BUSINESS RESIDENCE CLASS VISAS

DAVID RYKEN, PRINCIPAL, RYKEN & ASSOCIATES, BARRISTERS & SOLICITORS

INTRODUCTION

This paper will consider Immigration New Zealand's policy in the following areas:

(i) Investor 1 (Investor Plus).
(ii) Investor 2.
(iii) Entrepreneur (Work to Residence).
(iv) Permanent Residence.
(v) Parent Retirement (an investor category).

After discussing the basic policy provisions by way of introduction, there will be further discussion involving practical aspects to these categories and rulings of the Immigration and Protection Tribunal.

INVESTOR 1

- Investment of $10 million for three years.

- All grantees must arrive within 12 months of their visa being issued (not the same as the first 12 months of the investment period).

- Principal applicant must spend 44 days in years two and three or 88 days at any time during the three year investment period but only if $2.5 million or above is invested in investments not including philanthropic investments or bonds, i.e. $2.5 million must be invested in "Growth Investments".

- Funds must remain invested during the investment period. What comes out must go back in.

- No English language requirement.

INVESTOR 2

- Selections during late 2018 early 2019 fluctuating between 25 and 77 points. (See table below).

- Three years business experience (management or 25% ownership of a business employing five employees or with a turnover or NZ$1 million or more).

- All grantees must arrive in the first 12 months of the visa.

- Presence requirement of 146 days in each of years two, three and four.

- Presence requirement of a total of 438 days over the four year period portable where Growth Investments is in excess of $750K (25% of NZ$3 million).

- Minimum investment of $3 million can be reduced to $2.5 million but only with $1.5 million in Growth Investments (shares and equity and not bonds). An extra 20 bonus points also applies.

- English language requirement for principal applicant at 3.0 or more, IELTS (or equivalent).

ENTREPRENEUR

- A points assessment now for a work visa.

- Now highly restricted to: high growth, innovative or export potential (BB3.15.e.iv).

- Start up or 25% share or more buy-in (but see discussion on new employees).

- Business *must* create self-employment. Where self-employment is reached, an application for residence should *not* be filed but instead the entrepreneur work visa renewed for a second three year term. Filing a residence visa application too early is fatal.

- Self-employment in New Zealand. Percentage of time must establish "in New Zealand." Self-employment must mean a living wage.

PERMANENT RESIDENCE

- Refugees and partners of New Zealand citizens who have lived overseas for five years or more go straight to permanent residence.

- Five routes:

  (i) Investment of $1m for 2 years.

  (ii) Presence 184 days twice (years 1 and 2 or 2 and 3).

  (iii) Owner (25% or more) of a company.

  (iv) Purchase of a house in first 12 months (with conditions)

  (v) Tax resident status (not used).

- Investor 1 and 2 must first complete the investment period.

- Are there any exceptions? Should there be?

PARENT RETIREMENT

- New Zealand resident/citizen sponsor child.
- $1 million investment (additional $0.5 million held as "settlement funds").
- $60K annual income.
- New Zealand funds, must not be gifted (F3.10.1 e).

The following statistics involve cases taken from the Tribunal's website which may of course not record *all* its decisions. However category by category the decisions available indicate the following:

Investor 1

Year	Confirmed Decisions	Cancelled Referred back (New Information)	Cancelled Referred back (Decision incorrect)	Referred to the Associate Minister of Immigration to consider grant (Special circumstances)
2017	NIL			
2018	NIL			
2019	NIL			

Investor 2

Year	Confirmed Decisions	Cancelled Referred back (New Information)	Cancelled Referred back (Decision incorrect)	Referred to the Associate Minister of Immigration to consider grant (Special circumstances)
2017	2		4	

2018	9		5	2
2019	1		1	

Entrepreneur Residence

Year	Confirmed Decisions	Cancelled Referred back (New Information)	Cancelled Referred back (Decision incorrect)	Referred to the Associate Minister of Immigration to consider grant (Special circumstances)
2017	2			
2018	4	1	8	2
2019	2			

Permanent Residence

Year	Confirmed Decisions	Cancelled Referred back (New Information)	Cancelled Referred back (Decision incorrect)	Referred to the Associate Minister of Immigration to consider grant (Special circumstances)
2017	2		1	
2018	1			
2019				

