

Federal Court



Cour fédérale

Date: 20170103

Docket: IMM-2041-16

Citation: 2017 FC 7

Ottawa, Ontario, January 3, 2017

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

FREDY'S WELDING INC.

Applicant

And

**THE MINISTER OF EMPLOYMENT AND
SOCIAL DEVELOPMENT**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a negative Labour Market Impact Assessment (“LMIA”) decision of a Foreign Worker Officer of Service Canada, Temporary Foreign Worker Program (“Officer”), dated May 3, 2016.

Background

[2] On April 7, 2016, the Applicant applied for a LMIA in order to hire a temporary foreign worker (“TFW”) for the position of a Welder, a skilled trade described in the National Occupational Classification 7237 – Welders and related machine operators (“NOC 7237”). In the application, the Applicant stated that it was looking for a Welder with experience in Gas Tungsten Arc Welding (“TIG” welding), along with one to two years’ experience in maintaining and repairing the equipment used for welding, including diesel generators, and submitted documentation in support of its application. The Applicant stated that despite extensive recruitment efforts it had been unable to find a Canadian or permanent resident candidate with the required skill set and experience to fill the position. The Officer spoke with the Applicant and its representative on several occasions and requested further information, which was provided, and also contacted third parties to make inquiries, but ultimately refused the application.

Decision Under Review

[3] In her refusal letter, the Officer stated that her negative LMIA decision was based on her finding that the Applicant did not sufficiently demonstrate that there was a reasonable employment need for this job in its business. The requirement of one to two years of mechanics experience was not considered to be a bona fide occupational qualification for the position of welder (NOC 7265) and was not an essential requirement for the position.

[4] The Notes to File (“Notes”) prepared by the Officer indicate the dates on which she spoke with the Applicant, a third party (who appears to have been a representative of the

Applicant) and the Applicant's lawyer (who the Applicant asserts was in fact his immigration consultant), summarises the content of these conversations, and refers to her requests for and the receipt of further information from the Applicant. They also indicate the Applicant's efforts to hire a Canadian or permanent resident in Canada. The Officer states, having reviewed other NOC's, and based on the requirement of "non-certified mechanical experience," that NOC 7265 seemed appropriate. However, the Applicant's requirements were excessive and the wage offered was not reflective of these additional requirements (the Officer refers to NOC 7265, rather than NOC 7237 which was referenced by the Applicant in its application. The Notes indicate that she explained to the Applicant that she was using the NOC link on the Service Canada website which was for the 2006 NOC, and not the 2011 NOC utilized by the Applicant, but that this does not affect the decision).

[5] The Officer referenced sources and noted that there was very high unemployment in Manitoba, in the North and in Winnipeg for this NOC. Further, she had contacted the Winnipeg Welder's Union which, when asked, stated that there is no labour shortage for welders in Manitoba.

[6] The Officer listed her findings on labour market factors including: (i) there was no direct correlation between the hiring of the TFW and the creation or retention of employment for Canadians or Permanent Residents; (ii) with respect to development or transfer of skills and knowledge, inconsistent information was provided during the assessment; (iii) as to filling a labour shortage, that this could not be determined because the additional skills were not reflected in the wage rate, therefore, it could not be determined if a higher wage reflecting the higher skills

requirement would have attracted qualified candidates; and, (iv) the wages and working conditions were not acceptable based on the excessive position requirements.

[7] The Officer, in researching occupations, contacted the Canadian Welding Association and the president of a company that repairs, maintains and services diesel generators. She advised the Applicant that the additional skills of mechanical experience seemed excessive.

Issues

[8] The Applicant's written submissions were limited to those made when it sought leave to proceed with its application for judicial review. Therein the Applicant identified two issues, being the appropriate standard of review and whether the Officer erred in refusing the Applicant's application, however, its submissions also speak to an issue of procedural fairness. The Respondent's written submissions do not specify the issues, however, they address the question of whether the Officer's findings were reasonable and whether there was a breach of the duty of fairness.

[9] In my view the issues are:

- i. Was there a breach of procedural fairness, and
- ii. Was the Officer's decision reasonable?

Standard of Review

[10] Whether the Officer breached a duty of procedural fairness is an issue of law which is reviewable on a standard of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 79 and 87 (“*Dunsmuir*”); *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 (“*Khosa*”); *Ahmed v Canada (Employment and Social Development)*, 2016 FC 197 at para 8 (“*Ahmed*”)).

[11] The standard of review of the Officer’s LMIA decision is reasonableness (*Charger Logistics Ltd v Canada (Employment and Social Development)*, 2016 FC 286 at para 9; *Frankie’s Burgers Loughheed Inc v Canada (Employment and Social Development)*, 2015 FC 27 at para 22 (“*Frankie’s Burgers*”)). In judicial review, reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process but also with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para 47; *Khosa* at para 59). This Court has also previously held that deference should be shown to an officer’s interpretation of a NOC (*Gulati v Canada (Citizenship and Immigration)*, 2010 FC 451 at para 19; *Shetty v Canada (Citizenship and Immigration)*, 2012 FC 1321 at para 14).

Legislative Background

[12] The Respondent filed an affidavit of Jeff Scott, Director, TFWP – Western and Territories Region, Citizen Service Program Delivery Branch, Service Canada within the Department of Employment and Social Development Canada to provide general background

information concerning the TFWP, including the processing of applications by employers for LMIA's. The Applicant did not take issue with this and the parties were in agreement as to the prevailing legislative scheme.

[13] In short, the TFWP is created under the authority of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA") and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("IRP Regulations") which set out the legislative regime governing who may enter and temporarily work in Canada.

[14] A work permit is issued to a foreign national only if certain requirements are met. In this case, that included that an officer was required to make a determination on the matters set out in s 203(1) of the IRP Regulations, including whether the offer of employment is genuine and whether the employment of a TFW is likely to have a neutral or positive effect on the labour market in Canada. Section 203(1) provides that the officer must make this determination on the basis of an assessment which is commonly known as an LMIA. Sections 203(1.01), 203(3) and 200(5) of the IRP Regulations set out factors the officer must consider when assessing an LMIA application. The relevant provisions are as follows:

Work Permits

200 (1) Subject to subsections (2) and (3) — and, in respect of a foreign national who makes an application for a work permit before entering Canada, subject to section 87.3 of the Act — an officer shall issue a work permit to

**Permis de travail —
demande préalable à
l'entrée au Canada**

200 (1) Sous réserve des paragraphes (2) et (3), et de l'article 87.3 de la Loi dans le cas de l'étranger qui fait la demande préalablement à son entrée au Canada, l'agent délivre un permis de travail à l'étranger si, à l'issue d'un contrôle, les

a foreign national if, following an examination, it is established that

[...]

(c) the foreign national

[...]

(ii.1) intends to perform work described in section 204 or 205 and has an offer of employment to perform that work or is described in section 207 and has an offer of employment, and an officer has determined, on the basis of any information provided on the officer's request by the employer making the offer and any other relevant information,

(A) that the offer is genuine under subsection (5), and

[...]

(iii) has been offered employment, and an officer has made a positive determination under paragraphs 203(1)(a) to (e); and

Basis of assessment

(2.1) The assessment provided by the Department of Employment and Social Development on the matters set out in paragraphs (1)(a) to (e) must be based on any information provided by the

éléments ci-après sont établis :

[...]

c) il se trouve dans l'une des situations suivantes :

[...]

(ii.1) il entend exercer un travail visé aux articles 204 ou 205 pour lequel une offre d'emploi lui a été présentée ou il est visé à l'article 207 et une offre d'emploi lui a été présentée, et l'agent a conclu, en se fondant sur tout renseignement fourni, à la demande de l'agent, par l'employeur qui présente l'offre d'emploi et tout autre renseignement pertinent, que :

(A) l'offre était authentique conformément au paragraphe (5),

[...]

(iii) il a reçu une offre d'emploi et l'agent a rendu une décision positive conformément aux alinéas 203(1)a) à e);

Fondement de l'évaluation

(2.1) Dans l'évaluation qu'il fournit au sujet des éléments prévus aux alinéas (1)a) à e), le ministère de l'Emploi et du Développement social se fonde sur tout renseignement fourni par

employer making the offer and any other relevant information, but, for the purposes of this subsection, the period referred to in subparagraph (1)(e)(i) ends on the day on which the request for the assessment is received by that Department.

l'employeur qui présente l'offre d'emploi et sur tout autre renseignement pertinent, mais, pour l'application du présent paragraphe, la période visée au sous-alinéa (1)e(i) se termine à la date où la demande d'évaluation est reçue par ce ministère.

Genuineness of job offer

Authenticité de l'offre d'emploi

(5) A determination of whether an offer of employment is genuine shall be based on the following factors:

(5) L'évaluation de l'authenticité de l'offre d'emploi est fondée sur les facteurs suivants :

(a) whether the offer is made by an employer that is actively engaged in the business in respect of which the offer is made, unless the offer is made for employment as a live-in caregiver;

a) l'offre est présentée par un employeur véritablement actif dans l'entreprise à l'égard de laquelle elle est faite, sauf si elle vise un emploi d'aide familial;

(b) whether the offer is consistent with the reasonable employment needs of the employer;

b) l'offre correspond aux besoins légitimes en main-d'oeuvre de l'employeur;

(c) whether the terms of the offer are terms that the employer is reasonably able to fulfil; and

c) l'employeur peut raisonnablement respecter les conditions de l'offre;

(d) the past compliance of the employer, or any person who recruited the foreign national for the employer, with the federal or provincial laws that regulate employment, or the recruiting of employees, in the province in which it is

d) l'employeur – ou la personne qui recrute des travailleurs étrangers en son nom – s'est conformé aux lois et aux règlements fédéraux et provinciaux régissant le travail ou le recrutement de main-d'oeuvre dans la province où

intended that the foreign national work.

il est prévu que l'étranger travaillera.

Assessment of employment offered

Appréciation de l'emploi offert

203 (1) On application under Division 2 for a work permit made by a foreign national other than a foreign national referred to in subparagraphs 200(1)(c)(i) to (ii.1), an officer must determine, on the basis of an assessment provided by the Department of Employment and Social Development, of any information provided on the officer's request by the employer making the offer and of any other relevant information, if

203 (1) Sur présentation d'une demande de permis de travail conformément à la section 2 par tout étranger, autre que celui visé à l'un des sous-alinéas 200(1)c)(i) à (ii.1), l'agent décide, en se fondant sur l'évaluation du ministère de l'Emploi et du Développement social, sur tout renseignement fourni, à la demande de l'agent, par l'employeur qui présente l'offre d'emploi et sur tout autre renseignement pertinent, si, à la fois :

(a) the job offer is genuine under subsection 200(5);

a) l'offre d'emploi est authentique conformément au paragraphe 200(5);

(b) the employment of the foreign national is likely to have a neutral or positive effect on the labour market in Canada;

b) le travail de l'étranger est susceptible d'avoir des effets positifs ou neutres sur le marché du travail canadien;

[...]

[...]

Factors – effect on labour market

Facteurs – effets sur le marché du travail

(3) An assessment provided by the Department of Employment and Social Development with respect to the matters referred to in paragraph (1)(b) shall, unless the employment of the foreign national is unlikely to have a positive

(3) Le ministère de l'Emploi et du Développement social fonde son évaluation relative aux éléments visés à l'alinéa (1)b) sur les facteurs ci-après, sauf dans les cas où le travail de l'étranger n'est pas susceptible d'avoir des effets positifs ou neutres sur

or neutral effect on the labour market in Canada as a result of the application of subsection (1.01), be based on the following factors:

(a) whether the employment of the foreign national will or is likely to result in direct job creation or job retention for Canadian citizens or permanent residents;

(b) whether the employment of the foreign national will or is likely to result in the development or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;

(c) whether the employment of the foreign national is likely to fill a labour shortage;

(d) whether the wages offered to the foreign national are consistent with the prevailing wage rate for the occupation and whether the working conditions meet generally accepted Canadian standards;

(e) whether the employer will hire or train Canadian citizens or permanent residents or has made, or has agreed to make, reasonable efforts to do so;

(f) whether the employment of the foreign national is likely to adversely affect the

le marché du travail canadien en raison de l'application du paragraphe (1.01) :

a) le travail de l'étranger entraînera ou est susceptible d'entraîner la création directe ou le maintien d'emplois pour des citoyens canadiens ou des résidents permanents;

b) le travail de l'étranger entraînera ou est susceptible d'entraîner le développement ou le transfert de compétences ou de connaissances au profit des citoyens canadiens ou des résidents permanents;

c) le travail de l'étranger est susceptible de résorber une pénurie de main-d'oeuvre;

d) le salaire offert à l'étranger correspond aux taux de salaires courants pour cette profession et les conditions de travail qui lui sont offertes satisfont aux normes canadiennes généralement acceptées;

e) l'employeur embauchera ou formera des citoyens canadiens ou des résidents permanents, ou a fait ou accepté de faire des efforts raisonnables à cet effet;

f) le travail de l'étranger est susceptible de nuire au règlement d'un conflit de

settlement of any labour dispute in progress or the employment of any person involved in the dispute; and

travail en cours ou à l'emploi de toute personne touchée par ce conflit;

(g) whether the employer has fulfilled or has made reasonable efforts to fulfill any commitments made, in the context of any assessment that was previously provided under subsection (2), with respect to the matters referred to in paragraphs (a), (b) and (e).

g) l'employeur a respecté ou a fait des efforts raisonnables pour respecter tout engagement pris dans le cadre d'une évaluation précédemment fournie en application du paragraphe (2) relativement aux facteurs visés aux alinéas a), b) et e).

Issue 1: Was there a breach of procedural fairness?

Applicant's Submissions

[15] The Applicant submits the Officer decided, in her opinion and based on extrinsic evidence, that “welder with TIG mechanical experience” was an excessive requirement. In this regard, the Officer erred in relying on extrinsic evidence, namely conversations with union representatives, to contradict Service Canada’s published documents. The Applicant could not have anticipated that Service Canada would overrule its own occupational requirements based on unanticipated conversations with third parties unknown to the Applicant and with whom the Applicant was given no opportunity to correspond or converse.

Respondent's Submissions

[16] The Respondent submits that no procedural fairness issue arises from the Officer’s consultations with professional welding associations or otherwise. The Officer advised the

Applicant and the Applicant's representative of these consultations and provided the Applicant with an opportunity to respond. No authority supports the Applicant's suggestion that he ought to have been afforded a participatory role in these consultations.

Analysis

[17] In my view, a breach of procedural fairness does not arise from the Officer's decision to consult with third parties.

[18] As noted by Justice Shore in *Ahmed*, in assessing a LMIA, the degree of procedural fairness owed to the Applicant is relatively low (para 10) (also see: *Frankie's Burgers* at para 73; *Euro Railing Ltd v Canada (Employment and Social Development)*, 2015 FC 507 at para 12; *Kozul v Canada (Employment and Social Development)*, 2016 FC 1316 at para 9 ("Kozul")).

[19] That said, in *Kozul* at paragraphs 9 and 10, Justice Boswell referred to *Frankie's Burgers* and found that while the content may be low, it is not non-existent:

[9] The content of the duty of procedural fairness owed in the context of applications for a LMIA is relatively low. As the Court observed in *Frankie's Burgers*:

[73] The requirements of procedural fairness will vary according to the specific context of each case (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 21 [*Baker*]). In the context of applications by employers for LMOs, a consideration of the relevant factors that should be assessed in determining those requirements suggests that those requirements are relatively low. This is because, (i) the structure of the LMO assessment process is far from judicial in nature, (ii) unsuccessful applicants can simply submit another application (*Maysch v*

Canada (Citizenship and Immigration), 2010 FC 1253, at para 30; *Li v Canada (Citizenship and Immigration)*, 2012 FC 484, at para 31 [*Li*], and (iii) refusals of LMO requests do not have a substantial adverse impact on employers, in the sense of carrying “grave,” “permanent,” or “profound” consequences (*Baker*, above, at paras 23-25).

[10] While the duty of procedural fairness owed in this case may be at the low end of the spectrum, this is not to say that the duty is non-existent. There is a duty to disclose extrinsic evidence if it may impact the outcome of a decision. As noted by the Court in *Yang v Canada (Citizenship and Immigration)*, 2013 FC 20 at para 17, [2013] FCJ No 25: “The question is whether meaningful facts essential or potentially crucial to the decision had been used to support a decision without providing an opportunity to the affected party to respond to or comment upon these facts.”

[20] Justice Boswell held that, in the circumstances of the matter before him, it was unfair that the information the officer obtained from a telephone call with a third party was not conveyed or disclosed to the applicants before the officer issued the negative LMIA opinion. The information at issue directly challenged the applicant’s view as to the existence of a labour shortage for experienced copper sheet metal workers. Thus, denying the applicants an opportunity to comment upon or offer evidence to contradict the undisclosed information was unfair.

[21] However, in my view, that is not the factual situation in this matter and, on that basis, *Kozul* may be distinguished.

[22] In her Notes, the Officer stated that there was very high unemployment in Manitoba and in the North and high unemployment in Winnipeg for the welder position described by the subject NOC. On April 21, 2016, she spoke with someone at the Winnipeg Welder’s Union who,

when asked, said there was no shortage of welders in Manitoba. Later in the Notes the Officer refers to a JB Outlook report and EI percentage information, both of which confirmed that the occupation was experiencing high levels of unemployment. In a telephone call to the Applicant and its lawyer on April 25, 2016, the Officer explained that, based on labour market research, there was no shortage of welders in several provinces and particularly in northern Manitoba and Winnipeg. During another telephone call on the following day, the high unemployment rates were again discussed and attributed to the lack of work in the oil fields. Thus, while it is true that the Officer does not appear to have disclosed the call to the Winnipeg Welder's Union, the information provided from that source was consistent with the labour market information that she did discuss with the Applicant and its representative on two occasions. And, unlike *Kozul*, the Applicant had not made submissions on the issue of a general labour shortage of welders. Therefore, the information obtained from the Union was consistent with the information that was put to the Applicant and did not directly challenge its view as to the existence of a labour shortage.

[23] The Officer also contacted the Canadian Welding Association. The Notes indicate that she did this on April 26, 2016 and, in answer to the question "does a Welder have "Mechanical welding techniques to maintain a diesel generator", was told, no, that this would require either a heavy duty diesel mechanic or industrial mechanic first then welder skills secondly. In her Notes concerning a telephone interview on the same date with the Applicant and its lawyer, the Officer records that it was discussed that welders associations across Canada confirmed that the additional skills belonged to a mechanical industrial mechanic. In response to this, the Applicant's lawyer had argued that the Applicant was not looking for certification, which was

agreed. Later in the Notes the Officer entered: “EXPLAINED THAT – I WOULD BE CONSULTING WITH BE BUT THESE REQUIREMENTS SEEMDED [sic] EXCESSIVE AND THIS WAS CONFIRMED ALSO BY WELDERS ASSOCIATIONS CONTACTED ACROSS CANADA”.

[24] Thus, in this case, the Officer advised the Applicant that she had had discussions with welders associations concerning the additional skills the Applicant had included in its application for the welder position, which discussions had confirmed that the additional skills belonged to mechanical or industrial mechanics. The Applicant was given an opportunity to respond to the issue in the course of that discussion, which it did.

[25] While there may be some question of whether the Officer actually consulted with welders associations across Canada or whether her consultation was restricted to the contact she made with the Canadian Welding Association on April 26, 2016 as described in her Notes, the fact remains that the attributed response was put to the Applicant.

[26] A subsequent entry on May 2, 2016 indicates that the Officer also spoke to the president of a company listed as “repairers and maintenance and servicing of Diesel Generators”. He confirmed that he had no welding background, that his company provides maintenance and repair of diesel generators and that they require more of a mechanical repair experience. The Officer did not disclose this telephone call to the Applicant, issuing her decision immediately thereafter. However, viewed in the context of the question before her, being whether the duties of a welder would typically include diesel engine repair and maintenance, which question was put

to the Applicant and to which it made additional submissions, I am unable to find that the Applicant was prejudiced by the failure to disclose the content of the telephone call as no new additional critical facts arose from it.

[27] As discussed further below, there is also no merit to the Applicant's argument that it should have been privy to the telephone conversations with the third parties so as to ensure that the Officer was conveying the right information when seeking their opinions. Nor am I satisfied that the duty of procedural fairness owed in the context of the use of extrinsic evidence of this form in an administrative decision required such direct participation (see: *Kozul* at paras 10 and 13; *Yang v Canada (Citizenship and Immigration)*, 2013 FC 20 at para 17; *Frankie's Burgers* at para 73).

[28] In conclusion, I am not persuaded that in these circumstances the duty of procedural fairness owed to the Applicant was breached by the failure to disclose the extrinsic evidence arising from the telephone call to the Winnipeg Welder's Union or the president of a diesel generator repairer and maintenance company.

Issue 2: Was the Officer's decision reasonable?

Applicant's Submissions

[29] The Applicant says that numerous reviewable errors arise from the Officer's decision.

[30] First, the Officer decided that, in her opinion and based on extrinsic evidence, that "welder with TIG mechanical experience" was an excessive requirement. This was in spite of the fact that NOC 7237 includes, in the main duties for welders, "Assist with maintenance and repair of welding, brazing and soldering equipment" and that Service Canada's Job Bank provides a drop down menu option, in advertising for that job, to require candidates to "maintain and perform minor repairs on welding, brazing and soldering equipment". Thus, the Officer's main reason for refusal was in contradiction of Service Canada's published materials and the Applicant's requirement was not excessive, but was a normal foreseen requirement.

[31] The Applicant submits that the Officer erred in relying on extrinsic evidence, which I have addressed above. However, related to this is the Officer's mischaracterization of the evidence of the Applicant's representative who, during one of the interviews, said that the Applicant must have experience maintaining TIG welding equipment, which is a diesel generator. The Officer misquoted this as saying that they "must be able to work on diesel equipment". The diesel equipment in question is related to maintaining the TIG welding equipment. It is therefore possible that the Officer mischaracterized the Applicant's requirements in her discussion with the union representative to which the Applicant was not privy and was not able to make submissions.

[32] The Applicant also submits that the Officer erred by stating during an interview that if the worker were sent to a work site on his own, then he would be an independent contractor. It is a

reviewable error to believe that a welder cannot be an employee of a corporation if he travels to a work location without a supervisor and the Applicant's response to this line of questioning must be understood in that context.

[33] Finally, the Officer refers on several occasions to the Applicant having a lawyer, however, the Applicant's representative was an immigration consultant.

Respondent's Submissions

[34] The Respondent submits that although the Applicant contends that maintaining and repairing diesel generators ought to fall within the ambit of the "welding, brazing and soldering equipment," duties that the NOC indicates welders are required to maintain, the Officer's contrary conclusions are supported by the record:

- a) None of the 97 welders that applied for a position with the Applicant had the required experience in maintaining and repairing diesel generators which suggests that the requirement was excessive;
- b) The professional welding associations confirmed that diesel generator repair and maintenance is not a skill that welders are trained or expected to possess;
- c) The Applicant's current employee, who was a certified journeyman with qualifications in excess of those being sought for the proposed position and whose wage was nearly 50% higher than the proposed wage for the welder position, did not have the necessary skills to maintain or repair diesel generators;
- d) The Applicant himself drew a distinction between welding experience and the nature of the experience required to perform diesel generator maintenance and repair. In particular, the Applicant's job postings characterize the latter as "auto mechanic" rather than welding in nature:
 - i. TIG welding experience and at least one to two years basic auto mechanics experience in maintaining TIG welding equipment and diesel generators for welding equipment; and,
 - ii. "basic mechanic repair skills to maintain the engine running diesel generator, as it's required to perform welding service functions in the same manner as an automobile engine."
- e) The wording of the NOC itself is supportive of the conclusion. The NOC does not specifically identify the maintenance and repair of diesel generators as a welder's

duty, but does indicate that the maintenance and repair of such equipment is a main duty of other trades, including heavy-duty equipment mechanics.

[35] In light of this evidence, the Officer's interpretation of a welder's duties as described in the NOC was reasonable and the Applicant is asking the court to re-weigh the evidence, which is not its role.

[36] The Respondent also denies that the Officer mischaracterized the conversations that she had with the Applicant or his representative regarding the TIG welding experience. The Officer made contemporaneous notes of her conversations which are included in the record. The Applicant has not alleged that its principal or representative recorded those conversations and provided no reason why this Court should prefer the recollection of the conversation recorded in the affidavit of its principal which was made 2.5 months later. Further, even if the Officer's notes did not perfectly characterize this particular comment about the nature of the diesel generator requirement, this alone is not a reviewable error. The Officer's reasons are to be read as a whole and in context with the record which demonstrates that she had a full and accurate understanding of the requirement related to diesel generator repair and maintenance. With respect to the specific note entry complained of, the Applicant's representative subsequently provided an explanation which was considered by the Officer. Therefore, read in whole, the record confirms that the Officer's decision was based on a proper understanding of the facts of the case.

[37] The Respondent submits that there is no evidence to support the Applicant's speculation that the Officer may have mischaracterized the evidence to the union representative and that speculation is insufficient to establish that an error was made.

[38] The Respondent disagrees with the Applicant's interpretation of the Officer's comments concerning the nature of the proposed employer/employee relationship. However, the nature of the employee/employer relationship was not the basis for the refusal. And, in any event, the legal accuracy of one statement by the Officer does not alone establish that a reviewable error was made as the decision is reviewable on the basis of the whole of the record.

[39] The Respondent admits that the Officer erroneously referred to the immigration consultant as a lawyer but submits that this error is immaterial to the decision being reviewed.

Analysis

[40] The Applicant submits that the Officer mischaracterized the evidence of the Applicant's representative. Specifically, that the representative said that the candidate must have experience maintaining TIG welding equipment, which is a diesel generator, but the Officer misquoted this as saying the candidate must be able to work on diesel equipment, which may have led to a mischaracterisation of the Applicant's requirements when the Officer discussed these with the union, leading to an inaccurate response.

[41] I would first note that, in the covering letter of the application, the Applicant stated "... the candidate must have experience in Gas Tungsten Arc Welding ("TIG" welding), along with experience in maintaining and repairing the equipment used for the welding (diesel generators)." In Annex A to the application, it is stated that the Applicant is in need of a "Welder who is experienced in TIG Welding and in maintaining the diesel generators, specifically the Lincoln Ranger 305D, that the welders use to perform their welds". The submission goes on to note that

many of the Applicant's contracts are in remote locations where it is almost impossible to locate anyone who knows how to maintain and repair the diesel generators the welders use for their welds and, therefore, the welder must have this knowledge to be self-sufficient in such isolated locations. Currently, it is only the Applicant's principal who can repair diesel generators. Thus, if a candidate does not have this knowledge and the generator breaks down, then the principal would be forced to fly in to fix it. Given this, in my view, it was apparent from the application that the Applicant sought not only diesel generator maintenance but also repair skills.

[42] The affidavit of the principal of the Applicant states that, in her reasons, the Officer says that the Applicant's representative said "well, it's not exactly mechanic" and that the worker "must be able to work on diesel equipment" but that this is not an accurate reflection of the conversation as the representative was trying to explain that the welder must have experience maintaining TIG welding equipment which has a diesel generator.

[43] Although the Applicant offers a different recollection of the conversation from that which is reflected in the Notes made contemporaneously with the discussion, in my view it is not apparent from this excerpt that the Officer misunderstood the point. In its application, the Applicant had described the position as Welder with TIG Mechanical Experience. On April 21, 2016, the Officer advised the Applicant that a written explanation of what mechanical meant was needed as there was difficulty in finding this under the occupation. It was then that she recorded that the representative said that it was not exactly mechanical. In response to this she had referred to the conversation the day before during which that word had been used to disqualify

persons who had applied for the position. She recorded that the representative then stated that candidates must be able to work on diesel equipment.

[44] Further, the Applicant provided a written explanation on April 25, 2016 which included that:

The diesel generators that welders use for the TIG welding require regularly scheduled maintenance. The welder must know when and how to change the generator's oil, air filter, oil filter, and fuel filter. They also must know the type of lubricant and/or fuel required to operate the machine. Additionally, the person must know the machine's fuel capacity to prevent malfunction, and know how to bleed the fuel lines (vacuuming air from the fuel lines) should a problem occur.

Due to the type of contracts Fredy's Welding Inc. accepts, a TIG welder hired by the company is required to have the ability to perform maintenance duties on the diesel generator. This requirement is due to the fact that Fredy's Welding Inc. has a large number of contracts in remote locations in Manitoba, and elsewhere in the prairies and northern Ontario. Being in these remote areas can delay the completion of a contract should the diesel generator malfunction or require maintenance.

If the diesel generator malfunctions, a TIG welder who is able to correctly diagnose and resolve the malfunction in the equipment satisfactorily is essential. This will allow the welder(s) to continue to fulfil their contract safely, and without delay.

[45] The submission went on to address "TIG Mechanical Experience":

Mechanical welding techniques are essential to TIG welders who wish to specialize in fabricating small to medium mechanically welded parts. Mechanical welding processes are used in the manufacturing of Automobiles bodies, structural work, tanks, and general machine repair work. This is not a "mechanic," but a welder who does mechanical processes. Using the term "with TIG mechanical experience" in the advertising of this position, is to attract welders who have used TIG welding to soldering automobiles, or use welding in general machine repair. If the candidate has experience in this type of welding, then they would

be knowledgeable, or have a basic understanding on how to assist with the maintenance and repair of welding, brazing and soldering equipment. In this case, it would mean maintaining the TIG welding equipment and the diesel generator used to power this equipment.

[46] The Notes indicates that on April 26, 2016, the Officer put the question of whether a welder has “Mechanical welding techniques to maintain a diesel generator” to the Canadian Welding Association and received a negative response. When viewed in isolation, the manner in which this question was posed might suggest that the Officer did not understand the role of diesel generator maintenance and repair as proposed by the Applicant, however, viewed in the context of the response provided by the Applicant concerning TIG Mechanical experience, this question would appear to be intended to test that response and does not suggest a misunderstanding of the skill set which the Applicant was proposing. As regards to the Applicants’ submission, I would also note that it is difficult to understand how welding experience in general machine repair translates into knowledge of how to assist with the maintenance and repair of diesel generators used to power welding equipment.

[47] In any event, even if the Officer erred in understanding the context in which the mechanical experience is required vis-à-vis the diesel generator, which I don’t believe to be the case, her finding that the requirement was excessive is reasonable given the evidence in the record before her.

[48] The NOC description for welders does state that one of the duties of welding, brazing, and soldering machine operators is to “assist with the maintenance and repair of welding, brazing and soldering equipment”. The description does not specify that operating, maintaining and

repairing diesel generators is included in this duty and there is evidence in the record which supports the Officer's finding that this requirement is excessive.

[49] First, the Officer observed that the Applicant had been seeking candidates but, of the ninety seven candidates who applied for the position, none had the required diesel generator maintenance and repair requirement. The Officer noted that the excessive nature of the additional skills could explain why there were so many candidates who did not qualify. In my view, this was not an unreasonable inference as, if these skills did fall within the main duty as described in the NOC, then it could reasonably be expected that at least some of the welders applying for the position would have this qualification.

[50] Further, the Applicant submitted that its principal is the only individual in the company who is capable of repairing the diesel generators. And despite holding a red seal certificate in welding and being paid an hourly wage of \$38.03, the Applicant's other employee does not appear to have this skill set. The Applicant was seeking a candidate capable of maintaining and repairing diesel generators at a wage rate of \$23.00/hour, with no mechanical certification. The Officer noted that she had discussed with the Applicant "that the skills are so unique that none of the applicants, nor the unionized employee or the ER [employer] had these skills". It was reasonable for the Officer to consider the fact that a welder who is being paid almost twice as much and who is certified does not have this additional skill. Nor does this support the Applicant's position that the skill falls within the NOC duties.

[51] The Applicant in its posted job ad spoke to both TIG welding experience and basic auto mechanic experience, the latter pertaining to maintaining of TIG welding equipment and diesel generators for welding equipment and basic mechanic repair skills to maintain the engine running the diesel generator in the same manner as an automobile engine. Although this was not referenced by the Officer, I agree with the Respondent to the extent that this suggests two skill sets, welding and mechanical repair. The NOC description does include assisting with the maintenance and repair of welding, brazing and soldering equipment as a duty that welding, brazing and soldering machine operators may perform and does not specifically exclude diesel generator maintenance. However, basic mechanic repair skills to maintain the engine running the diesel generator could reasonably be found to exceed the described duty.

[52] Further, the Notes indicate that the Officer “researched occupations and details on maintenance of diesel generators”. She also contacted the Canadian Welding Association and possibly other welders associations across Canada neither of which supported the Applicant’s contention that the ability to maintain or repair diesel generators was a skill expected of or held by welders or that experience in mechanical welding techniques was demonstrative of knowledge of the additional skills. In my view, the Officer’s interpretation of the NOC was reasonable.

[53] As to the Applicant’s submissions that the Officer erred by referring to its immigration consultant as its lawyer, the error is not material to the decision. Nor do I agree with the Applicant’s characterisation of the Officer’s comments concerning the nature of the proposed employer/employee relationship, but again and in any event, this was not the basis for the

Officer's conclusion that the requirement of one to two years mechanical experience was excessive and not a bona fide occupational qualification of a welder under NOC 7265.

[54] The Officer's reasons are disjointed and make no references to the applicable legislative regime. However, it can be discerned that the Officer concluded that the job offer was not consistent with the reasonable employment needs of the Applicant as required to meet the genuineness requirement of s 200(5)(b) and 203(1)(a) of the IRP Regulations. Based on the Officer's reasons when read as a whole and the record, her conclusion that the Applicant's requirement that the welder candidate also have mechanical experience in maintaining and repairing diesel generators was excessive of the position requirements, was reasonably open to her and is within the range of possible, acceptable outcomes that are defensible on the facts and the law (*Dunsmuir* at para 47).

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is denied;
2. There is no order as to costs.

“Cecily Y. Strickland”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2041-16

STYLE OF CAUSE: FREDY'S WELDING INC. v THE MINISTER OF
EMPLOYMENT AND SOCIAL DEVELOPMENT

PLACE OF HEARING: WINNIPEG, MANITOBA

DATE OF HEARING: DECEMBER 12, 2016

JUDGMENT AND REASONS: STRICKLAND J.

DATED: JANUARY 3, 2017

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