

Federal Court



Cour fédérale

Date: 20140825

Docket: IMM-3457-13

Citation: 2014 FC 821

Ottawa, Ontario, August 25, 2014

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

CIJIA GAO

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The applicant seeks to set aside the April 25, 2013 decision of a visa officer refusing the applicant's application for permanent residency as a member of the Canadian Experience Class of skilled workers. The applicant had applied under the Canadian Experience Class under National Occupation Classification (NOC) 6211 as a Retail Sales Supervisor and had been offered a position at Safeway Ltd.

[2] After reviewing the evidence, the visa officer made the following relevant findings:

1. The applicant had not supervised and co-ordinated sales staff and cashiers or assigned sales workers to duties.
2. The applicant provided a letter from his employer, describing the applicant's job duties. The officer noted that three of the five job duties described use the verbs "helping," "assisting" and "aiding" in describing the applicant's responsibilities.

[3] In the decision letter, the officer concluded that the applicant did not provide evidence that he performed a substantial number of the main duties of a retail sales supervisor under NOC 6211, nor evidence that he performed the essential duties of the position. As such, the officer was not satisfied that the applicant met the statutory requirements to be granted permanent residence under the Canadian Experience Class and refused the application.

[4] The case before me is identical in substance to that of *Benoit v Canada (Citizenship and Immigration)*, 2013 FC 185. In that decision Justice Russel Zinn wrote:

Paragraph 87.1(2)(c) of the Regulations required that Ms. Benoit "[have] performed a substantial number of the main duties [...] including all of the essential duties" listed in the NOC under which she listed her experience. In NOC 6211, under which she applied, there are no "essential" duties, only "main" duties. Accordingly, Ms. Benoit was required to have performed a "substantial number" of these main duties...

[5] The officer in this case was required to determine if the applicant "performed a substantial number of the main duties." As noted however, the April 25, 2013 decision letter states that the officer was not satisfied that the applicant had "performed a substantial number of

the main duties of Retail Trade Supervisors as set out in the occupational description of the *National Occupational Classification*, including all of the essential duties.”

[6] NOC 6211 does not list any essential duties. It is, therefore, unclear, against what standard the officer assessed the application.

[7] The respondent points to the Computer Assisted Immigration Processing System (CAIPS) notes, which make no reference to essential duties, but only to “a substantial number of the job duties”, and urges that the Court overlook the error in the decision letter on the authority of *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at para 12. In my view, there is a substantive difference in resorting to the record to complete, or, in the language of the Supreme Court of Canada, to supplement an otherwise deficient decision, and resorting to the record to override or negate patent error on the face of the decision in respect of a critical element. In *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431, at paragraph 11, I wrote:

Newfoundland Nurses is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.

[8] In note that in *Benoit*, Justice Zinn resisted a similar argument urging an expansive application of the *Newfoundland Nurses* decision:

In my view, no amount of “supplement[ing],” to quote *Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 12, salvages the officer’s decision. The *Regulations* clearly require that only a “substantial” number of the duties be performed. That is the test. The officer in this case singles out only parts of two of the eight main duties from NOC 6211 and on that basis concluded that Ms. Benoit’s experience at the Granite did not qualify.

[9] The decision also cannot stand for a second reason. NOC 6211 requires that “some or all” of the duties be met. The decision letter focuses on the fact that employer’s letter described the applicant as “helping,” “assisting” and “aiding”. From that, the officer concluded that the applicant did not perform three of the duties. Without greater context, evidence or information before the officer, it was unreasonable for the officer to conclude that performing a function in concert with, or parallel to others, such as is common in a team-based work environment, means that the person did not perform the function or duty.

[10] In sum, this case is on all fours with *Benoit*, where the officer singled out two parts of the eight duties and on that basis concluded that Ms. Benoit did not qualify. Here, the officer unreasonably excluded evidence of three of the eight duties, and, on the face of the decision erroneously considered some of them to be essential.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted and the matter is remitted for reconsideration by a different immigration officer. There is no question for certification.

"Donald J. Rennie"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

Ram Sankaran

FOR THE APPLICANT

Ian Wiebe

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stewart Sharma Harsanyi
Immigration, Family and Criminal
Defense Lawyers
Calgary, Alberta

FOR THE APPLICANT

William F. Pentney
Deputy Attorney General of Canada
Calgary, Alberta

FOR THE RESPONDENT