immigration specialist may require additional documents, evidence and information as they consider necessary to determine an application.

…

Note: Documents provided as evidence of business experience must, in combination, demonstrate experience of all the elements contained within the requirements for recognition of the business experience (see BJ5.30.1).

…

Effective 25/07/2011

[25] The appellant claimed he had three years of recognised business experience, acquired between March 2010 and March 2013. He relied on his role as the deputy general manager of a Chinese-based investment company.

Immigration New Zealand's decision to decline

[26] Immigration New Zealand, in declining the application, stated that the appellant had claimed total income from his employment of RMB500,000 between 2009 and 2013 (or RMB100,000 during each of those five years). It appeared the

income he was earning from his employment was “low for a managerial role”. Further, there was insufficient “independent verifiable evidence” to show that he had been involved in planning, organisation, control, senior change-management, direction-setting and mentoring acquired through a management role within the company.

The requirements of BJ5.30.1

[27] The Tribunal, in *AW (Migrant Investor)* [2016] NZIPT 203075, *AY (Migrant Investor)* [2016] NZIPT 203057, and *BA (Migrant Investor)* [2016] NZIPT 203048, has recently explained that BJ5.30.1.a contains a number of requirements which can be separated out and summarised as follows:

(a) First, the principal applicant must have business experience which has been acquired through ownership of, or management-level experience in, the business relied on. Paragraph BJ5.30.1.b states that a principal applicant is considered to own a business if they own at least 25 per cent of a business.

(b) Second, the principal applicant must demonstrate that their business experience is in “planning, organisation, control, senior change-management, direction-setting and mentoring”.

(c) Third, the business relied on must be a “lawful business enterprise” as defined by BJ5.30.1.c. This provision states, as set out above, that a lawful business enterprise is an organisation that operates lawfully in a commercial environment with the goal of returning a profit. The organisation must not be set up primarily for passive or speculative purposes.

(d) Finally, the business must have at least five full-time employees or an annual turnover of NZ$1 million.

[28] For the reasons detailed below, the Tribunal finds that Immigration New Zealand failed, in this case, to either assess or correctly assess most of the above elements.

Ownership or management-level experience

[29] The appellant did not claim he owned the company. He relied on the fact that he had been an employee working for the company at "management level" (refer to point (a) noted at [27] above).

[30] Immigration New Zealand stated, in its final assessment summary document, that the appellant had provided insufficient "independent and verifiable documentation to substantiate his claim of employment at a managerial level". It also found that his declared income seemed too low for a person in a managerial role.

[31] The Tribunal does not accept Immigration New Zealand's finding in respect of the "management level" factor was correct. With respect to the lack of "independent and verifiable documentation" to confirm the appellant's claimed managerial-level experience, the Tribunal notes that this was clearly a reference to a failure to produce sufficient evidence from "official" sources, such as local government agencies. This is a common criticism made by Immigration New Zealand when declining investor applications pursuant to BJ5.30.1.a. However, as the Tribunal has previously stated, often some of the best evidence of an applicant's role and experience within a company will come from sources other than official agencies, such as the employing company. Indeed, in this case, some "official" evidence was produced, namely the appellant's social security records, but while these documents confirmed he was an employee of the company, they did not, nor were they designed to, demonstrate what sort of role he performed within the company.

[32] Having considered the letter of decline and final assessment summary document, the Tribunal finds that Immigration New Zealand failed to properly assess and weigh the detailed employment certificate generated by the company's legal representative. This document recorded that the appellant had worked in the company since 2010 as the deputy general manager. A detailed description of his managerial responsibilities was set out. This was relevant evidence and came from one of the best sources of information about the appellant's role – the employer. There is nothing to suggest to the Tribunal that the certificate was unreliable or inaccurate.

[33] In addition, Immigration New Zealand did not expressly consider the commercial agreements submitted (which were signed by the appellant as a representative of the company), the expense claim documents signed by the

appellant as a company “leader”, and the two letters of recommendation confirming his role as deputy general manager.

[34] By not having proper regard to the above evidence, Immigration New Zealand breached A1.5 of the fairness instructions, effective 29 November 2010, including the requirements to consider all known relevant information and to give an application proper consideration.

[35] With respect to Immigration New Zealand’s concern that the appellant’s claimed income appeared to be “low for a managerial role”, the Tribunal does not accept Immigration New Zealand was in a position to make such a finding. Certainly, fairness dictated that such a crucial part of its determination should have been first put to the appellant for comment, in accordance with A1.5, which includes the requirement to inform an applicant of information that might harm their case.

[36] For the above reasons, the Tribunal finds that Immigration New Zealand did not fairly or properly assess whether the appellant had been employed at “management level”.

The type of business experience required

[37] In terms of point (b) noted at [27] above, Immigration New Zealand found that the appellant had not demonstrated he had experience in planning, organisation, control, senior change-management, direction-setting and mentoring (in respect of his time at the company). However, Immigration New Zealand again had no express regard to the evidence produced by the appellant setting out the type of business experience he had obtained at the company. For example, the certificate from the company’s legal representative recorded that the appellant formulated and implemented the company’s development strategy and annual operation plans, assisted with adjustments to the company’s internal management structure, was involved in human resource matters, and was in charge of the Project Department (which included dealing with appointment and dismissal matters, supervision and resolving incidents). This certificate should have been properly weighed as part of Immigration New Zealand’s assessment of the appellant’s business experience.

[38] The Tribunal is also concerned that, in the letter containing potentially prejudicial information dated 7 July 2015, Immigration New Zealand did not clearly put to the appellant that it was not satisfied he had experience in planning,

organisation, control etc. Further, it provided no guidance as to the type of evidence to produce in respect of this matter. The specific documentation it did request, such as company financial statements, social insurance records and personal tax certificates, had no relevance to the type of experience the appellant had obtained while at the company. Immigration New Zealand also made no reference to, nor did it provide the appellant with a copy of, the evidence provision at BJ5.30.10. This provision sets out examples of relevant evidence to produce, such as references from employers on company letterhead, letters of appointment, job assessments and job specifications.

[39] The Tribunal finds that Immigration New Zealand breached the fairness requirements of instructions for the reasons set out above. It did not fairly or properly assess whether the appellant had obtained experience in planning, organisation, control, senior change-management, direction-setting and mentoring acquired during his time with the company.

Lawful business enterprise

[40] In terms of point (c) noted at [27] above, Immigration New Zealand made no finding as to whether or not the company was a “lawful business enterprise”, as defined at BJ5.30.1.c. The Tribunal, having considered all the evidence produced by the appellant, is satisfied the company is operating lawfully in a commercial environment with the goal of returning a profit.

Five full-time employees

[41] In terms of point (d) noted at [27] above, Immigration New Zealand stated, in its assessment summary, that it accepted the company had in excess of five full-time employees from March 2010 to March 2013. The Tribunal accepts that finding was correct.

Conclusion on correctness of decision to decline

[42] For the reasons set out above, taken together, the Tribunal finds that Immigration New Zealand’s decision to decline the application was not correct. It did not fairly or properly assess the appellant’s application. The application is returned to Immigration New Zealand for a correct assessment.

Observation

[43] Immigration New Zealand's electronic records confirm that the appellant claimed, in his Expression of Interest, three years of business experience. He relied on his time at the company between March 2010 and March 2013 (although the evidence indicates he continued working for the company up to and during the assessment). The Tribunal does not have a copy of the appellant's Expression of Interest form to confirm the claimed period, but this is not an issue in dispute on appeal.

[44] The Tribunal notes that the employment certificate produced by the appellant during the assessment recorded that he commenced working for the company in July 2010. If that is the case, his claimed period of employment would fall below the minimum three-year period and there would be an issue as to whether he provided inaccurate information in his Expression of Interest.

[45] Immigration New Zealand did not turn its mind to the above matter. The Tribunal simply raises this issue as it is something that will need to be put to the appellant in the new assessment, directed below, and then further addressed by Immigration New Zealand in accordance with the applicable instructions.

DETERMINATION

[46] 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 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.

[47] 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 by Immigration New Zealand in terms of the applicable residence instructions, in accordance with the directions set out below.

Directions

[48] It should be noted that while these directions must be followed by Immigration New Zealand they are not intended to be exhaustive and there may be other aspects of the application which require further investigation, remain to be completed or which require updating.

1. The application is to be reassessed by an Immigration New Zealand officer not previously associated with the application in accordance with the instructions in existence at the date the residence application was made. No further lodgement fee is payable.

2. In the absence of any new evidence to the contrary, Immigration New Zealand is to proceed on the basis that the company was a "lawful business enterprise" that had at least five full-time employees from 2010 to 2013 (BJ5.30.1.a and c).

3. Immigration New Zealand is to write to the appellant to confirm the period of his claimed business experience (refer to [43] to [45] above). He is also to be invited to produce further evidence in support of his having been employed in a management-level role, along with evidence demonstrating that his experience was in, among other things, "planning, organisation, control, senior change-management, direction-setting and mentoring". He must be provided with a copy of BJ5.30.10, with Immigration New Zealand setting out any other evidence that it requires to assist with its assessment pursuant to BJ5.30.1.a. The appellant must also be provided with a copy of BJ5.30.1.

4. Immigration New Zealand must consider all new evidence produced by the appellant, along with all evidence previously produced and the representative's submissions on appeal, before making a finding as to whether or not the appellant satisfies BJ5.30.a and BJ5.30.1.a.

5. If, at any stage, Immigration New Zealand finds potentially prejudicial matters which must be put to the appellant, it is to do so in clear and concise terms with reasons. The appellant is to be given a reasonable opportunity to respond.

[49] The appellant is to understand that the success of this appeal does not guarantee that his application will be successful, only that it will be subject to reassessment by Immigration New Zealand.

[50] The appeal is successful in the above terms.

Order as to Depersonalised Research Copy

[51] Pursuant to clause 19 of Schedule 2 of the Immigration Act 2009, the Tribunal orders that, until further order, the research copy of this decision is to be depersonalised by removal of the appellant's name and any particulars likely to lead to the identification of the appellant.

"M B Martin
M B Martin
Member

Certified to be the Research Copy released for publication.

M B Martin
Member