Federal Court  Cour fédérale

Date: 20101208

Docket: IMM-1587-10

Citation: 2010 FC 1255

Ottawa, Ontario, December 8, 2010

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

JUANITA ALICIA PENELOPE DASH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for a judicial review of the decision of a designated immigration officer dated December 11, 2009, to refuse the Applicant's application for permanent residence under the Skilled Worker category. The officer determined that the Applicant did not have the equivalent of one year of full-time experience within the ten years preceding her application date.

[2] Based on the reasons below the application is dismissed.

I. Background

A. *Factual Background*

[3] Juanita Alicia Penelope Dash (the Applicant) is a citizen of Guyana resident in the British Virgin Islands. In January 2007 she applied for permanent resident status under the Skilled Worker category, including her husband as a dependent. The application was received by the Immigration Section of the High Commission of Canada in Port-of-Spain, Trinidad and Tobago on January 19, 2007.

[4] The Applicant received a letter on March 24, 2009 advising her that her application had been brought forward for review and requesting information, including an updated application form, employment letters and evidence of funds. The visa office received this information on May 12, 2009.

[5] The Computer Assisted Immigration Processing System (CAIPS) notes include the following:

> PA HAS TWO YEARS OF EXPERIENCE AS AN
> ADMINISTRATIVE OFFICER – NOC: 1221 – SKILL LEVEL B
> …
>
> EXPERIENCE:
>
> APR2000 – MAY2000 – OMAI GOLD MINES – SAMPLER
> TRAINEE/GEOLOGICAL TECHNICIAN

JUL2000 – DEC2001 – BANK OF NOVA SCOTIA – STATEMENT CLERK, TELLER

JAN2007 – MAY2009 – JGS TELECOM –ADMINISTRATIVE OFFICER

[6] The Applicant then received a refusal letter dated December 11, 2009. This is the decision that is now under review.

B. *Impugned Decision*

[7] The visa officer found that the Applicant did not meet the minimum work experience required by paragraph 75(2)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR). This rule requires an applicant to have at least one year of continuous full-time employment experience, or the equivalent in part-time employment, within the ten years preceding the date of their application for a permanent resident visa.

C. *Legislative Scheme*

[8] Section 75 of the IRPR describes the class of federal skilled workers. Subsection 75(2) sets out the minimum requirements that an applicant must meet in order to qualify as a skilled worker. Paragraph 75(2)(a) specifies:

Skilled workers	Qualité
(2) A foreign national is a skilled worker if	(2) Est un travailleur qualifié l'étranger qui satisfait aux exigences suivantes :

(a) within the 10 years preceding the date of their application for a permanent resident visa, they have at least one year of continuous full-time employment experience, as described in subsection 80(7), or the equivalent in continuous part-time employment in one or more occupations, other than a restricted occupation, that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the National Occupational Classification matrix;	a) il a accumulé au moins une année continue d'expérience de travail à temps plein au sens du paragraphe 80(7), ou l'équivalent s'il travaille à temps partiel de façon continue, au cours des dix années qui ont précédé la date de présentation de la demande de visa de résident permanent, dans au moins une des professions appartenant aux genre de compétence 0 Gestion ou niveaux de compétences A ou B de la matrice de la Classification nationale des professions — exception faite des professions d'accès limité;
(b) during that period of employment they performed the actions described in the lead statement for the occupation as set out in the occupational descriptions of the National Occupational Classification; and	b) pendant cette période d'emploi, il a accompli l'ensemble des tâches figurant dans l'énoncé principal établi pour la profession dans les descriptions des professions de cette classification;
(c) during that period of employment they performed a substantial number of the main duties of the occupation as set out in the occupational descriptions of the National Occupational Classification, including all of the essential duties.	c) pendant cette période d'emploi, il a exercé une partie appréciable des fonctions principales de la profession figurant dans les descriptions des professions de cette classification, notamment toutes les fonctions essentielles.

[9] Subsection 75(3) provides that the application for a permanent resident visa will be refused and not further assessed if the foreign national fails to meet the minimal requirements of subsection 75(2).

[10] Subsection 76(1) sets out the selection criteria for the purpose of determining whether a skilled worker will be able to become economically established in Canada.

[11] Section 77 explains that the requirements and criteria set out in sections 75 and 76 must be met at the time an application for a permanent resident visa is made as well as at the time the visa is issued.

II. Issues

[12] The issues raised in this application are:

(a) Was the Applicant denied procedural fairness in that she had a legitimate expectation that her post-application work experience would be considered to meet the requirement under paragraph 75(2)(a)?

(b) Did the visa officer breach a duty of procedural fairness by failing to adequately explain why the Applicant's pre-application work was not considered satisfactory to meet the paragraph 75(2)(a) requirement?

III. Standard of Review

[13] Both issues are questions related to natural justice and procedural fairness. These are questions of law and warrant review on a standard of correctness. As a result the decision maker is owed no deference (*Malik v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1283,

at para. 23). As explained in *Skechley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392 at para. 53:

> The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty.

IV. Argument and Analysis

A. *The Applicant Was Not Denied Procedural Fairness*

[14] The Applicant submits that she had a legitimate expectation that the work experience she acquired between the time of her initial application and the assessment of her file by the visa officer would be considered when making a decision. When the Applicant's application was initially filed in January 2007 her work experience consisted of a one-month stint as a geological technician between April and May 2000, and a position at the Bank of Nova Scotia as a teller between July 2000 and December 2001 that was mostly part-time. However, after submitting her application the Applicant began working as a full-time administrative officer and still held that job when she updated her application in May 2009. The Applicant contends that the visa officer ignored this employment experience when determining that she did not meet the one-year requirement set out in paragraph 75(2)(a).

[15] This argument counters the clear language of paragraph 75(2)(a) which requires that applicants have at least one year of continuous full-time employment experience within the 10 years preceding the date of their application (emphasis added). To make this argument, the Applicant relies on two things: the Citizenship and Immigration Canada (CIC) operational manual,

"OP 6 Federal Skilled Workers" which guides CIC employees in the exercise of their functions and is publicly available on the CIC website; and the doctrine of legitimate expectations which, so far in its judicial evolution, affects the content of the duty of fairness owed to the individual if the individual has a legitimate expectation that a certain procedure will be followed (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at para. 26).

[16] The Applicant submits that since OP 6 instructs officers to "take into account any years of work experience that occur between application and assessment, and for which the applicant has submitted the necessary documentation" (found in section 10.13 of the 2009 version) when assessing the experience of applicants, the visa officer failed to meet the Applicant's legitimate expectation that her post-application work experience would count towards fulfilling the subsection 75(2) requirements.

[17] I fully agree with the Respondent's submissions that, in essence, the Applicant misunderstands the applicable regulations. Subsection 75(2) sets out the minimal requirements a foreign national must meet in order to be considered a skilled worker. According to subsection 75(3) if the applicant fails to meet the requirements of subsection (2), "the application for a permanent resident visa shall be refused and no further assessment is required". This is what happened to the Applicant's application in the present matter – her application failed to meet the minimal requirements and was rejected at the earliest stage.

[18] I have reviewed OP 6, version 2009-05-08, and the phrase on which the Applicant rests her legitimate expectation argument applies not to a subsection 75(2) assessment but rather to the subsequent stage in processing, an assessment of experience under subsection 76(1). In fact, preceding the statement relied upon by the Applicant in section 10.12, one finds chapter 9, entitled, "Procedure: Minimum requirements of a Federal Skilled Worker". This chapter breaks down section 75 into bullet points, notably one of which is:

[19] The work experience which will be assessed for all skilled worker applicants must:

- have occurred within the 10 years preceding the date of application;

[20] There are also helpful tables which clarify the regulations for visual learners --

If…	Then the officer will…
The applicant meets the minimal requirements	Proceed to Section 9.2
The applicant does not meet the minimal requirements	Refuse the application (R75(3)); and Not assess the application against the selection criteria.
	Note: Substituted evaluation (Section 11.3), cannot be used to overcome a failure to meet the minimum

(Found on page 17 of the 2009 version, emphasis added)

[21] So a visa officer following the protocol of OP 6 in the Applicant's case would have determined that she did not have the requisite amount of work experience. Only if the Applicant had met the minimum requirement set out in paragraph 75(2)(a) would the officer proceed to chapter 10 of OP 6. Chapter 10 is where he or she would find the instruction to consider post-

application work experience as per section 77 of the IRPR. As the Respondent ably explained, post-application experience is not relevant until an applicant meets the minimum requirements which require pre-application experience. Section 77 applies to both sections 75 and 76, and thus its directive that the requirements set out in those sections must be met at the time the application is made as well as the time that the visa is issued does not serve to cure an application that does not meet the minimum requirements.

[22] Giving sections 75 and 76 of the IRPR their ordinary meaning it is quite clear that the pre-application experience required under paragraph 75(2)(a) of IRPR does not include post-application experience. As Deputy Justice Maurice Lagacé stated in *Khan v. Canada (Minister of Citizenship and Immigration),* 2009 FC 302 at para. 14, "It follows from these provisions that an applicant who cannot meet the requirements of subsection 75(2) will invariably see his application refused under subsection 75(3)". If the Applicant had any legitimate expectation from reading the regulations and the processing manual, it was that her application would be rejected.

[23] The Applicant suggests that given the long delays in processing applications it would be more fair to consider the application date under paragraph 75(2)(a) to be the date of assessment rather than the date of initial receipt at the visa office. Though I am cognizant of the fact that applicants may have to endure a lengthy waiting period, it is quite clear that applicants are meant to submit their application after they have met the minimum requirements. The Applicant had no legitimate expectations that were denied.

B. *The Reasons Were Adequate*

[24] The Applicant further submits that the visa officer's decision is also unfair because she failed to provide any basis for finding that the Applicant's work experience at the Bank of Nova Scotia between July 2000 and December 2001 was not skilled.

[25] On her application, the Applicant described her position at the bank as "Teller/Customer Service" and listed it as falling under National Occupational Classification (NOC) code 1212, which is a skilled occupation as required by subsection 75(2)(a). NOC 1212 describes "Supervisors, Finance and Insurance Clerks". The Applicant listed her main duties as "prepare customer bank statements, perform cash transactions, open new accounts and cross-sell bank products, occasionally lead a team of (4) sellers." The Applicant explained that she was unable to acquire a current letter of reference and job description from her employer, so in lieu included old documents that were in her possession. These consisted of a temporary employment contract and a letter confirming that the Applicant's status changed from part-time to full-time in October 2001. However, these documents do not describe her work experience or duties performed.

[26] In the CAIPS notes, the visa officer assessed the Applicant's experience at the bank and concluded:

> No proof that she performed duties described in NOC 1212 (Skill level B). Between JUL00 to DEC01 subject performed duties in NOC 1413 and NOC 1433 – both Skill Level C.

[27] I must disagree with the Applicant who finds these reasons to be inadequate. It is settled law that visa applicants are owed a degree of procedural fairness which falls at the low end of the

spectrum (*Pan v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 838 at para. 26, *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297, [2000] F.C.J. No. 2043 (QL) (C.A.) at para. 41). CAIPS notes have been held to constitute sufficient reasons if they provide detail sufficient enough to allow the applicant to know why their application was rejected (*Bhandal v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 427, 147 A.C.W.S. (3d) 474 at para. 18).

