Federal Court Cour fédérale

Date: 20220725

Docket: IMM-2242-20

Citation: 2022 FC 1105

Ottawa, Ontario, July 25, 2022

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

P.P. MINERALS CANADA CORPORATION

Applicant

and

MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Sandip Nitin Kamdar ("Mr. Kamdar") is a majority owner of P.P. Minerals Canada Corporation, the Applicant in this judicial review. P.P. Minerals Canada applied to obtain a Labour Market Impact Assessment ("LMIA") under the Temporary Foreign Worker Program's ("TFWP") Owner/Operator category so that Mr. Kamdar would be able to enter Canada and oversee the company's operations. This application was rejected by an officer at Employment

and Social Development Canada [ESDC]. The Officer found that P.P. Minerals Canada was not actively engaged in the business and that there was not a demonstrated need for the position offered to Mr. Kamdar. The Applicant challenges the refusal in this judicial review.

[2] The key issue raised by the Applicant's challenge relates to how the requirement that the company be "actively engaged in the business in respect of which the offer is made" (s 200(5)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*]) is applied to applicants under the Owner/Operator stream. The Applicant argues that this requirement must take into account the special context of those applying through the Owner/Operator category, who are essentially beginning a start-up. The Applicant raised two arguments on this point. First, the Officer fettered their discretion by requiring that the "actively engaged" requirement be demonstrated by a company that was already "providing a good or service." Second, the Officer's reasons were not internally coherent because on the one hand, the Officer was looking for a business that was already operating, but then also wanted information about the future plans of the company. The Applicant also argues that the Officer made a factual error in their evaluation.

[3] I do not agree that there is a basis to set aside the Officer's decision. I am satisfied that the Officer did not fetter their discretion and came to the conclusion that the "actively engaged" requirement was not fulfilled for a number of reasons. Further, the reasons are internally coherent. The Officer was evaluating two different requirements in the regulations — one is forward-looking and the other asks about the current state of the business; addressing both these requirements did not lead to internally incoherent reasons as is being alleged. Lastly, the factual

error raised by the Applicant appears to be a clerical error in selecting the incorrect box and was in any case unrelated to the grounds on which the application was denied.

[4] The Applicant has not satisfied me that there is a basis to set aside the Officer's decision. For the reasons set out below, the application for judicial review is dismissed.

II. Background Facts

[5] Mr. Kamdar currently serves as P.P. Minerals India's Managing Partner and CEO. On September 18, 2019, Mr. Kamdar, wanting to expand his enterprise's operations, incorporated P.P. Minerals Canada. Mr. Kamdar is the majority owner of P.P. Minerals Canada. P.P. Minerals India specializes in the manufacturing and exporting of minerals and refractory materials. Mr. Kamdar's plan is for P.P. Minerals Canada to operate in the refractory industry in Canada as well.

[6] On February 4, 2020, P.P. Minerals Canada submitted an LMIA application, seeking to hire Mr. Kamdar as a CEO under the TFWP's Owner/Operator category. On February 11, 2020, the Officer contacted Mr. Kamdar and his former representative to advise them that there were concerns with the genuineness of the job offer and in particular the requirement that the business be "actively engaged" in Canada. Further information about the nature of the Owner/Operator stream and information about other applications approved in the Western region in 2016 were provided by the Applicant. On February 14, 2020, the Officer refused the application, determining that the job offer was not genuine under subsection 200(5) and paragraph 203(1)(a) of the *IRPR*.

III. Preliminary Issue

[7] Both parties raised complaints about the affidavits that were filed by the other on judicial review: the affidavit of Ksenia Tchern, former counsel to P.P. Minerals Canada ("Tchern affidavit"), filed by the Applicant, and the affidavit of Katharine Alexander, the Executive Director of TFWP branch at ESDC ("Alexander affidavit"), filed by the Respondent. I agree that both affidavits impermissibly contain opinions, arguments and legal conclusions about substantive issues raised in the judicial review (s 81(1) of the *Federal Court Rules*, SOR/98-106; (*Canada (Board of Internal Economy) v Canada (Attorney General)*, 2017 FCA 43 at paras 16-18). I have not considered those portions of the affidavits that contain impermissible argument (paras 18, 20-24, 36-39 of the Tchern affidavit, and para 9 of the Alexander affidavit) in reaching my decision.

IV. Issues and Standard of Review

[8] Three issues were raised by the Applicant in its challenge to the refusal decision: i) whether the Officer fettered their discretion by requiring the provision of goods or services for the business to be "actively engaged" under paragraph 200(5)(a) of the *IRPR*; ii) whether the Officer's reasons were internally coherent; and iii) whether the Officer made a factual error.

[9] On the first issue, regardless of the standard of review that applies, where a decision-maker fetters their discretion, the decision cannot stand (*Canada (Minister of Public Safety and Emergency Preparedness) v Keto*, 2020 FC 467 at para 29).

[10] The parties agree that the remaining issues are to be reviewed on a reasonableness standard.

[11] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court of Canada described the reasonableness standard as a deferential but nonetheless "robust form of review," where the starting point of the analysis begins with the decision-maker's reasons (at para 13). A decision-maker's formal reasons are assessed "in light of the record and with due sensitivity to the administrative regime in which they were given" (*Vavilov* at para 103).

[12] The Court described a reasonable decision as "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). Administrative decision-makers, in exercising public power, must ensure that their decisions are "justified, intelligible and transparent, not in the abstract, but to the individuals subject to it" (*Vavilov* at para 95).

V. Analysis

A. *Legislative context*

[13] An employer in Canada may be required to obtain a positive LMIA from ESDC before they can hire a temporary foreign worker. Subsections 203(1) and 203(3) of the *IRPR* set out the factors that an officer at ESDC must consider when assessing an application for an LMIA. This includes determining whether the employment offer is genuine. Whether a job offer is genuine is

assessed based on four factors set out in s 200(5) of *IRPR*. In this judicial review, the principle concern is with the Officer's determination that the Applicant had not met the requirement that the "offer is made by an employer that is actively engaged in the business in respect of which the offer is made…" (s 200(5)(a) of the *IRPR*).

[14] ESDC has published guidelines on this issue of assessing the genuineness of a job offer. The Directive on Genuineness Assessment that was operational at the time of the Officer's decision ("Genuineness Guidelines") set out that a business is "actively engaged" when the "employer has an actual, bona fide operating business where an employee could work and that is providing a good or service that is linked to the job offer".

B. *Officer did not fetter their discretion*

[15] The Applicant's central argument is that the Officer fettered their discretion by relying on the language in the Genuineness Guidelines to require a business to already be providing a good or service in order to be found to be "actively engaged" under paragraph 200(5)(a) of the *IRPR*. I agree with the Applicant that decision-makers cannot treat optional guidelines as if they are law and refuse to consider other relevant factors (*Thamotharen v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198 at para 62). However, upon carefully reviewing the Officer's reasoning, I do not agree that the Officer treated the language in the Genuineness Guideline as mandatory and based their determination solely on the basis that no good or service was being provided by the company at the time of the assessment.

[16] The assessment template form used by the Officer to set out their rationale for their decision includes language from the *IRPR* to describe the "actively engaged" requirement in paragraph 200(5)(a). The form also poses a question that uses the language from the Genuineness Guideline: "Is the employer currently a legitimate business providing a good or service where an employee could work?".

[17] The Applicant argues that the Officer's analysis unduly focused on answering this question, without taking into account the special circumstances of applicants applying under the Owner/Operator stream for a start-up business. The difficulty with this submission is that the Officer's analysis was not limited to only whether the company was currently providing a good or service. The Officer considered a number of factors in deciding that the Applicant had not met the "actively engaged" requirement set out in the *IRPR*. In addition to not providing any goods or services, the Officer noted: the company had no Canadian clients, no warehouse location was selected for the business, no business activities were occurring at the virtual office address that was provided, and that according to the Applicant, it would take approximately four to five months to acquire new clients once the business was opened. The Officer specifically asked the Applicant about how long it would take before the business would have clients. This is not indicative of an approach where the Officer felt bound by the language of the Genuineness Guidelines and the requirement that a good or service already be provided at the time of the assessment (*Charger Logistics Ltd v Canada (Minister of Employment and Social Development)*, 2016 FC 286 at para 21).

[18] Based on a number of factors, the Officer concluded that the Applicant had not met the requirements in paragraph 200(5)(a) of the *IRPR* that "the offer is made by an employer that is actively engaged in the business in respect of which the offer is made…" In the circumstances of this case, I am not satisfied that the Applicant has demonstrated that the Officer fettered their discretion in coming to this determination.

C. *Reasons were internally coherent*

[19] The Applicant also argued that the reasons were not internally coherent because despite having found the Applicant was not actively engaged in a business and therefore the job offer was not genuine, the Officer also went on to assess whether the Applicant could fulfill the reasonable need for the position (s 200(5)(B) in the *IRPR*) by considering the Applicant's future plans once the business was operational. There is no merit to this submission. The Officer's reasons are coherent; the Officer is providing an evaluation on different factors to be assessed in the genuineness evaluation as set out in the *IRPR*. The Officer clearly indicated their reasons with respect to each of the legislative factors.

D. *Factual error was not material to the refusal determination*

[20] The Applicant lastly submits that the decision should be set aside because the Officer incorrectly answered "No" to the question of "Is the employer compliant with federal/provincial/territorial employment and recruitment laws?" I find that this is likely to be a clerical error given that in the written narrative the Officer does not indicate that the employer had any issues with non-compliance. Moreover, this was not a basis for the Officer's refusal of

the application. This administrative error is not a basis to set aside the Officer's decision (*Kamburona v Canada (Minister of Citizenship and Immigration)*, 2020 FC 149 at para 20; *Vavilov* at para 100).

VI. Conclusion

[21] In these circumstances, I cannot find that there is a basis to interfere with the Officer's decision. The decision is transparent, intelligible and justified "in relation to the facts and law that constrain[ed]" the Officer (*Vavilov* at para 85). The application for judicial review is dismissed. Given my reasons for dismissing the application, I see no basis to award costs as requested by the Applicant. The parties did not identify a question of general importance to be certified and I agree that none arises.

JUDGMENT IN IMM-2242-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question of general importance is certified; and

3. No costs are awarded.

"Lobat Sadrehashemi"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Lev Abramovich	FOR THE APPLICANT
Samantha Pillon	FOR THE RESPONDENT

SOLICITORS OF RECORD:

ABRAMOVICH & TCHERN PC Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT