IMM-3079-96

BETWEEN:

Yu Yi TSAI, domiciled and residing at No. 81-24,
Cheng-Nan St., Nan-Ning Li, Ching-Shui Town,
Taichung Hsien, Taiwan,

Applicant,

- and -

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION c/o Deputy Attorney General
of Canada, Department of Justice, having office at
Complexe Guy Favreau, 200 René-Lévesque West, East Tower,
5th Floor, in the City of Montreal, Province of Quebec,

Respondent.

REASONS FOR ORDER

PINARD J.

The applicant seeks judicial review of a decision of Gregory Chubak, Second Secretary, Immigration at the Canadian Embassy in Seoul, Korea (the "visa officer"), dated July 16, 1996, refusing the applicant's application for permanent residence in Canada in the investor category.

In his refusal letter, the visa officer indicated the following:

> In my opinion you do not meet this definition of investor because you have not successfully operated, controlled or directed a business or commercial undertaking. Notwithstanding your not insignificant experience, your current and most senior position to date, while managerial in scope, does not meet the aforementioned definition. While you have an equity position in the accountancy of J.C. Wang and Co. and not insignificant responsibilities therein, these responsibilities as co-mamanger [*sic*] are insufficient to be interpreted as operating, controlling, or directing for the purposes of the Immigration Act and Regulations. As you explained and discussed in detail at interview, you are but one of three senior managers whose decisions regarding operation, direction, and control are consensual and, notwithstanding your co-manager's significantly greater equity positions, require the input and agreement of all to be effectively binding.

In the recent decision in *To v. Canada* (May 22, 1996), A-172-93, the Federal Court of Appeal discussed the standard of review applicable to a visa officer's decision to refuse an

applicant for permanent residence in the Entrepreneur category. The Honourable Mr. Justice Stone stated the following, at pages 2 and 3:

> **The appellant's application to enter Canada as an "entrepreneur" [. . .] immigrant from Hong Kong gave rise to a discretionary decision on the part of the immigration officer which was required to be made on the basis of specified statutory criteria. The appellant's intention was of establishing a business in Canada. The "ability" so required was one of the relevant criteria.**
>
> **Here, the immigration officer was not satisfied that the appellant had either the business ability or the personal financial resources to establish a business in Canada.** We agree with Jerome A.C.J. that the case does not justify judicial intervention. In *Maple Lodge Farms Limited v. Government of Canada et al.*, [1982] 2 S.C.R. 2, at pages 7-8, McIntyre J. stated for the Court:
>
> It is, as well, a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, **and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.**
>
> In our view, these requirements, to the extent that they apply, have been met in this case. Accordingly, no basis has been shown for interfering with the decision of the Trial Division.
>
> (My emphasis.)

As noted in *To*, there may be grounds for judicial intervention where a visa officer relies on irrelevant or extraneous criteria, thereby fettering his or her discretion. The applicant herein contends that the visa officer imported the requirement that he have "unfettered operational control" into the definition of "investor".[1] It is worth recalling that subsection 2(1) of the *Immigration Regulations, 1978* defines an investor as follows:

2. (1) In these Regulations,

[...]

"investor" means an immigrant who
(*a*) has successfully operated, controlled or directed a business,
(*b*) has made a minimum investment since the date of the investor's application for an immigrant visa as an investor, and
(*c*) has a net worth, accumulated by the immigrant's own endeavours,
(i) where the immigrant makes an investment referred to in subparagraph (*a*)(i) or (ii), (*b*)(i), (*c*)(i) or (ii), (*d*)(i) or (ii) or (*e*)(i) or (ii) of the definition "minimum investment", of at least $500,000, or
(ii) where the immigrant makes an investment referred to in subparagraph (*a*)(iii), (*b*)(ii), (*c*)(iii), (*d*)(iii) or (*e*)(iii) of the definition "minimum investment", of at least $700,000;

In *Cheng v. Canada* (1994), 25 Imm.L.R. (2d) 162, Mr. Justice Cullen concluded that a visa officer's decision to refuse an applicant's application for landing in the investor category

[1] Affidavit of Gregory Jeno Chubak, paragraph 14.

had to be quashed on the grounds that the visa officer had "imported additional requirements into the criteria for qualifying for the investor program, namely the operation, or responsibility for the operation, of the company as a whole". It is worth reproducing the relevant extract of *Cheng*, which is found at page 166:

> I do not believe that the officer followed the expressed policy in this case. That in itself is not an error worthy of referring the matter back for redetermination (see *Vidal v. Canada (Minister of Employment and Immigration)* (1991), 41 F.T.R. 118). However, as I read her reasoning as expressed in the letter to the applicant of November 19, 1993 and her affidavit sworn March 28, 1994, **I believe that she has imported additional requirements into the criteria for qualifying for the investor program, namely the operation, or responsibility for the operation, of the company as a whole. Indeed, if she found that the applicant was responsible for the operation of an integral, profit-generating part of the business, then he ought to have met the criteria absent some other factor. In the case at bar, the only such factor I can see is the added requirement of operating the business as a whole. This means that only those few at the actual top of the corporate ladder would qualify, while others in positions of otherwise great practical responsibility would not.**
>
> **This strict reading of the definition of investor is not consistent with the policies of Immigration Canada, as set out in the Regulations or expressed in the guidelines. It is not intended that the applicant operate a wholly-owned business or a wholly-owned undertaking. That interpretation is clearly wrong and the addition of such a criterion does amount to an error of law which adversely affected the exercise of her jurisdiction and which warrants referring the matter back to a different immigration officer for redetermination.** Essentially, by imposing her own criteria for the definition of investor on the circumstances of the applicant, the officer has fettered her discretion. Further, unless and until some new guidelines are introduced, the parties affected by the policy are entitled to be treated in a consistent manner, not to the arbitrary addition of criteria by each particular immigration officer.
>
> [...]
>
> In the case at bar, the officer, upon considering all of the evidence presented, reached a decision based in part on a misapprehension of the law. She did not, in so doing, breach the procedural fairness owed to the applicant. However, upon a rehearing of the matter, the applicant must be given the opportunity to explain how he qualifies as someone who has gained experience as a senior manager in a company.

(My emphasis.)

It is my opinion that the visa officer in the case at bar committed a similar error to that committed by the visa officer in *Cheng* by importing the requirement that the applicant have "unfettered operational control" of J.C. Wang and Company. The visa officer clearly viewed the fact that major operational and directional decisions were taken by consensus by a three-member management committee, of which the applicant was one, as a factor weighing against a finding that the applicant had "successfully operated, controlled or directed a business". From my reading of the definition of "investor", there is no requirement for an applicant in this category to have had sole or final decision-making power in a company. In my view, the visa officer was being unduly restrictive in his interpretation of this aspect of the definition of investor. Simply because the management style

of a corporation is based upon consensus decision-making does not necessarily mean that the applicant did not have significant responsibility in that company. The evidence in fact disclosed that the applicant was one of only three persons making final decisions with respect to the overall direction of the company.

Consequently, the decision of the visa officer is set aside on the ground that he imported extraneous and irrelevant criteria into the definition of investor, thereby fettering his discretion and erring in law. The matter is therefore sent back to a different visa officer at a different visa office for reconsideration.

This is not a matter for certification.

OTTAWA, Ontario
October 2, 1997

JUDGE