

Federal Court



Cour fédérale

Date: 20090610

Docket: IMM-4356-08

Citation: 2009 FC 609

Ottawa, Ontario, June 10, 2009

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

JOSE CABATU ESPINOSA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Jose Cabatu Espinosa, a citizen of the Philippines, applied to become a permanent resident of Canada as a skilled worker. A visa officer in Manila assessed Mr. Espinosa's application under the *Immigration and Refugee Protection Regulations*, SOR/2002-227, and granted him 66 points, one point short of the threshold for success. Accordingly, Mr. Espinosa's application was denied.

[2] Mr. Espinosa argues that the officer's assessment was unreasonable, and that the officer wrongly failed to exercise his discretion to grant Mr. Espinosa's application even though he was one point short.

I. The Officer's Decision

[3] In a letter accompanying his application, Mr. Espinosa suggested that he ought to be awarded 9 points in the “adaptability” category. This suggestion was based on two facts: first, that Mr. Espinosa’s spouse’s parents and two sisters live in Canada and are Canadian citizens; and second, that his spouse had completed a total of 14 years of full-time education. Mr. Espinosa proposed that he be awarded 5 points for the former and 4 points for the latter.

[4] The officer granted Mr. Espinosa 8 points for adaptability – 5 for his family connections in Canada and 3 for his spouse’s education. Had he been awarded the points he believed he deserved, Mr. Espinosa would have succeeded on his application.

[5] The officer’s notes reveal that he considered whether to exercise his discretion in Mr. Espinosa’s favour, but decided it would be inappropriate to do so.

II. The Statutory Framework

(a) Adaptability

[6] Under the Regulations, an applicant for permanent residence is entitled to be awarded 4 points for adaptability if his or her spouse would have been awarded 20 or 22 points in the “education” category if the spouse were applying directly as a skilled worker (s. 83(2)(b) – provisions cited are set out in Annex “A”).

[7] An applicant is entitled to 20 points for education if he or she has a two-year post-secondary educational credential or bachelor's degree, and has completed at least 14 years of full-time or full-time equivalent studies (s. 78(2)(d)). An applicant is entitled to 22 points if he or she has a three-year post-secondary educational credential or bachelor's degree, and has completed at least 15 years of full-time or full-time equivalent studies (s. 78(2)(e)).

(b) Discretion

[8] Under s. 76(3) of the Regulations, where an applicant falls short of the required number of points, an officer can substitute his or her own assessment of an applicant's likelihood of becoming economically established in Canada, in place of the strict criteria and point allocations prescribed by the Regulations. The officer may grant the application if "the number of points awarded is not a sufficient indicator of whether the skilled worker may become economically established in Canada".

III. Was the Officer's Adaptability Assessment Unreasonable?

[9] To be reasonable, a decision must be justified, transparent and intelligible, and fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law":

Dunsmuir v. New Brunswick, 2008 SCC 9, at para. 47.

[10] The evidence before the officer showed that Mr. Espinosa's spouse had completed secondary school (10 years of study), a two-year college program leading to a medical secretary diploma, and a further two years of study at Centro Escolar University. The latter period of study led to her recognition as an "Associate in Arts (Pre-Dentistry)" and entitled her to receive a

“Certificate of Eligibility for Admission into the Dental Course”. Thus, it is clear that Mr. Espinosa’s spouse had completed 14 years of full-time study.

[11] The Minister argues that the highest educational credential obtained by Mr. Espinosa’s spouse was her medical secretary diploma. Her further two years of study did not lead to an additional educational credential and, therefore, should not be considered in the calculation of the educational points in her favour. The Minister relies on *Bhuiya v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 878. There, Justice Anne Mactavish concluded that years of study completed after obtaining a particular educational credential (*i.e.*, a master’s degree) could not be counted toward the total number of years of full-time study. Therefore, in Mr. Espinosa’s spouse’s case, the two years she spent at university would not count as full-time studies if they did not lead to an educational credential. Under this approach, she would have been entitled only to 12 educational points (s. 78(2)(b)), and Mr. Espinosa, in turn, would only be entitled to a corresponding 3 adaptability points (s. 83(2)(c)).

[12] None of this kind of analysis is in the officer’s reasons; nor has the officer supplied an affidavit to explain his adaptability assessment.

[13] Mr. Espinosa argues, contrary to the conclusion in *Bhuiya*, above, that the Regulations do not stipulate that the years of full-time study must precede or lead up to the educational credential obtained by an applicant. They simply set out a dual requirement of an educational credential and a minimum number of years of full-time study. The purpose of these requirements is to ensure consistent treatment of applicants who come from various countries with different educational systems and requirements. The Regulatory Impact Assessment Statement (RIAS) accompanying the

Regulations states:

Given the range of educational and formal training systems around the world, this mechanism will serve to promote consistent standards in the assessment of education and training while still placing emphasis on the essentials – a credential as well as relevant minimum levels of education and formal training. (SOR/2002-227.)

[14] Mr. Espinosa also points to s. 78(4) of the Regulations as an aid to interpreting the rules for assessing educational credits. That provision states that an applicant who has a particular credential but not the required number of years of study should be “awarded the same number of points as the number of years of completed full-time or full-time equivalent studies”. This provision seems to suggest that the total number of years of full-time study should be counted, not just the years preceding the grant of a certificate or diploma.

[15] In my view, the interpretation of these provisions should await a case where they are squarely before the Court. For present purposes, I simply cannot find on the record before me a basis for concluding that the officer’s decision was justified, transparent or intelligible. Nor can I conclude that the decision falls within a range of acceptable outcomes.

