Federal Court  Cour fédérale

Date: 20090727

Docket: IMM-4788-08

Citation: 2009 FC 765

Ottawa, Ontario, July 27, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

EILLEN NOR LUMAYNO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of a visa officer (Officer) dated October 10, 2008 (Decision) refusing the Applicant's application for permanent residence under the live-in caregiver class.

BACKGROUND

[2] The Applicant was born on March 25, 1997 and is a citizen of the Philippines. She currently has temporary residence status in Canada under a work permit issued pursuant to the Live-in Caregiver Programme.

[3] The Applicant holds a Bachelor of Science in Commerce, with a major in Business Management, from the University of St. La Salle in the Philippines. Due to the scarcity of work in the Philippines, the Applicant decided to become a Live-in Caregiver in Canada to provide some support to her family and to seek a better life for herself. She attended the Lifeline International Caregivers Training Center in the Philippines for a six month course in order to qualify for the Canadian Live-in Caregiver Programme. She was issued a diploma for completion of the caregiver course on November 26, 2002.

[4] The Applicant has an aunt in Canada who entered under the Live-in Caregiver Programme. She advised the Applicant how to proceed with her application and put her in contact with an agency. The agency assisted the Applicant with her application and helped her find employment in Canada. The Applicant applied for temporary residence in Canada and was successful in her application.

[5] The Applicant arrived on March 9, 2004 and was issued a work permit at Vancouver airport while transferring to Toronto.

[6] The Applicant had an employment contract with Mr. Fitzroy McLeish and his family. This employment had been arranged through the agency. The work permit was valid until March 9, 2005.

[7] When the Applicant arrived in Toronto, her aunt met her at the airport and took her home. The aunt called the agent to make arrangements for the Applicant to start work with the McLeish family but was told that, because it had taken so long to process the Applicant's application, the employer had decided he could not wait and had hired someone else. The Applicant stayed with her aunt in Thornhill, Ontario and, after a few days of dealing with the shock, went to the agency to discuss other job options. The agency looked for new employment and the Applicant attended five interviews, but none of them resulted in employment.

[8] The aunt was upset with the agency and did not feel they were working hard enough for the Applicant. The Applicant ceased to use the agency's services and searched for jobs in newspapers and on websites. She remained unemployed from March 2004 until November 2004. The aunt learned that the Waldman family were looking for a live-in caregiver. The Applicant had an interview with the Waldman family and began working for them in December 2004.

[9] The Applicant had some disagreements with the Waldman family about pay and eventually Mr. Waldman informed her that they could no longer employ her. She worked for them until the end of February 2005, for a total of three months.

[10] The Applicant was unemployed in March 2005 and sought the assistance of agencies, while also looking for work on her own. She eventually secured employment with Ms. Inna Levitan in July 2005 and has continued as a Live-in Caregiver for the Levitan family since that time. She has worked for them for 3.5 years and is happy with her employment.

[11] The Applicant applied for permanent residence in Canada under the Live-in Caregiver Programme in March 2008.

DECISION UNDER REVIEW

[12] The Officer concluded that the Applicant had entered Canada on March 9, 2004 but she had not submitted proof of at least 24 months employment from March 9, 2004 to March 9, 2007. The Officer contacted the authorized representative of the Applicant and requested proof of 24 months employment during that period. On October 8, 2008, the authorized representative faxed further documentation to the Officer.

[13] The Officer noted that the Applicant had not provided proof that, from March 8, 2004 to March 9, 2005, she had worked for her employer, or that remuneration had been paid. The Applicant was authorized to work for Leonard and Natalie Waldman from December 6, 2004 to

October 27, 2005 and she provided a faxed copy of her 2005 T4 statement of remuneration paid with her employer's name, indicating an employment income of $2, 541. The Applicant did not provide any proof of the actual duration of her work with the Waldmans.

[14] The Applicant had been authorized to work for Ms. Inna Levitan from July 13, 2005 to the present. The Officer did not credit the Applicant for employment after the initial three-year period, which ended on March 8, 2007.

[15] The Officer noted that the Applicant had submitted the following documents in support of working 24 months within her first three years in Canada: (1) an unsigned typed letter from Ms. Inna Levitan confirming employment since July 2005 to present; (2) copies of 2005, 2006 and 2007 T4s; (3) statements of remuneration paid with employer's name and indicating employment income. None of the information statements for tax years 2005, 2006 and 2007 provided her employer's names or the duration of her employment.

[16] The Officer concluded that the Applicant had not provided proof of at least 24 months employment within the 3-year period from March 9, 2004, her date of entry into Canada. The Officer refused the Applicant's application for permanent residence. The Officer also noted that the Applicant's temporary resident status is valid to May 5, 2010.

ISSUES

[17] The Applicant submits the following issues on this application:

1) Did the Officer err by breaking down the calculation of the time the Applicant had been engaged in qualifying work for the purposes of permanent residence as a member of the Live-in Caregiver Class to a number of days rather than a number of months?

2) Did the Officer err by determining that the Applicant had not provided sufficient evidence that she had worked as a Live-in Caregiver for the required two years?

STATUTORY PROVISIONS

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

113. (1) A foreign national becomes a member of the live-in caregiver class if	**113.** (1) L'étranger fait partie de la catégorie des aides familiaux si les exigences suivantes sont satisfaites :
(*a*) they have submitted an application to remain in Canada as a permanent resident;	*a*) il a fait une demande de séjour au Canada à titre de résident permanent;
(*b*) they are a temporary resident;	*b*) il est résident temporaire;
(*c*) they hold a work permit as a live-in caregiver;	*c*) il est titulaire d'un permis de travail à titre d'aide familial;
(*d*) they entered Canada as a live-in caregiver and, for a cumulative period of at least two years within the three years immediately following	*d*) il est entré au Canada à titre d'aide familial et, au cours des trois ans suivant son entrée, il a, durant au moins deux ans :

their entry,

(i) resided in a private household in Canada, and

(ii) provided child care, senior home support care or care of a disabled person in that household without supervision;

(*e*) they are not, and none of their family members are, the subject of an enforceable removal order or an admissibility hearing under the Act or an appeal or application for judicial review arising from such a hearing;

(*f*) they did not enter Canada as a live-in caregiver as a result of a misrepresentation concerning their education, training or experience; and

(*g*) where they intend to reside in the Province of Quebec, the competent authority of that Province is of the opinion that they meet the selection criteria of the Province.

Calculation

(2) The cumulative period referred to in paragraph (1)(*d*) may be in respect of more than one employer or household and need not be without interruption, but may not be in respect of more than one

(i) d'une part, habité dans une résidence privée au Canada,

(ii) d'autre part, fourni sans supervision, dans cette résidence, des soins à domicile à un enfant ou à une personne âgée ou handicapée;

e) ni lui ni les membres de sa famille ne font l'objet d'une mesure de renvoi exécutoire ou d'une enquête aux termes de la Loi, ni d'un appel ou d'une demande de contrôle judiciaire à la suite d'une telle enquête;

f) son entrée au Canada en qualité d'aide familial ne résulte pas de fausses déclarations portant sur ses études, sa formation ou son expérience;

g) dans le cas où l'étranger cherche à s'établir dans la province de Québec, les autorités compétentes de cette province sont d'avis qu'il répond aux critères de sélection de celle-ci.

Calcul

(2) Les deux ans visés à l'alinéa (1)*d*) peuvent être passés au service de plus d'un employeur ou dans plus d'une résidence dès lors qu'ils ne le sont pas simultanément.

employer or household at a time.

199. A foreign national may apply for a work permit after entering Canada if they

199. L’étranger peut faire une demande de permis de travail après son entrée au Canada dans les cas suivants :

(*a*) hold a work permit;

a) il détient un permis de travail;

(*b*) are working in Canada under the authority of section 186 and are not a business visitor within the meaning of section 187;

b) il travaille au Canada au titre de l’article 186 et n’est pas un visiteur commercial au sens de l’article 187;

(*c*) hold a study permit;

c) il détient un permis d’études;

(*d*) hold a temporary resident permit issued under subsection 24(1) of the Act that is valid for at least six months;

d) il détient, aux termes du paragraphe 24(1) de la Loi, un permis de séjour temporaire qui est valide pour au moins six mois;

(*e*) are a family member of a person described in any of paragraphs (*a*) to (*d*);

e) il est membre de la famille d’une personne visée à l’un des alinéas *a*) à *d*);

(*f*) are in a situation described in section 206 or 207;

f) il se trouve dans la situation visée aux articles 206 ou 207;

