

Federal Court



Cour fédérale

Date: 20171127

Docket: IMM-1806-17

Citation: 2017 FC 1070

Ottawa, Ontario, November 27, 2017

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

SHABBIR SADIK KAPASI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Mr. Kapasi [the Applicant] seeks judicial review of the Visa Officer's [the Officer] refusal of his application for a permanent resident visa as a skilled worker. He applied for consideration under National Occupation Classification [NOC] code 1113 for securities agents, investment dealers, and brokers. Despite providing details of the positions held and his responsibilities with large financial institutions, his application was denied. For the reasons that

follow, this judicial review is allowed as the Officer fettered his discretion by relying heavily on the wording of the NOC rather than the governing legislation.

I. Background

[2] The Applicant is a citizen of India and became a Canadian permanent resident along with his wife and son in 2005. His permanent resident card expired in 2010, and in anticipation of the decision under review, he renounced his Canadian permanent resident status in early 2017.

[3] In December 2014, he applied under NOC 1113 of the Federal Skilled Worker Class [FSWC] program. He claimed experience as an investment representative similar to the securities agent/investment dealer referenced in NOC 1113. The Applicant stated that he met the requirements under s.75 (2) of the *Immigration and Refugee Protection Regulations* [IRPR], which sets out the requirements for a foreign national to be considered a skilled worker.

[4] On March 17, 2015, the Applicant received correspondence from Immigration Canada confirming his eligibility for the program.

[5] On February 23, 2017, he was notified that his application was refused. The Applicant later received the reasons for the refusal, dated May 3, 2017.

II. Decision Under Review

[6] The decision consists of two documents - the refusal letter of February 23, 2017, and the reasons of May 3, 2017.

[7] In the February 23 letter, the Officer noted that the Applicant did not meet the requirements of s.75 (2)(b) and (c) as the Applicant did not perform the actions and duties described in NOC 1113. The Officer noted that to qualify, applicants must establish that they performed the actions described in the lead statements of the specific NOC and have carried out a substantial number of the main duties of that occupation, including all of the essential duties.

[8] In the reasons of May 3, the Officer outlined the main duties associated with each of the job titles in NOC 1113. The Officer compared these duties to those outlined in the evidence provided by the Applicant for the positions he held as Director in Global Securities with Bank of America; Executive Director in the Equities Division for Goldman Sachs; Director with Deutsche Bank; and Vice-President of HDFC Mutual Fund.

[9] With respect to the Bank of America position, the Officer concluded that the Applicant's position did not meet "in name or level" the sample positions listed in NOC 1113. The Officer further concluded that the Bank of America position did not involve "investment orders to buy and sell products...bids and orders to buy and sell securities...and reviews of portfolio positions" as required by NOC 1113. The Officer concluded that although the duties in the Applicant's

position involved managing clients, the clients contemplated by NOC 1113 include personal, individual clients and businesses, and not major clients like banks.

[10] Regarding the Goldman Sachs position, the Officer stated that the employment letter provided did not list any duties, and the list of duties as provided by the Applicant could not be given much weight because it was self-serving information.

[11] The Officer took the same position with respect to the information provided regarding the Applicant's position with Deutsche Bank.

[12] On the HDFC position, the Officer noted that this position did not meet, in name or level, the positions set out in NOC 1113. The Officer also noted that there was insufficient evidence to show that the Applicant met the duties of a broker as outlined in the NOC.

[13] Based upon this assessment, the Officer concluded that the Applicant did not meet the requirements of s.75(2) of the IRPR.

III. Issues

[14] The Applicant argues that the decision is unreasonable and raises a number of issues. However, the issue of the Officer fettering his discretion is dispositive of this application.

IV. Standard of Review

[15] The standard of review is reasonableness (*Zhu v Canada (Citizenship and Immigration)*, 2013 FC 155 at para 23).

V. Analysis

A. *Fettering of Discretion*

[16] The Applicant argues that the Officer erred by strictly applying the language and titles used in the NOC, thereby fettering his discretion and failing to properly assess the Applicant's evidence.

