Federal Court  Cour fédérale

Date: 20090610

Docket: IMM-5061-08

Citation: 2009 FC 621

Ottawa, Ontario, June 10, 2009

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ARWINDER SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant was refused a work permit to work in a relative's restaurant in British Columbia. He seeks judicial review of that refusal. For the reasons that follow, his application is allowed.

Background

[2] The applicant, Arwinder Singh, a native of Punjab province in India, is the 26-year-old brother-in-law of the principal owner of the Mahek Restaurant and Lounge located in Surrey, British Columbia, his prospective Canadian employer. Mr. Singh was offered a position as a Food

Preparer for a two-year term in connection with a positive Labour Market Opinion (LMO) issued by Service Canada valid through 2010-09-04. In support of his Work Permit application, filed at the Canadian Consulate in Chandigarh, India, on September 11, 2008, he included a letter from his current employer, banking and property ownership records, and educational records.

[3] This was Mr. Singh's third failed application for a Work Permit for employment with Mahek Restaurant. The two previous applications were refused because of a visa officer's concerns that Mr. Singh would not be able to perform the work of cook described in the relevant LMO, and because he was "unable to adequately clarify inconsistencies raised in [the] application" and failed to satisfy the visa officer that "his stated reasons for visiting Canada were genuine."

[4] The most recent Work Permit application was for a position as food preparer and not for cook, as in the two previous applications.

[5] The Work Permit application now before the Court was refused by letter dated September 16, 2008. The visa officer's stated reasons for the refusal are as follows:

> You have not satisfied me that you will leave Canada by the end of the period authorized for your stay because:
>
> - you have not demonstrated that you are sufficiently well established in your country of residence
> - you have not satisfied me that you have sufficient ties to your country of residence to satisfy me that you would depart Canada at the end of the period authorized for your stay as a temporary resident

[6] The visa officer' in the Computer Assisted Immigration Processing (CAIPS) notes the applicant's family details, details of his prospective employment, as well his work experience and educational qualifications. The notes include the following considerations:

> THIS IS SUBJ'S THIRD APPLICATION FOR A WP TO GO TO THE SAME ER. LAST APPLICATIONS WAS SENT FOR A JR. ER IN CDA IS SUBJ'S BRO-IN-LAW […] AT THOSE TIMES PA WAS APPLYING FOR THE SAME ER TO WORK AS A CURRY TANDOORI COOK, BOTH TIMES, PAS WAS INTERVIEWED AND THE OFFICER FOUND THAT PA DID NOT APPEAR TO BE AN EXPERIENCE COOK. PA NOW APPLIED FOR THE SAME ER AS A FOOD PREPARER, NOT AS A COOK. DUTIES INCLUDE TO ASSIST THE RESTAURANT SPECIALTY COOKS AMONG OTHER DUTIES. THIS WOULD APPEAR THAT THE ER, WHO HAPPENS TO BE HIS BRO IN LAW AND SISTER HAVE TAILORED THE LMO FOR SUIT PA. PA HAS BEEN APPLYING TO WORK FOR THIS ER SINCE 2006, UNSUCCESFULLY. FROM DOCS SUBMITGED, PA DOES NOT APPEAR TO HAVE FUNDS OF HIS OWN, I AM NOT SATISFIED THAT PA IS ESTABLISHED IN INDIA AND FURTHER, NOT SATISFIED THAT PA WILL LEAVE CANADA AT THE END OF PERIOD OF AUTHORIZED STAY REFUSED (*sic*)

Issues

[7] The applicant raises three issues:

a. Whether the officer breached the principles of natural justice or procedural fairness by not affording the applicant an opportunity to address the officer's concerns either by way of letter or interview;

b. Whether the officer breached the principles of natural justice and procedural fairness by failing to provide adequate reasons; and

c. Whether the decision of the officer was reasonable.

Analysis

[8] I find that there is no merit to the submission that the officer ought to have provided the applicant with an opportunity to address his concerns. Justice Russell in *Ling v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1198, discusses when a visa officer ought to provide such an opportunity. Relying on *Ali v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 468, he noted firstly that there was no statutory right to an interview, or any dialogue of the sort suggested here. Secondly, it was noted that generally an opportunity to respond is available only when the officer has information of which the applicant is not aware. As in *Ling*, that is not the situation here. On the basis of the record before the Court, there was no denial of procedural fairness in not providing the applicant with an opportunity to address the officer's concerns.

[9] I am also of the view that the officer's reasons complied with his legal obligations. The adequacy of reasons must be examined in the context of the decision. The duty to provide reasons when assessing an application for temporary residence status has been held to be minimal: *da Silva v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1138. In this case, the reasons, which includes the CAIPS notes, makes it clear to the applicant the basis on which his application was denied; thus the fundamental objective of providing reasons was met.

[10] Lastly, the applicant submits that the visa officer's decision was unreasonable because the officer failed to consider evidence of ties to India, namely, that he has savings in a bank account, that he owns real property, and that his family lives there. The applicant contends there was no serious attempt to assess this evidence. He further adds that he was not found to have insufficient

ties or establishment in India on his previous applications, thus he submits supporting his position that the officer erred in this regard in the present application.

[11] The respondent's position is that it was reasonable of the officer, on the evidence before her, to conclude as she did with respect to whether the applicant would remain in Canada illegally. She expressed concern that the employer had altered the LMO to suit the applicant, and was also concerned that the applicant did not appear to have funds of his own. The respondent points out that the bank book submitted by the applicant relates to a joint account; hence it was reasonable of the visa officer to conclude the applicant had no funds of his own.

[12] In reply, the applicant specifically takes issue with the visa officer's note stating that the employer "altered the LMO to suit the Applicant." He points out that the LMO is issued by Service Canada, not by the employer, and contends that the fact that the employer is the applicant's brother-in-law is irrelevant to whether or not the applicant is liable to overstay his Work Permit.

[13] The visa officer seems to have made much of the fact that the applicant has made previous Work Permit applications in connection with job offers from the same employer, and that this employer is his brother-in-law. There are two potential problems with this. Firstly, there is no obvious justification for treating Work Permit applications like credit card applications, where one's credibility diminishes with every application made. Secondly, the visa officer's suspicion concerning the "modification" of the LMO was entirely speculative. It is fully possible, and indeed likely, that the employer is in need of both cooks and food preparers. It is not as if the two

occupations are unrelated. Secondly, it is hardly surprising that a Canadian business in need of workers from India would look to family members living there. There is no obvious connection between the fact that the applicant is being offered a job by a relative and whether he is likely to return to India and the officer fails to explain why she thought this was a relevant fact.

[14] While the officer is entitled to substantial deference in reaching her opinion, when these concerns are examined, I find that the decision reached does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law, as set out by the Supreme Court in *Dunsmuir v. New Brunswick*, 2009 SCC 9. I cannot say that the same result would have been reached had the officer not placed weight on the applicant's history of previous work permits and the fact that the employer was a relative.

[15] Accordingly, the decision is quashed and sent back for determination by a different officer.

[16] Neither party proposed a question for certification nor is there one on these facts.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The decision is quashed and sent back for a determination by a different officer; and

2. No question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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