(*g*) applied for a work permit before entering Canada and the application was approved in writing but they have not been issued the permit;

g) sa demande de permis de travail présentée avant son entrée au Canada a été approuvée par écrit, mais le permis ne lui a pas encore été délivré;

(*h*) are applying as a trader or investor, intra-company transferee or professional, as described in Section B, C or D

h) il demande à travailler à titre de négociant ou d’investisseur, de personne mutée à l’intérieur d’une

of Annex 1603 of the Agreement, within the meaning of subsection 2(1) of the *North American Free Trade Agreement Implementation Act*, and their country of citizenship — being a country party to that Agreement — grants to Canadian citizens who submit a similar application within that country treatment equivalent to that accorded by Canada to citizens of that country who submit an application within Canada, including treatment in respect of an authorization for multiple entries based on a single application; or

société ou de professionnel, selon la description qui en est donnée respectivement aux sections B, C et D de l'annexe 1603 de l'Accord, au sens du paragraphe 2(1) de la *Loi de mise en oeuvre de l'Accord de libre-échange nord-américain*, et son pays de citoyenneté — partie à l'Accord — accorde aux citoyens canadiens qui présentent dans ce pays une demande du même genre un traitement équivalent à celui qu'accorde le Canada aux citoyens de ce pays qui présentent, au Canada, une telle demande, notamment le traitement d'une autorisation d'entrées multiples fondée sur une seule demande;

(*i*) hold a written statement from the Department of Foreign Affairs and International Trade stating that it has no objection to the foreign national working at a foreign mission in Canada.

i) il détient une déclaration écrite du ministère des Affaires étrangères et du Commerce international qui confirme que celui-ci n'a aucune objection à ce qu'il travaille à une mission étrangère au Canada.

200. (1) Subject to subsections (2) and (3), an officer shall issue a work permit to a foreign national if, following an examination, it is established that

200. (1) Sous réserve des paragraphes (2) et (3), l'agent délivre un permis de travail à l'étranger si, à l'issue d'un contrôle, les éléments suivants sont établis :

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

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

(*b*) the foreign national will leave Canada by the end of the

b) il quittera le Canada à la fin de la période de séjour qui lui

period authorized for their stay under Division 2 of Part 9;

est applicable au titre de la section 2 de la partie 9;

(*c*) the foreign national

c) il se trouve dans l'une des situations suivantes :

(i) is described in section 206, 207 or 208,

(i) il est visé par les articles 206, 207 ou 208,

(ii) intends to perform work described in section 204 or 205, or

(ii) il entend exercer un travail visé aux articles 204 ou 205,

(iii) has been offered employment and an officer has determined under section 203 that the offer is genuine and that the employment is likely to result in a neutral or positive effect on the labour market in Canada; and

(iii) il s'est vu présenter une offre d'emploi et l'agent a, en application de l'article 203, conclu que cette offre est authentique et que l'exécution du travail par l'étranger est susceptible d'avoir des effets positifs ou neutres sur le marché du travail canadien;

(*d*) [Repealed, SOR/2004-167, s. 56]

d) [Abrogé, DORS/2004-167, art. 56]

(*e*) the requirements of section 30 are met.

e) il satisfait aux exigences prévues à l'article 30.

(2) Paragraph (1)(*b*) does not apply to a foreign national who satisfies the criteria set out in section 206 or paragraph 207(*c*) or (*d*).

(2) L'alinéa (1)*b*) ne s'applique pas à l'étranger qui satisfait aux exigences prévues à l'article 206 ou aux alinéas 207*c*) ou *d*).

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

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

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

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;

(*b*) in the case of a foreign national who intends to work in the Province of Quebec and does not hold a *Certificat d'acceptation du Québec*, a determination under section 203 is required and the laws of that Province require that the foreign national hold a *Certificat d'acceptation du Québec*;

b) l'étranger qui cherche à travailler dans la province de Québec ne détient pas le certificat d'acceptation qu'exige la législation de cette province et est assujetti à la décision prévue à l'article 203;

(*c*) the specific work that the foreign national intends to perform is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute, unless all or almost all of the workers involved in the labour dispute are not Canadian citizens or permanent residents and the hiring of workers to replace the workers involved in the labour dispute is not prohibited by the Canadian law applicable in the province where the workers involved in the labour dispute are employed;

c) le travail spécifique pour lequel l'étranger demande le permis est susceptible de nuire au règlement de tout conflit de travail en cours ou à l'emploi de toute personne touchée par ce conflit, à moins que la totalité ou la quasi-totalité des salariés touchés par le conflit de travail ne soient ni des citoyens canadiens ni des résidents permanents et que l'embauche de salariés pour les remplacer ne soit pas interdite par le droit canadien applicable dans la province où travaillent les salariés visés;

