IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2016] NZIPT 203466**

AT AUCKLAND

Appellant:	**SG (Skilled Migrant)**
Before:	D K Smallholme
Counsel for the Appellant:	A McClymont
Date of Decision:	27 October 2016

RESIDENCE DECISION

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[1] The appellant is a 28-year-old citizen of India whose application for residence under the Skilled Migrant category was declined by Immigration New Zealand.

THE ISSUE

[2] Immigration New Zealand declined the appellant's residence application because it was not satisfied that the appellant's qualification or work experience was relevant to his employment. Without points and bonus points for skilled employment or work experience, the appellant did not meet the minimum selection criteria of the Skilled Migrant category.

[3] The principal issue for the Tribunal is whether Immigration New Zealand fairly and properly assessed whether the appellant's work experience, as a supervisor and client manager in the horticulture industry, was relevant to his employment as a fruit quality controller.

[4] The Tribunal finds that Immigration New Zealand's decision was not correct. Immigration New Zealand did not adequately consider the evidence of the appellant's work experience as a supervisor and client manager. It failed to explain why it considered that the appellant had not demonstrated that his employment as a fruit quality controller could not reasonably have been

undertaken without this work experience. Immigration New Zealand's decision was not fair as it did not consider all of the relevant evidence or give appropriate reasons for declining the application.

[5] The application is therefore referred back to Immigration New Zealand for a correct assessment.

BACKGROUND

[6] The appellant's Expression of Interest was lodged on 1 April 2015. It was selected from the pool on 15 April 2015 and the appellant was invited to apply for residence on 30 April 2015. The appellant made his application for residence on 11 August 2015. He claimed 170 points, as follows:

Age	30 points
Skilled employment (less than 12 months)	50 points
Bonus points for skilled employment outside Auckland	10 points
Qualifications	50 points
Bonus points for New Zealand qualification	5 points
Work experience of more than two years	10 points
Bonus points for work experience in New Zealand of three or more years	15 points
Total	**170 points**

[7] In support of his claim to points, and bonus points, for skilled employment the appellant provided his individual employment agreement (18 June 2015) and job description for his role as a fruit quality controller at a horticulture farm in X city. The appellant's job description indicated that he was responsible for the day-to-day direction of the fruit-picking, pruning and packing teams in order to identify and manage pest and disease control and quality issues. The appellant worked for 40 hours per week and was paid an annual salary of $35,000. The appellant submitted that his role was a substantial match to the *Australian and New Zealand Standard Classification of Occupations* (ANZSCO) description of a Fruit and Vegetable Inspector.

[8] In support of his claim to points for work experience, and bonus points for his work experience in New Zealand, the appellant provided a letter from his former employer concerning his work as a supervisor and client manager, from November 2011 to March 2015.

[9] The appellant also provided a copy of his National Diploma in Business, at Level 6, which he had gained in December 2011 from a tertiary institution in New Zealand, and his Record of Achievement from the New Zealand Qualifications Authority (NZQA) which set out the standards he had achieved.

[10] On 12 November 2015, the appellant's employers responded to an Immigration New Zealand questionnaire about the nature of the appellant's role. They stated that the appellant worked in a senior position in the orchard and fruit pack house. He managed casual staff members in picking and packing various fruits. The appellant also operated the spraying machine and pruned the fruit trees. When asked why the appellant was considered to be particularly suited to the position of fruit quality controller, the employers stated that he showed initiative, was very good at written and oral English, and that he had a "farming background".

Immigration New Zealand's Concerns

[11] On 3 December 2015, Immigration New Zealand wrote to counsel with its concerns about the appellant's application. Immigration New Zealand advised that in order for the appellant's employment to be assessed as skilled, he was required to have relevant recognised qualifications and work experience. Immigration New Zealand was satisfied that the appellant's qualification, a Diploma, was at the level required by the ANZSCO. However, qualifications were relevant to employment only if the major subject area was directly applicable to the employment or an immigration officer was satisfied that the qualification was a key factor in the employer's decision to employ the applicant. The appellant's qualification transcript indicated that his major subject area was in "business environment" and "business operations and development", neither of which were directly applicable to his employment position. Given the employers' response in the questionnaire, Immigration New Zealand was also not satisfied that the appellant's qualification was a key factor in his employers' decision to employ him.

[12] In addition, Immigration New Zealand stated that it was not satisfied that the appellant's work experience as a supervisor and client manager (which it stated

was between 30 April 2013 and 30 March 2015) was relevant to the skilled employment he had claimed.

[13] Without points, and bonus points, for his skilled employment and work experience, the appellant would be entitled to 85 points. His application would not meet the minimum selection criteria of the Skilled Migrant category.

Response to Concerns

[14] On 10 December 2015, counsel responded to Immigration New Zealand's concerns. Counsel asserted that the appellant's qualification was a key factor in the employers' decision to employ him. In support, a further letter (8 December 2015) was provided from the employers.

[15] The employers stated that the appellant would "never have been offered the job" without his qualifications and previous work experience in horticulture, as they enabled him to manage the orchard and supervise workers "in line with best business practices". The employers also stated that they had misunderstood the purpose of Immigration New Zealand's earlier inquiry, as to why they considered that the appellant was suitable for the role of fruit quality controller. They did not understand that the question related to their reasons for employing the appellant; they considered that it related to his current performance in the role.

[16] Counsel also submitted that the NZQA website indicated that the purpose of a National Diploma in Business at Level 6 was to develop "competency in management and leadership roles". The standards achieved by the appellant included communication in a business environment, environmental impacts on business operations and strategies, and management and leadership theories. The major subject area of his qualification was relevant to his employment, as the appellant used these skills in his employment as a fruit quality controller.

[17] In terms of the relevance of the appellant's work experience, counsel emphasised that the current employers also indicated in their further letter that the appellant's previous management experience in the horticultural industry was directly relevant to his employment as a fruit quality controller.

[18] In support of this submission, copies of the appellant's job descriptions for his previous roles as a supervisor and client manager were provided to Immigration New Zealand. These indicated that the appellant supervised staff

within a horticultural farming environment in order to manage the quality of produce.

Immigration New Zealand Decision

[19] On 10 May 2016, Immigration New Zealand declined the appellant's application. Having considered the additional information provided, including the further letter from the employers and the appellant's job descriptions, Immigration New Zealand concluded that the appellant's qualification and work experience were not relevant to his employment.

[20] As the appellant was not entitled to points or bonus points for skilled employment and work experience, his application did not meet the minimum selection criteria of the Skilled Migrant category.

STATUTORY GROUNDS

[21] 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.

[22] 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

[23] On 24 May 2016, counsel lodged this appeal on the ground that the decision of Immigration New Zealand was not correct in terms of the applicable residence instructions.

[24] In support of the appeal, counsel provides written submissions (13 July 2016). Counsel submits that there was sufficient evidence to conclude that the

appellant's qualification was a key factor in his employers' decision to employ him. The employers stated that the appellant's qualifications were relevant to his employment. They also stated that the appellant's work experience was directly applicable to his employment, as he had a farming background and work experience in horticulture. Immigration New Zealand provided no explanation as to why it rejected the further evidence from the employers.

ASSESSMENT

[25] The Tribunal has considered the submissions provided on appeal and the file in relation to the appellant's residence application, which has been provided by Immigration New Zealand.

[26] 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

[27] The application was made on 11 August 2015 and the relevant criteria are those in residence instructions as at that time.

[28] Paragraph SM7.10 provides that skilled employment requires specialist, technical or management expertise, and that 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.
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> **Note:** The ANZSCO is available at www.immigration.govt.nz/ANZSCO
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> *Effective 14/05/2013*

[29] Paragraph SM7.10.1 outlines the requirements for employment to be assessed as skilled:

> **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
>
> …
>
> *Effective 14/05/2013*

[30] The ANZSCO Unit Group 3113 Primary Products Inspectors includes the occupation of Primary Products Inspector NEC (not elsewhere classified) (ANZSCO 311399), in which the occupation of Fruit and Vegetable Inspector is found. The occupation of Fruit and Vegetable Inspector is found in Part A of the List of Skilled Occupations at Appendix 6 of Government residence instructions.

[31] Immigration New Zealand did not determine whether the appellant's employment substantially matched the ANZSCO description, including core tasks, of a Fruit and Vegetable Inspector because it considered that the appellant had not established that he satisfied the qualification and work experience requirements of SM7.10.1.a.i and ii of residence instructions.

[32] The ANZSCO requires that a Fruit and Vegetable Inspector hold a New Zealand Register Diploma or at least three years' relevant work experience. As the appellant holds a Diploma in Business and also has three years' work experience, his qualifications and work experience met the ANZSCO skill level requirements. However, in order to meet the requirements of instructions, the appellant also had to establish that he held a relevant recognised qualification or relevant recognised work experience.

