Federal Court Cour fédérale

Date: 20100630

Docket: IMM-6347-09

Citation: 2010 FC 735

Vancouver, British Columbia, June 30, 2010

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

LITA CHUA TABUNGAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision by a Designated Immigration Officer at the Canadian Embassy in Manila, Philippines, dated October 15, 2009, in file number B052923662, whereby the Applicant's application for permanent residence in Canada was refused.

[2] For the reasons that follow, I have allowed the application and will return it for redetermination by a different officer after a fairness letter has been sent to the Applicant and a response received or the time for responding has expired.

[3] The Applicant is a citizen of and resident in the Philippines. She has on several occasions made applications for permanent residence in Canada and has been refused. The latest application, which is the one at issue here, was made on the basis that the Applicant had work experience for more than four years in a certain listed occupation, here category 4131 "College and Other Vocational Instructors, Translators, Elementary School Teacher."

[4] The Applicant filed an application with the Canadian Embassy in the Philippines which included, among other things, a letter from Tower Languages Tutorial Centre and a letter from Johnson Controls giving details as to her employment with those organizations.

[5] It appears that the file was given to a clerk at the Canadian Embassy who phoned Tower and what she believed was the correct branch of Johnson Controls and spoke to some otherwise unidentified persons there. The clerk's notation in the CAIPS notes as to the conversation with Tower is to the effect that she was told that the Applicant's employment there was part-time. The clerk's notation in the CAIPS notes as to the conversation with Johnson Controls is to the effect that she was told no such person by the Applicant's name worked there. The CAIPS notes entry for the same day 18 August 2009 also references four earlier applications for permanent residence made by the Applicant and a notation "all refused". These notes, however, state "NOC 4131 is eligible for processing" and conclude "File for VO's (Visa Officer) review."

[6] The file was then forwarded to an officer at the Canadian Embassy, not the officer who made the decision under review. That officer made a notation on the cover of the file "Appears

fraud employ cert" which the officer who ultimately made the decision, Officer Gonzales, agreed on cross-examination meant "fraudulent employment certificate" and probably was a reference to Johnson Controls.

[7] The file was apparently transferred to Officer Gonzalez who, in less than a day, appears to have reviewed it and rejected the application. This officer's CAIPS notes indicate that she had concerns as to credibility of the Applicant, apparently in respect of the Johnson Controls incident, but decided to base the decision on a finding that the letter from Tower was "insufficient" in that it was not entirely clear from that letter whether the employment was part-time or full-time.

[8] A reading of the Tower letter would not, on its face, alert the reader into believing that it was equivocal as to part-time or full-time. A fair reading would reasonably lead a reader to believe that full-time employment was meant. The officer could only reasonably have been alerted to the matter as a result of the CAIPS notes of the clerk who apparently recorded a telephone conversation with someone apparently at Tower.

[9] The evidence as it now appears in the record before me is that, as far as Johnson Controls is concerned, the clerk phoned the wrong office. A business card stapled to the letter had the correct number which appears to have been overlooked by the clerk. The Applicant worked at the office set out on the business card. However, this clerical error appears to have resulted in an endorsement on the corner of the file made by a colleague visa officer of "fraud" and raised concerns as to "credibility" by the visa officer who made the decision at issue. It appears that the officer making

the decision seized upon what cannot be likely said to be an ambiguity in the Tower letter, unless she had information not available to the Applicant as to the clerk's phone call and an apparent "part time" response, upon which to seize in making the decision.

[10] All of this calls out for a requirement that the Applicant should have been advised of these concerns and given a reasonable opportunity to respond. I echo what Justice Blais (as he then was) wrote in *Salman v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 877, [2007] F.C.J. 1142, at paragraph 12:

> ***12*** *This Court has also recognized, in Hassani v. Canada (Minister of Citizenship and Immigration), [2006] F.C.J. No. 1597, 2006 FC 1283, a duty on the part of the visa officer to express his concerns to the applicant when the issue is one of credibility or the genuineness of documents, and to provide the applicant with an opportunity to respond to such concerns. I am not satisfied that this duty was met in this case.*

[11] In a similar vein Justice Mosley in *Rukmangathan v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 284, [2004] F.C.J. No. 317, wrote at paragraph 42:

> ***42*** *The applicant's application was refused based, in part, on his unsatisfactory answers to these technical questions posed by the officer. However, in my view, this was not the sole or primary reason for the refusal, as the officer's negative views of "discrepancies" concerning his claimed employment experience, and the credibility and reliability of his documents, were also central to her decision to deny his application. As outlined above, I am persuaded that the officer failed to give the applicant a chance to respond to her concerns in these areas. Due to such breaches in procedural fairness, it is not possible to know if the outcome would have been different had the applicant had a full and fair opportunity to respond to the officer's concerns, and therefore, his application will be sent back for reassessment in accordance with these reasons.*

[12] Where the notation "fraud" is made on the file by a visa officer a red flag has been raised requiring serious investigation by the decision making officer and, in the case of any doubt, even if the matter is not directly relevant, the Applicant should be given a reasonable opportunity to respond.

[13] Accordingly, the application is allowed.

JUDGMENT

For the reasons provided:

THIS COURT ORDERS AND ADJUDGES that:

1. The application is allowed;
2. The matter is returned for redetermination by a different officer after a fairness letter has been sent to the Applicant and a response received or the time for doing so has expired;
3. No question is certified; and
4. No Order as to costs.

"Roger T. Hughes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6347-09
STYLE OF CAUSE:	LITA CHUA TABUNGAR v. MCI
PLACE OF HEARING:	Vancouver, BC
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