Date: 20080708

Docket: IMM-4097-07

Citation: 2008 FC 842

Montréal, Quebec, July 8, 2008

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

ANGELITA GUINTO BONDOC

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of the decision of a visa officer, dated July 24, 2007, refusing the applicants' application for a work permit in Canada as a "live-in caregiver" (LIC).

I. Facts

[2] A citizen of the Philippines, the applicant applied for a work permit and a temporary resident visa as a part of the Live-In Caregiver Program (LICP). Her intended employers were her sister and brother-in-law, both residents of Canada with their two children. At the time the application was submitted the children were 13 and 7 years old; the children are now 14 and 8 years old.

[3] Once the applicant received the validation of employment from Human Resources and Social Development Canada (HRSDC), she applied to Citizenship and Immigration Canada (CIC) for her work permit and temporary resident visa. The applicant attended an interview on July 24, 2007 and in a decision dated that same day, the visa officer denied her application.

II. Impugned Decision

[4] In a letter dated July 24, 2007, the visa officer provided three main reasons to refuse the application:

a. The employment offer was not genuine. In making this finding, the visa officer considered that the future employer was the applicant's sister, that she had never before hired a caregiver, that neither of the children had physical or mental disabilities, that the applicant's work hours were the same hours the children were in school with the exception of the period from 8:00 a.m. to 9:00 a.m., and that while

the children would soon be on summer vacation the parents had never hired a caregiver during this period.

b. The applicant was "unable to demonstrate that [she had] sufficient knowledge and skills to adequately provide care without supervision".

c. That "the job offer was made primarily for the purpose of facilitating [the applicant's] admission to Canada" and that the applicant's intentions in coming to Canada were not for a temporary purpose.

III. Issues

[5] The impugned decision raises three issues:

1. Did the visa officer err in finding that the offer of employment was not genuine?

2. Did the visa officer err in finding that the applicant's knowledge and skills to provide satisfactory care without supervision were inadequate?

3. Did the visa officer err in finding that the applicant's intention in coming to Canada was not for a temporary purpose?

IV. Standard of Review

[6] The question is whether the visa officer erred in her factual assessment of the applicant's

application. Therefore the standard of review is reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9). And as mentioned in *Dunsmuir*, at paragraph 161, "decisions on questions of fact always attract deference" and "when the issue is limited to questions of fact, there is no need to enquire into any other factor in order to determine that deference is owed to an administrative decision maker". Reasonableness remains the appropriate standard of review in this case.

[7] As pointed out also in *Dunsmuir* (above, at paragraph 47), this Court is only concerned "mostly with the existence of justification, transparency and intelligibility within the decision-making process […] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".

V. Legislation

[8] "Live-in caregiver" is defined by s. 2 of the *Immigration and Refugee Protection Regulations* (Regulations) as follows:

"Live-in caregiver" means a person who resides in and provides child care, senior home support care or care of the disabled without supervision in the private household in Canada where the person being cared for resides.	« aide familial » Personne qui fournit sans supervision des soins à domicile à un enfant, à une personne âgée ou à une personne handicapée, dans une résidence privée située au Canada où résident à la fois la personne bénéficiant des soins et celle qui les prodigue.

[9] The purpose of the LICP is both to fulfill the live-in care needs of the Canadian employer and also to allow the live-in caregiver to apply for permanent residence once the program is completed.

[10] In order to enter the LICP, the prospective employer first must submit for validation an offer of employment to Human Resources and social Development Canada (HRSDC), and subsequently obtain from a visa officer a work permit and a temporary resident visa (TRV) in Canada as a "live-in caregiver".

[11] According to Manual OP14, s. 5.7, validation indicates that the HRSDC officer was satisfied of the following:

a. The offer of employment exists;
b. There is a need established for the live-in care; and
c. A reasonable search has been carried out to identify qualified and available Canadian citizens and/or permanent residents and unemployed foreign caregivers already in Canada.

[12] Having obtained HRSDC validation of the offer of employment, the applicant then applies to a visa officer for a work permit and, if necessary, a TRV. According to s.112 of the Regulations, the visa officer is entitled to assess the applicant's application for a work permit based on a series of requirements, including the employment contract with her future employer. Section 112 of the Regulations reads as follows:

A work permit shall not be issued to a foreign national who seeks to enter Canada as a live-in caregiver unless they

(*a*) applied for a work permit as a live-in caregiver before entering Canada;

(*b*) have successfully completed a course of study that is equivalent to the successful completion of secondary school in Canada;

(*c*) have the following training or experience, in a field or occupation related to the employment for which the work permit is sought, namely,

(i) successful completion of six months of full-time training in a classroom setting, or

(ii) completion of one year of full-time paid employment, including at least six months of continuous employment with one employer, in such a field or occupation within the three years immediately before the day on which they submit an application for a work permit;

(*d*) have the ability to speak, read and listen to English or

Le permis de travail ne peut être délivré à l'étranger qui cherche à entrer au Canada au titre de la catégorie des aides familiaux que si l'étranger se conforme aux exigences suivantes :

a) il a fait une demande de permis de travail à titre d'aide familial avant d'entrer au Canada;

b) il a terminé avec succès des études d'un niveau équivalent à des études secondaires terminées avec succès au Canada;

c) il a la formation ou l'expérience ci-après dans un domaine ou une catégorie d'emploi lié au travail pour lequel le permis de travail est demandé :

(i) une formation à temps plein de six mois en salle de classe, terminée avec succès,

(ii) une année d'emploi rémunéré à temps plein — dont au moins six mois d'emploi continu auprès d'un même employeur — dans ce domaine ou cette catégorie d'emploi au cours des trois années précédant la date de présentation de la demande de permis de travail;

d) il peut parler, lire et écouter l'anglais ou le

French at a level sufficient to communicate effectively in an unsupervised setting; and	français suffisamment pour communiquer de façon efficace dans une situation non supervisée;
(*e*) have an employment contract with their future employer.	*e*) il a conclu un contrat d'emploi avec son futur employeur
[Emphasis added.]	[Souligné ajouté.]

[13] The applicable processing manual specifically states that the assessment of the employment contract includes establishing that it is *bona fide*. This Court has implicitly accepted in the case of *Soor v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1344 , [2006] F.C.J. No.1726 (QL), that the words "*bona fide*" can be inserted before "employment contract" when the visa officer makes a determination under s. 112(*e*) of the Act. The *bona fides* of the contract is therefore a legitimate issue for consideration by the visa officer, and an examination of the relationship between the employer and the potential employee therefore may be required.

VI. Analysis

a. Did the visa officer err in finding that the offer of employment was not genuine?

[14] The relevant portion of the decision reads as follows:

> I took into consideration that your future employer is your sister. She and her husband have never before hired a caregiver for their 14- and 8-year old children. Neither of the children has physical nor mental disabilities. Although at interview you had justified the sudden need for one because the children are starting with their summer break in August, I do not find this reason to be credible since the children

> have been having summer breaks for the past several years yet the employers had not hired a live-in caregiver for this purpose. Further the children are in school from 9am-5pm; your work schedule is from 8am-4pm. You had stated that while the children are in school, you will be doing light housekeeping, tidying up the house and preparing the children's meals. It appears that you will be doing more household chores than providing unsupervised care.

[15] The applicant submits that this finding is unreasonable. However and in light of the evidence on record, this Court is satisfied that the impugned decision is reasonable. The visa officer was justified to assess the *bona fides* of the future employment position, the relationship between the employer and the potential employee. The officer did not simply reject the application because the employment offer came from within family, but instead reviewed the "overall picture", to find that the employment position was not *bona fide*.

[16] The HRSDC deals exclusively with the employer in Canada, and therefore is not responsible for assessing the *bona fides* of the employment contract. The visa officer has the responsibility to assess the intent of both parties to the contract. As to the duties envisaged by the employment contract, the visa officer committed no unreasonable error in concluding that the applicant's duties were more in line with domestic duties, rather than providing unsupervised care to the children. And finally, with regards to the submission that the visa officer failed to consider the need of the potential employer, namely a letter faxed to HRSDC which described the potential employer's need for assistance, this Court notes that this letter is referred to in the Computer Assisted Immigration Processing System (CAIPS) notes, and therefore was considered by the visa officer.

[17] Having reviewed the evidence on record, including the CAIPS notes, the decision and the affidavit produced by the visa officer, this Court concludes that, viewed as a whole, the visa officer's finding that the employment offer was not genuine is reasonable. With regards to the officer's consideration of the applicant's familial relationship with her future employer, this Court notes that this is not the only pertinent factor considered in the officer's assessment of the *bona fides* of the employment offer. This consideration should not be isolated from the other factors that were also considered in support of this finding. And even if nothing in the Act or its Regulations prevents employment offers between family members, nothing on the other hand prevented the officer to consider the family relationship with the other factors that were considered in order to be able to convince herself that the applicant's offer of employment was not genuine.

[18] As to the argument that the visa officer failed to give adequate consideration to the HRSDC officer's validation of the employment contract, this argument has no merit. It is within the power of a visa officer to assess the genuineness of an employer's offer, and there is no requirement for him to give deference to the HRSDC officer's assessment of the validity of the employment offer.

[19] The evidence before the visa officer included that the potential employers had never hired a caregiver for their children, that their children did not require any special assistance due to physical or mental disabilities, and that although summer vacation was approaching the family had always managed without a caregiver in the past. There is no evidence supporting a sudden need of special assistance. Moreover, the applicant's proposed work schedule was such that she would only be regularly responsible for supervising the children for one hour a day from 8:00am to 9:00am. In

light of the evidence before the officer, the Court is satisfied that the impugned decision is reasonable.

b. Did the visa officer err in finding that the applicant's knowledge and skills to provide satisfactory care without supervision were inadequate?

[20] The applicant submitted that the HRSDC officer's approval and CIC officials' positive pre-screening of the applicant's caregiver skills, as completed with the results of the applicant's "SPEAK" test, created a strong presumption that the applicant is qualified as a "live-in caregiver" and has met the objective criteria set out in section 112 of the Regulations, and that the visa officer did not displace this presumption with sufficient reasons.

[21] But it is the visa officer who is required to assess whether the applicant is legitimately capable of performing the required duties, not the HRSDC officer. Paragraph 200(3)(*a*) of the Regulations stipulates clearly that an officer shall not issue a work permit to a foreign national if there are reasonable grounds to believe the foreign national is unable to perform the work sought. The visa officer performed the duties delegated to him and reached a reasonable finding given the evidence on record.

[22] The relevant portion of the impugned decision reads as follows: "In addition, you were unable to demonstrate that you have sufficient knowledge and skills to adequately provide care without supervision. [Immigration and Refugee Protection Regulations 2 "live-in caregiver" and

paragraph 200(3)(a)]". The CAIPS notes provide more insight into the reasoning behind this finding.

[23] The applicant opposes to this finding an alleged presumption that the applicant had the necessary skills given the pre-screening approvals from HRSDC and CIC officials. This Court disagrees with such an argument. While these officials have a role to play in the administration of the LIC Program, it is the visa officer who must be satisfied that the requirements are met, not the HRSDC and CIC officials.

[24] Thus, the visa officer must deny the application if satisfied that there are reasonable grounds to believe that the foreign national is unable to perform the duties of a live-in caregiver. In the present case, the visa officer indicated in the CAIPS notes that despite the documentary evidence attesting to the applicant's qualifications, still she was not satisfied based on the applicant's answers to her questions that she had the necessary knowledge and skills to work in an unsupervised setting. This finding is reasonable given the insufficient answers provided by the applicant to the visa officer's questions.

[25] While the applicant submits that her responses were correct and that the visa officer had no "right answers" with which to compare her answers, this Court disagrees, since the applicant's responses to the questions were clearly incomplete. The applicant has also failed to convince the Court that the visa officer breached procedural fairness in failing to provide adequate reasons for

this finding. While there is perhaps a lack of explanation for the finding in the actual letter explaining the decision, the CAIPS notes provide sufficient explanation.

[26] This Court sees no reason to interfere with the decision on this ground.

c. *Did the visa officer err in finding that the applicant's intention in coming to Canada was not for a temporary purpose?*

[27] As discussed above, the visa officer concluded that the job offer was not genuine and was made primarily for facilitating the applicant's admission to Canada. This appears to have led the visa officer to further believe that the applicant was not a person who sought to come to Canada for a temporary purpose. The relevant portion of the visa officer's decision reads:

> I have concluded that, on a balance of probabilities, the job offer was made primarily for the purpose of facilitating your admission to Canada. Sub-paragraph 200(1)(c)(iii) of the Immigration and Refugee Protection Regulations states that, "subject to subsections (2) and (3), an officer shall issue a work permit to a foreign national if, following an examination, it is established that (…) the foreign national … has been offered employment and an officer has determined under section 203 that the offer is genuine…
>
> Under the circumstances a work permit and a temporary resident visa cannot be issued because in opinion you are not a person who seeks to come into Canada for a temporary purpose [Immigration and Refugee Protection Regulations 179(a) and (d)].

[28] The applicant submits that the visa officer erred with this finding because it fails to take into consideration the purpose of the LIC Program, and is unreasonable given the absence of any evidence to support such a finding. On the other hand the Court considers that while there is a

provision entitling applicants for the LIC Program to have a dual intent in entering Canada, the visa officer must still be satisfied that ultimately the applicant would depart Canada and not remain here illegally if their application for permanent residence is denied.

[29] Having reviewed the entirety of the evidence before the visa officer, this Court agrees with the applicant that this finding is not supported by the evidence and that the visa officer had no basis to make it. In fact, the visa officer's appears to ignore the applicant's close ties to the Philippines including the fact that her husband and young child resided there. It is also an error for the visa officer to ignore in his decision the dual intent nature of the LIC Program. The visa officer does not have to be satisfied that the applicant has a temporary purpose in coming to Canada, but instead that the applicant will not remain illegally in Canada if her application for permanent residence under the LIC class is rejected.

VII. Conclusion

[30] While the visa officer did err in her finding that the applicant did not seek to come to Canada for a temporary purpose, still this error has no serious consequence on the impugned decision, since this Court has already found that the first two issues are both determinative of the visa officer's decision that the applicant does not meet the LICP's requirements, and that this finding is reasonable. So that even if the officer erred, the applicant still failed to meet the minimum level of eligibility, and therefore the error becomes immaterial and does not justify the intervention of this Court.

[31] Consequently, and in spite of the above noted error, the Court concludes that the impugned decision falls as a whole within a range of possible, acceptable outcomes which are defensible in respect of the facts and law, and is reasonable. Therefore the application will be dismissed.

[32] Further, the Court agrees with the parties that there is no question of general interest to certify.

JUDGMENT

FOR THE FOREGOING REASONS THE COURT dismisses the application.

"Maurice E. Lagacé"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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