Relevant recognised qualification

[33] For qualifications to be deemed relevant to employment, either of the two limbs in paragraph SM7.10.5 must be met:

> **SM7.10.5 Relevance of qualification(s) to employment**
>
> Qualifications are relevant to employment if:
>
> a. the major subject area of the principal applicant's recognised qualification is directly applicable to the employment; and/or
>
> b. an immigration officer is satisfied that the qualification was a key factor in the employer's decision to employ the principal applicant in that position.
>
> *Effective 14/05/2013*

[34] For the reasons that follow, the Tribunal finds that the appellant failed to demonstrate that he met either limb of SM7.10.5: either that the major subject area of his qualification was directly applicable to his employment or that his qualification was a key factor in his employers' decision to employ him as a fruit quality controller.

Major subject area of qualification directly applicable to employment

[35] The first limb in SM7.10.5 requires the appellant to demonstrate that the major subject area of his qualification is directly applicable to his *employment* (not the ANZSCO occupation). As to whether the qualification is directly applicable, the Tribunal (differently constituted) observed in *GH (Skilled Migrant)* [2011] NZIPT 200383:

> [26] This is not to say that an applicant can merely transfer a generic ability from one qualification into another area of specialisation. An applicant must still demonstrate that their qualification is directly applicable to their employment. … In the appellant's case, he is directly applying a specific skill set, his knowledge of Chinese language and culture, to his employment, marketing his company to prospective Chinese customers. That marketing is but one of the appellant's many roles as Office Manager is of no moment. SM7.10.5.a merely requires that the qualification be "directly applicable to the employment". It is silent as to the extent in which a qualification is used during the course of employment.

[36] The appellant's NZQA Record of Achievement indicated that his Diploma in Business focussed on business operations and development, and included such subjects as economic theory and practice, business trading environments and marketing.

[37] In his employment, the appellant required an understanding of fruit quality control issues and general horticultural practices. It involved identifying pests and diseases, pruning and spraying fruit trees and overseeing casual labourers picking

and packing fruit. Thus, the business subjects studied by the appellant were not relevant to his employment as a fruit quality controller. The appellant did not provide advice on the organisational structure of the business or on the business environment in which his employers' horticultural business operated, or concerning the sale and marketing of the fruit products produced by the business.

Key factor in employment

[38] The second alternative limb determining whether qualifications are relevant to an applicant's employment, is found at SM7.10.5.b. It requires that an immigration officer be satisfied that the appellant's qualification was a key factor in the employers' decision to employ the appellant in the role of fruit quality controller.

[39] Counsel submits that the appellant's employers misinterpreted Immigration New Zealand's inquiry and that their subsequent evidence established that the appellant's qualification was a key factor in their decision to employ him. Counsel asserts that considerable weight must be placed on the employers' further evidence. He relies on the following comments of the Tribunal in *BA (Skilled Migrant)* [2011] NZIPT 200011:

> [36] As to whether the appellant's qualifications are relevant to his employment, that is normally a matter for his employer to determine. Absent a specious or absurd claim, Immigration New Zealand should place considerable weight on an employer's assertion that the person's qualification was an important factor in their employment.

[40] The Tribunal accepts that Immigration New Zealand did not specifically ask the employers whether the appellant's qualifications were a key factor in their decision to employ him. However, it is not credible that a matter of such importance as the appellant's qualification would have been overlooked by the employers in their initial response. The fact that the employers made no mention of the appellant's qualification strongly suggests that they did not consider that his business qualification was a key factor in their decision to employ him as a fruit quality controller.

Relevant recognised work experience

[41] Paragraph SM7.10.10 outlines the requirements for assessing the relevance of work experience to employment:

SM7.10.10 Relevance of work experience to employment

Work experience is relevant to employment if the employer considers, and an immigration officer is satisfied that:

a. the work experience is directly applicable to the employment; and/or

b. the offer of employment could not reasonably have been made or the employment could not reasonably have been undertaken if the applicant did not have that work experience.

Effective 14/05/2013

[42] For the reasons that follow, the Tribunal finds that Immigration New Zealand was correct to find that the appellant did not meet the first limb, SM7.10.10.a. However, Immigration New Zealand failed to adequately consider the further evidence provided of the appellant's work experience as a supervisor and client manager, and therefore it was incorrect when it concluded that the appellant did not meet the second limb, SM7.10.10.b.

Work experience directly applicable to employment

[43] The first limb at SM7.10.10.a required that the appellant demonstrate that his work experience, as a supervisor and client manager for a horticulture labour-contracting business, was directly applicable to his employment as a fruit quality controller.

[44] In support of this claim, the appellant provided copies of his employment agreements and job descriptions for his former roles as a supervisor and client manager. As a supervisor, the appellant directed and supervised field staff performing different horticultural tasks such as harvesting, picking and pruning fruit and liaised with growers to ensure that the work was completed to the required standards. As a client manager, the appellant performed a similar role but held more responsibility for the business's activities; he had authority to negotiate contract rates with the farm owners and to source new clients. However, neither role was focused on performing tasks pertaining to quality of the fruit produced, such as inspecting fruit and trees to identify pests and disease or overseeing the standards of hygiene at the time of packing or the storage stage of fruit production.

[45] Immigration New Zealand was correct to find that the appellant's work experience as a supervisor and client manager was not relevant to his employment as a fruit quality controller.

Employment could not reasonably have been undertaken

[46] The second, alternative, limb found at SM7.10.10.b, was that the employment could not reasonably have been undertaken if the appellant did not hold his work experience as a supervisor and client manager in the horticulture industry.

[47] The appellant's job descriptions for his roles as supervisor and client manager indicated that he had been responsible for ensuring the quality of horticultural work performed by contract labourers, including that they complied with "grower policies and procedures". Similarly, as a fruit quality controller, the appellant was responsible for the management of fruit-picking, pruning and packing staff members in order to identify and manage quality issues and pest and disease control requirements. It was possible that the appellant could not have undertaken this employment without his earlier work experience. However, Immigration New Zealand undertook no analysis of the tasks set out in the appellant's job descriptions or how the tasks he had performed could have been relevant to his current employment. On declining the appellant's application, it simply stated:

> Having considered the additional information provided, the comments of the employer, and supporting documentation, we are not satisfied that SM7 has been met. The evidence provided is insufficient to support the claim that your qualification and experience are relevant to the employment claimed.

[48] Paragraph A1.5 of instructions (effective 29 November 2010) provides that whether a decision is fair or not depends on such factors as whether an application is given proper consideration, whether appropriate reasons are given for declining an application, and whether all known relevant information is considered.

[49] The Tribunal finds that Immigration New Zealand's process was unfair because it did not consider the further evidence presented by the appellant of his work experience as a supervisor and client manager, or give reasons for why it concluded that this further evidence was insufficient. Immigration New Zealand failed to explain to the appellant why it concluded that his earlier work experience as a supervisor and client manager in a horticultural setting was not relevant to his employment as a fruit quality controller. As it did not complete an analysis of the nature of the appellant's earlier roles, the Tribunal cannot be satisfied that Immigration New Zealand was correct when it concluded that it could not be satisfied the appellant's employment could not reasonably have been undertaken if he did not have that work experience.

Conclusion as to correctness

[50] The Tribunal finds that Immigration New Zealand's process was unfair and therefore that its decision was not correct in terms of the applicable residence instructions. While the appellant's qualification was not relevant to his employment as a fruit quality controller, Immigration New Zealand did not adequately consider the evidence of the appellant's work experience as a supervisor and client manager in the horticultural industry. It failed to explain why it considered that the appellant did not demonstrate that his employment as a fruit quality controller could not reasonably have been undertaken without this work experience.

STATUTORY DETERMINATION

[51] 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.

[52] 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

[53] 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. Immigration New Zealand is to invite the appellant to update his application within a reasonable timeframe, as he sees fit. If the appellant is not in the same employment, then he should provide information about his current employment or any offer of employment that has been made to him.

3. If the appellant remains in employment as a fruit quality controller then Immigration New Zealand should commence its assessment of the appellant's application by considering whether his employment as a fruit quality controller substantially matches the ANZSCO description, including core tasks, of Primary Products Inspectors NEC or any other relevant ANZSCO occupation.

4. Should the appellant's employment substantially match an ANZSCO occupation, then Immigration New Zealand is to reassess whether the appellant's work experience as a supervisor and client manager is relevant to his employment, with reference to the instruction at SM7.10.10.a and b, having regard to all of the information provided by his former and current employers.

5. If, as the result of the further assessment of the application, Immigration New Zealand has any concerns about the application, it shall put these to the appellant in clear terms with reasons and provide him with a reasonably opportunity to respond.

[54] The appellant is to understand that the reassessment of his application is no guarantee that he will be granted residence.

[55] The appeal is allowed in the above terms.

Order as to Depersonalised Research Copy

[56] 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.

D K Smallholme
Member

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