Federal Court  Cour fédérale

Date: 20120913

Docket: IMM-5222-11

Citation: 2012 FC 1079

Ottawa, Ontario, September 13, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

XIAO FENG TAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of an immigration officer (the officer), dated June 1, 2011, wherein the applicant was denied permanent residence under the federal skilled worker class of subsection 12(2) of the Act and subsection 76(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations). This decision was based on the officer's finding that the applicant did not have sufficient English language proficiency to perform his arranged employment in Canada and to become economically established.

[2] The applicant requests that the officer's decision be quashed and the matter be remitted for redetermination by a different officer.

Background

[3] The applicant, Xiao Feng Tan, is a citizen of China. His wife, Xiao Wen Huang, is also a citizen of China. The couple do not have any children.

[4] The applicant's wife was previously an accompanying dependent on her parents' Canadian permanent residence application. Her parents were granted permanent residence but she was denied due to her inability to satisfy the requirement of full time study. The applicant's wife's parents now live in Revelstoke, British Columbia, where they own and operate a Chinese restaurant called W.K. Garden Restaurant.

[5] The applicant has been working as a cook in China for almost ten years. On May 15, 2009, Service Canada issued him an arranged employment opinion (AEO) for the position as a cook at the W.K. Garden Restaurant. In the AEO, the specified language requirements for the occupation were listed as Cantonese or Mandarin and basic English (oral) and Chinese (written).

[6] On September 3, 2009, the Canadian Consul General in Hong Kong received the applicant's application for permanent residence under the federal skilled worker class. The applicant's wife was included as an accompanying dependent. The applicant indicated that he would not be providing a copy of approved test results but instead opted to provide evidence of proficiency in Canada's

official language. In his application, the applicant indicated that his English language proficiency was as follows: speak – basic; listen – basic; read – moderate; and write – basic.

[7] In a letter dated March 11, 2011 (the procedural fairness letter), the officer noted the levels of English language proficiency that the applicant claimed on his permanent residence application and the college transcript indicating that he took one English course in college. However, the officer observed that the applicant had failed to submit any written evidence of his English language proficiency. The officer was therefore concerned that the applicant had not established his claimed English proficiency in accordance with the Canadian Language Benchmark Standards for English speaking, listening, reading and writing. The officer therefore stated that she was unable to accurately assess the applicant's English language proficiency for immigration selection.

[8] The officer also acknowledged that the applicant's employment offer from W.K. Garden Restaurant did not specifically require that he possess any English language proficiency. However, the officer was not satisfied that the applicant's employer in Canada would be able to ensure that there was always someone in the kitchen that could help him read and understand safety equipment instructions. She was also not satisfied that the applicant would be able to communicate with Canadian authorities and services in case of emergencies or accidents in the kitchen environment. The officer noted that the fact that the applicant's offer of employment was at a restaurant owned by his relatives did not alleviate these concerns.

[9] The officer therefore concluded that she had concerns with the applicant's ability to become economically established in Canada. The officer granted the applicant sixty days to submit any information or documents that might disabuse the officer of her stated concerns.

[10] In response, the applicant submitted a short video (2 minutes and 46 seconds long) showing:

1. The applicant speaking in Mandarin (46 seconds);
2. The applicant speaking in English stating his name, age and home town and briefly discussing his schooling, employment and family status (43 seconds);
3. The applicant's English tutor explaining that the applicant has learned basic English skills (17 seconds); and
4. The applicant displaying English writing skills by writing three short sentences: "I am Tang Xiao Feng. I am 35 years old. I am learning English now." (60 seconds).

[11] The applicant also submitted an English handwritten note drafted by him and a transcript from the Guangdong University of Business Studies indicating his mark of 85 in an English course. These additional submissions were received by the Hong Kong Consul on May 18, 2011.

Officer's Decision

[12] In a letter dated June 1, 2011, the officer denied the applicant's application. The Computer-Assisted Immigration Processing System (CAIPS) notes that form part of the officer's decision also explain the reasons for the denial.

[13] The officer assessed a total of 56 points for the applicant's application for permanent residence:

Age: 10 points

Education: 20 points

Official language proficiency: 0 points

Experience: 21 points

Arrangement employment: 0 points

Adaptability: 5 points

[14] The officer explained that according to his AEO, the applicant was required to speak and write in Cantonese or Mandarin and also basic English. In the CAIPS notes, the officer noted that the applicant had not filed any language test results. Based on the applicant's college transcript, the officer was not satisfied that she could accurately assess the applicant's claimed level of English language proficiency. The officer also acknowledged the applicant's additional submissions and his claim that he was taking English language lessons with a private teacher. However, based on the record before her and the applicant's education and employment history, the officer was not satisfied with the applicant's alleged levels of English proficiency without confirmation by a third party language test.

[15] In her decision, the officer repeated her previous concerns about the applicant's ability to read and understand safety equipment instructions and to communicate with Canadian authorities in case of emergencies or accidents in the kitchen. Based on the evidence before her, including the applicant's additional submissions, the officer was not satisfied that she would be able to accurately

assess the applicant's claimed levels of English language proficiency in terms of speaking, listening, reading and writing against the Canadian Language Benchmark Standards for immigration selection purposes.

[16] As a result, the officer was not satisfied of the applicant's English proficiency and assigned him zero points under the official language proficiency factor. In addition, the officer was not satisfied that the applicant's Canadian employer would be able to ensure there was always someone close by in the kitchen to assist the applicant with English safety instructions and communicating with Canadian authorities in case of emergencies. Thus, the officer was not satisfied that the applicant could perform the arranged employment in Canada. The officer therefore also assigned the applicant zero points under the arranged employment factor and stated the same in her letter under the adaptability factor for having employment in Canada.

[17] In summary, the officer was not satisfied that the applicant would be able to become economically established in Canada. The applicant's permanent residence application was therefore denied.

Issues

[18] The applicant submits the following points at issue:

1. Did the officer err in law by using the wrong legal test in assessing the applicant on the arranged employment factor, pursuant to section 82 of the Regulations?

2. Did the officer err in law by failing to consider material evidence on the central issue of the case?

3. Did the officer err in law by double-counting the applicant's alleged lack of English language abilities by penalizing him on the language proficiency factor and the arranged employment factor for the same reason?

4. Did the officer's errors result in a miscarriage of justice?

[19] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the officer err in assessing the applicant's language proficiency on a higher standard than that specified in the AEO?

3. Did the officer err by not specifying what evidence the applicant should submit to establish his language proficiency?

4. Did the officer err by not considering the evidence before her?

5. Did the officer err by double-counting the applicant's level of English proficiency?

Applicant's Written Submissions

[20] The applicant submits that the officer made three errors of law in refusing the applicant's permanent residence application. The standard of review for questions of law is correctness.

[21] First, the officer applied the wrong legal test in assessing the applicant on the arranged employment factor pursuant to section 82 of the Regulations. The applicant submits that his AEO

identified the specific language requirements for the position as the ability to speak and write in Chinese and the ability to speak English at a basic level. No other language requirements are set out in section 82 of the Regulations. However, rather than assessing the applicant's language proficiency according to the AEO requirements, the officer assessed the applicant's language abilities on an elevated standard. The applicant submits that in doing so, the officer erred in law as she did not have the jurisdiction to require language proficiency above those required by Service Canada in the AEO.

[22] Moreover, the applicant submits that even if the officer had such jurisdiction, she did not advise him of what level of language he would have to demonstrate to prove that he could accomplish the tasks as a cook. In so doing, the officer committed a procedural fairness violation.

[23] Second, the applicant submits that the officer ignored material evidence adduced by the applicant on a central issue of the case. This too was an error of law. Upon receipt of the applicant's permanent residence application, the officer requested that the applicant submit "any information or documents" relevant to his language abilities within 60 days. The applicant submits that the officer did not specify that an English language test was required, nor what evidence of language abilities she was looking for. The applicant also notes that a language test is not required to prove language ability under the arranged employment factor.

[24] In response to the officer's request, the applicant submitted: a video of him speaking in English and of a tutor providing further detail on the applicant's English abilities; a handwritten letter that he drafted in English; and a transcript from the Guangdong University of Business Studies

indicating that he received a mark of 85 in an English course. This evidence proves that the applicant can speak, read, write and understand English. The applicant submits that the officer erred by ignoring this compelling evidence without providing a proper explanation on why the evidence was deficient.

[25] Third, the applicant submits that the officer erred by double penalizing him for an alleged lack of English abilities. The applicant highlights the officer's awarding of zero points under both the official language proficiency factor and the arranged employment factor based on the applicant's alleged lack of English proficiency. This was a case of double-counting which also constitutes an error of law. Although this argument relies on jurisprudence that developed on the previous *Immigration Regulations*, 1978, the applicant submits that this principle still applies today.

[26] The applicant submits that had the officer not made these errors, he would have been awarded ten points under the arranged employment factor and five points under the adaptability factor. The applicant would thereby have qualified for a permanent resident visa under the federal skilled worker class.

Respondent's Written Submissions

[27] The respondent submits that the reasonableness standard of review applies to the merits of the officer's decision, but no deference is warranted on questions of procedural fairness.

[28] The respondent notes that the officer provided the applicant with an opportunity to allay her concerns about his English proficiency. The respondent also notes that the AEO explicitly states that it is but one step in the process. The respondent submits that based on the evidence before her, the officer's decision was well within the range of reasonable outcomes.

[29] The respondent notes that it was the applicant's responsibility to put his best case forward. This onus did not shift to the officer if the application or supporting material was ambiguous or insufficient. The respondent submits that the short video of the applicant's language skills was insufficient to alleviate the officer's concerns. The respondent also notes that this video does not show the applicant's ability to speak, listen to, read and write English. It only shows the applicant writing fifteen words, three of which were his name and does not show him listening to and responding to questions or demonstrate his reading skills.

[30] In addition, the applicant's unverifiable letters and writing sample were inadequate proof that he wrote them and did not demonstrate his claimed level of English proficiency. It was thus reasonable for the officer to find that this evidence was insufficient to determine whether the applicant met the requisite benchmarks.

[31] Finally, with regards to the applicant's double counting argument, the respondent notes that he relies in support on a 1998 case. That case is not applicable as it pertained to the previous immigration regulations and not the current Regulations. The respondent submits that the visa officer was required to determine whether the applicant was capable of performing the employment contemplated. In the case of a cook working in a commercial kitchen, the officer reasonably

determined that some English language proficiency was necessary to operate equipment safely and to communicate with authorities in emergency situations. Concurrently, the officer was required to make a separate assessment of language proficiency. The respondent submits that the officer did not err in her assessment of the applicant's visa application.

Analysis and Decision

[32] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[33] An officer's determination of eligibility for permanent residence under the federal skilled worker class involves findings of fact and law and is reviewable on a standard of reasonableness (see *Malik v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1283, [2009] FCJ No 1643 at paragraph 22; and *Khan v Canada (Minister of Citizenship and Immigration)*, 2009 FC 302, [2009] FCJ No 676 at paragraph 9). In reviewing the officer's decision on the reasonableness standard, the Court should not intervene unless she came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] SCJ No 12 at paragraph 59).

[34] Conversely, the appropriate standard of review for issues of procedural fairness and natural justice is correctness (see *Malik* above, at paragraph 23; *Khan* above, at paragraph 11; *Wang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 798, [2008] FCJ No 995 at paragraph 13; and *Khosa* above, at paragraph 43). No deference is owed to officers on these issues (see *Dunsmuir* above, at paragraph 50).

[35] **Issue 2**

Did the officer err in assessing the applicant's language proficiency on a higher standard than that specified in the AEO?

In this case, the applicant submits that the officer erred by assessing the applicant's language proficiency on a higher standard than that specified in the AEO. Points awarded on AEOs are regulated under paragraph 82(2)(c) of the Regulations.

[36] As indicated, where an applicant does not intend to work in Canada before being issued a permanent resident visa and does not yet hold a work permit, the officer must assess whether the applicant is able to perform and likely to accept and carry out the employment described in an approved offer of employment (i.e., the AEO). An offer of employment is prepared by the prospective employer. The approval of the offer of employment then depends on an opinion provided by the Department of Human Resources and Skills Development (i.e., Service Canada). This opinion must be based on the genuineness of the offer of employment, the nature of the employment (i.e., not part-time or seasonal) and the wages offered.

