Date: 20090210

Docket: IMM-3631-08

Citation: 2009 FC 135

Calgary, Alberta, February 10, 2009

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

SHI WEI HUANG and ZHI YI MA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a visa officer's decision not to issue work permits to the principal applicant Shi Wei Huang and his accompanying wife Zhi Yi Ma. The refusals were communicated by separate letters, both dated July 15, 2008. For all intents and purposes, however, this review bears solely on the refusal of the principal applicant's request for a permit.

BACKGROUND

[2] Mr. Huang and his wife are Chinese nationals. Both are in their mid-thirties. They have been married since 1999. Mr. Huang is a cook by trade. Since 2002, he has worked as an assistant to the head chef at the Long Feng Hotel in Taishan City, where he earns a salary of 1300 RMB monthly.

[3] In January of 2008, Mr. Huang received an offer of employment from the Silver Dragon Restaurant, a Chinese restaurant operating at two locations in Alberta. Its main establishment is in Calgary; however, Mr. Huang was to work at its newer Banff location. The prospective employer obtained a positive Labour Market Opinion from the Foreign Workers Recruitment Branch of Service Canada towards the end of April 2008. The opinion was based on an assessment of the labour market and remains valid until April 25, 2009.

[4] The applicants retained the services of a Calgary law firm to assist them with their work permit requests. Their applications were submitted to the Immigration Section of the Canadian Embassy in Beijing under cover of letter dated May 27, 2008. The letter of offer and the labour market opinion were included in the accompanying document package; so was a letter from a manager of the Long Feng Hotel, Mr. Ma, attesting to Mr. Huang's cooking skills and the Hotel's intention to rehire him upon his return from abroad.

[5] Counsel's submissions on behalf of the applicants in the May 27, 2008 letter indicated that the prospective employer, Silver Dragon Restaurant, is a well-established business specializing in Chinese/Cantonese cuisine. Counsel also affirmed that Mr. Huang has over 10 years experience in

food preparation and cooking; that there is no English language requirement for the position he would be taking up; and that his goals are to gain international experience and earn money to bring back to China.

[6] The applicants' work permits were refused by a Visa officer in the Beijing Immigration Section. The officer's brief notes to CAIPS (Computer Assisted Immigration Processing System) from July 15, 2008 constitute his reasons for refusal of the visas.

> APPLICANT IS APPLYING TO WORK FOR 2 YEARS AS A COOK IN CANADA. APPLICANT'S SPOUSE IS ALSO APPLYING FOR A WORK PERMIT (…), IN THEORY SHE WOULD BE ELIGIBLE IF THIS APPLICATION IS APPROVED. APPLICANT AND SPOUSE HAVE NO CHILDREN. APPLICANT AND SPOUSE HAVE NO PREVIOUS OVERSEAS TRAVEL.
>
> APPLICANT STATES TO BE EMPLOYED AT A RESTAURANT AS ASSISTANT TO FIRST CHEF. SALARY IS STATED TO BE 1300 RMB/MTH. EQUIVALENT TO ABOUT $180 AT CURRENT EXCHANGE RATES.
>
> APPLICANT HAS NOT PRESENTED ANY OTHER PROOF OF SAVINGS OR ASSETS IN PRC. WITH LOW SALARY OF APPLICANT, EVEN BY CHINESE STANDARDS, I AM NOT SATISFIED THAT APPLICANT WILL HAVE SUFFICIENT INCENTIVE TO RETURN TO PRC AFTER AUTHORIZED TO STAY IN CANADA.
>
> APPLICANT HAS NOT DEMONSTRATED SUFFICIENT ESTABLISHMENT IN THE PRC AND / OR SUFFICIENT TIES TO MOTIVATE RETURN.
>
> I AM NOT SATISFIED THAT APPLICANT IS A BONA FIDE TEMPORARY RESIDENT WHO WILL LEAVE CDA AT THE END OF AUTHORISED STAY.
>
> REFUSED.

[7] The relevant legislative provision governing the applicants' refusal is section 200(1)(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227:

200 (1) Subject to subsections (2) and (3), an officer shall issue a work permit to a foreign national if, following an examination, it is established that	200 (1) Sous réserve des paragraphes (2) et (3), l'agent délivre un permis de travail à l'étranger si, à l'issue d'un contrôle, les éléments suivants sont établis :
(…)	(…)
(*b*) the foreign national will leave Canada by the end of the period authorized for their stay under Division 2 of Part 9;	*b*) il quittera le Canada à la fin de la période de séjour qui lui est applicable au titre de la section 2 de la partie 9;
(…)	(…)

ISSUES

[8] The applicants submit that there are three grounds on which the decision under review ought to be set aside:

a. the visa officer ignored or failed to consider all of the evidence before him;

b. the visa officer drew negative inferences which were not grounded in the evidence before him; and

c. the visa officer breached the duty of fairness in failing to put his concerns to the applicants before rendering his decision.

ANALYSIS

[9] In my view, this application must be allowed on the first ground raised by the applicants. As I am granting the application on this ground of review, it is not strictly necessary that I rule on the other two grounds of review advanced; however, in my view, they were without merit.

[10] The applicants submit that in finding that they had not demonstrated sufficient ties to China to ensure that they would return there after their two year work permits expire, the officer failed to mention and indeed ignored information indicating that they have family members in China, and that Mr. Huang's employer has offered to re-employ him on their return.

[11] The two certified tribunal records show that Mr. Huang has a father and sister and Ms. Ma has a father, mother, sister and brother all living in China. While the officer notes that the applicants do not have any children, he fails to mention these other family members or the promise of a job on their return.

[12] The applicants note that the officer's observation that they have no children is a statement made with no accompanying analysis. Hence it is not possible to ascertain whether this is considered a positive, a negative, or a neutral factor in his decision. The fact that all of their close family will be remaining in China would appear to be a positive factor indicating that they have ties to China and would be likely to return.

[13] Similarly, the officer notes that the applicants have no history of overseas travel without indicating whether this is considered a positive, a negative, or a neutral factor in terms of their likelihood of returning to China. In my view this can only be a neutral factor. They have never been abroad and thus there is no precedent one way or the other as to whether they would be likely to return once their visas expire.

[14] In the Court's view, the evidence that Mr. Huang has a job waiting for him on his return weighs in favour of the likelihood of his doing so, lack of employment on return being a possible incentive for staying in Canada. Again, this evidence is not specifically referenced or analyzed in the decision, as counsel for the applicants emphasized.

[15] While each of these factors is troubling, alone they would have been unlikely to warrant setting aside the officer's decision. It is well-established that the standard of review of a visa officer's decision is reasonableness, and the Court will normally show deference to an officer's appreciation of the evidence. The officer is presumed to have reviewed all of the material before him. In fact, as will be noted, in this case the officer filed an affidavit asserting that he did just that.

[16] As it can be seen from the CAIPS notes excerpted above, the officer found that Mr. Huang had not presented any proof of savings or assets in China. The respondent submitted that this fact, taken alone or coupled with the evidence that Mr. Huang's earnings in China are only modest, would have been enough, without positive evidence of strong ties to China, for the officer to conclude that his return was unlikely. Until the hearing the applicants had not challenged the officer's finding that they had not presented evidence of assets in China. However, at the hearing their counsel pointed to page 19 of the Certified Tribunal Record - "Application for A Temporary Resident Visa Made Outside Of Canada", submitted by Ms. Ma – in which she states "We have saving USD $3,000.00" (*sic*). There is also an undated, handwritten note on this document that reads "Call app't, app't confirmed that this form submit in error" (*sic*).

[17] It is not evident from the record who wrote this note or when. It is also not evident from the record whether the visa officer read this form or not. It does, on its face, contain information that might have been critical to the decision to be made, and it is included in the certified tribunal record.

[18] As noted, the respondent put in evidence an affidavit sworn December 15, 2008 by the visa officer whose decision is under review. I concur with the observations of Justice Gauthier in *Jesuorobo v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1680, at paragraph 12, that the respondent cannot rely on new evidence from the officer to change, explain or add to the refusal letter and the CAIPS notes. It is an attempt by the officer to pull himself up by his bootstraps where his CAIPS notes may be deficient or too summary in nature. That said, the officer, in his affidavit, swears that "I reviewed Mr. Huang's application kit and all of the applicants' supporting materials…". If this is so, he saw the reference to these applicants having $3000 USD in savings. Even if the form was filed in error, knowing of the existence of these funds, the officer's finding that the applicants had no assets in China is unreasonable, and may well be perverse.

[19] For this reason alone, this application must be allowed and the work permit applications must be remitted to another visa officer for fresh consideration. The original offer of employment was returned to the applicants in accordance with the Embassy's archiving policy. If an original is required, the respondent is directed to immediately advise the applicants.

[20] It would not be appropriate for the new officer to re-determine these applications and simply ignore the evidence contained in the document that was said to have been filed in error. Thus, the applicants shall have an opportunity to submit fresh or additional evidence in support of their work visa applications in order that the facts are squarely before the officer. In light of the shortness of time available before the Labour Market Opinion expires, they should do so as soon as possible. If nothing is filed by the applicants by March 25, 2009, then as of that date the officer shall be at liberty to render his determination in the absence of any additional information. Lastly, as the Labour Market Opinion remains valid only until April 25, 2009, the respondent is directed to issue the decision on the redetermination prior to April 25, 2009.

[21] It may well be that the officer examining these applications, even with the new evidence, will arrive at the same conclusion as the officer whose decision is under review. Nonetheless, fairness requires that the decision be made with all the evidence before the officer.

[22] Neither party submitted a question for certification and on the facts, as found, there is no such question.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed and the decisions of the visa officer dated July 15, 2008 are set aside;

2. The applicants' work permit applications shall be re-determined by another visa officer, in accordance with these Reasons;

3. The applicants shall be permitted to submit anything further that they wish to be considered in support of their applications; and

4. No question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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