Federal Court  Cour fédérale

Date: 20140411

Docket: IMM-5908-13

Citation: 2014 FC 357

Vancouver, British Columbia, April 11, 2014

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

JOHAN EFRAIN MEJIA MEJIA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Mejia Mejia sought permanent residence in Canada as a business immigrant, more particularly, as an investor. As such, he needed to meet the requirements of section 88(1) of the *Immigration Regulations*. On the interpretation of that regulation most favourable to Mr. Mejia Mejia he needed a combination of one year of experience in the management of a qualifying business with control of a percentage of equity therein and one-year management of at least five

full-time job equivalents. His application was rejected, primarily because he only provided payroll records for employees which covered an eight-month period.

[2] Thereafter, he asked that the visa officer reconsider. As part of that request, he provided payroll records which covered several years. The visa officer refused to reconsider.

[3] This is the judicial review of the original decision, not the refusal to reconsider.

[4] Section 88(1) defines the business experience of an 'investor' as:

(a) an investor, other than an investor selected by a province, means a minimum of two years of experience consisting of	a) S'agissant d'un investisseur, autre qu'un investisseur sélectionné par une province, s'entend de l'expérience d'une durée d'au moins deux ans composée :
(i) two one-year periods of experience in the management of a qualifying business and the control of a percentage of equity of the qualifying business during the period beginning five years before the date of application for a permanent resident visa and ending on the day a determination is made in respect of the application,	(i) soit de deux périodes d'un an d'expérience dans la gestion d'une entreprise admissible et le contrôle d'un pourcentage des capitaux propres de celle-ci au cours de la période commençant cinq ans avant la date où la demande de visa de résident permanent est faite et prenant fin à la date où il est statué sur celle-ci,
(ii) two one-year periods of experience in the management of at least five full-time job equivalents per year in a business during the period beginning five years before the date of application for a permanent resident visa and ending on the day a determination is made in	(ii) soit de deux périodes d'un an d'expérience dans la direction de personnes exécutant au moins cinq équivalents d'emploi à temps plein par an dans une entreprise au cours de la période commençant cinq ans avant la date où la demande de visa de résident permanent est

respect of the application, or	faite et prenant fin à la date où il est statué sur celle-ci,
(iii) a combination of a one-year period of experience described in subparagraph (i) and a one-year period of experience described in subparagraph (ii);	(iii) soit d'un an d'expérience au titre du sous-alinéa (i) et d'un an d'expérience au titre du sous-alinéa (ii);

[5] Although Mr. Mejia Mejia's counsel made a valiant effort to submit that the visa officer failed to consider the combination of two one-year periods, I cannot share that viewpoint.

[6] The Overseas Processing manual is clear that with rare exceptions payroll records are essential. Mr. Mejia Mejia was obviously aware of this as he did submit payroll records, but for a period less than a year. His subsequent excuse was that it was very expensive to translate from Spanish to English, although he promptly did so when he requested a reconsideration.

[7] Thus, the decision to reject his application for permanent residence was not unreasonable. It certainly fits within the considerations spelled out by the Supreme Court in *Dunsmuir v New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9.

[8] Matters become complicated when it comes to the request for reconsideration. The record clearly shows that Mr. Mejia Mejia claimed there were over 20 employees in the company which he owned with his mother and sister, but that he only had direct supervision over six. The visa officer wrote to Mr. Mejia Mejia simply to state that he was refusing to reconsider. However, in his notes to file, he indicated that there was an unexplained discrepancy from the fact that payroll

records for only six employees were submitted while there was a claim that Mr. Mejia Mejia had control of over twenty. That appears to be a clear error on the face of the record.

[9] However, Mr. Mejia Mejia did not seek leave to challenge that refusal. He takes the position that it was not a decision. However, at the same time he has attempted to use the material generated after the original refusal in his application record.

[10] With very few exceptions, judicial control is based on the record which was before the original decision-maker. This case does not fall within one of those exceptions.

[11] What Mr. Mejia Mejia should have done was to also seek judicial review of the refusal to reconsider.

[12] A case very much on point is the decision of the Federal Court of Appeal in *Vidéotron Télécom Limitée v Communications, Energy and Paperworkers Union of Canada*, 2005 FCA 90, 345 NR 130, [2005] FCJ No 398. As Mr. Justice Décary pointed out at para 10 thereof, when a board dismisses an application for reconsideration because it refuses to hear it on the merits, the initial decision remains intact and must be directly challenged in court "regardless of what the party chooses to do regarding the reconsideration decision". In this particular case, the decision was to refuse, rather than to reconsider the application on its merits. An application for leave and for judicial review could have been brought to this court, but was not.

[13] The parties agree that there is no serious question of general importance which would support an appeal to the Federal Court of Appeal.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that the decision of Raymond Gabin, Visa Officer, Immigration Section, Canadian Embassy in Bogotá, Colombia, dated July 18, 2013, is dismissed.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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