Federal Court  Cour fédérale

Date: 20180927

Docket: IMM-236-18

Citation: 2018 FC 954

Ottawa, Ontario, September 27, 2018

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

CHUNYING LIU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is a judicial review of a December 22, 2017 decision by an officer denying a work permit to Chunying Liu [the "Applicant"]. The Officer denied the work permit because the Officer was not satisfied that the employment offer was genuine, and that the Applicant was a *bona fide* worker who would leave at the end of their stay, pursuant to section 11(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] The Application is granted for the reasons that follow.

II. Background

[3] The Applicant was born in China and is 45 years old. The Applicant lived and worked in China as a human resources director at a real estate company and before that as a director at Shenyang Maidian Properties Consultancy Co. Ltd since at least 2010. In June 2015, the Applicant's daughter was accepted to study at New Westminster Secondary School in Vancouver, British Columbia, and holds a study permit to do so.

[4] In January 2016, the Applicant travelled to Canada with her daughter to help her settle in with her homestay family. The homestay family, Li Ying and her husband Liu Guangji, have a son who at the time was 8 years old.

[5] The Applicant had previously been refused a Canadian visa and re-applied in November 2015 and was granted a five-year multiple entry visa. She also has a valid US visa, which was issued for a 10-year period from December 15, 2015. She has never overstayed in either jurisdiction.

[6] When the Applicant returned to China after her January 2016 trip, she declared that she was inspired by her trip to Canada to change her lifestyle and move towards a "quieter lifestyle in Vancouver, and the more gentle pace of life". The Applicant thus aspired to become a live-in caretaker ["LIC"].

[7] The Applicant quit her job to pursue a career in childcare and enrolled in the Shenyang Success Solutions Career Training School in Shenyang, China. From April 2016 to December 2016, she attended at the training school and completed the practicum placements. She obtained an In-Home Caregiver Diploma on December 5, 2016, from the six (6) month program. The Applicant then worked as a Teaching Supervisor at the Shenyang Aston Educational Training School.

[8] The homestay family that the Applicant's daughter was staying with offered the Applicant a position as a caregiver for their son. Service Canada issued a positive Labour Market Impact Assessment ["LMIA"] for a job as defined under the National Occupation classification ["NOC"] 4411 ("Home Child Care Providers") for a two year period.

[9] On March 31, 2017, the Applicant filed an application for a Temporary Resident Visa and Work Permit on the basis of the positive LMIA. On May 8, 2017, an Officer refused the application.

[10] On May 31, 2017, the Applicant applied for leave and judicial review of the refusal decision. The decision was set aside by consent, and the Applicant was invited to submit any new documents that she wished to have considered on re-determination on November 27, 2017. The application was refused upon reconsideration on December 22, 2017.

[11] In the “tick mark” portion of the refusal letter the Officer identified that:

> A. You have not satisfied me that you would leave Canada by the end of the period; authorized for your stay. In reaching this decision, I considered several factors, including:
>
> - Purpose of visit
> - Employment prospects in country of residence

[12] The Officer held that the Applicant was not a genuine worker who would leave at the end of her stay, and that the job offer was also not genuine. The Officer’s Global Case Management System [“GCMS”] notes are also relevant in this proceeding. On September 29, 2017, the Officer made the following notes in the GCMS:

> File re-opened for re determination. file reviewed, PA is requesting a WP with LMIA as a in home caregiver. PA's daughter is holder of a SP and studying in AM Canada since 2015. PA also holds a TRV and has travelled to Canada to accompany daughter Employers have an 8 year old child and is a homestay for PA's daughter Employment contract has no start and end times of work only that PA will work 40 hours. LMIA has no specific experience - but has previous nanny experience and professional nanny training as assets. PA has no previous nanny experience, and took a program in china after child began to study in Canada. PA states on education and employment form that she worked as a teaching supervisor from April 2016 to March 2017, yet was also taking a "caregiver program" from April 2016 to December 2016. I have reviewed all the documentation and information provided in this application. I am not satisfied that the employment offer is genuine. I am not satisfied that the applicant is a bona fide worker. Application refused

[13] The notes of November 27, 2017, indicate that the Applicant had not initially been given an opportunity to provide updated documentation. The notes indicate that the Applicant was then given the opportunity to provide updated documentation, and after the Applicant did so, almost

identical notes were entered by the Officer (CTR at page 2):

> File re-opened for re determination. File reviewed. PA is requesting a WP with LMIA as an in home caregiver. PA's daughter is holder of a SP and studying in Canada since 2015. PA also holds a TRV and has travelled to Canada to accompany daughter. Employers have an 9 year old child and is the homestay for PA‘s daughter. I am not satisfied that this is a genuine job offer considering that PA’s daughter lives as student homestay in the same home. PA has no previous caregiver experience, took a program in china alter child began to study in Canada. PA states on education and employment form that she worked as a teaching supervisor from April 2016 to March 20l7. Yet was also taking a "caregiver program" from April 2016 to December 2016. I have reviewed all the documentation and information provided in this application. I am not satisfied that the employment offer is genuine. I am not satisfied that the applicant is a bona fide worker who will leave at the end of their authorized stay. Application refused.

III. Issue

[14] The issue is whether the decision to refuse the visa application was reasonable.

IV. Standard of Review

[15] The case law is well established that decisions about whether an officer erred in the refusal of a work permit application with visa offices abroad are reviewable on the standard of reasonableness (*Romero v Canada (Citizenship and Immigration)*, 2012 FC 265 at para11*; Samuel v Canada (Minister of Citizenship and Immigration)*, 2010 FC 223 at para 26).

[16] The jurisprudence of this Court has been clear that the decisions of visa officers should be given a high degree of deference, given the unique and localized expertise of visa officers in making such decisions.

A. *Relevant Provisions*

[17] The following provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, are applicable in these proceedings:

Issuance of Work Permits

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

(a) the foreign national applied for it in accordance with Division 2;

(b) the foreign national will leave Canada by the end of the period authorized for their stay under Division 2 of Part 9;

[…]

Exceptions

(3) An officer shall not issue a work permit to a foreign national if

(a) there are reasonable grounds to believe that the foreign national is unable to perform the work sought;

[…]

Genuineness of job offer

(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

Délivrance du permis de travail

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 éléments ci-après sont établis :

a) l'étranger a demandé un permis de travail conformément à la section 2;

b) il quittera le Canada à la fin de la période de séjour qui lui est applicable au titre de la section 2 de la partie 9;

[…]

Exceptions

(3) Le permis de travail ne peut être délivré à l'étranger dans les cas suivants :

a) l'agent a des motifs raisonnables de croire que l'étranger est incapable d'exercer l'emploi pour lequel le permis de travail est demandé;

[…]

Authenticité de l'offre d'emploi

(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

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.

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.

V. Parties' arguments

A. *Applicant's Argument*

[18] The Applicant submits that the decision was unreasonable on the basis of a number of errors. These errors, in the Applicant's submission, were driven by the fact that the Applicant's prospective employers are her daughter's homestay parents. The Applicant argued that this fact became a determinative factor for the decision maker in deciding that the job offer was not genuine. The Applicant asserted that pursuant to this Court's jurisprudence (*Nazir v Canada (Citizenship and Immigration)*, 2010 FC 553; *Bondoc v Canada* (Citizenship and Immigration), 2008 FC 842 at para15) an officer should not simply reject an application because the employment offer came from within the family, but must review the "overall picture" to find that the employment position was not *bona fide.*

[19] The Applicant presents that the additional following errors were made by the Officer:

- The Officer erred in stating that she lacked the childcare experience "needed" under the NOC and LMIA. As the NOC does not specify that any such experience is necessary, the Officer should not impute such a requirement into the NOC. In the alternative, the Applicant submits that the affidavit clearly notes her training as a teacher in a school with young children, and her successfully completed caregiver training courses, to demonstrate childcare experience;
- The Officer did not provide reasons as to why the training and work experience did not suffice as "caregiver experience", given the similarities of the roles between teaching supervisors and caregivers;
- The Officer ignored evidence. The Applicant submits that the Officer drew an adverse inference from the fact that the Applicant worked as a "Teaching Assistant" while also completing the caregiver program. The Applicant argues that the Officer's notation makes it clear that in drawing this adverse inference, the affidavit evidence was ignored. In the affidavit and attached exhibits, submitted by the Applicant and in the CTR, the record before the decision maker showed that the Applicant was working on evenings and weekends while completing her courses. However, no reference is made by the Officer to the relevant exhibit and to the explanation it provides;
- The Applicant disagrees with the negative inferences drawn from a lack of specificity in the work hours (see paragraph 36 for further discussion). The Applicant asserts that the lack of specificity of work hours is simply a neutral factor. It is also noteworthy that the prospective employers' letter states that the Applicant would care for the child before and after school;

