

Federal Court



Cour fédérale

Date: 20220316

Docket: IMM-1378-20

Citation: 2022 FC 358

[ENGLISH TRANSLATION]

Ottawa, Ontario, March 16, 2022

PRESENT: Mr. Justice Pamel

BETWEEN:

LIN TIAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Background and underlying decision

[1] The applicant, Lin Tian, is a citizen of the People's Republic of China who is seeking judicial review of a decision rendered by an immigration officer at the Canadian Consulate General in Hong Kong [officer], dated January 2, 2020. Mr. Tian applied for permanent

residence in the economic class as a self-employed person with relevant experience in cultural activities. His application included his spouse, Shan Gao, and their son as dependents.

[2] Mr. Tian has been in the film production business for several years. He graduated from Hebei Normal University in 2004 with a degree in advertising and received a master's degree in art design from Communication University of China in Beijing in 2007. Subsequently, from 2007 to 2016, he held several jobs at the General Administration of Press and Publication of China, during which he was entrusted with several different tasks. He was responsible for editing the national professional journal "Audio & Video Production"; he took part in the study and formulation of national standards for the television and film industry; he participated in the organization of major industry events; and he took part in the approval, evaluation and production of large-scale documentaries prepared by a Chinese international television channel [CCTV] to present Chinese culture.

[3] In 2016, Mr. Tian decided to become an independent producer. He specializes in cultural business projects that aim to showcase different cultural aspects of a country or community through a multimedia platform. Mr. Tian has worked in cooperation with several companies, including CCTV and Alibaba, whose resources he says he has used, specifically the professional production teams and directors. As an independent producer, Mr. Tian has been able to earn a significant income.

[4] Mr. Tian submitted his application for permanent residence in September 2018 with the intention of moving with his family to Toronto. On March 1, 2019, the Consulate General of

Canada in Hong Kong sent a letter to Mr. Tian requesting that he provide documentation to establish his useful experience gained in the cultural field and his intention and ability to work as a self-employed individual in Canada. In response to this letter, Mr. Tian submitted several documents, including his university transcripts, copies of his contracts with companies that have retained his services, photos of his various projects, proof of payments he has received for his work, and a business plan. This business plan has three components: [TRANSLATION] “(1) to help cultural and commercial brands in Canada create more targeted products and promote them in the Chinese market; (2) to foster the development of Canadian online videos through [his] experience in online video production; and (3) to create a Canadian film talent bank and bring projects from Chinese clients to Canada for production”. Mr. Tian also stated that he intends to invest \$100,000 to establish his own production studio in Toronto.

[5] In late March, Mr. Tian made an exploratory visit to Toronto, during which he stated he met with various local production companies and potential partners. Following his visit, Mr. Tian submitted letters from two companies with which he had meetings while in Toronto. These companies stated in their letters that they plan to cooperate with Mr. Tian on commercial film projects. Mr. Tian also submitted a letter of recommendation dated September 2019 written by the founder of RUI PRODUCTIONS, a company with which Mr. Tian has collaborated on a number of projects.

[6] On November 13, 2019, Mr. Tian was called for an interview at the Consulate General of Canada in Hong Kong, during which he was given the opportunity to address concerns raised by

the officer regarding his application for permanent residence. At the end of the interview, the officer reiterated his concerns to Mr. Tian:

[TRANSLATION]

The information you provided in your application and at your interview leaves some doubt in my mind, namely:

For the five-year period preceding the date of your application for a permanent resident visa, since 2013/09/21, I am satisfied that you have not acquired a two-year period or two one-year periods of experience in participating in cultural activities internationally as a producer in China.

Your experience as a self-employed person since 2016 consisted of commercial projects, not cultural activities. You have not been able to establish that you have the required experience under R88(1).

In addition, you explained that you were using the resources and employees of companies, including Alibaba, that were working with you on your production. You presented little serious research and knowledge enabling you to execute your business plan on your own as a self-employed person in Canada. In fact, you plan to rely on Alibaba, a Chinese company, to make you a self-employed producer in Canada. You have limited language skills at this time, which adds to the doubt about your ability to be self-employed in Canada and to make a significant contribution to cultural activities in Canada.

[7] In a letter dated January 2, 2022, the officer refused Mr. Tian's application for permanent residence [the officer's decision] because he did not meet the requirements set out in subsection 88(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations]. First, the officer found that Mr. Tian had not demonstrated that he had relevant experience in cultural activities for the five-year period immediately preceding the date of submission of his application for permanent residence, since his experience as an independent producer since 2016 is more in the area of commercial projects. The officer also found that Mr. Tian had not demonstrated that he had done serious research and that he had sufficient

knowledge to carry out his plan to work independently in Canada, since his plan was essentially to depend on the support of the Chinese company Alibaba. The officer also considered that Mr. Tian has limited skills in one of Canada's official languages.

[8] Mr. Tian argued that the officer erred in his analysis of the criteria derived from the definition of "self-employed" since he demonstrated that his projects, although commercial in nature, were also cultural. Mr. Tian also argued that the officer failed to consider the documentation presented to him regarding Mr. Tian's relevant experience as a high profile film producer and his ability to execute his plan.

II. Legislative scheme

[9] An application for permanent residence as a self-employed person will be refused if the applicant is not self-employed within the meaning of subsection 88(1) of the Regulations:

Minimal requirements

100(2) If a foreign national who applies as a member of the self-employed persons class is not a self-employed person within the meaning of subsection 88(1), the application shall be refused and no further assessment is required.

Exigences minimales

100(2) Si le demandeur au titre de la catégorie des travailleurs autonomes n'est pas un travailleur autonome au sens du paragraphe 88(1), l'agent met fin à l'examen de la demande et la rejette.

[10] Subsection 88(1) of the Regulations defines who is considered "self-employed":

self-employed person means a foreign national who has relevant experience and has the intention and ability to be self-employed in Canada and

travailleur autonome
Étranger qui a l'expérience utile et qui a l'intention et est en mesure de créer son propre emploi au Canada et de

to make a significant contribution to specified economic activities in Canada.	contribuer de manière importante à des activités économiques déterminées au Canada.
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[11] Foreign nationals applying for permanent residence as a self-employed person must therefore demonstrate that they have relevant experience. What constitutes relevant experience regarding cultural activities is also defined in subsection 88(1) of the Regulations:

relevant experience, in respect of	expérience utile
(a) a self-employed person, other than a self-employed person selected by a province, means a minimum of two years of experience, during the period beginning five years before the date of application for a permanent resident visa and ending on the day a determination is made in respect of the application, consisting of	a) S'agissant d'un travailleur autonome autre qu'un travailleur autonome sélectionné par une province, s'entend de l'expérience d'une durée d'au moins deux ans au cours de la période commençant cinq ans avant la date où la demande de visa de résident permanent est faite et prenant fin à la date où il est statué sur celle-ci, composée :
(i) in respect of cultural activities,	(i) relativement à des activités culturelles :
(A) two one-year periods of experience in self-employment in cultural activities,	(A) soit de deux périodes d'un an d'expérience dans un travail autonome relatif à des activités culturelles,
(B) two one-year periods of experience in participation at a world class level in cultural activities, or	(B) soit de deux périodes d'un an d'expérience dans la participation à des activités culturelles à l'échelle internationale,
(C) a combination of a one-year period of experience described in clause (A) and a	(C) soit d'un an d'expérience au titre de la division (A) et d'un an d'expérience au titre de la division (B),

one-year period of experience
described in clause (B),

...

...

III. Issue and standard of review

[12] This application for judicial review raises a single question: is the officer's decision reasonable?

[13] The standard of review applicable to the review of a decision on an application for permanent residence is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–7 [*Vavilov*]; *Grischenko v Canada (Citizenship and Immigration)*, 2012 FC 614 at para 10; *Kim v Canada (Citizenship and Immigration)*, 2008 FC 1291 at para 18). The Court must therefore consider the outcome of the officer's decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified (*Vavilov* at para 15). A decision will be considered reasonable if it is based on an internally coherent and rational chain of analysis (*Vavilov* at para 85).

IV. The officer's decision to refuse Mr. Tian's application for permanent residence is reasonable

[14] The definition of "self-employed person" in subsection 88(1) of the Regulations creates three cumulative criteria for an application for permanent residence as a self-employed person to be accepted: (1) the foreign national must have relevant experience; (2) the foreign national must have the intention and ability to create his or her own employment in Canada; and (3) that

employment must be likely to make a significant contribution to specified economic activities in Canada.

[15] Mr. Tian argued that the officer adopted an incorrect analysis of the criteria for foreign nationals applying for permanent residence as self-employed persons, since he considered that he had established his relevant experience as a producer and that he had the intention and ability to work in Canada as a self-employed person.

