Section de première instance de
la Cour fédérale du Canada

Federal Court of Canada
Trial Division

IMM-2114-96

Ottawa, Ontario, August 21, 1997

Present: The Honourable Mr. Justice Muldoon

Between:

HAJI MOHAMMAD ASGHAR,

Applicant,

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION,

Respondent.

ORDER

UPON application for an order to quash the assessment of a visa officer in New York (file no. B0337-5293-5) dated May 14, 1996, having come on for hearing in Toronto on July 29, 1997, in the presence of counsel for each side; and

UPON having perused the documents filed, and heard and read what was alleged by counsel aforesaid, now

THIS COURT ORDERS that the within application by the applicant and his dependents be, and it is hereby, dismissed.

F.C. Muldoon

Judge

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REASONS FOR ORDER

Muldoon, J.

This is an application for judicial review under section 18.1 of the ***Federal Court Act*** seeking to quash a decision of a visa officer rejecting an application for a permanent resident visa pursuant to sections 8 and 11(2) of the ***Immigration Regulations 1978*** (the Regulations).

Background

The applicant is a citizen of Pakistan. He has been residing illegally in the United States for several years and is currently residing in New York.

The applicant applied for a permanent visa under the "Skilled Workers Program". His wife and three children were included in his application as accompanying dependants.

The evidence before the visa officer indicated that the applicant obtained an Associate Engineer Diploma in "Instrument Technology" from the

Swedish Pakistan Institute of Technology (SPIT) in 1971. He was then employed by Gharibwal Cement Ltd., a state company, from 1971 to 1994 where he was employed in various supervisory capacities (foreman, head of mechanical workshop, head of electrical workshop, manager of transport section and senior engineer). In 1994, he left his employment and illegally entered the United States through Mexico.

The applicant is currently employed with Starr Auto Repair Shop in New York and listed his current employment in his application as "supervisor in auto shop". In his application for permanent residence (exhibit B to his affidavit sworn on June 15, 1995, in applicant's record (AR) p. 13) he wrote that his intended occupation in Canada is "INSTRUMENT mech. engineer". So however it appears not on the copy certified by Susan Burrows of the Canadian Consulate General in New York on July 3, 1996, from documents in the consulate's possession, where that intended occupation in Canada is shown on the form signed by the dependent wife as "INSTRUMENT MECH.". It is the form IMM008(01-95)E, exhibit B to the applicant's affidavit which the visa officer regarded according to paragraph 4 of his affidavit, sworn on August 23, 1996. The discrepancy is apparently of little moment.

The visa officer assessed the applicant as follows pursuant to the criteria of section 8 of the Regulations under the occupation **Mechanical Engineering Technologist**, CCDO 2165-142:

Age:	10
Occupational Demand:	01
Specific Vocational Preparation:	15
Experience:	06
Arranged Employment:	00
Demographic Level:	08
Education:	13
English:	09
French:	00
Assisted Relative Bonus:	00
Personal Suitability:	06
TOTAL:	**68**

Issues:

1. Did the visa officer fail to conduct the assessment required by the Regulations in refusing to assess the applicant under occupations inherent in his work experience?

2. Did the visa officer breach his duty to act fairly in failing to give the applicant an opportunity to adduce evidence of his qualifications?

3. Did the visa officer err in his assessment of the applicant's experience and level of education?

Analysis:

The applicant has argued that the visa officer failed to carry out the assessment required by the regulations when he failed or refused to assess the applicant under alternative occupations for which there was evidence from Gharibwal Cement Ltd. on the record that he was qualified, namely: "Instrument Repairer" and "Inspector-Machine Shop". Applicant never indicated to the visa officer, during the personal interview, that the applicant had ever taken any further occupational training in the 25 years since he had graduated from SPIT in 1971, according to the officer's paragraph 12 of his affidavit.

