

Date: 20071219

Docket: IMM-6768-06

Citation: 2007 FC 1336

Ottawa, Ontario, December 19, 2007

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

ARAM TCHAPRAZIAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of a visa officer's decision in Damascus, dated October 17, 2006, whereby she rejected the applicant's demand for a permanent residence visa as an entrepreneur. The visa officer concluded that the applicant did not have the ability or intention to provide active and on-going participation in the management of his brother's Canadian business. This application for judicial review is allowed for the following reasons.

FACTS

[2] The applicant is a citizen of Syria who applied for a permanent residence visa as an entrepreneur at the Embassy of Canada in Damascus. His brother, Kasbar Tchaprastian (Kasbar), also applied for a permanent residence visa in the same category.

[3] In 1978, the applicant left school, having completed seven years of education, to work as an apprentice goldsmith to his father in his family's gold and precious metal manufacturing business in Aleppo, Syria.

[4] In 1982, his father made Kasbar a 50% partner in the business. In 1990, he handed over the remaining 50% shareholding to the applicant.

[5] The applicant is in charge of the manufacturing side of the business: he staffs employees; he contracts, purchases and sells equipment; and he provides artistic direction. He also deals with the technical work inside the workshop and the supervision of employees.

[6] Kasbar is responsible for the administrative side of the business: he sells and markets the products; he deals with the maintenance of accounts and general record keeping; he is in charge of insurance and safety; he negotiates the contracts; and he implements strategies regarding the supply of raw goods.

[7] After working 15 years in the family business, the applicant received professional recognition as a qualified goldsmith from the Professional Association for Goldsmithery & Jewellery in Aleppo.

[8] The applicant's younger brother, Dikran Tchaprastian (Dikran), has been a Canadian citizen since 2001. He is a self-employed jeweller who manufactures gold and precious metal chains. In 1999, he opened a wholesale jewellery manufacturing business, DSK Goldsmith. He is also the owner of a retail store called Arman's Jewellers Ltd. which opened in 2001.

[9] The applicant and Kasbar each intend to expand, diversify and invest \$ 500,000.00 in Dikran's retail store in Canada. In 2003, the applicant attended a business seminar in Canada and he also analysed the Canadian market.

[10] On October 17, 2006, the applicant's request for a permanent resident visa was rejected while his brother's application was accepted.

THE IMPUGNED DECISION

[11] The applicant filed his application for permanent residence in Canada, prior to the date that the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 and its corresponding regulations, the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the IRPR) came into effect. Pursuant to section 361 of the IRPR, the applicant's demand, which was made under the former

Immigration Regulations, SOR/78-172 (the former *Regulations*) and was still pending when the IRPR came into force, must be assessed under both the former *Regulations* and the IRPR.

[12] The visa officer concluded that the applicant did not meet the requirements under the IRPR. She accepted the applicant's experience but she concluded that he did not demonstrate an ability to manage a business, especially given that the administrative tasks were his brother's responsibility. The applicant does not challenge this finding.

[13] The visa officer then assessed the application under the former *Regulations*. She concluded that the applicant was not eligible for a permanent resident visa as a member of the entrepreneur class and stated as follows:

Section 2(1) of the *Regulations* defines an entrepreneur as an immigrant who intends and has the ability to establish, purchase or make a substantial investment in a business or commercial venture in Canada that will make a significant contribution to the economy and whereby employment opportunities will be created or continued in Canada for one or more Canadian citizens or permanent residents, other than the entrepreneur and his dependants. He must also intend and have the ability to provide active and on-going participation in the management of the business or commercial venture.

Based on the answers you provided at the interview on September 18, 2006; as you stated your brother in Canada will be managing the business, you did not satisfy me that you intend and have the ability to provide active and on-going participation in the management of the business or commercial venture in Canada. Consequently, you are not eligible to receive an immigrant visa as an entrepreneur.

It is that part of the decision that is contested by the applicant.

ISSUES

[14] This application for judicial review raises the following issues:

- 1) What is the appropriate standard of review?
- 2) Did the visa officer err in her assessment of the application for a permanent resident visa as an entrepreneur under the former *Regulations*?

ANALYSIS

1) What is the appropriate standard of review?

[15] The case law is divided regarding the appropriate standard of review applicable to the judicial review of a visa officer's decision. However, in *Ouafae v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 459 (approved in 2006 FCA 68), I concluded that these contradictory positions were reconcilable:

[18] Opinion on the appropriate standard of review for decisions by visa officers is divided and appears to have spawned seemingly contradictory decisions. In some cases, reasonableness *simpliciter* was the chosen standard (see, *inter alia*, *Yaghoubian v. Canada (M.C.I.)*, [2003] FCT 615; *Zheng v. Canada (M.C.I.)*, [2000] F.C.J. No. 31, IMM-3809-98; *Lu v. Canada (M.C.I.)*, [1999] F.C.J. No. 1907, IMM-414-99). In other decisions, patent unreasonableness was chosen instead (see, for example, *Khouta v. Canada (M.C.I.)*, [2003] F.C.J. No. 1143, 2003 FC 893; *Kalia v. Canada (M.C.I.)*, [2002] F.C.J. No. 998, 2002 FCT 731).

[19] And yet, on closer inspection, these decisions are not irreconcilable. The reason for the different choices is essentially that the nature of the decision under review by this Court depends on the context. Thus it goes without saying that the appropriate standard of review for a discretionary decision by a visa officer assessing a prospective immigrant's occupational experience is patent unreasonableness. Where the visa officer's decision is based on an assessment of the facts, this Court will not intervene unless it can be shown that the decision is based on an erroneous finding of fact made in a perverse or capricious manner.

[20] However, it is not the same for a decision by a visa officer involving an application of general principles under an Act or

Regulations to specific circumstances. Where the decision is based on a question of mixed law and fact, the Court will show less deference and seek to ensure that the decision is quite simply reasonable...

[16] The issue of whether the visa officer erred in her assessment of the applicant's ability to participate in the management of his brother's business is one of mixed fact and law. Accordingly, the reasonable *simpliciter* standard applies and the Court will intervene only if the visa officer's decision discloses no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion it reached: see *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247; and *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748. The application of the reasonable *simpliciter* standard is not a point of contention between the parties.

2) Did the visa officer err in her assessment of the application for a permanent residence visa as an entrepreneur under the former *Regulations*?

[17] Pursuant to section 2(1) of the former *Regulations*, the applicant must intend to and have the ability to establish, purchase or make a substantial investment in a business in Canada to contribute to the Canadian economy and to create a minimum of one full-time employment opportunity. The applicant's ability and intention to provide active and on-going participation in the management of the business or commercial venture is also assessed.

[18] This is to be contrasted to the definition of an "entrepreneur" found in the IRPR, which is much more restrictive. The IRPR provides that, in addition to a minimum net worth of \$ 300,000.00 and a written statement, an applicant also needs to have the required "business experience" in the

management of a “qualifying business” and the control of a percentage of equity in this business (for ease of reference, the text of these provisions is reproduced in the Annex). Accordingly, the applicant’s failure to demonstrate that he meets the requirements under the IRPR is not determinative for the assessment of his application pursuant to the former *Regulations*.

[19] While the visa officer accepted that the applicant had the intention to expand and invest in his brother’s business, she found that the applicant did not meet the definition of an “entrepreneur” pursuant to the paragraph (b) of the former *Regulations*. In fact, she concluded that he did not have the ability to provide active and ongoing participation in the management of the business. The visa officer based her findings on the applicant’s statement that his brother Dikran will be managing the business in Canada and that he and Kasbar will help him.

[20] The visa officer did not provide any other reasons to support her findings. During the interview, the visa officer explained to the applicant that he needed experience in managing a business pursuant to the IRPR. Accordingly, the applicant explained that he had many years of experience managing the Syrian business with his brother. However, the visa officer failed to discuss the requirements under the former *Regulations*. This failure raises a serious doubt as to whether the visa officer actually considered the application under the former *Regulations*.

[21] Further, I do not think that the sole reason given by the visa officer to support her negative finding is relevant. Indeed, it is understandable that the applicant and Kasbar would rely on their

brother Dikran's knowledge of the Canadian market upon their arrival. In any event, it does not imply that they would not participate in the operations of the business.

[22] The *Immigration Manual*, OP 6 - section 3.1, provides guidelines to assess the eligibility of an entrepreneur under the former *Regulations*:

The following are among the points to consider in your assessment of an applicant's **intent and ability** to do business in Canada. The onus is on the applicant to document his or her qualities and skills:

- net worth;
- past and present field activity;
- level of expertise
- standing in the business community;
- recognition for business achievements;
- ownership of intellectual property;
- educational background;
- specialized business training;
- membership in professional associations;
- market research;
- exploratory visit to Canada;
- preparation for the move to Canada;
- education in Canada;
- official language proficiency;
- ownership of assets in Canada;
- relatives in Canada; and
- other knowledge of Canada or connections with Canada.

Note that the definition of an entrepreneur does not refer to a business track record nor to experience. While the person does not need to have a clear track record, past success in business is a strong indicator of the intent and ability to establish a business in Canada. A history of significant business responsibility will certainly strengthen the application.

General business experience or management experience may be a good measure of the applicant's intent and ability to do business. Some types of non business experience may also be readily transferable to a business setting. This may include financial or personnel experience, experience as a professional, or specific experience in the field of the intended business. The stronger the applicant's experience, the more it will enhance the application.

[23] The applicant has over 25 years of experience and expertise in the jewellery business. He has managed a successful business in Syria, of which he shared equal partnership with his brother. They collaborated in the success of their enterprise in different ways; the applicant was in charge of the manufacturing process and employee supervision while the administrative tasks were his brother's responsibility. Although each of them had separate tasks, their work was not compartmentalized to the extent that the applicant was unaware of what was going on in the business.

[24] In his interview before the visa officer, the applicant explained that they would need approximately 15 machines in order to expand their brother's business in Canada. He said that he had travelled to Italy to view the machines that they expected to purchase. The applicant was also aware of the annual profit and the taxes the Syrian business pays. Even if the applicant was mainly in charge of the technical aspects, those elements clearly show his knowledge and participation in the management of the business

[25] Moreover, an entrepreneur does not need to demonstrate identical experience to the intended business to be established in Canada. The applicant submits that the visa officer had to take into consideration his experience as a supervisor in the Syrian business as an indication of his ability to establish or contribute to a similar business.

In *So v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 6 (QL), Justice Dubé concluded that specific experience in running or managing a business was not required:

[5] After reviewing the applicant's file, the Immigration Officer concluded that his track record failed to demonstrate that he could provide active and on going participation in the management of a business as required under subsection 2(1) of the Immigration Regulations, 1978 (the "Regulations"). This conclusion was largely based on the fact that the Immigration Officer felt that the applicant was not involved in the management of the bank and thus merely performed as an employee and not an entrepreneur.

[...]

[9] There is nothing in the Regulations which specifically requires that an applicant under the entrepreneur category have the prior experience of running or managing a business. An entrepreneur under the Regulations is an immigrant who has the ability to establish, purchase or make a substantial investment in a business or commercial venture in Canada and who intends and has the ability to provide active and on going participation in the management of that business.

See also *Tam v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 568 (QL).

[26] Applicant's counsel correctly asserts that the difference between supervision and management is barely discernable. The *Black's Law Dictionary* (7th edition), describes a manager as a "person who administers or supervises the affairs of a business, office, or other organization" while supervision is defined as "the act of managing, directing or overseeing persons or projects".

[27] Not only does the applicant have extensive work experience, he also received professional recognition as a qualified goldsmith in 1999; he attended a business seminar in 2003; he has studied the Canadian market; and he intends to invest \$ 500,000.00 in his brother's Canadian business.

[28] The applicant meets numerous qualities and skills described in the *Immigration Manual*.

After having carefully reviewed the record, I am of the view that the visa officer erred in her assessment of the applicant's ability and intention to provide on-going participation in the management of a business in Canada.

[29] I agree with counsel for the applicant that the visa officer's concern about Dikran's involvement was not relevant to an assessment of the applicant's ability and intention to participate in a business in Canada. In any event, if the applicant ultimately fails to make a significant contribution to the business, the Immigration Appeal Decision is empowered to assess his compliance with the terms and conditions of his permanent visa. Such concerns are not open to the visa officer in deciding the initial application for permanent residence.

[30] I would therefore allow this application for judicial review and remit the matter to a different visa officer for expeditious redetermination.

ORDER

THIS COURT ORDERS that the application for judicial review is allowed, the visa officer's decision is set aside and the matter is referred back to a different visa officer for redetermination.

"Yves de Montigny"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6768-06

STYLE OF CAUSE: Aram Tchaprazian
v.
MCI

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: December 11th 2007

**REASONS FOR ORDER
AND ORDER BY:** de MONTIGNY J.

DATED: December 19, 2007

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ANNEX

Immigration and Refugee Protection Regulations, SOR/2002-227

88. (1) The definitions in this subsection apply in this Division.	88. (1) Les définitions qui suivent s'appliquent à la présente section.
"entrepreneur" means a foreign national who	«entrepreneur» Étranger qui, à la fois :
(a) has business experience;	a) a de l'expérience dans l'exploitation d'une entreprise;
(b) has a legally obtained minimum net worth; and	b) a l'avoir net minimal et l'a obtenu licitement;
(c) provides a written statement to an officer that they intend and will be able to meet the conditions referred to in subsections 98(1) to (5). (entrepreneur)	c) fournit à un agent une déclaration écrite portant qu'il a l'intention et est en mesure de remplir les conditions visées aux paragraphes 98(1) à (5). (entrepreneur)
"business experience" , in respect of	«expérience dans l'exploitation d'une entreprise»:
...	...
(b) an entrepreneur, other than an entrepreneur selected by a province, means a minimum of two years of experience consisting of 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	b) s'agissant d'un entrepreneur, autre qu'un entrepreneur sélectionné par une province, s'entend de l'expérience d'une durée d'au moins deux ans composée 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

determination is made in respect of the application;

faite et prenant fin à la date où il est statué sur celle-ci;

"minimum net worth" means

«avoir net minimal» :

(a) in respect of an entrepreneur, other than an entrepreneur selected by a province, \$300,000; and

a) S'agissant d'un entrepreneur autre qu'un entrepreneur sélectionné par une province, correspond à la somme de 300 000 \$;

(b) in respect of an entrepreneur selected by a province, the minimum net worth required by the laws of the province. (avoir net minimal)

b) s'agissant d'un entrepreneur sélectionné par une province, correspond à l'avoir net minimal exigé par le droit provincial. (minimum net worth)

"percentage of equity" means

«pourcentage des capitaux propres»

(a) in respect of a sole proprietorship, 100 per cent of the equity of the sole proprietorship controlled by a foreign national or their spouse or common-law partner;

a) Dans le cas d'une entreprise à propriétaire unique non dotée de la personnalité morale, la totalité des capitaux propres contrôlés par l'étranger ou son époux ou conjoint de fait;

(b) in respect of a corporation, the percentage of the issued and outstanding voting shares of the capital stock of the corporation controlled by a foreign national or their spouse or common-law partner; and

b) dans le cas d'une société par actions, la part des actions du capital social avec droit de vote émises et en circulation que contrôle l'étranger ou son époux ou conjoint de fait;

(c) in respect of a partnership or joint venture, the percentage of the profit or loss of the partnership or joint venture to which a foreign national or their spouse or common-law partner is entitled. (pourcentage des

c) dans le cas d'une société de personnes ou d'une coentreprise, la part des bénéfices ou des pertes portée à l'actif ou au passif de l'étranger ou de son époux ou conjoint de fait. (percentage of equity)

capitaux propres)

"qualifying business" means a business — other than a business operated primarily for the purpose of deriving investment income such as interest, dividends or capital gains — for which, during the year under consideration, there is documentary evidence of any two of the following:

(a) the percentage of equity multiplied by the number of full time job equivalents is equal to or greater than two full-time job equivalents per year;

(b) the percentage of equity multiplied by the total annual sales is equal to or greater than \$500,000;

(c) the percentage of equity multiplied by the net income in the year is equal to or greater than \$50,000; and

(d) the percentage of equity multiplied by the net assets at the end of the year is equal to or greater than \$125,000. (entreprise admissible)

«entreprise admissible» Toute

entreprise — autre qu'une entreprise exploitée principalement dans le but de retirer un revenu de placement, tels des intérêts, des dividendes ou des gains en capitaux — à l'égard de laquelle il existe une preuve documentaire établissant que, au cours de l'année en cause, elle satisfaisait à deux des critères suivants :

a) le pourcentage des capitaux propres, multiplié par le nombre d'équivalents d'emploi à temps plein, est égal ou supérieur à deux équivalents d'emploi à temps plein par an;

b) le pourcentage des capitaux propres, multiplié par le chiffre d'affaires annuel, est égal ou supérieur à 500 000 \$;

c) le pourcentage des capitaux propres, multiplié par le revenu net annuel, est égal ou supérieur à 50 000 \$;

d) le pourcentage des capitaux propres, multiplié par l'actif net à la fin de l'année, est égal ou supérieur à 125 000 \$. (qualifying business)