Federal Court   Cour fédérale

Ottawa, Ontario, August 16, 2022

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

  BETWEEN:

RECURSIVE CRAFT INC.

Applicant

and

THE MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT CANADA

Respondent

JUDGMENT AND REASONS

I.   Overview

[1]   The Applicant, Recursive Craft Inc., applied for a Labour Market Impact Assessment ("LMIA"), on the grounds that it sought to hire Mr. Nurguly Ashyrov ("Ashyrov") as its President and Chief Technology Officer. A Senior Development Officer of Employment and Social Development Canada ("Officer") issued a positive LMIA, but for a different National

Occupation Classification ("NOC") code than the one requested by the Applicant. The

Applicant seeks judicial review of the Officer's decision (IMM-4977-21), as well as the Officer's

refusal of the Applicant's request for reconsideration of the NOC code assigned (IMM-4978-21).

[2]   While the Applicant had requested an LMIA for NOC code 0013, "Senior managers –

financial, communications and other business services", the Officer granted the LMIA for NOC

code 0213, "Computer and information systems managers". The effect of classifying the job in

NOC 0213 is that Mr. Ashyrov will not have sufficient points in the Express Entry system to be

eligible for permanent residence in Canada.

[3]   The Applicant submits that the Officer unreasonably applied the NOC codes, failed to

observe the basic principles set out in the NOC interpretation guidelines ("NOC Guidelines"),

and ignored relevant factors.

[4]   For the reasons that follow, I find the Officer's decision to issue an LMIA for NOC code

0213 to be reasonable. I also find that it was reasonable of the Officer to refuse the Applicant's

reconsideration request. The Officer considered the duties and structure of the company and

applied the NOC codes in a manner that is justifiable and intelligible. Accordingly, this

application for judicial review is dismissed.

II.   **Facts**

A.   *The Applicant*

[5]   The Applicant is a Canadian company that was federally incorporated on December 11, 2019. It specializes in information technology ("IT") services, particularly web performance testing software. In 2020, its gross sales were over $100,000 CAD.

[6]   Mr. Ashyrov, a citizen of Georgia in his mid-thirties, owns 100% of the Applicant's shares. He is the Applicant's President and Chief Technology Officer. Mr. Ashyrov seeks permanent residence in order to run his business from Canada. He has an active Express Entry profile with Immigration, Refugees and Citizenship Canada, and he would have sufficient points to receive permanent residence if he has a job offer with an LMIA in NOC 0013.

[7]   On January 26, 2021, the Applicant submitted the request for an LMIA in NOC 0013, explaining that the business would grow if Mr. Ashyrov could work in Canada. The application explained that the company had one employee and intended to hire a software developer and a sales/marketing assistant in the next 12-24 months. The Applicant submitted that Mr. Ashyrov would be paid $60/hour and described his job as follows:

> to oversee the operation; to plan and strategize the corporate policies, allocate material, human and financial resources to implement business plan; to establish financial and administrative controls; to formulate and approve promotional campaigns; and approve overall human resources planning; to locate and hire reliable staff members; to represent the organization or delegate representatives to act on behalf of the corporation.

[8]   The Applicant described the minimum skills for the job as follows:

> some previous experience (several months) in directing the implementation and management of IT operation, some experience to drive organizational success and achievement consistently surpassing goals and boosting revenues while cutting costs; some experience spearheading all aspects of IT staff development and management (hiring, training, and direction to reach top team performance).

[9]   On March 26, 2021, the Officer interviewed Mr. Valery Gulyaev ("Gulyaev"). In an affidavit filed for the purposes of this judicial review, Mr. Gulyaev states that he is a director of the Applicant as well as a legal assistant to the Applicant's counsel.

B.   *Decisions Under Review*

[10]   On April 20, 2021, the Officer issued a positive LMIA for NOC 0213. The Officer's rationale for the NOC code selection reads as follows: "The principal business activity, job duties and requirements provided by the employer for the position of Executive Director with NOC 0213 are aligned with the 2011 National Occupation Classification description."

[11]   The next day, the Applicant's counsel asked the Officer to amend the LMIA from NOC 0213 to NOC 0013. The Officer responded: "The NOC code selection is correct based on the current size and structure of the company."

[12]   On May 3, 2021, the Applicant requested a reconsideration of the NOC code, arguing that it was unreasonable in light of the NOC Guidelines. On May 4, 2021, the Officer responded as follows:

> When I spoke to Valery Gulysev [sic], they indicated that they would be stepping down as Manager and that Ashyrov Nurguly would be taking over as managing the day-to-day tasks of the business.
>
> When I looked at the size/structure of the company, as having 1 employee, it made sense that the majority of Ashyrov's time would be spent managing the day to day operations of the company. As a manager, it's an essential part of the business and the Owner would be required to perform these duties in Canada. This is the basis's [sic] of my approval under 0213.
>
> If you're telling me this isn't the case, that he's truly spending the majority of his time doing 0013 duties, then I have more questions related to who is running the business, generating revenue, making client contacts and controlling the budgets with only one employee?

