

Date: 20080711

Docket: IMM-1077-07

Citation: 2008 FC 867

Halifax, Nova Scotia, July 11, 2008

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

PRADYMAN BHAILALBHAI PATEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of the decision a visa officer at the Canadian High Commission in New Delhi (the officer) dated January 2, 2006, wherein the officer denied the application for permanent residence as a member of the economic class.

I. Background

[2] Pradymanb Bhailalbai Patel (the applicant) filed his first application to immigrate to Canada as a skilled worker in May 2001. His first application was captured by the transitional Regulations and as such he was asked in December 2003 to submit new forms under the new legislation. The applicant's second application was then submitted. In his second application, the applicant applied in the intended occupation of Mechanical Engineer, under National Occupational Classification (NOC) 2132. The applicant listed his wife and son as family members on the application.

[3] An interview was held on January 2, 2007 at the Canadian High Commission in New Delhi, India. During the interview the applicant was questioned by the immigration officer about his work experience as an engineer. As a result of this transition period, the applicant's application was assessed by the officer under both the *Immigration Regulations*, 1978, SOR/78-172 and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR). In a letter dated January 2, 2007, the officer determined that the applicant did not meet the requirements for immigration to Canada. In response to the refusal letter, the applicant sent the officer a fax dated January 17, 2007 asserting that the applicant did indeed meet the requirements for immigration to Canada. In a letter dated February 27, 2007, the Canadian high Commission in New Delhi advised the applicant that his application had been considered on its substantive merits which fully concluded his application. This is the judicial review of the officer's decision dated January 2, 2007.

II. Officer's Decision

[4] In his decision dated January 2, 2007, the officer determined that the applicant did not meet the requirements for immigration to Canada as a member of the economic class, skilled worker. The officer informed the applicant that pursuant to subsection 11(1) of the *Immigration Regulations, 1978*, a successful applicant had to receive at least one unit for “experience” unless they had arranged employment from an employer willing to hire the person without experience. The officer informed the applicant that was not satisfied that the applicant had at least one year of experience as a Mechanical Engineer (NOC 2132), Skill level ‘A’. The officer’s notes provide greater insight into why the officer was of the opinion that the applicant had failed to meet the requirements.

[5] With regards to education, the officer awarded the applicant 20 points under IRPR and 10 points under the *Immigration Regulations, 1978*. The officer’s notes read:

PA has completed a Bachelor of Engineering from the North Maharashtra University. Original degree and marks sheet provided.

[6] With regards to Experience, the officer awarded the applicant 0 points under both IRPRF and the *Immigration Regulations, 1978*. The officer’s notes on experience discuss three engineering jobs occupied by the applicant. With regards to the applicant’s work experience at KHS Machinery Ltd., the officer noted that the applicant stated that was working as a engineer for approximately 20000Rs per month and that the documentation provided by KHS Machinery Ltd. indicated that the applicant was in reality paid 8900Rs per month. The officer noted that upon being questioned about discrepancy, the applicant stated “I don’t know exactly, but it must be tax”. The officer noted that

the documentation from KHS Machinery Ltd. lacked a description of the applicant's duties. Finally, the officer noted:

PA states that he is working as an M4 engineer, but there are M3, 2 and 1 engineers working in the company for more money.

[7] With regards to the applicant's work experience for Bhupendra Power Control, the officer's notes read that the applicant stated that he did maintenance on machines. The officer noted that the applicant was "vague regarding the types of machines that he serviced – he [was] not able to tell me exactly how the machine[s] function." The officer also noted that the applicant was unable to tell him how the product emerging from the machine was used in fertilizer, and unable to describe exactly what happens after the garbage was collected. The officer noted that the applicant stated that he kept the machines running by "sharpening the blades and doing whatever other checks [were] necessary based on his checklist." The officer's observation reads: "PA appears to be working as some type of service technician, not an engineer."

[8] With regards to the applicant's work experience for M/S Satellite Conveyors, the officer noted that the applicant stated that his sole job was to install conveyor systems based on drawings provided to him by his boss and to service these systems once installed. When asked how he would determine the specs for the conveyor system, the applicant responded by rule of thumbs and experience. The applicant also responded that he used no other techniques or formulas to determine the specs for erecting the conveyors, and that he did not have to calculate loads or weights for the construction of the conveyor system. The officer's observations read as follows:

PA appears to be working as conveyor belt installer. He is not involved in the jobsite design/layout of the conveyor system, the costing of the system or the in office design work. PA states that he does not calculate loads for the conveyor systems he installs and is only able to design/setup the conveyor systems based on his experience.