In ***Man v. M.E.I.***, T-2351-91, January 19, 1993, Jerome A.C.J. held that:

> The visa officer must, pursuant to the law and to a duty of fairness, address not only the intended occupation indicated by the applicant, but also alternate occupations for which the applicant is qualified and to which the applicant's experience may apply (See Hajariwala v. Canada (M.E.I.), 1989, 6 Imm.L.R. (2d) 222).

This is now a well recognized principle. However, where the applicant has not indicated a listed occupation, the question is, rather, whether a particular occupation is "inherent" in his work experience; therefore there must be evidence on the record that indicates that the applicant is qualified to pursue those occupations, otherwise the visa officer cannot be faulted for his failure to consider those occupations. This can be inferred from Associate Chief Justice

Jerome's decision in ***Li v. M.E.I.***, T-2217-89, January 23, 1990 where he held that there is an obligation on the visa officer to assess the applicant under any alternative occupation "inherent in his work experience" and ***Manji v. M.E.I.***, T-1267-92, April 21, 1993, where Teitelbaum J. stated the rule as follows:

> The issue arises as to whether the visa officer should have done more than what he did. That is to say, there was some material before the visa officer to indicate that the applicant was not really a sales manager and was not really a purchasing manager. But, in fact, was a sales representative; that is, an individual who sells textile material.

Also ***Muntean v. M.C.I.***, IMM-3499-94, October 11, 1995, Cullen J. (F.C.T.D.).

In the present case, prior to the interview, the applicant was asked to provide an "Informal Assessment of Academic Qualifications" by the Canadian Council of Professional Engineers, and the Canadian Council of Technicians and Technologists. From this informal assessment it appears that the applicant was considered from an academic point of view to be assessed in the occupation of "Mechanical Engineer Technologist".

The applicant was, as stated, called to the interview. It appears from the visa officer's notes and affidavit that the applicant went through his whole work experience with the visa officer including his experience as an instrument repairer and the various other duties he performed in the course of his employment in Pakistan and his current employment. Accordingly, he determined that the applicant had no useful experience or training with up-to-date material or instruments at the sub-supervisory level and proceeded to assess him under the "Mechanical Engineering Technologist" category which most closely matched his experience.

It could be argued that this case is determined by the decision of the Trial Division in ***Man, supra***, where Jerome A.C.J. stated:

> I see no reason to interfere with the visa officer's determination that the applicant's experience does not qualify her to be classified as a Sales Manager. She presented the officer with a thorough description of her duties while employed with Allied Tropical Fish Farms Limited and of the company itself. The visa officer examined this information and the appropriate references in the CCDO in arriving at his

> conclusion. I see no indication that the visa officer failed to apply the law or to exercise his duty of fairness."

Similarly, in ***Prasad v. M.E.I.***, IMM-3373-94, April 2, 1996, this Court found that the visa officer had adequately explained his rationale in uncontroverted affidavit evidence:

> Why the applicant was not assessed as "diesel mechanic, [No.]8584-382" or alternatively "construction equipment mechanic, [No.]8584-378" is of the essence of the contentious issue herein. Applicant did not provide proof of formal training as a diesel mechanic or as a construction equipment mechanic. Mr. Sutherland specified his reasoning in an affidavit sworn in Sydney on August 3, 1994, and filed two days later in Vancouver. Here are pertinent passages from that affidavit:
>
> > 5. On May 26, 1994, I conducted a paper review of Mr. Prasad's Application and supporting documents. I noted that Mr. Prasad had not submitted any evidence of formal training as a Diesel Mechanic (CCDO 8584-382) or Heavy Duty Mechanic, or as Construction Equipment Mechanic (CCDO 8584-378), other than claiming completion of a four day tune up course. Therefore, I determined that Mr. Prasad could not be considered as a qualified Diesel Mechanic or Construction Equipment Mechanic, or a mechanic of any definition. I noted in my computer notes that Mr. Prasad had "no formal trade certificate as a mechanic. Holds certificate as a panel beater class III but must have class I to be considered fully qualified as a tradesman in the field". I also made handwritten notes at the bottom of page 1 of Mr. Prasad's Application (exhibit "A) which state: "No formal training as a Mechanic other than 4 day tune up course. Not fully qualified as Panel Beater. Has only Class III but needs Class I. Diesel Mechanic Helper 8584-386, Heavy Duty Equipment Mechanic Apprentice 8584-113." (A Panel Beater is an Auto Body Repairer in Fiji, and requires a Class I certificate to be considered fully qualified in this trade in Fiji.) ***In Fiji, where working conditions, standards, equipment and job practices are very dissimilar to those of Canada, in the absence of formal training, education and/or Canadian experience, Mr. Prasad's work experience in Fiji, would not qualify him for entry into the Canadian labour market as a qualified tradesman.*** Mr. Prasad, who is not a licensed tradesman in his own country where formal education, apprenticeship and licensing is available for tradesman, cannot be considered as a qualified tradesman for Canada's purpose.
>
> (emphasis added)

Accordingly, the Court found that the visa officer, having given the applicant an opportunity to adduce evidence of his complete employment history concluded that the visa officer had not erred in law or breached his duty of fairness in not assessing the applicant under an alternative occupation.

Here, as in ***Prasad***, the applicant asserts that the visa officer should have asked for evidence supporting his qualifications as an "Instrument repairer" or "Inspector-Machine Shop". It was a very narrowly specialized shop producing

only required parts for repairs in the cement factory, as the applicant well knew. It is true that the Court has recognized that there may be a duty in fairness on the visa officer to inform the applicant of his concerns in order that the applicant may disabuse him. That principle was recognized in ***Muliadi v. M.E.I.***, [1986] 2 F.C. 205 (F.C/A) where the Court of Appeal decided that the visa officer had a duty to apprise the applicant of extrinsic evidence he relied upon in assessing his application. No extrinsic evidence was considered. The principle was recognized as well in cases where the visa officer had made a factual error in arriving at a preliminary conclusion without having spoken to the applicant [***Turingan v. M.E.I.***, (1993), 72.F.T.R. 316 (F.C./A).

It is trite law, however, that the applicant has the onus of convincing the visa officer that his application conforms to the Act and Regulations [section 8 of the Act]. On this issue, this Court in ***Prasad*** stated:

> The onus is on the applicant to satisfy the visa officer fully of all the positive ingredients in the applicant's application. It is not for the visa officer to wait and to offer the applicant a second, or several opportunities to satisfy the visa officer on necessary points which the applicant may have overlooked. The visa officer exhibited no error of law, egregious error of fact, nor yet any unfairness on this record. One must remind oneself that even if the Court might have come to a different conclusion, the purpose of these proceedings is to determine whether the visa officer went off the rails according to the classical criteria for successful judicial review. The case of ***Lam v. M.E.I.***, (1991) 15 Imm.L.R. (2d) 275, does not apply here, for the visa officer correctly categorized this applicant.

In ***Hajariwala v. M.E.I.***, [1989] 2 F.C. 79, Jerome A.C.J., though he recognized the duty of the visa officer to assess the applicant under alternative occupations nevertheless specified that the applicant had a duty to furnish all the information relevant to his application:

> It is also important to emphasize that the ***Immigration Act*** in section 8 required that those seeking landing in Canada must satisfy an immigration officer that they meet the selection standards set out in the Immigration Regulations, 1978. It is clearly, therefore, the responsibility of the applicant to produce all relevant information which may assist his application. The extent to which immigration officers may wish to offer assistance, counselling or advice may be a matter of individual preference or even a matter of departmental policy from time to time, but it is not an obligation that is imposed upon the officers by the Act or the Regulations.

In ***Wai v. M.C.I.***, IMM-3418-95, 24 October, 1996, Heald D.J. held that there is no duty on the visa officer to request more evidence when he is not

persuaded by the evidence already adduced that the applicant had "Arranged Employment". He stated:

> In my view, these grounds are without merit. It is the responsibility of the applicant to provide any and all relevant information in support of his application. There is no onus upon the visa officer in this regard. Similarly, the onus is upon the applicant to submit in evidence a valid offer of employment.

Finally in ***Muntean v. M.C.I.***, (1995), 103 F.T.R. 12, Cullen J. declined to recognize a breach of fairness and described the status of the law on that issue as follows:

> As to the issue of procedural fairness, I can discern no breach. A visa officer is under a duty to act fairly. Counsel for the applicant directed this Court to a number of cases in which it was found that this duty had been breached. In my view, this case law establishes that a visa officer must direct his or her mind to all aspects of the application and give the applicant an opportunity to clarify or elaborate on his written responses. In addition, there is authority for the assertion that the visa officer questioned an applicant about the duties performed in his previous employment and that when there is a concern about the applicant's qualifications for an intended occupation, the visa officer, informed the applicant (see ***Dhaliwal v. Canada (Minister of Employment and Immigration)*** (1992), 52 F.T.R. 311).

It is still not clear in what circumstances procedural fairness requires that the visa officer apprise the applicant of his concerns. However, from the authorities cited above one may conclude that this duty does not arise merely because the visa officer has not been convinced, after weighing the evidence, that the application is well founded. The visa officer's task is precisely to weigh the evidence submitted by the applicant. In the Court's words, in light of the onus that is on the applicant to produce evidence, it is not apparent that the visa officer should be compelled to give him a "running-score" at every step of the proceeding [***Covrig v. M.C.I.***, (1995), 104 F.T.R. 41].

In the case at bar, the applicant designated INSTRUMENT (Mech. Engineer) as an intended occupation. The visa officer determined, on the basis of the evidence adduced by the applicant and his questioning during the interview that the applicant should be assessed as a "Mechanical Engineering Technologist". In doing so, it appears from the record, that the visa officer considered the applicant's whole work experience and gave him an opportunity to submit

evidence of his qualifications. In the words of Wetston J. in ***Nassrat v. M.C.I.***, IMM-607-95, September 12, 1995:

> I agree that there may be cases when procedural fairness would require that notice of an important matter should be brought to the attention of the applicant. However, in my view, this case is not one of them. The immigration official had no concerns based on the evidence before her that would give rise to an immediate impression regarding the deficiency of such evidence. ***Fong, supra***, at 216.

The applicant has also impugned the visa officer's assessment of his level of education. These are questions of fact entirely within the mandate of the visa officer to determine and should not be interfered with unless the visa officer's conclusions are patently unreasonable [***Jetha v. M.C.I.***, IMM-1049-96, October 3, 1996; ***Lim v. M.E.I.***, [1991] 121 N.R. 241 (F.C/A)]. The applicant referred to his own graduation from SPIT as his highest educational attainment.

The visa officer awarded 13 points to the applicant for "Education", pursuant to subparagraph 1(1)(*c*)(ii) of Schedule I of the Regulations. The only evidence of the applicant's level of education on the record is that SPIT Diploma. The visa officer, in his discretion, determined that this was evidence of a "diploma or apprenticeship certificate program that requires completion of a secondary school diploma". There is evidence to support this conclusion in the application form and the applicant has not pointed to a specific error committed by the visa officer in the appreciation of this evidence. Paragraphs 13 through 18 of the visa officer's affidavit are most significant.

In regard to the applicant's wish to reside in Canada, it is unfortunate that from an occupational perspective, he has allowed his professional skills to go out of date, if they ever were up to North American standards. There is really nothing to contradict the visa officer's paragraphs 19, 20 and 21 on personal suitability. There is, in sum, no reason for the Court to intervene.

The Court is recognizant of the applicant's counsel's high standards of advocacy, but such cannot prevail against the manifest facts. If it could, the

applicants would have been successful here, but they are not, and the application is dismissed.

F.C. Muldoon
Judge

Ottawa, Ontario

August 21, 1997

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

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PLACE OF HEARING:	TORONTO, Ontario
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REASONS FOR ORDER OF THE HONOURABLE MR. JUSTICE MULDOON

DATED: AUGUST 21, 1997

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