IMM-4141-96

BETWEEN:

LYUDMILLA SAMOLENKO

Applicant

and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

HEALD, D.J.

This is an application for judicial review of the decision of visa officer G. Margaret Gass, dated September 12, 1996. By that decision, the visa officer refused the applicant's application for landing under the independent category. The basis for the assessment of the application was the necessary requirements for the occupation of graphic artist. It is the applicant's submission that the application should have been assessed based on the requirements for arts supervisor.

THE FACTS

The applicant applied for permanent residence status in Canada at the Canadian embassy in Tel Aviv on August 16, 1995. In that application, the applicant listed her occupation as computer graphics specialist.

The applicant says that a supplementary application was also given to the visa officer prior to the refusal decision. The respondent disputes this fact. That supplementary application was said to have contained an additional occupational category, arts supervisor, for consideration.

On September 5, 1996, the applicant was interviewed by the visa officer. The notes of the visa officer contain the following observations:

...Not a computer hard and software graphic specialist.
English is good-- technical
-- she is an artist
...She presently works at publishing house - monthly magazine, health magazines; she prepares layout, does ads. has done computer courses, computer graphics. She has 16 years education. Work in Ukraine; Advertising artist; in charge of a team. Design layouts; seems to have required experience.

Husband works as a driver - semi trailers.
Profession: Diesel Mechanic

Education: 10 years plus courses for mechanics - 6 months...

The visa officer subsequently made further notes on a document entitled Immigration Assessment Record-Abroad, which forms the official record of the decision. Those notes read as follows:

Subjects skills more aptly reflect that of a graphic artist and that she does design of advertisements. She uses a computer for her graphics but definitely is not expert on developing and monitoring software and hardware in the strictly technical sense. She uses her computers to create her designs graph. Zero demand.

On September 12, 1996 the visa officer wrote a letter to the applicant denying the application due to the fact that the applicant had been assessed as a graphic artist, which category failed to satisfy the occupational requirement. The embassy inadvertently sent out the unsigned file copy, instead of the original, to the applicant's agent. This agent was advised of the error on October 14, 1996. On October 15, 1996, the embassy confirmed in writing that there had been no misunderstanding and that the decision remained the same.

THE ISSUE

1. Did the visa officer err by failing to consider the applicant under the occupational category of arts supervisor?

THE ANALYSIS

The relevant jurisprudence is well summarized in *Saggu v. Canada (M.C.I.)* (28 November 1994), T-2186-92 (F.C.T.D.):

...The visa officer has a duty to assess an application with reference to the occupation represented by the applicant as the one for which he or she is qualified and prepared to pursue in Canada. That duty extends to each such occupation. An order of certiorari and mandamus will be available where there has been a failure to do so.

> ...Further, there is a clear responsibility on the part of a visa officer to assess alternate occupations inherent in the applicant's work experience: *Li v. Canada (M.E.I.)* (1990), 9 Imm.L.R. (2d) 263 (F.C.T.D.). A visa officer must consider an applicant's aptitudes, previous work experience, and whether or not this constitutes experience in the intended occupations. ...

The applicant has asserted that the supplementary application requesting consideration for the category of arts supervisor was before the visa officer prior to her decision. If so, then it would be a clear error of law for the visa officer not to have considered the category of arts supervisor. However, I am of the view that the evidence does not establish that the supplementary application was, in fact, before the visa officer.

The applicant relies on the affidavit of John O'Brien Grant. Mr. Grant is a solicitor practicing in association with counsel for the applicant. That affidavit states:

> 5. I am advised by Steve Rosenbaum and I verily believe that as a result of these qualifications, a supplementary Application For Permanent Residence for the Applicant was submitted to the Canadian Embassy in Tel-Aviv. Attached hereto to this my Affidavit as Exhibit "E" is a copy of the supplementary Application for Permanent Residence which indicates that the Applicant's intended occupation in Canada is that of an Arts Supervisor and Computer Graphics Specialist.

Exhibit "E" contains the described supplementary application, dated September 2, 1996. The document does not contain, *per se*, any evidence to suggest receipt by the respondent.

The respondent, through the affidavit of Louis Dumas, specifically denies that any supplementary application was submitted to or received by the Canadian Embassy in Tel Aviv. Dumas is not the visa officer who handled the applicant's file, but the visa officer has retired. Dumas states in his affidavit that his personal knowledge arises from his review of the documents in the file.

The onus is on the applicant to verify the facts upon which her application is dependent. The Grant affidavit is of doubtful evidentiary value. He deposed that the source of his information and belief was the applicant's counsel, Mr. Rosenbaum. Additionally, Mr. Rosenbaum could not reasonably be expected to have personal knowledge of the matter since the supplementary application was said to be filed by the

applicant's agent in Israel. Accordingly, on this record, the applicant has not proven that she submitted a supplementary application.

Reference may also be had to Rule 332 of the *Federal Court Rules*, which states in part:

> 332. (1) Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions on which statements as to his belief with the grounds thereof may be admitted.

Additionally, I refer to sub-Rule 12(1) of the *Federal Court Immigration Rules, 1993*:

> 12. (1) Affidavits field in connection with an application shall be confined to such evidence as the deponent could give if testifying as a witness before the Court.

The requirements of these rules have not been met in the circumstances of this case.

The applicant argued that, in any case, the interview notes of the visa officer showed that she must have seen the supplementary application. I do not agree. In my view, it is apparent that the information could just as easily have come from the interview itself. On the totality of the record, I conclude that it has not been established that the supplementary application was put before the visa officer.

For these reasons, the within application is dismissed.

CERTIFICATION

Neither counsel suggested certification of a serious question of general importance pursuant to section 83 of the *Immigration Act*, R.S.C. 1985, c. I-2. I agree that this is not a case for certification.

Darrel V. Heald
Deputy Judge

Ottawa, Ontario
July 28, 1997