

Federal Court



Cour fédérale

Date: 20150316

Docket: IMM-6664-13

Citation: 2015 FC 325

Ottawa, Ontario, March 16, 2015

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**MARIAM MAHFOUZ MEKHAEL
KERYAKOUS**

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGEMENT AND REASONS

[1] This is an application for judicial review of a decision of a visa officer of the Embassy of Canada in Cairo, Egypt, refusing Ms. Keryakous' application for permanent residence in the Federal Skilled Worker class [FSW class].

[2] For the reasons that follow, this application is allowed.

Background

[3] Ms. Keryakous is a citizen of Egypt. In January 2013, she applied for permanent residence in the FSW class and requested that her application be reviewed based on experience in the “Other administrative service managers” (NOC 0114) and “Retail and wholesale trade managers” (NOC 0621) occupations.

[4] With her application, she provided a Human Resources and Skills Development Canada [HRSDC] confirmation of her arranged employment with a pharmacy in Peterborough, Ontario, as a “Pharmacy Administration Manager” [the arranged employment]. This document indicated that a Bachelor’s degree was required by the employer for this position. She also included two letters from employers in Egypt – she was employed as an “Assistant Administrative Manager” and “Administrative Manager” at Emad Soliman Pharmacies Group [the Pharmacy] and as an “Administrator” at the Mansoura University Faculty of Medicine [the University].

[5] At the Pharmacy, her job duties included reviewing attendance of employees, creating timetables for executives and cashiers, determining daily tasks for administrative employees and cashiers, managing customer service and complaints, determining stock deficiencies, and placing orders. At the University her job duties included “managing, directing and assigning the tasks of all office staff as well as IT staff and technicians.”

[6] In a Global Case Management System [GCMS] entry dated April 8, 2013, the officer noted that the letters on file did not satisfy him or her that Ms. Keryakous “has performed the main duties of a manager or even of a NOC A or B position full-time,” that the job duties from

her employment in Egypt appeared to be clerical, and that “it was not at all clear that she has been responsible for supervising other employees.” The officer was concerned that Ms. Keryakous was not qualified for the arranged employment and that she intended to reside in Mississauga, Ontario when the arranged employment was in Peterborough.

[7] A procedural fairness letter dated April 19, 2013, informed Ms. Keryakous of these concerns and she was given sixty days to respond.

[8] Ms. Keryakous provided a response on May 10, 2013, including another letter from the Pharmacy and a job description card from the University that attested to the fact that her employment experience included management, training, and supervising staff. She also provided a letter from her prospective Canadian employer stating that he had interviewed her thoroughly and was satisfied that she had “tremendous practical experience and management skills” and that her “experience and knowledge meet and even exceed those required for the job in Canada.” The prospective employer indicated that he lives in Mississauga and commutes to work in Peterborough, so he had offered to carpool with Ms. Keryakous until she and her family decide where to live.

[9] The application was refused on June 19, 2013, with the officer indicating that no submissions to the fairness letter had been received. The Applicant’s representative advised the visa office of the error and provided proof that a response has been sent before the deadline. The GCMS notes indicate that the submissions had been made in time but not properly attached to the file. By letter dated August 12, 2013, the officer advised that the application had been re-

opened and requested documentation to show that her uncle, Mr. Nagi Youssef, “is currently residing in Canada which should include a lease agreement, most recent notice of assessment (NOAH) from CRA, employer’s letter confirming employment, monthly bills, credit card invoices.” In addition the letter stated that she “is required to provide ... updated contact information for her relative in Canada.”

[10] Ms. Keryakous’ representative responded by email dated September 9, 2013, attaching her Uncle’s Confirmation of Landing dated July 4, 2012, Permanent Resident Card dated July 4, 2012, and a TD Canada Trust credit card statement dated July 25, 2013, for the month showing purchases and payments made between July 14 and July 25, 2013. It was explained that the uncle was on a month-to-month lease and had no lease agreement, did not have a Notice of Assessment from CRA as he had not yet filed a tax return, and had no current employment but was seeking employment.

[11] The officer refused the application in a decision dated September 12, 2013. The officer was not satisfied that Ms. Keryakous had experience that fit within the “Other administrative service managers” (NOC 0114) or “Retail and wholesale trade managers” (NOC 0621) categories or in any Skill Type 0 Management Occupation. However, the officer was satisfied that she had sufficient experience in an occupation that corresponds to Skill Level A or B of the NOC matrix to meet the requirements of subsection 75(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, so this was used as the basis of her assessment.

[12] The Officer did not award Ms. Keryakous any points for her arranged employment in Canada. The officer found that her response to the April 9, 2013 fairness letter was insufficient to overcome his or her concerns that Ms. Keryakous is not able to perform or likely to accept and carry out arranged employment.

[13] In a GCMS entry dated August 8, 2011, the officer wrote:

[Applicant] has no education that is directly related to retain [*sic*] management or to pharmacy. She has a bachelor degree in English Language and literature I have reviewed other applications with similar [Arranged Offers of Employment] where the applicant is a practicing Pharmacist in Egypt but is not yet registered to work as a Pharmacist in Canada. That is not the case here. Applicant has no qualifications as a pharmacist in Egypt and so she could not be registered as a Pharmacist in Canada (unless she takes a degree in Pharmacy). I understand that the [Arranged Offer of Employment] is not for a job as a pharmacist and therefore it is not necessarily relevant that she is not qualified as a pharmacist. I also understand that she has provided evidence that she worked in a pharmacy in an administrative position in Egypt and that this is relevant to the position offered. Nevertheless, I find it impractical that the employer would not seek to hire someone who has the ability to be registered in Canada as a pharmacist. It is certainly reasonable to suppose that such an employee would have more to offer for the purposes of the owner of pharmacies.

[14] The officer also did not award Ms. Keryakous any points for adaptability on the basis of having a relative in Canada. In reaching that decision, the officer considered the response to the request for supporting documentation. In a GCMS entry dated September 12, 2013, the officer noted that Mr. Youssef's credit card statement did not establish he was living in Canada because it only covered a brief period of time, showed purchases which could have been made by someone on vacation and there were no payments that indicated long-term residency. Further, the officer questioned whether Mr. Youssef actually lived at the address provided since there was

no lease and the officer had been unable to contact Mr. Youssef at the phone number provided. Mr. Youssef's status as a permanent resident did not address the officer's concern that he may be living and working outside of Canada. The officer concluded that he was not satisfied that Mr. Youssef is living in Canada. Ms. Keryakous does not challenge that part of the decision.

[15] The GCMS entry noted that Ms. Keryakous, her prospective employer and the immigration consultant are all Egyptian Christians and that "while this itself is in no way an indication that the job offer is not genuine or that the applicant is unable to perform the job," if she is "under qualified for the job or doesn't really intend to take the job, it is possible that community members have facilitated this job offer so that the applicant would be eligible to apply for [permanent residence]" [emphasis added].

[16] In the officer's overall assessment, Ms. Keryakous received 65 points out of a possible 100. The minimum requirement to qualify for immigration to Canada is 67, so the officer concluded that Ms. Keryakous had not obtained sufficient points to demonstrate that she will be able to become economically established in Canada.

Issues

[17] The issues are:

1. Did the officer err in failing to exercise his discretion to approve Ms. Keryakous's skilled worker application given the unique circumstances of this case?
2. Did the officer err in assessing Ms. Keryakous's arranged employment? Did the officer deny Ms. Keryakous procedural fairness by failing to provide a meaningful

opportunity to respond to the officer's concerns with respect of the offer of arranged employment?

Analysis

A. Substituted Evaluation

[18] I agree with the respondent that this issue is to be decided in its favour. As is stated in the Minister's memorandum of argument, "While visa officers have the authority to consider an alternative evaluation under section 76(3) on their own initiative, they are under no duty to exercise that discretion unless specifically requested to do so." *Ealamieh v Canada (Minister of Employment and Immigration)*, 2008 FC 722. There was no request by Ms. Keryakous that the officer exercise that discretion and there is thus no reviewable error in his failure to do so on his own initiative.

B. Evaluation of the Arranged Employment Offer

[19] It is submitted by the respondent that the officer's decision is entitled to deference and that his decision is reasonable based on the record.

[20] While I accept that the result reached by the officer was open to him, I am similarly of the view that the opposite result was equally open to him based on the record. I am deeply concerned that the result reached may have been swayed by improper considerations and it is for that reason, that the decision must be set aside and the application redetermined by a different officer. Moreover, these improper considerations were outlined in the officer's notes and Ms. Keryakous was not given the appropriate opportunity to respond to them. Therefore, the decision was also procedurally unfair and must be set aside for this reason as well.

[21] In particular, I am not satisfied that the officer's assessment was not influenced or tainted by a suspicion that the offer was made only to facilitate Ms. Keryakous's entry into Canada. My concern arises from the fact that the officer appears to give no weight to the opinion of Ms. Keryakous's future employer in Canada who wrote that he had interviewed Ms. Keryakous, discussed "her credentials and areas of her practical experience" at her current and former jobs, and found her to have "tremendous practical experience and management skills and people skills" which led him to conclude that she is more than qualified to do the job he offered her. I am particularly troubled by at least two observations of the officer.

[22] First, the officer speculates that it is "impractical" that the Canadian employer is not seeking to fill the Administrative Manager position in the pharmacy with someone who has the ability to be registered as a pharmacist in Canada. He writes in the GCMS notes:

I find it impractical that the employer would not seek to hire someone who has the ability to be registered in Canada as a pharmacist. It is certainly reasonable to suppose that such an employee would have more to offer for the purposes of the owner of pharmacies.

[23] This observation strongly suggests that the officer has questions about the bona fides of the alternative employment offer.

[24] Second, the officer in the fairness letter observed that "you have declared an intention to reside in Mississauga, Ontario, which is approximately 180km away from the location of the employment that has been offered to you." The officer asks no question regarding this observation or indicates in any way what his concern is. Nonetheless, the prospective employer in his letter to the officer writes:

I live in Mississauga and commute to Peterborough. I offered Mariam to carpool with me at the beginning until she and her family make their own choice of residence.

[25] The officer's comments on this again suggest that he is questioning the bona fides of the offer. He writes:

I do not find it reasonable that the applicant would intend to travel 180km each way to work.... The employer has indicated that [Ms. Keryakous] may carpool with him, but according to his letter he owns many pharmacies. Are they all in Peterborough? Does he go to Peterborough each day? I would have expected [Ms. Keryakous] to provide a well-thought out explanation for why she has not immediately chosen to live where the job is. The response provided is insufficient to overcome my concerns.

Perhaps if the officer had asked Ms. Keryakous why she had not immediately chosen to live where the job is, he would have received a response. If that was his concern, then procedural fairness dictates that he ought to have stated it clearly in the fairness letter. His real concern appears to be directed to the prospective employer and his offer of carpooling. Surely the employer knows how frequently he drives to Peterborough and knows his expectations for the employee. How can there be any real concern that the offer of carpooling will permit the applicant to meet the employer's needs?

[26] In my view, one can not help but ask whether this officer's determination on these central questions was influenced by what he speculated was a scheme by the Egyptian Christian community to facilitate Ms. Keryakous entry into Canada. The officer suggests this as a possibility in the GCMS notes:

I note that there is info in the [Arranged Employment Offer] file which indicates that the employer and the consultant are both

Egyptians who know each other through their church community in Canada. According to her birth certificate on file [Ms. Keryakous] is also an Egyptian Christian and she has at least one relative who recently became a [Permanent Resident] so she has some connection to the same community in Canada. This in itself is in no way an indication that the job offer is not genuine or that the applicant is unable to perform the job. Indeed, if the applicant were qualified this community connection would likely have a very large positive impact on her ability to settle in to the job and Canada. However, if applicant is under qualified for the job, or doesn't really intend to take the job, it is possible that community members have facilitated this job offer so that applicant would be eligible to apply for [Permanent Residence], as having an [Arrangement Employment Offer] was one of the very few ways to be eligible to apply at the time that [Permanent Residence] applied. I note that the employer was contacted by telephone prior to the issuance of the [Arranged Employment Offer] and I note that the employer has provided updated confirmation of the [Arranged Employment Offer]. However, after considering the applicant's education and training background and prior work experience, and after presenting my concerns about her ability and likelihood to accept and carry out the employment and providing her with an opportunity to respond, I am not satisfied that she is able to perform and is likely to accept this employment.

[27] In my view, it cannot be said with any assurance that this decision is reasonable given the shadow of these concerns surrounding it. Furthermore, the officer did not put his concerns to Ms. Keryakous in a procedurally fair manner.

[28] No party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed, the decision is set aside and the application is referred to a different officer for determination.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6664-13

STYLE OF CAUSE: MARIAM MAHFOUZ MEKHAEL KERYAKOUS v
THE MINISTER OF CITIZENSHIP AND
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