CASE IN POINT: IMMIGRATION

Immigration history haunts work permit applicant

Immigrant denied extension of work permit because he knowingly worked without one in the past

BACKGROUND

Foreign worker program changing with times

CAN THE PAST immigration history of an applicant be considered a negative factor when he applies for a work permit? This is one of the questions the Federal Court of Canada had to consider in a recent case where an Austrian citizen, who had been in Canada for the majority of the last 21 years, had his request for an extension to his work permit and his wife's visitor status refused.

Because the foreign worker had worked under an expired permit in the past, he was considered unlikely to leave Canada once a new one expired. However, he had never been the subject of a formal inquiry or told to leave Canada.

Immigration lawyer Sergio R. Karas takes a look at how such circumstances are treated in the application process and what else is considered when extensions to permits are evaluated.

| BY SERGIO KARAS |

GERHARD RONNER, an Austrian citizen, obtained visitor status for short term stays in Canada on several occasions beginning in the 1980s while he pursued his business of building log cabins in Chilliwack, B.C. During this time, he was reported by immigration authorities for "actively engaging in employment or his business without obtaining an employment authorization," when alleged to be working in Canada. Ronner had applied for permanent residency as an entrepreneur during his stay in Canada, but later withdrew his application. His spouse had accompanied him for the past eight years.

Since 1989, Ronner obtained not only visitor status, but several work permits as a log home builder, with some intervening periods of time where he had no status. There was some disagreement between the parties as to whether or not Ronner was aware he had been reported for immigration violations twice before in 1990 and 1992. However, he had never been the subject of a formal immigration inquiry, or told to leave Canada, though he did so on several occasions.

Work permit extension denied

An immigration officer refused to extend Ronner's work permit and his wife's visitor status based on the fact they failed to prove they met the following criteria:

- They would leave Canada by the end of the period authorized for their stay.
- They would not contravene the conditions of entry.
- They were not inadmissible to Canada under the provisions of the Immigration and Refugee Protection Act.

In reaching his conclusion, the officer considered the following factors: the Ronners' travel and identity documents; the reasons for travel to Canada and the reasons for applying for the extensions; their financial means for the extended stay and return home; the ties to their country of residency including immigration status, employment and family ties; and whether the applicants would be likely to leave Canada at the end of their authorized stay. The officer found that there was no significant benefit to having Ronner remain in Canada under an exemption from a Labour Market Opinion as an entrepreneur, and that he would not likely leave Canada by the end of the authorized stay. In addition, the officer found Ronner's wife did not warrant an extension of her visitor status since she had engaged in unauthorized work in Canada assisting her husband in the business, and the officer did not believe that she would leave Canada by the end of the period authorized.

The Ronners challenged the decision, principally on two grounds. First, they argued the officer made findings and drew adverse inferences based upon materials and rulings which the applicants did not have an opportunity to see and comment upon, breaching procedural fairness. Second, they said the decision was unreasonable and the officer made perverse and arbitrary findings of facts that were not based on the materials before him.

Worked in Canada previously without a permit

The Minister of Immigration claimed Ronner and his wife were indeed working in Canada and Ronner was aware of his own immigration history of working in Canada without a work permit, being reported twice for immigration viola-

Continued on page 5

CASE IN POINT: IMMIGRATION

Worker reported twice for immigration violations

...continued from page 4

tions and working for four years without a Work Permit after he had already been reported for the same offence. The minister contended that Ronner disregarded immigration laws on more than one occasion and, therefore, the officer's findings were reasonable.

Relying on the 2006 decision of *Toor v. Canada (Minister of Citizenship & Immigration)*, the court found the officer was not required to bring to an applicant's attention adverse conclusions that he may draw from the applicant's evidence. Such obligation will only arise when the adverse conclusions were drawn from material not known to the applicants. The court found the decision was based upon documents and answers provided by the applicants, as well as reports in their immigration record.

While the officer was subject to a duty of fairness including a reasonable opportunity for the applicants to know and respond to information upon which the officer proposes to rely, the scope of that duty will depend on whether the applicants were denied such reasonable opportunity on the factual, administrative and legal context of the decision. The court relied upon *Chiau v. Canada (Minister of Citizenship & Immigration)*, where the Federal Court of Appeal held that it was well recognized the quantum of the duty of procedural fairness varies according to the context of each situation. In this case, there was considerable evidence Ronner was aware that he had been reported for immigration violations in 1990 and 1992, the officer's notes reflected his dealings with immigration authorities and, therefore, there was a minimal duty of procedural fairness owed in that context.

The court followed the standard of review prescribed by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, which found that the standard of review analysis must be that of reasonableness, but if the standard of review applicable to a particular situation is well settled by past jurisprudence, the court may adopt that standard. In this case, the court found that the prevailing standard of review for the immigration officer's decision was reasonableness, except for the question of procedural fairness, which was subject to correctness. However, having found that no procedural fairness was owed to the applicants by disclosing their prior immigration dealings, of which they should have been already aware, using the reasonableness standard of review, the applicants could not succeed.

Ronner highlights the potential difficulties for work permit applicants who have a negative prior immigration history. One curious fact in this case, is that the applicants appeared to have filed an application for Permanent Residence based on the entrepreneur category, but mysteriously withdrew it. The court gave no indication as to why that application did not proceed. Had the Ronners proceeded with a permanent residence application, it could have been open to the immigration officer to reach a more favorable conclusion with respect to their work permit and visitor status extensions while that application was in the process of adjudication.

For more information see:

- *Ronner v. Canada (Minister of Citizenship & Immigration)*, 2009 CarswellNat 2384 (F.C.).
- *Toor v. Canada (Minister of Citizenship & Immigration)*, 2006 CarswellNat 1342 (F.C.).
- *Chiau v. Canada (Minister of Citizenship & Immigration)*, 2000 CarswellNat 2930, (Fed. C.A.).
- *Dunsmuir v. New Brunswick*, 2008 SCC 9 (S.C.C.).

Temporary work permits in Canada

Anyone who is not a Canadian citizen or a Canadian permanent resident who wants to work in Canada must be authorized by Service Canada. Usually that means getting a temporary work permit for Canada.

Some temporary workers do not need a temporary work permit for Canada. Categories of workers exempted from needing a temporary work permit include diplomats, foreign athletes, clergy and expert witnesses. These exemptions may change at any time, so workers and employers should check with the visa office responsible in their area to confirm that if someone is exempt from a temporary work permit.

Some job categories in Canada have streamlined procedures for applying for a temporary work permit or have different requirements, such as:

- Information technology workers
- Live-in caregivers
- Business people covered by free-trade agreements

Source: Human Resources and Development Canada

ABOUT THE AUTHOR

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