Federal Court  Cour fédérale

Date: 20100722

Docket: IMM-5670-09

Citation: 2010 FC 764

Ottawa, Ontario, July 22, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

HONG WEI DING

Applicant

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of the decision of a visa officer at the Canadian Embassy in Beijing, China refusing the Applicant's application for permanent resident status as a member of the self-employed person class.

[2] The application for judicial review shall be dismissed for the following reasons.

[3] In 2006, the Applicant, Hong Wei Ding, made an application for a permanent resident visa under the self-employed person class. His application was based on his employment as president of a traditional Chinese medicine and massage training centre. His expressed intention was to operate a Chinese therapeutic massage clinic and training centre in Vancouver.

[4] In a letter dated August 31, 2009, the visa officer determines that the Applicant does not qualify for a permanent resident visa in the self-employed person class. The visa officer states that, based on a review of evidence in support of the application, she is not satisfied that the Applicant falls within the meaning of a self-employed person as he had not been self employed in cultural activities in the five (5) years preceding his application.

[5] Pursuant to subsection 100(1) of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (the Regulations), in order to apply under the prescribed class of self-employed person, an individual must fall within the meaning of self-employed person at subsection 88(1).

[6] Subsection 88(1) of the Regulations defines a self-employed person as follows: "self-employed person means a foreign national who has relevant experience and has the intention and ability to be self-employed in Canada and to make a significant contribution to specified economic activities in Canada". Also at subsection 88(1), in respect of a self-employed person, relevant experience includes "in respect of cultural activities, two one-year periods of experience in self-employment in cultural activities".

[7] The Applicant raises only one issue - that the visa officer erred by failing to provide reasons as to why traditional Chinese medicine is not a cultural activity under the Regulations. Nonetheless, the Applicant's arguments center on the reasons why Chinese medicine should be included in the meaning of cultural activity. Both of these issues will be addressed.

[8] The Court will not intervene as long as the visa officer's decision is reasonable and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 47*; Kim v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1291, [2008] F.C.J. No. 1644 at paragraph 18).

[9] Turning first to the determination that the Applicant's self-employment experience does not fall within the prescribed meaning of relevant experience under the *Regulations*, I am satisfied that the visa officer did not err and that traditional Chinese medicine is not a cultural activity contemplated under subsection 88(1).

[10] The Applicant argues that his business in traditional Chinese medicine is a cultural activity because Chinese medicine cannot be separated from Chinese culture and healing is an art. In my view, there is no support for such an interpretation. Even though cultural activities are not explicitly defined in the Regulations, the operations manual *OP 8 Entrepreneurs and Self-Employed* (OP 8) set out examples of cultural activities. Section 11.3 of OP 8, gives examples of self-employment that are traditionally captured in the meaning of self-employed experience in cultural activities, those include music teachers, painters, illustrators, film makers, freelance journalists,

choreographers and set designers. Also included are those with management experience in the world of arts and culture, such as theatrical or musical directors and impresarios. Section 11.4 stipulates that it is intended that the self-employed class enrich Canadian culture. It is clear that cultural activities are meant to be those as ordinarily understood to be part of the arts. There is no basis on which to conclude that experience in a Chinese therapeutic massage clinic and training centre falls within the meaning of cultural activities under the Regulations.

[11] The Respondent highlights that under the previous version of the regulations, an applicant under the self-employed category was required to show that he could make an economic or a cultural contribution (*Immigration Regulations, 1978*, S.O.R. /78-172 at s. 2.1; see the decisions in *Ying v. Canada (Minister of Citizenship and Immigration)* (1997), 41 Imm. L.R. (2d) 129; *Yang v. Canada (Minister of Employment and Immigration)* (1989), 27 F.T.R. 74). That is no longer the case under the current Regulations and the change was adopted in order to ensure that only immigrants who have been employed in cultural activities would be eligible within the class and that business immigrants with more generic business abilities meet the requirements under the other classes (*Regulatory Impact Analysis Statement*, C. Gaz. 2002. II at page 239). The Applicant's experience is clearly more in the nature of a business than a cultural activity and the regulatory change was aimed at creating a clear separation between the two.

[12] In order to be eligible for consideration under the self-employed person class, an applicant must meet the regulatory definition – this includes having the requisite relevant experience. In the

case at bar, the Applicant does not meet the definition and it was reasonable for the officer to refuse the application.

[13] It is not necessary to deal at length with the alleged error with regard to the reasons. It suffices to say that, in light of the fact that the Applicant's relevant experience was clearly not contemplated under the regulatory scheme, no further analysis was required and the reasons are sufficient and reasonable.

[14] Even though the Court is of the opinion that the application for judicial review should be dismissed, it agrees with the applicant that an affidavit filed in response to a judicial review application should not provide explanations or elaborate on reasons that are not apparent in the decision or the CAIPS notes from the Officer (*Kalra v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 941, 29 Imm. L.R. (3d) 208 at paragraph 15). Such is the case with paragraph 5 of Francesca Imperato's affidavit. The Court did not rely on this paragraph to reach its conclusion.

[15] No question for certification was proposed and none arises.

JUDGMENT

THIS COURT ORDERS that the judicial review application be dismissed. No question is certified.

"Michel Beaudry"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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