[13]   On May 4, 2021, Mr. Gulyaev replied to the Officer's email, explaining that he is a *director* of the company, not a manager, and that Mr. Ashyrov is the one who runs the business, signs up clients, generates revenue, and controls the budget. Mr. Gulyaev delineated the current roles in the business as follows:

> Mr Ashyrov (President and Manager), me (performing [administrative] functions namely effecting bank transactions on President's requests), one payroll employee (software developer) and one freelancer (another software developer) both of who are reporting to Mr Ashyrov, President.

[14]   He indicated that he would likely be stepping down once his presence as a Canadian director was no longer required.

[15]   On July 14, 2021, the Officer responded as follows:

While Service Canada does not formally offer a reconsideration to LMIA decisions, I did review your NOC at the request of your third party. My response was provided on May 4, 2021. The assessment was conducted on the NOC based on information presented regarding the current structure, size and duties of the position. While it is possible that eventually Nurguly Ashyrov may eventually be able to focus solely on the duties identified in NOC 0013, currently NOC 0213 was deemed the best fit at the time of assessment.

III.   **Legal Framework**

[16]   Subsection 203(2.1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 provides that the assessment of an LMIA must be "…based on any information provided by the employer making the offer and any other relevant information…"

[17]   The Government of Canada defines the Applicant's preferred NOC code, 0013, as follows:

> **0013 – Senior managers – financial, communications and other business services**
>
> Senior managers in this unit group are usually appointed by a board of directors, to which they report. They work either alone or in conjunction with the board of directors to develop and establish objectives for the company, and to develop or approve policies and programs. They plan, organize, direct, control and evaluate, through middle managers, the operations of their organization in relation to established objectives. They work in establishments throughout the telecommunications, finance, insurance, real estate, and data processing, hosting and related services industries as well as other business service industries.

[18]   The main duties for NOC 0013 are described as follows:

- Determine the company's mission and strategic direction as conveyed through policies and concrete objectives which are met through the effective management of human, financial and material resources

- Authorize and organize the establishment of major departments and associated senior staff positions

- Allocate material, human and financial resources to implement organizational policies and programs; establish financial and administrative controls; formulate and approve promotional campaigns; and approve overall human resources planning

- Select middle managers, directors or other executive staff; delegate the necessary authority to them and create optimum working conditions

- Represent the organization, or delegate representatives to act on behalf of the organization, in negotiations or other official functions.

Senior managers in this unit group may specialize in areas such as finance, marketing or human resources or in a particular service area.

[19]   The NOC code chosen by the Officer, NOC 0213, is defined by the Government of

Canada as follows:

0213 – Computer and information systems managers

Computer and information systems managers plan, organize, direct, control and evaluate the activities of organizations that analyze, design, develop, implement, operate and administer computer and telecommunications software, networks and information systems. They are employed throughout the public and private sectors.

[20]   The main duties for NOC 0213 are described as follows:

- Plan, organize, direct, control and evaluate the operations of information systems and electronic data processing (EDP) departments and companies

- Develop and implement policies and procedures for electronic data processing and computer systems development and operations

- Meet with clients to discuss system requirements, specifications, costs and timelines

- Assemble and manage teams of information systems personnel to design, develop, implement, operate and administer computer and telecommunications software, networks and information systems

- Control the budget and expenditures of the department, company or project

- Recruit and supervise computer analysts, engineers, programmers, technicians and other personnel and oversee their professional development and training.

IV. Preliminary Issue

[21] The style of cause currently lists the Respondent as "Employment and Social Development Canada". Pursuant to subsection 5(2) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, the respondent is the responsible Minister, rather than the department. Accordingly, the style of cause is amended to name the "Minister of Employment and Social Development Canada" as the proper respondent.

V. Issues and Standard of Review

[22] The sole issue in this application for judicial review is whether the Officer's decision to assign NOC 0213 to the LMIA is reasonable.

[23]   While the Applicant submits that the Officer ignored evidence, thereby engaging an issue

of procedural fairness that attracts a correctness standard of review, I agree with the

Respondent's submission that the decision is to be reviewed on the reasonableness standard.

[24]   The question of whether a decision-maker ignored evidence is subsumed into the *Vavilov*

framework, as the evidence before the decision-maker is a factual constraint bearing on the

reasonableness of the decision (*Canada (Minister of Citizenship and Immigration) v Vavilov*,

2019 SCC 65 ("*Vavilov*") at para 106; *Khir v Canada (Citizenship and Immigration),* 2021 FC

160 at para 49).

[25]   Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13).

The reviewing court must determine whether the decision under review, including both its

rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable

decision is one that is based on an internally coherent and rational chain of analysis and that is

justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85).

Whether a decision is reasonable depends on the relevant administrative setting, the record

before the decision-maker, and the impact of the decision on those affected by its consequences

(*Vavilov* at paras 88-90, 94, 133-135).

[26]   For a decision to be unreasonable, the applicant must establish the decision contains

flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns

about a decision will warrant intervention. A reviewing court must refrain from reweighing

evidence before the decision-maker, and it should not interfere with factual findings absent

exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156, at para 36).

VI.   **Analysis**

A.   *Application of NOC codes and NOC Guidelines*

[27]   The Applicant submits that the Officer failed to observe the "core difference" between NOC 0013 and NOC 0213 and how these codes relate to job descriptions. According to the Applicant, NOC 0213 describes an IT professional who manages the IT department exclusively, while NOC 0013 includes IT professionals who provide not only the management of an IT structure in the organization, but also the management of the company as a whole.

[28]   The Applicant argues that NOC 0013 covers a broader spectrum of duties and responsibilities of a manager who is in charge of the strategic development of a company, which matches with the job description for Mr. Ashyrov in the LMIA application. According to the Applicant, the position involves: overseeing business operations in general, not just managing an IT department; developing not only IT-related policies, but strategic corporate policies; both controlling and allocating resources; establishing administrative and financial controls; and representing the company as a whole. The Applicant also refers to the index of titles for each NOC code, arguing that NOC 0213 does not include a single title involving general management of a company. In contrast, NOC 0013 includes titles such as "Chief executive officer", "Chief

operating officer", "President and chief executive officer", and "Computing services company president".

[29]   The Applicant further submits that it was unreasonable of the Officer to consider the size of the company, as nowhere in the descriptions of either NOC 0213 or NOC 0013 are the size or structure of an organization mentioned. Instead, the Officer was required to assess the duties under the position and the "kind of work performed", in accordance with the principles in the NOC Guidelines. Choosing a proper NOC code may be based on many factors listed in the NOC Guidelines, but these do not include the size or structure of a company.

[30]   The Respondent maintains that the Officer's application of the NOC codes and NOC Guidelines was reasonable. The Respondent submits that NOC 0013 is assigned to job positions of senior managers who are near the top of large organizations and who work through subordinate middle managers. The description of a NOC 0013 position necessarily requires a larger corporation with several levels of hierarchy, where the senior manager does their work through middle managers. The Respondent argues that it was apparent from the LMIA application that there would be no role available in the Applicant's company like that described in NOC 0013.

[31]   On the other hand, the NOC 0213 code is assigned to managers in computer and information system businesses, who may be middle managers in larger corporations controlling a department or project, or managers who control a company. The Respondent argues that NOC 0213 includes managers who control the company but also work directly with the teams

completing the computer and information system work. The Respondent points to certain components of the main duties of NOC 0213, which include: "Plan, organize, direct, control and evaluate the operations of information systems and electronic data processing (EDP) departments and companies" and "Control the budget and expenditures of the department, company or project".

[32]   Through email communications with the Applicant following the issuance of the decision, the Officer referenced the "current size and structure of the company", including the company's single employee, and concluded that "the majority of [Mr.] Ashyrov's time would be spent managing the day to day operations of the company". Since the Applicant had only one employee at the time of the LMIA application, the Respondent submits that it was reasonable of the Officer to consider the size and structure of the company in their analysis. From this, the Officer reasonably determined that the President and Chief Technology Officer would be directly involved in the operations of the business, as he would not likely be working through middle managers. The Respondent also reiterates that Mr. Ashyrov's job description included hiring staff, which is consistent with tasks from NOC 0213 such as recruiting and supervising.

[33]   Furthermore, the Respondent submits that it was reasonable for the Officer to focus on the description of the position and not rely solely on the job title. The Respondent argues that an officer must "look beyond formal job titles and carry out their own evaluation of whether an applicant meets the requirement of a specific NOC based upon a global assessment of the information provided by an applicant" (*Saatchi v Canada (Citizenship and Immigration)*, 2018 FC 1037 at paras 23-28).

