

Federal Court



Cour fédérale

Date: 20110518

Docket: IMM-1381-10

Citation: 2011 FC 571

Ottawa, Ontario, May 18, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

**RITESHKUMAR GOPALDAS PATEL
RESHMA RITESHKUMAR PATEL and
SANVI RITESHKUMAR PATEL**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION CANADA**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act), for judicial review of a decision of a designated immigration officer (the officer), dated December 24, 2009, wherein the officer denied the application for permanent residence as a member of the federal skilled worker class.

[2] The principal applicant requests an order quashing the decision of the officer and remitting the matter back for redetermination by a different officer in accordance with the law.

Background

[3] Riteshkumar Gopaldas Patel (the principal applicant) was born on January 27, 1981 and is a citizen of India.

[4] The principal applicant applied for permanent residence as a member of the federal skilled worker class under the National Occupation Classification (NOC) 1111 – financial auditors and accountants.

Officer's Decision

[5] The officer found that the principal applicant did not meet the requirements of subsection 75(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations) for permanent residence in Canada.

[6] The officer found that the principal applicant had not provided satisfactory evidence that he had at least one year of continuous full time experience or equivalent part time experience as an accountant. The officer also found that the principal applicant provided only a single employment document in which the job duties listed have largely been copied from the NOC (the experience

letter). She further found that the job duties listed in the experience letter were identical to those listed in the letter of offer of employment with Rubina Kitchen on which the application was based.

[7] As the officer found that the principal applicant did not meet the requirements of subsection 75(2) of the Regulations, she refused his application under subsection 75(3).

Issues

[8] The principal applicant submitted the following issues for consideration:

1. Did the visa officer breach principles of procedural fairness by basing her decision on the validity of documentation without informing the applicant of the issue and allowing him an opportunity to respond?
2. Did the visa officer err in rendering a decision on credibility without interviewing the applicant?
3. Did the visa officer err in law in failing to provide adequate reasons in her decision or her notes?
4. Did the visa officer render a decision that was unreasonable given the facts before her?

[9] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the officer deny the principal applicant procedural fairness by not informing him of her concerns and not convoking an interview?

Applicants' Written Submissions

[10] The principal applicant submits that if the descriptions of his duties in the experience letter and written on his application form are accurate, then he clearly qualifies as an accountant and should obtain 79 points to qualify for permanent residence in Canada.

[11] The applicants submit that the officer was concerned with the veracity of the principal applicant's employment letter and the description of his duties. When an officer has concerns about the veracity of documents submitted in an application, he or she is required to convoke an interview so that the principal applicant may assuage the officer's concerns. The officer in this case did not raise her concerns with the principal applicant, breaching the procedural fairness owed to him.

[12] The officer further provided inadequate reasons for her decision as she failed to provide an explanation as to why the issue of similarity between the content of the employer's letter with what is contained in the NOC is relevant.

Respondent's Written Submissions

[13] The respondent submits that the principal applicant was afforded procedural fairness. The officer did not question the veracity of the employment letter. Rather, she found that the letter was insufficient proof of the applicant's experience as the letter parroted the job duties of the NOC description without adding further details.

[14] The onus was on the principal applicant to demonstrate that he qualified for a visa which includes adducing evidence that he met the applicable selection criteria. Procedural fairness does not require an officer to advise an applicant of a concern relating to his ability to meet the selection criteria. As such, the officer was not required to convoke an interview because her concerns regarding the principal applicant's application arose directly from the Regulations.

[15] Finally, the respondent submits that the officer provided adequate reasons as they disclose what decision was reached and the rationale for it.

[16] The officer's decision falls within the range of options open to the decision maker on the judicial review and the application should be dismissed.

Analysis and Decision

[17] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[18] A visa officer's determination of eligibility for permanent residence under the federal skilled worker class involves findings of fact and law and is reviewable on a standard of reasonableness (see *Malik v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1283 at paragraph 22).

[19] Any issues of natural justice involving visa officers, however, are evaluated on a correctness standard (see *Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12, [2009] 1 SCR 339 at paragraph 43).

[20] **Issue 2**

Did the officer deny the principal applicant procedural fairness by not informing him of her concerns and not convoking an interview?

The central issue in this case is whether the officer rejected the application due to concerns about the credibility of the letter of experience or because she found that the principal applicant did not produce sufficient evidence of his work experience.

[21] The case law specifies that a visa officer is not under a duty to inform an applicant about any concerns regarding the application which arise directly from the requirements of the legislation or regulations (see *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 at paragraphs 23 and 24).

[22] However, a visa officer is obligated to inform an applicant of any concerns related to the veracity of documents and will be required to make further inquiries (see *Hassani* above, at paragraph 24).

[23] The onus is always on the principal applicant to satisfy the visa officer of all parts of his application. The officer is under no obligation to ask for additional information where the principal

applicant's material is insufficient (see *Madan v Canada (Minister of Citizenship and Immigration)* (1999), 172 FTR 262, [1999] FCJ No 1198 (FCTD) (QL) at paragraph 6).

[24] Regulation 75 clearly indicates that a foreign national is only a skilled worker if he can show one year of full time employment where he performed the actions in the lead statement of the NOC and a substantial number of the main duties.

[25] As such, if the visa officer were concerned only that the employment letter was insufficient proof that the principal applicant met the requirements of Regulation 75, then she would not have been required to conduct an interview.

[26] However, the officer states that her concern is that the duties in the employment letter have been copied directly from the NOC description and that the duties in the experience letter are identical to the letter of employment. I agree with the principal applicant that the officer's reasons are inadequate to explain why this was problematic. I find that the implication from these concerns is that the officer considered the experience letter to be fraudulent.

[27] Consequently, by viewing the letter as fraudulent, the officer ought to have convoked an interview of the principal applicant based on the jurisprudence above. As such, the officer denied the principal applicant procedural fairness and the judicial review must be allowed.

[28] The principal applicant moved to amend the style of cause by adding his spouse and child as applicants. Reshma Riteshkumar Patel is his spouse and Sanvi Riteshkumar Patel is his daughter.

The style of cause is so amended.

[29] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[30] **IT IS ORDERED that:**

1. The application for judicial review is allowed, the decision of the officer is set aside and the matter is referred to a different officer for redetermination.

2. The style of cause is amended by adding Reshma Riteshkumar Patel and Sanvi Riteshkumar Patel as applicants.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions*Immigration and Refugee Protection Act, SC 2001, c 27*

72.(1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

72.(1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

Immigration and Refugee Protection Regulations, SOR/2002-227

75.(1) For the purposes of subsection 12(2) of the Act, the federal skilled worker class is hereby prescribed as a class of persons who are skilled workers and who may become permanent residents on the basis of their ability to become economically established in Canada and who intend to reside in a province other than the Province of Quebec.

75.(1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des travailleurs qualifiés (fédéral) est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada, qui sont des travailleurs qualifiés et qui cherchent à s'établir dans une province autre que le Québec.

(2) A foreign national is a skilled worker if

(2) Est un travailleur qualifié l'étranger qui satisfait aux exigences suivantes :

(a) within the 10 years preceding the date of their application for a permanent resident visa, they have at least one year of continuous full-time employment experience, as described in subsection 80(7), or the equivalent in continuous part-time employment in one or more occupations, other than a restricted occupation, that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the National Occupational Classification matrix;

a) il a accumulé au moins une année continue d'expérience de travail à temps plein au sens du paragraphe 80(7), ou l'équivalent s'il travaille à temps partiel de façon continue, au cours des dix années qui ont précédé la date de présentation de la demande de visa de résident permanent, dans au moins une des professions appartenant aux genre de compétence 0 Gestion ou niveaux de compétences A ou B de la matrice de la Classification nationale des professions — exception faite des professions d'accès limité;

(b) during that period of employment they performed the actions described in the lead statement for the occupation as set out in the occupational descriptions of the National

b) pendant cette période d'emploi, il a accompli l'ensemble des tâches figurant dans l'énoncé principal établi pour la profession dans les descriptions des professions de cette

Occupational Classification; and

(c) during that period of employment they performed a substantial number of the main duties of the occupation as set out in the occupational descriptions of the National Occupational Classification, including all of the essential duties.

(3) If the foreign national fails to meet the requirements of subsection (2), the application for a permanent resident visa shall be refused and no further assessment is required.

classification;

c) pendant cette période d'emploi, il a exercé une partie appréciable des fonctions principales de la profession figurant dans les descriptions des professions de cette classification, notamment toutes les fonctions essentielles.

(3) Si l'étranger ne satisfait pas aux exigences prévues au paragraphe (2), l'agent met fin à l'examen de la demande de visa de résident permanent et la refuse.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-1381-10

STYLE OF CAUSE: RITESHKUMAR GOPALDAS PATEL
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- and -

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION CANADA

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: December 8, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: May 18, 2011

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