Federal Court  Cour fédérale

Date: 20110420

Docket: IMM-3303-10

Citation: 2011 FC 461

Ottawa, Ontario, April 20, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

BABAK PIRZADEH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks to set aside a decision dated March 4, 2010 of a Visa Officer at the Canadian Embassy in Damascus, Syria, denying the applicant's application for a Permanent Resident Visa (PRV) under the Federal Skilled Worker (FSW) class. The visa request was denied on the basis that the Visa Officer was not satisfied that the applicant was able to perform the duties listed in the arranged offer of employment nor that he met the minimum requirements of the job. The standard of review of this decision is reasonableness, which can only be assessed if the decision is first situated in the legislative and regulatory context in which it is taken.

Facts

[2] The applicant is a citizen of Iran. In July 2007 he submitted an FSW application to the Canadian Embassy in Damascus. Under the *Immigration and Refugee Protection Regulations* (SOR/2002-227) (the *Regulations*) points are awarded to applicants based on discrete categories: age, education, experience, arranged employment, official language proficiency, and adaptability. The applicant was awarded a total of 63 points, when he needed 67 points for his application to be approved under the FSW regime.

	NOC code: 0631 Points Assessed	**Maximum**
Age:	10	10
Education:	20	25
Experience:	21	21
Arranged Employment:	0	10
Official Language Proficiency	8	24
Adaptability	4	10
TOTAL	**63**	**100**

[3] Along with his application, the applicant included an Arranged Employment Offer (AEO) as a manager of a Toronto *Subway*™ restaurant. He had secured an Arranged Employment Opinion from Service Canada (AEOSC) in support of this AEO, in which Service Canada classified the position as that of a *Retail Trade Manager* under NOC0621, found on the National Occupations Classifications (NOC) list.

[4] The applicant was assessed by the Visa Officer under NOC0631 instead of NOC0621, and no points were awarded in the Arranged Employment category. The Visa Officer wrote in his decision:

> Although you submitted an application with arranged employment, I am not satisfied that you meet the minimum requirements of the job and are able to perform the duties listed in the arranged employment. The arranged employment states that previous related experience is required. You do not have previous related experience in NOC code 0631 and therefore I am not satisfied you meet the minimum requirements of the job. I advised you of my concern at interview and gave you the opportunity to respond. [Emphasis added]

[5] It is indisputable that based on the above the Visa Officer had legitimate concerns about the applicant's ability or capacity to perform the job of *Retail Trade Manager*. The Visa Officer wrote:

> [y]ou have therefore not satisfied me that you will be able to become economically established in Canada.

[6] The Visa Officer concluded in his letter to the applicant, that:

> [f]ollowing an examination of your application, I am not satisfied that you meet the requirements of the [*IRPA*] Act and the regulations for the reasons explained above. I am therefore refusing your application."

Issue

[7] Counsel for the applicant contends that the Visa Officer's decision that the applicant did not have related work experience is unreasonable because:

(a) The officer compared the wrong NOC codes;

(b) The applicant's work experience was clearly related to the duties of the position he was offered; or

(c) The officer ignored the rest of the job offer contents, including that on-site training would be provided.

Secondly, the applicant contends that the reasons for decision are deficient.

[8] The substantive question, the Visa Officer's assessment of the work experience is assessed on a reasonableness standard, and the procedural question, the adequacy of reasons, is a legal one which attracts a standard of correctness, per *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9.

[9] The Visa Officer referenced the wrong NOC codes. The Visa Officer, relying on the Human Resources and Skills Development Canada (HRSDC) opinion, referenced the duties of the applicant's current occupation as a manufacturing manager to the NOC occupation of Restaurant and Food Service Managers - NOC 0631. Given that the substantive position was to manage a food service establishment, it is difficult to see how this error in the label worked any unfairness to the applicant. This is, indeed, the crux of the case.

[10] When the applicant submitted his application, he described the employment he was then engaged in as an *Industrial Manager*. He claimed that his job entailed the following:

- I plan, organize, direct and control the operations of our manufacturing establishment.
- Develop and implement plans to efficiently use materials, labour and equipment to meet production targets.
- Direct quality control inspection system and develop production reporting procedures.
- Develop equipment maintenance schedules and recommend the replacement of machines.
- Time measurement for develop of production line, project control, line balancing (man balance power).

[11] As noted earlier, the applicant also supplied an AEO as a *Retail Trade Manager* from a Subway™ restaurant in Toronto. The letter declared that the job entailed the following:

- Plan and direct the operation of our establishment.
- Manage staff and assign duties.
- Determine services to be sold, and implement prices.
- Locate, select and procure merchandise for purchase.
- Develop and implement marketing strategies.
- Plan budgets and authorize expenditures.
- Determine staffing requirements and hire or oversee hiring of staff.

[12] As noted earlier, this AEO was validated by the AEO from Service Canada. However the AEO itself incorrectly ascribed NOC code 0631 (Retail Food Service Manager) to *Retail Trade Manager*.

