Federal Court  Cour fédérale

Date: 20100419

Docket: IMM-3647-09

Citation: 2010 FC 424

Ottawa, Ontario, April 19, 2010

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

RAUL ARANGO MIRANDA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for the judicial review of the decision (the decision), dated March 27, 2009, of a Visa Officer (the Officer) to refuse the Applicant's application for immigrant visas to Canada under the Federal Skilled Worker class of migrants.

[2] For the reasons set out below the application is dismissed.

I. Background

[3] The Applicant is a 42 year old citizen of Mexico. The Applicant has a wife and daughter who are Mexican citizens and were included in the visa application as dependents.

[4] In October 2006, the Applicant applied for permanent residence under the Federal Skilled Worker class at the Canadian Embassy in Mexico. On October 14, 2008, the Applicant was provided with a list of required documents to be submitted by him within four months to facilitate processing. A package with regard to the Applicant's application was received by the Canadian Embassy on February 12, 2009. The Computer Assisted Immigration Processing System (CAIPS) notes states "Application forms and supporting documents received on 12FEB2009".

[5] On March 27, 2009, the Officer assessed the Applicant 64 out of the required 67 points and refused his application. The Officer awarded the Applicant 00 out of a possible 10 points for adaptability. The Officer stated:

> Following an examination of your application, I am satisfied that the points accurately reflect your ability to get established in Canada. By letter addressed to you on 14 October 2008, you were requested to submit all the documents requested together in one package. You were also advised that if the requested information was not provided, I might not be satisfied and your application might be refused. You indicated that your spouse had a non-university certificate or diploma, however, the diploma as bilingual executive secretary is not sufficient to determine that the course completed was of at least one year on a full time basis. Points for other factors were assigned according to the documents presented.
>
> I am satisfied that the points accurately reflect your ability to become economically established in Canada.

II. Legislative Framework

[6] The Federal Skilled Worker class is governed by sections 75 to 85 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (*Regulations*). The primary method for determining whether an applicant qualifies to be a member of this category is set out in section 76 of the *Regulations*. Subsection 76(3) provides immigration officers with the discretion to substitute criteria in the evaluation if the number of points awarded is not a sufficient indicator of whether the skilled worker may become economically established in Canada. Section 83 allows a visa officer to award an applicant points for adaptability based on the education credentials of their spouse and sets out how the points are to be awarded.

[7] It should be noted that the discretion under subsection 76(3) is clearly exceptional and applies only in cases where the points awarded are not a sufficient indicator of whether the skilled worker will become economically established in Canada (see *Esguerra v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 413; [2008] F.C.J. No. 549).

III. Issues and Standard of Review

[8] The Applicant raises the following issues:

(a) Did the Officer err in failing to consider the Applicant's request for the excise of positive discretion or positive substituted evaluation pursuant to subsection 76(3) of the *Regulations*?

(b) Did the Officer err in not affording the Applicant an opportunity to provide more evidence regarding the educational qualifications of his wife?

[9] The issue of whether the Officer considered the Applicant's request for a substituted evaluation is to be reviewed on a standard of correctness (see *Fernandes v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 243; 71 Imm. L.R. (3d) 134).

[10] The standard of review of a discretionary decision of a visa officer is reasonableness (see *Khan v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 302; [2009] F.C.J. No. 676). Issues related to the duty of fairness are evaluated on a correctness standard.

IV. Analysis

[11] The first issue raised by the Applicant is if the Officer erred in failing to consider the Applicant's request for the excise of positive discretion or positive substituted evaluation. However,

there is a question as to whether the issue of substitute evaluation was raised by the Applicant to the Officer.

[12] In his Affidavit dated August 14, 2009, the Applicant states at paragraphs 7 to 9 that his counsel sent a submission letter (the submission letter), together with supporting documents to the Canadian Embassy on February 10, 2009, and that the submission letter included a request for substituted evaluation. As set out above, the CAIPS notes indicate that application forms and supporting documents were received on February 12, 2009, but there is no mention of a letter. The Application Record included the submission letter at pages 41 to 43.

