

Federal Court



Cour fédérale

Date: 20101117

Docket: IMM-494-10

Citation: 2010 FC 1113

Ottawa, Ontario, this 17th day of November 2010

Before: The Honourable Mr. Justice Pinard

BETWEEN:

Emelita DE GUZMAN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the First Secretary, Immigration, of the Canadian Embassy in Makati City, Philippines, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, by Emelita De Guzman (the “applicant”). The officer rejected the applicant’s application for permanent residence under the Federal Skilled Worker class on the basis that she did not receive the required number of points under the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the “Regulations”).

* * * * *

[2] The applicant is a citizen of the Philippines. She is the primary applicant in this application for permanent residence, and lists her husband and her three sons as dependents.

[3] The applicant has a Bachelor of Sciences in Nursing, as well as an additional diploma in Nursing, and has worked as a registered nurse since 1991. Her husband, in addition to completing secondary schooling, has a one-year diploma in automotive mechanics. Her husband attended other post-secondary institutions for a total of three years, but did not complete any diploma or certificate. Her husband has two sisters who live in Canada and are Canadian citizens.

[4] The applicant filed her application for permanent residence under the Federal Skilled Worker class in July 2004, at which time she submitted all relevant documents regarding her education and that of her husband, as well as regarding the family members in Canada. In April 2009, the Embassy requested updated information regarding these issues. The applicant provided copies of this information, which had not changed since 2004.

[5] The applicant submitted in her application that she should receive 67 points according to the Regulations, including 22 points in the category of Education, and 8 points in the category of Adaptability, on the basis of her family in Canada and her spouse's education.

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[6] The officer awarded the applicant a total of 62 points, and determined that this total was insufficient to satisfy the officer that the applicant would be able to become economically established in Canada, as the minimum requirement for admission is 67 points.

[7] The officer awarded 20 points, not 22, in the Education category (the respondent concedes that 22 points, not 20, should have been awarded to the applicant on the basis of her education, and that the officer erred with respect to this category. However, the respondent notes that this only brings the applicant's total points to 64).

[8] The officer awarded 5 points, not 8, in the Adaptability category.

* * * * *

[9] The relevant portion of the Regulations is as follows:

Definitions

78. (1) The definitions in this subsection apply in this section.

“full-time”

“full-time” means, in relation to a program of study leading to an educational credential, at least 15 hours of instruction per week during the academic year, including any period of training in the workplace that forms part of the course of instruction.

“full-time equivalent”

“full-time equivalent” means, in respect of

Définitions

78. (1) Les définitions qui suivent s'appliquent au présent article.

« équivalent temps plein »

« équivalent temps plein » Par rapport à tel nombre d'années d'études à temps plein, le nombre d'années d'études à temps partiel ou d'études accélérées qui auraient été nécessaires pour compléter des études équivalentes.

« temps plein »

« temps plein » À l'égard d'un programme

part-time or accelerated studies, the period that would have been required to complete those studies on a full-time basis.

d'études qui conduit à l'obtention d'un diplôme, correspond à quinze heures de cours par semaine pendant l'année scolaire, et comprend toute période de formation donnée en milieu de travail et faisant partie du programme.

Education (25 points)

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

- (a) 5 points for a secondary school educational credential;
- (b) 12 points for a one-year post-secondary educational credential, other than a university educational credential, and a total of at least 12 years of completed full-time or full-time equivalent studies;
- (c) 15 points for
 - (i) a one-year post-secondary educational credential, other than a university educational credential, and a total of at least 13 years of completed full-time or full-time equivalent studies, or
 - (ii) a one-year university educational credential at the bachelor's level and a total of at least 13 years of completed full-time or full-time equivalent studies;
- (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

Études (25 points)

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

- a) 5 points, s'il a obtenu un diplôme d'études secondaires;
- b) 12 points, s'il a obtenu un diplôme postsecondaire — autre qu'un diplôme universitaire — nécessitant une année d'études et a accumulé un total d'au moins douze années d'études à temps plein complètes ou l'équivalent temps plein;
- c) 15 points, si, selon le cas :
 - (i) il a obtenu un diplôme postsecondaire — autre qu'un diplôme universitaire — nécessitant une année d'études et a accumulé un total de treize années d'études à temps plein complètes ou l'équivalent temps plein,
 - (ii) il a obtenu un diplôme universitaire de premier cycle nécessitant une année d'études et a accumulé un total d'au moins treize années d'études à temps plein complètes ou l'équivalent temps plein;
- 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) 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 total of at least 15 years of completed full-time or full-time equivalent studies; and

(f) 25 points for a university educational credential at the master's or doctoral level and a total of at least 17 years of completed full-time or full-time equivalent studies.

Multiple educational achievements

(3) For the purposes of subsection (2), points

(a) shall not be awarded cumulatively on the basis of more than one single educational credential; and

(b) shall be awarded

(i) for the purposes of paragraphs (2)(a) to (d), subparagraph (2)(e)(i) and paragraph (2)(f), on the basis of the single educational credential that results in the highest number of points, and

(ii) for the purposes of subparagraph (2)(e)(ii), on the basis of the combined

(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 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;

f) 25 points, s'il a obtenu un diplôme universitaire de deuxième ou de troisième cycle et a accumulé un total d'au moins dix-sept années d'études à temps plein complètes ou l'équivalent temps plein.

Résultats

(3) Pour l'application du paragraphe (2), les points sont accumulés de la façon suivante :

a) ils ne peuvent être additionnés les uns aux autres du fait que le travailleur qualifié possède plus d'un diplôme;

b) ils sont attribués :

(i) pour l'application des alinéas (2)a) à d), du sous-alinéa (2)e)(i) et de l'alinéa (2)f), en fonction du diplôme qui procure le plus de points selon la grille,

(ii) pour l'application du sous-alinéa (2)e)(ii), en fonction de l'ensemble des

educational credentials referred to in that paragraph.

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.

[. . .]

Adaptability (10 points)

83. (1) A maximum of 10 points for adaptability shall be awarded to a skilled worker on the basis of any combination of the following elements:

(a) for the educational credentials of the skilled worker's accompanying spouse or accompanying common-law partner, 3, 4 or 5 points determined in accordance with subsection (2);

(b) for any previous period of study in Canada by the skilled worker or the skilled worker's spouse or common-law partner, 5 points;

(c) for any previous period of work in Canada by the skilled worker or the skilled worker's spouse or common-law partner, 5 points;

diplômes visés à ce sous-alinéa.

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.

[. . .]

Capacité d'adaptation (10 points)

83. (1) Un maximum de 10 points d'appréciation sont attribués au travailleur qualifié au titre de la capacité d'adaptation pour toute combinaison des éléments ci-après, selon le nombre indiqué :

a) pour les diplômes de l'époux ou du conjoint de fait, 3, 4 ou 5 points conformément au paragraphe (2);

b) pour des études antérieures faites par le travailleur qualifié ou son époux ou conjoint de fait au Canada, 5 points;

c) pour du travail antérieur effectué par le travailleur qualifié ou son époux ou conjoint de fait au Canada, 5 points;

d) pour la présence au Canada de l'une ou l'autre des personnes visées au paragraphe (5), 5 points;

(d) for being related to a person living in Canada who is described in subsection (5), 5 points; and

(e) for being awarded points for arranged employment in Canada under subsection 82(2), 5 points.

Educational credentials of spouse or common-law partner

(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:

(a) for a spouse or common-law partner who would be awarded 25 points, 5 points;

(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.

Family relationships in Canada

(5) For the purposes of paragraph (1)(d), a skilled worker shall be awarded 5 points if

(a) the skilled worker or the skilled worker's accompanying spouse or accompanying common-law partner is related by blood, marriage, common-law partnership or adoption to a person who is a Canadian citizen or permanent resident living in Canada and who is

[...]

e) pour avoir obtenu des points pour un emploi réservé au Canada en vertu du paragraphe 82(2), 5 points.

Études de l'époux ou du conjoint de fait

(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 :

a) dans le cas où l'époux ou le conjoint de fait obtiendrait 25 points, 5 points;

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.

Parenté au Canada

(5) Pour l'application de l'alinéa (1)d), le travailleur qualifié obtient 5 points dans les cas suivants :

a) l'une des personnes ci-après qui est un citoyen canadien ou un résident permanent et qui vit au Canada lui est unie par les liens du sang ou de l'adoption ou par mariage ou union de fait ou, dans le cas où il l'accompagne, est ainsi unie à son époux ou conjoint de fait :

[...]

(v) a child of their father or mother, (v) un enfant de l'un de leurs parents,
[...]
[...]

* * * * *

[10] At the hearing before me, counsel for both parties agreed to raise only one issue, namely: Did the officer err in law in failing to award eight points in the Adaptability category when the applicant has qualifying relatives living in Canada and the applicant's husband holds a 1-year diploma and a total of 15 years of education?

[11] The respondent acknowledges that the applicant rightly received five points on the basis of her family members in Canada.

[12] The applicant submits that she should have received three additional points in this category on the basis of her husband's education. Both sides are in agreement as to the method of calculating the points awarded for a spouse's education under the Adaptability category. According to section 83 of the Regulations, the officer calculates the number of points the spouse would have received for his or her education under section 78 of the Regulations if the spouse had been the primary applicant. A corresponding number of points is then awarded to the primary applicant under section 83 on the basis of this calculation.