[13] As a result of concerns as to the relevance and suitability of the applicant's prior experience the applicant was instructed by the Embassy, in a letter dated December 16, 2009, to provide a reference letter and explain how he qualified for his AEO. The applicant responded on January 11, 2010:

> In respond [sic] to your inquiry regarding submission of a written description of my employment, I should claim that all my transferable skills in the managerial job I was performing may be useful in my future occupation as a "Retail Trade Manager", In my current job which I have had since 1988, I have been involved with supervision and training of manpower in Iran Khodro and I am sure I will be able to use this experience in my future job. I will be planning, organizing, directing and controlling the operation of the store to optimize the sell and services of this business. Although the appearance of these two jobs may look different but the managerial requirements to run them both still remains the same.

[14] The Computer Assisted Immigration Processing System (CAIPS) notes indicate that the Visa Officer remained unsatisfied with the response;

> I am not satisfied with PA's [person affected] written explanation. I have concerns with PA's ability to perform the job and I have concerns with PA's intent to accept job once in Canada.
>
> Interviewing Officer:
>
> PA has an AEO to be a Retail Trade Manager at Subway. Pa's previous work experience has been with Iran Khodro as an Industrial Manager since 1988. Concerns with PA's ability and intent. [Emphasis added]

[15] The Visa Officer had concerns with not only the applicant's ability to perform the job offered to him, but also his intent to accept it, to actually assume his responsibilities in the position. This is, of course, the second prong of the test imposed under the *Regulations*. This finding is not challenged on this application.

[16] The applicant was interviewed by the Visa Officer. The interview was conducted in English. The applicant confirmed he understood English and was instructed by the Visa Officer to explain when he did not understand something asked of him. The applicant claimed that his work experience as an Industrial Manager lended itself well to being a Retail Trade Manager at the *Subway*™ restaurant in Toronto. During the interview, the Visa Officer noted that as "PA started speaking incoherently about products and targets….PA does not understand the question [about intent to take the employment in Canada]…PA then speaks incoherently about finding targets and goals and society targets."

[17] The Visa Officer ultimately remained unsatisfied and wrote in the CAIPS notes:

> I have reviewed the complete file and I am not satisfied that the PA meets the requirements of the AEO. The job details of the AEO state "previous related experience is required". PA does not have "previous related experience" as a retail trade manager **or** a restaurant and food service manager (NOC code 0631). Although PA states that the main duties under NOC 0911 (his current job) and NOC 0631 (his employment for the AEO) are similar, they are significantly different. I am not satisfied PA meets the minimum requirements for the AEO. APPLICATION REFUSED. [CAPS in original] [Emphasis added]

[18] Three observations flow from this. First, the Visa Officer assessed the applicant against both occupational codes. Second, the Visa Officer tested the applicant's prior experience against the requirements of the proposed employment. Third, throughout their correspondence and the interview, the Visa Officer and the applicant were *ad idem* as to the nature of the employment offered and its classification as a R*etail Trade Manager*.

[19] The error in the labeling of the position does not go to the root of the decision nor does it render it unreasonable. First, in the CAIPS notes, which form part of the decision, the Visa Officer wrote: "PA does not have 'previous related experience' as a retail trade manager or a restaurant and food service manager (NOC code 0631)." Thus, the Visa Officer did in fact consider the applicant's application in relation to the NOC code he actually applied for: NOC code 0621, *Retail Trade Manager*. Secondly, the Visa Officer found that the applicant did not have the requisite intention to undertake the employment, and third, the CAIPS notes reveal a solid evidentiary footing on which the Visa Officer based his conclusions.

[20] I note as well that NOC codes 0621 and 0631 are strikingly similar:

> **0621 Retail Trade Managers**
> Retail trade managers plan, organize, direct, control and evaluate the operations of establishments that sell merchandise or services on a retail basis. Retail trade managers are employed by retail sales establishments or they may own and operate their own store.
>
> Employment requirements:
>
> - Completion of secondary school is required.
> - A university degree or college diploma in business administration or other field related to the product or service being sold may be required.
> - Several years of related retail sales experience at increasing levels of responsibility are usually required.
>
> [Emphasis added]

> **0631 Restaurant and Food Service Managers**
> Restaurant and food service managers plan, organize, direct, control and evaluate the operations of restaurants, bars, cafeterias and other food and beverage services. They are employed in food and beverage service establishments, or they may be self-employed.
>
> Employment requirements:
>
> - Completion of a college or other program related to hospitality or food and beverage service management is usually required.
> - Several years of experience in the food service sector, including supervisory experience, are required.
>
> [Emphasis added]

[21] NOC code 0621 speaks of an FSW applicant requiring several years of related retail sales experience while NOC code 0631 speaks of an FSW applicant requiring several years of experience in the food service sector. While these are different requirements, the Visa Officer's classification or labeling error had no bearing on the substance of the decision or the fairness by which the decision was reached. The applicant had no experience in either. The Visa Officer wrote:

> I am not satisfied that you meet the minimum requirements of the job and are able to perform the duties listed in the arranged employment… [which] states that previous related experience is required. You do not have previous related experience in NOC code 0631 and therefore I am not satisfied you meet the minimum requirements of the job. [Emphasis added]

[22] Validation or classification by HRSDC is not determinative of the Visa Officer's obligation to conduct an analysis in accordance with the *IRPA* and the *Regulations*. It does not relieve the obligation on the Visa Officer to assess and test whether the applicant is able to perform the duties of the position offered, or to put it more directly, the Visa Officer must determine whether the applicant is up to the requirements of the job; *Bellido v Canada (Minister of Citizenship and Immigration)* 2005 FC 452. The Visa Officer turned his mind to the specific requirements of the position offered. It is the substantive position offered, and not the HRSDC label that governs the Visa Officer's assessment, it should not be forgotten that during the interview the applicant indicated that Subway sold hamburgers.

[23] It is a basic principle of administrative law that, where natural justice or the fairness of the procedure is in question, a remedy will ordinarily be recognized regardless of the futility or inevitability of the result when the matter is remitted to the decision maker for reconsideration. There are rare exceptions to this, as discussed by the Supreme Court of Canada (SCC) in *Mobil Oil Canada Ltd. v Canada-Newfoundland Offshore Petroleum Board* [1994] 1 SCR 202, Justice Iacobucci, writing for the Court noted:

> On occasion, however, this Court has discussed circumstances in which no relief will be offered in the face of breached administrative law principles: e.g., *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561.
>
> …

> In *Administrative Law* (6th ed. 1988), at p. 535, Professor Wade discusses the notion that fair procedure should come first, and that the demerits of bad cases should not ordinarily lead courts to ignore breaches of natural justice or fairness. But then he also states:
>
> > A distinction might perhaps be made according to the nature of the decision. In the case of a tribunal which must decide according to law, it may be justifiable to disregard a breach of natural justice where the demerits of the claim are such that it would in any case be hopeless.

[24] In the context of this case, is an academic discussion because, as noted, I do not find any breach of procedural fairness. The applicant's ability to perform the job in question was fully and fairly assessed on its merits against the relevant standards and against the correct occupational code, albeit also against an incorrect, but substantially similar occupational code. No one was misled by this. Moreover, with respect to the second branch of the test under the *Regulations*, the Officer formed the opinion that the applicant did not have the requisite intention to assume the position, a finding which was not challenged on this application.

[25] The responsibility of this Court is to ensure that the Visa Officer exercised his discretion in accordance with the *IRPA* and the *Regulations* as informed by the jurisprudence. It is also to ensure that there is no breach of procedural fairness in the process by which the assessment is conducted. No unfairness, or lack of opportunity arose from the error. The applicant knew throughout the entire process what was in issue, and, significantly, could not point to any further or different information that might have been brought to the attention of the Visa Officer but for the mislabeling. The applicant’s argument would have the substantive analysis conducted by the Officer subordinated to a clerical error in referring to the incorrect code.

Applicant's Work Experience

[26] Counsel for the applicant argues that his client's work experience is clearly related to the duties of the position he was offered. In other words, counsel argues that the applicant's experience as an *Industrial Manager* in Iran qualifies him for work as a *Retail Sales Manager* in Canada. To conclude on this issue, it is prudent to again look at the applicant's assertions:

> In respond [sic] to your inquiry regarding submission of a written description of my employment, I should claim that all my transferable skills in the managerial job I was performing may be useful in my future occupation as a "Retail Trade Manager". In my current job which I have had since 1988, I have been involved with supervision and training of manpower in Iran Khodro and I am sure I will be able to use this experience in my future job. I will be planning, organizing, directing and controlling the operation of the store to optimize the sell and services of this business. Although the appearance of these two jobs may look different but the managerial requirements to run them both still remains the same. [Emphasis added]

[27] This aspect of the decision making process is entitled to considerable deference. In assessing the relevance of the past experience to the AOE the Visa Officer is making a finding of fact which will not be disturbed unless demonstrated to be unreasonable. In this case, the applicant's past experience was in relation to an automobile parts manufacturing plant. As noted from the excerpts of the interview in the CAIPS notes, it was not without reason that the Visa Officer questioned the transferability of that experience to a position in a fast-food restaurant.

Adequacy of Reasons

[28] Counsel for the applicant also argues that the reasons for decision supplied in the letter are deficient.

[29] I do not accept that the reasons are inadequate. The CAIPS notes form, unquestionably, part of the decision and they indicate clearly, both through the nature of the questions posed by the Visa Officer and the responses received, together with the formal decision letter, the scope and detail of the Visa Officer's concerns. The reasons meet the criteria expressed by the Court of Appeal in *VIA Rail Canada Inc. v National Transportation Agency* [2001] 2 FC 25 and in particular the comments of Evans JA in *Canada (Minister of Human Resources Development) v Quesnelle* 2003 FCA 92, at para 11.

[30] For these reasons, the application will be dismissed.

[31] No question of general importance was put forward for certification, and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. No question for certification has been proposed and the Court finds that none arises.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3303-10
STYLE OF CAUSE:	BABAK PIRZADEH v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	March 17, 2011
REASONS FOR JUDGMENT AND JUDGMENT BY:	RENNIE J.
DATED:	April 20, 2011

APPEARANCES:

Matthew Jeffery	FOR THE APPLICANT
Nina Chandy	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Matthew Jeffery Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT