Foreign worker's language ability inadequate to perform job duties

Foreign worker had positive Labour Market Opinion but visa officer felt worker's language skills and qualifications didn't meet requirements for truck driver position

BY SERGIO KARAS

BACKGROUND

The level of proficiency in Canada's official languages that a foreign worker must possess has been the source of some controversy in recent years. The Federal Court has attempted to address this issue in several cases, but it remains unsettled as visa officers have considerable discretion in this area.

In the recent decision in *Singh v. Canada* (Minister of Citizenship and Immigration), a visa officer's refusal to issue a work permit to an applicant who obtained a Labour Market Opinion (now Labour Market Impact Assessment) to work in Canada as a truck driver has been upheld by the Federal Court.

Singh was a citizen of India and a permanent resident of Italy. He was offered a job in Canada, based on his work experience as a heavy truck driver. The employer did not require a high level of English proficiency for the position, and the job duties included "driving and operating trucks, maintaining and writing log books, operate vehicles with all rules and regulations of the road and load being carried." Based on a positive Labour Market Opinion, Singh applied for a work permit and submitted proof of residency in Italy, an experience letter indicating current income and citing driving experience in Italy, a bank statement, proof of Italian truck driver's licence, and English language test results. The employer was aware that Singh would need to convert his Italian truck driver's licence to a Canadian licence and obtain the air brake endorsement once he arrived in Canada.

Work permit rejected over lack of ability and qualifications

The visa officer refused the application for a work permit because Singh failed to demonstrate that he adequately met the job requirements of his prospective job in Canada, based on insufficient evidence of employment indicating trucking ability; low level of education, no satisfactory evidence of ability to communicate in English to the degree required to perform the job in Canada in a safe and efficient manner; and failing to provide a driver's licence of the type required in the Labour Market Opinion with the required air brake endorsement. In addition, the visa officer was not satisfied Singh would leave Canada at the end of his authorized period of stay.

Singh challenged the refusal in Federal Court and argued that it was unreasonable. First, he contended that the language requirements were arbitrarily decided as there was no measure that the officer could point to on the level of proficiency required. He noted that the language testing scores, averaging 4.0 in the International English Language Testing System were low, but a specific language ability was not prescribed for a truck driving job. Further, he argued that the Labour Market Opinion confirmation required oral and written English but not a specific level of proficiency. Last, the National Occupational Classification (NOC) description did not require a particular level of English and the duties in the job offer only mandated basic English language skills.

Singh argued that the finding of insufficient trucking experience by the visa officer was unreasonable because he provided evidence of ten years of truck driving experience in Italy, a letter of employment and proof of his Italian driver's licence.

With regards to the visa officer's decision that he would not leave Canada at the end of the period authorized in the work permit, Singh contended that it was unreasonable because there was no evidence to suggest that he would not abide by Canadian immigration law. The evidence of his stay in Italy as a legal resident, positive Labour Market Opinion, and his ability to apply for Permanent Residency in Canada under the Canadian Experience Class indicated otherwise. He relied on the decision in *Zhang v. Canada (Minister of Citizenship and Immigration)*, where a similar issue arose, to underscore his point.

He also submitted that the officer breached the duty of procedural fairness by failing to provide him with the opportunity to address his concerns with respect to language, work experience, and temporary intent. Singh relied on *Gedeon v. Canada (Minister of Citizenship and Immigration)*, to support his position.

The respondent argued that it was reasonably open to the officer to find that the applicant was not a genuine temporary resident because he had not submitted sufficient evidence that he would be able to perform the duties of his prospective job in Canada. Also, since Singh failed to establish his ability to perform the duties of that job, it was reasonable for the visa officer to conclude that he was not a genuine temporary resident and that he would not have proper means to support himself. The mere fact that a positive Labour Market Opinion was issued was not determinative of an applicant's ability to perform the work sought. The visa officer was under a duty to perform an independent assessment of that ability, as held in *Grewal v. Canada (Minister of Citizenship and Immigration)*. In this case, Singh provided insufficient evidence of his truck driving ability. Further, the officer's assessment of his language ability was relevant to the assessment of his ability to perform his job, and that was reasonable. Officers are entitled to determine that an applicant requires language ability different from that stated in the Labour Market Opinion.

On the procedural fairness issue, the respondent submitted that Singh was not entitled to an opportunity to address the officer's concerns because they arose directly from his failure to satisfy legal and regulatory requirements, rather than from the credibility, accuracy, or genuine nature of the information he submitted.

