

AT AUCKLAND

Appellant: **MW (Skilled Migrant)**

Before: S A Aitchison (Member)

Counsel for the Appellant: Z Chen

Date of Decision: 21 February 2018

RESIDENCE DECISION

[1] The appellant is a 30-year-old citizen of China whose application for residence under the Skilled Migrant category includes his wife, aged 28 years, and daughter, aged one-and-a-half years.

THE ISSUE

[2] Immigration New Zealand declined the appellant's residence application because it was not satisfied that his employment substantially matched the relevant *Australian and New Zealand Standard Classification of Occupations* (ANZSCO) occupation of a Marketing Specialist and, without points for skilled employment, he did not meet the minimum selection criteria of the Skilled Migrant category.

[3] The principal issue for the Tribunal is whether Immigration New Zealand's assessment of the application was procedurally fair. For the reasons that follow, the Tribunal finds that the appellant was not given a fair opportunity to respond to Immigration New Zealand's prejudicial concerns, as it issued its decision before receiving relevant documentary evidence in support of his employment. The application should therefore be returned to Immigration New Zealand for assessment.

BACKGROUND

[4] The appellant applied for residence on 14 July 2016. He claimed points for employment as an international marketing specialist in a business which performed property development and investor and property management services. In support of his employment, he provided a copy of his individual employment agreement, dated 15 September 2015, which set out his annual salary of \$50,000.

[5] During its assessment of the application, Immigration New Zealand requested that the appellant's employer complete a questionnaire about the appellant's employment. In a completed questionnaire, dated 28 March 2017, the employer gave a precis of the appellant's employment, explaining that he was responsible for creating advertising materials and strategies to attract Chinese investment capital into the business and reported directly to the investment manager. He co-ordinated advertising campaigns and provided advice on investors' project interests. The appellant produced marketing materials outlining communication strategies to test the market, although many business clients were referrals from the Chinese community and from real estate agents.

[6] Immigration New Zealand interviewed the appellant on 23 June 2017. During this interview, the appellant explained that he was employed in a business which sold investment projects to prospective investors. He stated that he was responsible for advertising business services for the company, including through local social media, advertising campaigns and distribution of paper materials. He stated that the business was primarily a real estate development company, and he liaised with real estate agents to source potential investors. Projects were then priced by project managers and approved by the business's accountant.

[7] On 30 June 2017, Immigration New Zealand wrote to the appellant with concerns that his employment did not substantially match the ANZSCO description and core tasks for a Marketing Specialist. It invited a response to these concerns by 14 July 2017.

[8] The appellant, who was unrepresented at the time and had planned overseas travel, wrote to Immigration New Zealand and requested an extension of time to respond to its concerns. Immigration New Zealand granted an extension until 28 July 2017. The appellant then appointed counsel, Ms Zhou of McClymont & Associates, to represent him on the matter. On 28 July 2017, newly-appointed counsel requested a further extension of time to respond to Immigration New

Zealand's concerns. Immigration New Zealand granted this extension until 4 August 2017.

[9] On 4 August 2017, as requested by his counsel, the appellant provided counsel with electronic copies of evidence in support of his employment to submit to Immigration New Zealand. Counsel told the appellant that he would later need to provide original copies of this documentation. Later that day, counsel emailed submissions to Immigration New Zealand (making detailed reference to the documentary evidence provided by the appellant), and advised that, due to the electronic challenges of sending a large volume of documentary evidence, such would follow by post. On 11 August 2017, having not received this documentary evidence, Immigration New Zealand contacted counsel about the matter and was told that, due to a backlog in her office, the documentary evidence had not been sent, but assured that the documents would be received by Immigration New Zealand on 16 August 2017. However, Immigration New Zealand declined the request for a further extension of time and issued its decision.

Immigration New Zealand Decision

[10] On 14 August 2017, Immigration New Zealand declined the appellant's application on the ground that his employment did not substantially match the ANZSCO description and core tasks for a Marketing Specialist. Without points for skilled employment, the appellant did not meet the minimum selection criteria of the Skilled Migrant category.

STATUTORY GROUNDS

[11] 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.

[12] 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

[13] On 6 September 2017, 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.

[14] In support of the appeal, newly-appointed counsel makes submissions and provides material, including documentary evidence which the appellant provided to his prior counsel in electronic format on 4 August 2017 in support of his response to Immigration New Zealand's concerns, including:

- (a) A copy of an investment plan advertisement with a real estate company, prepared by the appellant (undated).
- (b) A research memorandum prepared by the appellant on assessing the Chinese luxury real estate conferences market (15 June 2017).
- (c) Emails between the appellant and industry specialists concerning venture capital fund investments and migrant investors (June 2017).
- (d) Proposals for newspaper advertisements of the business prepared by the appellant (27 April 2017).
- (e) Correspondence between the appellant and a media and entertainment organisation concerning coordination of advertisement campaigns (May 2017).
- (f) Evidence of property development and investment projects managed by the business.
- (g) A research memorandum prepared by the appellant advising on loan-value-ratio changes in the New Zealand finance sector and any affect on market investment in residential centre property development (19 September 2016).
- (h) A "promotion proposal and agreement for customized project package" prepared by the appellant (31 January 2016), in which the

appellant sets out proposals for business promotion and advertising through online websites, mobile and social media platforms.

- (i) Copies of advertisement order forms and quotations for the business with advertising agencies.
- (j) A copy of a Chinese business's networking template prepared by the appellant, including names of influential Chinese connections; names of Chinese platforms for traditional advertising; names of places to source investors in New Zealand; and methods for networking with potential Chinese investors in New Zealand.
- (k) Copies of weekly staff meeting minutes attended by the appellant and other business colleagues (March and May 2017, December 2016), which includes notes on marketing and business promotion initiatives.
- (l) A copy of a market survey report prepared by the appellant, relating to overseas property investment of Chinese individuals (15 February 2017).
- (m) A copy of an investment brief prepared by the appellant and another colleague (7 September 2016).
- (n) Other copies of marketing and advertising materials for business projects.
- (o) A copy of customer surveys and statistical compilations from the survey prepared by the appellant.
- (p) A copy of the appellant's employment agreement (15 September 2015) and job description.
- (q) A letter from the appellant's employer (4 August 2017).

[15] In his submissions, counsel states that Immigration New Zealand's assessment of the appellant's application was procedurally unfair. He states that the appellant was not given a reasonable opportunity to respond to Immigration New Zealand's concerns as his former counsel failed to provide Immigration New Zealand with relevant documentary evidence in support of his employment prior to it reaching its decision. He states that the appellant duly provided his counsel with such documentation within the deadline set by Immigration New Zealand for responding to its concerns, and through counsel's incompetence, this material was

not sent to Immigration New Zealand as the appellant had been led by his counsel to believe. Counsel states that the appellant has been substantially prejudiced by his counsel's incompetency, and denied a reasonable opportunity to respond to Immigration New Zealand's prejudicial concerns.

[16] Counsel advises that the appellant lodged a complaint on 23 November 2017 with the New Zealand Law Society concerning his counsel's incompetent and unprofessional conduct. Counsel attaches a copy of the appellant's complaint form and statement in this regard (23 November 2017).

ASSESSMENT

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

[18] 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

[19] The application was made on 14 July 2016 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 employment substantially matched the ANZSCO description and core tasks for a Marketing Specialist.

[20] The relevant instructions in this case are:

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

[21] The appellant claimed that he was employed in the occupation of a Marketing Specialist, listed in Part A of the List of Skilled Occupations at Appendix 6. For the appellant's employment to be classified as skilled, SM7.10.1.a requires that his employment substantially match the description and core tasks of a Marketing Specialist as set out in the ANZSCO.

[22] The ANZSCO description for a Marketing Specialist (ANZSCO Code 225113) states:

Identifies market opportunities and advises on the development, coordination and implementation of plans for pricing and promoting an organisation's goods and services.

