

Federal Court



Cour fédérale

**Date: 20110902**

**Docket: IMM-6501-10**

**Citation: 2011 FC 1026**

**Ottawa, Ontario, September 2, 2011**

**PRESENT: The Honourable Mr. Justice Beaudry**

**BETWEEN:**

**ENRIQUE PUPKO MAIZEL**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review under s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 26 (IRPA) of the decision rendered by an immigration Officer (Officer), dated July 22, 2010 denying the applicant's application for permanent resident status as a Federal Skilled Worker – Financial Manager (NOC 0111 category).

[2] For the reasons set out below, this application shall be allowed.

**Facts**

[3] The applicant is a citizen of Mexico and resides in Mexico City but spends significant time in Toronto, as a visitor, investor and business person.

[4] Since July 1997, he has been employed as Chief Executive Officer (CEO)/ Chief Financial Officer (CFO) at Procables de Mexico (Procables) in Mexico City.

[5] He applied for permanent residence in Canada as a Federal Skilled Worker – Financial Manager (NOC 0111 category) on October 19, 2009. In accordance with the Ministerial Instructions, his application was screened by the Officer in Mexico City to determine whether it was eligible for processing.

[6] The Officer's Computer Assisted Immigration Processing System (CAIPS) notes indicated that the Officer was unsatisfied with the applicant's evidence, showing performance of duties or occupation of a Financial Manager on a full-time basis. The CAIPS notes also indicated that the applicant did not provide evidence that Procables had registered him with the Social Security Mexican Institute as the financial manager of his company.

[7] A letter dated July 22, 2010 was sent to the applicant to advise him that he did not qualify under Ministerial NOC 0111 Financial Manager.

[8] He requested a redetermination of the Officer's decision on September 17, 2010, which was refused on September 20, 2010.

[9] The applicant has become a successful business person in Mexico and is currently collaborating with a group of business partners to open a bakery café/restaurant in Toronto.

### **Issues**

[10] The issues to be determined in this application are:

- a. Did the Officer err in law in determining that the applicant was trying to circumvent the business classifications of Investor or Entrepreneur?
- b. Did the Officer exhibit bias against the applicant?
- c. Did the Officer err by not providing the applicant an opportunity to respond to any concerns relating to his Skilled Worker eligibility?
- d. Did the Officer err in fact and in law in determining that the applicant did not qualify for processing under the NOC 0111 category?

### **Standard of review**

[11] The applicant submits that questions of fact and mixed fact and law should be granted deference and should be reviewed on a standard of reasonableness, whereas questions of law should generally be reviewed on a standard of correctness. For questions of procedural fairness, he contends that no deference is accorded and therefore the correctness standard should be applied (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190).

[12] The respondent states that an Officer's assessment of a Skilled Worker applicant is generally subject to reasonableness (*Dunsmuir*, above, paras 45, 47-49, 53; *Canada (Minister of Citizenship and Immigration) v Khosa*, [2009] CSC 12, paras 59, 62). He also cites *Kniazeva v Canada (Minister of Citizenship and Immigration)*, [2006] ACF 336.

[13] Therefore, the Court is of the opinion that the first three issues shall be reviewed using the reasonableness standard, and for the fourth, correctness will be applied (*Dunsmuir*, above, paras 47, 50).

***a. Did the Officer err in law in determining that the applicant was trying to circumvent the business classifications of Investor or Entrepreneur?***

**Applicant's Arguments**

[14] The applicant submits that the Officer erred in indicating that the applicant was trying to circumvent the business categories as Investor or Entrepreneur. The applicant relies on the CAIPS notes which state: "IT APPEARS PA MAY BE TRYING TO CIRCUMVENT THE BUSINESS CATEGORIES AS INVESTOR OR ENTREPRENEUR" (Exhibit L of the Affidavit of Candace Rose Salmon, Tab 4 of the Applicant's Application Record, page 437).

[15] He urges that the Officer linked the fact that the applicant is a shareholder in the company and has significant wealth for use in establishing himself in Canada with the possibility of the applicant wanting to evade the business categories of immigration. As such, the applicant argues that the Officer considered extraneous information to determine if his application was eligible for processing.

[16] He asserts that the reference to his possible circumvention of the business categories is without merit, as the immigration law, policy and common law enable him to submit his application under the category that will best suit his interest and experience (*Olajuwon v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ 967).