[13] The parties disagree on the calculation of the husband's years of education. The applicant submits that the husband has a total of 15 years of education, including the one-year diploma in

automotive mechanics. According to the Regulations, if he were the primary applicant, under subparagraph 78(2)(c)(i), he would be awarded 15 points. Therefore, per paragraph 83(2)(c), the applicant would receive three points for her husband's education.

[14] The respondent argues that the husband does not have 15 years of education. On the applicant's application forms (page 85 of the Tribunal Record), the husband is shown to have completed 10 years of elementary and secondary schooling. He also completed a one-year diploma in automotive mechanics. However, the respondent notes that the husband's two years at Far Eastern University (1974-1976) and his one year at University of Manila (1976-1977) did not result in completed studies, and that therefore these years do not count towards his total years of education and are not relevant to this application. I agree.

[15] Subsection 78(1) of the Regulations defines "full-time studies" as being "in relation to a program of study leading to an educational credential"; the corresponding French version is more precise: "À l'égard d'un programme d'études qui conduit à l'obtention d'un diplôme". As the husband in the present case did not obtain an educational credential from these years of study, namely 1974-1976 and 1976-1977, they should not be considered.

[16] In *Roberts v. Minister of Citizenship and Immigration*, 2009 FC 518, Justice Max M. Teitelbaum stated:

[18] Even if it had been before the Officer, the extra year of A Level study would not be relevant to the assessment of education credentials. In *Bhuiya v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 878, [2008] F.C.J. No. 1110, Justice Anne Mactavish explained that "the years of education requirement is

clearly intended to establish minimum standards for each type of degree” and the fact that an applicant may have spent one additional year in school after obtaining their degree “does not turn a 16 year Master’s degree into a 17 year Master’s degree”. That same logic applies here: the fact that the Applicant spent an extra year in school after obtaining her O Levels does not turn an 11-year diploma into a 12-year one.

(See also *MD. Ali Khan v. The Minister of Citizenship and Immigration*, 2010 FC 983, and *MD. Khairul Kabir v. The Minister of Citizenship and Immigration*, 2010 FC 995.)

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[17] For the reasons set out above, this application for judicial review is dismissed.

[18] The applicant has suggested the following question for certification:

In assessing the points for education under section 78 of the *Immigration and Refugee Protection Regulations*, does the visa office award points for years of full-time or full-time equivalent studies that did not result in the issuance of an academic credential and were not part of the progression towards the highest academic credential?

[19] The question is whether the question is a “serious question of general importance” as required by paragraph 74(d) of the *Immigration and Refugee Protection Act*. The respondent argues that it is not, as the Regulations answer the question, in that the definition of “full-time [education]” set out in subsection 78(1) qualifies it as being “in relation to a program of study leading to an educational credential”. In French, « temps plein » is defined as being « [à] l’égard d’un programme d’études qui conduit à l’obtention d’un diplôme ».

[20] The respondent further notes that subparagraph 78(3)(b)(i) specifies that points will be awarded “on the basis of the single educational credential that results in the highest number of points”, and argues that when read together with the definition of “full-time”, it is clear that Parliament’s intention was that years of study that did not lead to an educational credential were not to be counted. The focus in subparagraph 78(3)(b)(i) on the educational credential itself makes this clear.

[21] I am convinced by the respondent’s argument. The applicant cites several cases that she says demonstrate divergence in the jurisprudence on this point. However, *McLachlan v. Minister of Citizenship and Immigration*, 2009 FC 975, dealt with the interpretation of subsection 78(4), which was not raised in this case, and the two recent cases decided by Madam Justice Elizabeth Heneghan, *Khan v. Minister of Citizenship and Immigration*, 2010 FC 983, and *Kabir v. Minister of Citizenship and Immigration*, 2010 FC 995, dealt with situations in which the applicants were attempting to count the years from two Masters degrees. In all of these cases, the years of education, whether in excess of the norm or not, led to an educational credential. The applicant did not point to any cases where the years of education did not lead to any educational credential.

[22] As the applicant has not identified any diverging jurisprudence on the issue, and the definitions in the Regulations appear to provide the answer, the applicant’s question does not meet the threshold of a “serious question of general importance”.

[23] No question is certified.

JUDGMENT

The application for judicial review of a decision of the First Secretary, Immigration, of the Canadian Embassy in Makati City, Philippines, rejecting the applicant's application for permanent residence under the Federal Skilled Worker class, is dismissed.

“Yvon Pinard”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-494-10

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

DATED: November 17, 2010

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