

Federal Court



Cour fédérale

Date: 20130405

Docket: IMM-4492-12

Citation: 2013 FC 343

Ottawa, Ontario, April 5, 2013

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

**EMAD AGEEB EKLADIOUS MANSOUR
ENGY FIKRY BOLES SALAMON
SANDY EMAD AGEEB EKLADIOUS MANSOUR
JOLLY EMAD AGEEB EKLADIOUS MANSOUR**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review commenced pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). It seeks review of a decision made by a visa officer (Visa Officer) refusing an application for permanent residence in Canada as a federal skilled worker made pursuant to subsection 12(2) of the IRPA and section 75 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRP Regulations).

Facts

[2] The Applicant and his family, the co-applicants, are Egyptian citizens. The Applicant holds a Bachelor's Degree in Civil Engineering and a Diploma in Metallic Structures Engineering, both from Cairo University. He also completed an American Society of Civil Engineering one year Construction Project Management - Certified Program offered in Cairo.

[3] In October 2010, the Applicant applied for permanent residence in Canada under the skilled worker category as a Construction Manager, National Occupational Classification Code: 0711 (NOC 0711). On December 13, 2011, the Canadian Embassy in Cairo requested updated information which the Applicant submitted on December 27, 2011. On February 29, 2012, the Applicant received a letter from the Visa Officer refusing his application on the basis that he did not provide satisfactory evidence that he had performed the actions described in the lead statement for the subject occupation as set out in NOC 0711 (Decision).

[4] Upon review of the Decision, the Applicant formed the opinion that the Visa Officer did not consider an employment letter that he had included in his application. He submits that he resubmitted the letter on April 24, 2012 and, having received no response, did so again on May 9, 2012. As he still received no response, he commenced this application for judicial review.

Decision under Review

[5] The Decision states that the Visa Officer had completed his assessment of the Applicant's application for permanent residence in Canada as a federal skilled worker and determined that the Applicant is not eligible for processing in the category of NOC 0711, Construction Manager. The

Visa Officer states that the Applicant did not provide satisfactory evidence that he had performed the actions described in the lead statement for the occupation as set out in the occupational descriptions. He was therefore not satisfied that the Applicant is a Construction Manager NOC 0711.

[6] Further, as the Applicant did not provide satisfactory evidence that he had the necessary work experience, he did not meet the requirements of the Ministerial Instructions. These were published in the Canada Gazette on November 28, 2008 and specify that only certain applicants, including those who have work experience in certain listed occupations, are eligible to be processed in the federal skilled worker class.

[7] Computer Assisted Immigration Processing System notes (CAIPS Notes) accompany the Decision. The CAIPS Notes original file assessment entry on August 9, 2010 by the service delivery agent states the following:

Assessed Eligible NOC 0711. Duties performed by PA correspond to Lead Statement and/or Main Duties for this NOC.

PA has a minimum of one year of work experience within the past 10 years in eligible NOC Code 0711.

PA is therefore recommended to the visa office for a final determination of eligibility for processing

Letter emailed to address(es) above requesting PA to submit full application to CAIRO within 120 days.

This was followed by a February 27, 2012 entry, presumably by the Visa Officer:

PI IS A GRADUATE ENGINEER. ALL PROVIDED DOCUMENTAION INDICATE THAT HE IS REGISTERED AND HAS WORKED AS AN ENGINEER. PI HAS NOT PRESENTED

ANY LETTERS FROM HIS EMPLOYERS TO SHOW THAT HE HAS WORKED AS A CONSTRUCTION MANAGER.

I AM NOT SATISFIED THAT PI MEETS THE REQUIREMENTS OF NOC 0711. ACCORDINGLY TO AVAILABLE INFORMATION, PI DOES NOT MEET REQUIREMENTS OF NOC 0711 NO OTHER WORK EXPERIENCE OR OCCUPATIONS PRESENTED THAT COULD BE CONSIDERED AS ELIGIBLE. THEREFORE PI IS INELIGIBLE FOR PROCESSING UNDER THIS PROGRAM.

Issues

[8] The Applicant submits that there are two issues for consideration in the present application, did the Visa Officer err when he concluded that the Applicant did not meet the requirements of Construction Manager NOC 0711, and, did the Visa Officer breach the duty of fairness by failing to provide the Applicant with an opportunity to respond to the Visa Officer's concerns?

[9] I would phrase the issues as follows:

- a) Was the Decision reasonable?
- b) Did the Visa Officer breach the duty of fairness?

Standard of Review

[10] A standard of review analysis need not be conducted in every instance if the jurisprudence already establishes which standard is to apply (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]). Apart from any question of law or natural justice, when a decision is factual in nature and deference is owed to the decision maker, the standard of review for decisions concerning permanent residence under the federal skilled worker class is reasonableness (*Tabanag v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1293 [*Tabanag*] at paras 11-12).

[11] Thus, the first issue in this case is reviewed on a standard of reasonableness.