[13] While the application forms and supporting documents are included in the Tribunal Record, the submission letter is not. In a further affidavit, dated February 2, 2010, the Applicant states:

> I am advised that my counsel received a copy of the Tribunal Record on or about January 12, 2010. My counsel advised me that the submissions dated February 10, 2009 requesting a substituted evaluation and the exercise of positive discretion are missing from the Tribunal Record. I have serious concerns that although the Embassy received all of the supporting documents to my application, the submissions requesting substituted evaluation were not considered by the Officer.

[14] At the hearing it became clear that Counsel for the Applicant did not actually send the package to the Embassy. Counsel prepared the submission letter and some of the application package and then sent this material to the Applicant for him to include further documentation. The Applicant then sent the package to the Embassy. The submission letter was not included in the package.

[15] The onus is on the Applicant to satisfy the Officer with all of the relevant information and documentation to satisfy the Officer that the application meets the statutory requirements (*Tran v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1377; 59 Imm. L.R. (3d) 217). I also note that Justice Richard Mosley stated in *Eslamieh v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 722; [2008] F.C.J. No. 909, that visa officers have the authority to consider an alternative evaluation under subsection 76(3) by their own motion, but that it is clear from the jurisprudence that they are under no obligation to exercise that discretion unless specifically requested to do so.

[16] Based on these facts, the Officer did not have the submission letter nor a request to consider substituted evaluation before him or her. Therefore, it was not an error for the Officer not to consider a substituted evaluation.

[17] Secondly, the Applicant argues that the Officer erred in not affording him an opportunity to provide more evidence regarding the educational qualifications of his wife. The Applicant argues that his wife has three years of full-time studies and had the Officer provided the Applicant with an opportunity to address concerns about the duration of the studies, the Applicant would have been able to clarify and confirm this.

[18] I agree with the Applicant that the Officer had a duty to act fairly (see also *Muliadi v. Canada (Minister of Employment and Immigration)*, [1986] 2 F.C. 205; 66 N.R. 8 (C.A.)). In *Khan*,

above, Deputy Judge Maurice E. Lagacé described the values underlying the duty of procedural fairness when considering an application for immigration on a skilled worker visa. Deputy Judge Lagacé stated that a person should have the opportunity to present their case fully and fairly, and have decisions affecting their rights made using a fair, impartial, and open process, appropriate to the context of the decision (see paragraph 21).

[19] However, the Officer was under no obligation to inform the Applicant of the insufficiency of his documents and there is no absolute entitlement to an interview in this context (*Ramos-Frances v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 192; 2007 FC 142). In this case, the Officer's concerns arose directly from the requirements as set out in the legislation and therefore there is no duty to provide the Applicant with the opportunity to address those concerns (see, for example, *Hassani v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1597, 2006 FC 1283).

[20] The October 14, 2008 letter from Citizenship and Immigration to the Applicant specifically addressed the issue of what he needed to establish to obtain points for education. The Applicant did not provide any transcripts or other evidence to establish that his wife's studies were full time, as set out in the October 14 letter. Given that there is no absolute entitlement to an interview, and the fact that the onus is on an applicant for permanent residence to ensure that his or her file is complete, I find that the Officer did not breach the duty of fairness by not informing the Applicant of any concerns with regard to his wife's education. The Officer's conclusion that the diploma as bilingual

executive secretary is not sufficient to determine that the course completed was of at least one year on a full time basis was reasonable.

[21] The fact that the Officer did not mention another diploma in the reasons is not fatal to the decision. Administrative agencies are not required to refer to every piece of evidence and explain how they dealt with it (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 157 F.T.R. 35; 1998 CanLII 8667).

[22] The parties have submitted no question for certification and none arose.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. this application is dismissed; and

2. there is no award for costs.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-3647-09**
STYLE OF CAUSE:	**MIRANDA v. MCI**
PLACE OF HEARING:	**TORONTO**
DATE OF HEARING:	**APRIL 8, 2010**
REASONS FOR JUDGMENT AND JUDGMENT BY:	**NEAR J.**
DATED:	**APRIL 19, 2010**

APPEARANCES:

Katherine Yang	FOR THE APPLICANT
Leila Jawando	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Niren and Associates Toronto, Ontario	FOR THE APPLICANT
Myles J Kirvan Deputy Attorney General Canada	FOR THE RESPONDENT