

Date: 20090108

Docket: IMM-734-08

Citation: 2009 FC 18

Montréal, Quebec, January 8, 2009

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

NIGEL BUDHOORAM

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision of a visa officer (the Officer) dated December 20, 2007, wherein the Officer found that the applicant did not meet the requirements for permanent residence in a skilled worker category and declined to substitute her own evaluation of the applicant's ability to become economically established in Canada.

II. The facts

[2] All citizens of Trinidad, the applicant, his wife and his two children have lived in Canada from March 2003 until April 2007.

[3] The applicant originally came to Canada in March 2003 and filed a refugee claim, which was refused on February 9, 2004. He subsequently remained in Canada on work permits until he and his family returned to Trinidad in April 2007 before receiving an evaluation on a pre-removal risk assessment.

[4] From November 2004 to April 2007, the applicant was employed by Siltech Corporation and received on February 21, 2006 from this employer an Offer of Employment as a chemical plant operator.

[5] On March 22, 2006, the applicant submitted an application to Service Canada to have this job offer approved as arranged employment pursuant to the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations), paragraph 82(2)(c). On April 27, 2006 the Foreign Worker Program granted a positive Arranged Employment Opinion.

[6] The applicant then applied for permanent residence in Canada as a skilled worker with arranged employment. He also requested consideration under subsection 76(3) of the Regulations, the “substituted evaluation”, a discretionary power granted under the Regulations.

[7] Following the applicant's personal interview conducted in Trinidad, on April 8, 2007, further submissions were sent to the Canadian High Commission in Port of Spain (Canadian High Commission) reiterating the request that subsection 76(3) of the Regulations be applied.

[8] The Canadian High Commission advised the applicant that he did not meet the requirements for immigration to Canada. The file was, however, reopened and reviewed allowing the applicant to submit an updated letter of employment.

[9] The applicant had a subsequent interview at the Canadian High Commission, whereby the Officer allegedly focused on the applicant's finances and more particularly the money he would have received from his mother.

[10] On December 20, 2007, the applicant's application for permanent residence was refused as it was determined that he did not meet the requirements for immigration to Canada.

III. Issues

[11] Did the Officer err in a reviewable manner in failing to consider the applicant's request for the exercise of positive discretion or positive substituted evaluation, or to record her consideration of same?

IV. Analysis

Standard of Review

[12] The jurisprudence of this Court has recognized that the decision of an immigration officer in the assessment of an application for permanent residence under the skilled worker class involves an exercise of discretion and should therefore be afforded considerable deference. And to the extent that such an assessment is carried out in good faith, in accordance with the principle of natural justice, and without relying on irrelevant or extraneous considerations, the decision is reviewable on the standard of unreasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, para. 62).

Substituted Evaluation – Pertinent Legislation

[13] Subsection 76(3) of the Regulations makes possible “substitution of evaluation” by an officer. This power permits the officer to override the selection system when he or she believes that the total number of points awarded is not a sufficient indicator of whether or not the applicant may become established in Canada.

76. (1) For the purpose of determining whether a skilled worker, as a member of the federal skilled worker class, will be able to become economically established in Canada, they must be assessed on the basis of the following criteria:

(a) the skilled worker must be awarded not less than the minimum number of required points referred to in subsection (2) on the basis of the following factors,

76. (1) Les critères ci-après indiquent que le travailleur qualifié peut réussir son établissement économique au Canada à titre de membre de la catégorie des travailleurs qualifiés (fédéral) :

a) le travailleur qualifié accumule le nombre minimum de points visé au paragraphe (2), au titre des facteurs suivants :

(i) les études, aux termes de l'article 78,

(ii) la compétence dans les

namely,

- (i) education, in accordance with section 78,
- (ii) proficiency in the official languages of Canada, in accordance with section 79,
- (iii) experience, in accordance with section 80,
- (iv) age, in accordance with section 81,
- (v) arranged employment, in accordance with section 82, and
- (vi) adaptability, in accordance with section 83; and

- (b) the skilled worker must
 - (i) have in the form of transferable and available funds, unencumbered by debts or other obligations, an amount equal to half the minimum necessary income applicable in respect of the group of persons consisting of the skilled worker and their family members, or
 - (ii) be awarded the number of points referred to in subsection 82(2) for arranged employment in Canada within the meaning of subsection 82(1).

- langues officielles du Canada, aux termes de l'article 79,
- (iii) l'expérience, aux termes de l'article 80,
- (iv) l'âge, aux termes de l'article 81,
- (v) l'exercice d'un emploi réservé, aux termes de l'article 82,
- (vi) la capacité d'adaptation, aux termes de l'article 83;

- b) le travailleur qualifié :
 - (i) soit dispose de fonds transférables — non grevés de dettes ou d'autres obligations financières — d'un montant égal à la moitié du revenu vital minimum qui lui permettrait de subvenir à ses propres besoins et à ceux des membres de sa famille,
 - (ii) soit s'est vu attribuer le nombre de points prévu au paragraphe 82(2) pour un emploi réservé au Canada au sens du paragraphe 82(1).

Number of points

(2) The Minister shall fix and make available to the public the minimum number of points required of a skilled worker, on the basis of

- (a) the number of applications by skilled workers as members of the federal skilled worker class currently being processed;
- (b) the number of skilled workers projected to become permanent residents according to the report to Parliament referred to in section 94 of the Act; and
- (c) the potential, taking into account economic and other relevant factors, for the establishment of skilled workers in Canada.

Circumstances for officer's substituted evaluation

(3) Whether or not the skilled worker has been awarded the minimum number of required points referred to in subsection (2), an officer may substitute for the criteria set out in paragraph (1)(a) their evaluation of the likelihood of the ability of the skilled worker to become economically established in Canada if the number of points

Nombre de points

(2) Le ministre établit le nombre minimum de points que doit obtenir le travailleur qualifié en se fondant sur les éléments ci-après et en informe le public :

- a) le nombre de demandes, au titre de la catégorie des travailleurs qualifiés (fédéral), déjà en cours de traitement;
- b) le nombre de travailleurs qualifiés qui devraient devenir résidents permanents selon le rapport présenté au Parlement conformément à l'article 94 de la Loi;
- c) les perspectives d'établissement des travailleurs qualifiés au Canada, compte tenu des facteurs économiques et autres facteurs pertinents.

Substitution de l'appréciation de l'agent à la grille

(3) Si le nombre de points obtenu par un travailleur qualifié — que celui-ci obtienne ou non le nombre minimum de points visé au paragraphe (2) — ne reflète pas l'aptitude de ce travailleur qualifié à réussir son établissement économique au Canada, l'agent peut substituer son appréciation aux critères prévus à l'alinéa (1)a).

awarded is not a sufficient indicator of whether the skilled worker may become economically established in Canada.

[14] The discretion under subsection 76(3) of the Regulations is clearly exceptional to cases where the points awarded are not a sufficient indicator of whether the skilled worker will become economically established. This decision is entitled to deference and the fact that that the applicant or the Court would have weighed the factors differently is not a ground for judicial review (*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, paras. 34-39; *Poblano v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1167, paras. 4-5, 8).

[15] The applicant failed to obtain the points for selection as a skilled worker. He requested a substituted evaluation, arguing that the points received were not a sufficient indicator of whether he might become economically established in Canada. A substituted evaluation is a discretionary decision that should be accorded a high degree of deference. Does the applicant's disagreement with the Officer's substituted evaluation indicate any reviewable error?

[16] In this case, the applicant contends that the rationale provided to the Officer constituted good reasons for the latter to exercise her discretion in the applicant's favor. The Officer, however, summarily dismissed the applicant's request for substituted evaluation, without providing a reasonable assessment.

[17] At the applicant's interview with the Officer on November 22, 2007, the latter explained to the applicant that he had been awarded insufficient points for immigration to Canada. Although he was then given an opportunity to refute the points awarded, he stated that he agreed with the points awarded.

[18] The Officer informed the applicant about certain concerns he had, such as the fact that the applicant's mother continued to support him financially. The information and explanations provided by the applicant did not satisfy the Officer that he had or would be able to become economically established in Canada. As a result, the Officer did not substitute his evaluation pursuant to subsection 76(3) of the Regulations.

Accuracy of Points Calculated for Experience

[19] The applicant had previously, in two visa applications, stated that he was a driver/salesman for his father's bakery business. On the subsequent applicant's application for a permanent visa skilled worker, he requested however to be assessed as a chemical plant operator and did not identify any other occupations under which he wished to be assessed.

[20] In 2007, the applicant informed another officer that he had worked as a manager for his father's bakery business, and presented a letter from his father to that effect. This officer found that the new information conflicted with the previous information given by the applicant on two occasions (1999 and 2001) on his visa applications in which he had stated he was a driver/salesman for his father's business.

[21] This other officer refused the applicant's skilled worker application on June 7, 2007, but the application was subsequently reopened for reconsideration by an Officer regarding substituted evaluation pursuant to subsection 76(3) of the Regulations. In the request for reopening the applicant's application, there was no mention about the points awarded for experience and no request was made for a re-examination of the points for experience.

[22] At the applicant's interview with the Officer on November 22, 2007, the selection grid was reviewed with the applicant based on the letter of refusal of the other officer. The applicant did not at any time contradict the points awarded, including the points for experience and stated that he accepted the points awarded.

[23] The applicant was unable to establish that he ever worked as a retail manager. Further, the applicant did not identify that occupation on his application form as required under subsections 80(5) and 80(6) of the Regulations reading as follows:

A skilled worker must specify in their application for a permanent resident visa the four-digit code of the *National Occupational Classification* that corresponds to each of the occupations engaged in by the applicant and that constitutes the skilled worker's work experience.

An officer is not required to consider occupations that have not been specified in the application.

Le travailleur qualifié indique dans sa demande de visa de résident permanent, à l'aide du code à quatre chiffres de la *Classification nationale des professions*, toutes les professions qu'il a exercées et qui correspondent à son expérience de travail.

L'agent n'a pas à tenir compte des professions qui ne sont pas mentionnées dans la demande.

[24] Given that the applicant had previously stated in two visa applications that he was a driver/salesman in his father's bakery business from 1991/1992 to 2001, it was open to the Officer to give no weight to the applicant's statement and self-serving letter that he was a manager in his father's business since 1992.

[25] Further, the applicant did not state in his skilled worker application that he had been a manager, nor did he request assessment in this occupation. In addition, at his interview the applicant stated that he had not provided an updated IMM8 application form as his counsel had told him it was not necessary since the only thing that had changed was his address.

[26] Moreover, when the applicant's counsel requested to reopen the first officer's refusal, she did not mention anything regarding the points that had been awarded for experiences nor did she request any reconsideration of these points.

[27] Given these facts, which indicated that the applicant had not worked as a manager, it was open to the Officer to award the applicant no additional points for experience as a manager.

Applicant's Difficulty to Become Financially Independent

[28] It was also open to the Officer to find that the applicant might have substantial difficulty becoming financially independent - considering the magnitude of his financial responsibilities, the significant support he has received from his mother and the limitations he and his wife will more than likely face allowing for the fact that they do not have post-secondary education.

[29] The applicant must establish his entitlement to a visa. He must meet the selection criteria as a member of the skilled worker class at the time of his application is made and at the time the visa is issued. He was unable to meet his onus and as a result he obtained only 63 points; the Officer was not satisfied that points allotted were an inaccurate reflection of the applicant's ability to become established.

Positive Substituted Evaluation Not Appropriate

[30] Subsection 76(3) of the Regulations makes possible "substitution of evaluation" by an officer, and permits him to override the selection system where he or she believes the point total is not a sufficient indicator of whether or not the applicant may become economically established in Canada. In the present case, the Officer did consider the applicant's request and reasons for a substituted evaluation, but felt that the points reflect the applicant's capacity to establish himself in Canada.

[31] There is no requirement under the regulations, guidelines or jurisprudence that visa officers give reasons for the refusal to exercise discretion. It is clear however from the CAIPS notes forming part of the file that the Officer was not satisfied that the points were an inaccurate reflection of the applicant's ability to become established.

V. Conclusion

[32] For all these reasons, the Court concludes that the visa officer did not commit a reviewable error in the exercise of his discretion and in the initial assessment of the applicant's application. His

assessment appears to have been carried out in good faith, in accordance with the principle of natural justice, and without relying on irrelevant or extraneous considerations. It therefore deserves the deference of the Court.

[33] Considering the circumstances of this case, the Court finds that the impugned decision falls within a range of possible and acceptable outcomes which are defensible in respect of the facts and the law and is therefore reasonable. As a consequence, the judicial review application will be dismissed.

[34] The Court agrees with the parties that there is no serious question of general importance to certify.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application is dismissed.

“Maurice E. Lagacé”

Deputy Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-734-08

STYLE OF CAUSE: NIGEL BUDHOORAM v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBRE 20, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** LAGACÉ D.J.

DATED: JANUARY 8, 2009

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