### **Respondent's Arguments**

[17] The respondent contends that the applicant admitted his attempt at circumventing the system by stating in his affidavit that his application under the NOC 0111 category was due to the lengthy timelines and process under the Investor and Entrepreneur categories.

[18] Accordingly, he reiterates that the applicant did not demonstrate that it was his intent to be a financial manager, as per the NOC 0111 category. He argues that the applicant has started a business venture in Canada and has made substantial investments in Canada beyond the requirements of the entrepreneurial category. As a result, the applicant demonstrates that his application belongs in the business categories as Investor or Entrepreneur.

[19] The respondent takes further issue with applicant's challenge of a finding of pure facts where deference should be given to the Officer due to his familiarity with the NOC. He relies on *Madan v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ 1198, para 24:

In any event, visa Officers should be afforded considerable discretion in determining whether an applicant satisfies the requirements for a given occupation, including their interpretation of the provisions of the NOC. They have a familiarity with and understanding of this document that is at least equal to, and will often exceed, that of a reviewing court.

### Analysis

[20] According to *Madan*, an Officer should be afforded discretion in determining whether an applicant satisfies the requirements for a given occupation, including his interpretation of the provisions of the NOC. However, the Court agrees as per *Olajuwon*, that an Officer has the duty to assess the applicant in relation to the category he applied for.

[21] In the case at bar, the Court does not agree with the respondent's submission that, by his own admission, the applicant demonstrates that his application belongs under a different NOC category. The respondent relies on the applicant's affidavit stating that (Affidavit of Enrique Pupko Maizel, Tab 4 of the Applicant's Application Record, page 13, para 17):

I have already invested substantially in Canada and have created many job opportunities for Canadians beyond the requirements of the entrepreneur category. The investor category is not appropriate for me. Investor and entrepreneur class applications in Mexico are so few, or so long in process, that there is not a processing time available on the Citizenship and Immigration Website [...] I applied for immigration to Canada in the manner which best enables my application's processing, and it is my belief that I am a skilled worker per the definition under NOC 0111 Financial Manager [...]

[22] As such, the Court finds the Officer's inference that the applicant was trying to get around the business categories of Investor or Entrepreneur is unreasonable. While the applicant did refer to the lengthy processing times for entrepreneur and investor applications in Mexico as a motivation to apply under the NOC 0111 category, this statement does not entail that the applicant chose this method to circumvent a category that the Officer considered more appropriate. The Officer's findings were unreasonable, as applicants have the right to submit their case in the manner which best represents them and with the highest likelihood of success.

***b. Did the Officer exhibit bias against the applicant?***

**Applicant's Arguments**

[23] The applicant believes that there “may” have been bias in the processing of his application (applicant’s Memorandum of Fact and Law, Tab 5 of the applicant’s Application Record, page 505, para 71). He argues that the fact that he and his family are Jewish was an extraneous reason for the denial of his application for permanent resident status (*Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369).

[24] The applicant notes that the negative determination of eligibility was made days after the applicant applied for study permits for his children to attend a Hebrew school in Canada. In fact, he applied for and was granted the study permits on July 14, 2010 and the negative determination was rendered on July 22, 2010.

**Respondent's Arguments**

[25] The respondent argues that the applicant’s assertions are without merit. The respondent states that there is no evidence to suggest that the Officer exhibited bias towards the applicant nor that the Officer was aware that the applicant applied for and obtained study permits for his children to attend a Hebrew school in Canada (*Committee for Justice and Liberty*, above). The respondent asserts that there is no evidence that would lead a reasonable and informed person to find bias in the applicant’s case.

### **Analysis**

[26] The court is not satisfied that the applicant has demonstrated that the Officer exhibited bias towards the applicant because he is Jewish. The granting of the study permits on July 14, 2010 and the negative determination on July 22, 2010 is a coincidence. There are no reasons to believe that the Officer showed an apprehension of bias without anymore evidence. Therefore, the case of *Committee for Justice and Liberty* does not apply.

*c. Did the Officer err by not providing the applicant an opportunity to respond to any concerns relating to his Skilled Worker eligibility?*

### **Applicant's Arguments**

[27] The applicant argues that the Officer had a duty of fairness to inform him of the concerns regarding his application and consequently had a duty to give him the opportunity to disabuse them (*Liao v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ 1719, *Rukmangathan v Canada (Minister of Citizenship and Immigration)*, [2004] ACF 317).

### **Respondent's Arguments**

[28] The respondent replies that the duty of procedural fairness applies to discretionary administrative decisions and its content varies according to the context. The respondent states that the concept of fairness is situational, not abstract or absolute *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. Several factors have been recognized as relevant in determining the procedures required by the common law for the duty of procedural fairness.



[29] It is at the low end of the spectrum for claims for permanent residence under the NOC 0111 category due to the absence of legal right to permanent residence, the fact that the burden is on the applicant to establish his eligibility, the less serious impact on him compared with the removal of a benefit and the public interest in containing administrative costs (*Mei v Canada (Minister of Citizenship and Immigration)*, [2009] FC 1281).

[30] The respondent further adds that the Officer was under no duty of fairness, as the application was never placed into processing. The Officer notified the applicant that rather than being refused, his application was never placed into processing as it was deemed ineligible under Ministerial Instructions (Exhibit H of the Affidavit of Candace Rose Salmon, Tab 4 of the Applicant's Application Record, page 396).

[31] Finally, the respondent underscores that an Officer is under no duty of fairness to clarify a deficient application or to advise an applicant of every concern he has (*Kaur v Canada (Minister of Citizenship and Immigration)*, [2010] FCJ 587, para 9; *Hassani v Canada (Minister of Citizenship and Immigration)*, [2006] FCJ 1597, para 26).

### **Analysis**

[32] The applicant cites *Rukmangathan*, at para 22 to argue that “[...] the duty of fairness may require immigration officials to inform applicants so that an applicant may have a chance to “disabuse” an Officer of such concerns [...]”. However, *Rukmangathan* further goes on to say that “[...] this principle of procedural fairness does not stretch to the point of requiring that a visa

Officer has an obligation to provide an applicant with a ‘running score’ of the weaknesses in their application” (confirmed in *Hassani*, para 23 and in *Kaur*, above, para 9).

[33] It is worth reiterating the main principles relating to the consideration of the duty of procedural fairness cases. In *Baker*, at paragraphs 22 and 23, Justice L’Heureux-Dubé opined as follows:

The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected

[...]

Several factors are relevant to determining the content of the duty of fairness: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself. This list is not exhaustive.

[34] Thus, as stated in *Mei*, at paragraph 16, “it has been decided that the duty of fairness is limited in cases of permanent residence applications made from outside Canada”.

[35] In the case at bar, a number of factors tend to limit the requirements of the duty of fairness:

- a. First, the nature of the decision made by the Officer was clearly of an administrative nature, not judicial;
- b. Second, as mentioned in *Mei*, although there is no appeal procedure for applications of permanent residency, there is the possibility of bringing an application for leave and judicial review. Also, if rejected, the applicant can submit a new application;
- c. Third, there is no evidence that being granted permanent residence status is of such crucial importance to the applicant or his family;

- d. Fourth, there is no evidence to prove that the applicant had a legitimate expectation to be questioned by the Officer who had concerns with his application. In fact, the Officer notified the applicant in his correspondence dated September 7, 2010 that procedural fairness applies only to cases that have been placed into processing, as per the Operation Manuel, *OP 6 Federal Skilled Workers* (Exhibit T of the Affidavit of Candace Rose Salmon, Tab 4 of the Applicant's Application Record, pages 481-482);
- e. Fifth, the duty of fairness requires taking into account and respecting the choices of procedure made by the agency itself (*Baker*,). As such, an Officer screening an application to determine whether it is eligible for processing is not required to confront an applicant with his concerns relating to the inadequacy of supporting documentation, or to point out the evidentiary weaknesses of the application;

[36] The burden of proof as to whether there has been a breach of the principles of natural justice or procedural fairness is on the person alleging the breach. The Court is not satisfied that the evidence presented by the applicant shows that such a situation occurred.

*d. Did the Officer err in fact and in law in determining that the applicant did not qualify for processing under the NOC 0111 category?*

**Applicant's Argument**

**NOC 0111 Classification**

[37] The applicant challenges the Officer's decision because, he argues, the Officer did not assess his application under the NOC 0111 category as a Financial Manager but rather under the NOC 0014 category as a general business manager.

[38] He refers to the CAIPS notes: "IT APPEARS PA IS A GENERAL BUSINESS MANAGER 0014 OF HIS COMPANY – THIS NOC IS NOT LISTED UNDER MINISTERIAL INSTRUCTIONS" (Exhibit L of the Affidavit of Candace Rose Salmon, Tab 4 of the Applicant's Application Record, page 437).

