

Federal Court



Cour fédérale

Date: 20130411

Docket: IMM-8323-12

Citation: 2013 FC 364

Ottawa, Ontario, April 11, 2013

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

FU RONG

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a decision by the Economic Unit Supervisor at the Canadian Embassy in Beijing [the officer], dated June 28, 2012. The officer refused the applicant's application for a permanent resident visa as a member of a provincial nominee class on the basis that she was inadmissible to Canada for misrepresentation under paragraph 40(1)(a) of the Act.

FACTS

[2] The applicant is a citizen of China. On June 10, 2009, the Province of Manitoba nominated her for permanent residence in Canada under its Provincial Nominee Program, along with her spouse and daughter.

[3] The applicant stated on Schedule 1 to her application that since January 2004 she had worked for the Tangshan Huaxin Electromechanical company.

[4] On March 10, 2011, a visa officer asked that telephone verification of the applicant's employment as an accountant at the Tangshan Huaxin Electromechanical Plant [the company] be conducted. This request was forwarded to the Anti-Fraud Unit of the Canadian Embassy in Beijing.

[5] On March 26, 2012, a member of the Anti-Fraud Unit [referred to as "RHO" in the Computer Assisted Immigration Processing System (CAIPS) notes] phoned the company to verify the applicant's employment. An individual answered claiming to be Mr. Han, the receptionist in the administration office. He confirmed the company's name and address and said the name of the company's boss was Song Xiaowen, but he did not have Song Xiaowen's contact information. He stated the company had 30 to 40 employees, including three accountants (surnamed Song, Li and Han). He did not know who the applicant was. He also stated the company was on leave that day and he was the only one available in the office.

[6] RHO proceeded to phone the applicant. RHO wrote in the CAIPS notes that the applicant first stated she was at work that day, but then said she was not in the office but was in Qinjuangdao

on a business trip, given that her supervisor, Song Shufen, had sent her there to see a client. She explained that because her company was having a difficult time, she needed to do some sales even though she was an accountant. RHO also noted that the applicant could not provide her boss' full name and that the applicant stated the company had around 10 office staff and around 100 workers. She stated there were two other accountants with the company, and their names were Yu Huibua and Zhai Xiaofang. The applicant also told RHO that the company was not on leave that day and she was only able to provide the company's phone number after shuffling through some papers.

[7] The two phone calls raised concerns for a visa officer that the applicant had misrepresented her employment experience as an accountant with the company. On April 3, 2012, this visa officer sent a procedural fairness letter [the fairness letter] to the applicant, detailing the discrepancies between the conversations with her and Mr. Han and inviting her to make representations within 45 days.

[8] In response to the fairness letter, the applicant provided a personal statement attempting to respond to the visa officer's concerns about discrepancies in the phone conversations. She also submitted the company's business license and payroll records, as well as two letters signed by representatives of her employer which stated that she was employed as Director of Bookkeeping since January 2004. The letters also responded to other concerns raised in the fairness letter.

THE IMPUGNED DECISION

[9] The officer concluded that the applicant was inadmissible to Canada under paragraph 40(1)(a) of the Act because she misrepresented her employment as an accountant / Director of

Bookkeeping at the Tangshan Huaxin Electromechanical Plant and that she would remain inadmissible for two years pursuant to paragraph 40(2)(a).

[10] She came to this determination through the results of the telephone verifications performed on March 26, 2012 and that the applicant's reply to the fairness letter did not alleviate the officer's concerns.

[11] In the CAIPS notes, the officer explained why the applicant had not alleviated the concerns outlined in the fairness letter:

- Her explanation for the initial inconsistency related to her whereabouts when she was called on March 26, 2012, namely that she was not yet completely awake and did not want to make a bad impression, was self-serving and not credible;
- The applicant could not provide the full name of the boss of the company. Her explanation that he was rarely at the factory was self-serving, not credible, and simply did not make sense given that the boss was the person that recruited her, was the head of the company, and was a relative of her supervisor;
- The applicant's explanations for why the information provided by Mr. Han was incorrect were not credible; and
- The applicant had not provided updated employment information to support her claim that her duties now included business travel in order to make sales for the company.

[12] In the CAIPS notes, the officer also noted that the applicant's reply to the fairness letter raised an additional discrepancy: the payroll records she submitted indicated her time wage as RMB

3200 per month and did not list a real wage, while the applicant's employment letter on file stated that she earned RMB 4000 per month.

[13] The officer noted that she would not request a verification of the documents in the applicant's reply to the fairness letter because the references could not be considered reliably impartial and the verifying authorities may have been co-opted to provide false verifications. Accordingly, she accorded less weight to the documents than to the information provided in the telephone verification.

[14] The issue in the present application is whether the officer erred in refusing the applicant's application.

ARGUMENTS AND ANALYSIS

Applicant's argument

[15] The applicant submits the officer erred by accepting Mr. Han's evidence without any doubt, in spite of the fact that the number of employees stated by Mr. Han contradicted the information obtained about the company online and that Mr. Han could not provide the Embassy with:

- the full names of the people that he said were the accountants in the Plant;
- the phone number of Song Xiaowen, who he considered to be the boss;
- the actual accountants in the Plant, according to the applicant;
- the actual ownership situation of the Plant, given that his evidence about the ownership had been contradicted by the business license the applicant provided to the Embassy; and

- confirmation that the applicant was employed at the Plant, in spite of later confirmation by payroll records.

[16] The applicant affirms Mr. Han was inexperienced at the time the Embassy called him and on his probationary period at the time. She notes the following:

- the English translation of an email she sent the Embassy following their phone call with her, both “volunteer” and “temporary personnel” were used to describe Mr. Han;
- In the letter from her employer that she submitted to the Embassy following the procedural fairness letter, Mr. Han was described as a “temporary member”; and
- Mr. Han did not appear on the payroll records for March, 2012. He received payment by way of adjustments to the April payroll.

[17] The applicant emphasizes that the officer erred by not giving any positive consideration to the credible documentation she submitted in response to the fairness letter to support her statements during her telephone interview, including a letter of certification signed by the three highest representatives of her company, payroll records, and business license. For example, the officer failed to consider that the payroll records confirmed the applicant’s employment, and instead found that the payroll records indicated a wage for the applicant that was inconsistent with the wage indicated in her employment letter on file.

[18] The officer also erred by deciding without proper analysis that verifying authorities may have been co-opted to provide false verifications. There was absolutely no evidence that the applicant may have co-opted verifying authorities and, in any case, she would not have needed to do

so since she had actually been employed by the Plant since 2004. The officer failed to consider, among other things, whether the applicant had sufficient means to co-opt verifying authorities, how the letter of certification would have been signed by all three of the highest representatives of the Plant, whether the Plant or the applicant would have created false payroll records and submitted them to the Embassy, or whether the documents submitted by the Plant could have been verified in some objective way.

Respondent's argument

[19] The respondent submits it was entirely reasonable for the officer to rely on the inconsistencies and concerns she noted in the CAIPS notes to find that the applicant had misrepresented her employment at the Plant and that none of the applicant's minor factual concerns vitiate the officer's decision.

[20] Contrary to the applicant's assertions, it was reasonably open for the officer to impugn the applicant's credibility based on the different answers Mr. Han gave regarding the names of the accountants at the Plant and the ownership situation of the Plant. Unlike the applicant's submissions in response to the fairness letter, there was nothing self-serving about Mr. Han's evidence. He gave straight answers to the questions he was asked. As there was no consequence to Mr. Han admitting that he did not know the answers to the questions he was asked, the respondent submits his evidence was inherently reliable.

[21] Moreover for the respondent, the officer considered the documents and notarized statements that the applicant submitted in response to the fairness letter and reasonably assigned them little

weight, as she found they were self-serving and not credible. Regarding the payroll records in particular, they were considered by the officer, but in the face of a contradiction in the applicant's own evidence, the officer reasonably drew an adverse inference and no positive consideration was warranted.

[22] Even if the officer's comments regarding false verifications were improper in any way, which the respondent denies, the officer was simply providing reasons as to why the applicant was not afforded a procedural step to which she was not otherwise entitled.

[23] I disagree with the respondent's position for the following reasons.

[24] The applicant provided numerous documents to respond to the fairness letter:

- a personal statement responding to the concerns raised in the fairness letter;
- a notarized letter (the "letter of certification") signed by the company's legal representative, original legal representative, and the person in charge of finance and marketing, corroborating the information in the above-mentioned personal statement and indicating that Mr. Han did not know most of the company's administrative staff when he spoke with the Canadian Embassy;
- a letter from the company's original legal representative, corroborating the information the applicant provided to the Canadian Embassy over the phone and explaining that the person who answered the phone at the Plant was unfamiliar with the company's staff;
- the company's business license, which corroborated the applicant's and employer's statements that the company's legal representative had recently changed; and

- the company's payroll records from December 2011 to March 2012, all of which listed the applicant's name.

[25] The officer's reasons for preferring the information provided by Mr. Han over the information provided by the applicant and her employer were as follows (in the CAIPS notes):

The further documents submitted by the applicant do not overcome the concerns raised by the telephone verification. It is commonly understood at this visa office, and is my experience, that improperly issued and inauthentic documents, including inauthentic stamped and notarized documents, are easily obtained in China. I do not consider that requesting a verification of these supplementary documents will address my concerns because the applicant has been alerted as to the possibility of telephone verifications, and under these circumstances verifying authorities may have been co-opted to provide false verifications. I therefore give less weight to these documents than to the information provided in the telephone verification.

I gave more weight to the telephone verification report than to the information provided subsequent to the receipt of our procedural fairness letter, as this appeared to have been prepared for presentation purposes only. Now that the Applicant has been alerted to our concerns, any further verifications of this information will not yield accurate results as the verifying authorities are now aware of the circumstances and may have been co-opted to provide false verifications.

I do not consider that contacting the references provided by the applicant would address my concerns because they are provided by the applicant after she received our letter of concern and cannot therefore be considered reliable sources of impartial information.

[Emphasis added]

[26] In my view, the officer failed to adequately explain why she preferred a telephone conversation with the employer's receptionist over the information provided by the applicant and her employer in response to the fairness letter. By relying on the information Mr. Han provided over

the telephone, the officer essentially found that the company's December 2011 to March 2012 payroll records were falsified and that the company representatives were either not telling the truth in their letters or that the letters themselves were falsified. The officer did not explain why these documents were rejected. Rather, the officer's CAIPS notes focus on minor inconsistencies between the information the applicant and Mr. Han gave over the phone, even though these inconsistencies were reasonably and consistently explained in the documents provided by the applicant and her employer. Moreover, many of the inconsistencies which concerned the officer were only peripheral to the core issue of whether the applicant had misrepresented her employment.

[27] The officer's focus on the information provided by Mr. Han to the exclusion of the documentary evidence suggests a closed mind with disregard for the documentary evidence and an absence of any true weighing of the positive and negative evidence (*Paulino v Canada (Citizenship and Immigration)*, 2010 FC 542 at paras 59-62).

[28] Furthermore, in my opinion the officer erred in fact by stating that the applicant did not address the inconsistency between her and Mr. Han's answers regarding the number of staff employed by the company. The applicant did indeed address this inconsistency. The officer ignored the fact that in the notarized letter from company management that the applicant submitted as part of her response to the fairness letter, the management explained that the Plant had more than 100 employees, but because the Plant had suffered a heavy loss in production in recent years, most of the employees had left the Plant on holiday and only a small number of the employees had stayed in the Plant to process incoming materials.

[29] I am also perplexed by the officer's statement that "under these circumstances verifying authorities may have been co-opted to provide false verifications". As noted by the applicant, there was no evidence before the officer that the applicant may have co-opted the authorities who verified her work experience and the accuracy of the information she gave RHO over the telephone on March 26, 2012.

[30] I disagree with the respondent that the officer was simply providing reasons as to why the applicant was not being afforded a procedural step to which she was not otherwise entitled. The excerpt above demonstrates that the officer's decision was founded in part on the possibility that the applicant had co-opted the verifying authorities.

[31] Moreover, it was unreasonable for the officer to not contact the representatives of the company on the basis that the letters signed by the company representatives were provided after the applicant received the fairness letter and could not therefore be considered reliable sources of impartial information. This reason does not make sense to me, given that the goal of the fairness letter was to allow the applicant an opportunity to address certain concerns and documentation issued by the applicant's stated employer was the strongest and perhaps only way to address those concerns.

[32] Accordingly, in my view, it was unreasonable for the officer to find that the applicant had misrepresented her employment.

[33] For these reasons, the application for judicial review is granted and the matter is referred for re-determination by a different officer.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the decision is quashed;
2. The matter is referred for re-determination by a different officer; and
3. There is no question for certification.

“Danièle Tremblay-Lamer”

Judge

ANNEX

Relevant Legislation

Immigration and Refugee Protection Act, SC 2001, c 27:

Misrepresentation

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;

(b) for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation;

(c) on a final determination to vacate a decision to allow the claim for refugee protection by the permanent resident or the foreign national; or

(d) on ceasing to be a citizen under paragraph 10(1)(a) of the *Citizenship Act*, in the circumstances set out in subsection 10(2) of that Act.

Application

(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 a determination in Canada, the date the

Faussees déclarations

40. (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :

a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;

b) être ou avoir été parrainé par un répondant dont il a été statué qu'il est interdit de territoire pour fausses déclarations;

c) l'annulation en dernier ressort de la décision ayant accueilli la demande d'asile;

d) la perte de la citoyenneté au titre de l'alinéa 10(1)a) de la *Loi sur la citoyenneté* dans le cas visé au paragraphe 10(2) de cette loi.

Application

(2) Les dispositions suivantes s'appliquent au paragraphe (1) :

a) l'interdiction de territoire court pour les deux ans suivant la décision la constatant en dernier ressort, si le résident permanent ou l'étranger n'est pas au pays, ou suivant l'exécution de la mesure de renvoi;

removal order is enforced; and

(b) paragraph (1)(b) does not apply unless the Minister is satisfied that the facts of the case justify the inadmissibility.

b) l'alinéa (1)b) ne s'applique que si le ministre est convaincu que les faits en cause justifient l'interdiction.

FEDERAL COURT
SOLICITORS OF RECORD

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DATED: April 11, 2013

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