CASE IN POINT: IMMIGRATION

Work permit refused due to worker's lack of experience

LMO didn't require three years experience, but job advertisement and other documents indicated it was

BACKGROUND

LMO no guarantee for work permit

THERE are many requirements that must be met for a foreign worker to be approved to work in Canada. Many of these requirements are designed to ensure the worker will bring the appropriate skills to benefit Canada's labour market and to protect jobs for Canadian citizens. An employer obtaining a Labour Market Opinion based on its job opening is an important step in the process, but it's no guarantee that a selected foreign worker will be approved for a work permit.

| BY SERGIO KARAS |

THE FEDERAL Court of Canada has upheld a decision by the Canadian Embassy in Bangkok, Thailand, refusing an application for a temporary work permit despite the fact that the applicant foreign worker had obtained the requisite Labour Market Opinion (LMO) with a job offer confirmed by a Canadian employer. The decision highlights the foreign worker's obligation to meet the work experience requirements set out in the LMO.

In *Grusas v. Canada (Minister of Citizenship and Immigration)*, the foreign worker was a citizen of Thailand and applied for a permit as a cook. To support her application, she submitted an LMO issued by Human Resources and Skill Development Canada (HRSDC), which listed as requirements for the position a "trade diploma or certificate and oral and written Thai and English" as the only necessary qualifications. However, in a different document accompanying the application, the employer listed three years of experience in the food services industry as a requirement for the job. That experience requirement was also highlighted in the employer's application for the LMO and the job offer.

To support her application, the foreign worker submitted several letters confirming her work experience at a hotel in Thailand and stating that she had completed training in food and beverage services for four months, plus a certificate from Carnival Cruise Lines stating that she had worked on a cruise ship as a team waitress. The applicant also included several training certificates showing that she had completed a Thai cooking course, and a letter stating that she had passed occupational testing in cookery at a private culinary testing institute in Bangkok. The worker was interviewed and the officer subsequently refused the application for a work permit, taking the position that the LMO required three years of work experience and that the applicant could not meet that requirement.

The officer's notes disclosed that he considered the LMO, educational and training requirements of the position, and all the documents presented by the worker. He noted that her work with Carnival Cruise Lines was not as a cook and that her education and qualifications did not meet the LMO requirements. The officer found that the LMO "required" three years of experience in the food services industry when considered in the context of the employer application and job offer, and because the applicant did not have them, he had to refuse the application as he was not satisfied that the foreign worker met the requirements set out in the Immigration and Refugee Protection Act Regulations.

The Federal Court noted in its judicial review that the officer's decision was to be reviewed on a standard of reasonableness based on well settled jurisprudence. The court noted that a tribunal's interpretation of its enabling statute will generally be accorded deference, and that the Supreme Court of Canada upheld this approach in *Alliance Pipeline Ltd. v. Smith* and most recently in *A.T.A. v. Alberta (Information & Privacy Commissioner)*, where it held that the standard of review on a tribunal's interpretation of its home statute is reasonableness, unless the interpretation falls into the enumerated categories for which the standard of correctness applies: constitutional questions, questions of central importance to the legal system as a whole, questions on the jurisdictional lines between specialized tribunals, and questions of vires. The officer's interpretation of the regulations did not fall into any of these exceptions, so the court found that it should only intervene if the decision was unreasonable, namely that it fell outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Reasonable grounds to believe worker is unable to perform the work

The central issue in the case was the

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3-year requirement not in LMO but was in other documents

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application of s. 200(3)(a) of the Regulations, which requires that an officer shall not issue a work permit if there are reasonable grounds to believe that the foreign national is unable to perform the work sought.

The worker felt that it was unreasonable for the officer to refuse the application because the LMO did not require three years of experience, although the application for the LMO made by the employer and other accompanying documents referred to that three-year period. The worker cited the Federal Court decision in *Chen v. Canada (Minister of Citizenship and Immigration)*, which held that in all applications, the visa officer was under a duty to examine all of the relevant evidence in order to come to an independent assessment of whether there are reasonable grounds to believe that the applicant is unable to perform the work, and that the officer cannot be bound by a statement in the LMO that a particular language or education or training is or is not required.

The worker also relied on the decision in *Randhawa v. Canada (Minister of Citizenship and Immigration),* which held that while it is reasonable to require that an applicant satisfy the job requirements of a particular position before obtaining a work visa, it is unreasonable not to take into account some measure of job orientation that would inevitably be provided by the employer. Since the employer in this case was going to provide orientation to the worker, that should have been taken into consideration by the officer. The worker also objected to the officer not taking into consideration the National Occupational Classification, which does not require three years of experience for the position of cook, but only completion of secondary school and a college or other program in cooking.

The court rejected all of the applicant's arguments and held that it was clear from the reasons in the refusal that the officer reviewed the application, interviewed the applicant, and was satisfied that she had no employment experience as a cook. In addition, the officer noted that since the foreign worker did not have three years of employment experience in the food service industry as required, he was obligated to refuse the application.

Required experience mentioned in LMO application

The worker conceded that although the three-year requirement was not specifically stated in the LMO, it was mentioned by the employer in the application and it was then open to the officer to take it into consideration. Further, the LMO clearly stated that the positive opinion was based on information provided in the application and outlined in the annex to the LMO. The three-year work experience requirement was clearly set out in the job details forwarded by the employer when applying for the LMO and in the advertisements published by the employer. The court concluded that it was clear from the job requirements that the applicant would need, in addition to formal certification, a significant amount of experience as a specialized Thai cook. Further, the court noted that the officer confronted the worker with her lack of experience during the interview. It was then not difficult to understand why the officer concluded that the applicant did not have the necessary work experience for the job and the refusal of her application was logical. The court held that the officer's determination was consistent with the objective requirements for employment experience and with the language in the job details requiring "at least three years' experience in the food service industry" and also consistent with the objective standards outlined by the National Occupational Classification for cooks for which the LMO was explicitly issued. The court rejected the applicant's contention that training and orientation provided by the employer could offset the significant work experience required for the position and upheld the officer's refusal to grant a work permit.

This decision should serve as a reminder to employers and foreign workers that a Work Permit application after having obtained a LMO is not simply a formality, but a process where a visa officer can refuse an applicant if she is not satisfied that the foreign worker meets all the requirements of the regulations. The ability to perform the duties outlined in a job offer and in a LMO are critical factors that should not be ignored. CELT

For more information see:

- *Grusas v. Canada (Minister of Citizenship and Immigration)*, 2012 CarswellNat 1935 (F.C.).
- *Alliance Pipeline Ltd. v. Smith*, 2011 CarswellNat 202 (S.C.C.).
- *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 CarswellAlta 2068 (S.C.C.).
- *Chen v. Canada (Minister of Citizenship and Immigration)*, 2005 CarswellNat 4950 (F.C.).
- *Randhawa v Canada (Minister of Citizenship and Immigration)*, 2006 CarswellNat 6368 (F.C.).

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