[28] In the present case, there was no proof provided by the Applicant to show that that her experience was that which would be required to be classified as NOC 1212. The visa officer, who has experience in these matters, determined that her position at Scotia Bank was better classified as NOC 1413 and NOC 1433, neither of which are of skill type 0, or skill level A or B as required. In *Khan*, above, the applicant argued that his work experience should have been listed as NOC 1231 (even though he had applied under NOC 1431). The visa officer, however, determined that the main duties listed by the applicant corresponded more closely to NOC 1431 ("Accounting and related clerks") which was not an O, A or B level occupation. The Court held at para. 17 that, "The visa officer had the expertise to make this assessment and the Court sees no valid reasons to reverse the opinion of the decision maker…". Clearly, visa officers are recognized as having the experience to come to these conclusions.

[29] As the Respondent notes in the present matter, the visa officer pointed to evidence, or a dearth thereof, assessed the requirements in light of the evidence, and came to a conclusion. The Applicant cannot ask for anything more than a discussion of the evidence which lays out the reasoning for the visa officer's conclusion. I am of the view that this "line of inquiry" is more than

was undertaken by the visa officer *in Olorunshola v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1056, 66 Imm. L.R. (3d) 192. In this case, cited by the Applicant, a reviewable error was found because the visa officer did not assess the occupation under the NOC code which the applicant wished to be assessed, and for which the applicant provided supporting documentation. At para. 24, the visa officer indicated in the CAIPS notes only that the applicant, "[s]tated he worked as 4162 […] but clearly he has not." The other case law cited by the Applicant is also unhelpful to her case – *Khan*, above, dismisses the applicant's application for judicial review, because the visa officer's decision was determined to be reasonable, and *Kumar v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 306, 88 Imm. L.R. (3d) 299 is a case in which the applicant had a letter supporting her application, but, the visa officer had credibility concerns which, in violation of the applicant's right to procedural fairness, were not put to her. *Adu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 565, 139 A.C.W.S. (3d) 164 is case relating to a humanitarian and compassionate claim.

[30] In the present case, it cannot be said that the Applicant was not properly assessed under her chosen NOC code, nor were the reasons of the visa officer deficient in any way. Accordingly, this application for judicial review must fail.

V. Conclusion

[31] No question to be certified was proposed and none arises.

[32] In consideration of the above conclusions, this application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

" D. G. Near "

Judge

ANNEXE “A”

Immigration and Refugee Protection Regulations (SOR/2002-227)	*Règlement sur l’immigration et la protection des réfugiés* (DORS/2002-227)
Federal Skilled Worker Class	Travailleurs qualifiés (fédéral)
Class	Catégorie
75. (1) For the purposes of subsection 12(2) of the Act, the federal skilled worker class is hereby prescribed as a class of persons who are skilled workers and who may become permanent residents on the basis of their ability to become economically established in Canada and who intend to reside in a province other than the Province of Quebec.	75. (1) Pour l’application du paragraphe 12(2) de la Loi, la catégorie des travailleurs qualifiés (fédéral) est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada, qui sont des travailleurs qualifiés et qui cherchent à s’établir dans une province autre que le Québec.
Skilled workers	Qualité
(2) A foreign national is a skilled worker if	(2) Est un travailleur qualifié l’étranger qui satisfait aux exigences suivantes :
(a) within the 10 years preceding the date of their application for a permanent resident visa, they have at least one year of continuous full-time employment experience, as described in subsection 80(7), or the equivalent in continuous part-time employment in one or more occupations, other than a restricted occupation, that are listed in Skill Type 0 Management Occupations or Skill Level	a) il a accumulé au moins une année continue d’expérience de travail à temps plein au sens du paragraphe 80(7), ou l’équivalent s’il travaille à temps partiel de façon continue, au cours des dix années qui ont précédé la date de présentation de la demande de visa de résident permanent, dans au moins une des professions appartenant aux genre de compétence 0 Gestion ou

A or B of the National Occupational Classification matrix;

niveaux de compétences A ou B de la matrice de la Classification nationale des professions — exception faite des professions d'accès limité;

(b) during that period of employment they performed the actions described in the lead statement for the occupation as set out in the occupational descriptions of the National Occupational Classification; and

b) pendant cette période d'emploi, il a accompli l'ensemble des tâches figurant dans l'énoncé principal établi pour la profession dans les descriptions des professions de cette classification;

(c) during that period of employment they performed a substantial number of the main duties of the occupation as set out in the occupational descriptions of the National Occupational Classification, including all of the essential duties.

c) pendant cette période d'emploi, il a exercé une partie appréciable des fonctions principales de la profession figurant dans les descriptions des professions de cette classification, notamment toutes les fonctions essentielles.

Minimal requirements

(3) If the foreign national fails to meet the requirements of subsection (2), the application for a permanent resident visa shall be refused and no further assessment is required.

Exigences

(3) Si l'étranger ne satisfait pas aux exigences prévues au paragraphe (2), l'agent met fin à l'examen de la demande de visa de résident permanent et la refuse.

Selection criteria

76. (1) For the purpose of determining whether a skilled worker, as a member of the federal skilled worker class, will be able to become economically established in Canada, they must be assessed

Critères de sélection

76. (1) Les critères ci-après indiquent que le travailleur qualifié peut réussir son établissement économique au Canada à titre de membre de la catégorie des travailleurs qualifiés (fédéral) :

on the basis of the following criteria:

(a) the skilled worker must be awarded not less than the minimum number of required points referred to in subsection (2) on the basis of the following factors, namely,

a) le travailleur qualifié accumule le nombre minimum de points visé au paragraphe (2), au titre des facteurs suivants :

(i) education, in accordance with section 78,

(i) les études, aux termes de l'article 78,

(ii) proficiency in the official languages of Canada, in accordance with section 79,

(ii) la compétence dans les langues officielles du Canada, aux termes de l'article 79,

(iii) experience, in accordance with section 80,

(iii) l'expérience, aux termes de l'article 80,

(iv) age, in accordance with section 81,

(iv) l'âge, aux termes de l'article 81,

(v) arranged employment, in accordance with section 82, and

(v) l'exercice d'un emploi réservé, aux termes de l'article 82,

(vi) adaptability, in accordance with section 83; and

(vi) la capacité d'adaptation, aux termes de l'article 83;

(b) the skilled worker must

b) le travailleur qualifié :

(i) have in the form of transferable and available funds, unencumbered by debts or other obligations, an amount equal to half the minimum necessary

(i) soit dispose de fonds transférables — non grevés de dettes ou d'autres obligations financières — d'un montant égal à la moitié du revenu vital minimum

income applicable in respect of the group of persons consisting of the skilled worker and their family members, or	qui lui permettrait de subvenir à ses propres besoins et à ceux des membres de sa famille,
(ii) be awarded the number of points referred to in subsection 82(2) for arranged employment in Canada within the meaning of subsection 82(1).	(ii) soit s’est vu attribuer le nombre de points prévu au paragraphe 82(2) pour un emploi réservé au Canada au sens du paragraphe 82(1).
[…]	[…]
Conformity — applicable times	Application
77. For the purposes of Part 5, the requirements and criteria set out in sections 75 and 76 must be met at the time an application for a permanent resident visa is made as well as at the time the visa is issued.	77. Pour l’application de la partie 5, les exigences et critères prévus aux articles 75 et 76 doivent être remplis au moment où la demande de visa de résident permanent est faite et au moment où le visa est délivré.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-1587-10**
STYLE OF CAUSE:	**JUANITA ALICIA PENELOPE DASH v. MCI**
PLACE OF HEARING:	**TORONTO**
DATE OF HEARING:	**NOVEMBER 10, 2010**
REASONS FOR JUDGMENT AND JUDGMENT BY:	**NEAR J.**
DATED:	**DECEMBER 8, 2010**

APPEARANCES:

Matthew Jeffery	FOR THE APPLICANT
Khatidja Moloo	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Matthew Jeffery Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General Canada	FOR THE RESPONDENT