CASE IN POINT: IMMIGRATION

Foreign worker must establish language ability

Insufficient language skills and no incentive to leave were reasonable justifications for visa officer to refuse work permit: Court

BACKGROUND

Speaking the same language

FOREIGN workers who are applying to work in Canada — and employers who are applying to have a worker come to Canada to work for them — have to prove a certain number of things before the worker will be allowed to take a job. The worker's skills must be appropriate for the specific duties of the job, the worker must be able to speak functional English or French, and Citizenship and Immigration Canada must be confident the worker will return to his or her country when the work permit expires.

When an employer offers someone overseas a job in Canada and invests in an effort to bring her to Canada, it better make sure that candidate will meet the requirements for a work permit, or it might find that investment wasted.

| BY SERGIO KARAS |

THE ABILITY to speak, write and understand English or French has recently become a lightning rod in the debate of who can come to Canada. While the focus of government efforts has been primarily on the language ability shown by potential applicants for permanent residency, employers should take note of the fact that language skills are also important in the recruitment of temporary foreign workers and the granting of temporary work permits.

In a recent Federal Court case, a foreign worker applicant sought judicial review of the decision made by a visa officer at the Canadian High Commission in New Delhi, India, refusing his application for a temporary work permit as a kitchen helper, due to the fact that he failed to establish his language ability.

In *Singh v. Canada (Minister of Citizenship and Immigration)*, the worker secured a job offer to work full-time as a kitchen helper at the Hotel North in Goose Bay, N.L. He submitted a positive Labour Market Opinion and provided the visa officer with a supporting letter from his former employer in the Indian army, another from his current employer confirming that he understood English sufficiently well to perform his duties in Canada, and a third one from the his prospective employer in Canada indicating that she had personally spoken to the applicant and found his language abilities to be sufficient.

In addition to documentation supporting his language skills, the applicant also provided an explanation indicating that he had no close family ties in Canada; his wife, two children, parents and sibling all resided in India; he and his wife had a combined $56,000 in assets in India; and he would receive half of his father's estate, totalling a further $53,000. His current employer also provided confirmation that he would be able to return to his job when he came back from Canada.

Worker's grasp of English not sufficient: visa officer

After reviewing the documentation the worker provided, the visa officer rejected the application on the basis of two main factors: First, he found that the worker had insufficient language skills and, second, he found that the applicant would have no incentive to return to India, given the disparity in earning power between the two countries. The worker sought judicial review of that negative decision.

In its reasons, the Federal Court relied on two important cases. First, it referred to the 2011 decision of *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, where the Supreme Court of Canada clarified the approach to be taken in judicial review of the reasoning behind an administrative decision. In that case, the court noted that every reason, argument, or other detail, need not be contained in the reasons, nor is a "decision-maker... required to make an explicit finding on each constituent element... leading to its final conclusion." The reviewing court must simply be able to understand why the decision was made. The reasons are to "be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes."

Second, the court relied on *Chhetri v. Canada (Minister of Citizenship & Immigration)*, where the same court held that the provisions of the Immigration and Refugee Protection Act and the Immigration and Refugee Protection Regulations had the combined effect to require visa officers to be satisfied that individuals are not inadmissible and that they will leave Canada on expiry of their visa. The court found that it is often overlooked that it must

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Visa officers must be confident worker will leave Canada

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be "established" that the foreign national will leave at the end of the visa. Therefore, the combined effect of the statutory provisions does not leave much room for officers to give the applicant the benefit of the doubt; rather, there is a positive obligation that it be established that the foreign national will leave before the visa can be issued.

Similarly, an applicant must establish that he meets the requirements of the job for which he seeks to come to Canada. In *Singh*, the court noted that the worker did not meet the burden of establishing that he met the language requirements of the job description and, while there was some evidence regarding his language ability — including letters from his superiors, and from his prospective employer — those letters did not confirm his ability to speak or write, but rather only his ability to understand English. That was a crucial deficiency in the evidence presented.

The court ruled that, even if the visa officer's reasons did not explicitly indicate that the letters were deficient because they did not mention the worker's written or oral English skills, it would be contrary to the guidance of the Supreme Court in *N.L.N.U.* to require such a statement in the reasons. The officer considered the letters, but concluded that the applicant's English ability was insufficient to grant the work permit. The court held that based on a review of the record, that conclusion was reasonably open to the officer, and therefore judicial review could be dismissed.

Erroneous assumption not only reason for work permit refusal

While the court agreed that the visa officer erred by relying on the disparity in earnings potential between India and Canada to conclude that the applicant was not a temporary worker in good faith and that he might remain after the expiry of his work permit, the difference in earnings was not the only component of the officer's decision.

Visa officers must be satisfied that individuals are admissable and that they will leave Canada on expiry of their visa.

The court noted that the refusal letter also indicated a concern regarding the applicant's travel history, and that the appropriate notes were made by the officer in the computer system to support that conclusion. Because the officer reasonably found that the applicant did not meet the necessary language requirements, any error in considering the disparity of earnings between Canada and India was not crucial to the decision and did not alter the outcome of the application. The court refused judicial review and upheld the visa officer's decision.

It is important to note that employers who intend to hire foreign workers should satisfy themselves that the candidates meet all the requirements of the position including language ability. If the position offered by an employer to a foreign worker requires understanding, oral and written language skills, then it is prudent to request that the applicant provide proof of that ability. Otherwise, employers risk investing considerable time and resources in the application process only to find that, despite obtaining a positive Labour Market Opinion, the visa post abroad will refuse the work permit application on the grounds that the candidate does not meet all the requirements for the job. CELT

For more information see:

- *Singh v. Canada (Minister of Citizenship and Immigration)*, 2012 CarswellNat 1025 (F.C.).
- *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 CarswellNfld 414 (S.C.C.).
- *Chhetri v. Canada (Minister of Citizenship & Immigration)*, 2011 CarswellNat 2726 (F.C.).

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