

Federal Court



Cour fédérale

Date: 20190325

Docket: IMM-3956-18

Citation: 2019 FC 367

Ottawa, Ontario, March 25, 2019

PRESENT: The Assistant Chief Justice Gagné

BETWEEN:

ANIL KUMAR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Mr. Anil Kumar is a 25-year-old citizen of India. He disagrees with the decision of an Immigration Officer rejecting his application for a permanent resident visa under the Canadian Experience Class on the basis that he did not meet the skilled work experience requirement. The Immigration Officer found that the Applicant did not provide sufficient evidence that he

performed the main duties of a cook as described in the National Occupational Classification [NOC] 6322.

II. Facts

[2] The Applicant received a study permit in order to obtain a Computer and Network Support Technician diploma from Humber College, in Ontario. In October 2015, after having completed the program, he received a postgraduate work permit.

[3] In May 2016, the Applicant started to work as a cook helper at J's Pizza and Convenience Store in Abbotsford, British Columbia. Two months later, he was promoted to the position of cook due to his good work and communication skills.

[4] In September 2017, the Applicant applied to the British Columbia Provincial Nominee Program. His application was approved by the British Columbia Ministry of Jobs, Trade and Technology. He was therefore nominated to apply for a permanent resident visa and did so under the NOC level B, code 6322 (cook).

[5] In April 2018, the Applicant was informed that he did not meet the skilled work experience requirement for the occupation of cook. As the Applicant was allowed to make additional submissions, his employer submitted a letter of support describing his job duties, as well as the different food items he prepares.

[6] Nevertheless, the Applicant's application for a permanent resident visa was denied in August 2018 on the basis that he did not meet the skilled work experience requirement.

III. Impugned Decision

[7] The Immigration Officer found that in order to be a member of the Canadian Experience Class, the Applicant needed to establish, pursuant to subsection 87.1(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations]: (i) that he had temporary resident status during the qualifying period of work experience in Canada, (ii) that he met the minimum language proficiency threshold in either French or English, and (iii) that he had qualifying Canadian skilled work experience.

[8] With respect to the occupation of cook identified in the application, the Immigration Officer found that the Applicant did not meet the skilled work experience requirement. He found that the information provided to substantiate the Applicant's duties at his place of employment did not demonstrate that he prepares and cooks complete meals and a wide variety of foods. Instead, the Applicant was found to prepare and cook only simple food items. Furthermore, there was insufficient evidence that the Applicant did not use pre-made items in the preparation of food.

[9] In making this determination, the Immigration Officer considered that the Applicant's place of employment has a specialized menu for pizzas and that it offers a fast food counter service and delivery. The Immigration Officer found that the Applicant's duties fell under the

NOC level D, code 6711 (Food counter attendants, kitchen helpers and related support occupations).

[10] As a result, the Immigration Officer concluded that he could not issue a visa to the Applicant because he did not meet the statutory requirements.

IV. Issues

[11] This application for judicial review raises a single issue:

Did the Immigration Officer err in finding that the Applicant did not meet the skilled work experience requirement?

[12] The question of whether the Immigration Officer applied the correct statutory provision is reviewable on the standard of correctness (*Qin v Canada (Citizenship and Immigration)*, 2013 FCA 263 at para 33). However, the Immigration Officer's determination that the Applicant did not have the requisite skilled work experience is a question of mixed fact and law reviewable on the standard of reasonableness (*Parssian v Canada (Citizenship and Immigration)*, 2016 FC 304 at para 17; *Dhaliwal v Canada (Citizenship and Immigration)*, 2016 FC 131 at para 17).

