Federal Court  Cour fédérale

Date: 20140324

Docket: IMM-2346-12

Citation: 2014 FC 279

Ottawa, Ontario, March 24, 2014

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

SABA KHOSH KHOOEE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Saba Khosh Khooee's application for a visa as a member of the Federal Skilled Worker class was denied. She had claimed qualifying experience in two eligible occupations: NOC 0711- Construction Manager, and NOC 2151- Architect. This is her application for judicial review of that decision pursuant to s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The applicant is a 31 year-old Iranian citizen living in Sweden on a student visa. Ms. Khooee obtained a Bachelor's and a Master's degree in Architectural Engineering in Tehran, Iran in September 2005 and March 2008 respectively. Ms. Khooee has been a member of the Iranian Construction Engineers Organization since February 2008. In August 2008, Ms. Khooee and her husband moved to Sweden where Ms. Khooee began a Master's degree in Urban Planning and Design at the Royal Institute of Technology.

[3] Throughout her undergraduate and Masters' degree studies (November 2003-June 2008), Ms. Khooee worked part-time and full-time in various jobs as an architect. Upon graduation with her Masters' degree, Ms. Khooee worked full-time from June 2008 to July 2009, which she claimed as work experience as a Construction Manager.

[4] In a letter dated February 18, 2010, the applicant was notified that her application had been deemed eligible for processing under the Federal Skilled Worker class due to her work experience in an occupation specified in the Minister's Instructions. The letter did not refer to a specific NOC code. The applicant assumed that her application was being assessed under NOC 0711-Construction Manager. However, Computer Assisted Immigration Processing System (CAIPS) notes from February 9, 2010 indicate that the applicant had identified NOC codes 0711 – Construction Manager and NOC 2151 – Architect in her application and that she had been found to be eligible for assessment under the Architect code.

[5] CAIPS notes entered on June 24, 2010 state the following:

> I have completed an assessment of this application and have determined that PI is not eligible for processing in this category [of Federal Skilled Workers…].

> […]
> Although the NOC code 0711 corresponds to an occupation specified in the Instructions, the information submitted to support this application is sufficient [*sic*] to substantiate that Applicant do not meets [*sic*] the occupational description and/or a substantial number of the main duties of NOC 0711. PI has provided several reference letters which indicate that she is more an architect than a construction manager. The job description (duties and responsibilities) does not correspond to the NOC 0711. By the same time [*sic*] she was working apparently full time, she was also studying architecture. She claimed only one year of experience as construction manager (her last job) but claimed 4 years of experience as an architect. I am therefore not satisfied that PI actually has one year of experience in this occupation, as per NOC 0711, and this application is not eligible for other processing.

[6] On February 10, 2012 or earlier (the exact date of receipt is disputed), Ms. Khooee received an undated refusal letter, which explained that she had not provided sufficient evidence of her work experience in the listed occupation of NOC 2151- Architect. The CAIPS notes indicate that the refusal letter was sent on January 26, 2012.

[7] In a letter dated February 13, 2012, the applicant sought clarification and asked that her application be reconsidered. She submitted that her application had been made primarily under NOC 0711 - Construction Manager, although she had claimed prior experience as an architect. Ms. Khooee's counsel expressed concern that the application had not been assessed as a construction manager at all. It was also noted that Construction Managers were no longer on the list of Occupations in Demand in the most recent Ministerial Instructions.

[8] This application for leave and for judicial review was filed on March 9, 2012. On March 23, 2012, the applicant received a response from Ms. Wendy Wolbert, the Second Secretary Immigration at the High Commission of Canada in London. She indicated that a clerical error had resulted in Ms. Khooee being sent an incorrect refusal letter. However, Ms. Wolbert confirmed that

Ms. Khooee's work experience as NOC 0711 – Construction Manager had also been reviewed and refused as insufficient. An amended refusal letter dated April 2, 2012 was sent.

[9] The amended refusal letter stated, among other things:

> 0711 – Construction Manager
> I have determined your eligibility on the basis of the information on your file. Although the NOC code corresponds to the occupations specified in the Instructions, you provided insufficient evidence that you performed all of the essential duties and a substantial number of the main duties, as set out in the occupational descriptions of the NOC. I am therefore not satisfied that you have experience as an [*sic*] Construction Manager.
>
> Since you did not provide satisfactory evidence that you have work experience in any of the listed occupations, you do not meet the requirements of the Ministerial Instructions and your application is not eligible for processing. […]

[10] The sole issue, in my view, is whether the visa officer's decision was reasonable.

[11] The parties agree and I accept that the standard of review applicable to the decisions of visa officers is reasonableness. As discussed by the Supreme Court of Canada in *Dunsmuir v New Brunswick* 2008 SCC 9 [*Dunsmuir*] at para 47, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. 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.

[12] The applicant submits that the decision is not intelligible, transparent or justified as it confuses her application for consideration under the two NOC codes – 0711-Construction Manager and 2151- Architect. Although she had been deemed eligible for assessment due to her work

experience in an occupation specified in the Minister's Instructions and was informed of this in the February 18, 2010 letter, she was not informed that the initial eligibility finding was on the basis of work experience as an Architect, and not as a Construction Manager. Nor was she informed what impact, if any, this deemed eligibility had on the assessment of the NOC 0711 – Construction Manager claim. Then in early 2012, her application was assessed on the basis of the Construction Manager NOC but denied on the ground that she had not provided sufficient evidence to establish the required work experience for the Architect NOC. No explanation was ever provided for why the NOC codes were confused or why the visa officer considered that her duties were closer to those of an architect. The record contains no affidavit from the visa officer to clarify matters.

[13] On at least two separate occasions, the wrong NOC code was referenced. The respondent submits that these were mere clerical errors that should not taint the decision or its reasons. Reading the CAIPS notes and the corrected refusal letter, it is clear that the visa officer assessed the applicant in the intended occupation of Construction Manager. Her reasons for the ineligibility finding are also clear, the respondent submits. The officer was not satisfied, based on the applicant's evidence, that the applicant had performed all of the essential duties and a substantial number of the main duties set out in NOC 0711 for a minimum of one full year. Furthermore, it was not surprising that the officer reached the conclusion that the applicant's duties were more akin to those of an architect given that she self-identified as having more experience as an architect than as a construction manager.

[14] Moreover, the respondent argues, the visa officer's main concern was that even if the applicant's employment from June 2008 to July 2009 could be characterized as performing the

duties of a construction manager, it was not equivalent to one year's worth of full time employment in that occupation, because she was also studying full time. The reference letter does not state whether she was employed on a full- or part-time basis. Hence, it was not unreasonable for the visa officer to conclude that the applicant could not work full-time and go to school full-time.

[15] The applicant contends that this was yet another error by the visa officer as she completed her Master's degree in March 2008 and was not, therefore, studying between June 2008 and July 2009. Moreover, she argues that when the reference letter for the project manager job she performed for that year is compared to the NOC description of the Construction Manager role, the duties set out in both "appear identical".

[16] I agree with the applicant that the decision is unintelligible and lacks transparency. Further, it is unclear whether the alternative application under NOC code 2151- Architect was ever properly assessed. In the circumstances, I am satisfied that the application must be granted.

[17] The applicant seeks costs and a writ of mandamus directing that the visa application be processed within 60 days. Costs may only be awarded in immigration proceedings for special reasons pursuant to Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*. While I don't think that the application in this matter was handled with due care and attention, that does not amount to special reasons in my view. Nor is a writ of mandamus fixing the date for processing the visa application appropriate. The administration of the legislative scheme is the responsibility of the Minister. I will order that it be done within a reasonable amount of time.

[18] I am satisfied that the applicant should not be disadvantaged by the change in Ministerial instructions since the date she submitted her application. I will order that her application for a visa be freshly considered under the instructions as they were on the date her application was submitted.

[19] No serious question of general importance was proposed and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. the application is granted;
2. the matter is remitted for reconsideration by a different visa officer within a reasonable period of time; and
3. the reconsideration shall proceed on the basis of the Ministerial Instructions as they were when the application for a visa was submitted.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2346-12
STYLE OF CAUSE:	SABA KHOSH KHOOEE and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 30, 2014
REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
DATED:	MARCH 24, 2014

APPEARANCES:

Inna Kogan	FOR THE APPLICANT
Sybil Thompson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

INNA KOGAN Law Firm Inna Kogan Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT