

Federal Court



Cour fédérale

Date: 20170314

Docket: IMM-3527-16

Citation: 2017 FC 273

Ottawa, Ontario, March 14, 2017

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

SKY BLUE TRANSPORT LTD

Applicant

and

**MINISTER OF EMPLOYMENT AND SOCIAL
DEVELOPMENT**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is a judicial review of a decision by an officer of Employment and Social Development Canada [the Officer] refusing the Applicant's application for a Labour Market Impact Assessment [LMIA]. The negative decision was based on the lack of "genuineness" of the job offer due the excessive experience requirement for the job: the requirement that long-haul truck drivers have 1-2 years of experience.

[2] The pertinent provision of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations], is s 203:

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

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

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

(c) the issuance of a work permit would not be inconsistent with the terms of any federal-provincial agreement that apply to the employers of foreign nationals;

(d) in the case of a foreign national who seeks to enter Canada as a live-in caregiver,

(i) the foreign national will reside in a private household in Canada and

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

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

c) la délivrance du permis de travail respecte les conditions prévues dans l'accord fédéral-provincial applicable aux employeurs qui embauchent des travailleurs étrangers;

d) s'agissant d'un étranger qui cherche à entrer au Canada à titre d'aide familial :

(i) il habitera dans une résidence privée au Canada et y fournira sans

provide child care, senior home support care or care of a disabled person in that household without supervision,

(ii) the employer will provide the foreign national with adequate furnished and private accommodations in the household, and

(iii) the employer has sufficient financial resources to pay the foreign national the wages that are offered to the foreign national; and

(e) the employer

(i) during the period beginning six years before the day on which the request for an assessment under subsection (2) is received by the Department of Employment and Social Development and ending on the day on which the application for the work permit is received by the Department, provided each foreign national employed by the employer with employment in the same occupation as that set out in the foreign national's offer of employment and with wages and working conditions that were substantially the same as — but not less favourable than — those set out in that offer, or

supervision des soins à un enfant ou à une personne âgée ou handicapée,

(ii) son employeur lui fournira, dans la résidence, un logement privé meublé qui est adéquat,

(iii) son employeur possède les ressources financières suffisantes pour lui verser le salaire offert;

e) l'employeur, selon le cas :

(i) au cours de la période commençant six ans avant la date de la réception, par le ministère de l'Emploi et du Développement social, de la demande d'évaluation visée au paragraphe (2) et se terminant à la date de réception de la demande de permis de travail par le ministère, a confié à tout étranger à son service un emploi dans la même profession que celle précisée dans l'offre d'emploi et lui a versé un salaire et ménagé des conditions de travail qui étaient essentiellement les mêmes — mais non moins avantageux — que ceux précisés dans l'offre,

(ii) is able to justify, under subsection (1.1), any failure to satisfy the criteria set out in subparagraph (i).

(ii) peut justifier le non-respect des critères prévus au sous-alinéa (i) au titre du paragraphe (1.1).

...

...

(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 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:

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

(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;

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) 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;

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

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

(d) whether the wages offered to the foreign national are consistent with the prevailing wage rate for the occupation and whether

d) le salaire offert à l'étranger correspond aux taux de salaires courants pour cette profession et les conditions de travail qui lui

the working conditions meet generally accepted Canadian standards;

sont offertes satisfont aux normes canadiennes généralement acceptées;

(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;

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) whether the employment of the foreign national is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute; and

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

[Emphasis added]

[Je souligne]

[3] The *Immigration and Refugee Protection Act*, SC 2001, c 27, and the Regulations set out a regime under which Canadian employers can hire temporary foreign workers to address skill and labour shortages. The requirements in s 203(1) must be satisfied for an officer to issue a work permit. The relevant requirement in this case, paragraph (a), has been underlined above.

[4] The determination of whether an offer of employment is genuine is governed by s 200(5) of the Regulations:

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

(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;

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

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

(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 intended that the foreign national work.

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

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

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

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 il est prévu que l'étranger travaillera.

[5] The employment positions for which LMIA's are sought are classified within occupational groupings in the National Occupational Classification [NOC] system. Guidelines are issued to assist officers in deciding, on a case by case basis, whether occupational requirements are consistent with experience requirements listed in the NOC.

II. Factual Background

[6] Mr. Ranjit Bhangoo is the director and employer contact of the Applicant. He posted job advertisements in January 2016 seeking long-haul truck drivers with at least 1-2 years of experience. He was able to hire only one suitable Canadian candidate.

[7] On July 28, 2016, the Officer conducted a pre-assessment telephone interview with Bhangoo. The Officer questioned the rationale for the job requirement of 1-2 years of experience. Bhangoo explained that it was a requirement of the insurance provider as well as a risk reduction strategy with respect to the concern of “handing over trucks to new drivers”.

There is some question as to whether Bhangoo raised the safety concern of drivers operating vehicles through mountains and in snowy conditions.

[8] In written submissions to the Officer on July 29, 2016, Bhangoo reiterated the existence of the written contract with the insurer regarding driver qualifications. The insurance policy required three years of driving experience, but a minimum of one year of driving experience was required to be covered under premium policies. (The difference between the insurance requirement and the job experience was never explained.) The effect is that insurance for drivers with less than one year of experience is not available and insurance for drivers with between 1-3 years of experience is more costly.

[9] The Officer refused the LMIA application on August 4, 2016, citing:

- failure to demonstrate sufficient efforts to hire Canadians in the occupation; and

- insufficient demonstration of a reasonable employment need for this job at the business.

The Officer found that although experience is an asset, the 1-2 years of experience requirement was not a *bona fide* occupational requirement for the relevant NOC 7411 classification – Long-Haul Truck Driver.

[10] It is relevant to note that the Officer stopped the assessment at the “genuineness” threshold. It was unnecessary to consider other LMIA factors if this threshold is not met.

[11] The Officer acknowledged the receipt of the submissions on the insurance requirements. She also indicated that the representative of the employer had advised the Officer that the loads consisted of produce, refrigerated food, and general freight, and that drivers would not be required to transport dangerous goods or travel on dangerous routes.

[12] It is important in the context of this judicial review, and particularly in relation to the allegation of fettering of discretion, to note the Officer’s reference to operational guidance which states:

However, if the employer makes a case that they require experience for relevant factors related to job performance, these may be accepted if they are deemed reasonable (i.e. experience in driving dangerous goods, challenging routes etc.) by the assessing officer.

III. Issues

[13] The issues are:

1. Did the Officer fetter her discretion by strictly adhering to the NOC classification and the operational and interim guidelines (whether public or internal)?
2. Was the decision reasonable?
3. Did the Officer breach the principle of procedural fairness by not disclosing the interim and operational guidelines?
4. Did the Officer err by failing to take into account the successful LMIA in 2015?

IV. Standard of Review

[14] The parties agree on the standard of review.

[15] The standard of review with respect to the Officer's conclusion is reasonableness (*Frankie's Burgers Lougheed Inc v Canada (Employment and Social Development)*, 2015 FC 27, 473 FTR 67 [*Frankie's Burgers*]).

With respect to procedural fairness, the standard of review is correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190).

On the matter of fettering discretion, a standard of review analysis is unnecessary. Any decision in which a decision maker fettered his or her discretion is both incorrect due to an error of law and also unreasonable.

V. Analysis

A. *Fettering of Discretion*

[16] The Applicant argues that the Officer slavishly followed the NOC classification and the Guidelines and refused to consider an element not laid out in the classification.

[17] In my view, there is no basis for this argument. As indicated in paragraph 12 of these Reasons, the Officer did not foreclose the possibility of deviating from the Guidelines or the NOC classification. She recognized that the Applicant could have provided sufficient justification for additional job requirements, and simply held that the Applicant had not done so in this case.

[18] In *Frankie's Burgers* at para 92, the Court held that there is nothing wrong with an officer following Guidelines/NOC classifications so long as they are not considered binding and are applied in a manner which permits departures where warranted. Here, the Officer specifically recognized that she had the ability to step outside of the Guidelines in an appropriate case.

[19] The Applicant relied on *Seven Valleys Transportation Inc v Canada (Employment and Social Development)*, 2017 FC 195 [*Seven Valleys*], wherein the Court overturned an LMIA decision because the officer did not take into account challenging routes, public safety, and the high value of trucks in determining whether a requirement of 1-2 years of driving experience was justified in the circumstances. This case is distinguishable from the instant case because in *Seven Valleys* the officer refused to consider the rationale for the additional job requirements. In the

present case, the Officer took into account the employer's rationale but found that it lacked substance, in large measure because it was focused on insurance costs for which minimal detail had been provided.

B. *Reasonableness of Decision*

[20] In my view, the decision is reasonable. The crux of this case is the failure to provide objective evidence of the necessity of the proposed job requirements. It was a striking feature of this case that, other than the unspecified insurance saving, there was no evidence of the necessity of the requirement of 1-2 years of experience.

[21] The Applicant criticizes the Officer for failing to consider that drivers would be required to drive in mountains and snow. However, this was the rationale advanced to justify the experience requirement.

[22] A decision maker is not required to mention every piece of evidence, and here there was little, if any, documentation on the driving circumstances as justifying the job requirement. Mountain roads and snow are common features of driving in British Columbia, and the Applicant never established that a driver required 1-2 years of experience in order to drive trucks in these common conditions.

C. *Procedural Fairness*

[23] The Applicant has not made out a case of breach of procedural fairness. The level of procedural fairness owed in cases such as these is relatively low (*Frankie's Burgers* at para 73).

[24] In this case, the Applicant was made aware of all of the Officer's concerns, and the employer contact had an opportunity to address these concerns. The fact remains that the Applicant failed to provide sufficient evidence to convince the Officer that the experience requirement was not excessive.

The Applicant's reliance on cases related to the consideration of extrinsic evidence is misplaced. Guidelines, whether published or not, are not extrinsic evidence.

[25] Reliance on internal guidelines or information is not unfair if the substance of the information has been conveyed to an applicant and the applicant has been provided with an opportunity to respond (*Seven Valleys* at para 27).

D. *Successful LMIA Decision*

[26] Quite apart from the procedural problem of submitting evidence in the judicial review that was not before the decision maker, the material that the Applicant seeks to introduce at this juncture is neither relevant nor persuasive.

[27] The fact that an application for an LMIA in 2015 which contained a driving experience requirement was successful could only be relevant if the facts were identical, including the

rationale and the evidence supporting the requirement. That information is not before the Court, nor was it before the Officer.

[28] The Court need not strike the affidavit in question or rely on cases which hold that officers are not bound by previous decisions, as in this case the Applicant has not established relevancy.

VI. Conclusion

[29] For these reasons, this judicial review will be dismissed. There is no question for certification.

JUDGMENT

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

"Michael L. Phelan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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