[39] The applicant states that the NOC 0014 category is intended for Senior Managers in health, social and community services and membership organizations. He submits that his position as CEO/CFO at Procables, a private corporation which provides electrical components, does not fall within the scope of the NOC 0014 category (Tab 4 of the Applicant's Application Record, pages 454-457 for the NOC 0014 requirements) (*Saggu v Canada (Minister of Citizenship and Immigration)*, [1994] ACF 1823).

[40] He relies on *Qin v Canada (Minister of Citizenship and Immigration)*, [2002] FCJ 1576 at paragraph 20, stating:

[...] The purpose of the statute is to permit immigration, not prevent it. It follows that applicants have the right to frame their application in a way that maximizes their chances for entry. It is the corresponding obligation of immigration Officers to provide a thorough and fair assessment, and to provide adequate reasons for refusals when they occur.

### **Duties and Responsibilities under the NOC 0111 Category**

[41] The applicant further challenges the Officer's decision by claiming that he meets the requirements for the Federal Skilled Worker under the NOC 0111 category. He argues having the ability to become financially established in Canada and having a minimum of one year's continuous experience over the past ten years as a Financial Manager (*Shangguan v Canada (Minister of Citizenship and Immigration)*, [2007] FCJ 127; *McHugh v Canada (Minister of Citizenship and Immigration)*, [2006] FCJ 1480).

[42] Furthermore, he argues that he has completed the duties enumerated in the NOC 0111 category in the course of his employment at Procables, such as planning, organizing, directing, controlling and evaluating the operation of the accounting department (for a list of Financial Manager's duties, see pp 495-495 of the Applicant's memorandum of fact and law) (*Saggu v Canada (Minister of Citizenship and Immigration)*, [1994] FCJ 1823).

[43] He alleges that he provided sufficient documentation, namely reference letters and financial details, as evidence of his experience as a Financial Manager.

[44] Finally, he takes issue with the Officer's finding that Procables did not appear to have registered him as their Financial Manager. The applicant relies on the CAIPS notes stating the following: "PA DID NOT PROVIDE EVIDENCE THAT COMPANY HAS REGISTERED HIM BEOFRE SOCIAL SECURITY MEXICAN INSTITUTE AS THE FINANCIAL MANAGER OF THIS COMPANY" (Exhibit L of the Affidavit of Candace Rose Salmon, Tab 4 of the applicant's Application Record, page 437). The applicant certifies that Mexican law permits one high-ranking company Officer to be exempt from Social Security registration.

### **Respondent's Arguments**

#### **NOC 0111 Classification**

[45] The respondent argues that the Officer's reference to the NOC 0014 category is irrelevant since the applicant was considered under the NOC 0111 category. He states that the Officer was merely noting that the applicant appeared to fall under another NOC category and commented on

the applicant's evidence that he appeared to be better suited for a Business category as an Investor or Entrepreneur.

[46] It was therefore reasonable for the Officer to note that the duties the applicant performed at Procables did not coincide with the NOC 0111 category, given that the applicant is currently collaborating with a group of business partners to open a business in Toronto.

### **Duties and Responsibilities under the NOC 0111 Category**

[47] According to the respondent, in order to be eligible for processing under the NOC 0111 category, an individual must meet the requirements set out in the Ministerial Instructions. The applicant must have arranged employment, have been residing in Canada for at least one year as a temporary foreign worker or have at least one year of continuous full-time employment or equivalent paid work experience in the last ten years in one or more of the listed occupations (*Ministerial Instructions*, Canada Gazette, Vol 142, No 48).

[48] He relies on *Wankhede v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ 968, at para 6, to argue that a visa Officer is not required to speculate as to an applicant's experience in an occupation.

[49] He submits that the applicant did not provide sufficient information to prove that he performed the duties of Financial Manager under the NOC 0111 category, adding that the evidence demonstrated that he was a business owner and shareholder of Procables. With the exception of one letter provided by Diversified Managed Investments (DMI, the applicant's reference letters did not

specifically outline his employment duties while employed at Procables. As such, the respondent maintains that the Officer's determination falls within the range of possible and acceptable outcomes.

### **Analysis**

#### **NOC 0111 Classification**

[50] I find that the Officer considered the applicant's application under the NOC 0111 category and not under the NOC 0014 category.

[51] A visa Officer has a duty to assess an application with reference to the occupation represented by the application as the one for which the applicant is qualified and prepared to pursue in Canada *Saggu v Canada (Minister of Citizenship and Immigration)*, para 16.

[52] As such, I do not agree that the applicant was considered under the NOC 0014 category. In light of the CAIPS notes, the Officer was simply indicating that the applicant appeared to fall under another potential category and better suited to a Business category as an Investor or Entrepreneur. This note was clearly reasonable, as the applicant is currently collaborating with a group of business partners to open a bakery business in Toronto, Canada.

#### **Duties and Responsibilities under the NOC 0111 Category**

[53] Having considered and analyzed the documents and the parties' written submissions, I find that the Officer's decision to decline the applicant's application for processing cannot stand.

[54] The Minister of Citizenship and Immigration issued instructions that were published in the Canada Gazette on November 28, 2008. These instructions specify that only applicants who have an Arranged Employment Offer, who are legally residing in Canada for at least one year as a Temporary Foreign Worker or an International Student, or who have work experience in a certain listed occupations are eligible to be processed in the Federal Skilled Worker class (*Ministerial Instructions*, Canada Gazette, Vol 142, No 48).

[55] The relevant provision of the *Immigration and Refugee Protection Regulations* (SOR/2002-227) (the Regulations) is as follows (Exhibit M of the Affidavit of Candace Rose Salmon, Tab 4 of the Applicant's Application Record, page 450):

Class

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.

Skilled workers

(2) A foreign national is a skilled worker if

(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;

(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

(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.



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.

[56] Financial Managers are also required to have performed some or all of the following duties (for a complete list, see Exhibit N of the Affidavit of Candace Rose Salmon, Tab 4 of the Applicant's Application Record, at page 452):

- a. Plan, organize, direct, control and evaluate the operation of an accounting, audit or other financial department
- b. Develop and implement the financial policies, systems and procedures of an establishment
- c. Prepare or co-ordinate the preparation of financial statements, summaries and other cost-benefit analyses and financial reports
- d. Co-ordinate the financial planning and budget process, and analyze and correct estimates
- e. Supervise the development and implementation of financial simulation models.

[57] In *McHugh*, at para 15, the Court states that NOC categories require that applicants have performed *some or all* of the duties in question, allowing "[...] a Visa Officer to give greater weight to certain duties contained in the job description over others, but does not require that applicants must have performed all of the duties listed."

[58] Moreover, according to *Wankhede*, at para 6, "the applicant has the obligation to put forward a prima facie case that he meets the employment requirements of the job with respect to which he asks to be assessed." *Wankhede* further states that an Officer is not required to speculate as to the training and experience of an applicant.

[59] I find that the Officer did not reasonably assess the applicant's workplace duties relevant to the NOC 0111 category. The applicant's responsibilities at Procables included directing all the accounting and finance operations as well as planning financial policies, procedures and systems. In addition, the applicant was in charge of supervising and making decision based on financial statements, summaries, and other cost-benefit analyses and financial management reports (see letters of references, Exhibit J of the Affidavit of Candace Rose Salmon, Tab 4 of the Applicant's Application Record, pages 426-429).

[60] The applicant's documented financial management skills demonstrate that he would satisfy several of the criteria in the Financial Management category. Seeing that the applicant established Procables in Mexico City with only two other partners, he was obliged to fulfill financial duties listed under the NOC 0111 category, such as co-ordinating the financial planning and budget process, cash flow management and accounting supervision. The Court relies on the applicant's statement that "In the beginning, all of us had to do everything" ("Procables de Mexico", Exhibit J of the Affidavit of Candace Rose Salmon, Tab 4 of the Applicant's Application Record, page 431).

[61] While the Officer had considerable discretion in determining whether the applicant satisfied the requirements of NOC 0111 category, in this case, the Officer's conclusion was unreasonable.

[62] The parties did not propose questions for certification and none arise.

**JUDGMENT**

**THIS COURT ORDERS that:**

1. The application for judicial review be allowed.
2. The matter is remitted back for redetermination by a different visa Officer.
3. No question is certified.

“Michel Beaudry”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-6501-10

**STYLE OF CAUSE:** Enrique Pupko Maizel v MCI

**PLACE OF HEARING:** Toronto

**DATE OF HEARING:** August 30, 2011

**REASONS FOR JUDGMENT:** BEAUDRY J.

**DATED:** September 2, 2011

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