A. *Mr. Tian's relevant experience*

[16] In order to demonstrate that he met the first criterion of the definition of self-employed, Mr. Tian attempted to establish that he had relevant experience in self-employment in cultural activities by submitting several documents showing his experience as a producer.

[17] In his decision, the officer concluded that Mr. Tian's experience was in commercial projects rather than cultural activities:

[TRANSLATION]

Your experience as a self-employed person since 2016 consisted of commercial projects, not cultural activities. You have not been able to establish that you have the required experience under R88(1).

[18] During the interview, the officer raised the commercial nature of Mr. Tian's production projects and asked him to explain how his projects qualified as cultural activities:

[TRANSLATION]

Q. Your productions are commercial projects; please explain how your commercial productions qualify as cultural activities.

A. Yes. I did some advertising, and the work also included cultural activities. For example, Tianma and Alibaba collaborated internationally to include cultural features.

[19] After the officer reiterated to Mr. Tian his concerns about the commercial nature of his plans, Mr. Tian provided the officer with the following explanation:

[TRANSLATION]

Although my projects are commercial, the context is cultural. My productions touched on African culture and Japanese culture, the promotion was to raise awareness and attract tourists. The coffee project took place in 2018.

[20] Tian argued that although his projects are commercial in nature, the content itself is cultural in nature. As an example, he cited his project with Alibaba and TIMA on Japan's national holiday in 2018, which aimed to promote Japanese culture in China through an interactive multimedia platform. He also mentioned his projects entitled "National business card of Mexico" and "South African Coffee Project".

[21] Subsection 88(1) of the Regulations does not define what constitutes a cultural activity. The operational guide *OP 8 – Entrepreneur and Self-Employed*, published by Immigration, Refugees and Citizenship Canada [OP 8 Guide], provides non-exhaustive examples of what may constitute a cultural activity (at para 11.3):

Self-employed experience in cultural activities or athletics. This will capture those traditionally applying in this category. For example, music teachers, painters, illustrators, film makers, freelance journalists. Beyond that, the category is intended to capture those people who work behind the scenes, for example, choreographers, set designers, coaches and trainers.

Management experience in the world of arts and culture may also be a viable measure of self-employment; for example, theatrical or musical directors and impresarios.

...

Participation at a world-class level in cultural activities or athletics intends to capture performers. This describes those who perform in the arts, and in the world of sport. “World class” identifies persons who are known internationally. It also identifies persons who may not be known internationally but perform at the highest levels in their discipline.

[22] I am not persuaded that the officer misunderstood or disregarded the evidence before him (*Vavilov* at para 126). Mr. Tian acknowledges that his projects are [TRANSLATION] “advertising or commercial” in nature, and he himself describes his projects as [TRANSLATION] “promotional productions” or projects that are intended to [TRANSLATION] “promote” aspects of a certain culture. The fact that these projects deal with cultural aspects and events does not negate the essentially commercial nature of his experience as a producer. As Mr. Tian stated in his interview, the purpose of his projects was to promote tourism. This is a far cry from the examples offered in the OP 8 Guide. Cultural activity means an activity that is customarily carried on in the arts (*Ding v Canada (Citizenship and Immigration)*, 2010 FC 764 at para 10). In my view, it was reasonable for the officer to conclude that Mr. Tian’s projects did not constitute cultural activities.

B. *Mr. Tian's intention and ability to create his own employment in Canada to make a significant contribution to Canada's cultural activities*

[23] Regarding the last two criteria of the definition of "self-employed", the officer found that Mr. Tian had not demonstrated that he has the ability to create his own employment in Canada that would allow him to make a significant contribution to cultural activities:

[TRANSLATION]

In addition, you explained that you were using the resources and employees of companies, including Alibaba, that were working with you on your production. You presented little serious research and knowledge enabling you to execute your business plan on your own as a self-employed person in Canada. In fact, you plan to rely on Alibaba, a Chinese company, to make you a self-employed producer in Canada. You have limited language skills at this time, which adds to the doubt about your ability to be self-employed in Canada and to make a significant contribution to cultural activities in Canada.

[24] First, Mr. Tian argued that his intention to create his own job is established by the fact that he filed his application as a self-employed person and that he made an exploratory visit to study the Canadian market. However, I am of the opinion that Mr. Tian's intention was not questioned by the officer. I will therefore assess the officer's findings with respect to, first, Mr. Tian's limited resources and knowledge and, second, Mr. Tian's language abilities.

(1) Mr. Tian's limited resources and knowledge for executing his plan

[25] Mr. Tian argued that the officer failed to consider the criteria set out in OP 8 in determining whether foreign nationals would have the ability to create their own employment in Canada. In his opinion, the following excerpt from OP 8 creates guidelines for the officer to rely on in assessing a person's ability to establish in Canada:

A person's financial assets may also be a measure of intent and ability to establish economically in Canada. There is no minimum investment level for a self-employed person. The capital required depends on the nature of the work. Applicants must have sufficient funds to create an employment opportunity for themselves and maintain themselves and their family members. They must show you that they have been able to support themselves and their family through their talents and would be likely to continue to do so in Canada. This includes the ability to be self-supporting until the self-employment has been created.

[Emphasis added.]

[26] According to Mr. Tian, on the basis of these guidelines, a person's ability to establish in Canada is demonstrated by evidence that, among other things, (1) the person has the skills to perform the work; (2) the person has supported himself or herself through that work; and (3) the person has sufficient funds to create his or her own employment and to support himself or herself and his or her family until self-sustaining employment has been created. He considers the documentary evidence he submitted sufficient to demonstrate that he meets these criteria.

[27] I do not agree with Mr. Tian's interpretation of the guidelines in OP 8, which do not establish a test, but simply indicate that financial assets "may" also be a measure of that person's ability to establish in Canada. At the interview, the officer considered the fact that Mr. Tian was planning to invest \$100,000, but it was Mr. Tian's explanation of how he would actually carry out his plan that did not satisfy the officer:

[TRANSLATION]

The PA plans to be a producer in Canada and will invest Can\$100,000.

...

Q. Can you explain in detail how you will implement your plan, e.g., costs of setting up a studio, competition, etc.? In the past, as a

self-employed producer, you relied on the resources of other companies to make your productions.

A. When I was in Toronto in March of this year, I was looking at the local production scene. I would like to set up my studio in Mississauga—there are a lot of production companies in that area. The cost of renting a house or office space is about Can\$3,000 per month. I'll need to buy equipment, including a computer and printer, hire an assistant, who won't work full time 10 days a month, especially for translation, at Can\$150 per day. I have calculated my costs, and I expect to make a profit. I have three collaboration models for when I am in Canada, to have one or two projects per month, each bringing in between Can\$7,000 and Can\$8,000. After deducting expenses (rent, translation, etc.) from my gross income of Can\$130,000 per year on average, my net income will be about Can\$70,000 per year.

Q. You still haven't told me how you will be able to set up your business in Canada, since you will be a newcomer against the current local competition and you don't know the local market well.

A. In Canada, there are many outstanding production companies, and I have a lot of experience with media networks. In Canada, the use of user numbers in networks is growing. In March, I met a lot of people, for the Canada Day plan (Alibaba Project), and I met with people from maple syrup and ice wine production. The presentation of my work on my smart phone interests these Canadian companies. The cost is low and the delivery is fast compared to traditional media.

[28] Mr. Tian simply has not demonstrated that he is able to create his own job without relying on his Chinese client Alibaba. In an interview, he basically stated that his plan was to work with Alibaba:

[TRANSLATION]

Q. How will you create your self-employment in Canada?

A. I plan to work with Alibaba in China, and they will open an office in Canada. They will promote their products on their platform in Canada. I have experience working with Alibaba. I will continue to work with them. Also, when I come to Canada, I will set up my own work studio; I would like to join the local

associations, like CTAP and MPAT, for Canadian media productions. I think I could get work by joining them. In March, when I was in Toronto, I met a person from a local company, “Magz” and I plan to do business by working with local companies and associations. In March, I also met people from other companies, media companies and Canadian-Canadian business associations; they were interested in working with me and like my angles. I would like to offer services to international productions, such as Alibaba; I plan to complete and release a production in March of next year. I would also like to bring Canadian crews to China and introduce Canadian productions to the Chinese market.

[29] The detailed plan submitted by Mr. Tian is separated into three steps: [TRANSLATION] “(1) to help cultural and commercial brands in Canada create more targeted products and promote them in the Chinese market; (2) to foster the development of Canadian online videos through [his] experience in online video production; and (3) to create a Canadian film talent bank and bring projects from Chinese clients to Canada for production”. The fact that he plans to rely on his Chinese partner to create his own job does not demonstrate that he has the means to carry out his plan in Canada. To establish that he is able to create his own job, the applicant must demonstrate, through extensive planning and detail, that he has the means to produce his projects in Canada (*Wei v Canada (Citizenship and Immigration)*, 2019 FC 982 at paras 31–34 [*Wei*]). I agree with the reasoning of Justice Annis in *Wei*:

[35] There is actually no basis therefore, to criticize the Officer for that portion of her explanation that required an indication from the Applicant of how the project was going to proceed when it obviously involves numerous other participants for its execution as a reasonable demonstration of an ability to produce a series of TV films. His answers were entirely based upon others doing most of the work, with actually no meaningful indication of how the project was to proceed.

...

[37] Such is this evidence, that it is not even clear that permanent residency is required for the project to succeed. The preceding

production of the film in Vancouver did not require the Applicant's permanent residency for its completion. The concept underlying a self-employed person under section 88(1) is that permanent residency status is necessary for the success of the project, not that the project can succeed otherwise, but that the Applicant should be rewarded with permanent residency if success results. The intention is that the Applicant be self-employed in Canada for the purpose of significantly contributing to a specified economic activity.

[Emphasis in original.]

[30] Like the applicant in *Wei*, Mr. Tian was unable to provide details of how the projects would be carried out or to demonstrate that his projects would make a significant contribution to Canada's cultural activities, as he has always relied on the resources of his Chinese clients and has not demonstrated that all aspects of the production would be done in Canada.

[31] I cannot accept Mr. Tian's argument that the officer should have asked him specific and closed questions at the interview in order to obtain the level of detail he was seeking. The onus is applicants to establish that they are able to create their own employment in Canada (*Lv v Canada (Citizenship and Immigration)*, 2018 FC 935 at para 22). In addition, the officer made it clear to Mr. Tian what his concerns were with his application.

(2) Mr. Tian's language skills

[32] Mr. Tian argued that, although he recognizes his limitations in English, he has the language skills necessary to create his own employment in Canada as he is able to communicate in simple English via email and read documents, as evidenced by his results on China's College English Test CET 4 and CET 6, which he took while in university. He added that the fact he

hired an interpreter during the interview with the officer cannot be held against him to the point of being fatal to his application.

[33] I agree with the Minister that the language ability of a foreign national applying for permanent residence as a self-employed person is a relevant factor in assessing his or her chances of success in Canada, as stated by Justice Annis in *Wei*:

[45] Finally, the Officer cannot be criticized for noting that the Applicant could not speak either official language, particularly when it is stated as a factor in the overall assessment of being self-employed. The Applicant seeks to be a permanent resident in a country with two official languages where he speaks neither and proposes to take on a highly complicated project at the same time. Language abilities are always a relevant consideration for success in Canada. This is even more so for persons who wish to earn their way into the country to become permanent residents, where supposedly they will spend the rest of their life contributing to Canada, i.e. permanent residents. The Applicant promising to learn one of the two official languages only once a permanent resident is among the clearest signal, and as empty as the remainder of his application in terms of the absence of any demonstration of commitment to Canada. The time and place to start learning the language is well before the application is filled, or some demonstration of intensive training success. The last thing an applicant should do is criticize the Officer for doing her job in noting requirements not met as a relevant consideration why the application should be refused.

[Emphasis in original.]

[34] Mr. Tian's language skills are all the more relevant since he claims to want to make a significant contribution to Canada's cultural activities. Paragraph 11.4 of OP 8 states that it is intended that "the self-employed class enrich Canadian culture". OP 8 also states that the significant contribution factor is relative and that its definition is left to the discretion of the officer, who is in a better position than the Court to determine the applicant's language ability

(*Shang v Canada (Citizenship and Immigration)*, 2019 FC 341 at para 22). In my opinion, the officer's conclusion as to Mr. Tian's language ability is not unreasonable. Other than an English test he took at university over ten years ago, Mr. Tian has not shown that he took any steps to learn either of Canada's official languages before filing his application.

V. Conclusion

[35] Considering the documentary evidence and the explanations given by Mr. Tian during his interview with the officer, I am of the opinion that it was reasonable for the officer to conclude that Mr. Tian's projects did not constitute cultural activities and to find that he had not demonstrated that he had the knowledge and means to create his own employment in Canada. I dismiss the application for judicial review.

JUDGMENT in IMM-1378-20

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.
2. No question of general importance is certified.

“Peter G. Pamel”

Judge

Certified true translation
Michael Palles

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1378-20

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PLACE OF HEARING: MATTER HEARD BY VIDEOCONFERENCE

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