

**Date: 20081128**

**Docket: IMM-2401-08**

**Citation: 2008 FC 1330**

**Ottawa, Ontario, November 28, 2008**

**PRESENT: The Honourable Mr. Justice Kelen**

**BETWEEN:**

**SEYED SAEED NASSERI**

**Applicant**

**and**

**THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is judicial review of a decision of a visa officer in Damascus, Syria dated March 17, 2008 refusing the applicant's application for permanent residence in Canada as "an entrepreneur" under Section 12(2) of the Immigration and Refugee Protection Act (IRPA), on the basis that the applicant did not qualify as "an entrepreneur" under the definitions in Section 88(1) of the Immigration and Refugee Protection Regulations (IRPR).

## **FACTS**

[2] The applicant is a 67 year old citizen of Iran. He submitted an application for permanent residence under the entrepreneur class on September 21, 2003 for himself and his family.

[3] The applicant is a mechanic and has been the sole owner and manager of a mechanical repair workshop business in Tehran, Iran, for over forty years. The applicant states that he has a net worth exceeding \$2,000,000 accumulated from the operation of his business and the value of his residential property.

[4] The applicant declared in Schedule 6 to his application that the net assets of his business for the fiscal years of 2005 and 2006 amounted to \$127,652.00 and \$125,129.00 respectively, and that the net income of his business for those years was \$54,886.00 and \$56,105.00 respectively. The applicant provided audited financial statements as evidence of this information.

[5] The applicant states that he has employed four employees in his business during all the relevant fiscal periods.

[6] The applicant states that he relies heavily on the services of an independent accounting firm, Noga & Co. (the “auditors”), in the financial management of his business. The auditors send a person to the applicant’s business every week to assist with bookkeeping, and also audit the applicant’s documents and provide annual audited financial statements of his business. These are the statements that were provided by the applicant as evidence of his business assets and income.

[7] The applicant had an interview with the visa officer on March 16, 2008. The Officer questioned the applicant about his business and, in a letter dated March 17, 2008, denied the applicant's application for permanent residence in Canada on the basis that the applicant's business did not meet the requirements of a "qualifying business" set out in Section 88(1) of IRPR.

### **Relevant Legislation**

[8] Section 12(2) of IRPA provides that foreign nationals may be selected for permanent residence status on the basis of their economic status:

#### Economic Immigration

12. (2) A foreign national may be selected as a member of the economic class on the basis of their ability to become economically established in Canada.

#### Immigration économique

12. (2) La sélection des étrangers de la catégorie « immigration économique » se fait en fonction de leur capacité à réussir leur établissement économique au Canada.

[9] Section 88(1) of the IRPR gives the relevant definitions for those applying for permanent residence status as entrepreneurs.

"entrepreneur" means a foreign national who

(a) has business experience;

(b) has a legally obtained minimum net worth; and

(c) provides a written statement to an officer that they intend and will be able to meet the conditions referred to in

«entrepreneur» Étranger qui, à la fois :

a) a de l'expérience dans l'exploitation d'une entreprise;

b) a l'avoir net minimal et l'a obtenu licitement;

c) fournit à un agent une déclaration écrite portant qu'il a l'intention et est en mesure

subsections 98(1) to (5).

de remplir les conditions visées aux paragraphes 98(1) à (5).

Applicants under this category must meet this definition for at least two of the five years preceding their application.

[10] “Business experience” is defined as:

"business experience", in respect of:

(b) an entrepreneur, other than an entrepreneur selected by a province, means a minimum of two years of experience consisting of two one-year periods of experience in the management of a qualifying business and the control of a percentage of equity of the qualifying business during the period beginning five years before the date of application for a permanent resident visa and ending on the day a determination is made in respect of the application;

«expérience dans l’exploitation d’une entreprise»:

b) s’agissant d’un entrepreneur, autre qu’un entrepreneur sélectionné par une province, s’entend de l’expérience d’une durée d’au moins deux ans composée de deux périodes d’un an d’expérience dans la gestion d’une entreprise admissible et le contrôle d’un pourcentage des capitaux propres de celle-ci au cours de la période commençant cinq ans avant la date où la demande de visa de résident permanent est faite et prenant fin à la date où il est statué sur celle-ci;

[11] “Qualifying business” is defined as:

"qualifying business" means a business – other than a business operated primarily for the purpose of deriving investment income such as interest, dividends or capital gains — for which, during the year under consideration, there is documentary evidence of any two of the following:

(a) the percentage of equity multiplied by

«entreprise admissible» Toute entreprise — autre qu’une entreprise exploitée principalement dans le but de retirer un revenu de placement, tels des intérêts, des dividendes ou des gains en capitaux — à l’égard de laquelle il existe une preuve documentaire établissant que, au cours de l’année en cause, elle satisfaisait à deux des critères suivants :

the number of full time job equivalents is equal to or greater than two full-time job equivalents per year;

(b) the percentage of equity multiplied by the total annual sales is equal to or greater than \$500,000;

(c) the percentage of equity multiplied by the net income in the year is equal to or greater than \$50,000; and

(d) the percentage of equity multiplied by the net assets at the end of the year is equal to or greater than \$125,000.

a) le pourcentage des capitaux propres, multiplié par le nombre d'équivalents d'emploi à temps plein, est égal ou supérieur à deux équivalents d'emploi à temps plein par an;

b) le pourcentage des capitaux propres, multiplié par le chiffre d'affaires annuel, est égal ou supérieur à 500 000 \$;

c) le pourcentage des capitaux propres, multiplié par le revenu net annuel, est égal ou supérieur à 50 000 \$;

d) le pourcentage des capitaux propres, multiplié par l'actif net à la fin de l'année, est égal ou supérieur à 125 000 \$.

### **Decision under review**

[12] In denying the applicant's application, the visa officer wrote:

I am not satisfied that Nasser Repair Shop meets the requirements of a Qualifying Business for the following reasons:

Annual sales: Based on the figures provided in your schedule 6 and financial statements, the annual sales amounts do not meet the minimum requirements of a qualifying business in any of the years for which information is provided.

Net income: I have reviewed the invoices and tax documents you submitted as proof of your net income. This documentation is insufficient to establish that this business achieved the net income as stated on your schedule 6 form and your financial statements.

Net assets: I questioned you regarding the net asset value of the business and the breakdown of business assets. The responses you

provided were inconsistent with the information on your Schedule 6 and financial statements. In addition, the information on your financial statements and Schedule 6 is not supported by documentary evidence which shows that the net asset value of this business meets the minimum requirements.

Based on a review of the information on file, I am not satisfied that this is a qualifying business. There is insufficient evidence to satisfy me that this business meets at least two of the four business performance attributes for at least two years. Consequently, you have not satisfied me that you are an entrepreneur and therefore eligible for a permanent resident visa as a member of the entrepreneur class.

(Applicant's Record, p. 8)

[13] The applicant seeks judicial review of this decision on the basis that he provided sufficient documentary evidence establishing at least two of the four business performance attributes, that the visa officer's decision was based on irrelevant factors and miscommunications during the interview, and that the visa officer's decision was therefore unreasonable.

#### **STANDARD OF REVIEW**

[14] Decisions of a visa officer are entitled to a substantial degree of deference. Following the Supreme Court's decision in *Dunsmuir v. New Brunswick* [2008] S.C.J. No. 9, 2008 SCC 9, holding that the two standards of review are correctness and reasonableness, decisions of a visa officer relating to applications for permanent residence under the entrepreneur class are subject to a standard of review of reasonableness. *Nadezhda v. Canada (MCI)* 2008 FC 553, 167 A.C.W.S. (3d) 779, per Justice Phelan at paragraphs 11-12; *Shakeri v. Canada (MCI)*, 2008 FC 752, per Justice Lagacé at paragraph 7.

[15] In reviewing the Board's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir* at paragraph 47).

## ANALYSIS

[16] In order to meet the requirements of a "qualifying business" the applicant's repair shop has to meet two of the four criteria outlined in the IRPR. Thus, the visa officer's finding that the applicant's annual sales do not meet the minimum requirements in the regulations, which the applicant does not contest, is not a bar to the applicant's business being determined a qualifying business. The applicant submits that his business meets the other three criteria of a qualifying business, i.e. he has employed four full-time employees and has maintained a net income of over \$50,000 and net assets of over \$125,000 for the relevant years. The visa officer did not dispute that the applicant has employed the requisite number of employees at all relevant times. Thus, the applicant had to establish that he satisfied one additional requirement in order to show that he owned a "qualifying business."

[17] Section 88 of the IRPR provides the following definitions for "net income" and "net assets":

"net assets" , in respect of a qualifying business or a qualifying Canadian business, means the assets of the business, minus the liabilities of the business, plus shareholder loans made to the business by the foreign national who is making or has made an application for a permanent resident visa and their spouse or common-law partner.

«actif net» S'agissant d'une entreprise admissible ou d'une entreprise canadienne admissible, s'entend de l'excédent de l'actif de celle-ci sur son passif, augmenté des prêts octroyés à l'entreprise par l'étranger qui demande ou a demandé un visa de résident permanent et son époux ou conjoint de fait.

"net income" , in respect of a qualifying business or a qualifying Canadian business, means the after tax profit or loss of the business plus remuneration by the business to the foreign national who is making or has made an application for a permanent resident visa and their spouse or common-law partner.

«revenu net» S'agissant d'une entreprise admissible ou d'une entreprise canadienne admissible, les bénéfices ou pertes de l'entreprise après impôts, compte tenu de la rémunération versée par l'entreprise à l'étranger qui demande ou a demandé un visa de résident permanent et à son époux ou conjoint de fait.

[18] The applicant provided audited financial statements prepared by his accountants. He states that he relied on these statements in providing the amounts in his application. Schedule 6 of the applicant's application states that his net income was \$54,886 in 2005 and \$56,105 in 2006, and his net assets totalled \$ \$127,652 in 2005 and \$125,129 in 2006.

[19] The applicant included a tax statement for the 2006 operating year from the Ministry of Economic and Financial Affairs in his documentary evidence, but there is no similar statement for 2005, and it is not clear whether the tax statement provided is for the full amount of taxes paid in 2006 (Tribunal Record, p. 70). Thus, the visa officer was correct in concluding that there was insufficient documentary evidence to show that the applicant had the requisite net income, after taxes, for the relevant years. However, the applicant would still qualify for a visa as an entrepreneur if his net assets were found to meet the requirements set out in section 88 of the IRPR.

[20] The applicant was questioned about his net assets during the interview. The visa officer found that the applicant's responses "were inconsistent with the information on your Schedule 6 and financial statements." The relevant portion of the CAIPS notes states:



What documentary proof do you have of the net assets of your business? The fixed assets, PA asks. What is the *ttl (sic)* net asset value of your business? Mechanical permit. What doc evidence do you have of the value of the net assets of this business? I have a shop. What documentary evidence do you have of the value of the net assets of your business? Equipment. I have motors. What doc proof do you have of the value of the assets? I have them here. Repairing equipment. What documentary proof do you have that support the net asset value? It's there. What do you have? This refers to the repairing equipment. What docs do you have, other than these invoices, what docs do you have to support the value of bus assets? Looks through his bag. States he is sure it is his file. Asked what the name of the doc is so I can look at it. States: the jack, the repairing equipment.

[21] The respondent states that these portions of the transcript indicate that the applicant was unable to answer simple questions about his business, leaving the visa officer with an insufficient basis to make an informed decision that the applicant's shop was a qualifying business within the meaning of section 88 of the IRPR.

[22] According to the applicant, these CAIPS notes indicate that there was confusion on both the applicant and the visa officer's part, and that the visa officer based her decision in part on irrelevant issues and in part on the confusion resulting from the miscommunications during the interview. The applicant points to other portions of the CAIPS notes where the visa officer or the applicant were confused, such as the visa officer's confusion between two individuals named Valot Ratoos and Varouj Ratodsi, or the applicant's confusion over the meaning of the term "profit margin."

(Applicant's Record, pp. 12-13)

[23] The visa officer did not specify in her decision what additional evidence would be necessary to substantiate the applicant's net assets. This should have been made clear to the applicant, and the applicant should have been given an opportunity to gather the documents supporting the applicant's net assets and present them to the visa officer with the assistance of his accountant. The Overseas Processing Manual identifies balance sheets and income statements as the primary source of financial information in applying the criteria. It further states that "there are essentially three levels of assurance that a public accountant can provide to the users of financial information: audits; review engagements; and compilation engagements."

[24] During the interview, the visa officer asked the applicant several times what documentary evidence he had to establish the criteria, but did not indicate in the interview or the subsequent letter what additional documents may have been necessary to establish his net assets. It is unclear from visa officer's decision why she felt there was insufficient material to determine net assets. The audited financial statements provide a calculation of net assets for the relevant years. The visa officer did not state that the financial statements were not credible, reliable or satisfactory. These financial statements are the best evidence of the value of the business and its assets.

[25] The visa officer stated that there were inconsistencies between the documentary evidence and the applicant's responses in the interview. However, the applicant did not provide any information during the interview that contradicted the documentary evidence, although he clearly did not understand some of the visa officer's questions.

[26] The CAIPS notes indicate that there were serious communication problems during the interview, which must have been evident to the visa officer. However, the visa officer did not make any adverse findings as to credibility of applicant or infer from the applicant's failure to understand him that the applicant was not the owner of the business in question. Thus, the applicant's failure to understand the officer's questions does not evince any inconsistency between his documentary evidence and his responses. The visa officer should have explained clearly why the audited financial statements provided were insufficient to determine whether applicant's net assets met requirements. Without such an explanation, her decision is not "intelligible" and thus does not meet reasonableness definition of *Dunsmuir*.

[27] For these reasons, the application for judicial review is granted and the matter will be referred back to another visa officer for redetermination with the direction that its processing be expedited.

[28] Neither party considered that this case raised any serious question of general importance that ought to be certified for an appeal. The Court agrees.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that:**

This application for judicial review is allowed, the decision of the visa officer is set aside, and the application is referred to another visa officer for redetermination with the Court's direction that the redetermination be expedited.

“Michael A. Kelen”

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Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** IMM-2401-08

**STYLE OF CAUSE:** SEYED SAEED NASSERI v. MINISTER OF  
CITIZENSHIP & IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** November 18, 2008

**REASONS FOR JUDGMENT  
AND JUDGMENT:** Kelen J.

**DATED:** November 28, 2008

**APPEARANCES:**

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