Reasonableness is concerned with the existence of justification, transparency and intelligibility, and with whether the decision falls within a range of possible, acceptable outcomes (*Dunsmuir*, above, at para 47; *Brown v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1305 at para 16; *Kaur Barm v Canada (Minister of Citizenship and Immigration)*, 2008 FC 893 at para 12).

[12] As breach of a duty of fairness is an error in law, the second issue is reviewable on the standard of correctness (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at para 22 [*Newfoundland and Labrador Nurses' Union*]).

Arguments of the Parties

Applicant's Submissions

[13] The Applicant submits that the Visa Officer erred in finding that the Applicant does not meet the requirements for Construction Manager NOC 0711. The Applicant submitted documentation which confirms that he had worked as a construction manager for seven years with Orascom Construction Industries (Orascom). The Applicant submits that the Visa Officer either misunderstood or ignored the letter from Orascom; either event being a reviewable error. The Applicant submits that the Visa Officer's reasons fail to explain the basis for his conclusion that the Applicant did not meet the requirements and that the Decision is unreasonable.

[14] In addition, the Applicant submits that the Visa Officer breached the duty of fairness because he failed to provide the Applicant with an opportunity to respond to the Visa Officer's concern that he had not been employed as a construction manager. The Applicant relies on *Gedeon v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1245, for the proposition that a visa officer commits a reviewable error when he or she does not provide reasons for rejecting evidence of an applicant's work experience and does not provide an applicant with an opportunity to address those concerns.

Respondent's Submissions

[15] In its written submissions, the Respondent states that the Applicant failed to discharge his onus to demonstrate that during the relevant period of employment he performed the actions described in the lead statement for the occupation of Construction Manager as set out in the occupational description for NOC 0711 (IRP Regulations, above, subsection 75(2)(b)). As a result of this failure, the Visa Officer is obliged to refuse the application without further assessment (IRP Regulations, above, subsection 75(3)). The Respondent argues that the Applicant did not provide sufficient evidence that he had performed the actions in the lead statement on NOC 0711 and, in particular, did not provide any evidence to demonstrate that he had worked as a construction manager.

[16] The Respondent also argued in its written submissions that it was reasonable for the Visa Officer to only make a determination that the Applicant had not performed the actions of this occupation pursuant to subsection 75(2)(b) of the IRP Regulations. He did not make a determination under subsection 75(2)(c) of the IRP Regulations regarding the main duties for this

occupation which the Applicant argues that he performed. Furthermore, visa officers do not have a duty to contact an applicant to seek clarification when an applicant files insufficient or ambiguous evidence (*Lam v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1239 at paras 3- 4 (TD); *Kaur v Canada*, 2010 FC 442 at para 10-11 [*Kaur*]).

[17] However, when appearing before me, the Respondent acknowledged that the certified tribunal record (CTR) did contain a copy of the letter from Orascom as part of the Applicant's application seeking permanent residence status as a federal skilled worker. This had been overlooked when the Respondent's written submissions were prepared. Accordingly, the Respondent made no submissions when appearing before me.

Analysis

[18] The IRP Regulations state as follows regarding skilled workers:

<u>Class</u>	<u>Catégorie</u>
<p>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.</p>	<p>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.</p>
<p><u>Skilled workers</u></p> <p>(2) A foreign national is a skilled worker if</p>	<p><u>Qualité</u></p> <p>(2) Est un travailleur qualifié l'étranger qui satisfait</p>

aux exigences suivantes :

- | | |
|--|---|
| <p>(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;</p> | <p>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;</p> |
| <p>(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</p> | <p>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;</p> |
| <p>(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.</p> | <p>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.</p> |

[19] The onus was on the Applicant to establish that he had performed the actions described in the lead statement as set out in NOC 0711 and a substantial number of the main duties of this

occupation (*Mihura Torres v Canada (Minister of Citizenship and Immigration)*, 2011 FC 818 at para 37; *Kaur*, above, at para 30).

[20] The lead statement, or job description, for NOC 0711 is found on the Human Resources and Skills Development Canada website and it states the following:

0711 Construction managers

Construction managers plan, organize, direct, control and evaluate the activities of a construction company or a construction department within a company, under the direction of a general manager or other senior manager. They are employed by residential, commercial and industrial construction companies and by construction departments of companies outside the construction industry.

Example Titles

commercial construction manager
construction manager
construction superintendent
general contractor
housing construction manager
industrial construction manager
pipeline construction manager
project manager, construction
residential construction manager

Main duties

Construction managers perform some or all of the following duties:

- Plan, organize, direct, control and evaluate construction projects from start to finish according to schedule, specifications and budget
- Prepare and submit construction project budget estimates
- Plan and prepare construction schedules and milestones and monitor progress against established schedules
- Prepare contracts and negotiate revisions, changes and additions to contractual agreements with architects, consultants, clients, suppliers and subcontractors
- Develop and implement quality control programs

- Represent company on matters such as business services and union contracts negotiation
- Prepare progress reports and issue progress schedules to clients
- Direct the purchase of building materials and land acquisitions
- Hire and supervise the activities of subcontractors and subordinate staff.

[21] It should be noted that the Respondent originally argued that the Applicant did not provide “any” evidence to demonstrate that he has worked as a Construction Manager and referred to the CAIPS Notes entry which states that the Applicant “has not presented any letters from his employers to show that he has worked as a construction manager”.

[22] On an application for judicial review, the courts “should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome” (*Newfoundland and Labrador Nurses’ Union*, above at para 15).

[23] Having reviewed the record that was before the Visa Officer, it appears to me that there was evidence that the Applicant was employed as a construction manager in Egypt.

[24] In his visa application package, the Applicant provided a Certificate of Experience and Recommendation from his employer of more than a decade, Orascom. This letter indicates that the Applicant was employed as a full time civil engineer from October 1, 1995 to December 31, 2002, and then as a construction manager from January 1, 2003 to March 30, 2010.

[25] The letter includes his job description and I have underlined those areas that overlap with the main duties of Construction Managers as set out in NOC 0711.

- Supervising civil work at site such as surveying, earth work, levelling, and constructing concrete buildings and foundations
- Erecting steel structures at site
- Adjusting and solving problems of networks at site
- Designing and preparing of shop drawing of steel structures using different codes
- Designing concrete structures
- Organizing, planning, and evaluating construction projects
- Preparing construction schedules
- Representing the company on business services and union contracts negotiation
- Preparing contracts, changing orders, and negotiating revisions with consultants, clients, and subcontractors
- Preparing progress reports
- Hiring and supervising activities of subcontractors and staff

[26] As the foregoing indicates, there is a significant overlap between what the Applicant did in his position as a construction manager and what is required of a Construction Manager by NOC 0711.

[27] While the Visa Officer need not mention every piece of evidence in his Decision, the Federal Court has stated that, “the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that

the agency made an erroneous finding of fact “without regard to the evidence” *Cepeda-Gutierrez v Canada*, [1998] 157 FTR 35 at para 17 citing *Bains v Canada (Minister of Employment and Immigration)*, [1993] 63 FTR 312.)

[28] The letter from the Applicant’s employer goes right to the heart of the matter. It states that the Applicant worked as a civil engineer, then as a construction manager from January 1, 2003 to March 30, 2010 and lists his duties in those positions. Those duties clearly overlap with the Construction Manager NOC 0711 duties, yet the Visa Officer did not mention the letter in his reasons and denied the application on the basis that the Applicant “did not provide satisfactory evidence that [he] performed the actions described in the lead statement for the occupation, as set out in the occupational descriptions of the NOC.”

[29] The Respondent originally argued that this overlap pertains only to the main duties and that the Visa Officer determined that the Applicant failed to establish that he met the requirements of the lead statement of NOC 0711. The lead statement is, in effect, a job description. It generally describes the duties of construction managers.

[30] I have set out the lead statement below and have underlined the “actions” which are common to the Applicant’s role as a construction manager as described in the letter from Orascom:

Construction managers plan, organize, direct, control and evaluate the activities of a construction company or a construction department within a company, under the direction of a general manager or other senior manager. They are employed by residential, commercial and industrial construction companies and by construction departments of companies outside the construction industry.

[31] In my view, the Respondent's original position was one of form and not of substance. The letter from Orascom Construction Industries clearly establishes that the Applicant was employed by a construction company, as a construction manager, and that his job description included planning, organizing, controlling and directing the activities of that company. It addresses the requirements of the lead statement of NOC 0711.

[32] In *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 72, the Supreme Court of Canada stated the following while addressing a judicial review commenced pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c F7:

[72] The language of s. 18.1(4)(d) makes clear that findings of fact are to be reviewed on a highly deferential standard. Courts are only to interfere with a decision based on erroneous findings of fact where the federal board, commission or other tribunal's factual finding was 'made in a perverse or capricious manner or without regard for the material before it'. [...]

[33] In this case, however, I am satisfied that the Visa Officer ignored or overlooked critical evidence on the record before him, the Orascom letter, pertaining to the Applicant's employment as a construction manager. Accordingly, his finding of fact as to the Applicant's employment experience was made in a perverse or capricious manner. The Decision was therefore, not justified, transparent and intelligible, nor did it fall within the range of possible, acceptable outcomes.

[34] As this finding alone is sufficient to allow the appeal, it is not necessary to address the issue of the breach of the duty of fairness.

Conclusion

[35] The Application for judicial review is allowed and the matter is returned for reconsideration by a different visa officer.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is returned for reconsideration by a different visa officer. No question of general importance for certification has been proposed and none arises.

“Cecily Y. Strickland”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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**REASONS FOR JUDGMENT
AND JUDGMENT BY:** STRICKLAND J.

DATED: April 5, 2013

APPEARANCES:

Sherif R. Ashamalla

FOR THE APPLICANTS

Brad Gotkin

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Sherif R. Ashamalla

FOR THE APPLICANTS

William F. Pentney
Deputy Attorney General of Canada
Toronto, Ontario

FOR THE RESPONDENT