The officer's final comment with regards to the applicant's education reads: "I am not satisfied that PA has performed the duties of a Mechanical Engineer, NOCC 2132 for at least 1 year full time within the past 10 years."

[9] With regards to the applicant's adaptability or personal suitability, the officer made the following point awards and notes. Under IRPR, the officer awarded the applicant 4 points for adaptability. Under the *Immigration Regulations, 1978*, the officer also awarded the applicant 4 points. In doing so, the officer made a number of notes. The officer noted that the applicant stated that he believed his education/professional qualifications would be recognized in Canada as per information from his friends. He had not contacted CCPE to confirm this. The officer also noted that the applicant had never travelled or worked outside of India. The officer's observations read as follows:

PA appears to have done little in terms of preparing to work in Cda. He has (sic) not been in touch with CCPE, he has not contacted an (sic) potential employer, he does not know if his ed/prof qualifications will be accepted and he does not appear to know much about the cost of living in Cda

[10] In conclusion, the officer found that the applicant did not meet the requirements to immigrate to Canada as a member of the skilled workers class and consequently rejected the application.

III. Issues

[11] The applicant submitted the following issues for consideration:

1. Did the immigration officer err in misconstruing and/or ignoring the applicant's employment history as a mechanical engineer?
2. Did the immigration officer overly narrowly read the NOC in such a narrow way as to exclude the applicant because he did not perform all of the specified duties of an engineer despite the NOC stating that a mechanical engineer performs some or all of the specified duties?
3. Did the immigration officer err in not assessing the applicant in alternative similar occupations?

[12] The issues were stated at the hearing as follows:

1. What is the appropriate standard of review?
2. Did the officer err in finding the applicant did not have the experience to be a mechanical engineer?
3. Did the officer err in failing to assess the applicant in alternative similar occupations?

IV. Applicant's Submission

[13] The applicant submitted that the appropriate standard of review for cases involving a determination of whether an applicant meets the requirements of a particular occupation as described in an NOC is reasonableness *simpliciter*.

[14] The applicant submitted that the officer erred by applying an overly narrow interpretation of NOC 2132. It was submitted that the officer failed to evaluate the applicant's skills and experience as a Mechanical Engineer in a manner consistent with the supporting work experience documentation. The applicant submitted that NOC 2132 defines the occupation in question as someone who "performs some or all of the specified duties" (*Moneim v. MCI*, [2000] F.C.J. No. 1977 at paragraph 16). Moreover, requirements of an NOC have to be assessed "with a certain degree of flexibility" (*Moneim*, above at paragraph 18). The applicant submitted that he has a Bachelor Degree in Mechanical Engineering and approximately 10 years of full time work experience as a Mechanical Engineer. Thus, the applicant submitted that the officer's award of zero points for experience was not reasonable. The applicant submitted that the officer failed to consider the totality of the evidence before rendering their decision.

[15] It was further submitted that the officer erred in failing to assess the applicant for similar occupations. The applicant noted previous cases where it was found that an immigration officer had a duty to consider the applicant for similar NOC occupations where the facts warranted it (*Hui v. MCI*, [1998] F.C.J. No. 1368, *Sy v. MCI*, [2002] F.C.J. No. 1179).

V. Respondent's Submissions

[16] The respondent submitted that the appropriate standard of review for the officer's determination was patently unreasonableness. The assessment of the qualifications and the experience of the applicant is a matter of fact entirely within the discretion of the visa officer and not subject to judicial review unless exercised in an unreasonable or improper manner (*Parmar v. Canada (MCI)* (1997), 139 F.T.R. 203).

[17] The respondent submitted that the duties as described by the applicant in his interview do not demonstrate that he performed the actions in the lead statement or a substantial number of the main duties for NOC 2132. It was submitted that the officer correctly found that the duties and responsibilities described by the applicant corresponded more with a service person or installer of conveyer belts than with those listed in NOC 2132. The applicant submitted that considering that the applicant was not involved in the jobsite design, layout, cost, or calculation of loads of the conveyor system, the officer's conclusions were not patently unreasonable.

[18] With regards to the alleged failure to assess the applicant under alternate NOCs, the respondent submitted that the applicant requested and was assessed in the occupation of Mechanical Engineer. It was also submitted that even now, the applicant has not shown how he meets the requirements for Mechanical Engineering Technician.

VI. Applicant's Reply

[19] The applicant further submitted that the head-note for NOC 2132 states clearly that Mechanical Engineers do not just research, design and develop machinery, but that they also

“perform duties related to the evaluation, installation, operation and maintenance of mechanical systems.” It was submitted that these are precisely the duties the applicant described during his interview.

[20] The applicant also reiterated case law supporting that the officer had a duty, based on the facts of the case, to assess the applicant under related occupations such as a Mechanical Engineering Technician.

VII. Analysis

A. What is the appropriate standard of review?

[21] The applicant submitted that the appropriate standard of review is one of reasonableness *simpliciter*. The respondent submitted that the appropriate standard of review is one of patently unreasonable based on the authority of *Lim v. Canada (MEI)* (1991), 12 Imm. L.R. (2d) 161 (F.C.A.). The case of *Lim* above, involved an officer’s determination on whether the appellant was qualified to be a Personnel Officer in Canada and the Federal Court of Appeal held that “this was a pure question of fact entirely within the mandate of a visa officer to resolve.” In that case, the standard of review adopted by the Court was one of patent unreasonableness. However, in light of the Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, there remains only two standards of review in Canada: correctness and reasonableness. In my opinion, given the factual nature of the question and the expertise of the immigration officer, I am satisfied that the appropriate standard of review is reasonableness.

[22] As to the officer's determinations on personal suitability, they too are reviewable on a standard of reasonableness given that they are a "matter within the discretion on the part of visa officer" (*Kompanets v. Canada (MCI)* (2006) 6 Imm. L.R. (3d) 107 (F.C.T.D.) above at paragraph 11).

B. Did the officer err in finding the applicant did not have the experience to be a mechanical engineer?

[23] The applicant submitted that the officer erred in awarding no points for experience. In making this argument, the applicant relied on *Moneim* above, wherein Justice Tremblay-Lamer of this Court held that it was unreasonable to give zero points for experience to an accountant who had performed some of the key duties listed in the corresponding NOC for at least two years. I note that in *Moneim* above, the applicant was found to have performed some of the key duties listing in the corresponding NOC.

[24] In his decision dated January 2, 2007, the officer concluded:

I am not satisfied that you meet the requirements for the occupation of Mechanical Engineers NOC 2132 Skill level 'A', since you have not satisfied me that you have performed a substantial number of the main duties of this occupation as set out in the National Occupational Classification, including the essential ones.

[25] A review of the officer's CAIPS notes shows the following comment:

I am not satisfied that PA has performed the duties of a mechanical engineer, NOC 2132 for at least 1 year full time within the past 10 years.

[26] The main duties of a mechanical engineer are listed in NOC 2132 as follows:

Main duties:

Mechanical engineers perform some or all of the following duties:

- Conduct research into the feasibility, design, operation and performance of mechanisms, components and systems
- Plan and manage projects, and prepare material, cost and timing estimates, reports and design specifications for machinery and systems
- Design power plants, machines, components, tools, fixtures and equipment
- Analyze dynamics and vibrations of mechanical systems and structures
- Supervise and inspect the installation, modification and commissioning of mechanical systems at construction sites of industrial facilities
- Develop maintenance standards, schedules and programs and provide guidance to industrial maintenance crews
- Investigate mechanical failures or unexpected maintenance problems
- Prepare contract documents and evaluate tenders for industrial construction or maintenance
- Supervise technicians, technologists and other engineers and review and approve designs, calculations and cost estimates.

[27] The officer, in his decision letter, stated that the applicant had not satisfied him he had “performed a substantial number of the main duties of this occupation as set out in the National Occupational Classification, including the essential ones.” This taken with the reference in the CAIPS notes that “I am not satisfied that PA has performed the duties of a mechanical engineer, NOC 2132 [...]” indicates to me that the officer believed that the applicant had to have performed all the duties of a mechanical engineer or substantially all the main duties of a mechanical engineer in order to qualify. This is not the case as the NOC clearly refers to “some of all of the following duties”.

[28] I am of the view that the officer made a reviewable error and as a result the application for judicial review must be allowed and the matter referred to a different officer for redetermination.

[29] Because of my finding on this issue I need not deal with the remaining issue.

[30] The applicant proposed a serious question of general importance for my consideration for certification, but I am not prepared to certify the question.

ORDER

IT IS ORDERED that the application for judicial review is allowed and the matter is referred to a different officer for redetermination. No question is certified.

“John A. O’Keefe”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1077-07

STYLE OF CAUSE: PRADYMAN BHAILALBHAI PATEL

- and -

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 16, 2008

**REASONS FOR ORDER
AND ORDER OF:** O'KEEFE J.

DATED: July 11, 2008

APPEARANCES:

Marvin Moses	FOR THE APPLICANT
Kevin Lunney	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Marvin Moses Toronto, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT