Federal Court Cour fédérale

Date: 20240828

Docket: IMM-11311-23

Citation: 2024 FC 1336

Toronto, Ontario, August 28, 2024

PRESENT: Mr. Justice Diner

BETWEEN:

MIRPOURIA ZARRABI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Zarrabi seeks judicial review of a decision made by a visa officer [Officer] dated August 23, 2023, refusing his application for permanent residence [PR] under section 25.2 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Decision]. For the reasons below, this application is granted.

[2] Mr. Zarrabi is an Iranian citizen. He applied for permanent residence under the *Temporary Public Policy: Temporary Resident to Permanent Resident Pathway* [Pathway] on June 7, 2021.

[3] One of the requirements to qualify for PR through the Pathway is to have accumulated one year of full-time work experience or the equivalent in part-time experience (1,560 hours) in Canada in an eligible occupation listed in Annex A or Annex B in the three years preceding the date on which the application for PR is received. Mr. Zarrabi indicated that he was applying under Stream B in his PR application, which required that "the one year of work experience must have been acquired in one or more occupations listed in Annex B, or a combination of occupations in Annexes A and B".

[4] The Officer refused Mr. Zarrabi's PR application, concluding that Mr. Zarrabi did not meet the requirement of having worked 1,560 hours in a qualifying National Occupation Classification [NOC] position. The Officer considered that while Mr. Zarrabi's 1254.34 hours of work as a Cashier Barista at Starbucks Coffee Canada [Starbucks] between May 2019 and July 2020 counted in a Stream B occupation because it fell under NOC-6611 (Cashier) which is listed in Annex B, his 648 hours worked after July 2020 as a supervising barista/shift supervisor at Starbucks did not count, because the Officer determined that job falls under NOC code 6311 (Food service supervisor) which is not listed in Annex A or B.

[5] The Respondent sent Mr. Zarrabi a procedural fairness letter [PFL] on August 15, 2023 outlining these concerns. In Mr. Zarrabi's response to PFL of August 16, 2023, he clarified that

the hours have been met because he worked an additional 648.65 hours as a supervising barista/shift supervisor. He also provided a letter from Starbucks, explaining that his duties as a supervising barista/shift supervisor were largely aligned with that of a cashier, as classified under NOC-6611, just with one added responsibility of supervising other baristas who are on duty during the same shift. Starbucks also specified that the internal title for this position was supervising barista and not shift supervisor.

[6] The sole issue before this Court is whether the Decision to refuse Mr. Zarrabi's PR application was reasonable (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 59–63; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 99 [*Vavilov*]). Mr. Zarrabi argues that the Decision was unreasonable because the Officer failed to assess his PFL response, which addressed the concerns regarding his hours worked as a supervising barista/shift supervisor. I agree with Mr. Zarrabi. The Officer raised the initial concerns with Mr. Zarrabi by way of a PFL, but failed to engage with the additional evidence provided in the PFL response in the Decision, neither making any mention of the PFL response in that Decision, nor providing any transparent justification or rationale as to why the work did not qualify as a cashier.

[7] I begin by noting that Mr. Zarrabi bears the onus of demonstrating that he meets the requirements to be eligible for the Pathway, and I acknowledge that in a PR application under that program, an officer does not have discretion to accept the hours worked in a position that falls outside Annexes A or B (*Keke v Canada (Citizenship and Immigration)*, 2024 FC 178 at para 27, citing *Salazar Godinez v Canada (Citizenship and Immigration)*, 2023 FC 495 at

para 21). However, the issue here was a matter of failing to grapple with the evidence provided (*Vavilov* at para 128).

[8] At the hearing, Mr. Zarrabi's counsel reminded the Court that the NOC job classifications are "intended for broad use" and that "occupations are identified and grouped primarily according to the work performed, as determined by training, education, tasks, experiences, duties and responsibilities for an occupation" (Statistics Canada, *National Occupational Classification (NOC) 2021 Version 1.0*, Catalogue No 12-583-X (Ottawa: Statistics Canada, 2021) at p 8). This underlines that to solely be guided by the job title rather than the underlying duties places form over substance.

[9] I note that in *Rodrigues v Canada (Citizenship and Immigration)*, 2009 FC 111 [*Rodrigues*], this Court has held that "the real function of the visa officer is to determine what is the pith and substance of the work performed by an applicant" (at para 10) (albeit, in the context of the Skilled Worker Program). Furthermore, the job functions rather than the title are key for the proper classification. As this Court has further noted "the particular job title a person may hold is not a significant factor in the assessment a visa officer is required to make under s 87.1(2) of the *IRPR*" (*Adewunmi v Canada (Citizenship and Immigration)*, 2021 FC 1186 at para 23, in the context of Canadian Experience Class). Although the threshold may differ for different PR programs, the principle remains constant: the determinative factor is what Mr. Zarrabi did for Starbucks as a shift supervisor. If one looks at the pith and substance of his job duties as a barista (cashier), it is difficult to understand – without any explanation or rationale from the officer – how the additional task changed the classification to NOC-6311, the duties of which, by and

large, do not appear consistent with his supervisor role. As Justice Phelan stated in in *Rodrigues*, "[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" (at para 10).

[10] The Respondent asserted that the Court can assume the Officer took the PFL response into account. I acknowledge that visa officers are not required to make explicit findings on each piece of evidence in front of them (*Vavilov* at para 128) and that they are generally presumed to have weighed and considered all of the evidence on file (*Zhou v Canada (Citizenship and Immigration)*, 2013 FC 465 at para 20). In these circumstances and as explained above, the Officer's lack of engagement with material evidence provided in response to the PFL constitutes a reviewable error, lacking transparency and proper justification.

[11] Therefore, in my view, the Decision is not intelligible, transparent and properly justified (*Vavilov* at paras 99–101). The application for judicial review is thus accordingly allowed.

JUDGMENT in file IMM-11311-23

THIS COURT'S JUDGMENT is that:

1. The judicial review is allowed. The matter is remitted to a different officer for redetermination.

2. There is no question to certify.

3. No costs will issue.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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