Language requirement reasonable: Court

The Federal Court agreed with the respondent's arguments on all points, and held that the officer's decision was reasonable and procedurally fair. The court noted that it was reasonable for the officer to request and consider language scores. The job offer stated that the applicant was required to read and maintain log books and understand the rules of the road. It was therefore reasonable for the officer to find that a certain level of English was required and that the applicant's language scores were insufficient to do the job in a safe manner. The court noted that, as in *Grewal*, it was open to the visa officer to determine the language level required for

a position. In that case, Grewal had applied as a temporary foreign worker. His application was rejected as the visa officer was concerned that he might overstay his permit, and found that he did not have a sufficient command of English to carry out the duties of the truck driver position. Grewal had equal or higher language scores than Singh in the present case. Also, as in *Grewal*, it was clear that the officer thought about the language requirement and explained why she considered that a greater level of English proficiency was required. In *Grewal* the court held that "findings on language levels for temporary foreign workers are highly discretionary decisions, on which there is little jurisprudence… The visa officer was required to make findings based on the evidence before her and there is no evidence in the present case that she exercised her discretion capriciously or unreasonably."

The court further held that a positive Labour Market Opinion is not determinative of how a visa officer must exercise her discretion, and visa officers are entitled to determine that an applicant requires language ability different from that set forth in the Labour Market Opinion and job offer if relevant to the performance of the job duties. All the Labour Market Opinion portion of the process does is to test the labour market need, and not the attributes of the individual, which are the responsibility of the visa officer, as established in *Chen v. Canada* (Minister of Citizenship and Immigration).

The court noted that further guidance was found in the applicable version of the Citizenship and Immigration policy manual, which indicated that immigration officers should not limit their assessment of language or other requirements to perform the work sought to those described in the Labour Market Opinion. Those language requirements should be part of the officer's assessment of the applicant's ability to perform the specific job sought. The officer can consider the specific work conditions and any arrangements the employer has made, and the terms in the actual job offer, in addition to general requirements set out in the NOC description: Foreign Worker Manual, s. 8.3.

The court also agreed with the respondent that the finding by the visa officer that the job offer letter was insufficient was also reasonable. The applicant failed to prove that he could fulfill the duties of the job as the reference letter stated that he worked in Italy only as a driver, not as a truck driver and does not describe his duties. It was therefore impossible to know if the work in Italy was analogous to the intended work in Canada.

The court held that the officer's finding that the applicant's temporary intent was not demonstrated was also reasonable: as the officer found that the applicant would not be able to fulfill the job duties, it followed that he would not be able to fulfill the terms of temporary resident status. The presumption that foreign nationals seeking to enter Canada are immigrants could therefore not be rebutted by the applicant.

The visa officer was not required to provide extensive reasons, under reasoning established in *Quintero Pacheco v. Canada (Minister of Citizenship and Immigration)*. The visa officer provided sufficient reasons in this case and the decision was clear and intelligible. The applicant was not entitled to an opportunity to address the officer's concerns because they arose directly from his failure to satisfy the requirements of the legislation and the regulations in that he did not show that he was able to perform the work sought. There was no issue as to the credibility, accuracy or genuine nature of the information submitted, which may have triggered the opportunity to address the officer's concerns. It was the applicant's duty to put forward sufficient materials to satisfy the officer that he could fulfill the job duties and he failed to do so.

The mere fact that an applicant possesses a positive Labour Market Opinion is not determinative of his ability to perform the work sought. The officer properly undertook her duty to perform an independent assessment, with respect to language and other factors. Singh's application for judicial review was dismissed.

This case highlights the importance of appropriate preparation of work permit applications. Many applicants and employers believe that because they have obtained a positive Labour Market Impact Assessment (previously Labour Market Opinion) the application for a work permit is a mere formality. That is not the case.

For more information see:

- *Singh v. Canada (Minister of Citizenship and Immigration)*, 2015 CarswellNat 250 (F.C.).
- *Zhang v. Canada (Minister of Citizenship and Immigration)*, 2006 CarswellNat 6134 (F.C.).
- *Gedeon v. Canada (Minister of Citizenship and Immigration)*, 2004 CarswellNat 4097 (F.C.).
- *Grewal v. Canada (Minister of Citizenship and Immigration)*, 2013 CarswellNat 2013 2780 (F.C.).
- *Chen v. Canada (Minister of Citizenship and Immigration)*, 2005 CarswellNat 4950 (F.C.).
- *Quintero Pacheco v. Canada (Minister of Citizenship & Immigration)*, 2010 CarswellNat 2892 (F.C.).

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