[34]   I agree with the Respondent's position. While the Applicant's counsel stated during the hearing that the Applicant has four employees, at the time of the LMIA application, the Applicant had only one employee and intended to hire two more in the upcoming 12 to 24 months. Given the small size of the organization's team, I find it was reasonable of the Officer to determine that Mr. Ashyrov – regardless of his title – would not be working through middle managers, but would instead be directly involved in the operations of the business, a position that was better suited to a NOC 0213 classification.

[35]   I accept the Applicant's submission that NOC Guidelines do not address the specific size or structure of an organization, and the descriptions for NOC 0213 and NOC 0013 do not in fact provide any concrete numbers for the size of a company. However, I find that the Applicant's argument that the Officer erred by considering the size of the corporation is misplaced. I agree with the Respondent's argument that it is necessary to consider the size and structure of an organization in order to understand what the day-to-day role of an executive would be. In this case, it is also significant in understanding the "kind of work performed", pursuant to the NOC Guidelines. As noted by the Respondent, the role of an executive in a company with hundreds of employees and a corresponding hierarchy of managers will necessarily differ from the role of an executive in a company with one employee.

[36]   As such, I also agree with the Respondent that the NOC 0013 description suggests that it relates to a position within an organizational structure with several levels of hierarchy that allows for middle management – a structure most often associated with larger organizations. The description of NOC 0013 refers to managers who "plan, organize, direct, control and evaluate,

through middle managers, the operations of their organization…". As rightly noted by the Respondent during the hearing, the fundamental difference between NOC 0013 and NOC 0213 is that NOC 0013 refers to positions of executives who operate through middle management, rather than engaging in the work themselves.

[37]   Furthermore, while Mr. Ashyrov may very well hold the title of "President and Chief Technology Officer", I find it was reasonable of the Officer to examine the duties he performs and the role he plays within such a small team. Job titles are not determinative. As the Respondent argues, to accept that Mr. Ashyrov's title determines his NOC code would elevate form over substance in the manner that this Court has routinely rejected (*Katebi v Canada (Citizenship and Immigration)*, 2014 FC 813 at para 53; *Rodrigues v Canada (Citizenship and Immigration)*, 2009 FC 111 at para 10). Notably, this aligns with the Applicant's argument that the core principle of NOC coding, pursuant to the NOC Guidelines, relates to the "kind of work performed". The Officer also explained that as the Applicant's company grows, it could be possible for Mr. Ashyrov to eventually focus on NOC 0013 duties.

[38]   Under the reasonableness standard, the Officer's decision-making process is entitled to deference (*Vavilov* at para 98). I find that the Officer adequately applied the NOC Guidelines to assess the job position in the LMIA application, as well as the duties performed by Mr. Ashyrov. In doing so, I am satisfied that the underlying rationale of the Officer's decision is transparent, intelligible and justified (*Vavilov* at para 15).

B.   *Whether the Officer ignored other relevant factors*

[39]   The Applicant submits that the Officer misapprehended evidence by referring to Mr. Gulyaev as a manager in email communications when he is in fact a director. The Applicant argues that the difference between a manager and a director is an important distinction, as the latter is not involved in day-to-day business. The Applicant further notes that the Officer's reasons erroneously describe Mr. Ashyrov's position as "Executive Director" instead of President and Chief Technology Officer.

[40]   While conceding that there were two minor discrepancies in the decision and the follow-up emails from the Officer, the Respondent submits that these had no bearing on the substance of the decision, as reasonableness review is not a "line-by-line treasure hunt for errors" (*Vavilov* at para 102). The Respondent argues that whether Mr. Ashyrov *was* running the company had no bearing on what role he *would* have. In any case, the Officer did not change her mind when this discrepancy was pointed out to her. Additionally, the Respondent argues that the correct job title was used elsewhere in the decision.

[41]   On this point, I agree with the Respondent. These minor misstatements by the Officer are not sufficiently "central or significant" to overturn the decision (*Vavilov* at para 100). As noted by my colleague Justice Grammond in *Telus Communications Inc v Vidéotron Ltée*, 2021 FC 1127 at paragraph 47, "Without more, I am unable to conclude that the use of one word creates a serious issue that could render the decision unreasonable".

VII.   Conclusion

[42]   For the reasons above, I find the Officer's decision to issue an LMIA for NOC code 0213 to be reasonable. I also find that it was reasonable of the Officer to refuse the Applicant's reconsideration request. Accordingly, this application for judicial review is dismissed. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-4977-21 and IMM-4978-21

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to name the "Minister of Employment and Social Development Canada" as the proper Respondent.

2. The applications for judicial review in IMM-4977-21 and IMM-4978-21 are dismissed. A copy of these Reasons shall be placed in each Court file.

3. There is no question to certify.

"Shirzad A."
Judge