

**Date: 20080728**

**Docket: IMM-964-07**

**Citation: 2008 FC 920**

**Ottawa, Ontario, July 28, 2008**

**PRESENT: The Honourable Madam Justice Simpson**

**BETWEEN:**

**EDWARD JAMES KUNKEL**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] Edward James Kunkel (the Applicant) seeks Judicial Review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision of a visa officer (the Visa Officer) dated 9 January, 2007 wherein she denied the Applicant a permanent resident visa as a skilled worker (the Decision).

## **BACKGROUND**

[2] The Applicant is a citizen of the United States. Beginning on May 22, 2001, he started working in Canada pursuant to work permits. He initially worked for Turbo Promote Inc., and, on October 29, 2002, he was issued a permit to work for Instaclick Inc. (Instaclick) in Canada.

[3] The Applicant also owns and operates his own consulting firm which is based in New York State. The Applicant would contract through his consulting firm to work for clients such as Instaclick, which he stated was his company's only client in Canada. The Applicant said that he and his common-law wife are the company's only employees.

### ***The Convictions***

[4] After working in Canada for several years, the Applicant applied for a permanent resident visa on June 7, 2004 (the Application). In his Application, he declared, *inter alia*, that he had never been convicted of a crime or an offence in any country. In fact, he had been twice convicted in the United States, once for driving while impaired on March 17, 1995 and the other for driving while ability impaired on January 4, 2001.

[5] The Applicant did, however, disclose these convictions in submissions he made to support his Application. He had also applied for rehabilitation in respect of them on February 22, 2006.

[6] On three occasions, the Applicant was denied entry into Canada due to his convictions. On the most recent occasion, on December 27, 2005, the border officer seized the Applicant's work permit on the basis that the Applicant had not, at that time, disclosed the second conviction. After making extensive submissions, the Applicant subsequently obtained a new temporary work permit on the basis that his work in Canada would save jobs at Instaclick.

### ***The Phone Number***

[7] When reviewing the Application, immigration officials discovered on February 10, 2005 that the phone number listed for Instaclick appeared to belong to another company, OrgasmCash.com. An interview was scheduled with the Applicant on January 9, 2007 to confirm his employment and other aspects of the Application. However, the Applicant was not advised prior to the interview about the discrepancy in Instaclick's phone number.

### ***The Interview***

[8] In his affidavit, the Applicant alleged that the Visa Officer had forgotten that the interview had been scheduled for that day. He claimed that the interview began over one hour late and lasted only 30 minutes. However, the Visa Officer deposed that she was ready and prepared to interview the Applicant, that the interview started only 15 minutes late and that it lasted about 90 minutes.

[9] The Applicant submitted that this dispute could only be resolved through cross-examination. However, he took no steps to cross examine the Visa Officer. Because no cross-examination took place and because the Visa Officer's affidavit is corroborated by detailed CAIPS notes made on the day of the interview, the Visa Officer's evidence is preferred.

[10] According to the CAIPS notes, the Visa Officer disclosed all her concerns regarding the Application during the interview, including the discrepancy in the phone number. The CAIPS notes reveal that the discussion regarding the phone number proceeded as follows:

I then referred to our preliminary analysis (the basis of the rqmt for intv) and read aloud our concerns that telephone listing for Instaclick, Inc., shows a number for a different company, "OrgasmCash.com" and asked the subject to explain this apparent disparity of info. Subj did not initially respond but then stated that "OrgasmCash.com" is one of Instaclick's clients. I asked why a company would list their telephone number for one of its clients. Subj did not respond. He later stated that his letter was forwarded to our office by his former immig consultant. I asked how this had any relevance as the 2004 and 2006 employment reference letters contained the same address, fax and telephone letters. Subj did not respond.

[11] The Visa Officer also asked the Applicant a number of questions regarding his work for Instaclick. The Applicant provided inconsistent answers regarding when he started working for Instaclick. He first said he had been working for Instaclick since 2002 but later stated he started in 2003. He could not provide an exact start date.

[12] The Applicant claimed that he qualified as a management consultant as he had saved 30-40 jobs at Instaclick. However, the Visa Officer found that when he was "given the opportunity to

explain how and when he achieved this, the Applicant stumbled over his words and was ultimately unable to provide a sufficient explanation.”

[13] The Visa Officer also noted that the Applicant provided inconsistent information about his role at Instaclick. He had provided two letters of employment (one dated February 10, 2004 and the other dated December 5, 2006) which suggested that he was employed an employee. However, he also provided consulting agreements between Instaclick (as “Client”) and his consulting company (as “Consultant” which the Applicant had signed as “President”). Clause 9 of the consulting agreements provided:

**9. Consultant an Independent Contractor.** Consultant is an independent contractor, and neither Consultant nor Consultant’s staff is, or shall be deemed, Client’s employees.

[14] The Visa Officer also asked the Applicant about his convictions and he was not forthcoming. The CAIPS notes record the discussion as follows:

The Applicant did not admit that he had incurred a conviction for DWI/DUI in 2001 – he referred to a 1998 conviction. He did not directly respond to my questions about his failure to disclose all of his criminal history. Subj’s credibility is in serious question and was duly advised. It was only after I read aloud info from FOSS in which I learned his rehab approval [for his First Conviction] was rescinded that subj admitted to 2001 conviction.

### *The Decision*

[15] The Visa Officer concluded that the Applicant had failed to confirm his role or function with either his consulting firm or Instaclick. She also found that he had not demonstrated that he had worked as a management consultant, the occupation he had listed in his Application.

[16] As such, the Visa Officer held that the Applicant did not qualify as a skilled worker. In particular, he did not meet the requirements under paragraph 75(2(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations), which provides:

#### Skilled workers

(2) A foreign national is a skilled worker if

(a) within the 10 years preceding the date of their application for a permanent resident visa, they have at least one year of continuous full-time employment experience, as described in subsection 80(7), or the equivalent in continuous part-time employment in one or more occupations, other than a restricted occupation, that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the *National Occupational Classification* matrix;

#### Qualité

(2) Est un travailleur qualifié l'étranger qui satisfait aux exigences suivantes :

a) il a accumulé au moins une année continue d'expérience de travail à temps plein au sens du paragraphe 80(7), ou l'équivalent s'il travaille à temps partiel de façon continue, au cours des dix années qui ont précédé la date de présentation de la demande de visa de résident permanent, dans au moins une des professions appartenant aux genre de compétence 0 Gestion ou niveaux de compétences A ou B de la matrice de la *Classification nationale des professions* — exception faite des professions d'accès limité;

[17] In addition, the Visa Officer found that the Applicant had failed to provide complete information about his employment history and convictions. As such, she held he had contravened

subsection 16(1) of the Act which provides that “[a] person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.”

## **ISSUES AND STANDARD OF REVIEW**

[18] The issues are:

1. Was the Visa Officer required to disclose the inconsistent telephone number prior to the interview?
2. Did the Visa Officer err in concluding that the Applicant had not demonstrated his work experience as a management consultant?
3. Did the Visa Officer err by failing to acknowledge that the Applicant had disclosed his convictions?

[19] The first issue is a question of procedural fairness for which no deference is given. The second and third issues are questions of mixed fact and law for which the standard of review is reasonableness.

## **DISCUSSION**

### ***Issue 1 Procedural Fairness***

[20] The Applicant argues that, in this case, the Visa Officer was required to disclose the discrepancy regarding Instaclick’s phone number well in advance of the interview. Immigration

officials were aware of the discrepancy for almost two years but only informed the Applicant at the interview. The Applicant submits that the Visa Officer breached the duty of procedural fairness by surprising him with the discrepancy.

[21] It is well established that a decision-maker must disclose extrinsic evidence to allow an applicant a fair opportunity to address it (see, for example, paragraphs 20-21 of the decision of Justice Marshall Rothstein in *Dasent v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 20 (T.D.), rev'd on other grounds, (1996), 107 F.T.R. 80 (C.A.)).

[22] However, in my view the Visa Officer provided the Applicant with a fair opportunity to address the discrepancy in phone numbers by raising the issue during the interview. It was hardly a complicated matter. Accordingly, in the circumstances of this case, she met the disclosure requirements and the duty of procedural fairness.

## ***Issue 2 Reasonableness of Decision***

[23] It is clear from the CAIPS notes that the Applicant had difficulty answering the most basic questions about his relationship with Instaclick. He could not adequately explain how he could be an employee and an independent consultant at the same time. He could not provide any details regarding what he did for Instaclick, such as how he had saved jobs there. He could not explain why a client of Instaclick that was located in the same building had the same phone number. He could



not even provide consistent information about the year he started working at Instaclick much less an exact start date.

[24] The interview had been held after the Applicant had had a work permit seized and after he had made, through extensive written representations, a successful application to have a temporary permit issued. It is also noteworthy that interviews are only scheduled when there are concerns about the Application. In this context, one would expect the Applicant to have been much better prepared for the interview and to be able to answer the simple questions he was asked.

[25] In my view, it was open to the Visa Officer based on the interview and the documentary evidence before her to conclude that the Applicant had not demonstrated he had at least one year's experience as a management consultant. For this reason, the Applicant did not qualify under paragraph 75(2)(a) of the Regulations.

### *Issue 3            The Convictions*

[26] The Visa Officer's finding that the Applicant had not met the requirements of paragraph 75(2)(a) of the Regulations was sufficient to deny the Application. As I have already concluded that she made no reviewable errors in that regard, I therefore do not need to consider whether she made any errors with respect to issue 3 as they would have no effect on the outcome of the Application or this Judicial Review.

**JUDGMENT**

**UPON** reviewing the material filed and hearing the submissions of counsel for both parties in Toronto on Thursday, June 12, 2008;

**AND UPON** being advised that no questions are posed for certification;

**NOW THEREFORE THIS COURT ORDERS AND ADJUDGES that** for the reasons given above the Application is dismissed.

“Sandra J. Simpson”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-964-07

**STYLE OF CAUSE:** EDWARD JAMES KUNKEL  
and  
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** 12-JUN-2008

**REASONS FOR JUDGMENT:** SIMPSON J.

**DATED:** JULY 28, 2008

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