

AT AUCKLAND

Appellant: OT (Skilled Migrant)

Before: Z N Pearson (Member)

Representative for the Appellant: T Delamere

Date of Decision: 8 June 2016

RESIDENCE DECISION

[1] The appellant is a 33-year-old citizen of Malaysia, whose application for residence under the Skilled Migrant category of instructions was declined by Immigration New Zealand. His application includes his wife, aged 36, and their daughter, aged two-and-a-half.

THE ISSUE

[2] Immigration New Zealand declined the appellant's residence application because it was not satisfied that his role as a direct sales manager for a mobile sales company substantially matched the *Australian and New Zealand Standard Classification of Occupations* (ANZSCO) description, including core tasks, of a Sales and Marketing Manager. Without points for skilled employment, the appellant did not have sufficient points to meet the minimum selection criteria of the Skilled Migrant category.

[3] The principal issue for the Tribunal is whether Immigration New Zealand acted fairly and properly in its assessment of the appellant's application. For the reasons that follow, the Tribunal finds that Immigration New Zealand did not act fairly as it failed to properly raise the reasons for its decision with the appellant for comment prior to declining the appellant's application. The decision is returned to Immigration New Zealand for a correct assessment.

BACKGROUND

[4] The appellant lodged his Expression of Interest under the Skilled Migrant category of instructions on 2 March 2015 and was invited to apply for residence. He made his application for residence under the Skilled Migrant category of instructions on 4 June 2015. He claimed 125 points, which included 60 points for skilled employment as a direct sales manager, a position he claimed substantially matched the ANZSCO description of a Sales and Marketing Manager. He provided a copy of his individual employment agreement and job description. He was paid \$42,000 per annum.

Employment Verification

[5] On 23 June 2015, the appellant's employer, one of the two managing directors for the company, responded to Immigration New Zealand's employer questionnaire. He answered questions about the appellant's role and responsibilities, explaining that the appellant's role was a new position in the company. He also provided documents requested by Immigration New Zealand, including an organisational chart for the establishment.

Not a Substantial Match

[6] On 10 September 2015, Immigration New Zealand advised the appellant that it was not satisfied that his role substantially matched the ANZSCO descriptions of either a Sales and Marketing Manager or a Technical Sales Representative. It was also not satisfied that he was undertaking the core tasks for either of these ANZSCO occupations because it had no documentary evidence to substantiate his claimed responsibilities. In addition, it appeared that his employer was involved in the daily operation of the company, which limited the decision-making that the appellant was able to exercise. It had been unable to identify an alternative occupation on the List of Skilled Occupations that was a fit for his role. Without points for skilled employment, he would not have sufficient points to meet the minimum selection criteria of the Skilled Migrant category.

Appellant's Response

[7] The appellant responded to Immigration New Zealand's concerns on 23 September 2015. He made comments about the extent to which he was responsible for undertaking the ANZSCO core tasks for a Sales and Marketing Manager and provided documents to demonstrate his responsibilities. He

explained that because his position was a newly-created one, he had had to create a number of initiatives to develop the sales department. He stated that his employer was not involved in the daily operation of the company and had other businesses to run.

Immigration New Zealand Decision

[8] On 21 October 2015, Immigration New Zealand declined the appellant's application because it was not satisfied that his role as a direct sales manager substantially matched the ANZSCO description of a Sales and Marketing Manager or of a Technical Sales Representative. Without points for skilled employment, the appellant was awarded 65 points, which was not sufficient to meet the minimum selection criteria of the Skilled Migrant category.

STATUTORY GROUNDS

[9] 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.

[10] 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

[11] On 10 December 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.

[12] The appellant's newly-appointed representative makes submissions on appeal (undated) and provides copies of documents already on the Immigration New Zealand file. The representative submits that Immigration New Zealand

acted contrary to the principles of fairness and natural justice, was biased and predetermined the decision. Further, Immigration New Zealand failed to consider the relevant information and evidence before it and provided inappropriate reasons for declining the application.

ASSESSMENT

[13] 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.

[14] 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

[15] The application was made on 4 June 2015 and the relevant criteria are those in residence instructions as at that time. Immigration New Zealand declined the application because it was not satisfied that the appellant's role as a direct sales manager substantially matched the ANZSCO description, including core tasks of a Sales and Marketing Manager or of a Technical Sales Representative.

Relevant instructions

[16] The instructions required that Immigration New Zealand act according to the principles of fairness and natural justice, as set out below:

A1.5 Fairness

a. Whether a decision is fair or not depends on such factors as:

...