(*d*) the foreign national seeks to enter Canada as a live-in caregiver and the foreign national does not meet the requirements of section 112; or

d) l'étranger cherche à entrer au Canada et à faire partie de la catégorie des aides familiaux, à moins qu'il ne se conforme à l'article 112;

(*e*) the foreign national has engaged in unauthorized study or work in Canada or has failed to comply with a

e) il a poursuivi des études ou exercé un emploi au Canada sans autorisation ou permis ou a enfreint les conditions de

condition of a previous permit or authorization unless	l'autorisation ou du permis qui lui a été délivré, sauf dans les cas suivants :
(i) a period of six months has elapsed since the cessation of the unauthorized work or study or failure to comply with a condition,	(i) une période de six mois s'est écoulée depuis les faits reprochés,
(ii) the study or work was unauthorized by reason only that the foreign national did not comply with conditions imposed under paragraph 185(*a*), any of subparagraphs 185(*b*)(i) to (iii) or paragraph 185(*c*);	(ii) ses études ou son travail n'ont pas été autorisés pour la seule raison que les conditions visées à l'alinéa 185*a*), aux sous-alinéas 185*b*)(i) à (iii) ou à l'alinéa 185*c*) n'ont pas été respectées,
(iii) section 206 applies to them; or	(iii) il est visé par l'article 206,
(iv) the foreign national was subsequently issued a temporary resident permit under subsection 24(1) of the Act.	(iv) il s'est subséquemment vu délivrer un permis de séjour temporaire au titre du paragraphe 24(1) de la Loi.

STANDARD OF REVIEW

[19] The standard of review for decisions of a visa officer has, prior to *Dunsmuir*, been held to be reasonableness *simpliciter*: *Castro v. Canada (Minister of Citizenship and Immigration)* 2005 FC 659 at paragraph 6 and *Ram v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 855. However, when a visa officer refuses a work permit solely on an issue of statutory interpretation, the standard of review is correctness: *Singh v. Canada (Minister of Citizenship and*

Immigration) 2006 FC 684 at paragraph 8 and *Hamid v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1632 at paragraph 4.

[20] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review": *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[21] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[22] Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to the second issue raised by the Applicant to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph

47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[23] The first issue raises matters of statutory interpretation, which I have reviewed using a standard of correctness (see: *Canada (Canadian Food Inspection Agency) v. Porcherie des Cèdres Inc.*, [2005] F.C.J. No. 273 (F.C.A.)) as well as the application of the law to the facts of this case, which I have reviewed on a standard of reasonableness. See: *Baldrey v. H & R Transport Ltd.*, [2005] F.C.J. No. 729 (F.C.A.) and *Herrada v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1004.

ARGUMENTS

The Applicant

Days vs. Months

[24] The Applicant submits that the Officer erred by breaking down her work experience as a Live-in Caregiver to days rather than months. Specifically, the Officer developed a system of calculation that combined months and days.

[25] The Applicant points out that she accumulated 24 months of employment as a Live-in Caregiver in the three years following her arrival in Canada. She says that she accumulated the following months of work:

1) 2004: December

2) 2005: January, February, July –December

3) 2006: January-December

4) 2007: January-March

[26] The Applicant notes that, notwithstanding the 24 months of work, the Officer engaged in a calculation of the number of days worked by the Applicant within months when she did not work for the full month. The Applicant says there is no indication that the qualifying work experience of a Live-in Caregiver should be counted in terms of days. The Regulations relating to the requirement of two years of work experience do not break down the requirement of experience into days. The Applicant contends that the two-year requirement was not intended by Parliament to be a calculation of a specific number of days. If it had been, the legislation would have made this clear.

[27] The Applicant cites and relies upon the following from the Citizenship and Immigration (CIC) Manual *IP4: Processing Live-in Caregivers in Canada* (Manual):

> The two-year period does not include any absence from Canada, periods of unemployment, part-time work, sickness or maternity leave. However, allowable vacation leave, as outlined in the provincial and territorial employment standards legislation, will be counted as part of the two years.

[28] In the alternative, the Applicant says that, if the Officer was required to undertake a calculation of the days worked by the Applicant, the Officer did not make the correct calculation and it is unclear how the Officer conducted his calculation. She says there is no indication that the Officer considered days of rest or vacation time; therefore, the Officer committed a reviewable error when calculating the Applicant's work experience.

Evidence

[29] The Applicant also submits that it is unclear if the Officer thought that insufficient evidence had been provided or that the work experience claimed was insufficient to meet the requirement of the Regulations. Regardless, the Applicant says that she met the requirement of the two years of work experience and provided sufficient evidence in support.

[30] The Applicant notes that, when her permanent residence application was submitted, the requirements for proof of employment expected by CIC were less stringent and provided her with options as to what documentation to provide to establish her work experience. She says that the manual in use at the time of her application for permanent residence provided that she: complete the application forms; include the history of her work experience in Canada and all of the work permits that she held while in Canada; and provide her ongoing contract with her current employer and her Income Tax Return information for 2005, 2006 and 2007.

[31] In October 2008, the Applicant was contacted by her representative and, following a telephone conversation, she provided T4s for 2005, 2006 and 2007, as well as reference letters from her current employer. The T4s listed the employer, as is typically the case.

[32] Notwithstanding the additional information, the Applicant received a refusal letter on October 10, 2008. Counsel for the Applicant then submitted further information to try and demonstrate that the Applicant had completed 24 months of employment. The Applicant set out the required two years of work experience, including a letter from the Waldman family. Applicant's counsel requested that the Decision be reconsidered. However, the Applicant was required to file an Application for Leave and Judicial Review prior to any reconsideration.

[33] The Applicant insists that she submitted the evidence necessary to demonstrate that she meets the requirements of employment as a Live-in Caregiver.

[34] The Applicant also points out that in the manual, as well as in the forms provided to applicants for permanent residence under the Live-in Caregiver Class, there is no indication that a strict count of days will be applied to the assessment of qualifying work experience. All documentation refers specifically to either years or months, but never days.

The Respondent

[35] The Respondent notes that the Applicant claims she worked for the Levitan family for six months in 2005, with her wages working out to $180.59 a week. This is well below minimum wage for full-time employment. The Levitan family paid her $14,901.90 or $287.57 a week in 2006. The Respondent says that the Applicant has not explained this situation and stresses that part-time work cannot be included in the 24 months of required employment. In addition, the Levitan family

contract involves caring for children of 15 and 17 years of age and it has not been explained why children of that age would require childcare.

Decision Not in Error

[36] The Respondent submits that the Applicant's application for permanent residence was refused due to the lack of evidence to prove her completion of 24 months of cumulative employment within three years of her entry into Canada. The calculation of days was only mentioned after the refusal, when the Officer reviewed the new submissions of Applicant's counsel, and concluded that her Decision should be maintained.

[37] The Respondent says that the Applicant has not identified any authority for a prohibition on counting the work periods in terms of days. The Officer could not have counted the work period in terms of years because the work experience would have been expressed in fractions of years. The onus was on the Applicant to provide documentation which showed her exact days of work, but the Applicant failed to provide any records of employment or letters from her employers indicating a start or an end date. The Applicant is unhappy with how she was assessed but has no one to blame but herself, having failed to provide the documentation that is required by the processing manual to prove her periods of employment.

[38] The Respondent also submits that, even if the Officer had counted the Applicant's employment in terms of months, she would not have met the 24-month requirement because she

was unemployed in excess of 12 months in that three-year period. The Applicant was unemployed from March 9, 2004 until November 30, 2004, which indicates eight months and 2/3 of a month unemployed. The Applicant also states that she was unemployed for March-June of 2005, which is four months. She began working in July 2005, but did not say on which date. Therefore, her total unemployment in the relevant 36 months is at least 12 and 2/3 months.

[39] The Respondent submits that the Act and the Regulations do not provide any discretion to the Officer to waive the requirement of 24 months of work in the relevant 36-month period. The Applicant may be close to the 24 months, but this is not sufficient: *Laluna v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 271 (F.C.T.D.).

[40] The Respondent also points out that the Applicant's work from December 2004 to February 2005 was described as housekeeping, ironing, walking the employer's dog and making meals. This does not fit within the statutory definition of a Live-in Caregiver. Therefore, the Officer was very generous (probably by oversight) in awarding the Applicant any credit for that period of employment at all. Without this employment the Applicant has only 20 months of work experience in the 36-month period.

[41] The Respondent also submits that the Applicant clearly provided insufficient evidence of her 24 months of employment. The following documents must be provided under section 9.5 of the manual:

> **9.5. Acceptable evidence of two years' employment**
> Evidence must include:

> • a letter from the current employer showing the start date and confirming the applicant's status as being currently employed;
> • record of earnings (ROE): under the *Employment Insurance Regulations*, an employer must complete an ROE after every interruption of earnings due to termination of contract, illness or injury. Applicants should have ROEs for each previous job, but will not have one for their current job. The local HRCC may assist if employees have trouble obtaining ROEs;
> • a statement of earnings showing hours worked and deductions made by employer;
> • a record of wages and deductions sent to the Canada Customs and Revenue Agency; if they are still employed with the same employer and any of the above documents are not available, they may provide a statutory declaration stating terms and conditions of their most recent employment.
>
> **Note:** The two-year period does not include any absence from Canada, periods of unemployment, part-time work, sickness or maternity leave. However, allowable vacation leave, as outlined in the provincial and territorial employment standards legislation, will be counted as part of the two years.
>
> Live-in caregivers have the right to be covered under workers' compensation, but this period of unemployment is not included in the required two-year work record.

[42] The Applicant did not provide all of the required information or comply with the instructions. The Respondent also disagrees with the Applicant's argument that the current requirements should not apply. The document requirements were changed on November 30, 2007, four months before the Applicant submitted her application. There was no reason why she or her counsel should not have been aware of the change.

[43] The Respondent says there is no dispute that the updated section 9.5 of the manual applies in this case. The Applicant failed to provide a ROE from her previous employer, the Waldmans, which would have evidenced her start and end date of employment. There is no indication in the Applicant's affidavit that she even requested a ROE from the Waldmans, or that she approached the local HRCC to assist her in obtaining a ROE from the Waldmans.

[44] The Respondent notes that the Applicant provided T4 tax documents and tax returns to support her permanent residence application which showed her wages and deductions. However, she did not provide any statement of earnings indicating the number of hours worked and/or the dates upon which those hours were worked.

[45] The Respondent also points to the fact that the Applicant did not provide an employment contract outlining the terms of employment for the period from July 2005 to March 28, 2008. Nor did she provide any documentation that showed she worked as a live-in caregiver for at least two years at the time of her application for permanent residence. Such documentation is mandatory.

[46] Counsel for the Applicant never requested any further time to obtain documentation and there was no indication in counsel's pre-decision submission of October 7, 2008 that any further documentation would follow. There was also no indication that any documentation was requested from the Waldmans, or why it might have been difficult to obtain documents from the Waldmans given that the Applicant no longer resided in that home. The Respondent stresses that the onus was

on the Applicant to provide acceptable documentation and the Officer made no error in determining that she did not qualify for permanent residence.

[47] The Respondent contends that the onus was also on the Applicant to provide evidence that she performed care-giving duties in the course of her employment. The Respondent relies upon the *Bondoc v. Canada (Minister of Citizenship and Immigration)* 2008 FC 842 case at paragraphs16 and 19:

> **16** …The visa officer has the responsibility to assess the intent of both parties to the contract. As to the duties envisaged by the employment contract, the visa officer committed no unreasonable error in concluding that the applicant's duties were more in line with domestic duties, rather than providing unsupervised care to the children.
>
> …
>
> **19** The evidence before the visa officer included that the potential employers had never hired a caregiver for their children, that their children did not require any special assistance due to physical or mental disabilities, and that although summer vacation was approaching the family had always managed without a caregiver in the past. There is no evidence supporting a sudden need of special assistance. Moreover, the applicant's proposed work schedule was such that she would only be regularly responsible for supervising the children for one hour a day from 8:00am to 9:00am. In light of the evidence before the officer, the Court is satisfied that the impugned decision is reasonable.

The Respondent submits that the same principles should apply to any assessment of past performed duties.

[48] The Respondent also reminds the Court of the limited discretion of an officer to grant permanent residence where an applicant cannot establish a minimum of two years' work as a live-in caregiver. The Respondent cites paragraphs 11-13 of *Laluna*:

> **11** The application for permanent residence was refused on the ground that the applicant had not satisfied the requirements set forth in the Act and in the Immigration Regulations[2] (Regulations) concerning the length of time she was employed as a live-in caregiver since her admission to Canada.
>
> **12** The purpose of the Live-in Caregiver Program was emphasized by Jerome A.C.J., in the Turingan v. Minister of Employment and Immigration[3] wherein he stated:
> [...] it should be recognized that the primary purpose of the Live-in Caregiver Program is to encourage people to come to Canada to fill a void which exists in our labour market. As consideration for their commitment to work in the domestic field, the Program's participants are virtually guaranteed permanent residence status provided that they work the required 24 month period. The immigration officer, therefore, has limited discretion to refuse permanent residence status once it has been determined that the participant has worked the required 24 months.[4] (emphasis added).
>
> **13** In the case at bar, contrary to the argument raised by the applicant, the Turingan[5] decision does not support the contention that the immigration officer has any discretion where the live-in caregiver does not comply with the 24 month requirement. In fact, it underlines the necessity of meeting the statutory requirement. Considering the clarity of the requirements set out in both the Act and the Regulations, I am of the view that the officer correctly applied the Regulations.

[49] The Respondent submits that the *Laluna* finding applies to the case at bar. The Officer had no discretion to grant permanent residence where the Applicant had not established the required amount of care-giving work. The Respondent also notes that the Federal Court in both *Turingan* and *Laluna* recognized a requirement of "24 months" of work, not "two years" of work. The

Respondent submits that the Federal Court has already demonstrated that the time requirement may properly be referred to as a number of months.

[50] The Respondent concludes that the Applicant did not meet the requirements of the Live-in Caregiver Class and she was properly refused permanent residence under this category.

ANALYSIS

[51] It is clear from reading the Decision that the Applicant's application for permanent residence was refused because she failed to provide the documentation required by the policy manual to establish that she had worked as a live-in caregiver for at least two years at the time of her application for permanent residence.

[52] She has raised various objections to the Decision in this application and has made several suggestions as to how her application for permanent residence should have been dealt with. None of them overcome the basic problem confronted by the Officer and which emanated from the Applicant and her failure to provide appropriate documentation.

[53] The Applicant says there was uncertainty as to how the calculation was made, and how it should be made, and that she should be given the benefit of the flexible and constructive approach that is the policy behind the live-in caregiver program. But the Applicant has declined to provide the start and end dates for her employment and appears to be of the view that the number of days that she may have worked in any particular month do not matter. She has, however, provided no

authority to support this position and she still has not explained why she will not, or cannot, provide the relevant dates.

[54] My review of the record reveals that the Officer was flexible and constructive. The Officer made very clear to the Applicant and her counsel the information that was required for the Decision. She gave them time to respond. There were no requests for more time. The information was just not provided.

[55] In addition, I do not think that the Officer could complete the calculation based upon inferences from the information that was provided. There was no explanation as to why the Applicant could not provide start and completion dates or why ROES were not forthcoming. There is no indication that she even attempted to have her employers provide these materials. In fact, the Officer attempted to make a calculation based upon the information provided after the Decision but, in the end, had to conclude that the Applicant had failed to establish that she qualified.

[56] The information provided after the Decision had been made did not assist and, in fact, the letter from the Waldmans throws into doubt whether the Applicant even performed live-in caregiver services for that family.

[57] The onus is on the Applicant to provide acceptable documentation to establish that she qualifies for permanent residence. The requirements are set out in the relevant policy manual. In

addition, the Officer made requests for information and documentation that was not produced by the Applicant.

[58] The Officer had no discretion to grant permanent residence for less than two years of live-in caregiver work. (See *Laluna*.)

[59] I have reviewed the materials that were submitted, as well as each of the Applicant's complaints about the Decision, and the process that led to the Decision. There is nothing in the record to suggest that the Decision was incorrect or unreasonable. The Applicant simply failed to provide the evidence necessary to establish that she had worked as a live-in caregiver for the required period of time.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed;

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.:	IMM-4788-08
STYLE OF CAUSE:	***EILLEN NOR LUMAYNO***
	v.
	THE MINISTER OF CITIZENSHIP AND MMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	June 4, 2009
REASONS FOR JUDGMENT:	RUSSELL J.
DATED:	July 27, 2009

WRITTEN REPRESENTATIONS BY:

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