

Date: 20080910

Docket: IMM-4843-07

Citation: 2008 FC 1012

Ottawa, Ontario, September 10, 2008

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

NORY ANNE MALONZO

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] In November 2004, Ms. Malonzo submitted an application for permanent residence under the skilled worker category. She included in her application an arranged employment opinion from Human Resources and Skills Development Canada (HRSDC) for the position of Administrative Officer under National Occupation Classification (NOC) 1221. A Canadian employer had extended an offer of employment to Ms. Malonzo for a full-time position as an Administrative Officer in its commercial interior design company in Toronto.

[2] On September 20, 2007, Ms. Malonzo attended an interview at the Consulate in Buffalo, New York. At the interview, the officer inquired about the nature of the arranged employment in Canada and Ms. Malonzo's previous employment in the Philippines.

[3] As a result of the interview Ms. Malonzo was unable to achieve sufficient points to qualify for a permanent resident visa as a member of the skilled worker category and her application was rejected. She achieved 63 points, while 67 is the minimum required score. In this application, she principally challenges two aspects of the assessment: (1) the awarding of 17 out of a maximum of 21 points for prior work experience; and (2) the awarding of 0 out of a maximum of 10 points for arranged employment.

[4] For the reasons that follow, I am of the view that the officer's decision was not unreasonable, and that this application should be dismissed.

ISSUES

[5] Ms. Malonzo raises three issues:

1. Whether the officer erred in determining that she did not have any experience as an Administrative Officer (NOC 1221) and Financial Accounts Analyst (NOC 1114) and further erred in not awarding her points for arranged employment;
2. Whether the officer erred in failing to utilize substituted evaluation methodology under section 76(3) of the *Immigration and Refugee Protection Regulations*, S.O.R./ 2002-227; and

3. Whether the officer provided insufficient reasons for the decision.

BACKGROUND AND ANALYSIS

The Arranged Employment

[6] In the HRSDC application for arranged employment, the employer listed the requirements of the job as including a post-secondary business diploma and three years experience in an administrative or financial position. The skills required were listed as: advanced computer skills; organizational skills; being detail oriented; and good communication skills. The duties were described in the application in the following manner:

COMPUTER RECORD KEEPING OF
CLIENTS/CONTRACTS/PROJECTS/TIME-
TRACKING/PAYABLES & RECEIVABLES, ALL ASPECTS OF
OFFICE MANAGEMENT & COORDINATION OF OFFICE
SYSTEMS.

[7] At the interview on September 20, 2007, officer noted the following on the Computer Assisted Immigration Processing System (CAIPS) notes:

SUBJECT ASKED TO DEFINE DUTIES WHICH WILL
INCLUDE FILING, PAYROLL (CALCULATE TIME, OT ETC.
AND ISSUE CHECKS), PREPARE APPOINTMENTS FOR MR.
SWEENEY, RESEARCH ON COMPANIES THEY ARE
WORKING ON (E.G. SEARS).

...

LMO STATES NOC CODE AND TITLE AS 1221 --
ADMINISTRATIVE OFFICER. DUTIES AS DESCRIBED BY
SUBJECT SEEM TO FALL UNDER NOC CODE 1432
(PAYROLL CLERK) OR 1411 (GENERAL OFFICE CLERK)
BOTH WHICH FALL UNDER SKILL LEVEL C AND DO NOT
QUALIFY FOR POINTS. I HAVE REVIEWED THE DUTIES
UNDER NOC CODE 1221 AND FEEL THAT THE WORK AS
DESCRIBED BY SUBJECT ABOVE DOES NOT REFLECT THE

MAIN DUTIES OF THIS OCCUPATION AS SET OUT IN THE OCCUPATIONAL DESCRIPTIONS OF THE NATIONAL OCCUPATIONAL CLASSIFICATION (NOC). I FIND THAT THIS EMPLOYMENT DOES NOT MEET THE POINT QUALIFICATION AS OUTLINED IN R75(2) (B) AND (C). NO POINTS AWARDED FOR ARRANGED EMPLOYMENT.

