IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2019] NZIPT 205434**

RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA

Appellant:	**DT (Entrepreneur Residence Visa)**
Before:	S Benson (Member)
Representative for the Appellant:	D J Fujikawa
Date of Decision:	23 July 2019

RESIDENCE DECISION

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[1] The appellant is a 43-year-old citizen of China whose application for residence under the Business (Entrepreneur Residence Visa) category was declined by Immigration New Zealand. The appellant's application includes his 40-year-old wife and 10-year-old daughter, also citizens of China.

THE ISSUE

[2] Immigration New Zealand declined the appellant's residence application because it was not satisfied that his business was trading profitably or that his business was consistent with the business plan in respect of which he was granted a work visa.

[3] The principal issue for the Tribunal is whether business revenue from China received from individuals and employees of distributors was genuine revenue and therefore whether the appellant's business was trading profitably. For the reasons that follow, the Tribunal finds that Immigration New Zealand's decision was correct.

[4] The Tribunal also finds that the appellant does not have special circumstances, arising from his and his family's settlement in New Zealand or from the contribution of his business to the New Zealand economy, such as would

warrant a recommendation to the Minister of Immigration of an exception to Government residence instructions.

BACKGROUND

[5] In March 2015, the appellant was granted an Entrepreneur Work Visa based on a business plan to develop and sell educational software to individuals, schools and distribution agents in New Zealand and China ("the business"). The proposed products were described as software development – language learning software (including Mandarin, Cantonese and English), test preparation software (such as IELTS and TOEFL) and finance learning software. The revenue forecast in the business plan was:

Year 1	$500,000
Year 2	$525,000
Year 3	$551,250

[6] The appellant's company was incorporated and began trading in June 2015. On 15 December 2015, Immigration New Zealand granted the appellant the balance of his Entrepreneur Work Visa, which expired on 25 March 2018. The appellant subsequently held a Specific Purpose work visa, which expired on 4 February 2019, and a further work visa, which expired on 24 May 2019. He presently holds a student visa, which is valid until 11 September 2020.

Residence Application

[7] On 27 November 2017, the appellant made his application for residence under the Business (Entrepreneur Residence Visa) category of instructions. In a letter lodging the application, the appellant's then counsel submitted that the appellant had successfully established and operated a business that had achieved the goals stated in the business plan and had benefitted New Zealand significantly.

[8] With the application and subsequently, the appellant provided tables of overseas sales and invoices to distributors and accounts stating income for the business in the past three years ending 31 March, as follows:

	2016	2017	2018
Sales	$67,604		
Overseas sales		$522,301	$556,781
Domestic sales		$19,484	
Sales: commission			$66,841
Sales: commission no GST			$2,021
Total	**$67,604**	**$541,785**	**$625,63**

[9] After deduction of expenses and before shareholder salaries, distributions and non-taxable items, there was a loss in the year to 31 March 2016 and profits in the years to 31 March 2017 and 31 March 2018:

Year to 31 March 2016	($24,222)
Year to 31 March 2017	$53,396
Year to 31 March 2018	$118,547

Verification

[10] In December 2018, Immigration New Zealand, amongst other issues discussed with the appellant, obtained further information to verify the provenance of deposits by individuals into the business's bank account.

Immigration New Zealand's Concerns

[11] On 11 January 2019, Immigration New Zealand wrote to the appellant's new representative raising concerns that the appellant's business was not trading profitably on the date the application was lodged or that it clearly had the potential to become profitable within the following 12 months, as required by residence instructions. It was concerned that business revenue from China was not genuine and could not be relied on to determine whether the business had achieved the revenue targets in the appellant's business plan. Immigration New Zealand referred to the business's invoices to distributors in China ("the overseas invoices"), noting that these were not paid by the distributors, but by individuals, including employees of the distributors. Immigration New Zealand also noted that one distributor in China was a company owned by the appellant's mother.

[12] Immigration New Zealand also raised concerns about the business operating as an education agent for overseas students and that this was not consistent with the business plan in respect of which the appellant was granted an Entrepreneur Work Visa.

[13] Immigration New Zealand invited the appellant to make comments and to provide further information.

Reply by Appellant

[14] On 25 January 2019, the appellant's representative stated, in reply, that the business was trading profitably. All overseas invoices were for the sale of software bought by Chinese customers through distributors in China. The representative acknowledged that overseas invoices were paid by employees or associates of the company's distributors. However, he stated, this was necessary to avoid restrictions on payment of money from China. The payment arrangement was confirmed by certificates from distributors (worded and dated identically), stating that invoices were paid by persons listed in the certificates on the basis that it was "more convenient for us to make an international payment by personal account":

> So I entrust people who are experienced in this area below to make the payments with the correspondent (*sic*) invoices. We also confirm that all of these people have an association with us or our business and that they were asked to make the payments for the following invoices on our behalf.

[15] Further, all payments from China were deposited into the business's bank accounts in New Zealand. The representative also provided evidence that, he said, demonstrated that sales in China were genuine, including lists of customer details from the distributors in China, divided into English learning software and financial learning software. The representative also submitted that the business remained consistent with the original business plan.

Immigration New Zealand Decision

[16] On 13 March 2019, Immigration New Zealand declined the appellant's application for residence. It was not satisfied that the business revenue in China was genuine and therefore that the business was trading profitably because:

(a) Payments to the business from China were not from distributors to whom the invoices were addressed, but from individuals, including persons employed by a family business of the appellant in China.

(b) There was a lack of evidence that payments were for the sale of software products. Immigration New Zealand could not verify a customer list provided by the appellant. It also noted that it had made over 70 telephone calls to customers stated as purchasers of the software, but no one acknowledged buying the software.

[17] Immigration New Zealand was also not satisfied, given the finding that revenue was not genuine, that the business clearly had the potential to trade profitably within the following 12 months.

[18] Immigration New Zealand was also not satisfied that the business was consistent with the business plan submitted for the appellant's Entrepreneur Work Visa because it was operating as an education agent for overseas students.

STATUTORY GROUNDS

[19] 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.

[20] 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

[21] On 16 April 2019, 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.

[22] In support of his appeal, the appellant's representative makes submissions (16 April 2019, 17 May 2019, 2 July 2019 and 16 July 2019) and provides copies of documents already on Immigration New Zealand's file and new evidence, comprising:

(a) A link to the websites of the New Zealand China Trade Association and law firms in China as to the effect, in China, of documents with a company seal attached.

(b) Links to pages on the website of the New Zealand Ministry of Foreign Affairs and Trade and an international law firm stating that flexible payment methods were required when doing business in China.

(c) A New Zealand Police warning to be suspicious of cold calls.

New Evidence on Appeal

[23] Section 189(1) of the Act provides that, in determining the correctness of Immigration New Zealand's decision, the Tribunal may not consider any information or evidence that was not provided to Immigration New Zealand before it made the decision that is the subject of the appeal, unless it falls under one of the relevant exceptions in that section.

[24] The links to websites of the New Zealand China Trade Association, the law firm in China and New Zealand Ministry of Foreign Affairs and Trade do not satisfy the exception in section 189(3)(a) because, with reasonable diligence, they could have been placed before Immigration New Zealand before it made its decision.

[25] The New Zealand Police warning as to suspicious cold calls could not, with reasonable diligence, have been placed before Immigration New Zealand before it made its decision because the appellant was not warned that this was an issue in Immigration New Zealand's letter of concerns (11 January 2019). However, this was not relevant to whether the business revenue was genuine.

[26] Further, the new documents are not relevant to whether the appellant, his partner and their child have special circumstances (section 189(3)(b)).

ASSESSMENT

[27] 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.

[28] 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. Although the appellant appeals only on the ground that the decision was not correct, the Tribunal also assesses whether the appellant has special circumstances which warrant consideration of an exception by the Minister of Immigration.

Whether the Decision is Correct

[29] The application was made on 27 November 2017 and the relevant criteria are those in residence instructions as at that time. Immigration New Zealand declined the appellant's application because it was not satisfied that he had demonstrated that his business was benefiting New Zealand significantly by trading profitably on the date of lodgement based on concerns that overseas revenue was not genuine.

Business (Entrepreneur Residence Visa) category instructions

[30] Applicants under the Business (Entrepreneur Residence Visa) category must demonstrate, amongst other things, that the business is benefiting New Zealand significantly:

> **BH2.1 Successful establishment and operation of a business that benefits New Zealand significantly**
>
> Principal applicants in the Entrepreneur Residence Visa Category are required to:
>
> a. demonstrate that they have successfully established a business in New Zealand that realises the benefits outlined in their business plan, and have operated that business for at least:
>
> i. two years, and meet the requirements of BH2.1.1; or
>
> ii. six months, and meet the requirements of BH2.1.5; and
>
> b. demonstrate that the business is benefiting New Zealand significantly (see BH4.10); and
>
> …
>
> *Effective 21/11/2016*

[31] A requirement for a business to benefit New Zealand significantly is that it is trading profitably:

> **BH4.10 Criteria for a business benefiting New Zealand**
>
> …
>
> b. The business is trading profitably on the date the application is lodged or a business immigration specialist is satisfied that it clearly has the potential to become profitable within the following 12 months.

c. For definitions of “new products or services” and “trading profitably” please refer to the Definitions section at BB6.

Effective 24/03/2014

[32] “Profitable” and “trading profitably” (BH4.10.b and .c) are defined under BB6.1.40:

BB6.1.40 Definition of trading profitably

For the purposes of the instructions in Entrepreneur Work Visa Category (BB) and the Entrepreneur Residence Visa Category (BH), "trading profitably" means:

a. meeting or exceeding the forecasted annual turnover from the original business plan, and assessment from the points scale at BB3.10(d); and

b. making sufficient profit to enable the principal applicant to pay themselves at least the minimum wage per annum.

Effective 21/11/2016

[33] Immigration New Zealand must also deal with an application fairly:

A1.5 Fairness

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

- whether an application is given proper consideration;
- 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 only relevant information is considered;
- whether all known relevant information is considered.

…

Effective 29/11/2010

Genuine revenue

[34] On 13 March 2019, Immigration New Zealand declined the appellant’s application on the basis that the business was not trading profitably because overseas revenue was not genuine. Invoices addressed to distributors in China were not paid by the distributors, but rather by individuals, including persons employed by a family business of the appellant in China, breaking the link between the sales and deposits into the business’s bank accounts:

> [We] remain unable to establish the connection between the payments to [the company] and the contracts with the distributors. Therefore, we are unable to be satisfied that you have demonstrated that your business meets or exceeds the forecasted level turnover from the original business plan.

[35] On appeal, the appellant's representative submits that the overseas invoices were paid by employees or associates of distributors to avoid restrictions on payment of money from China, as confirmed by the distributors. The appellant relied on invoices sent by the company to distributors in China and customer lists from the distributors, which, it is argued, were not properly verified by Immigration New Zealand:

> Proper means were provided to check details of customer information for software purchasers, but cold calling a very small number of these cannot be considered proper verification. By cold calling and (presumably) saying "Hi, I'm from INZ, please tell me your information" you are guaranteed to get suspicious non-cooperation as a result. To then try to construe this as evidence that all 15,886 customers don't exist is clearly not proper verification. Using a statistically insignificant sample size (0.063%) combined with investigated methods that do not amount to a fair test, is deliberately pre-determining the conclusion. No evidence was provided that the verification was carried out or how it was carried out.

[36] The representative also submitted that it was not significant that certificates from distributors were not on business letterheads because Chinese businesses used a company stamp, rather than letterhead.

[37] The Tribunal finds that Immigration New Zealand was correct to find that the appellant's business was not trading profitably on the basis that overseas revenue was not genuine. Restrictions on the flow of capital from companies in China to overseas may have necessitated unconventional and complex means to ensure that the appellant's business was paid. However, it was the appellant's responsibility to demonstrate to Immigration New Zealand that his business revenue was genuine, including that revenue originated from the companies to whom goods and services were provided. The evidence established that invoices to the distributors were paid by individuals, who had no apparent legitimate interest in making the payments. The combination of the business invoices to distributors in China, the distributors' customer lists and certificates from the distributors (even with company stamps) did not establish that the payments to the appellant's business were by the distributors.

[38] The Tribunal finds that Immigration New Zealand made reasonable attempts to verify that the customer lists were genuine by making 70 telephone calls to customers stated as purchasers of the software. The Tribunal acknowledges that Immigration New Zealand did not put the results of this verification to the appellant for comment before its decision to decline the application and therefore did not give

the appellant a reasonable opportunity to respond to harmful information, as required by residence instruction A1.5. However, there was no prejudice to the appellant because the lists did not address the issue of payments by the distributors to the appellant's business.

[39] As the appellant was unable to demonstrate that revenue from overseas sales was genuine, the business had insufficient genuine revenue to meet the revenue targets in the business plan and did not establish that the business was trading profitably on the date the application was lodged (BH4.10.b). Further, with most revenue excluded in this way, the business did not clearly have the potential to become profitable within the following 12 months (BH4.10.b).

Correctness of decision

[40] For the reasons given above, the Tribunal finds that Immigration New Zealand's decision was correct. The appellant did not demonstrate that his business had sufficient genuine revenue to meet the forecast annual turnover in the business plan and therefore did not demonstrate that the business was trading profitably. As it was not proved that the revenue was genuine, the appellant also did not demonstrate that the business clearly had the potential to trade profitably within the following 12 months.

Whether there are Special Circumstances

[41] The Tribunal has power pursuant to section 188(1)(f) of the Act to find, where it agrees with the decision of Immigration New Zealand, that there are special circumstances of an appellant that warrant consideration by the Minister of Immigration of an exception to the residence instructions.

[42] Whether an appellant has special circumstances will depend on the particular facts of each case. The Tribunal balances all relevant factors in each case to determine whether the appellant's circumstances, when considered cumulatively, are special.

[43] Special circumstances are "circumstances that are uncommon, not commonplace, out of the ordinary, abnormal"; *Rajan v Minister of Immigration* [2004] NZAR 615 (CA) at [24] per Glazebrook J.

Personal and family circumstances

[44] The appellant is a 43-year-old citizen of China. His application for residence includes his wife, aged 40, and their daughter, aged 10.

[45] The appellant holds a Bachelor of Science degree (1999) and a Master of Higher Education (2003), granted by a Chinese university. From 2001, the appellant had employment in China as a director or general manager of IT companies. The appellant visited New Zealand on several occasions since 2006 and, from June 2015, he has lived mostly in New Zealand. From March 2015, he has held a series of work visas and has worked as general manager and director of his New Zealand-based business. The appellant presently holds a student visa and states, through his representative, that he intends to study for a Master of Business Administration degree.

[46] The appellant's wife holds a Bachelor of Arts degree, granted by a Chinese university in 2000. From 2000 to July 2018, she was employed as a university lecturer. The wife visited New Zealand in August 2013 and, since July 2015, she has lived in New Zealand for various periods of time. The appellant's representative describes her as moving permanently to New Zealand in May 2018. The wife has held a series of work visas valid to September 2020.

[47] The appellant's daughter first entered New Zealand in July 2015. After four short visits, she has lived mostly in New Zealand since July 2016. She holds a student visa valid to September 2020 and there is evidence that she attends school in New Zealand.

[48] The appellant's application for residence states that the appellant and his wife have no siblings and that their parents live in China.

Health, character and English language requirements

[49] Immigration New Zealand was satisfied that the appellant, his wife and their daughter met the health requirements of instructions. Further, the appellant (but not his wife) met the English language requirements of instructions. Immigration New Zealand was also satisfied that the appellant and his wife met the character requirements of instructions.

Appellant's business

[50] The appellant's business was established to sell language learning software (including Mandarin, Cantonese and English), test preparation software (such as IELTS and TOEFL) and finance learning software. The appellant provided employment agreements to demonstrate that his business has two full-time employees. Immigration New Zealand has not raised any issues as to the genuineness of the employment offered by the business. However, as stated above, Immigration New Zealand does not accept that the business has genuine overseas revenue or that it has met the forecasts of revenue and profit in respect of the business plan. The appellant has provided evidence that the business has earned significant income from education agency agreements with New Zealand universities, tertiary institutions and high schools.

Discussion of special circumstances

[51] The appellant has lived mostly in New Zealand since June 2015 and his wife since about May 2018. The Tribunal accepts, to some extent, that they will have settled in New Zealand during the time they have lived here. However, the appellant has lived in New Zealand for only four years, which is not out of the ordinary, and his wife has only lived here since May 2018. Further, their familial nexus is to China, where their parents live.

[52] In considering special circumstances, the Tribunal is required to have regard to the best interests of any child, as a primary consideration under Article 3(1) of the 1989 *Convention on the Rights of the Child*, although not as a paramount consideration: see *Puli'uvea v Removal Review Authority* [1996] 3 NZLR 538 (CA) and *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24] per Tipping J. The appellant's daughter has lived a significant part of her life in China and her best interests, given her age, are in remaining with her parents, wherever they live. A transition back to China, if required, could be managed with assistance from her parents. It has not been demonstrated that the daughter's best interests require that she and her family be granted residence.

[53] The appellant's business has expanded its operations to education agency work with New Zealand universities, tertiary institutions and high schools. However, the appellant has not demonstrated that his business had genuine revenue to meet forecasts of revenue and profit in his business plan. The contribution to New Zealand by the appellant's business is not considered to be out of the ordinary or unusual.

[54] The Tribunal finds that the circumstances of the appellant, his family and business, when considered individually and cumulatively, are not special and do not warrant a recommendation to the Minister of Immigration that they be granted residence as an exception to instructions.

DETERMINATION

[55] This appeal is determined pursuant to section 188(1)(a) of the Immigration Act 2009. The Tribunal confirms the decision of Immigration New Zealand to decline the appellant's application for residence as correct in terms of the applicable residence instructions. The Tribunal does not consider that the appellant has special circumstances which warrant consideration by the Minister of Immigration as an exception to those instructions under section 188(1)(f) of the Immigration Act 2009.

[56] The appeal is unsuccessful.

Order as to Depersonalised Research Copy

[57] 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, his wife and his daughter.

"S Benson"
S Benson
Member

Certified to be the Research Copy released for publication.

S Benson
Member