IV. Did the Officer Wrongly Fail to Exercise his Discretion in Mr. Espinosa’s Favour?

[16] Given my conclusion on the first issue, it is unnecessary for me to give a definitive answer to the second. However, in the event that it becomes relevant on the reassessment of Mr. Espinosa’s application, I would note that the officer appears to have failed to consider the settlement funds that Mr. Espinosa has accumulated (\$270,670.00), his family connections in Canada and his language skills, in concluding that it would be inappropriate to grant his application.

[17] These factors are relevant to Mr. Espinosa's capacity to become economically established in Canada and should inform the exercise of discretion under s. 76(3).

V. Conclusion and Disposition

[18] In my view, the officer's assessment of Mr. Espinosa's adaptability does not meet the standard of reasonableness stipulated by the Supreme Court of Canada in *Dunsmuir*, above. Accordingly, I must allow this application for judicial review and order a re-assessment of Mr. Espinosa's application by a different officer. Given the manner in which I have decided the issues, no question of general importance arises.

JUDGMENT

THIS COURT'S JUDGMENT IS that:

1. The application for judicial review is allowed.
2. Mr. Espinosa's application shall be re-assessed by a different officer.

“James W. O’Reilly”

Judge

Annex "A"

*Immigration and Refugee Protection Regulations, SOR/2002-227**Règlements sur l'immigration et la protection des réfugiés, DORS/2002-227*Circumstances for officer's substituted evaluation

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

Education (25 points)

78(2) A maximum of 25 points shall be awarded for a skilled worker's education as follows:

...

(d) 20 points for

(i) a two-year post-secondary educational credential, other than a university educational credential, and a total of at least 14 years of completed full-time or full-time equivalent studies, or

(ii) a two-year university educational credential at the bachelor's level and a total of at least 14 years of completed full-time or full-time equivalent studies;

(e) 22 points for

(i) a three-year post-secondary educational credential, other than a university educational credential, and a total of at least 15 years of completed full-time or full-time equivalent studies, or

(ii) two or more university educational credentials at the bachelor's level and a

Substitution de l'appréciation de l'agent à la grille

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).

Études (25 points)

78(2) Un maximum de 25 points d'appréciation sont attribués pour les études du travailleur qualifié selon la grille suivante :

[...]

d) 20 points, si, selon le cas :

i) il a obtenu un diplôme postsecondaire — autre qu'un diplôme universitaire — nécessitant deux années d'études et a accumulé un total de quatorze années d'études à temps plein complètes ou l'équivalent temps plein,

(ii) il a obtenu un diplôme universitaire de premier cycle nécessitant deux années d'études et a accumulé un total d'au moins quatorze années d'études à temps plein complètes ou l'équivalent temps plein;

e) 22 points, si, selon le cas :

(i) il a obtenu un diplôme postsecondaire — autre qu'un diplôme universitaire — nécessitant trois années

total of at least 15 years of completed full-time or full-time equivalent studies;

...

Special circumstances

(4) For the purposes of subsection (2), if a skilled worker has an educational credential referred to in paragraph (2)(b), subparagraph (2)(c)(i) or (ii), (d)(i) or (ii) or (e)(i) or (ii) or paragraph (2)(f), but not the total number of years of full-time or full-time equivalent studies required by that paragraph or subparagraph, the skilled worker shall be awarded the same number of points as the number of years of completed full-time or full-time equivalent studies set out in the paragraph or subparagraph.

Educational credentials of spouse or common-law partner

83(2) For the purposes of paragraph (1)(a), an officer shall evaluate the educational credentials of a skilled worker's accompanying spouse or accompanying common-law partner as if the spouse or common-law partner were a skilled worker, and shall award points to the skilled worker as follows:

...

(b) for a spouse or common-law partner who would be awarded 20 or 22 points, 4 points; and

(c) for a spouse or common-law partner who would be awarded 12 or 15 points, 3 points.

d'études à temps plein et a accumulé un total de quinze années d'études à temps plein complètes ou l'équivalent temps plein,

(ii) il a obtenu au moins deux diplômes universitaires de premier cycle et a accumulé un total d'au moins quinze années d'études à temps plein complètes ou l'équivalent temps plein;

[...]

Circonstances spéciales

(4) Pour l'application du paragraphe (2), si le travailleur qualifié est titulaire d'un diplôme visé à l'un des alinéas (2)b), des sous-alinéas (2)c)(i) et (ii), (2)d)(i) et (ii) et (2)e)(i) et (ii) ou à l'alinéa (2)f) mais n'a pas accumulé le nombre d'années d'études à temps plein ou l'équivalent temps plein exigé par l'un de ces alinéas ou sous-alinéas, il obtient le nombre de points correspondant au nombre d'années d'études à temps plein — ou leur équivalent temps plein — mentionné dans ces dispositions.

Études de l'époux ou du conjoint de fait

83(2) Pour l'application de l'alinéa (1)a), l'agent évalue les diplômes de l'époux ou du conjoint de fait qui accompagne le travailleur qualifié comme s'il s'agissait du travailleur qualifié et lui attribue des points selon la grille suivante :

[...]

b) dans le cas où l'époux ou le conjoint de fait obtiendrait 20 ou 22 points, 4 points;

c) dans le cas où l'époux ou le conjoint de fait obtiendrait 12 ou 15 points, 3 points.

FEDERAL COURT
SOLICITORS OF RECORD

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