Federal Court

Cour fédérale

Date: 20110627

Docket: IMM-6324-10

Citation: 2011 FC 784

Ottawa, Ontario, June 27, 2011

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

GUOFEI XU

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application by Guofei Xu seeking judicial review of a decision by a visa officer in Beijing, China refusing her application for a permanent resident visa in the skilled worker category. The visa officer found that Ms. Xu had misrepresented an offer of arranged Canadian employment and, in the result, she was determined to be inadmissible under ss 40(1) of the *Immigration Refugee and Protection Act,* SC 2001, c27, (IRPA).

Background

[2] Guofei Xu is a citizen of the People's Republic of China (China). In 2005 she began studies at Laurentian University and the following year she graduated with a diploma in Global Business Administration. In early 2007, Ms. Xu obtained a work permit from the Respondent and shortly thereafter she began working for The Manco Group (Manco) as an office coordinator in Toronto. After her work permit expired in January 2008, Ms. Xu returned to China.

[3] In December 2008 Manco offered Ms. Xu permanent employment as an office coordinator in its Toronto office with a plan to involve her in the set up of an affiliated office in China. The offer of employment included a starting salary of $39,800.00 per annum and benefits. On December 18, 2008 Manco applied to Service Canada for an Arranged Employment Opinion (AEO) and on March 8, 2009 the AEO was issued with the following caveat:

> This positive AEO, including the annex, must be submitted by the skilled worker to CIC as part of her permanent residency application. This AEO confirmation is only one of CIC's many requirements in issuing a permanent resident visa. It does not authorize the individual to enter, remain or work in Canada. That decision is the responsibility of the CIC.

[4] Ms. Xu made her application for a permanent resident visa in the Federal Skilled Worker Class in May 2009. In order to verify the genuineness of Manco's offer of employment, a visa officer at the Canadian Embassy in Beijing, China asked Ms. Xu to provide corroborating income tax information for Manco and photographs of its business premises.

[5] The President of Manco, Tony Mansour, responded by letter dated October 15, 2009. He provided the available documentation and pointed out that two of the requested Canada Revenue

Agency (CRA) forms were not applicable to Manco. On December 17, 2009 the visa officer requested Manco's 2008 T2 corporate tax return and payroll list and its 2008 Business Notice of Assessment. By letter dated January 20, 2010 Mr. Mansour refused to provide the additional requested documentation on the following basis:

> We were surprised to know that you are requesting additional corporate tax information from us. **Please be advised that we are a private corporation and are not obliged to disclose such information/documentation to any government agencies other than Revenue Canada.** We are just trying to re-employ an employee whom we hired before, for an ordinary position of office coordinator, not a senior position with very high salary. And we have sufficient financial resources to cover that.
>
> Moreover, for your information, when we applied for the AEO for Belinda to Service Canada, as Applicant in that application, we have followed Service Canada's instructions and provided complete information and documentation to them.
>
> Back in October 2009, as request by you, we already provided to your office a lot of additional information and documents including our payroll information concerning the specific payroll account that Belinda is to be placed. We believe that would be sufficient enough for you to make your judgment. Therefore, we believe that you are asking too much and not in a position to provide such further documentation as you requested.
>
> [Emphasis in the original]

[6] The visa officer was not satisfied with Manco's response and sent a fairness letter on March 30, 2010 to Ms. Xu setting out the following concerns:

> I have reasonable grounds to believe that you have not fulfilled the requirement put upon you by section 16(1) of the **Immigration and Refugee Protection Act** which states:
>
> > 16(1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa

> and all relevant evidence and documents that the officer reasonably requires.

Specifically, I have concerns that the offer of employment in the Arranged Employment Opinion is not genuine and has been obtained solely for the purpose of meeting the requirements of the Skilled Worker Program and subsequently receiving permanent resident status in Canada.

I have reviewed the financial and tax documents provided from your intended employer in Canada, The Manco Group. Based on these documents, I am not satisfied that this employer has the ability and intent to pay the wage offered ($39,800 per year) as per the Arranged Employment Opinion for the following reasons:

- Based on the 2008 T4 Summary of Remuneration provided, the total employment income paid to employees was $51,925 with a total number of 4 T4 slips filed. This is an average of $12,981 per T4 slip filed.
- Although requested, you did not provide a copy of the 2008 T2 - Corporation Income Tax Return and Business Notice of Assessment from your intended employer.
- Although requested, you did not provide a payroll list indicating present employees and salaries paid from your intended employer.

Based on the above, I also have concerns that you are not likely to accept and carry out the employment offered upon arrival in Canada.

Please note that if it is found that you have engaged in misrepresentation in submitting your application for permanent residence in Canada, you may be found to be inadmissible under section 40(1)(a) of the **Immigration and Refugee Protection Act**. A finding of such inadmissibility would render you inadmissible to Canada for a period of two years according to section 40(2)(a):

> 40(1) A permanent resident or a foreign national is inadmissible for misrepresentation
> (a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act
>
> 40(2) The following provisions govern subsection (1):
> (a) the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of two years following, in the case of a

> determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of determination in Canada, the date the removal order is enforced.

> I would like to give you an opportunity to respond to this information. I will afford you 30 days from the receipt of this letter to make any representations in this regard. Please use the address noted at the top of the letter for all correspondence and clearly indicate your file number. If you do not respond to this request within the time outlined above, your application will be refused.

[7] Mr. Mansour responded by letter dated April 9, 2010 stating that he was "shocked" by the suggestion of a misrepresentation. He attempted to explain the significance of some of the information he had previously provided but he again refused to submit Manco's corporate tax information on the basis that he was "not obliged" to do so. He concluded with the statement that the visa officer's allegation of misrepresentation "is truly insulting and groundless".

[8] Once again the visa officer was unsatisfied with Manco's response and Ms. Xu's application for a visa was rejected by letter dated June 11, 2010. The visa officer's file notes provide the following rationale for the decision:

> I HAVE CONSIDERED THE ABOVE INFORMATION, BUT IT HAS NOT ALLEVIATED MY CONCERNS THAT THIS IS NOT A GENUINE OFFER OF EMPLOYMENT. WE HAVE NOT RECEIVED SUFFICIENT INFORMATION FROM THE AEO EMPLOYER TO BE SATISFIED THAT THIS COMPANY HAS SUFFICIENT RESOURCES TO HIRE THE APPLICANT AT THE WAGE STATED IN THE AEO ($39,800 PER YEAR). THE APPLICANT WAS ASKED TO PROVIDE A COPY OF THE 2008 T2 CORPORATION INCOME TAX RETURN, THE BUSINESS NOTICE OF ASSESSMENT, AND THE PAYROLL LIST FROM THE AEO EMPLOYER. NONE OF THESE WERE PROVIDED, AND THEREFORE IT IS NOT POSSIBLE TO HAVE AN ACCURATE PICTURE OF THE COMPANY'S FINANCIAL HEALTH IN ORDER TO DETERMINE WHETHER THE

> COMPANY INDEED HAS THE RESOURCES TO PAY THE APPLICANT'S SALARY.
>
> IN MY OPINION, THE APPLICANT HAS MISREPRESENTED THE FACT THAT THERE IS A GENUINE OFFER OF EMPLOYMENT BY PROVIDING AN ARRANGED EMPLOYMENT OPINION FROM A COMPANY THAT, BASED ON FINANCIAL DOCUMENTS PROVIDED, DOES NOT HAVE THE ABILITY TO PAY THE WAGE OFFERED IN THE AEO. THIS COULD HAVE LED TO AN ERROR IN THE ADMINISTRATION OF THE ACT BECAUSE IT COULD HAVE LED AN OFFICER TO BE SATISFIED THAT THE APPLICANT MET THE REQUIREMENTS OF THE ACT WITH RESPECT TO BEING ELIGIBLE FOR PROCESSING AS A SKILLED WORKER UNDER THE MINISTERIAL INSTRUCTIONS, AND ALSO WITH RESPECT TO POINTS AWARDED FOR ARRANGED EMPLOYMENT.
>
> AS THIS IS NOT A GENUINE OFFER OF EMPLOYMENT, I HAVE ALSO REMOVED THE 15 POINTS ASSOCIATED WITH AN AEO, BRINGING THE APPLICANT'S POINTS TOTAL TO 58.
>
> I THEREFORE RECOMMEND THAT THE APPLICANT BE MADE INADMISSIBLE TO CANADA UNDER SECTION A40 OF THE ACT.

