Federal Court  Cour fédérale

Date: 20180419

Docket: IMM-3726-17

Citation: 2018 FC 424

Ottawa, Ontario, April 19, 2018

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

HAZEL SEVILLA

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a Visa Officer's [the Officer] decision to deny Ms. Sevilla [the Applicant] a temporary resident visa for a work permit. For the reasons that follow, this judicial review is granted as the Officer applied extraneous criteria to the application.

I. Background

[2] In June 2017, the Applicant, a citizen of the Philippines, filed her third application for a work permit under the same labour market impact assessment [LMIA]. An interview of the Applicant was scheduled for August 10, 2017. The Applicant's legal counsel asked to be present for the interview but the visa office did not respond to this inquiry.

[3] On the day of the interview, the Applicant appeared with her legal counsel. The Global Case Management System [GCMS] notes indicate that the Officer spoke to legal counsel about his presence at the interview as follows:

> Client appeared with her counsel this morning and asked the counsel's presence at the interview. I met with the counsel and explained that our standard procedure is to interview the client without the presence of a counsel…However, if he feels that there are valid reasons why he should be present at the interview we would like him to make a written submission so that we could consult with our legal branch and get back to him and in the meantime we will post postpone the interview for today. Alternatively, the interview can also go ahead without his presence…Counsel asked to consult with his client and returned back saying that his client is ready to go ahead with her scheduled interview without his presence.

[4] Not wanting to have the matter further delayed, the Applicant chose to proceed with the interview in the absence of her lawyer.

II. Decision Under Review

[5] The decision under review consists of the decision letter dated August 10, 2017 and the GCMS/interview notes of the Officer.

[6] In the decision letter, the Officer notes that the Applicant was not able to demonstrate that she adequately met the job requirements of her prospective employment. According to the Officer, she did not "meet the requirements" of s.11(1) of the *Immigration and Refugee Protection Act* [IRPA].

[7] In the GCMS/interview notes, the Officer noted that the Applicant explained that she is employed in the Philippines as a caregiver, and has worked for the same employer for a number of years. The Officer asked the Applicant if she had any documentation to support her employment, and the Applicant produced a letter signed by her employer. The Officer noted that since the employer was an individual, additional documentation was required to corroborate employment.

[8] The Officer noted that in the Philippines, the law requires that all domestic employees and employers pay for social security benefits. The Officer noted that a record of contributions showing the name of the employer and employee is sufficient evidence of a domestic employment relationship. The Applicant indicated that she was paying her social security benefits, and stated that her and her employer agreed that the employer contributions were part of the salary. The Officer concluded that the employer was not a registered employer for the purposes of the social security system in the Philippines.

[9] The Officer concluded that without other documents to support her employment, the letter signed by her employer was not sufficient. The Officer rejected the application because he was not satisfied the Applicant had the necessary 1-2 years of caregiver experience.

III. Issues

[10] The Applicant raises a number of issues including procedural fairness arguments with regard to her right to have legal counsel present. She also raises issues with the Officer's interpretation of the law of the Philippines. However, the issue which is dispositive of this application is the Officer's application of criteria not otherwise found in the governing law.

IV. Analysis

[11] The Officer refused the application because the Applicant did have the required 1-2 years of work experience. However it is unclear from the record where the Officer got this requirement. Although his decision claims that this requirement came from the LMIA, the Applicant's prospective Canadian employer received a positive LMIA. Further, the National Occupational Classification for the Applicant's proposed position also does not set out this requirement.

[12] Section 200 (3)(a) of the *Immigration and Refugee Protection Regulations* [*IRPR*] states:

200(3) An officer shall not issue a work permit to a foreign national if	**(3)** Le permis de travail ne peut être délivré à l'étranger dans les cas suivants
(a) there are reasonable grounds to believe that the foreign national is unable to perform the work sought;	**a)** l'agent a des motifs raisonnables de croire que l'étranger est incapable d'exercer l'emploi pour lequel le permis de travail est demandé;

[13] Previously, s.112 of the IRPR set out certain educational requirements or work experience for live-in caregivers. However, that provision did not apply to the Applicant. The relevant statutory provision in this case is s.200(3)(a).

[14] On a reasonableness review the Officer is entitled to deference in his assessment of the evidence, and is entitled to conclude that the Applicant, because of lack of corroboration, did not meet the requirements of s.200(3)(a). However, there is no indication that the Officer assessed the Applicant's purported experience on the basis of the governing law. Instead he rejected the application based on a requirement of 1-2 years of experience which was not explained in the reasons or decision letter. If the Officer is to adopt a benchmark, he should state and explain how that benchmark relates to the requirement in s.200(3)(a).

[15] Accordingly, this Court cannot be sure that the Officer did not fetter his discretion by failing to have regard to the binding law, which the Respondent cites as s.200(3)(a) (*Canada (Citizenship and Immigration) v Thamotharem*, 2007 FCA 198 at para 62).

[16] Here by failing to explain from where the requirement for 1-2 years' work experience came, the Officer fettered his discretion and his decision is not justified, transparent, or intelligible in the language of *Dunsmuir v New Brunswick*, 2008 SCC 9.

JUDGMENT in IMM-3726-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The decision of the Visa 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

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