[37] Thus, the statutory regime leaves the description of the specific employment duties and requirements up to the employer, subject only to the limitations that the employment not be part-time or seasonal and that the wages meet Canadian standards. In fact, in its guidance document to employers preparing job descriptions, Service Canada highlights the importance of clearly defining health or safety hazards associated with the employment. As such, the specification of these types of requirements is left to the employer.

[38] Nevertheless, recognizing the significant deference owed to visa officers on their exercise of discretion under paragraph 82(2)(c) of the Regulations, the jurisprudence has clearly established that an approved offer of employment, or AEO, from Service Canada does not eliminate the officer's duty to assess whether the applicant is able to perform the work outlined therein. For example, in *Bellido v Canada (Minister of Citizenship and Immigration)*, 2005 FC 452, [2005] FCJ No 572 at paragraph 21, Madam Justice Judith Snider stated:

> HRDC validation is not, as the Applicant submits, sufficient evidence of arranged employment. Such validation does not remove the obligation of the Visa Officer to assess whether the Applicant is able to perform the job described in the validation. [emphasis added]

[39] Similarly, in *Garcia Porfirio v Canada (Minister of Citizenship and Immigration)*, 2011 FC 794, [2011] FCJ No 997, Mr. Justice David Near explained (at paragraph 33):

> I agree that HRSDC and Citizenship and Immigration Canada (CIC) have different goals and benchmarks to meet, and it is equally clear that they each have a different realm of expertise. In this regard, CIC has chosen to use the specialized knowledge of HRSDC to help to streamline the processing of skilled workers. However, the immigration or visa officer is still the final check and balance in the system. Although an officer might be directed to take the HRSDC AEO at face value, they are instructed and required to consider

> whether the applicant is able and likely to carry out the offer of employment by section 82 of the Regulations. [emphasis added]

[40] Thus, officers play an important role in independently assessing federal skilled worker permanent residence applications. Reliance on AEOs can help streamline the application review process, however, officers remain responsible for the final decision on whether applicants can and will be able to carry out the arranged employment described therein.

[41] This brings us to the crux of the matter in this case. Here, the AEO merely specified that the applicant needed to have basic English oral proficiency to complete the employment. No English writing or reading skills were specified. Nevertheless, the officer found that the applicant's proposed employer would not be able to ensure that an English speaking person was always present while the applicant was working. The officer therefore concluded that in addition to the basic English oral proficiency, the applicant would require sufficient English proficiency to be able to read English safety equipment instructions in the kitchen and to communicate with Canadian authorities in case of accidents or emergencies. The officer found that these requirements were important in assessing whether the applicant could perform and carry out the proposed employment and thereby become economically established in Canada.

[42] In finding that the applicant required English reading to perform and carry out the employment, the officer incorporated a requirement not specified in the AEO. Although the ability to read and understand safety instructions and the ability to communicate with authorities in case of emergencies is clearly important and arguably applicable to most jobs, these requirements were not included in the AEO, the relevant statutory provisions or the policy guidelines. The officer therefore

erred by incorporating requirements that exceeded those specifically listed in the AEO and by denying the applicant's permanent residence application in part on this basis.

[43] The existence of this error will have an effect on the number of points to be awarded to the applicant, hence, the application for judicial review must be allowed and the matter referred to a different officer for redetermination.

[44] Because of my finding on Issue 2, I need not deal with the remaining issues.

[45] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is referred to a different officer for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, SC 2001, c 27

12. (2) A foreign national may be selected as a member of the economic class on the basis of their ability to become economically established in Canada.	12. (2) La sélection des étrangers de la catégorie « immigration économique » se fait en fonction de leur capacité à réussir leur établissement économique au Canada.
14. (2) The regulations may prescribe, and govern any matter relating to, classes of permanent residents or foreign nationals, including the classes referred to in section 12, and may include provisions respecting	14. (2) Ils établissent et régissent les catégories de résidents permanents ou d'étrangers, dont celles visées à l'article 12, et portent notamment sur :
(a) selection criteria, the weight, if any, to be given to all or some of those criteria, the procedures to be followed in evaluating all or some of those criteria and the circumstances in which an officer may substitute for those criteria their evaluation of the likelihood of a foreign national's ability to become economically established in Canada;	a) les critères applicables aux diverses catégories, et les méthodes ou, le cas échéant, les grilles d'appréciation et de pondération de tout ou partie de ces critères, ainsi que les cas où l'agent peut substituer aux critères son appréciation de la capacité de l'étranger à réussir son établissement économique au Canada;
72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

Immigration and Refugee Protection Regulations, SOR/2002-227

75. (1) For the purposes of subsection 12(2) of the Act, the federal skilled worker class is hereby prescribed as a class of persons who are skilled workers and who may become permanent residents on the basis of their ability to become economically established in Canada and who intend to reside in a province other than the Province of Quebec.	75. (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des travailleurs qualifiés (fédéral) est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada, qui sont des travailleurs qualifiés et qui cherchent à s'établir dans une province autre que le

Québec.

(2) A foreign national is a skilled worker if

(2) Est un travailleur qualifié l'étranger qui satisfait aux exigences suivantes :

(a) within the 10 years preceding the date of their application for a permanent resident visa, they have at least one year of continuous full-time employment experience, as described in subsection 80(7), or the equivalent in continuous part-time employment in one or more occupations, other than a restricted occupation, that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the National Occupational Classification matrix;

a) il a accumulé au moins une année continue d'expérience de travail à temps plein au sens du paragraphe 80(7), ou l'équivalent s'il travaille à temps partiel de façon continue, au cours des dix années qui ont précédé la date de présentation de la demande de visa de résident permanent, dans au moins une des professions appartenant aux genre de compétence 0 Gestion ou niveaux de compétences A ou B de la matrice de la Classification nationale des professions — exception faite des professions d'accès limité;

(b) during that period of employment they performed the actions described in the lead statement for the occupation as set out in the occupational descriptions of the National Occupational Classification; and

b) pendant cette période d'emploi, il a accompli l'ensemble des tâches figurant dans l'énoncé principal établi pour la profession dans les descriptions des professions de cette classification;

(c) during that period of employment they performed a substantial number of the main duties of the occupation as set out in the occupational descriptions of the National Occupational Classification, including all of the essential duties.

c) pendant cette période d'emploi, il a exercé une partie appréciable des fonctions principales de la profession figurant dans les descriptions des professions de cette classification, notamment toutes les fonctions essentielles.

(3) If the foreign national fails to meet the requirements of subsection (2), the application for a permanent resident visa shall be refused and no further assessment is required.

(3) Si l'étranger ne satisfait pas aux exigences prévues au paragraphe (2), l'agent met fin à l'examen de la demande de visa de résident permanent et la refuse.

76. (1) For the purpose of determining whether a skilled worker, as a member of the federal skilled worker class, will be able to become economically established in Canada, they must be assessed on the basis of the following criteria:

76. (1) Les critères ci-après indiquent que le travailleur qualifié peut réussir son établissement économique au Canada à titre de membre de la catégorie des travailleurs qualifiés (fédéral) :

(a) the skilled worker must be awarded not

a) le travailleur qualifié accumule le nombre

less than the minimum number of required points referred to in subsection (2) on the basis of the following factors, namely,

minimum de points visé au paragraphe (2), au titre des facteurs suivants :

(i) education, in accordance with section 78,

(i) les études, aux termes de l'article 78,

(ii) proficiency in the official languages of Canada, in accordance with section 79,

(ii) la compétence dans les langues officielles du Canada, aux termes de l'article 79,

(iii) experience, in accordance with section 80,

(iii) l'expérience, aux termes de l'article 80,

(iv) age, in accordance with section 81,

(iv) l'âge, aux termes de l'article 81,

(v) arranged employment, in accordance with section 82, and

(v) l'exercice d'un emploi réservé, aux termes de l'article 82,

(vi) adaptability, in accordance with section 83; and

(vi) la capacité d'adaptation, aux termes de l'article 83;

(b) the skilled worker must

b) le travailleur qualifié :

(i) have in the form of transferable and available funds, unencumbered by debts or other obligations, an amount equal to half the minimum necessary income applicable in respect of the group of persons consisting of the skilled worker and their family members, or

(i) soit dispose de fonds transférables — non grevés de dettes ou d'autres obligations financières — d'un montant égal à la moitié du revenu vital minimum qui lui permettrait de subvenir à ses propres besoins et à ceux des membres de sa famille,

(ii) be awarded the number of points referred to in subsection 82(2) for arranged employment in Canada within the meaning of subsection 82(1).