- whether the applicant is informed of information that might harm their case (often referred to as potentially prejudicial information);
- whether the applicant is given a reasonable opportunity to respond to harmful information;

...

- whether appropriate reasons are given for declining an application;

...

- whether all known relevant information is considered.

...

Effective 29/11/2010

[17] Paragraph SM7.10 of instructions states that skilled employment requires specialist, technical or management expertise, and the assessment of whether an occupation is skilled is primarily based on the ANZSCO:

SM7.10 Skilled Employment

- a. Skilled employment is employment that requires specialist, technical or management expertise obtained through:
 - i. the completion of recognised relevant qualifications; or
 - ii. recognised relevant work experience (see SM7.10.15 below); or
 - iii. the completion of recognised relevant qualifications and work experience.
- b. Assessment of whether an occupation is skilled for the purposes of the Skilled Migrant Category (SMC) is primarily based on the Australian and New Zealand Standard Classification of Occupations (ANZSCO) which associates skill levels with each occupation.

Note: The ANZSCO is available at www.immigration.govt.nz/ANZSCO

Effective 14/05/2013

[18] For an applicant to be awarded points for his or her skilled employment, SM7.10.1.a requires that their employment substantially match the ANZSCO description, including core tasks, of an occupation on the List of Skilled Occupations at Appendix 6 of instructions:

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:

...

Effective 14/05/2013

ANZSCO requirements

[19] The ANZSCO occupation of Sales and Marketing Manager (131112) is described in the ANZSCO Unit Group 1311 Advertising, Public Relations and Sales Managers. This occupation is included in Part A of the List of Skilled Occupations at Appendix 6 of residence instructions. The ANZSCO describes a

Sales and Marketing Manager as someone who “plans, organises, directs, controls and coordinates the sales and marketing activities within an organisation”.

The core tasks for the unit group are:

- directing the development and implementation of sales strategies and setting sales targets in order to maximise an organisation’s sales and customer loyalty
- directing the development and implementation of strategies to promote an organisation’s goods and services to as many people as possible
- directing the development and implementation of strategies to generate increased consumption of an organisation’s goods and services through the creation and reinforcement of ‘brand image’ or ‘brand loyalty’
- directing the development and implementation of strategies to build and maintain an organisation’s image and reputation with its customers, investors and the wider public.

[20] A Sales and Marketing Manager oversees and directs an organisation’s sales and marketing activities, operating at a strategic level by providing overall direction to the sales and marketing activities of the organisation. He or she will manage the sales of the company’s products and services, ensure growth in sales revenue, and identify objectives, strategies and action plans to improve sales and earnings of the company. A sales and marketing manager is unlikely to directly sell the company’s goods and services, but is responsible for organising the sales strategies to be undertaken by others.

[21] The appellant was employed as a direct sales manager for a company that operated mobile sales vans. The sales representatives visited communities and customers in the vans, selling a range of food, clothing and other household items largely on credit. Four sales representatives reported to the appellant and he reported to one of the two managing directors, AA. Four administration staff, including a secretary and store supervisor, also worked for the company and reported to the other managing director, BB. The employer and the appellant both explained that the appellant’s role was a new position, but no reasons were given as to why the company had developed the position, or who had undertaken the work the appellant now did before he was hired.

Size of establishment and appellant’s tasks

[22] In declining the appellant’s application, Immigration New Zealand’s main concerns about the appellant’s employment were, broadly, two-fold. First, although it did not clearly articulate this, it was concerned that the extent to which the appellant performed the core tasks was limited by the size and scale of the company. It described this concern in its letter of decline as not being satisfied that the percentage of his role that he devoted to completing the core tasks was

“full-time”, in other words, that the size of the establishment limited how often the appellant performed the core tasks.

[23] While the size of an establishment can be a relevant consideration to an assessment of an application, it is not determinative, and if an applicant demonstrates that they undertake the ANZSCO core tasks, the fact that these tasks are completed in relation to a small establishment will not necessarily count against an applicant. In a small-scale establishment, the manner or extent to which some of the tasks are performed may well be less sophisticated than if they were being performed in larger establishments. It is a matter to be determined on a case-by-case basis, in the context of an applicant’s employment.

[24] In this case, Immigration New Zealand did not articulate its concern to the appellant in its letter of 10 September 2015 and give him an opportunity to respond. There was little information before it about the extent to which he spent time performing activities related to the ANZSCO core tasks. Immigration New Zealand did consider the fact that the appellant had introduced sales targets and undertaken a number of promotions and customer reward initiatives, but considered that, because such activities were limited to a handful of examples, these activities could not be considered to be a major part of the appellant’s work. The representative argues, on appeal, that in the context of the appellant’s employment, which he had held for only about a year, it was not unreasonable that the appellant had not performed the core tasks more frequently, some of which might only be undertaken once a year in any establishment. The appellant needed to be given an opportunity to respond to Immigration New Zealand’s concerns in this regard, in accordance with the principles of fairness at A1.5.

Employers’ involvement in establishment

[25] Immigration New Zealand’s second concern was that the two employers’ involvement in the operation of the establishment limited the appellant’s ability to plan, organise, direct, control and coordinate the development and implementation of the different sales and marketing activities. In other words, it was concerned about the appellant’s ability to meet the description for the occupation as well as specific core tasks.

[26] Immigration New Zealand’s letter of 10 September 2015 raised the issue of the employers’ involvement in the operations of the establishment. It recorded, in passing, that BB was involved in the administration of the business. However, it focused its comments on the fact that it did not appear credible that the employer

to whom the appellant reported, AA, had so little involvement in the running of the establishment, which it considered would affect the appellant's ability to demonstrate that he met the description and core tasks of the occupation of Sale and Marketing Manager.

[27] In response, the appellant explained that there were two managing directors, one of whom, BB, was involved in the administration of the business full-time and worked from the office. The appellant claimed that BB's role was limited to administration, that he only managed the four administration personnel that reported to him, and had no involvement in sales and marketing. The appellant explained that AA was involved in his other businesses and that he had "minimal involvement" in the daily operation of the business. AA's own evidence, in response to the employer questionnaire, had been to state that his own role was "basically to grow this business to its full potential... and making sure all departments [are] progressing at [their] optimal level". AA indicated in his comments that the appellant briefed him in relation to products that were selling well or not but otherwise he "handles most of it" himself.

[28] In its letter declining the application, Immigration New Zealand relied heavily on the role of BB in the operations of the establishment. It stated that he was present in the office full-time and that it was not credible, particularly in a small organisation, that the appellant would not discuss sales and marketing with him or that BB, as one of the directors, would not be involved in making decisions for the company. Immigration New Zealand noted that neither of the directors had commented on this issue.

[29] Given that the issue of the extent of BB's involvement in the operations of the business and how this affected the appellant's role had not been raised with the appellant, contrary to the principles of fairness at A1.5, it is not surprising that no response was received on this point. Immigration New Zealand needed to make its decision on the evidence before it, and, if it required further evidence of the two employers' roles, particularly that of BB, it should have sought direct comment on this from the appellant and the employers, rather than relying on broad assumptions it had made from the limited evidence before it. Immigration New Zealand did not establish how the presence of BB affected whether the appellant had the responsibility to direct the development and implementation of sales strategies as envisaged by the ANZSCO description. BB's involvement in the operations of the establishment might well have limited the appellant's role. However, whether BB's presence in the office on a daily basis affected the

appellant's role to the extent that his employment could not be considered to be a substantial match to the ANZSCO occupation of a Sales and Marketing Manager, should have been explored in more detail.

Correctness of decision

[30] The Tribunal finds that Immigration New Zealand's decision to decline the appellant's application was not correct because it did not act fairly. It failed to properly raise the reasons for its decision with the appellant for comment prior to declining the appellant's application. The application is returned to Immigration New Zealand for a correct assessment.

DETERMINATION

[31] 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.

[32] 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

[33] 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 that require further investigation, remain to be completed or 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. Immigration New Zealand is to invite the appellant to update his application within a reasonable timeframe, as he sees fit and to provide further information about how his employment substantially matches the ANZSCO description, including core tasks, of a Sales and Marketing Manager.
3. Immigration New Zealand is to seek further information as necessary, from the appellant and/or his employers, about the involvement of both employers in the operations of the establishment and how this impacts on the appellant's role.
4. If, at any stage, Immigration New Zealand finds potentially prejudicial matters with the appellant's application, it must put these to the appellant in clear and concise terms with reasons. The appellant is to be given a reasonable opportunity to respond.

[34] 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.

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

Order as to Depersonalised Research Copy

[36] 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.

Certified to be the Research
Copy released for publication.

Z N Pearson
Member

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