V. Analysis

[13] Subsection 87.1(2) of the Regulations lists the requirements in order for a foreign national to be a member of the Canadian Experience Class:

Member of the class	Qualité
(2) A foreign national is a member of the Canadian	(2) Fait partie de la catégorie de l'expérience canadienne

experience class if

(a) they have acquired in Canada, within the three years before the date on which their application for permanent residence is made, at least one year of full-time work experience, or the equivalent in part-time work experience, in one or more occupations that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the *National Occupational Classification* matrix, exclusive of restricted occupations; and

(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 Occupational Classification*;

(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;

(d) they have had their proficiency in the English or French language evaluated by an organization or institution that is designated under subsection 74(3) using

l'étranger qui satisfait aux exigences suivantes :

a) l'étranger a accumulé au Canada au moins une année d'expérience de travail à temps plein, ou l'équivalent temps plein pour un travail à temps partiel, dans au moins une des professions, autre qu'une profession d'accès limité, appartenant au genre de compétence 0 Gestion ou aux niveaux de compétence A ou B de la matrice de la *Classification nationale des professions* au cours des trois ans précédant la date de présentation de sa demande de résidence permanente;

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 la *Classification nationale des professions*;

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 la *Classification nationale des professions*, notamment toutes les fonctions essentielles;

d) il a fait évaluer sa compétence en français ou en anglais par une institution ou une organisation désignée en vertu du paragraphe 74(3) qui utilise un test

a language test that is approved under that subsection, the results of which must indicate that the foreign national has met the applicable threshold that is fixed by the Minister under subsection 74(1) for each of the four language skill areas; and

(e) in the case where they have acquired the work experience referred to in paragraph (a) in more than one occupation, they meet the threshold for proficiency in the English or French language, fixed by the Minister under subsection 74(1), for the occupation in which they have acquired the greater amount of work experience in the three years referred to in paragraph (a).

d'évaluation linguistique approuvé en vertu de ce paragraphe et les résultats de ce test démontrent qu'il a obtenu, pour chacune des quatre habiletés langagières, le niveau de compétence applicable établi par le ministre en vertu du paragraphe 74(1);

e) s'il a acquis l'expérience de travail visée à l'alinéa a) dans le cadre de plus d'une profession, il a obtenu le niveau de compétence en anglais ou en français établi par le ministre en vertu du paragraphe 74(1) à l'égard de la profession pour laquelle il a acquis le plus d'expérience au cours des trois années visées à l'alinéa a).

[14] The description of the work of cook under the NOC 6322 reads as follows:

6322 Cooks

Cooks prepare and cook a wide variety of foods. They are employed in restaurants, hotels, hospitals and other health care institutions, central food commissaries, educational institutions and other establishments. Cooks are also employed aboard ships and at construction and logging campsites.

...

Main duties

Cooks perform some or all of the following duties:

- Prepare and cook complete meals or individual dishes and foods

- Prepare and cook special meals for patients as instructed by dietitian or chef
- Schedule and supervise kitchen helpers
- Oversee kitchen operations
- Maintain inventory and records of food, supplies and equipment
- May set up and oversee buffets
- May clean kitchen and work area
- May plan menus, determine size of food portions, estimate food requirements and costs, and monitor and order supplies
- May hire and train kitchen staff.

Cooks may specialize in preparing and cooking ethnic cuisine or special dishes.

Employment requirements

- Completion of secondary school is usually required.
- Completion of a three-year apprenticeship program for cooks or completion of college **or** other program in cooking or food safety **or** Several years of commercial cooking experience may be required.
- Trade certification is available, but voluntary, in all provinces and territories.
- Red Seal endorsement is also available to qualified cooks upon successful completion of the interprovincial Red Seal examination.

Additional information

- The Red Seal endorsement allows for interprovincial mobility.
- There is mobility among the various types of cooks in this group.

- Progression to supervisory or more senior positions, such as chef, is possible with experience and training.

Exclusions

- Chefs (6321)
- Food counter attendants, kitchen helpers and related support occupations (6711)

[15] The description of a food preparer's and a kitchen helper's duties is contained in the NOC 6711 and reads as follows:

6711 Food counter attendants, kitchen helpers and related support occupations

Food counter attendants and food preparers prepare, heat and finish cooking simple food items and serve customers at food counters. Kitchen helpers, food service helpers and dishwashers clear tables, clean kitchen areas, wash dishes, and perform various other activities to assist workers who prepare or serve food and beverages. They are employed by restaurants, cafés, hotels, fast food outlets, cafeterias, hospitals and other establishments.

...

Main duties

Food counter attendants and food preparers perform some or all of the following duties:

- Take customers' orders
- Clean, peel, slice and trim foodstuffs using manual and electric appliances
- Use deep fryer, grill, oven, dispensers and other equipment to prepare fast food items such as sandwiches, hamburgers, fries, salads, ice cream dishes, milkshakes and other beverages

- Portion, assemble, and wrap food or place it directly on plates for service to patrons, and package take-out food
- Use equipment to prepare hot beverages such as coffee and tea specialties
- Serve customers at counters or buffet tables
- Stock refrigerators and salad bars and keep records of the quantities of food used
- May receive payment for food items purchased.

Kitchen helpers perform some or all of the following duties:

- Wash and peel vegetables and fruit
- Wash work tables, cupboards and appliances
- Remove trash and clean kitchen garbage containers
- Unpack and store supplies in refrigerators, cupboards and other storage areas
- Sweep and mop floors, and perform other duties to assist cook and kitchen staff.

...

Employment requirements

- Some secondary school education is usually required.
- On-the-job training is provided.

Additional information

- There is considerable mobility among jobs in this unit group.
- Movement into other occupations within food preparation and service, such as cook or waiter, is possible with further training and experience.

Exclusions

- Chefs (6321)

- Cooks (6322)
- Food and beverage servers (6513)
- Food service supervisors (6311)

[16] Under subsection 87.1(2) of the Regulations, an applicant must fulfil a cumulative test (*Morgan v Canada (Citizenship and Immigration)*, 2014 FC 897 at para 19). The Applicant had to show that his employment matched the lead statement for the occupation of cook and that he performed a substantial number of the duties of a cook. Therefore, the Immigration Officer applied the correct legal test by first determining whether the Applicant performed the actions described in the lead statement of the NOC 6322, as required by paragraph 87.1(2)(b) of the Regulations.

[17] Under paragraph 87.1(2)(b) of the Regulations, a decision-maker must look at the actions described in the lead statement for the occupation as set out in the NOC. The lead statement for the occupation of cook, according to the NOC 6322 reads, “[c]ooks prepare and cook a wide variety of foods”. Instead, the NOC 6711 states that food preparers “prepare, heat and finish cooking simple food items and serve customers at food counters”.

[18] In his decision, the Immigration Officer noted that the main duty differentiating a cook from a food preparer is the preparation of “complete meals and a wide variety of foods”. In my view, it was reasonable for the Immigration Officer to conclude that the Applicant does not prepare a wide variety of foods because the Applicant only prepares a limited variety of simple foods, such as pizzas, chicken wings, lasagna, salads and breads which are served at a food counter.

[19] While a finding that the Applicant did not meet the requirement of paragraph 87.1(2)(b) is sufficient to dispose of the case, the Immigration Officer's reasons show that his conclusion would be the same with respect to paragraph 87.1(2)(c) of the Regulations, which required the Applicant to show he performed a substantial number of the duties of a cook. The Immigration Officer specifically found that he was not satisfied that the Applicant performed the main tasks of a cook on a regular basis.

[20] While I agree that there may be an overlap between the duties of food preparer and cook, the real question for the visa officer is to determine the pith and substance of the work performed by the Applicant (*Rodrigues v Canada (Citizenship and Immigration)*, 2009 FC 111 at para 10). The answer to the question of whether the Applicant performed a substantial number of the main duties of a cook set out in the NOC is "very much a discretionary judgment call. Parliament has said that visa officers are to make that discretionary call and, as the jurisprudence makes clear, the Court cannot countermand a decision unless it falls outside of the range posited in paragraph 47 of *Dunsmuir*" (*Hosseini v Canada (Citizenship and Immigration)*, 2013 FC 766 at para 54). Deference must be afforded to the assessment of an Applicant's job experience and its comparison to the NOC job description (*Qin v Canada (Citizenship and Immigration)*, 2013 FC 147 at para 16, *aff'd* 2013 FCA 263 at para 25).

[21] The Immigration Officer examined the differences between the main duties of a cook and those of a food preparer and noted as distinguishing factors that cooks oversee kitchen operations and prepare more than simple food items, while food preparers do not. He reasonably concluded that the Applicant's duties were closer to those of a food preparer because (1) the Applicant's

duties do not regularly involve overseeing kitchen staff and operations, as the establishment already has a manager/supervisor; and (2) the Applicant's main duties involve preparing simple fast foods such as pizzas and salads by assembling pre-made items.

[22] The Immigration Officer reached this conclusion by noting the small size of the establishment (9 employees) and the small number of cooks, as well as the presence of a manager/supervisor who, on a balance of probabilities, already regularly oversees the kitchen operations. Similarly, the Immigration Officer concluded that the manager/supervisor would, on a balance of probabilities, be in charge of training new staff. Considering the evidence before the Immigration Officer, this was a reasonable inference.

[23] The Immigration Officer also noted that the Applicant did not provide any evidence with respect to whether the Applicant "cooks the items that are necessary for the pizzas or salads instead of obtaining pre-made items and assembling them together to finalize the product". With this in mind, the preparation of pizzas with pre-made items is analogous to the preparation of hamburgers, sandwiches and salads, which are simple food items listed under the main duties of a food preparer as set out in the NOC 6711. Once again, these findings are reasonable and are based on the evidence presented to the Immigration Officer.

[24] If the Applicant's evidence, notably his employer's letter, had provided details about how the Applicant prepares food items from scratch, it likely would not have been open to the Immigration Officer to conclude that he prepares simple food items by assembling pre-made items. The onus was on the Applicant to present sufficient evidence that his application met the

requirements of the NOC (*Saatchi v Canada (Citizenship and Immigration)*, 2018 FC 1037 at para 30; *Morgan v Canada (Citizenship and Immigration)*, 2014 FC 897 at para 15) and the Immigration Officer reasonably concluded that he had not met that burden.

[25] The Applicant submits that his job description also includes keeping track of food supplies and inventory and following sanitary and safe food handling practices. I note that there is some overlap between the duties of a cook to “clean kitchen and work area” and to “monitor and order supplies” and the following duties listed in the NOC 6711: “stock refrigerators and salad bars and keep records of the quantities of food used” and “wash work tables, cupboards and appliances”. However, as stated by Justice Michael L. Phelan, “[t]angential performance of one or more functions under one or more job categories does not convert the job or the functions from one NOC category to another” (*Rodrigues v Canada (Citizenship and Immigration)*, 2009 FC 111 at para 10). The Immigration Officer was entitled to make a judgment call with regards to the pith and substance of the Applicant’s work. Given the distinguishing factors identified and relied on by the Immigration Officer, his conclusion that the Applicant did not perform a substantial number of the main duties of a cook was reasonable.

[26] Therefore, the Immigration Officer reasonably concluded that the Applicant does not meet the work experience requirement as set out in subsection 87.1(2) of the Regulations.

VI. Conclusion

[27] The Immigration Officer reasonably concluded that the Applicant did not perform the duties of a cook as described in the NOC 6322, and that as a result, he did not meet the skilled

work experience requirement. For these reasons, this application for judicial review is dismissed.

The parties have proposed no question of general importance for certification and none arises from the fact of this case.

JUDGMENT in IMM-3956-18

THIS COURT’S JUDGMENT is that:

1. This Application for judicial review is dismissed;
2. The style of cause is amended to replace the “Minister of Immigration, Refugees and Citizenship” with the “Minister of Citizenship and Immigration”;
3. No question of general importance is certified.

“Jocelyne Gagné”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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