

RŌPŪ TAKE MANENE, TAKE WHAKAMARU
AOTEAROA

Appellant: SF (Skilled Migrant)

Before: Judge P Spiller (Chair)

Counsel of the Appellant: S Shamia

Date of Decision: 17 May 2021

RESIDENCE DECISION

[1] The appellant is a 38-year-old citizen of China. His application for residence under the Skilled Migrant category of residence instructions was declined by Immigration New Zealand. The application included his 39-year-old wife and 10-year-old child, also citizens of China.

THE ISSUE

[2] Immigration New Zealand declined the appellant's residence application because it found that his employment as a marketing specialist did not substantially match the *Australian and New Zealand Standard Classification of Occupations* (ANZSCO) description, including core tasks, of a Marketing Specialist. Without points for skilled employment, the application could not succeed.

[3] The principal issue for the Tribunal is whether Immigration New Zealand correctly assessed the appellant's application. For the reasons which follow, the Tribunal finds that Immigration New Zealand did not. The application is therefore referred back to Immigration New Zealand for a new assessment.

BACKGROUND

[4] The appellant arrived in New Zealand in July 2016 and was granted a student visa and studied the English language. He was then granted a further student visa and completed a Post Graduate Diploma in Business. In March 2018, he was granted a work visa. In March 2019, he was employed as a marketing specialist in a furniture store.

[5] On 15 April 2019, the appellant applied for residence under the Skilled Migrant category. He claimed points for skilled employment as a Marketing Specialist, relying on his employment as a marketing specialist. He claimed a total of 160 points, including 50 points for skilled employment.

[6] In support of his application, the appellant attached his employment agreement which set out his job description. His salary was listed as \$26 per hour.

Immigration New Zealand's Verification

[7] On 11 November 2020, Immigration New Zealand conducted separate telephone interviews with the appellant and his employer. The appellant said that he did long-term marketing and daily marketing, developed and organised sales events, designed and placed posters, advertised online and developed customer channels. His long-term marketing plan was done every year, and he was trying to develop a website for the company. He collected data from Trade Me, did a survey in the shop, and collected feedback from the customers. He planned the relocation of the warehouse.

[8] The employer said that there were 10 full-time and two part-time staff working for the company, with two branches. There were two departments, the sales department and the post-sales department, and the appellant worked for the former. At the branch where the appellant worked, there were five full-time (including the manager and her husband) and one part-time staff. The appellant introduced customer data so that information about specials could be sent to them; and advised on which items should be put on sale and the price.

Immigration New Zealand's Concerns

[9] On 18 November 2020, Immigration New Zealand advised the appellant in writing that it did not consider his role to be a substantial match to the ANZSCO description, including core tasks, of a Marketing Specialist.

[10] Immigration New Zealand advised that it appeared that the appellant's employer and her partner were involved in the day to day running of the business; there were no other marketing staff in the business; the employer did not appear to have any advertising or marketing channels; the business had no website; during the application process he declared that he initially started employment with the employer as a sales representative, however, his employer stated that the appellant started with the employer as a marketing specialist; and the appellant's current role of a marketing specialist was a newly created position. Immigration New Zealand concluded that the business had no scope to have a full-time marketing specialist.

[11] Immigration New Zealand thus advised that the appellant did not appear to qualify for points for skilled employment. Without these points, his application could not succeed.

Appellant's Response

[12] On 8 January 2021, the appellant's then representative responded to Immigration New Zealand's concerns. Counsel submitted that the appellant's employment met the requirements of the ANZSCO occupation of a Marketing Specialist, and that he performed the core tasks of that occupation. Counsel provided evidence of the work performed by the appellant in his role as a marketing specialist. This evidence included a marketing plan, a support letter from the appellant's employer, a statutory declaration by the general manager of the appellant's company, a description of marketing activities and advertising campaigns, and an outline of the company structure.

Immigration New Zealand's Decision

[13] By letter dated 25 February 2021, Immigration New Zealand declined the appellant's application.

[14] Immigration New Zealand advised that it had taken into account the information received. However (for the reasons outlined below), it was not

satisfied that his employment was a substantial match with the description, including core tasks, of a Marketing Specialist.

[15] Immigration New Zealand awarded the appellant a total of 90 points. Without points for skilled employment, his application could not succeed.

STATUTORY GROUNDS

[16] 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.

[17] 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

[18] On 16 March 2021, the appellant lodged this appeal on the ground that the decision of Immigration New Zealand was not correct.

[19] In support of the appellant's appeal, his counsel provides submissions (29 April 2021). Counsel submits that Immigration New Zealand incorrectly assessed the appellant's skilled employment as a Marketing Specialist. Counsel submits that Immigration New Zealand failed to consider properly the relevant core tasks for a Marketing Specialist; did not engage with the evidence presented; and placed too much emphasis on the telephone interview with the appellant.

ASSESSMENT

[20] 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.

[21] 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

[22] The application was made on 15 April 2019 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 was a substantial match to the ANZSCO description, including core tasks, of the occupation of a Marketing Specialist. The relevant instructions in this case are:

SM3.15 Approving an application

- a. An application under the Skilled Migrant Category will be approved if an immigration officer is satisfied that:

...

- iv. the principal applicant:
- has current skilled employment in New Zealand or an offer of ongoing skilled employment in New Zealand; or
 - has undertaken full-time study for at least two years in New Zealand that has resulted in the award of a Doctorate or Master's degree.

...

Effective 19/02/2018

SM6.10 Skilled Employment

- a. ...
- b. Assessment of whether employment is skilled for the purposes of the Skilled Migrant Category is primarily based on the Australian and New Zealand Standard Classification of Occupations (ANZSCO) which associates skill levels with each occupation, and the level of remuneration for the employment.

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

SM6.10.5 Skilled employment in an occupation included in the ANZSCO

Current employment in New Zealand or an offer of employment in New Zealand will be assessed as skilled if:

- a. ...

- b. the principal applicant can demonstrate that their employment substantially matches the description for that occupation as set out in the ANZSCO (see SM6.10.5.1); and

...

SM6.10.5.1 Assessment of 'substantial match'

- a. For the purpose of SM6.10.5 (b) above, assessment of 'substantial match' involves a determination of whether the applicant's employment is substantially consistent with the ANZSCO 'Occupation' (6-digit) level description for that occupation and with the tasks listed at the ANZSCO 'Unit Group' (4-digit) level description for that occupational group, excluding any tasks which are not relevant to the 'Occupation' description.
- b. To be considered a substantial match to an occupation, the tasks that are relevant to the applicant's employment role must comprise most of that role.

For example: An applicant's employment in the occupation 'Disabilities service officer' (411712) is not required to include the task set out at the ANZSCO Unit Group (4-digit) classification level for 'Welfare support workers' of "supervising offenders on probation and parole". Other listed tasks that are relevant to the role of a "Disabilities services officer" must comprise most of their role.

...

Effective 26/11/2018

[23] Instructions also address the requirements of fairness in decision-making, at A1.5.a, relevantly as follows:

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 all known relevant information is considered.

Effective 29/11/2010

[24] The appellant claimed that he was employed in a position which substantially matched the ANZSCO description, including core tasks, of a Marketing Specialist. For the appellant's employment to be classified as skilled, SM6.10.5.b and SM6.10.5.1.a and b require that it substantially match the

description, including relevant core tasks, of a Marketing Specialist as set out in the ANZSCO.

[25] The ANZSCO description of the occupation of a Marketing Specialist (225113) is that he or she:

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

[26] The list of core tasks for the Unit Group 2251 (Advertising and Marketing Professionals) comprises the following (numbered for ease of reference):

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.

[27] The Unit Group Advertising and Marketing Professionals includes a diversity of roles. The Tribunal (differently constituted) has previously established that the tasks that are relevant to the occupation of a Marketing Specialist are tasks seven to nine above: see *KB (Skilled Migrant)* [2016] NZIPT 203065. These tasks involve identifying market opportunities, undertaking market research, and providing advice on all elements of marketing and the promotion of goods.

[28] Immigration New Zealand was not satisfied that the appellant performed any of the three relevant tasks. The Tribunal will now examine Immigration New Zealand's assessment of these tasks.

Task seven: supporting business growth and development through the preparation and execution of marketing objectives, policies and programmes

[29] The appellant noted in his interview that he undertook long-term marketing and daily marketing activities. He developed and organised sales events, designed and placed posters, advertised online, developed customer channels, planned the relocation of the warehouse, and was trying to develop a website for the company.

[30] In response to the letter of concern, the appellant provided a yearly summary from 2019 to 2020 outlining advertising strategies that he had developed to support the sales objectives throughout the year. He reiterated that he assisted with the relocation of the warehouse, and said that he developed a Black Friday proposal and Christmas Day, Boxing Day and New Year promotions. He provided evidence of the activities and campaigns for 2021, notably, marketing strategies for post-lockdown of COVID-19; and a promotion strategy and package deal strategy. The appellant and his employer both stated that there had been an increase in sales, arising out of the appellant's activities. The company director stated that company revenue saw a big jump of almost half a million after the appellant started working full-time as a marketing specialist, allowing for an increase in staff.

[31] Immigration New Zealand noted that the appellant had not referred to any marketing objectives, policies or programmes during his interview. Immigration New Zealand found that the appellant's evidence of marketing objectives was "very generic" and not detailed to show how these marketing objectives fitted into the current business model or how the brand awareness increased sales. The warehouse relocation was an example of operational efficiency but did not demonstrate how the appellant had supported business growth or development through the preparation and execution of marketing objectives. There was no evidence to show that online sales increased or decreased following the 2021 campaigns, or that the business was not already carrying out the promotion strategy and package deal strategy. Immigration New Zealand noted that some of the material in the documentation provided was taken from other websites.

[32] Immigration New Zealand found that the appellant had not been able to demonstrate how the claimed business growth was related to any preparation and execution of a marketing objective, policy or programme, or how he contributed to this sales growth. Without any supporting evidence, Immigration New Zealand had

concerns about the credibility of this claim as the appellant had not referred to any marketing objectives, policies or programmes during his interview.

[33] The Tribunal finds that Immigration New Zealand did not engage with the evidence produced by the appellant or provide appropriate reasons when determining whether he performed core task seven. It was incorrect that the appellant had not provided relevant evidence in his interview, of, for example, his preparation and execution of marketing policies and programmes, as is indicated in his interview statements set out above. There was evidence of him supporting business growth, from the evidence of the appellant's employer and the company director, particularly in terms of the increase in sales growth. Immigration New Zealand's concern that the appellant did not refer in his interview to the evidence produced later overlooks the fact that the letter of concern is meant to provide a genuine opportunity for the appellant to produce further evidence in support of his application (to meet the fairness requirements set out in A1.5.a, to have a reasonable opportunity to respond to harmful information). The Tribunal finds that there was evidence that the appellant supported business growth and development through the preparation and execution of marketing objectives, policies and programmes, and that Immigration New Zealand acted unfairly in overlooking that evidence.

Task eight: commissioning and undertaking market research to identify market opportunities for new and existing goods and services

[34] The appellant noted in his interview that he collected data from Trade Me, did a survey in the shop, and collected feedback from customers, and this was confirmed by his employer. In response to Immigration New Zealand's letter of concern, the appellant provided evidence of data collected by the company's Trade Me account and through email inquiries, and evidence of a marketing plan. He also provided a market segmentation analysis of customers assessment, in which he had divided customers into smaller groups to understand their specific characteristics. The product development arising out of the market research related to existing bed ranges, preferences, pinewood beds, and existing and new mattresses. For example, he provided data and the information used in "Internal research of mattress" and in "New Product Intake". He stated that this information was used to build the correct product range, set the appropriate distribution parameters, and position the new campaigns to match sales to each customer.