[8] Ms. Malonzo filed an affidavit with this application in which she swears that she advised the officer that the duties of the arranged job were “to administer general office procedures and routines, specifically to develop and manage an effective filing system to keep track and record the company’s clients and projects; to oversee payables and receivables, including payroll; to coordinate all matters related to meetings and the executive” and would be responsible “to coordinate matters related to budgets, expenses, including manage the purchase of equipment and supplies, maintain records of office services, and prepare financial report”. (sic)

[9] The Applicant submits that the officer misapprehended or ignored her evidence in determining that the duties of the arranged job corresponded with NOC 1432 or 1411, both of which fall under Skill Level C and neither of which qualify for points. The Applicant asserts that the duties are more properly described as falling under NOC 1221, which would attract points.

[10] In my view, the officer’s summary in the CAIPS notes and that of the Applicant in her affidavit do not differ to the extent that it can be said that the officer’s decision in this regard was unreasonable. To go further would involve a reweighing of the evidence and a redetermination of the officer’s decision – a role that is not open to this Court on judicial review.

Employment History

[11] The officer also reviewed with Ms. Malonzo her employment history and, in this regard, the

CAIPS notes read as follows:

MAY 1994 - JUNE 1995 - ADMINISTRATIVE ASSISTANT - PHILIPPINE NATIONAL BANK THROUGH TEMP AGENCY. TELLER AT THE BANK. WORKED FRONT LINE SERVING CUSTOMERS DURING DAY, OPENING ACCOUNTS, CLOSING, FILING, CURRENCY EXCHANGE ETC.

JUNE 1995 - MARCH 1997 - FINANCIAL ACCOUNTS ANALYST - ABSORBED FROM AGENCY (WORKED DIRECTLY FOR BANK). STILL A BANK TELLER BUT HAD MORE RESPONSIBILITY -- DID CLEARING CHECKS, GENERAL LEDGERS, REPORTS, ATM, BALANCING IN/OUT CASH OF ATM. MADE 4000/MO. PHIL PESO.

THE ABOVE BOTH FALL UNDER NOC 1434 - BANKING, INSURANCE AND OTHER FINANCIAL CLERKS AND IS SKILL LEVEL C. DOES NOT QUALIFY FOR POINTS.

JUNE 1997 - DECEMBER 2000 -- CHANGED JOBS (ASKED FOR TRANSFER) AND MOVED TO LAND BANK OF THE PHILIPPINES (LBP). LBP SERVICE CORP. HELD HER "CONTRACT" AND ARRANGMENT THE EMPLOYMENT WITH LBP. CREDIT INVESTIGATOR - WORKED FOR THE LOAN BRANCH OF THE BANK. NO LONGER HANDLED CASH -- CREDIT INVESTIGATOR - LOAN OFFICER - EVALUATING ACCOUNTS -- RE-EVALUATION OF LOANS - MADE RECOMMENDATION TO LOAN DECISION MAKE AND PROVIDED SUPPORTING ARGUMENTS FOR RECOMMENDATION. MADE \$6,000 - \$7,000/MO PHIL PESO.

THE ABOVE QUALIFIES UNDER NOC CODE 1232 - LOAN OFFICER AND IS SKILL LEVEL B. SUBJECT QUALIFIES FOR TWO YEARS EXPERIENCE FOR ABOVE WORK HISTORY.

[12] Again, in her affidavit Ms. Malonzo provides greater detail of the roles she performed in these positions. Contrary to the submissions made at the hearing of this application, the CAIPS notes clearly indicate that the officer awarded the Applicant points for her work experience after June 1997. The real area of dispute is with respect to the work experience prior to that date, for which she was not awarded any points.

[13] With respect to the period prior to June 1995, the evidence in Ms. Malonzo's affidavit and the officer's notes are quite similar in terms of the duties described for that position. Accordingly, the officer's decision cannot be said to be unreasonable.

[14] There is a divergence between the officer's notes and the Applicant's affidavit with respect to the duties Ms. Malonzo performed as a Financial Accounts Analyst between 1995 and 1997. The officer's notes from the interview, as set out in paragraph 11 above, describe the duties as being equal to those of a bank teller but with more responsibility, including responsibilities for clearing cheques, general ledgers, reports and ATM responsibilities. The officer found that those duties fall under NOC 1434, Banking Clerk. The Applicant submits that the officer gave only a cursory analysis of the evidence she presented at the meeting. I am unable to agree with that position. Had the Applicant submitted documentation with the original application that detailed the duties of the roles in which she had been employed, that submission might have carried greater weight. Unfortunately, all that was before the officer were letters from employers stating the period of employment and the position title. Other than that, the only evidence of the duties associated with

these jobs was that provided by the Applicant in her original application, which is quite similar to the officer's description, and her statements made to the officer at the interview.

[15] In my view, the officer's evidence with respect to the content of the interview is to be preferred to the Applicant's because his notes were made contemporaneously with the event and his description of duties is more in keeping with the pay level of the position. Further, if the position involved the responsibilities alleged now by the Applicant, one would expect them to have been recited by her in her original application; but they are not.

[16] For these reasons, I am unable to agree with the Applicant that the decision of the officer was unreasonable.

Substituted Evaluation Methodology

[17] The Applicant submits that as she was so close to having the required points – having achieved 63 of the required 67 – the officer erred in failing to employ the substituted evaluation methodology under section 76(3) of the Regulations, which provides as follows:

76. (3) Whether or not the skilled worker has been awarded the minimum number of required points referred to in subsection (2), an officer may substitute for the criteria set out in paragraph (1)(a) their evaluation of the likelihood of the ability of the skilled worker to become economically established in Canada if the number of points awarded is not

76. (3) Si le nombre de points obtenu par un travailleur qualifié — que celui-ci obtienne ou non le nombre minimum de points visé au paragraphe (2) — ne reflète pas l'aptitude de ce travailleur qualifié à réussir son établissement économique au Canada, l'agent peut substituer son appréciation aux critères prévus à l'alinéa (1)a).

a sufficient indicator of whether the skilled worker may become economically established in Canada.

[18] The Respondent submits that the Applicant made no request to the officer to substitute his or her own evaluation and, in those circumstances, cannot now complain that the officer did not do so.

I agree with this submission which relies on the following observation from Justice Rothstein of this Court, as he then was, in *Lam v. Canada (Minister of Citizenship and Immigration)*, (1998), 152

F.T.R. 316 at para. 5 and 6:

Nothing precludes the visa officer, on his or her own motion, from proceeding under subsection 11(3) [now s. 76(3)] if he or she considers that it is warranted to do so. However, if an applicant wishes the visa officer to exercise discretion under subsection 11(3), it would seem that some form of application would be required. While there is no prescribed wording to which an applicant must adhere, I would think the application would at least have to indicate some good reasons why a units of assessment determination would not reflect the chances of successful establishment in Canada by the applicant. There was no such application here.

The applicant says he would not know that he must make an application to request subsection 11(3) consideration until he is told his application fails under the units of assessment determination, and this is a reason for a personal interview. However, this argument is misplaced. The visa officer is not required to provide a piecemeal ongoing determination and advise the applicant at each stage, even if a personal interview is conducted. The units of assessment award is the conventional way in which visa officers determine whether an immigrant visa may be issued. Subsection 11(3) is exceptional. Where an applicant has reason to believe that he or she may be successfully established in Canada, irrespective of the units of assessment determination, he or she should apply for a determination under subsection 11(3) setting forth relevant reasons. Otherwise, while the visa officer may do so on his or her own volition, there is no obligation on the visa officer to exercise a discretion under subsection 11(3). As indicated, there was no application by the

applicant for the exercise of discretion by the visa officer under subsection 11(3) in this case.

[19] Accordingly, the officer cannot be faulted for failing to consider a substituted evaluation mechanism when none was requested.

Adequacy of Reasons

[20] It was submitted that the Respondent breached its duty of fairness by providing a decision which was a short letter that did not include the CAIPS notes. In my view, the Respondent's submission on this point is correct: if there was any unfairness here, it was corrected when the Respondent provided the certified tribunal record to the Court and parties following the filing of this application for leave and judicial review.

Conclusion

[21] For all of these reasons this application is dismissed. No question was proposed by either party for certification and, in my view, there is none.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application is dismissed; and
2. No question is certified.

“Russel W. Zinn”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4843-07

STYLE OF CAUSE: NORRY ANN MALONZO v.
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

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**REASONS FOR JUDGMENT
AND JUDGMENT:** ZINN J.

DATED: September 10, 2008

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