[23] The ANZSCO core tasks for Unit Group 2251 Advertising and Marketing Professionals, which includes the occupation of Marketing Specialist, include (numbering added):

1. planning, developing and organising advertising policies and campaigns to support sales objectives
2. advising executives and clients on advertising strategies and campaigns to reach target markets, creating consumer awareness and effectively promoting the attributes of goods and services
3. coordinating production of advertising campaigns involving specialised activities, such as artwork, copywriting, media scripting, television and film production and media placement, within time and budget constraints
4. analysing data regarding consumer patterns and preferences
5. interpreting and predicting current and future consumer trends
6. researching potential demand and market characteristics for new goods and services and collecting and analysing data and other statistical information
7. supporting business growth and development through the preparation and execution of marketing objectives, policies and programs
8. commissioning and undertaking market research to identify market opportunities for new and existing goods and services
9. advising on all elements of marketing such as product mix, pricing, advertising and sales promotion, selling, and distribution channels.

Breach of procedural fairness

[24] The Tribunal finds that Immigration New Zealand's assessment of the appellant's employment was procedurally unfair, which has prejudiced the outcome of the appellant's residence application.

[25] Immigration New Zealand did not have all available material in relation to the appellant's employment before it when it made its decision on his application, because counsel had not provided it with the documentary evidence she had received from the appellant, either in electronic form or by post. Immigration New

Zealand was on notice from counsel that documentary evidence would follow the submissions filed on 4 August 2017, and counsel's submissions also summarised aspects of this documentary evidence.

[26] On 11 August 2017, Immigration New Zealand contacted counsel and inquired as to the whereabouts of the documents. Counsel advised Immigration New Zealand that, due to a backlog at the firm the material had not been posted, but that the matter would be prioritised and the documents sent by 16 August 2017. However, Immigration New Zealand responded that it would not allow any further extensions of time to provide such evidence, as it had already granted two extensions (from 14 July to 28 July 2017 due to the appellant's travel plans, and from 28 July 2017 to 4 August 2017 due to newly-appointed counsel), and a month had passed since the first deadline set for responding to its concerns.

[27] The Tribunal has examined the substantive evidence that the appellant provided to his former counsel and considers that it has direct relevance to the ANZSCO core tasks and description for the occupation of Marketing Specialist, and that such evidence may have materially affected the outcome of his application. Notably, in its decision, Immigration New Zealand found that it could not be satisfied of the appellant's performance of the core tasks as many of the assertions made by the employer and the appellant about the nature of the appellant's employment had not been corroborated by documentary evidence.

[28] Although Immigration New Zealand's assessment of an application is not an open-ended inquiry that awaits an applicant's ability to satisfy the relevant instructions, it must properly consider requests for extensions of time to respond to relevant matters and, when fairness dictates, it has the ability to grant an applicant an extension of time to respond to its concerns (see A1.5.a, Fairness, effective 29 November 2010). Immigration New Zealand was put on notice that the appellant had provided his counsel with relevant documentary evidence with which to support his application and respond to Immigration New Zealand's concerns, and counsel acknowledged to Immigration New Zealand her receipt of such material, but through counsel's own delay, this material was not provided. Moreover, Immigration New Zealand did have before it counsel's submissions dated 4 August 2017, which made detailed reference to the documentary evidence the appellant had provided to counsel, so Immigration New Zealand was aware of the tenor of the evidence to be provided. By proceeding with its decision on the application without the material provided by the appellant, when such extant evidence may well have allayed Immigration New Zealand's concerns regarding the skilled nature of the appellant's

employment, the appellant has clearly been left in a position of prejudice, through no fault of his own.

Conclusion on correctness

[29] The Tribunal finds that, in the circumstances, Immigration New Zealand's decision to decline the application was not correct. Immigration New Zealand failed to afford the appellant a fair opportunity to respond to its prejudicial concerns. Accordingly, the decision is cancelled and the application returned to Immigration New Zealand for a correct assessment.

DETERMINATION

[30] 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 based on 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.

[31] 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

[32] 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 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. Immigration New Zealand is to take into account all evidence provided by the appellant, together with the evidence already on file, and the evidence provided to the Tribunal on appeal, as set out above.
3. Immigration New Zealand is then to conduct an assessment of whether the appellant's employment is a substantial match to the ANZSCO description, including core tasks, of a Marketing Specialist.
4. If Immigration New Zealand is satisfied the appellant's employment is a substantial match, it is to proceed to assess his application against the remaining requirements of residence instructions.
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.

[33] 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.

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

Order as to Depersonalised Research Copy

[35] 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 and his family.

Certified to be the Research
Copy released for publication.

S A Aitchison
Member

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