[9] It is from this decision that this application for judicial review arises.

Issue

[10] Was the visa officer's decision unreasonable and made without appropriate regard to the evidence?

Analysis

[11] I agree with counsel for the Respondent that the issues raised on this application are ones of mixed fact and law which attract the deferential standard of review of reasonableness: see *Cao v Canada (MCI)*, 2010 FC 450, 367 FTR 153.

[12] Ms. Xu contends that the visa officer's decision was unreasonable and made without due regard to the evidence. She argues that the visa officer failed to consider Manco's explanations of the tax information it had produced which, in her view, ought to have displaced any concern that Manco's offer of employment was not genuine.

[13] The fundamental problem with this is that Manco's attempted explanation of its submitted tax information did not make a convincing case for its ability to employ Ms. Xu particularly in the face of its deliberate refusal to submit the corporate tax information requested by the visa officer.

[14] The employer may have been correct in its assertion that it had no legal obligation to provide the supporting payroll and income tax evidence requested by the visa officer. This information was, however, clearly relevant and reasonably considered to be necessary to address the visa officer's stated concern about the genuineness of the employment offer. It was not the employer's role to decide what information would be sufficient to establish the genuineness of its employment offer and the visa officer had no obligation to accept Manco's assurances in the absence of the requested corroborating evidence. In the face of the intransigence of the employer, it should not have been a surprise to anyone involved that Ms. Xu's application was rejected.

[15] The suggestion that the visa officer did not consider the employer's explanation of its submitted tax records is belied by the visa officer's express file references to that information. The heart of the visa officer's decision was that Manco had deliberately refused to produce material payroll information and that it was "not possible to have an accurate picture of the company's financial health in order to determine [if it had] the resources to pay [Ms. Xu's] salary". This was the basis for the visa officer's removal of 15 points from the eligibility assessment leaving Ms. Xu with insufficient points to qualify. These were eminently reasonable conclusions and there is no basis to set them aside on judicial review.

[16] The visa officer's misrepresentation finding is, however, problematic. A finding of misrepresentation under section 40 of the IRPA is a serious matter which should not be made in the absence of clear and convincing evidence: see *Baseer v Canada*, 2004 FC 1005, 256 FTR 318. While a withholding of material information may be a basis for a finding of misrepresentation, here the refusal was that of Manco and not Ms. Xu. There is nothing in the record to show that Ms. Xu was complicit in the employer's decision – a decision which was apparently made for business reasons. The visa officer's decision makes a completely unsupported leap from the reasonable finding of insufficiency of evidence to one of misrepresentation. A misrepresentation is not proved where the evidence is found only insufficient to establish the necessary criteria for admissibility. As a result, I find that the misrepresentation finding was made without regard to the evidence and must be set aside.

[17] What remains is the visa officer's decision to reject Ms. Xu's visa application on the merits. As noted above, there is no basis to interfere with that part of the decision.

Conclusion

[18] This application for judicial review is allowed in part. The visa officer's finding of a misrepresentation under section 40 of the IPRA is set aside but the underlying finding that Ms. Xu had failed to establish an entitlement to a permanent resident visa is upheld.

[19] Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT

THIS COURT'S JUDGMENT is that the visa officer's finding of a misrepresentation under section 40 of the IPRA is hereby set aside but in all other respects the application is dismissed.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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