

Federal Court



Cour fédérale

Date: 20121114

Docket: IMM-882-12

Citation: 2012 FC 1321

Ottawa, Ontario, November 14, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

PRASHANT JAYANAND SHETTY

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant seeks judicial review of the December 21, 2011, decision of a visa officer (“the Officer”) at the Consulate General of Canada in Los Angeles, California. In the decision, the Officer refused the Applicant’s application for permanent residence under the Federal Skilled Worker class.

[2] For the reasons that follow, the application for judicial review is allowed.

I. Facts

[3] The Applicant, Mr. Prashant Jayanand Shetty, is an Indian citizen who is a resident of the United States. He was deputed to the United States in July 2006 by his employer at the time, Persistent Systems Limited. He worked for Persistent Systems in India from November 2001 until July 2006, and for the company's American subsidiary in California until August 2008. He is currently an employee of SENA Systems, Inc., an identity and access management services company.

[4] Mr. Shetty applied for permanent residence in Canada as a Federal Skilled Worker in early 2010 on the basis of his minimum of one year's experience in a designated National Occupation Classification (NOC). His application was made pursuant to the instructions published by the Minister of Citizenship and Immigration ("the Minister") on November 28, 2008. Specifically, Mr. Shetty applied on the basis of his experience in NOC 0213 – Computer and Information Systems Managers, relying on the tasks he carried out during the time he worked for Persistent Systems in the United States.

II. Decision under Review

[5] The Officer evaluated Mr. Shetty's application on the basis of the documents submitted, and was not satisfied that he performed the actions described in the lead statement for the occupation of

a Computer and Information Systems Manager – NOC 0213. Specifically, the Officer found it “questionable” that the employment verification letter came from the Indian office of Persistent Systems, rather than the American office, where Mr. Shetty purportedly carried out the duties that would fall in the category of NOC 0213.

[6] The Officer further found that, based on the employment verification letter supplied by the Applicant, that his work was primarily consultative in nature, and not as managerial as required by NOC 0213. The Officer was convinced that Mr. Shetty’s dealings with his employer’s clients were limited to specific projects with limited duration, and “in concert with the clients, rather than taking over primary control.”

[7] The Officer determined that Mr. Shetty’s experience in the ten years preceding his application did not fall into any other categories identified by the Minister in his instructions of November 28, 2008. Additionally, since he is not currently a resident of any form in Canada, nor does he have a job offer in Canada, Mr. Shetty was not qualified to come to Canada under the Federal Skilled Worker category.

III. Issues

[8] The determinative issues in this case are:

- a) Whether the Officer breached a requirement of procedural fairness by failing to convoke the Applicant for an interview; and

- b) Whether the Officer's conclusions with respect to the Applicant's experience were reasonable.

IV. Standard of Review

[9] Questions of procedural fairness are reviewable on the standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43).

[10] Discretionary decisions made by visa officers are entitled to a high degree of deference. Unless the Officer's decision is unreasonable or based on irrelevant or extraneous considerations, this Court should not interfere with his decision (*Talpur v Canada (Minister of Citizenship and Immigration)*, 2012 FC 25, [2012] FCJ No 22 at para 19; *Khan v Canada (Minister of Citizenship and Immigration)*, 2009 FC 302, [2009] FCJ No 676 at para 9). Indeed, the standard of reasonableness is concerned "mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision 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 SCR 190 at para 47).

V. Analysis

A. *Procedural Fairness*

[11] The Applicant contends that he should have been given an opportunity to disabuse the Officer of his concerns with respect to the Applicant's work experience. Specifically, the Applicant submits that the Officer's concerns went to the credibility, accuracy or genuine nature of the documents before him.

[12] It is incumbent upon applicants to submit the relevant documentation to demonstrate that they meet the criteria of the particular category in which they are applying for status in Canada. This Court has held on several occasions that "an officer is generally not under a duty to inform a skilled worker class applicant about his concerns when they arise directly from the requirements of the legislation or regulations" (*Li v Canada (Minister of Citizenship and Immigration)*, 2012 FC 484, [2012] FCJ No 509 at para 34; *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283, [2006] FCJ No 1597 at para 24; *Gulati v Canada (Minister of Citizenship and Immigration)*, 2010 FC 451, [2010] FCJ No 771 at para 43).

[13] After considering the evidence, I tend to agree with the Respondent's characterization of the Officer's concerns as pertaining to the Applicant's documentation to demonstrate relevant work experience, a concern that arises directly from the requirements of the legislation or regulations. The Officer was thus under no duty to convoke the Applicant for an interview, and did not breach his duties of procedural fairness in this case.

B. *Reasonableness of the Decision*

[14] The Applicant's arguments that the Officer fettered his discretion hinge on the Officer's interpretation of the NOC requirements, and are thus more appropriately analyzed under the rubric of reasonableness.

[15] In that vein, the Applicant submits that the Officer erred in treating the lead statement as a "threshold hurdle for the Applicant to overcome," rather than as merely a part of the whole description of the NOC category, which the Officer was required to read in a fair and broad manner. The Applicant finally posits that the evidence he submitted to describe the duties he performed at Persistent Systems "clearly" demonstrated that he performed a management role, which the Officer erred in attributing to NOC categories 2171 (Information Systems Analyst and Consultant) and 2174 (Senior Programmer Analyst).

[16] The Respondent contends that that it was open to the Officer to find that the Applicant performed the work described in NOC 2171, based on the evidence before him, and that, apart from his finding with respect to identifying the supervision of other IT professionals as a function of NOC 2171 positions, the Officer's decision was reasonable.

[17] I find that the Officer's cumulative reasoning renders his decision unjustifiable on the facts of this case. First, as the Applicant points out, the Officer's concerns with respect to where the Applicant carried out the tasks described in the employment verification letter from Persistent

Systems are not relevant to the evaluation of the Applicant's experience. While it may be relevant for determining the length of time for which he was responsible for the listed tasks, it was already established in the record that he carried out these activities for a minimum of one year.

[18] Second, the Officer determined that the Applicant did "not plan, organize, direct, control and evaluate the activities and operations of the information systems/technology and EDP department of his employer, nor of its clients," while the employment verification letter stated that the Applicant was responsible for (see Application Record at 65):

- Evaluating the operations of the current Identity and Access Management Systems within the client organization.
- Requirement gathering & complete design of User Provisioning and Federation model.
- Discussions with client on specifications, costs and timelines for deployment and integration.
- Leading the complete upgrade of Oracle Access Manager from 7.0.4.3 to 10.1.4.2.0.
- Develop and implement policies and procedures for access control within the organization.
- Leading the Middleware Operations team in supporting and maintaining the Identity and Access Management infrastructure on client side.
- Preparing Training Guides and training the Client Operations team on the deployment of Oracle IdM products.
- Involved in recruitment and mentoring of Software Engineers and Programmer Analysts, and overseeing their professional development and training.

[19] The Officer's finding that these responsibilities do not involve any planning, organizing, directing, or evaluating the activities and operations of aspects of his employer's business – the description included in the lead statement for NOC 0213 positions – appears to ignore the description in the Applicant's employment verification letter. This finding is particularly troublesome after looking at the main duties attributed to NOC 0213 positions.

[20] Finally, and most problematically, the Officer determined that the Applicant's dealings with his employer's clients were "limited to working on specific projects with limited duration, and he does so in concert with the clients, rather than taking over primary control." There is no basis in the record for the conclusion that the Applicant does not take "primary control" in his dealings with his employer's clients. Absent an explanation for this finding, I find the decision unreasonable.

[21] Given my finding on this point, there is no need to address the Applicant's argument with respect to the proper burden of proof employed by the Officer.

VI. Conclusion

[22] While the Officer did not breach a duty of procedural fairness owed to the Applicant by not convoking him for an interview, the Officer's overall decision was unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is sent back for re-determination by a different officer.

“ D. G. Near ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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AND JUDGMENT BY:** NEAR J.

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