- The Applicant argues that it is unreasonable to conclude that the job offer is not genuine given the Applicant's explanation of why she chose to change jobs. Given that there is no requirement for previous experience as a caregiver under the NOC, there should be no negative inference drawn from any comparable deficiency in her experience, due to her life course trajectory and her more recent positive experiences with learning about child care and engaging in practical skill development. In any case, the position is a low skill job and the Applicant comes with relevant qualifications and has worked with children. These qualifications are confirmed by the practicum reports, employment records, and photos produced as evidence in the CTR;
- Lastly, the Applicant has a visa already, and the Applicant can visit her daughter at any point that is convenient to her. Therefore, speaking to the genuine nature of the job offer, why would the Applicant seek a work permit if she did not wish to work? The Applicant submits that the two year path to becoming a permanent resident through the LCP stream is no longer an option.

B. *Respondent's Argument*

[20] The Respondent's position is that the Officer had three central factors to examine: the Applicant had no caregiver experience, had a daughter who resided at the home where the job offer was from, and the Applicant only took the caregiver course after she returned from Canada to China. While an individual factor on its own may not have led to an automatic disqualification, the Respondent submits that given the confluence of these factors, the cumulative decision made by the visa officer with expertise is reasonable.

[21] The Respondent argues that an officer's decision is reasonable if the officer, given the officer's expertise and job-specific knowledge, is satisfied that the offer was not genuine and that applicant would not leave when the work permit expires.

[22] The Respondent submits that the onus is on the Applicant to demonstrate that the job offer was genuine. Further, the Respondent submits that if an officer is unsatisfied with an applicant's submissions, the officer is not required to make conclusive findings or prove the offer is not genuine. The Respondent argued that the reasons provided are never comprehensive in a visa case, where visa officers are not expected to make specific reference to all of the evidence before them. Based on this argument, the reasons provided in the decision and in the notes meet the reasonableness standard.

VI. Analysis

[23] The Officer's notes do not speak for themselves in determining what part of the application is deficient, and if so, as to what aspects of the application were considered negatively. In reading the notes, the Officer simply listed the "factors" considered, and we are left to infer from the file our own conclusions of which of the factors drew positive inferences and which of the factors drew negative inferences.

[24] I stop now to caution that a visa officer's reasons do not have to be lengthy or provide great detail. In *Solopova v Canada (Citizenship and Immigration)*, 2016 FC 690 at paragraph 32, Justice Gascon held that:

> Even where the reasons for the decision are brief, or poorly written, this Court should defer to the decision maker's weighing of the evidence and credibility determinations, as long as the Court is able to understand why the decision was made. I add that a visa officer's duty to provide reasons when rejecting a temporary resident is minimal and falls at the low end of the spectrum.

[25] Nor is insufficiency of reasons a standalone basis for allowing judicial review as per *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 14.

[26] However, if a decision lacks transparency and intelligibility, I must find the decision to be unreasonable. When the Officer stated in the notes:

> …I am not satisfied that this is a genuine job offer considering that PA's daughter lives as student homestay in the same home, PA has no previous caregiver experience, took a program in china after child began to study in Canada. PA states on education and employment form that she worked as a teaching supervisor from April 2016 to March 20l7. Yet was also taking a "caregiver program" from April 2016 to December 2016"

[27] I cannot find that the Officer's method of listing the factors to be transparent or intelligible. In reading the GCMS notes, one does not know what evidence presented by the Officer supports the final conclusion reached by the Officer or if the above is meant to be simply a listing of neutral factors.

[28] The Officer must set out the reasons why he felt the job offer was not genuine and not simply list factors drawn from the record without further analysis on the inferences based on those factors. Without an analysis of how the factors led the Officer to determine that the job

offer was not genuine, we are left to infer our own reasons as to why the Officer decided that way.

[29] Further, this Court in *Portillo v Canada (Citizenship and Immigration),* 2014 FC 866, has held an officer must provide an explanation when raising the question about a lack of experience, and specifically when a NOC and an LMO do not require further experience. It is a reviewable error for the Officer to have not provided an explanation on the question of suitability. In this case, however, the Officer simply stated, "PA has no previous caregiver experience, took a program in china after child began to study in Canada."

[30] Finally, if I were to accept that it was reasonable for the Officer to require demonstrable childcare experience, the fact that the Applicant supervises children in her current job should not be completely discounted. Her experience, based on the courses she successfully passed, her practicums, and her current occupation are similar to the desired childcare experience sought by the Officer. More importantly, it was the experience the prospective employers wished for their 8 year old son.

[31] The Officer drew attention in the notes from 2017/09/29 to the fact that the LMIA notes that previous nanny experience and training are assets. As the Applicant lacked nanny training specifically, the Officer held that the Applicant was not a genuine worker, and that the job offer was also not genuine.

[32] Yet the most significant issue is that the decision maker does not provide analysis on why this inference was drawn (though the question is ultimately immaterial). The Officer states that previous nanny experience is an asset, as is professional nanny training, and that the Applicant has no previous nanny training. However, requiring the Applicant to have experience as a nanny is importing further qualification than the Applicant needed to care for the 8 year old child in question.

[33] It may be that the Officer found the Applicant's submissions unsatisfactory, and on the basis of consideration of the file in its entirety, made his or her finding. However, in the face of clear non-consideration of affidavit evidence, the decision is unreasonable.

[34] I specifically refer to the issue raised by the Officer in noting that the Applicant, "states on education and employment form that she worked as a teaching supervisor from April 2016 to March 2017, yet was also taking a 'caregiver program' from April 2016 to December 2016."

[35] The Respondent further argued that, "there was no evidence before the Officer regarding the hours of the day that the Applicant attended the caregiver program. Therefore, the Officer had no way to determine that the two commitments did not overlap, and was entitled to the raise the question". I believe that the reference in the notes about not having the hours was concerning the job offer, and not about the statement regarding the Applicant attending school and working at the same time. The decision maker says that the employment contract only says 40 hours and does not state a start and stop time. In this case, both issues were answered in the materials filed, and therefore these should not be negative factors.

[36] The Officer had evidence before him/her denoting the Applicant's work hours. The exhibit states, "During the period from Apr 2016-Dec 2016, her work time was 16:30-19:30 on Tuesday to Friday, 9:30 -19:30 on Saturday and Sunday. Her monthly salary was RMB 1,800 yuan. From January 2017 to present, her work time is 9:30-19:30 on Tuesday to Sunday." This exhibit to the affidavit clearly lends credence to the explanation given in her online application. In this explanatory letter, the Applicant stated, "During her caregiver training course, Ms. Liu worked in the evenings and weekends as a Teaching Supervisor with the Shenyang Aston Educational Training School. She then moved into a permanent full-time role in that same position with that same school on completion of her training course in January 2017, and continues to work in that post on a full-time basis as at the date of the writing."

[37] Finally, the prospective employers said that she would work 40 hour weeks, but did not set out exactly the start and stop time. Setting out a flexible start and stop time is reasonable as the caregiver role was for a school-age child, which inherently needs to be flexible given a student's before-school preparation and extracurricular activities. Therefore, it appears quite clearly that the Officer had in front of him/her evidence relating to a material question (that of the Applicant's experience and qualifications) that the Officer overlooked without providing reasons.

[38] In *Villagonzalo v Canada (Citizenship and Immigration)*, 2008 FC 1127, Justice O'Keefe adjudicated on a matter regarding an applicant who had applied for a work permit under the live-in caretaker program. In that case, the Applicant attempted to provide a reasonable explanation in regards to overstaying a TRV in Canada through affidavit evidence, which the officer did not

refer to in his notes in denying her application on the basis of the overstay. Justice O'Keefe stated, at paragraph 26, that "There should have been some consideration of the applicant's explanations".

[39] Just as in this case, the lack of consideration of affidavit evidence renders grounds to set the decision aside (*Campbell Hara v Canada (Citizenship and Immigration),* 2009 FC 263).

[40] While the factor of the child staying at the prospective employers is indeed a relevant factor before the decision maker, this should not have been isolated factor that seemed to have become determinative of the decision in these proceedings. The Officer must consider the evidence presented, assess the evidence, consider all the factors, and then provide reasons to the Applicant that justify the decision in order to reach the necessary standard of transparency and intelligibility.

[41] In sum, the decision was not reasonable as it was not transparent, intelligible, and evidence was ignored.

[42] No question for certification was presented by either party and none arises.

[43] The Court orders that the application be allowed and the matter be referred back to be reconsidered by a different officer.

JUDGMENT in IMM-236-18

THIS COURT'S JUDGMENT is that:

1. The application is allowed and sent back to be reconsidered by a different officer;

2. No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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