[35] Immigration New Zealand observed that the appellant did not discuss the collection of the above data in his interview and he stated that he mainly collected the weekly sales, and so it was not satisfied that the data was credible. Immigration New Zealand noted that the appellant had not provided any evidence of where the data presented was collected from or why the data was collected, and it noted that there was an error in the data. It noted that the appellant had not been able to demonstrate why the market research on mattresses was conducted, what the business was already purchasing and what was changed.

[36] The Tribunal notes that the failure of an appellant to refer in his interview to evidence that is later produced does not, in itself, negate the credibility of the evidence later produced. Immigration New Zealand was incorrect in stating that there was no evidence of where or why the data was collected, as the appellant explained in his evidence the source of the information and the purpose of the data. The Tribunal finds that there is evidence that the appellant commissioned and undertook market research to identify market opportunities for new and existing goods and services. This was overlooked by Immigration New Zealand.

Task nine: advising on all elements of marketing such as product mix, pricing, advertising and sales promotion, selling, and distribution channels

[37] The appellant said, in his interview, that he did long-term marketing and daily marketing, developed and organised sales events, designed and placed posters, advertised online on Trade Me, and developed customer channels. His long-term marketing plan was done every year, and he was trying to develop a website for the company. His employer said that the appellant worked for the sales department and advised on which items should be put on sale and the price.

[38] In response to the letter of concern, the appellant provided evidence of product mix under the headings “Flagship products week plan” and “12th Anniversary Promotion Proposal”; distribution channels under “Website proposal”, “WeChat Strategies”, and “Business to business strategy”; pricing under “Pricing strategy”; and advertising and sales promotion under “Relocation Campaign Proposal” and “Black Friday Campaign Proposal 2020”. The detailed week plan outlined the newly arrived oak furniture range. He stated that he had seen an increase in products sold, and an increase in contact list customers.

[39] Immigration New Zealand noted that the appellant had provided a detailed flagship product week plan and a 12th Anniversary Promotion proposal, but there was no supporting evidence. In the telephone interview, he was asked where he

advertised and he stated Trade Me only. However, he had later provided evidence of WeChat strategies, and this information contradicted what he had stated in the interview. No translations had been provided for the WeChat screenshots, and so Immigration New Zealand could not be satisfied that this evidence was credible. The appellant stated that he had seen an increase in sales, but he had not provided any evidence to support this claim. He had not been able to demonstrate how he had increased sales using any elements of marketing.

[40] The Tribunal finds that Immigration New Zealand did not have proper regard to the evidence produced by the appellant and did not provide appropriate reasons. The detailed evidence that the appellant provided was supporting evidence to his claim that he performed this task. At no stage in Immigration New Zealand's interview of the appellant did it ask him if he advised on all elements of marketing such as product mix, pricing, advertising and sales promotion, selling, and distribution channels. The Tribunal does not accept that the information that the appellant offered at the interview was contradictory to that later presented in direct response to whether he performed the requirements of task nine. It is incorrect that the appellant did not provide any supporting evidence that there was an increase in sales as a result of his efforts, in view of the evidence of the employer and managing director noted above. In any event, task nine requires the applicant to provide advice and there is no requirement to show sales increases as a result.

Assessment of occupation description

[41] As noted above, the description of the occupation of a Marketing Specialist requires the occupant to identify market opportunities and advise on the development, coordination and implementation of plans for pricing and promoting an organisation's goods and services.

[42] Immigration New Zealand acknowledged that the appellant might have "certain involvement in the marketing of goods and services". However it noted that, during his interview, he was given multiple opportunities to elaborate on his tasks and provide examples, and he was asked if he would like to add anything further. His inability to provide details and specific examples reinforced that he was not performing the tasks of a Marketing Specialist. Immigration New Zealand found that the tasks that he was performing, such as the management of Trade Me, responding to customer emails and managing deliveries, were more

aligned to the role of a Sales Representative than to a Marketing Specialist. Sales Representatives represented companies to sell their goods and business services to wholesale and retail establishments. However, these were skill level 4 occupations which required a minimum threshold of at least \$37.50 per hour or above, which the appellant did not meet.

[43] The Tribunal finds that Immigration New Zealand did not engage with the evidence presented by the appellant or provide proper reasons for its decision that the appellant's employment did not meet the description including core tasks of the occupation of a Marketing Specialist. Its repeated reference to the evidence provided by the appellant at the interview overlooks two factors. First, at no stage during the interview did Immigration New Zealand put to the appellant for response whether he carried out the three relevant core tasks of: supporting business growth and development through the preparation and execution of marketing objectives, policies and programmes; commissioning and undertaking market research to identify market opportunities for new and existing goods and services; and advising on all elements of marketing such as product mix, pricing, advertising and sales promotion, selling, and distribution channels. Instead, the interview of less than half an hour largely proceeded with the appellant providing basic information in response to elementary questions raised by Immigration New Zealand. Second, as noted above, the focus on the information given at the interview does not appear to respect the purpose of the letter of concern process, which is to provide a genuine opportunity for further and better evidence to be provided. The result was that Immigration New Zealand did not have adequate regard to the more detailed evidence that was provided in response to the letter of concern.

Conclusion as to correctness

[44] The Tribunal finds that Immigration New Zealand's decision to decline the appellant's application was incorrect. There was evidence that the appellant's employment substantially matched the ANZSCO description, including core tasks, of a Marketing Specialist. Immigration New Zealand did not have adequate regard to this evidence, and did not provide appropriate reasons for its decision (contrary to instruction A1.5.a).

DETERMINATION

[45] 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.

[46] 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

[47] It should be noted that, while these directions must be followed by Immigration New Zealand, they are not intended to be exhaustive. 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 assessed again by an immigration officer with no previous association with this application, in accordance with residence instructions in effect at the date the application was made and without the requirement to pay any further lodgement fee.
2. Immigration New Zealand shall seek confirmation from the appellant that he remains in the same employment on the same terms and conditions. If not, he is to be given a reasonable opportunity to provide Immigration New Zealand with an updated offer of employment.
3. The appellant is to be given a further opportunity to provide Immigration New Zealand with information relating to whether his employment substantially matches the description, including core tasks, of the occupation of a Marketing Specialist, or any other relevant occupation. The Tribunal emphasises that it is the responsibility of the appellant to provide sufficient evidence in support of his claim.

4. Immigration New Zealand shall then undertake a new assessment having regard to all of the information previously provided to it by the appellant and to the Tribunal on appeal, and any additional material with which he chooses to update his application. It must ensure that all relevant evidence is properly considered and weighed in its determination of whether the appellant's employment substantially matches the description, including core tasks, of the occupation of a Marketing Specialist, or any other relevant occupation.
5. If, at any stage in its reassessment of the application, Immigration New Zealand identifies 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.
6. Immigration New Zealand shall provide appropriate reasons for its decision, in relation to each of the relevant ANZSCO core tasks and description of the appellant's occupation, and refer (as appropriate) to the evidence it took into account to reach its decision.

[48] The appellant is to understand that the reassessment of his application is no guarantee that his employment will be found to be a substantial match or that he will be granted residence.

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

Order as to Depersonalised Research Copy

[50] 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 wife and child.

Certified to be the Research
Copy released for publication.

Judge P Spiller
Chair

"Judge P Spiller"
Judge P Spiller
Chair