[17] An administrative decision-maker fetters his/her discretion by relying *solely* on non-binding guidelines as if they were law (*Canada (Citizenship and Immigration) v Thamothers*, 2007 FCA 198 at para 62; *Stemijon Investments Ltd. v Canada (Attorney General)*, 2011 FCA 299 at para 24). This is precisely what occurred here, and therefore the Officer's decision is unreasonable.

[18] Section 75 of the IRPR sets out the applicable legislative framework which the Officer was under a duty to apply. Section 75(2)(b) of the IRPR requires applicants to perform actions "described in the lead statement for the occupation as set out in the occupational descriptions of the [NOC]." Section 75(2)(c) of the IRPR requires that an applicant perform "a substantial

number of the main duties of the occupation as set out in the occupational descriptions of the [NOC], including all of the essential duties.”

[19] While s.75 of the IRPR, to some extent, incorporates the NOC as the standard by which an applicant’s experience is measured, it clearly does not mandate a microscopic analysis of an applicant’s experience according to the exact terminology of the titles or duties listed in the NOC.

[20] In this case, the lead statement for NOC 1113 provides that securities agents and investment dealers buy and sell certain financial instruments for individual investors, pension fund managers, banks, trust companies, insurance firms and other establishments. Brokers trade these instruments on behalf of investment firms and other groups. The main duties for each position generally track the lead statement. The NOC also includes a list of *example* titles which qualify under the NOC.

[21] However, instead of using the NOC as a guide in his assessment of whether the Applicant qualified under s.75 of the IRPR, as required by the legislation, the Officer applied the exact wording of the non-binding NOC, measuring the Applicant’s listed titles and duties against the words of the NOC. This is unreasonable because the Officer should have considered whether the Applicant’s job titles and duties met the substantive requirements of s.75 of the IRPR, which do not incorporate the NOC in whole.

[22] The Officer stated that the Applicant's various positions "do[es] not appear to meet in name or in level the positions stated under NOC 1113." However, as the NOC Tutorial in the record shows, the names and levels of positions in the NOC are illustrations only, and an applicant need not closely track those positions in order to qualify under the legislation. Accordingly, the Officer is not bound by them and his heavy reliance on them resulted in his failure to properly consider the Applicant's evidence.

[23] Similarly, it is well-established that an applicant need not frame an application according to the exact duties listed in the NOC; accordingly, an Officer should not assess the application by applying the strict wording of the NOC (*Song v Canada (Citizenship and Immigration)*, 2015 FC 141 at para 29). Yet, here, the Officer noted that: "There is insufficient evidence to show that the PA carries out investment orders to buy and sell products, make bids and offers to buy and sell securities, or prepare reviews of portfolio positions" which are the duties described for a "broker" in the NOC. Again, the Officer focused too rigidly on the listed duties without considering the substance of the Applicant's job experiences.

[24] By fettering his discretion, the Officer failed to apprehend the Applicant's evidence. For example, the Officer rejected the Applicant's Bank of America letter because that letter focused on larger-scale clients. Despite it appearing that the Applicant otherwise performed the substance of the duties listed in NOC 1113, the Officer disregarded this by noting that the Applicant's clients were not individuals. The Officer concluded that the term "clients" in the NOC duties refers to "individual or small business groups" and their "portfolios" to mean "personal

investment accounts.” However, there is no basis for this conclusion anywhere in the NOC, or more importantly, in the governing legislation which the Officer had to apply.

[25] Taken together, these errors demonstrate that the Officer was unreasonable and based his decision on the specific wording in the NOC respecting titles and duties, thus fettering his discretion.

JUDGMENT in IMM-1806-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The decision of the Officer is set aside and the matter is remitted for redetermination by a different officer;
2. No question of general importance is proposed by the parties and none arises; and
3. There will be no order as to costs.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1806-17

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CITIZENSHIP AND IMMIGRATION

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