

Federal Court



Cour fédérale

Date: 20160818

Docket: IMM-393-16

Citation: 2016 FC 947

Ottawa, Ontario, August 18, 2016

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

CHARVEY ZERNA AGUILAR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Ms. Aguilar's application for a study permit was refused by a visa officer in Manila who provided her with a form letter checking boxes which read:

You have not satisfied me that you would leave Canada at the end of your stay. In reaching this decision, I have considered several factors, including:

Employment prospects in country of residence

Current employment situation

[2] The visa officer's notes to file explain, somewhat, the basis for the officer's decision. In relevant part, the notes read:

Subj she had been employed as caregiver since May 2011 but did not provide evidence of employment, income or personal savings.

[3] Although the officer had other concerns, the lack of this information appears to have been the most significant factor in the negative decision.

[4] I find that the decision fails to fall within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law:" *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47. The problem with the officer's decision lies with the facts – and specifically the employment information.

[5] The officer filed an affidavit in this application in which he attests that the Applicant "did not provide evidence of employment, income and personal savings." I note that evidence of personal savings was irrelevant as the Applicant's aunt and uncle had provided evidence that they were paying her tuition and providing financial support to her when in Canada.

[6] Counsel for the Respondent conceded that the officer's statement must have been based on the officer's notes from the time the decision was made, because, as was candidly acknowledged, the Certified Tribunal Record [CTR] contains none of the information filed with the application. It contains only the paper application itself and a list of documents supplied. The file was culled by the Respondent after the decision was made.

[7] Because the record was culled it is not possible to confirm or deny the officer's statement. However, there is evidence in the CTR that the Applicant did submit the documents; namely, the Document checklist at page 17 of the CTR submitted with her application and which provides instructions to "Complete and place this checklist on top of your application." The Applicant has a check mark opposite each item she was required to submit, including "Letters from your current and past employers dated within 2 months of the application indicating: Position; earnings; years of employment."

[8] There is no dispute that the Applicant did submit documents listed in all of the 11 other items she checked (even though none are in the CTR). Why would she have checked but have failed to submit one of the items checked? Perhaps she overlooked it, or perhaps the officer overlooked it. On this basis alone, and given the Respondent's action of culling the file, I would have allowed the application.

[9] The Applicant filed an affidavit of her aunt in Canada who, with her husband, is paying for the Applicant's tuition and support while in Canada. She attests that she "is a party to this matter and fully conversant with the facts hereinafter deposed to." At paragraph 7 she attests:

Contrary to the assertion by the visa officer that she, "did not provide evidence of employment, income or personal savings." I am advised and verily believe that my niece submitted proof of employment and income with her application to the Embassy. Attached herein and marked as "Exhibit C" to this my Affidavit is a copy of her Certificate of Employment and pay slip from Allied Home Services she submitted to the Embassy.

The referenced Exhibit is a Certificate of Employment dated November 27, 2015 - 3 days before the application filing date of December 1, 2015, and her pay slip for the period November 1-30 2015.

[10] The Respondent submits that this affidavit evidence ought not to be accepted because they were not before the decision-maker and because the aunt fails to say who informed her of the facts to which she attests. These were the only grounds of objection raised.

[11] The first objection is without merit. If this submission were accepted one could never provide evidence that a document which the officer says he did not have was in fact before him.

[12] The second objection has merit. The Applicant submits that it is evident from the record and the circumstances of her being supported in Canada by her aunt that it was she who provided the information to her. That may be so; however, the specific objection made goes to weight, not to admissibility.

[13] The evidence of the checklist submitted with the application and the weight given to the aunt's affidavit establish on a balance of probabilities that the "missing" documents were provided. Accordingly, the officer's decision must be set aside.

[14] Because the application record was culled, the Applicant will be given the opportunity to resubmit the documents she filed and any new documents or information in support of her application, which shall be determined by a different visa officer.

[15] I repeat what I said to counsel during the hearing – I find it irresponsible of the Respondent to cull files so quickly. Culling ought only to happen after the time for filing of an application for leave and judicial review has expired. This case would not likely have come before the Court if the cull had not taken place.

[16] No question for certification was proposed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed, the decision of the visa officer is set aside, the application shall be determined by a different officer after the Applicant is provided an opportunity to submit the documents she originally provided and any other relevant information, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-393-16

STYLE OF CAUSE: CHARVEY ZERNA AGUILAR v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: AUGUST 15, 2016

JUDGMENT AND REASONS: ZINN J.

DATED: AUGUST 18, 2016

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