

Federal Court



Cour fédérale

Date: 20130607

Docket: IMM-6620-12

Citation: 2013 FC 618

Ottawa, Ontario, June 7, 2013

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

KHURRAM ZAHUR BUTT

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision by a visa officer (the officer), dated May 10, 2012, wherein the applicant's application for permanent residence as a foreign skilled worker was refused.

[2] The applicant requests that the officer's decision be set aside and the application be referred back to the High Commission of Canada in London for redetermination by a different officer.

Background

[3] The applicant is a citizen of Pakistan. He submitted his foreign skilled worker application in 2010 based on his experience as a construction manager, National Occupation Classification (NOC) Code 0711. In support of his application, he included letters from two employers where he had worked as project manager.

Officer's Decision

[4] The officer issued a decision on May 10, 2012. Notes from the Computer Assisted Immigration Processing Service (CAIPS) serve as the reasons for decision.

[5] The entry for October 19, 2010, indicates the visa officer referred the application for a final determination of processing. The entry for April 24, 2012, indicates the application was rejected:

ALTHOUGH THE NOC CODE 0711 CORRESPONDS TO AN OCCUPATION SPECIFIED IN THE INSTRUCTIONS, THE INFORMATION SUBMITTED TO SUPPORT THIS APPLICATION IS INSUFFICIENT TO SUBSTANTIATE THAT CLIENT MEETS THE OCCUPATIONAL DESCRIPTION AND/OR A SUBSTANTIAL NUMBER OF THE MAIN DUTIES OF NOC 0711. SUBJECT PROVIDED LETTERS FROM THE PAKISTAN ARMY WHICH PROVIDE NO DETAILS OF DUTIES, UNDATED WORK REFERENCE FROM EDEN HOUSING AND APPOINTMENT LETTER FROM HUSNAIN COTEX LTD. ALSO PROVIDED AN UNDATED WORK REFERENCE FROM HUSNAIN COTEX LTR STATING THAT WAS EMPLOYED THERE AS PROJECT MANAGER IN LAHORE-GURANWALA HIGHWAY CONSTRUCTION. DUTIES LISTED IN THE WORK REFERENCE DO NOT CONFORM TO THE LEAD STATEMENT AND THE MAIN DUTIES OF NOC 0711. SUBJECT'S WORK EXPERIENCE APPEARS TO BE MORE SIMILAR TO THOSE OF CIVIL

ENGINEERS (NOC 2131). I AM THEREFORE NOT SATISFIED THAT SUBJECT ACTUALLY HAS ONE YEAR OF EXPERIENCE IN THIS OCCUPATION, AS PER NOC 0711, AND THIS APPLICATION IS NOT ELIGIBLE FOR FURTHER PROCESSING.

Issues

[6] The applicant submits the following points at issue:

1. Did the decision maker err in law by ignoring evidence or misconstruing evidence?
2. Did the decision maker fail to exercise diligence as per the Processing Manual (OP 6A) in assessing the applicant's credentials?

[7] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the officer err in rejecting the application?

Applicant's Written Submissions

[8] The applicant argues the officer ignored or misconstrued the evidence concerning work experience. The reference letter from Husnain Cotex Limited indicates that the applicant worked as a project manager of the construction of a national highway from January 2009 to June 2010. While the applicant listed his designation as civil engineer in Schedule 3 of his application, it is obvious that the duties and responsibilities fell within NOC 0711, construction manager.

[9] Regarding the undated reference letters, the applicant argues the foreign skilled worker application checklist did not mention that such letters had to be dated. The dates of the applicant's employment were clearly mentioned so the omission of the letter date is not material. The OP 6A Processing Manual only refers to sufficient detail to support the claim of at least one year of continuous work experience.

[10] In the alternative, the applicant argues the officer was not sufficiently diligent in assessing his credentials as required by Processing Manual OP 6A.

Respondent's Written Submissions

[11] The respondent argues the applicable standard of review is reasonableness and that the officer's decision was reasonable. The onus was on the applicant to file a clear application together with supporting documentation. He failed to meet the requirements, as none of the supporting documents referred to the duties listed in NOC 0711, or did so in insufficient detail. While the applicant argues he performed these duties, the officer made his decision based on the employment documentation provided as evidence. Deference is owed to the officer given the expertise in NOC listed duties.

Analysis and Decision

[12] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[13] The officer's determination of the applicant's foreign skilled worker application is a finding of fact and law, reviewable on a reasonableness standard, as I held in *Anabtawi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 856 at paragraph 28, [2012] FCJ No 923.

[14] In reviewing the officer's decision on the standard of reasonableness, the Court should not intervene unless the officer came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47 and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59, [2009] 1 SCR 339). As the Supreme Court held in *Khosa* above, it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraph 59).

[15] **Issue 2**

Did the officer err in rejecting the application?

The main duties for NOC 0711, as shown in the Minister's affidavit evidence, are as follows:

- Plan, organize, direct, control and evaluate construction projects from start to finish according to schedule, specifications and budget
- Prepare and submit construction project budget estimates
- Plan and prepare construction schedules and milestones and monitor progress against established schedules
- Prepare contracts and negotiate revisions, changes and additions to contractual agreements with architects, consultants, clients, suppliers and subcontractors
- Develop and implement quality control programs
- Represent company on matters such as business services and union contracts negotiations
- Prepare progress reports and issue progress schedules to clients
- Direct the purchase of building materials and land acquisitions
- Hire and supervise the activities of subcontractors and subordinate staff.

[16] The applicant's letter of appointment from Husnain Cotex Limited lists duties as part of the position of project manager:

- a. Coordination with RE SMEC / Project Director NHA and GM (NHIP) / CRE SMEC.
- b. Preparation of Construction and Material Schedule.

- c. Procurement of material required for the project.
- d. Review of existing staff and fire dishonest persons and hire new staff.
- e. Ensure proper maintenance of equipment.
- f. Equipment will be hired only with approval of CEO.
- g. Prepare monthly Profit and Loss Account.
- h. Keep records of material procured and consumed.
- i. Keep head office informed about progress and expenses.

[17] The officer made no mention of the letter of appointment. The reasons only highlight the letter of reference for the same position. The letter of appointment refers to duties that are similar to the NOC 0711 description that are not included in the letter of reference, such as procurement and supervising subordinate staff. The officer did not explain why the letter of reference was considered as mutually exclusive to the letter of appointment.

[18] The officer is presumed to have considered all of the evidence before him (see *Oprysk v Canada (Minister of Citizenship and Immigration)*, 2008 FC 326 at paragraph 33, [2008] FCJ No 411). However, the more important the evidence that is not mentioned, the more willing a court may be to infer from silence that the tribunal made a finding of fact without regard to the evidence (see *Pinto Ponce v Canada (Minister of Citizenship and Immigration)*, 2012 FC 181 at paragraph 35, [2012] FCJ No 189).

[19] While I appreciate that reasons are typically brief in visa decisions, there were three one-page documents listing job duties and the officer's reasons only mention two of them. Given that the

officer's decision centres around whether the applicant's documentation supports the claim that his duties were analogous to those in NOC 0711, this is an omission that rises to the level described in *Pinto Ponce* above. This was central evidence and it was unreasonable for the officer not to consider it in making the decision or providing reasons.

[20] The application for judicial review is therefore granted and the matter is referred to a different officer for redetermination.

[21] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT’S JUDGMENT is that the application for judicial review is allowed, the decision of the officer is set aside and the matter is referred to a different officer for redetermination.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, SC 2001, c 27

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6620-12

STYLE OF CAUSE: KHURRAM ZAHUR BUTT
- and -
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 30, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: June 7, 2013

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