(ii) soit s'est vu attribuer le nombre de points prévu au paragraphe 82(2) pour un emploi réservé au Canada au sens du paragraphe 82(1).

82. (1) In this section, "arranged employment" means an offer of indeterminate employment in Canada.

82. (1) Pour l'application du présent article, constitue un emploi réservé toute offre d'emploi au Canada à durée indéterminée.

Marginal note:Arranged employment (10 points)

Note marginale :Emploi réservé (10 points)

(2) Ten points shall be awarded to a skilled worker for arranged employment in Canada in an occupation that is listed in Skill Type 0 Management Occupations or Skill

(2) Dix points sont attribués au travailleur qualifié pour un emploi réservé appartenant aux genre de compétence 0 Gestion ou niveaux de compétences A ou B de la

Level A or B of the National Occupational Classification matrix if they are able to perform and are likely to accept and carry out the employment and

matrice de la Classification nationale des professions, s'il est en mesure d'exercer les fonctions de l'emploi et s'il est vraisemblable qu'il acceptera de les exercer, et que l'un des alinéas suivants s'applique :

(a) the skilled worker is in Canada and holds a work permit and

a) le travailleur qualifié se trouve au Canada, il est titulaire d'un permis de travail et les conditions suivantes sont réunies :

(i) there has been a determination by an officer under section 203 that the performance of the employment by the skilled worker would be likely to result in a neutral or positive effect on the labour market in Canada,

(i) l'agent a conclu, au titre de l'article 203, que l'exécution du travail par le travailleur qualifié est susceptible d'entraîner des effets positifs ou neutres sur le marché du travail canadien,

(ii) the skilled worker is currently working in that employment,

(ii) le travailleur qualifié occupe actuellement cet emploi réservé,

(iii) the work permit is valid at the time an application is made by the skilled worker for a permanent resident visa as well as at the time the permanent resident visa, if any, is issued to the skilled worker, and

(iii) le permis de travail est valide au moment de la présentation de la demande de visa de résident permanent et au moment de la délivrance du visa de résident permanent, le cas échéant,

(iv) the employer has made an offer to employ the skilled worker on an indeterminate basis once the permanent resident visa is issued to the skilled worker;

(iv) l'employeur a présenté au travailleur qualifié une offre d'emploi d'une durée indéterminée sous réserve de la délivrance du visa de résident permanent;

(b) the skilled worker is in Canada and holds a work permit referred to in paragraph 204(a) or 205(a) or subparagraph 205(c)(ii) and the circumstances referred to in subparagraphs (a)(ii) to (iv) apply;

b) le travailleur qualifié se trouve au Canada, il est titulaire du permis de travail visé aux alinéas 204a) ou 205a) ou au sous-alinéa 205c)(ii) et les conditions visées aux sous-alinéas a)(ii) à (iv) sont réunies;

(c) the skilled worker does not intend to work in Canada before being issued a permanent resident visa and does not hold a work permit and

c) le travailleur qualifié n'a pas l'intention de travailler au Canada avant qu'un visa de résident permanent ne lui soit octroyé, il n'est pas titulaire d'un permis de travail et les conditions suivantes sont réunies :

(i) the employer has made an offer to employ the skilled worker on an

(i) l'employeur a présenté au travailleur qualifié une offre d'emploi d'une durée

indeterminate basis once the permanent resident visa is issued to the skilled worker, and

indéterminée sous réserve de la délivrance du visa de résident permanent,

(ii) an officer has approved that offer of employment based on an opinion provided to the officer by the Department of Human Resources and Skills Development at the request of the employer or an officer that

(ii) un agent a approuvé cette offre sur le fondement d'un avis émis par le ministère des Ressources humaines et du Développement des compétences, à la demande de l'employeur, à sa demande ou à celle d'un autre agent, où il est affirmé que :

(A) the offer of employment is genuine,

(A) l'offre d'emploi est véritable,

(B) the employment is not part-time or seasonal employment, and

(B) l'emploi n'est pas saisonnier ou à temps partiel,

(C) the wages offered to the skilled worker are consistent with the prevailing wage rate for the occupation and the working conditions meet generally accepted Canadian standards; or

(C) la rémunération offerte au travailleur qualifié est conforme au taux de rémunération en vigueur pour la profession et les conditions de l'emploi satisfont aux normes canadiennes généralement acceptées;

(d) the skilled worker holds a work permit and

d) le travailleur qualifié est titulaire d'un permis de travail et, à la fois :

(i) the circumstances referred to in subparagraphs (a)(i) to (iv) and paragraph (b) do not apply, and

(i) les conditions visées aux sous-alinéas a)(i) à (iv) et à l'alinéa b) ne sont pas remplies,

(ii) the circumstances referred to in subparagraphs (c)(i) and (ii) apply.

(ii) les conditions visées aux sous-alinéas c)(i) et (ii) sont réunies.

83. (1) A maximum of 10 points for adaptability shall be awarded to a skilled worker on the basis of any combination of the following elements:

83. (1) Un maximum de 10 points d'appréciation sont attribués au travailleur qualifié au titre de la capacité d'adaptation pour toute combinaison des éléments ci-après, selon le nombre indiqué :

(a) for the educational credentials of the skilled worker's accompanying spouse or accompanying common-law partner, 3, 4 or 5 points determined in accordance with subsection (2);

a) pour les diplômes de l'époux ou du conjoint de fait, 3, 4 ou 5 points conformément au paragraphe (2);

(b) for any previous period of study in

b) pour des études antérieures faites par le

Canada by the skilled worker or the skilled worker's spouse or common-law partner, 5 points;

travailleur qualifié ou son époux ou conjoint de fait au Canada, 5 points;

(c) for any previous period of work in Canada by the skilled worker or the skilled worker's spouse or common-law partner, 5 points;

c) pour du travail antérieur effectué par le travailleur qualifié ou son époux ou conjoint de fait au Canada, 5 points;

(d) for being related to a person living in Canada who is described in subsection (5), 5 points; and

d) pour la présence au Canada de l'une ou l'autre des personnes visées au paragraphe (5), 5 points;

(e) for being awarded points for arranged employment in Canada under subsection 82(2), 5 points.

e) pour avoir obtenu des points pour un emploi réservé au Canada en vertu du paragraphe 82(2), 5 points.

(5) For the purposes of paragraph (1)(d), a skilled worker shall be awarded 5 points if

(5) Pour l'application de l'alinéa (1)d), le travailleur qualifié obtient 5 points dans les cas suivants :

(a) the skilled worker or the skilled worker's accompanying spouse or accompanying common-law partner is related by blood, marriage, common-law partnership or adoption to a person who is a Canadian citizen or permanent resident living in Canada and who is

a) l'une des personnes ci-après qui est un citoyen canadien ou un résident permanent et qui vit au Canada lui est unie par les liens du sang ou de l'adoption ou par mariage ou union de fait ou, dans le cas où il l'accompagne, est ainsi unie à son époux ou conjoint de fait :

(i) their father or mother,

(i) l'un de leurs parents,

(ii) the father or mother of their father or mother,

(ii) l'un des parents de leurs parents,

(iii) their child,

(iii) leur enfant,

(iv) a child of their child,

(iv) un enfant de leur enfant,

(v) a child of their father or mother,

(v) un enfant de l'un de leurs parents,

(vi) a child of the father or mother of their father or mother, other than their father or mother, or

(vi) un enfant de l'un des parents de l'un de leurs parents, autre que l'un de leurs parents,

(vii) a child of the child of their father or mother; or

(vii) un enfant de l'enfant de l'un de leurs parents;

(b) the skilled worker has a spouse or common-law partner who is not accompanying the skilled worker and is a Canadian citizen or permanent resident living in Canada.

b) son époux ou conjoint de fait ne l'accompagne pas et est citoyen canadien ou un résident permanent qui vit au Canada.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5222-11
STYLE OF CAUSE:	XIAO FENG TAN - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	March 20, 2012
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	September 13, 2012

APPEARANCES:

Gabriel Chand	FOR THE APPLICANT
Edward Burnet	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Chand & Company Law Corporation Vancouver, British Columbia	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT