

Date: 20100720

Docket: IMM-6560-09

Citation: 2010 FC 759

Ottawa, Ontario, July 20, 2010

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

GURPREET KAUR SANDHU

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Gurpreet Kaur Sandhu applies to this Court pursuant to section 18.1 of the *Federal Court Act*, R.S.C., 1985, c. F-7 for judicial review of the decision of a Visa Officer from the Canadian High Commission in New Delhi.

[2] Ms. Sandhu is a citizen of India who had worked for three inter-related small companies that provided travel and immigration services in India. She applied for a permanent residence

visa as a skilled worker as a Banking Manager (NOC 1434) and Secretary (NOC 1241) as recognized by Canada's National Occupational Classification (NOC).

[3] The Officer was not satisfied with the documentation concerning Ms. Sandhu's experience as a banking clerk. She also decided the Ms. Sandhu did not have experience as a secretary at the NOC 1241 B skill level because that skill level was not required in small service-orient companies.

[4] The Visa Officer refused Ms. Sandhu's application for permanent residency as a skilled worker finding she did not meet the requirements under subsection 75(2) of the *Immigration and Protection Refugee Regulations*, SOR/2002-227 (the Regulations).

[5] For the reasons that follow I am allowing the judicial review.

Facts

[6] Ms. Sandhu is a 30 year old Indian citizen. She earned a Bachelor of Business Administration degree at Punjab University in 2001, she later earned a Master of Business Administration at Punjab Technical University.

[7] In 2004 the Applicant took a job at a company called Directaccess Marketing Pvt. Ltd. in Ludhiana. It appears from her contract of employment that this job required she work at the Bank of Punjab Ltd. However, what her responsibilities at the bank would be is not clear on the record.

[8] From May 2005 until October 2007 the Applicant was an office secretary for a company called Moga Swastik Travels. This company is a travel, visa and immigration service. The owner is certified through the Canadian Society of Immigration Consultants.

[9] In 2007 Ms. Sandhu became the manager's secretary at G.N. Immigration Advisers and in April of 2009 she acted again as office secretary and later co-ordinator at Guru Nanak Travel Advisers. All these companies appear related.

[10] The Applicant provided employer's letters confirming her employment duties at each of the companies. In the letter of the most recent employer, Guru Nanak Travel Advisors (Reg'd), dated August 19, 2009, the proprietor confirmed Ms. Sandhu's prior employment with the sister concern, G.N. Immigration Advisers. Ms. Sandhu's "main duties" are described as:

- 1) Receive and answer telephone calls and enquiries conducted by the clients.
- 2) Welcome the new clients and forward them to the right person after determining their purpose of visit.
- 3) Receive and check both manual and electronic mails on daily basis and distribute them to the appropriate person.
- 4) Make and deal with the appointments.
- 5) Respond to the mails received as directed by manager.
- 6) Type, print and dispatch the daily correspondence by using computers.
- 7) Some times may also prepare type and print the immigration and visa application forms in case of staff shortage.
- 8) Order office stationary and other supplies in shortages.
- 9) Also send and receive messages by using fax machines.
- 10) Also train and guide the new workers about the work performed in the office when required.
- 11) Arrange travel schedule of the employer according to instructions issued.

[11] Included in her application are monthly accounts of the Applicant's work hours from her various employers. These appear to be standardized documents referred to as a Register of Employees established pursuant to rule 5 of the Punjab Shops and Commercial Establishment Rules, 1958 and they indicate the Applicant worked eight hours a day, six days a week and took leave on occasion.

[12] The Applicant also submitted a variety of certificates, pay stubs and other documents to substantiate her claims of employment.

[13] The Applicant secured a job offer from a company in the Greater Toronto Area.

Decision Under Review

[14] The Visa Officer refused Ms. Sandhu's application, writing:

I am not satisfied that you meet the requirement set out in Paragraph 75(2) of the *Immigration and Refugee Protection Regulations* because a Banking Clerk (NOC 1434) does not meet the requirement for assessment as it is not listed in Skill Type 0, or Skill Level A or B of the National Occupational Classification matrix, and your documentation does not satisfactorily demonstrate that you have performed the main duties of a Secretary (NOC 1241) and/or a Loan Officer (NOC 1232). Your documents from Directaccess Marketing Pvt. Ltd. do not list your title or duties and given your salary level, I am not satisfied that you performed the main duties of a Loan Officer (NOC 1232). Regarding your position as Secretary (NOC 1241), given the size of the companies, the nature of their business lines, and the description of your duties, I not [sic] satisfied that you are performing the duties of an occupation in the skill level B, as opposed to an occupation in the skill level C such as a General Office Clerk.

[15] The Visa Officer amplifies her reasoning in an affidavit submitted in support of her decision. She first explains the Applicant was not able to produce sufficient evidence to establish her claim that she was a loan officer. This is apparently due to the closing of the office that hired her at the time. This aspect of her decision is not challenged.

[16] With respect to the secretarial work, the Visa Officer explains that she considered the “‘quality of duties’ performed by the Applicant, rather than the number of duties performed.” The Officer added that she had no doubt the Applicant worked in the enterprises she claimed to work at. The Officer found the Applicant’s work at these companies did not qualify for the appropriate skill level. She wrote:

“Skill Worker applications require the additional assessment of skill levels A, B and C differentiation, since skill level C is not eligible. In such cases, I may consider the working environment or context in which the duties are being performed, thereby placing “greater weight on certain duties” by for [sic] the purpose of assessing the skill level.”

[17] Some responsibilities overlap between a secretary (NOC 1241, skill level B) and an office clerk (NOC 1411, skill level C). In this case, the Officer identified overlapping skills, such as: editing, keying in and proofreading documents; answering inquiries; answering telephone; processing/outgoing mail and ordering office supplies. She singled out the other responsibilities exclusive to secretaries which is the higher skill level job, including: establishing office procedures; preparing minutes; conducting research and supervising staff.

[18] The Officer assessed the likely needs of the Applicant's employers and came to the conclusion that it was not likely they would have needed the Applicant to perform those tasks which distinguish a secretary from an office clerk.

[19] The Officer concluded the Applicant did not have the necessary responsibilities at her job to qualify at the higher skill level B, the minimum to qualify for the skilled worker category as a secretary. She decided:

Based on the documents submitted, I am not satisfied that you performed the duties of a Secretary (NOC 1241) ... for at least one year, on a continuous and full time basis, within the period starting ten years before the date of your application.

[20] The Visa Officer refused the application for a permanent resident visa as a skilled worker.

Relevant Legislation

Immigration and Protection Refugee Regulations, (SOR/2002-227)

75. (1) For the purposes of subsection 12(2) of the Act, the federal skilled worker class is hereby prescribed as a class of persons who are skilled workers and who may become permanent residents on the basis of their ability to become economically established in Canada and who intend to reside in a province other than the Province of Quebec.
Skilled workers

(2) A foreign national is a

75. (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des travailleurs qualifiés (fédéral) est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada, qui sont des travailleurs qualifiés et qui cherchent à s'établir dans une province autre que le Québec.
Qualité

skilled worker if

(a) within the 10 years preceding the date of their application for a permanent resident visa, they have at least one year of continuous full-time employment experience, as described in subsection 80(7), or the equivalent in continuous part-time employment in one or more occupations, other than a restricted occupation, that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the National Occupational Classification matrix;

(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; and

(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.

Minimal requirements

(3) If the foreign national fails to meet the requirements of subsection (2), the application for a permanent resident visa shall be refused and no further assessment is required.

(2) Est un travailleur qualifié l'étranger qui satisfait aux exigences suivantes :

a) il a accumulé au moins une année continue d'expérience de travail à temps plein au sens du paragraphe 80(7), ou l'équivalent s'il travaille à temps partiel de façon continue, au cours des dix années qui ont précédé la date de présentation de la demande de visa de résident permanent, dans au moins une des professions appartenant aux genre de compétence 0 Gestion ou niveaux de compétences A ou B de la matrice de la Classification nationale des professions — exception faite des professions d'accès limité;

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 cette classification;

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 cette classification, notamment toutes les fonctions essentielles.

Exigences

(3) Si l'étranger ne satisfait pas aux exigences prévues au paragraphe (2), l'agent met fin à l'examen de la demande de visa de résident permanent et la refuse.

Issue

[21] I find there is one question in this case:

What should the Visa Officer have done given her doubts concerning the Applicant's actual responsibilities?

Standard of Review

[22] The Supreme Court's Decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 determined there are two standards of review at common law in Canada: reasonableness and correctness.

Questions of fact and mixed fact and law should be granted deference and will be reviewed on a standard of reasonableness, whereas questions of law will generally be reviewed on a standard of correctness.

[23] I find the issues in this case concern the duty of procedural fairness. These are questions to which no deference is accorded the standard of review is therefore correctness.

Analysis

[24] Both the Applicant and the Respondent referred me to cases concerning the duty Officers may have to disabuse themselves of certain doubts about a record.

[25] In *Sharma v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 786, Justice Snider reiterated the now accepted notion that a Visa Officer is not obliged to notify applicants of inadequacies in their applications. She refers to Justice Rothstein, as he then was, in *Ahmed v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 940 who found, "such a

requirement would be akin to requiring a visa officer to give advance notice if a negative decision.”

In *Sharma*, the Applicant was notified about inadequate submissions with respect to claims about his wife’s education. Justice Snider found this was adequate notice that further documentation was required.

[26] Justice Paul Crampton found in *Trivedi v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 422 the content of the duty of procedural fairness in the decisions of visa officers was at the low end of the spectrum. He concluded there was no obligation to reopen a decision because the Minister was very clear that an Applicant must “put their best foot forward” in their application.

[27] The Applicant had submitted a complete Application. Her employer documents in her letter confirming employment that the Applicant has performed the duties listed. In this case, the Applicant provided a fulsome application with independent documentation supporting her assertions. She put her best foot forward (*Trivedi*), and unlike in *Sharma*, no further information was required. The Applicant’s last employer listed her responsibilities. This list included two tasks which would qualify the Applicant as a secretary as understood by the NOC 1241 standard: namely, making travel arrangements and training new staff.

[28] The Officer questioned these last two tasks by speculating they would not likely be required given the size of the employer’s operation. It was perfectly reasonable for the Officer to entertain a doubt which contradicted the evidence.

[29] The Officer wrote in her notes:

This company appears to have 7 employees

...

for a small service-oriented company, where there is a manager – it seems unlikely that company need a dedicated secretary and the duties performed would be at a B level.

...

- more reasonable that PA is working in a clerical occupation (such as 1441) as duties are very similar.

[30] The Officer questioned whether the Applicant would be making travel arrangements in a travel agency; training new staff in a sales-oriented environment; that complex administrative procedures would be needed to put in place and/or that minute-taking meetings even occur. The Officer elaborated in her affidavit:

... It appears the applicant made attempts to over-estimate the skill level of her duties by claiming to perform duties that were unlikely in the context of her work environment. For example, she claimed that one of her main duties is to “arrange the travel schedule for her employer according to the instructions issued”. This is a critical duty, as listed in NOC 1241 and is not listed in NOC 1411. However, the applicant’s current employer appears to be a proprietor of a small immigration consulting and travel agency, in which arranging travel is one of its main business lines. Additionally, she indicates that part of her duties as a Secretary is to prepare immigration application forms and make air ticket reservations. Given the business lines of the various concerned companies, the applicant’s own description of her duties and her employer’s description of her duties, I am not satisfied that she was performing the duties of a skill level A or B occupation.

[31] The Visa Officer does not identify a basis for her assumption that a small business enterprise does not require a dedicated secretary. A review of the documentation suggests otherwise in this

case. The Applicant is highly educated, receives a regular salary and it is the employer who confirms travel and training responsibilities.

[32] In *Huyen v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 904 and *Gandhi v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1054, this Court held where the application is adequate, but the officer nevertheless entertains a doubt on the evidence, there remains a duty to clarify the information with the Applicant.

Conclusion

[33] When a Visa Officer has a doubt which has no foundation in the facts and the Applicant puts her best foot forward by submitting a complete application; the Officer should seek clarification to either substantiate or eliminate the doubt. Without seeking clarification, the Officer was in no position to do either.

[34] In result, I am granting the application for judicial review.

[35] The matter is remitted for re-determination by a different visa officer.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is granted.
2. The matter is remitted for re-determination by a different visa officer.

“Leonard S. Mandamin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6560-09

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**REASONS FOR JUDGMENT
AND JUDGMENT:** MANDAMIN, J.

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