Federal Court  Cour fédérale

Date: 20120612

Docket: IMM-6340-11

Citation: 2012 FC 704

Ottawa, Ontario, this 12th day of June 2012

Present: The Honourable Mr. Justice Pinard

BETWEEN:

NIHAL TISSA SENADHEERA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by Nihal Tissa Senadheera (the "applicant") of the decision, dated June 24, 2011, of Designated Immigration Officer U. Atukorala (the "officer"), pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"). The officer refused the applicant's application for a permanent resident visa as a skilled worker pursuant to subsection 12(2) of the Act and section 76 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations").

[2] The applicant is a citizen of Sri Lanka. He holds a Bachelor of Science and a Masters of Business Administration, and has owned and operated his own company, Fidelity International (Private) Ltd. since 1996.

[3] In 2008, the applicant obtained a positive Arranged Employment Opinion ("AEO") for the position of Business Development Manager with North American Tea & Coffee Inc., in Delta, British Columbia. He submitted an application for permanent residence in Canada under the Federal Skilled Worker Program in December 2009. In the application, the applicant requested that the decision-maker consider substituted evaluation under subsection 76(3) of the Regulations if he did not obtain the minimum required points.

[4] After submitting all other required documentation in support of his application, the applicant received a letter dated May 23, 2011 advising him that he did not meet the requirements for a skilled worker visa pursuant to subsection 75(2) of the Regulations, specifically because he had not provided sufficient evidence of his employment experience. Counsel for the applicant contacted Citizenship and Immigration Canada Program Manager B. Hudson, requesting reconsideration on the basis that further documentation should have been requested if there was a concern about a lack of work experience. The officer decided that his first decision-letter dated May 23, 2011 was sent in error and that the applicant was entitled to a point assessment under section 76 of the Regulations because he had a positive AEO.

[5] The applicant raises the following issues:

i. Did the officer err in failing to recognize the applicant's work experience?

ii. Did the officer err by failing to exercise his or her discretion pursuant to subsection 76(3) of the Regulations?
iii. Did the officer err by failing to recognize the applicant's accompanying spouse's post-secondary education documents, or the applicant's AEO?
iv. Did the officer fail to observe principles of procedural fairness by providing inadequate reasons?

[6] Decisions regarding applicants' eligibility for permanent residence as skilled workers are based on discretionary findings of fact and are therefore to be reviewed by this Court based on a standard of reasonableness, only to be disturbed if the officer's reasoning was flawed and the resulting decision falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para 47). Although there may be more than one possible outcome, as long as the officer's decision making process was justified, transparent and intelligible, a reviewing court cannot substitute its own view of a preferable outcome (*Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para 59).

[7] The officer's obligation to consider whether to exercise his or her discretion under subsection 76(3) of the Regulations is not discretionary, however, and is reviewable on a correctness standard (*Miranda v. Minister of Citizenship and Immigration*, 2010 FC 424). Questions of procedural fairness are also reviewed on a standard of correctness (*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3).

i. *Did the officer err in failing to recognize the applicant's work experience?*

[8] The applicant argues that if the officer had concerns about the applicant's work experience, he had a duty to notify the applicant of his concerns and give the applicant an opportunity to respond (*Torres v. Minister of Citizenship and Immigration*, 2011 FC 818 at paras 37-40).

[9] The respondent notes that the Documents Checklist specifies the required documentation to prove work experience, and indicates that: "If you cannot provide a reference from your current employer, provide a written explanation."

[10] The respondent is right that the Documents Checklist clearly sets out the required documents to prove work experience, specifically, letters of reference from past and current employers. The Checklist advises those who cannot provide references to provide an explanation. The applicant did not submit the required documents, and he did not provide an explanation for why he could not obtain them. I do not accept the applicant's contention that he had no way of proving his work experience except through his own statements. As the respondent submits, he could, for example, have obtained letters of support from his clients detailing his duties (*Bandoo v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 603 (T.D.) (QL)).

[11] I also agree with the respondent that the officer was under no obligation to notify the applicant of the deficiencies in his application — the onus was on the applicant to submit a complete application that established that he met the requirements for a skilled worker visa. Since the applicant failed to submit sufficient evidence of his work experience, it was reasonable for the officer to award no points under this category.

[12] I note that, since the applicant did not establish that he had at least one year of continuous full-time employment experience within the preceding ten years, he did not satisfy the minimum requirements of a skilled worker under subsection 75(2) of the Regulations. Therefore, the application should have been refused under subsection 75(3) and no further analysis should have been conducted. The officer appears to have believed that the applicant was entitled to a point assessment under section 76 of the Regulations because he had a positive AEO. However, a positive AEO does not exempt an applicant from the requirements of subsection 75(2) of the Regulations.

[13] I can find nothing in the Act, the Regulations or the Ministerial Instructions to suggest that an applicant is exempted from the requirements of subsection 75(2) if he or she has a positive AEO. The Ministerial Instructions state that applications will be immediately processed if an applicant has a positive AEO, but the application must still meet the requirements of the Act and Regulations. Therefore, I cannot understand why the officer determined that this application was entitled to a point assessment, since the officer found that the applicant had not established his work experience, meaning he had not shown he met the requirements of subsection 75(2) of the Regulations. It appears to me that the application was properly refused pursuant to subsection 75(3) the first time, an outcome which remains unaffected.

[14] For this reason, the present application for judicial review will be dismissed, since all of the other alleged errors occurred in the point assessment under section 76 of the Regulations. Since the application was not properly considered under section 76, these alleged errors would not alter the outcome.

[15] I agree with counsel for the parties that this is not a matter for certification.

JUDGMENT

The application for judicial review of the decision of Designated Immigration Officer U. Atukorala, refusing the applicant's application for a permanent resident visa as a skilled worker pursuant to subsection 12(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, and section 76 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, is dismissed.

"Yvon Pinard"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6340-11
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APPEARANCES:

Chi-Young Lee	FOR THE APPLICANT
Kim Sutcliffe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

McCrea & Associates Vancouver, British Columbia	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT