

Date: 20070809

Docket: IMM-999-07

Citation: 2007 FC 829

Vancouver, British Columbia, August 9, 2007

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

GURCHARAN SINGH

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a visa officer's decision dated January 12, 2007, denying an application for a permanent resident visa as an "entrepreneur". The visa officer decided that the applicant did not meet the minimum requirements for business experience in a "qualifying business" as defined in the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations).

[2] The applicant, a citizen of India, resides and works in the Philippines. He has been involved in business for over 25 years and has a personal net worth exceeding \$1,500,000. He applied on

June 24, 2002, for a permanent resident visa. In support of his application, he provided a list of assets, proof of bank deposits held by him and his wife, valuation of real estate owned in India, and financial statements for three businesses: Sanjit Trading Corporation, Gurcharan Singh Trading, and Gurcharan Sing Puar.

I. Issues

[3] The issues raised in this application are:

1. Did the visa officer err in finding that the applicant did not meet the minimum requirements for his business to be a “qualifying business” as defined in the Regulations in order to be an entrepreneur under the Regulations?
2. Did the visa officer have a duty to provide the applicant with an interview when the visa officer decided that the evidence submitted by the applicant was insufficient to qualify the applicant as an entrepreneur?

II. Relevant Legislation

[4] The legislation relevant to this application is the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations). The applicable provisions of the Regulations are set out in Annex A of these reasons.

III. Standard of Review

[5] The first issue raised in this application concerns a question of mixed law and fact, namely whether the legal definition of a “qualifying business” applies to the facts underlying the applicant’s

business experience. Given that the visa officer is entitled to some deference in respect of factual findings, but not in respect of the determination of the correct legal test to apply to those factual findings, the appropriate standard of review is one of reasonableness.

[6] With respect to the second issue, this is a question of law in which the Court has greater expertise than the visa officer so that the appropriate standard of review is correctness.

IV. Decision under Review

[7] The visa officer was not satisfied that the applicant was a member of the entrepreneur class.

In the decision letter under review, the visa officer set out the requirements of subsections 97(1) and 88(1) of the Regulations. In particular, the visa officer stated:

Subsection 88(1) of the regulations states that “business experience”, in respect of an entrepreneur, means the management of a qualifying business and the control of a percentage of equity of the qualifying business for at least two years in the period beginning five years before the date of application for a permanent resident visa and ending on the day a determination [is] made in respect of the application.

Subsection 88(1) defines “qualifying business” as a business – other than a business operated primarily for the purpose of deriving investment income such as interest, dividends or capital gains – for which, in each of any two years in the period beginning five years before the date of application for a permanent resident visa and ending on the day a determination is made in respect of the application, there is documentary evidence of any two of the following:

- (a) the percentage of equity multiplied by the number of full time job equivalents is equal to or greater than 2 full time job equivalents per year;

(b) the percentage of equity multiplied by the total annual sales is equal to or greater than \$500,000;

(c) the percentage of equity multiplied by the net income in the year is equal to or greater than \$50,000;

(d) the percentage of equity multiplied by the net assets at the end of the year is equal to or greater than \$125,000.

[...]

You do not come within the meaning of entrepreneur because you have not satisfied me that you have business experience in a qualifying business as defined in the regulations. Despite our request to submit substantive documentation, you have not demonstrated that you meet at least two of the above criteria of a qualifying business. As a result, you do not meet the requirements of subsection 97(2) of the regulations. Please note, I am convinced, from the information contained on the file, that this assessment accurately reflects your chances of successfully settling in Canada. [...]

V. Analysis

A. *Scheme of the Regulations for Entrepreneurs*

[8] A person who qualifies as an entrepreneur in the Regulations may become a permanent resident on the basis that an entrepreneur will have demonstrated their ability to become economically established in Canada.

[9] An entrepreneur is defined under s. 88 of the Regulations as, *inter alia*, a person with a minimum of two years of experience in the management of a "qualifying business". A "qualifying business" is defined as a business, other than a business for the purpose of deriving investment income, with:

1. two or more full-time employees per year;

2. annual sales equal to or greater than \$500,000;
3. net income equal to or greater than \$50,000; and
4. net assets equal to or greater than \$125,000.

The "qualifying business" must meet any two of these criteria.

[10] The Court finds, and the parties agree, that the "assets" of the qualifying business are different **from** the "net worth" of the entrepreneur, which is the second criterion of the definition of an entrepreneur. That criterion requires that a person have a minimum net worth of \$300,000. However, as explained, the parties do not dispute that the minimum net worth of the applicant, which is in excess of \$1.5 million dollars, is different than the minimum requirement of the assets of the qualifying business, which is \$125,000.

B. *Issue No. 1* *Did the visa officer err in finding that the applicant did not meet the minimum requirements for his business to be a "qualifying business" as defined in the regulations in order to be an entrepreneur under the Regulations?*

[11] The applicant provided financial information with respect to three businesses which he operated in the Philippines for the financial years 1997 to 2004 inclusive. The Court has reviewed this information and found that it is, in many respects, confusing and inconsistent. Sometimes the financial information is provided for two businesses and sometimes for three. With respect to one business, sometimes the information shows that the applicant owns a percentage of the business and at other times that he owns all of the business. Some of the information shows that one of the businesses is a corporation and at other times the information shows that it is a proprietorship. The

consensus of the Court and counsel is that it is difficult to make sense of parts of the financial information provided by the applicant in support of his application.

[12] In any event, the respondent has given the applicant the benefit of the doubt with respect to these inconsistencies and has proceeded to decide whether the financial records demonstrate that the combined businesses of the applicant meet the minimum requirement of the definition of "qualifying business" for two of the eight years for which financial records were provided. Based on this financial information, the visa officer found that the combined businesses of the applicant did not for any two years meet the minimum requirement of \$500,000 for annual sales, the minimum requirement of \$50,000 for net income or the minimum requirement of \$125,000 for net assets.

[13] Accordingly, I am satisfied that the visa officer reasonably concluded that the applicant was not a member of the entrepreneur class as established under subsection 97(1) of the Regulations since he did not establish the minimal requirements set out in subsection 97(2).

C. Issue No. 2 Did the visa officer have a duty to provide the applicant with an interview when the visa officer decided that the evidence submitted by the applicant was insufficient to qualify the applicant as an entrepreneur?

[14] The duty to act fairly on the visa officer does not relieve the applicant from the onus of satisfying the visa officer that the applicant has met the requirements of the Regulations. The visa officer is under no duty to request that better further evidence be produced. As I held in *Heer v. Canada (Minister of Citizenship and Immigration)* 2001 F.C.J. No. 1853 at paras. 20 and 21, the applicant has knowledge that he must provide proof that he qualifies as an entrepreneur. When the

evidence submitted is deficient or insufficient, the visa officer is not obliged to provide the applicant with a preliminary finding in this regard, or an interview, or with another opportunity to present more evidence. The applicant should have been well aware of the minimum requirement with respect to annual sales, net income and business assets in order to be a "qualifying business" under the definition of an entrepreneur. Accordingly, there is no error of law in failing to provide the applicant with either an interview or another opportunity to address the concerns of the visa officer with respect to the deficient financial information provided by the applicant.

VI. Conclusion

[15] For these reasons, this application must be dismissed.

[16] At the conclusion of the hearing, it was clear that this case has not raised an important question which should be certified for an appeal. The respondent initially proposed a question which both parties and the Court agreed would not be determinative of this appeal. Accordingly, both parties and the Court agree that this case does not raise a question which should be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed.

"Michael A. Kelen"

Judge

Annex "A"

Immigration and Refugee Protection Regulations, SOR/2002-227

Definitions

88. (1) The definitions in this subsection apply in this Division.

[...]

"business experience" , in respect of [...]

(b) an entrepreneur, other than an entrepreneur selected by a province, means a minimum of two years of experience consisting of two one-year periods of experience in the management of a qualifying business and the control of a percentage of equity of the qualifying business during the period beginning five years before the date of application for a permanent resident visa and ending on the day a determination is made in respect of the application; and (*expérience dans l'exploitation d'une entreprise*) [...]

"entrepreneur" means a foreign national who

(a) has business experience;

(b) has a legally obtained minimum net worth; and

(c) provides a written statement to an officer that they intend and will be able to meet the conditions referred to in subsections 98(1) to (5).
(*entrepreneur*)

[...]

"full-time job equivalent" means 1,950 hours of paid employment. (*équivalent d'emploi à temps plein*)

[...]

Définitions

88. (1) Les définitions qui suivent s'appliquent à la présente section.

« actif net » S'agissant d'une entreprise admissible ou d'une entreprise canadienne admissible, s'entend de l'excédent de l'actif de celle-ci sur son passif, augmenté des prêts octroyés à l'entreprise par l'étranger qui demande ou a demandé un visa de résident permanent et son époux ou conjoint de fait. (*net assets*) [...]

« avoir net » [...]

b) s'agissant d'un entrepreneur, autre qu'un entrepreneur sélectionné par une province, s'entend de la juste valeur marchande de tous les éléments d'actif de l'entrepreneur et de son époux ou conjoint de fait, diminuée de la juste valeur marchande de tous leurs éléments de passif; [...] (*net worth*)

« avoir net minimal » :

a) S'agissant d'un entrepreneur autre qu'un entrepreneur sélectionné par une province, correspond à la somme de 300 000 \$; [...]
(*minimum net worth*)

« entrepreneur » Étranger qui, à la fois :

a) a de l'expérience dans l'exploitation d'une entreprise;

b) a l'avoir net minimal et l'a obtenu licitement;

c) fournit à un agent une déclaration écrite portant qu'il a l'intention et est en mesure de remplir les conditions visées aux paragraphes 98(1) à (5).
(*entrepreneur*) [...]

« entreprise admissible » Toute entreprise — autre

"minimum net worth" means

(a) in respect of an entrepreneur, other than an entrepreneur selected by a province, \$300,000; and (*avoir net minimal*) [...]

"net assets" , in respect of a qualifying business or a qualifying Canadian business, means the assets of the business, minus the liabilities of the business, plus shareholder loans made to the business by the foreign national who is making or has made an application for a permanent resident visa and their spouse or common-law partner. (*actif net*)

"net income" , in respect of a qualifying business or a qualifying Canadian business, means the after tax profit or loss of the business plus remuneration by the business to the foreign national who is making or has made an application for a permanent resident visa and their spouse or common-law partner. (*revenu net*)

"net worth" , in respect of [...]

(b) an entrepreneur, other than an entrepreneur selected by a province, means the fair market value of all of the assets of the entrepreneur and their spouse or common-law partner minus the fair market value of all of their liabilities; and (*avoir net*) [...]

"percentage of equity" means

(a) in respect of a sole proprietorship, 100 per cent of the equity of the sole proprietorship controlled by a foreign national or their spouse or common-law partner;

(b) in respect of a corporation, the percentage of the issued and outstanding voting shares of the capital stock of the corporation controlled by a foreign national or their spouse or common-law partner; and

(c) in respect of a partnership or joint venture, the percentage of the profit or loss of the partnership or joint venture to which a foreign national or their spouse or common-law partner is entitled. (*pourcentage des capitaux propres*) [...]

"qualifying business" means a business — other

qu'une entreprise exploitée principalement dans le but de retirer un revenu de placement, tels des intérêts, des dividendes ou des gains en capitaux — à l'égard de laquelle il existe une preuve documentaire établissant que, au cours de l'année en cause, elle satisfaisait à deux des critères suivants :

a) le pourcentage des capitaux propres, multiplié par le nombre d'équivalents d'emploi à temps plein, est égal ou supérieur à deux équivalents d'emploi à temps plein par an;

b) le pourcentage des capitaux propres, multiplié par le chiffre d'affaires annuel, est égal ou supérieur à 500 000 \$;

c) le pourcentage des capitaux propres, multiplié par le revenu net annuel, est égal ou supérieur à 50 000 \$;

d) le pourcentage des capitaux propres, multiplié par l'actif net à la fin de l'année, est égal ou supérieur à 125 000 \$. (*qualifying business*) [...]

« équivalent d'emploi à temps plein » Correspond à 1 950 heures d'emploi rémunéré. (*full-time job equivalent*)

« expérience dans l'exploitation d'une entreprise » : [...]

b) s'agissant d'un entrepreneur, autre qu'un entrepreneur sélectionné par une province, s'entend de l'expérience d'une durée d'au moins deux ans composée de deux périodes d'un an d'expérience dans la gestion d'une entreprise admissible et le contrôle d'un pourcentage des capitaux propres de celle-ci au cours de la période commençant cinq ans avant la date où la demande de visa de résident permanent est faite et prenant fin à la date où il est statué sur celle-ci; (*business experience*) [...]

« pourcentage des capitaux propres »

a) Dans le cas d'une entreprise à propriétaire unique non dotée de la personnalité morale, la totalité des capitaux propres contrôlés par l'étranger ou son époux ou conjoint de fait;

b) dans le cas d'une société par actions, la part des

than a business operated primarily for the purpose of deriving investment income such as interest, dividends or capital gains — for which, during the year under consideration, there is documentary evidence of any two of the following:

(a) the percentage of equity multiplied by the number of full time job equivalents is equal to or greater than two full-time job equivalents per year;

(b) the percentage of equity multiplied by the total annual sales is equal to or greater than \$500,000;

(c) the percentage of equity multiplied by the net income in the year is equal to or greater than \$50,000; and

(d) the percentage of equity multiplied by the net assets at the end of the year is equal to or greater than \$125,000. (*entreprise admissible*) [...]

Members of the class

97. (1) For the purposes of subsection 12(2) of the Act, the entrepreneur class is hereby prescribed as a class of persons who may become permanent residents on the basis of their ability to become economically established in Canada and who are entrepreneurs within the meaning of subsection 88(1).

Minimal requirements

(2) If a foreign national who makes an application as a member of the entrepreneur class is not an entrepreneur within the meaning of subsection 88(1), the application shall be refused and no further assessment is required.

actions du capital social avec droit de vote émises et en circulation que contrôle l'étranger ou son époux ou conjoint de fait;

c) dans le cas d'une société de personnes ou d'une coentreprise, la part des bénéfices ou des pertes portée à l'actif ou au passif de l'étranger ou de son époux ou conjoint de fait. (*percentage of equity*) [...]

« revenu net » S'agissant d'une entreprise admissible ou d'une entreprise canadienne admissible, les bénéfices ou pertes de l'entreprise après impôts, compte tenu de la rémunération versée par l'entreprise à l'étranger qui demande ou a demandé un visa de résident permanent et à son époux ou conjoint de fait. (*net income*) [...]

Qualité

97. (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des entrepreneurs est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada et qui sont des entrepreneurs au sens du paragraphe 88(1).

Exigences minimales

(2) Si le demandeur au titre de la catégorie des entrepreneurs n'est pas un entrepreneur au sens du paragraphe 88(1), l'agent met fin à l'examen de la demande et la rejette.

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SOLICITORS OF RECORD

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