



[2021] 3 F.C.R. D-17

CITIZENSHIP AND IMMIGRATION

IMMIGRATION PRACTICE

Judicial review of Employment and Social Development Canada (ESDC) program officer's decision refusing applicant's request for positive Labour Market Impact Assessment (LMIA)¹ — LMIA requirement governed by *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations), ss. 203(1),(3), guidelines contained in EDSC's "Program requirements for low-wage positions" (program requirements) — Applicant applied for LMIA for food service supervisor position at its restaurant in Surrey, British Columbia — As result of COVID-19 pandemic, changes made to assessment criteria — Employers now required to confirm that workers still able to perform their duties despite local restrictions, to re-advertise any job advertisements posted prior to March 15, 2020, due to increase in unemployment rate — Applicant informing officer those requirements met — Officer finding issues with advertisements — Applicant having to provide copies of advertisements from organizations with whom applicant claimed to be advertising — Providing summary of its advertising efforts — Officer's decision informing applicant that LMIA resulted in negative decision due to "[i]nsufficient efforts to hire Canadians/PRs." — Advertising sent to agencies not posted according to program requirements — Applicant submitting that officer fettered discretion by treating advertising to underrepresented groups as mandatory — Also submitting that proper question set out in Regulations, s. 203(1)(b), namely whether employment of foreign national likely to have neutral or positive effect on labour market in Canada — Further submitting that minimum advertising requirements not appearing in list of factors enumerated under s. 203(3), only in program requirements — Whether officer fettered discretion when making decision under review — Officer not generally required to discuss why departure from program requirements not warranted in a case — However, clear from case law that officer's discretion found to be unduly fettered where clear that officer considered program requirements to be mandatory or applied them as such — Unreasonable to expect officer to consider deviating from program requirements without request to do so from applicant — Here, applicant requested officer to exercise some flexibility in application of program requirements — Officer viewed program requirements guidelines as mandatory — Only considered whether advertising met specific targeting, duration expectations set out in program requirements — Those not factors set out in Regulations — Not demonstrating flexibility as to whether applicant's cumulative efforts could also demonstrate reasonable attempts at recruitment despite not complying with program requirements — Officer treated compliance with program requirements as necessary to demonstrate reasonable efforts, instead or merely being sufficient — This was an unlawful fettering of officer's discretion, rendering decision unreasonable — Officer not set up to succeed in her assessment; officer tasked with considering application in accordance with set of guidelines purporting to be "requirements" — Elements embedded in structure of assessment process strongly imply that program requirements should be treated as mandatory — Respondent ought to consider taking steps to clarify role of program requirements as guidance, not law — Application allowed.

TUFOR HOLDINGS LTD. V. CANADA (EMPLOYMENT AND SOCIAL DEVELOPMENT) (IMM-3771-20, 2021

¹ An employer in Canada may be required to obtain a positive LMIA before hiring a foreign worker. A positive LMIA shows that there is a need for a foreign worker and that no Canadian worker or permanent resident is available to fill the position.

FC 1350, Zinn J., reasons for judgment dated December 3, 2021, 16 pp. + 6 pp.)