Parent Retirement

Year	Confirmed Decisions	Cancelled Referred back (New Information)	Cancelled Referred back (Decision incorrect)	Referred to the Associate Minister of Immigration to consider grant. (Special circumstances)
2017				
2018	2			
2019				

INVESTOR 2 POOL DRAWS: LATEST TRENDS

DATE	No.	LOW POINT	HIGHEST POINT
18 October 2018	8	33	80
1 November 2018	9	25	100
15 November 2018	6	33	74
29 November 2018	9	25	110
13 December 2018	9	33	77
17 January 2019	5	33	78
31 January 2019	11	33	120
14 February 2019	9	33	105
28 February 2019	8	33	85

GENERAL DISCUSSION

A reading of the case law at the Tribunal quickly indicates that of those cases published, that many cases that are presented to INZ are poorly prepared, even when represented. A high level of "referral" back or error may indicate poor decision making but when the case complexities are reviewed, INZ are often not assisted by the way in which the material is presented, and then later discussed. Here are some tips:

- Investor 1 and 2 from China. Funds *must* move out of China lawfully. Check the Bank of China circulars etc. for use of foreign exchange quotas. Can the applicant use the quotas of friends or is it restricted to "lineal" relatives, (spouses, children and grandchildren?).

- Identify clearly where the money has come from.

- Sales of assets must be supported by documentation (including the sale of art works).

- If earnings are the source then annual earnings must be significant enough to match the accumulation of the suggested investment amount.

- Identify who owns the nominated funds. Where they are not owned or co-owned by the principal applicant preliminary steps may be needed.

- Once nominated, records must be kept of all fund movements.

Entrepreneur

It may be that the interrelationship between the business plan and final performance has changed over time. Focusing on and buying an existing business had the added difficulty involving the passage of time. Where the targeted business is no longer available, because it has been sold, then there may need to be a change request under BB5.

The amount of the investment indicated must normally be made. Invoices must be kept, to confirm start-up expenditure. The entrepreneur residence visa will often be declined if the business plan is not followed. This is important in two areas:

(i) Profit forecasts.
(ii) (New) NZ employee numbers.

The rules at BH3.1 regarding consistency however have been poorly understood. The final requirement is that the business must not be a different business: BH3.a.ii.

However there is some latitude to this rule within BH3.1.b. So if it is the case that the business presented at the residence stage is different from the business proposal then a secondary assessment kicks in and asks the questions set out at BH3.1.b:

- Whether it would have met the requirement for a business plan under the EW visa category?

- Whether it would have required the same or greater level of capital investment.

- Whether the applicant has relevant experience for the new business.

- Whether the business has provided a significant benefit equal or greater than the original business.

However, as against the possible "flexibility" set out in BH3.1.b, BH3.1.c indicates a decline where a stricter goal arising out of the points that were claimed is not met. Unless there were unforeseen circumstances etc. (BH3.1.c i and ii) and the failure was not due to a lack of planning etc. (BH3.1.c iii).

Clearly BH3.1 c sets out a stricter approach to new cases coming through where work visas have been issued under the points system in the EW visa process.

Note also that since 25 March 2014 we now have a definition at BB6.1.40 of what is meant by "trading profitably." The definition reinforces the linkage between both the projected turnover and the projected profit, and what has then been achieved. This may explain (in part) a more slavish approach to profit projections in the most recent cases (2017 and 2018). However as will be seen, there are still cases involving pre-2014 businesses that continue to come through.

With cases that continue to come through involving LTBV or "pre EW points system", what then can be made of businesses that have realised lower profits than had been forecast or NZ employee numbers are lower than in the business plan (but come within the earlier requirement to employ at least one new citizen or resident employee (unless relying on a different "benefit" to New Zealand)). For this we can obtain guidance from

the Tribunal case law. As discussed above, the starting point in BH4 is whether the end result is a *different* business (meaning not the one in the business plan).

For example in *BP (Entrepreneur)* [2014] NZIPT 202032 the Tribunal agreed that the business was significantly different from the business plan. The capital that had been invested was far less than was proposed. There were fewer employees. It was proposed that the business would lease a warehouse but instead it was being operated from a home. The scale of the proposed business was out of step with the end product such as to allow a finding that the end product was a *different* business, from the business proposal.

In *BT (Entrepreneur)* [2014] NZIPT 202210, 11 December 2014 the Tribunal held that there was a significant departure from the business plan. The amount invested was $900K below the amount proposed.

In *BX (Entrepreneur)* [2015] NZIPT 202127, 12 February 2015, the business was inconsistent with the business plan. The business plan concerned the manufacture and sale of aluminium. The appellant had continued to operate a second business involving consultancy, but that had not been approved.

The Tribunal discusses principle in depth in the following. It will be seen that in some cases it may be *wrong* to approach the issue in terms of a strict adherence to the business plan.

In *BI* (*Entrepreneur*) [2014] NZIPT 201516 in reference to the amount of investment ($87,993 and not $95,000 as per the business plan) the Tribunal stated at [32] as follows:

> "…While in certain circumstances a reduced investment may, alongside other factors, indicate that a business is operating at a much smaller scale than originally proposed, to the extent that it could no longer reasonably be described as the *same business* that had been approved, that was not the finding made by Immigration New Zealand" [italics added].

In *BK Entrepreneur* [2014] NZIPT 201961, the business was at a far lower scale, there was a lower investment and reduced revenue. Instead of setting up a retail outlet the business operated from home on a much reduced scale. In that case it was accepted by the Tribunal that the finding that the business that had been set up was different from the proposal, was a correct finding.

Reflecting on the wording of the provision itself the task under BH3.1 (a) (ii) is to first determine whether the business is "different from the business proposal…"

Accordingly the Tribunal is correct in pointing out that there must be an overall assessment first and a finding that the difference must add up to a position where:

"it could no longer reasonably be described as the same business".

Accordingly we ask ourselves whether the current financials and the number of employees suggest a business that is *different from* the business proposal.

This requires a global assessment. Whether 3 citizens/residents, 5 citizens/residents or 7 citizens/residents are employed we ask the following questions:

(i) Is the business of the scale that was proposed?

(ii) Has the business operator invested the finance and time in the business that he proposed?

(iii) Overall, even if there are technical differences between the current business and the business plan do these differences reasonably amount to a *different business*?

Even if the questions are answered negatively, BH3.1.b must then be considered. As it will be seen below, however, cases are not always being interpreted in the proposed fashion in accordance with the 2014 case law. It is accepted that with EW points-based post residence cases a lower amount invested or a lower number of residents/citizens employed may mean that the work visa would not have been granted. It may however be that the EW points assessed cases gravitate to a stricter approach.

CASELAW DISCUSSION

I – INVESTOR 1

There are few cases that have gone on appeal involving investor 1 applications; none in the last two year period. We look therefore further back:

AK (Migrant Investor) [2015] NZIPT 202246. Singapore citizens. Nominated funds had not been established as having been earned or acquired legally. Evidence of employment income was not provided. Applicant could not establish how the purchase of 9 properties had been financed. An assertion that the funds came from loans from her husband's late father, inheritance etc. was not supported by any evidence. Care needed to be taken because tax notices indicated that on salary alone, the appellant would not have been able to accumulate the investment finance. Appeal refused.

AS (Migrant Investor) [2015] NZIPT 205062 (18 December 2015). A self-represented applicant from Saudi Arabia. Investment not transferred or invested within 12 months. No request for an extension. No special circumstances. Appeal refused.

CN (Migrant Investor) [2016] NZIPT 203554. A 64 year old citizen from Canada. Value of assets had not been established. New evidence on appeal not considered, and did not disclose a "particular event". Would not have changed the outcome. An independent shareholder valuation was not provided. The history of the share acquisition did not establish value.

II – INVESTOR 2

In *CQ (Migrant Investor)* [2017] NZIPT 203625 (31 January 2017), business experience was not accepted (not 5 employees and not $1m million turnover). Immigration New Zealand held that it was insufficient to rely on financial statements prepared by the business as proof of turnover. Annual tax returns and social insurance records were insufficient. Stamped tax receipts and proof of employee numbers (relevant to social security certificates) were not provided.

The issue in *CR (Migrant Investor)* [2017] NZIPT 203471 (2 March 2017) was whether the appellant (divorced from husband) had acquired her nominated investment, and a shareholding in a building supply company (PR of China). In describing where the funding for the nominated shares had come from, INZ had misunderstood the appellant's evidence (that it had come from another company she owned and a loan agreement against *that* company). Referred back.

In *CS (Migrant Investor)* [2017] NZIPT 203737 (31 May 2017) the appellant had used the quotas of friends and family to exchange Chinese Xuan for US dollars. Evidence as to the legality of the use of quotas of family and friends submitted only on appeal could not be considered. However the matter was referred back for unfairness. The case officer, had in the course of the correspondence referred to non-existent correspondence and had obviously got two cases muddled. The funds were transferred in RMB and not US dollars. Factual inaccuracies were carried into the decision.

CU (Migrant Investor) [2017] NZIPT 203747 (31 May 2017) concerns lawful transfer of Chinese RMB. Funds nominated had already been transferred and were held in NZD and USD by ANZ China. Funds had been transferred with the help of friends and relatives (presumably using their quota). However residence was declined as Immigration New Zealand said it was not satisfied the funds were earned by the appellant as they had been remitted to family and friends for conversion. Therefore they were not considered as "earned or acquired legally". In its deliberation Immigration New Zealand used an incorrect Bank of China circular that was in fact irrelevant to the case in question (transfer quotas had been used from 2011 to 2015 to build up the investment amount). Immigration New Zealand wrongly stated that a SAFE certificate was required. Further the Tribunal did not accept that the money exchange transactions were relevant as to whether or not the money was "earned or acquired legally" in instructions. See also *AU (Migrant Investor)* [2016] NZIPT 203155, a previous ruling concerning the use of family members' quotas to exchange and transfer currency and that this does *not* relate to "ownership" or "acquisition" of the funds.

The question of the legitimacy of the use of in this case a son's foreign currency quota again arose in *CV (Migrant Investor)* [2017] NZIPT 203917 (29 June 2017). Again the theory held by Immigration New Zealand was that as a result it could not be satisfied that the nominated funds were earned or acquired legally. CU was cited in the decision pointing out that whether the funds have been earned or acquired legally is an enquiry fixed on a single or series of points in time, namely the point(s) at which the funds or amounts were initially earned or acquired, as the case may be. This case is also an example of a lack of clarity by the representative as to what the nominated assets etc. were. The Tribunal made the point that with *settlement* funds (BJ5.45.10), lawful acquisition was not required as it was with nominated (investment funds (BJ5.40.1. c.). Please note settlement funds are no longer required (as at 22 March 2017).

Business experience was the focus in *CZ (Migrant Investor)* [2018] NZIPT 204623 (9 March 2018). A telephone interview indicated a lesser role during part of the period claimed (sales work and not managerial). Documentary evidence did not establish her role as a manager for the earlier period. Decision upheld.

In *DA (Migrant Investor)* [2018] NZIPT 204522 there was inadequate evidence as to how the funds were earned. Employment agreements, banks statements and tax certificates indicated total income of $97K over a 7 year period. This was insufficient to account for the accumulation of all the nominated funds. Documents filed on the appeal could not be considered.

Whether funds had been transferred from the client's bank account was an issue in *DB (Migrant Investor)* [2018] NZIPT 204530 22 March 2018. Some of the investment funds came from the son's and wife's account in consideration to BJ7.10.a iii. The funds *must* come from the principal's account. A second transfer rectifying this error was outside of the investment timeframe. Note: There was no issue with funds remitted through the dependent applicants' bank accounts into New Zealand into a (pre-filing) nominated fund (already in the country). Instead of lodging an appeal a refiling was required.

DC (Migrant Investor) [2018] NZIPT 204608 concerns whether the fund was legally earned or acquired. Acquisitions of shareholding not properly explained. Incentive shares did not match the poor financial performance of the company and unpaid tax liabilities of the share-issuing company.

DE (Migrant Investor) [2018] NZIPT 204607 (16 April 2018). Immigration New Zealand required incorrectly that the applicant prove that all nominated funds/assets were earned or acquired legally. Applicant failed to identify which assets were for investment and which for settlement funds (important because the question of whether earned of acquired legally applies to one and not the other). There were sufficient funds in an asset (house) that had been verified (a gift from parents). Earnings did not reflect a far larger sum of savings which therefore remained unexplained. However that could be used for settlement funds and its origins did not need to be vetted. Referred back. **Note:** the different rule that applied to settlement funds no longer applies. Note however that settlement funds are still required in the Parent Retirement category.

DF (Migrant Investor) [2018] NZIPT 204728 (1 May 2018). After transfer of funds, Immigration New Zealand was not satisfied the invested amount was sourced from the approved nominated sources. The case concerned money that was transferred not form the sale of shares but from un-nominated company-related loans that had been

repaid. However other nominated sources were available. The matter was referred back however because the case officer had precluded or discouraged the representative from applying for an investment period extension under BJ7.20.1.c. The Tribunal felt that the response to the representative indicated that INZ would not approach a request to extend the timeframe with an open mind and provided no reasons for that approach.

DG (Migrant Investor) [2018] NZIPT 204681 (17 May 2018) follow BQ (Migrant Investor) [2016] NZIPT 203186 and *BO (Migrant Investor)* [2016] NZIPT 203133 – Funds owned but not co-owned by the supporting spouse cannot be included in nominated funds (even if supported by a matrimonial property agreement).

In *DH (Migrant Investor)* [2018] NZIPT 204637 (18 May 2018), the investment was deficient. A portion of the funds had been transferred into a New Zealand company in which the appellant was sole director and shareholder. The company transferred the funds to a third party company as a loan ($900K). The appellant asserted that this amounted to an "investment in equity in a New Zealand firm". It was held that the loan activity did not amount to an activity "capable" of a commercial return under normal circumstances. The second ground that was given was that the company did not appear to have "the potential to contribute" to the New Zealand economy. A loan to a third party was not an "active use" of funds. The Tribunal held that the company had not established itself as an operational commercial enterprise through one loan. It was simply a vehicle.

The golden raspberry award:

In *DI (Migrant Investor)* [2018] NZIPT 204599 (30 May 2018), there was a shortfall in the investment amount. The representative at the time indicated that she was not aware that the investment had to be actually invested in the 12 month period, but thought that occurred after residence was granted! The appellant had only invested $322K in a NZ QDII fund facilitated by the Bank of China. Special circumstances however were found. The fact that incorrect advice had been given was a factor, interestingly. Incompetence on the part of the adviser helped in this case!

DJ (Migrant Investor) [2018] NZIPT 204780 (18 June 2018), concerned nominated funds, some in the bank and the balance to be from the proceeds of sale of real estate.

The sale was underway but payment in full not received. At the time of application it was not necessary to have receipt of the sale of an asset. The investment period was yet to take place. Decision cancelled.

DK (Migrant Investor) [2018] NZIPT 204725, failed because of insufficient objective evidence of business experience. Tax documentation (Japan) was accepted but unaudited financial statements were not independently verified. The onus was on the applicant and verification was requested by Immigration New Zealand. Decision to decline upheld.

In *DL (Migrant Investor)* [2018] NZIPT 204834, the appellant failed to demonstrate that a property in Shanghai was earned or acquired lawfully. The property had been sourced from the appellant's mother-in-law, who stated she had sold valuable inherited artworks. No evidence of the sale of these artworks was provided. Decision upheld.

In *DM (Migrant Investor)* [2018] NZIPT 204868 (25 September 2018), the case had been presented on the basis of property held solely by the spouse but with the intention to transfer to the principal applicant once approved. As the applicant did not own the nominated funds, residence was correctly refused. Comment: Best to transfer to co-ownership *before* filing.

In *DO (Migrant Investor)* [2018] NZIPT 204961; the appellant had not established that funds already in New Zealand had been transferred from her bank account in Russia. Linking bank statements were not provided. It was possible that some of the missing documents were filed but untranslated. Case not proved.

III – ENTREPRENEUR

In *BF (Entrepreneur)* [2017] NZIPT 203750 (12 March 2017), the business was not adding significant benefit and was not trading profitably. Given the project involved the purchase of an existing business there would need to be at least one new employee for BH4.10.a.i to apply, applying *CA (Entrepreneur)* [2015] NZIPT 202215 at [35]:

> The trading profitability requirement at BH4.10.b was also not met (including the potential to do so in the following 12 months). The profit did not indicate the appellant could pay herself the minimum was. **QUESTION:** Why was residence filed, instead of a roll-over?

In *BL (Entrepreneur)* [2017] NZIPT 204034, the business was not trading profitably. A specialist cafe/delicatessen specialising in European and German food. Losses in each of five years. There had been a renewal in 2013. Special circumstances not found notwithstanding the establishment of an equestrian riding and vaulting school by the wife (also not making a profit).

In *CG (Entrepreneur)* [2018] NZIPT 204956 (8 November 2018), it was argued that an Entrepreneur Residence visa application could be made without an LTBV or EW visa if they met the requirement of an Entrepreneur Work visa. However policy required the applicant to hold a visa that allows self-employment. Special circumstances applied. A US Navy and commercial airline pilot with an avocado orchard.

CJ (Entrepreneur) [2018] NZIPT 205022 (28 September 2018). Issued on the same day as CL (below). Shareholder's current account does not measure how much has been invested.

CK (Entrepreneur) [2018] NZIPT 204692 was referred back for procedural reasons. Relevant responses and associated documents filed by a representative were not considered. The evidence had been emailed before the deadline. The Tribunal accepted the email and attachments had been sent and were relevant to the issues raised (including an accountant's letter of explanation and affidavits). The documents were arguably credible but needed to be considered. Referred back.

CL (Entrepreneur) [2018] NZIPT 205122, (28 September 2018). This is the first of several cases where INZ had wrongly looked at whether the shareholder account had preserved the amount of the investment. The applicant had invested the correct amount, at start-up. A reduction in the shareholders in subsequent years did *not* amount to divestment. The shareholder's current account is an account which records transactions between the company and a shareholder. Funds can flow in either

direction. There was no requirement to "invest" and "retain." See [47]. The Tribunal stated at [46] citing *CL*:

> "At best, the balance of the shareholder's current accounts may be considered an approximation of a shareholder's initial investment, an approximation that becomes increasingly unreliable over time because of the legimate and regular business transactions unrelated to an initial investment in the business. Using it as a proxy for measuring initial investments in the business is not a correct or reliable interpretation of the figure".

In *CM (Entrepreneur)* [2018] NZIPT 204821 (11 October 2018) the issue of eating into the shareholder's account had come up again (from $192K to $182K!). Again it was argued that this revealed a divestment. It was argued in this case as well that the shareholder's current account did not represent the actual investment. CL was cited drawing on comments made in CJ. The Tribunal held it was an error to rely on the shareholder's current account balance as a reliable measure of the appellant's investment.

CN (Entrepreneur) [2018] NZIPT 204693 (21 October 2018) was declined on the ground the business was not trading profitably. The project involved the purchase of an existing business meaning that no new employment was established. Because the question of profit was a standalone ground the Tribunal did not need to consider whether new employment had been achieved. The case involved a second restaurant purchase. A change of proposal had not been made. However a revised financial forecast was requested and filed. It was proposed that a declining turnover at the restaurant would be reversed and there would be an annual turnover of $1.05 million by 2016. The "benefit" would include three new employment positions.

The representative involved in this case (not on appeal) ran what must be a specious argument. As the appellant had "incorporated" her own company, which meant it was a *new* business and therefore all the employees were *new*. The argument appears thankfully not to have been pursued on appeal.

The decision of the Tribunal is however clearly problematic (this case has been discussed in the media). The Tribunal discusses the question of trading profitably by measuring the performance of the business against the financial forecast as per the original business plan stating it still applied ($1.2 million in the first year rising to $1.32 million in the second year). It was argued on appeal that as the balance (LTBV) visa had been approved, in the knowledge of the second restaurant purchase Immigration New Zealand had accepted that the revised business plan projected sums (as proposed by the accountant) at $1.0 million rising to a $1.05 million in the second year. A 45 seat restaurant had been purchased instead of the initial proposal of a 150 seat restaurant (which someone else had purchased).

The Tribunal however found that a change of proposal had not been carried out and the previous counsel had reassured that the higher forecasts were feasible. It is suggested by the Tribunal at [50] that Immigration New Zealand should have required a change of proposal application. However the Tribunal held it (INZ) was entitled to rely on her counsel's clear advice that the second business was equivalent in size, scale and nature. The revised expectations were not formalised.

At [51] the Tribunal went on to suggest that INZ should have explicitly stated that she was bound by the forecast revenue and benefits in her LTBV business plan. It was alleged by the Tribunal that the appellant's counsel must have known this by not pursuing a "change of proposal." As a result, the Tribunal held that the issuing of the LTBV balance on the basis of the new proposal did *not* result in an expectation that the lower figures applied. The Tribunal went on to determine that in order to be trading profitably the original LTBV business plan (based around the first proposed restaurant) had to be met ($1.2 million, $1.32 million and then $1.452 million). The business had in fact achieved $793K and $1.083 million in the second year (and had achieved $1.237 million in the 11 months to 28 February 2017).

It is difficult to accept that given the fact that the business had provided a modest salary for the owner and $1.372 million income for the year ending 31 March 2017 that this does not amount to "trading profitability," in the normal sense of these words. Holding slavishly to the business plan projected amounts, it is suggested, is an error in interpretation approach, in spite of the wording in BB6.1.40.

Apparently the owner has a new entrepreneur visa, presumably, with realistic projected turnover figures. Comment: The case involved an LTBV business issued on 23 October 2012. It is difficult to envisage why the Tribunal case law above did not apply.

CO (Entrepreneur) [2018] NZIPT 205104 (2 November 2018) was another decision concerning an incorrect focus on the shareholder's current account. Referred back.

CP (Entrepreneur) [2018] NZIPT 204934 (6 November 2018) concerned a second appeal, the first appeal concerning a character issue. The second appeal had been declined but quashed on appeal to the High Court. The employment of a new employee was held to be a "particular" event materially affecting the appellant's eligibility. Counsel had not made the argument. Referred back.

CS (Entrepreneur) [2018] NZIPT 204940 the business involved importing vehicle car parts from Japan. Visa was to work for DCF Company. Director's fees paid from ABC Company Ltd which appeared to be work. Not authorised. Appellant had been working for several companies other than the one specified on his LTBV visa. Declined.

CU (Entrepreneur) [2018] NZIPT 204981 (23 November 2018). The Tribunal held potential to become profitable had not been considered correctly. Accounts receivable equalled income in the final period. Business plan indicated $100K, $120K in year 2 and $180K in year 3. Second year target met. Some income received in China not yet transferred to NZ for the third year of trading. Sufficient evidence to trigger a potential to become profitable, however. Referred back.

CV (Entrepreneur) [2018] NZIPT 204925 (27 November 2018) Employment on casual contracts with no minimum hours could not be counted toward full time employment for BB6.1.25.b. An employee on a full time contract but fixed term was therefore not "ongoing" and "permanent" and could not be counted. Did not have one new NZ employee and therefore did not make BH4.10.a.iv (at least one NZ citizen or resident).

CW (Entrepreneur) [2018] NZIPT 204774, (9 November 2018). Immigration New Zealand misunderstood what was intended in the business plan as revenue forecast. Case involved a travel agency. Tribunal found INZ wrong to conclude that business

"commercial" arrangements with other travel agencies meant the work had been outsourced. Referred back.

CX (Entrepreneur) [2018] NZIPT 205036, (30 November 2018). Invested only $58,505. Business plan proposed $100K. Same or greater investment required under BH2.1.d (LTBV granted on 7 April 2014). Funds transferred were not enough. Decline upheld.

DE (Entrepreneur) [2019] NZIPT 205051 (11 January 2019). Projected profit had not been met. Projected profits in the business plan were set at $680K, $744K and $867K. Profits were only $626K and $625K. Not sufficient to meet BB4.10.b (within 12 months).

DF (Entrepreneur) [2019] NZIPT 205128, (31 January 2019). Appellant had only invested $138K. Business Plan indicated $175K. Advertising Agency with design and media services. Declined.

IV – PERMANENT RESIDENCE

In *AM (SSRV)* [2017] NZIPT 203934, the appellant was dependent on her father's General Skills Category residence grant but had returned to Britain. Her resident visa expired on 28 August 1997. There were no grounds to apply for a second subsequent resident visa. Special circumstances did not apply (parents and two brothers living in New Zealand). Psychological and professional reports considered. Own children not included and living in the UK was a countervailing factor.

In *AU (Permanent Resident)* [2017] NZIPT 20428 the failure to meet any of the 5 connections to New Zealand could not be cured by an "intent". The appellant had shortened his time in New Zealand (working as a senior safety risk manager) to care for his aging parents.

In *AY (Permanent Resident)* [2018] NZIPT 205020 (12 December 2018) the appellant had relied on the business option involving the purchase of two taxis and two taxi licences. The Tribunal agreed that it had not been established that the business was trading successfully and benefitting New Zealand. Financials indicated trading at a net loss of $16,998. Improved financials (submitted as evidence in support of special circumstances) were insufficient to establish special circumstances.

V – PARENT RETIREMENT

In *AL (Parent Retirement)* [2018] NZIPT 204668 (14 May 2018), the Tribunal upheld that R5.35 prevented a son who was the dependent child in a resident application in 2000 from now sponsoring his parents on their new residence application. The wife and son had obtained residence when the husband who was in China was approved residence under the then Business (Investor) category. The husband never flew in. The wife subsequently lost her residence status as she returned to China. The son kept his and became a citizen. Special circumstances not found.

In *AM (Parent Retirement)* [2018] NZIPT 204777 (21 November 2018) – funds transferred to New Zealand could not be counted as funds nominated and approved. Residential properties were also nominated assets worth $1.1 million and $0.88 million. Applicant proposed not to sell the properties in New Zealand (and invest in an approved investment) but to transfer a nominated fund of RMB 3.0 million from China. Funds invested in the ASB had not come from the bank indicated in China. It transpired that the funds that arrived in an intermediate bank in the US had been transferred through the accounts of nine individuals (foreign quotas), before arriving at the HSBC account. It was alleged that the approval-in-principle case officer had agreed to the use of quotas belonging to other people. There was no record of this. Some of the "linking documentation" was provided to the Tribunal on appeal, but the Tribunal could not consider the information. It was alleged (there was no evidence of this) that personal attendance on the branch at Hong Kong was required. The Tribunal did not accept that the hot weather was a reason to allow the evidence on appeal where it was not provided to Immigration New Zealand under s 189 (3) (a). The case was represented throughout by the son. Special circumstances not found. Decision upheld.

STATISTICS: THE IMMIGRATION STORY

The latest available statistics on the MBIE website lump business category statistics in with the skilled migrant category. The overall decline rate was 13% for 2016/2017, with a total of 12,589 applications being approved (involving 28,646 people). Of this, 447

principal applicants (total 1,418 people) were granted residence under "Investor"[1] and 198 under the Entrepreneur (Residence) category (594 people). These figures do not include Relocation of Employee policy (see below).

Although the policies change from year to year records indicate 129 resident grantees under "Investor" in 1997/98 with a peak in 2001/2002 at 4,394 and a current rate during 2016/2017 of 1,418. The Entrepreneur statistics which also involves policies that have changed significantly begins with just one approval in 1998/1999 and 28 in 1999/2000, when this policy was first introduced.[2] It peaks in 2005/2006 with 2,092 gaining residence and in the last five years fluctuating between 404 (2011/2012) and the high point of 852 (2015/2016) and then a drop to 594 in 2016/2017 (the last year available). It is predicted by the writer that with the changes to the business plan requirement (see above) the number of those gaining residence through the entrepreneur category will continue to drop. Fewer will be coming through the entrepreneur work visa programme.

What these statistics do not tell us however is what impact there is on success rates where the applicant is represented by experienced and competent advisers. All it provides us with is context. Neither does it reflect the work that immigration lawyers and advisers do to deflect the filing of cases that will not pass muster.

CONCLUDING REMARKS

Although there may be a high overturn rate, a reading of the cases decided by the Tribunal indicates, when the cases are analysed in detail, a poor level of advocacy and representation. In the cases involving investors from China, there is the added difficulty involved in proving in a transparent manner the origins of funds and past business experience.

Of course what we do not know is how many cases there are that do not come before the Tribunal, including the cases that do not get filed (because of the adverse advice of competent counsel) and the cases that are well presented with cogent submissions and

[1] Presumably Investor 1 and 2.

[2] Note that this was long before Australia introduced its equivalent.

well-identified evidence, and are quietly and correctly processed by INZ. The Tribunal overturn rate is a blunt instrument. For a fraction of the investment amount, investors are encouraged to seek the assistance of competent and experienced immigration counsel and advisers, who study the case law and who strive to foresee the issues that a given case will present, and to avoid going on appeal. The narrative set out by the Tribunal of cases going wrong is extremely helpful, and needs to be recognised.

The cases discussed above of course identify what can sometimes go wrong. What cannot be discussed through case law analyses are the many cases that have gone right, or according to plan.

DAVID RYKEN
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