Federal Court  Cour fédérale

Date: 20100520

Docket: IMM-3977-09

Citation: 2010 FC 553

Ottawa, Ontario, May 20, 2010

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

SOBIA NAZIR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of a visa officer's decision, dated June 8, 2009, wherein the officer found that Sonia Nazir, the Applicant, did not meet the requirements for a work permit as a live-in caregiver pursuant to section 112 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations").

I. The facts

[2] The Applicant is a 30-year old Pakistani citizen who applied for a work permit as a live-in caregiver on November 3, 2008. This employment was offered by the Applicant's brother-in-law (her sister's husband), Mr. Iqbal Muhammad Naeem, and consisted in taking care of his three children aged 9 years, 5 years and 16 months. Service Canada had previously issued a positive Labour Market Opinion on August 15, 2008.

[3] On April 6, 2009, the Applicant was interviewed at the Canadian High Commission in Islamabad. During the interview, the Applicant's linguistic ability, educational and employment history, previous student visa application, and family and career plans were discussed. At the conclusion of the interview, the visa officer asked the Applicant to provide evidence of employment of her sister and of her brother-in-law along with evidence regarding their income. The requested documents were received on April 27, 2009.

[4] The visa officer refused the application on June 7, 2009 and mailed the refusal letter to the Applicant on June 8, 2009.

II. The impugned decision

[5] The refusal letter simply stated that the Applicant did not meet the requirements of the Live-in Caregiver program because the visa officer was not satisfied that the employment offer was genuine.

[6] The Computer Assisted Immigration Processing System ("CAIPS") notes are more instructive as to the reasons behind the refusal.

[7] The visa officer was not satisfied that the Applicant's intentions were *bona fide* and temporary in nature, and that she was a genuine temporary worker in Canada. While noting that there is no legislative restriction preventing family members from offering relatives jobs as live-in caregiver, the visa officer was not convinced that the job offer was not made primarily for the purpose of facilitating the Applicant's admission in Canada.

[8] The visa officer cast doubts on the Applicant's career plans because of her educational and employment background. The Applicant has completed a Bachelor of Commerce and then a two-year textile and fashion designing program. Afterwards, the Applicant worked as an administrative officer at Hameed Educational Complex, from which position she resigned in 2005, apparently to further her education and with the intention of opening her own school in Pakistan.

[9] The Applicant then started working as a pre-school teacher in March 2006 before enrolling in an executive MBA program in November 2006. The visa officer questioned that choice in light of the Applicant's expressed intention to open her own school. In the visa officer's opinion, a Master degree in the field of education or childhood development would have been a much more logical choice, given the Applicant's desire to open a school. Furthermore, the visa officer had concerns about the fact that the Applicant was refused a study permit in June 2007 which would have enabled her to enrol in a hotel and restaurant management program. According to the visa

officer, the Applicant was unable to provide a reasonable explanation as to why she applied to such a program; in her view, this was not consistent with her plans to work as a live-in caregiver for her sister in Canada in order to save money and gain experience with young children so that she could then open her own school in Pakistan.

III. The issues

[10] This application for judicial review raises two issues:

A) Did the visa officer breach her duty of procedural fairness by failing to apprise the Applicant of her concerns?

B) Did the visa officer err by failing to properly asses the Applicant's eligibility for the live-in-caregiver program and to consider the Applicant's explanations?

IV. The analysis

[11] There is no issue between the parties as to the appropriate standard of review. Issues pertaining to natural justice and procedural fairness are reviewable under the correctness standard: *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2005] F.C.J. No. 2056 at paras. 53-54; *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 at para. 100. As to the eligibility of the Applicant to the live-in caregiver class, it is a determination that requires the application of the legal requirements to the Applicant's particular situation. As such, it is a question of mixed facts and law which attracts the reasonableness standard: *Villagonzalo v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1127, [2008] F.C.J. No. 1398 at para. 18; *Yin v. Canada (Minister of Citizenship and*

Immigration), 2001 FCT 661, [2001] F.C.J. No. 985 at para. 20; *Ouafae v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 459, [2005] F.C.J. No. 592 at para. 20.

A. *Did the Visa Officer Breach her Duty of Procedural Fairness?*

[12] Counsel for the Applicant argued that the visa officer failed to provide her with an opportunity to address the concerns relating to the job being offered. In her affidavit, the Applicant explained that the sole concern expressed by the visa officer during the interview had to do with her future employer's financial capability to hire her. The Applicant was required to provide further documents in that respect and did so. The Applicant also explained that the visa officer probed her ability to perform the job and appeared to be satisfied that she was qualified. According to her, the visa officer never expressed any concerns regarding the genuineness of the offer nor of the Applicant's intention to take up the job offered. Since she could not deal with these concerns, it is submitted that the visa officer breached the rules of natural justice.

[13] The Applicant also contended that much of the visa officer's decision making was based on the stereotyping of the Applicant because of her prior application for a student permit. She argued that the visa officer drew a negative inference from her choice not to pursue a Master's in Education. By doing so, the visa officer extended her own experience in Canada to that of a citizen of a very different country without discussing the differences in the educational systems of the two countries. This would amount to relying on extrinsic evidence that goes beyond the experience that a visa officer is entitled to rely on.

[14] I agree with counsel for the Applicant that the only appropriately introduced evidence in regard to what happened during the interview is the affidavit of the Applicant, since there was no affidavit by the visa officer attesting to the truth of the content of the CAIPS notes. In such cases, the jurisprudence is clearly to the effect that CAIPS notes entered by an officer following an interview can be part of the record but do not prove what happened during the interview. Since the Applicant filed an affidavit upon which she was not cross-examined explaining what happened during the interview, it is her version that must prevail: see *Chou v. Canada (Minister of Citizenship and Immigration)* (2000), 190 F.T.R. 78; aff'd 2001 FCA 299, [2001] F.C.J. No. 1524.

[15] A foreign national seeking to obtain a live-in caregiver work permit must satisfy the requirements listed in section 112 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "*Regulations*"). This section reads as follows:

Work permits — requirements	**Permis de travail : exigences**
112. A work permit shall not be issued to a foreign national who seeks to enter Canada as a live-in caregiver unless they	**112.** Le permis de travail ne peut être délivré à l'étranger qui cherche à entrer au Canada au titre de la catégorie des aides familiaux que si l'étranger se conforme aux exigences suivantes :
(a) applied for a work permit as a live-in caregiver before entering Canada;	a) il a fait une demande de permis de travail à titre d'aide familial avant d'entrer au Canada;
(b) have successfully completed a course of study that is	b) il a terminé avec succès des études d'un niveau équivalent à

equivalent to the successful completion of secondary school in Canada;	des études secondaires terminées avec succès au Canada;
(c) have the following training or experience, in a field or occupation related to the employment for which the work permit is sought, namely,	c) il a la formation ou l'expérience ci-après dans un domaine ou une catégorie d'emploi lié au travail pour lequel le permis de travail est demandé :
(i) successful completion of six months of full-time training in a classroom setting, or	(i) une formation à temps plein de six mois en salle de classe, terminée avec succès,
(ii) completion of one year of full-time paid employment, including at least six months of continuous employment with one employer, in such a field or occupation within the three years immediately before the day on which they submit an application for a work permit;	(ii) une année d'emploi rémunéré à temps plein — dont au moins six mois d'emploi continu auprès d'un même employeur — dans ce domaine ou cette catégorie d'emploi au cours des trois années précédant la date de présentation de la demande de permis de travail;
(d) have the ability to speak, read and listen to English or French at a level sufficient to communicate effectively in an unsupervised setting; and	d) il peut parler, lire et écouter l'anglais ou le français suffisamment pour communiquer de façon efficace dans une situation non supervisée;
(e) have an employment contract with their future employer.	e) il a conclu un contrat d'emploi avec son futur employeur.

[16] This program allows a person who has obtained such a work permit to stay in Canada afterward and apply for permanent residence if he or she has worked as a live-in caregiver for a period of at least two years within the three years immediately following their entry (s. 113 of the

Regulations). Therefore, an officer need not be convinced that applicants will be going back to their country when their work permits expire, as is the case for other types of work permit.

[17] That being said, an officer must still be convinced that the offer of employment is genuine and that the applicant is seeking to enter Canada on a temporary basis for the purpose of becoming a member of that class. While it may be true that the visa officer did not raise explicitly the genuineness of the job offer or the Applicant's real intent in taking up that job, it cannot be contended that these issues were not on her mind and were not raised during the interview. According to the Applicant's own account, she was questioned as to why she enrolled in an executive MBA program if she wanted to open her own school. The officer was also apparently perplexed by her application for a study permit that would have enabled the Applicant to study hotel and restaurant management at Humber College in Toronto, Ontario. These questions were obviously prompted by the visa officer's queries as to the real intention of the Applicant in coming to Canada, as these two courses of study do not easily tie in with the Applicant's stated purpose in applying as a live-in caregiver. The officer could obviously have asked the question more directly, but the she cannot be faulted for not having given the Applicant the opportunity to address her concerns. The fact that she was asked at the conclusion of the interview to provide additional documents regarding her employer's finances cannot be interpreted as evidence that this was the visa officer's only concern.

[18] As for the Applicant's submission that the visa officer's decision was based on a stereotype resulting from her failed application for a student permit (submitted in 2006 but refused in June

2007), it is quite simply without merit. I agree with the Respondent that the visa officer did not impose a stereotype in the manner in which she assessed this study visa. The visa officer noted the inconsistency in the Applicant's actions in applying for a hotel and restaurant program in 2007 and then claiming to have an interest in opening up a school in Pakistan. This is not a case where an officer relies on vague generalizations not grounded in the evidence. The fact that the Applicant had already applied to study in Canada was obviously a factor to be considered in assessing the intentions of the Applicant, especially since her proposed course of study had nothing to do with the Applicant's professed interest in child education and care-giving. But far from relying only on that factor, the visa officer also considered the Applicant's entire academic and work history. This was all information provided by the Applicant herself, and the visa officer in no way based her decision on extrinsic evidence.

B. *Did the Visa Officer Err by Failing to Properly Asses the Applicant's Eligibility for the Live-In-Caregiver Program and to Consider the Applicant's Explanations?*

[19] The Applicant submits that the visa officer failed to consider her explanation as to why she applied to study hotel and restaurant management and why she now wishes to work for her sister and brother in law. In the CAIPS notes, the visa officer simply stated: "FN WAS NOT ABLE TO PROVIDE A REASONABLE EXPLANATION AS TO WHY SHE APPLIED TO STUDY HOTEL & RESTAURANT MANAGEMENT PROGAM IN CDA WHILE HER PLANS ARE TO WORK AS A LIVE-IN-CAREGIVER FOR HER SISTER IN CDA, SAVE ENOUGH MONEY GAIN EXPERIENCE IN WORKING WITH HER SISTER'S YOUNG CHILDREN IN CDA RETURN & START HER OWN SCHOOL IN PAKISTAN".

[20] Visa officers assessing live-in caregiver permits have a duty to take into consideration an applicant's explanation and to explain why they reject such explanations: *Salman v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 877, [2007] F.C.J. No. 1142 at para. 13; *Villagonzalo*, above, at para. 26.

[21] According to the uncontradicted affidavit sworn by the Applicant, she applied for a study permit to take a hotel and restaurant management course in Toronto in 2006 because her goal at the time was not to open a children's facility in Pakistan but to acquire training that would make her employable in that country. She did work as a teacher from March 2006, but explained that she took that job to support herself and keep busy pending the preparation for and processing of her study permit application. She also explained that she enrolled in an MBA program in November 2006 because she was not certain about the success of her pending application to study in Canada and also because such a program of study would cohere with her recent work experience as an administrative officer in an educational complex. When her application for a study permit was rejected in June 2007, she was left with a history of administration at Hameed Educational Complex, some work experience in childcare in a primary school, and a soon to be completed background in marketing and business from Preston University in Pakistan. It is at that point in time that she formed the intention to start a school in Pakistan, on the basis of her background education and experience. Through speaking with her marketing professors, she became aware that she needed to distinguish herself from the competition in order to run a successful school. She planned to distinguish herself by demonstrating that she has worked in a western society such as Canada and so needed to gain western work experience. The relatively higher income from Canada

as a live-in-caregiver would form the financial foundation for her future educational endeavour in Pakistan.

[22] This explanation appears entirely sound and rational, yet the visa officer rejected it and boldly asserted that the Applicant was unable to provide a reasonable explanation for the reason she applied to study hotel and restaurant management program in Canada. The visa officer does not at any point explain what in her perspective would have been a reasonable answer, nor does she explain why she found the Applicant's answer unreasonable. Worse still, it appears from the Applicant's affidavit that the visa officer asked her a number of questions not reported in the CAIPS notes that are of questionable relevance (why her brother does not live with his parents in Pakistan and who shares the household expenses, why the Applicant did not know more about her sister's job in Canada, how she could take care of her ill father when travelling with him and why she was leaving him behind if he is sick, etc.).

[23] I also find troubling the visa officer's notes that she is not satisfied the Applicant's intentions are *bona fide* and temporary in nature, and that she would be a genuine temporary worker in Canada. Such a statement betrays a misunderstanding by the visa officer of the legislative scheme behind the live-in-caregiver program and the possible dual intent applicants may have. As I stated in *Ouafae*, above, at para. 32:

> As for what the officer made of the fact that the applicant's brother was her employer, which led him to believe she would not go back to Morocco, that was unfounded. Not only was it pure speculation, as there was no evidence to support such an inference, but what is more, there is nothing in the Act or

> Regulations to prevent family ties between future employer and employee. Furthermore, the caregiver program specifically provides that these individuals can apply for permanent residence afterward. A candidate with no intention of applying for permanent residence would be ineligible for the program (see point 5.2 of the manual). The manual also points out that with these individuals, it is difficult to apply the normal requirement that temporary residents will leave Canada by the end of the authorized period (8.4 of the manual). The officer's determination was therefore clearly erroneous; he quite simply disregarded the type of program involved in this case.

[24] For all of the foregoing reasons, I am therefore of the view that this application for judicial review ought to be allowed. The parties have not raised any question of general importance and none arises.

ORDER

THIS COURT ORDERS that the application for judicial review be allowed. The matter is therefore referred to a different visa officer for redetermination. No question is certified.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Max Chaudhary	FOR THE APPLICANT
Sally Thomas	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrister & Solicitor 18 Wynford Drive, Suite 707 North York, ON M3C 3S2	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT