Federal Court

Cour fédérale

Date: 20110526

Docket: IMM-6513-10

Citation: 2011 FC 617

Ottawa, Ontario, May 26, 2011

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

MARTIN TAN LEE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicant, Mr. Martin Tan Lee, is a citizen of the Philippines who wishes to immigrate to Canada. On October 25, 2004, he applied for a permanent resident visa under the "federal skilled worker class" as described in the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations).

[2] The Applicant applied on the basis that he could become economically established in Canada as someone who meets the criteria of the National Occupational Classification (NOC) category NOC 0013 (Senior Managers – Financial, Communications and Other Business Services).

[3] The application was assessed by a Designated Immigration Officer of the Canadian High Commission (the Officer) in Manila, Philippines, and the Applicant was awarded the following points:

	POINTS	**MAXIMUM**
AGE	04	10
EDUCATION	22	25
OFFICIAL LANGUAGE English French	 14 00	24
EXPERIENCE	21	21
ARRANGED EMPLOYMENT	00	10
ADAPTABILITY Spouse's Education	 04	10
TOTAL	**65**	**100**

[4] In a decision dated September 1, 2010, the Officer refused the Applicant's application because he had failed to earn the minimum 67 points needed to qualify for a permanent resident visa as a skilled worker. In addition, the Officer concluded that she would not use her discretion to substitute a positive evaluation for the Applicant, as permitted under s. 76(3) of the Regulations.

[5] The Applicant seeks judicial review of that decision.

II. Issues

[6] In addition to the preliminary matter discussed below, this application raises the following issues:

1. What is the appropriate standard of review?

2. Did the Officer err in assessing the Applicant's education, by failing to give enough points for the Applicant's pre-university education and for his post-secondary education?

3. Did the Officer err in assessing the Applicant's language capabilities?

4. Did the Officer err by failing to award the Applicant points for a qualifying relative in Canada?

5. Did the Officer err in declining to conclude that the number of points awarded was not a sufficient indicator of the whether the Applicant would become economically established in Canada?

6. Should costs be awarded in this case?

7. Should any of the questions posed by the Applicant be certified?

III. Preliminary Matter

[7] At the commencement of the hearing, counsel for the Applicant, Mr. Timothy E. Leahy, asked that I recuse myself from hearing this application for judicial review on the grounds of a reasonable apprehension of bias. Following submissions on this request, I advised Mr. Leahy that I would reserve my decision on this preliminary motion. The following sets out my reasons for denying this motion.

[8] Mr. Leahy's request relates to a motion to strike an application for leave and judicial review and four applications for leave and judicial review filed in our Court. In all cases, Mr. Leahy was counsel of record and, in all cases, he was not successful. With respect to the motion to strike and a subsequent motion for re-consideration brought by Mr. Leahy that was dismissed, Mr. Leahy submits that:

> [Y]ou rendered a decision that you knew was not consistent with the facts and went beyond even what the department of justice was requesting and that the reason you did so was because I was counsel.

[9] In summary, Mr. Leahy stated as follows:

> I can only conclude that when I'm counsel, you render decisions based on the fact that I'm counsel, not on the basis of the facts or the law. And therefore, I'm requesting you to recuse yourself.

[10] The test for disqualification of a judge is set out in the decision of the Supreme Court of Canada in *Wewaykum Indian Band v Canada*, [2003] 2 SCR 259 at paragraph 60:

> In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, supra, at p. 394, is the reasonable apprehension of bias:

> ... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[11] Mr. Leahy's arguments appear to rest on an allegation that, because I have ruled against him on a motion to strike and on four leave applications, I am generally predisposed to decide against his clients.

[12] In dealing with this motion that I recuse myself from hearing the present application, I must ask myself whether an informed person, "viewing the matter realistically and practically – and having thought the matter through" would conclude that there is sufficient justification for disqualification in this case.

[13] A judge is often called upon to decide matters where she is presented arguments by a counsel who has previously appeared before the judge. It is not uncommon for a counsel to have "lost" or "won" a number of cases before the same judge. It would not be realistic or practical to believe that a judge would not fairly decide the next case argued by the same counsel.

[14] The allegation of apprehension of bias is being made against a judge who is bound by an oath of office and who bears a strong responsibility to be impartial. As stated by the Supreme Court of Canada in *Arsenault-Cameron v PEI*, [1999] 3 SCR 851 at paragraph 2, "The test for

apprehension of bias takes into account the presumption of impartiality. A real likelihood of bias must be demonstrated." Finally, I observe the reminder given by my colleague, Justice Teitelbaum, in *Samson Indian Nation and Band v Canada*, [1998] 3 FC 3 (TD), at paragraphs 73 to 75, as to the solemnity of the judicial oath and the impartiality that it brings with it.

[15] In conclusion, the apprehension of bias alleged by Mr. Leahy is not well-founded. In my view, the fact that I have dismissed previous applications brought by Mr. Leahy, as counsel, does not give rise to a reasonable apprehension of bias. Stated differently, an informed person, viewing the matter realistically and practically – and having thought the matter through – would not think that it is more likely than not that I, whether consciously or unconsciously, would not decide fairly. The motion for recusal is dismissed.

IV. Background

[16] The Applicant applied, in 2004, to come to Canada in the federal skilled worker class. At that time, he described his occupation as "Executive Vice President (Banker)"and his educational level as "MBA Candidate". The Applicant included his wife and three teen-aged daughters in his application. The Applicant listed an uncle of his wife as a relative in Canada.

[17] As set out in the Computer Assisted Immigration Processing System (CAIPS) notes of the Officer (which notes form part of the reasons for decision), the Applicant's file was reviewed in June 2010. In a letter dated June 23, 2010, the Officer informed the Applicant of the shortcomings in his application and invited further submissions. The identified deficiencies included: no evidence

of the completion of his masters degree; no results of formal language testing; and no proof that the wife's uncle still resided in Canada.

[18] The Applicant, through a consultant, responded on August 20, 2010. In that correspondence, the consultant addressed the deficiencies as follows:

- the original diploma and transcript of records for his Master's degree were provided, in respect of which the consultant suggested that the Applicant be awarded 25 points;

- the International English Language Testing System (IELTS) results were included and the consultant "suggested" that the Applicant should be awarded 14 points for his language skills in English; and

- the consultant advised that the uncle no longer resided in Canada.

[19] On the basis of this information, the Officer assessed the Applicant against the regulatory criteria and awarded the Applicant only 65 points. The Officer agreed with every assessment proposed by the consultant with the exception of education where the Officer's CAIPS notes reflect the following reasoning:

> PA [the Applicant] submitted TOR showing completion of MBA in 2006. In the Phils, a Bachelors and Masters degrees are completed in 4 & 2 yrs respectively. Therefore points for education is 22 only.

[20] Finally, the Officer stated that she considered a substitute evaluation, but was satisfied that the points awarded were sufficient indicators of the capacity of the Applicant to become successfully established in Canada. As a result, she refused the application.

[21] In a letter dated October 8, 2010, counsel for the Applicant made a request for reconsideration. The main areas of concern related to an "under-assessment" of the Applicant's education and to the failure of the Officer to exercise "positive discretion" to approve the Applicant in spite of his failure to meet the points threshold. The matter was reconsidered and, in a letter dated October 20, 2010, the earlier decision was affirmed.

V. **Legislative Scheme**

[22] The *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) provides the "framework" for immigration to Canada. Section 12(2) of IRPA states that 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". Section 14 of IRPA provides very broad powers to the Governor-in-Council to establish the detailed regulations that govern the selection of immigrants to Canada. Specifically of relevance to the Applicant, s. 14(2) provides that the Regulations may prescribe and govern matters relating to "classes", including the establishment of provisions respecting:

(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	*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

evaluation of the likelihood of a foreign national's ability to become economically established in Canada;	capacité de l’étranger à réussir son établissement économique au Canada;

[23] Pursuant to s. 14 of IRPA, the detailed regulations regarding the assessment of persons coming to Canada have been enacted. The scheme of the Regulations is clear; the assessment of individuals within a class is to be carried out on an objective basis. The intention of the legislators is that the measurement of points, through an objective set of criteria across a variety of factors, will result in a transparent, consistent and reliable indicator of an applicant’s ability to become established in Canada. All of the factors assessed – age, job offers, language skills, relatives in Canada, education – are indicators of the ability to become established in Canada.

[24] Given the rationale of the Regulations, it appears to me that only in exceptional circumstances would this points assessment not be a fair evaluation of an applicant’s ability to become established in Canada. However, there is a discretionary ability of a reviewing officer to “override” a negative (or positive) evaluation. Pursuant to s. 76(3) of the Regulations:

> . . . an officer may substitute for the criteria set out in paragraph (1)(a) their evaluation of the likelihood of the ability of the skilled worker to become economically established in Canada if the number of points awarded is not a sufficient indicator of whether the skilled worker may become economically established in Canada.

VI. Analysis

A. *Issue #1: Standard of Review*

[25] Other than the issue of procedural fairness connected with Issue #5, the issues raised by the Applicant all involve questions of fact or mixed fact and law. The standard of reasonableness applies. This Court can only intervene in the Board's decision if it is not reasonable. That is, the decision will stand unless it does not fall "within the range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[26] Any issue of procedural fairness, including adequacy of reasons, will be reviewed on a standard of correctness.

B. *Issue #2: Education*

[27] Education is one of the factors to be assessed in determining whether an applicant should be granted permanent resident status in Canada.

[28] The Regulations provide specific direction to immigration officers in the evaluation of education. Very detailed guidance is contained in s. 78(2) of the Regulations. Of relevance to this application, s. 78(2) of the Regulations provides that a maximum of 25 points may be awarded for education, as follows:

(2) A maximum of 25 points shall be awarded for a skilled worker's education as follows:	(2) Un maximum de 25 points d'appréciation sont attribués pour les études du travailleur qualifié selon la grille suivante :
(*a*) 5 points for a secondary school educational credential;	*a*) 5 points, s'il a obtenu un diplôme d'études secondaires;
(*b*) 12 points for a one-year post-secondary educational credential, other than a university educational credential, and a total of at least 12 years of completed full-time or full-time equivalent studies;	*b*) 12 points, s'il a obtenu un diplôme postsecondaire — autre qu'un diplôme universitaire — nécessitant une année d'études et a accumulé un total d'au moins douze années d'études à temps plein complètes ou l'équivalent temps plein;
(*c*) 15 points for	*c*) 15 points, si, selon le cas :
(i) a one-year post-secondary educational credential, other than a university educational credential, and a total of at least 13 years of completed full-time or full-time equivalent studies, or	(i) il a obtenu un diplôme postsecondaire — autre qu'un diplôme universitaire — nécessitant une année d'études et a accumulé un total de treize années d'études à temps plein complètes ou l'équivalent temps plein,
(ii) a one-year university educational credential at the bachelor's level and a total of at least 13 years of completed full-time or full-time equivalent studies;	(ii) il a obtenu un diplôme universitaire

(*d*) 20 points for

(i) a two-year post-secondary educational credential, other than a university educational credential, and a total of at least 14 years of completed full-time or full-time equivalent studies, or

(ii) a two-year university educational credential at the bachelor's level and a total of at least 14 years of completed full-time or full-time equivalent studies;

(*e*) 22 points for

(i) a three-year post-secondary educational credential, other than a university educational credential, and a total of at least 15 years of completed full-time or full-time equivalent studies, or

(ii) two or more university educational credentials at the bachelor's level and a total of at least 15 years of completed full-time or full-time equivalent studies; and

(*f*) 25 points for a university educational credential at the master's or doctoral level and a total of at least 17

de premier cycle nécessitant une année d'études et a accumulé un total d'au moins treize années d'études à temps plein complètes ou l'équivalent temps plein;

d) 20 points, si, selon le cas :

(i) il a obtenu un diplôme postsecondaire — autre qu'un diplôme universitaire — nécessitant deux années d'études et a accumulé un total de quatorze années d'études à temps plein complètes ou l'équivalent temps plein,

(ii) il a obtenu un diplôme universitaire de premier cycle nécessitant deux années d'études et a accumulé un total d'au moins quatorze années d'études à temps plein complètes ou l'équivalent temps plein;

e) 22 points, si, selon le cas :

(i) il a obtenu un diplôme postsecondaire — autre qu'un diplôme universitaire — nécessitant trois années d'études et a accumulé un total de quinze

years of completed full-time or full-time equivalent studies	années d'études à temps plein complètes ou l'équivalent temps plein, (ii) il a obtenu au moins deux diplômes universitaires de premier cycle et a accumulé un total d'au moins quinze années d'études à temps plein complètes ou l'équivalent temps plein; *f)* 25 points, s'il a obtenu un diplôme universitaire de deuxième ou de troisième cycle et a accumulé un total d'au moins dix-sept années d'études à temps plein complètes ou l'équivalent temps plein.

[29] It is important to note that points are not awarded cumulatively for more than one educational credential (Regulations, s. 78(3)(a)) and that points are awarded on the basis of the single educational credential that results in the highest number of points (Regulations, s. 78(3)(b)(i)).

[30] In this case, the Officer granted the Applicant 22 points for his education. Even though he held a master's level degree, the Officer concluded that he had only 16 years of studies – 10 years of elementary/secondary education, followed by four years of bachelor studies, followed by two years for his master's level.

[31] The Applicant contends that he falls within s. 78(2)(f) and should have been awarded 25 points for education for having a degree at the masters level and at least 17 years of educational study. The Applicant submits that the Officer made two significant errors when assessing his education:

- she improperly treated his three-year MBA as a two-year MBA; and
- she substituted the public school 10-year norm for the actual 11-year requirement of the Applicant's private school in determining the number of years of pre-tertiary education.

[32] As advised by the Applicant, the term "tertiary" is commonly used to refer to education that Canadians would more usually refer to as "post-secondary".

[33] The first alleged error arises with respect to the Applicant's master's degree. There is no question that the Applicant holds a Masters Degree in Business Administration (MBA). The question is whether the studies leading to that degree should have been assessed as a two or a three-year program of studies.

[34] The record shows that the Applicant began an MBA program of studies in 1980. As reflected in the transcript from the relevant period, the Applicant was enrolled and completed a number of courses between 1980 and 1984 in the "Master in Business Administration Program" at

Ateneo de Manila University (AMU). In a letter, the Registrar of AMU described the MBA program as follows:

> The regular MBA program which he was initially enrolled in 1981 required the completion of 48 units of academic studies and 6 units of Thesis writing for a total of 54 units. The program was structured to be completed by a student in three (3) years or six (6) semesters if he is enrolled on a full load basis.

[35] Had the Applicant completed the degree in the 1980s, it appears that he would have completed a three-year degree. The problem for the Applicant is that he did not complete the MBA degree until 2006. While the Applicant may have subsequently received some credit for the earlier courses, he did not complete the program. A similar situation was considered in *de Guzman v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1113, where Justice Pinard, at paragraph 14, concluded that, where a program of studies is not completed, the "years do not count towards his total years of education and are not relevant to this application".

[36] Beginning in the 2004-2005 academic year, the Applicant returned to his studies and completed three semesters and a "strategic management paper" in a program entitled "MBA-Ateneo-Regis Program". In 2006 he graduated with an MBA.

[37] The Officer assessed the academic credential against the AMU requirements that existed at the time the Applicant completed his degree. In 2006 – when the Applicant graduated – the standard MBA program at AMU could be completed in two years of full-time study. As noted:

> When awarding points, we do so based on the amount of time it should take to complete a program of study if it were undertaken on a full-time basis. For this reason, the current Ateneo MBA program is assessed as a two year masters program, regardless of how long it takes an individual to complete their studies. PA began his studies 30

> years ago in 1980, but didn't complete them. The degree he was granted in 2006 incorporated his transfer credits from the 1980s and is considered in the school that granted it to be a two-year program. For this reason, and in spite of the fact that it took PA longer to compete, we are unable to award more points than the 22 at which he was assessed. (16 years of study – ie. 10 yrs of elementary/secondary followed by 4 yrs of bachelor studies followed by 2 yrs of masters level)

[38] In my view, this is a reasonable interpretation of the Regulations and application of the Regulations to the assessment of the Applicant's MBA program. Moreover, it is consistent with the decision of my colleague, Justice Pinard in *de Guzman*, above.

[39] I also reject the Applicant's argument that he should have received credit for 11 years of primary/secondary school education. The Applicant attended a private school for 11 years. The usual course of study leading to graduation from secondary school in the Philippines is 10 years. I appreciate the Applicant's submissions that the quality of education at the private school was higher and that private education is almost an essential for someone in the Applicant's situation. However, the Applicant was awarded credit for 10 years of study because he could have obtained a secondary level of education in the Philippines after 10 years. The mode or manner of how the Applicant completed the studies – or whether the private school may have led to a better quality of education – is not relevant to the question of determining the points to be awarded (see *Shahid v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 40 at para 31).

C. *Issue #3: Language*

[40] Language skills are assessed pursuant to s. 79 of the Regulations. A maximum of 24 points, "based on the benchmarks referred to in *Canadian Language Benchmarks*", may be awarded (Regulations, s. 79(2)). Of particular importance to this application, the Minister may designate organizations or institutions to assess language proficiency and "shall, for the purposes of correlating the results of such assessment by a particular designated organization or institution …, establish the minimum test result required for each ability and each level of proficiency" (Regulations, s. 79(3)). The Minister has so designated, with such designations and correlations set out in OP6, the relevant Operating Manual of the Department of Citizenship and Immigration Canada (CIC). In that regard, section 12.9 of OP6 sets out the tests score equivalency chart for IELTS test results. Finally, s. 79(4) of the Regulations provides that:

(4) The results of an assessment of the language proficiency of a skilled worker by a designated organization or institution and the correlation of those results with the benchmarks in accordance with subsection (3) are conclusive evidence of the skilled worker's proficiency in the official languages of Canada for the purposes of subsections (1) and 76(1).	(4) Les résultats de l'examen de langue administré par une institution ou organisation désignée et les équivalences établies en vertu du paragraphe (3) constituent une preuve concluante de la compétence du travailleur qualifié dans les langues officielles du Canada pour l'application des paragraphes (1) et 76(1).

[41] The language skills assessment for the Applicant was based on the IELTS results dated August 5, 2010. The Applicant was awarded 14 points for his language skills and disputes only one aspect of the language skills assessment. His test result for “Listening” was 7.0. According to the IELTS equivalency table in OP6, s. 12.9, a score of 5.5 to 7.0 under the listening component is equivalent to a “moderate” ability or two points under s. 79(2)(b) of the Regulations. In this one category, the Applicant asserts that he should have been awarded four points, instead of two.

[42] The Applicant is critical of the use of the IELTS scores to satisfy the requirements of the Regulations. However, he points to no error in how the Officer applied the Regulations. The Officer acted in complete accord with the Regulations. Under the current Regulations, there is no way to assess more than 14 points to the Applicant for his language ability. The Officer had no discretion to award a higher number of points than set out in the Regulations and s. 12.9 of OP6.

[43] While the Applicant may disagree with the policy underlying the regulatory language requirements, he has presented no reviewable error in the language assessment.

D. *Issue #4: Relative in Canada*

[44] An applicant may receive a maximum of 10 points for “adaptability” (Regulations, s. 83). The Applicant received four points for “adaptability” in respect of his wife’s education. He believes he should have received an additional five points for a relative in Canada.

[45] One of the recognized elements of adaptability is the existence of family relationships in Canada. The Regulations (see ss. 83(1)(d) and 83(5)) provide that a skilled worker applicant "shall be awarded 5 points" if the skilled person (or his partner) is related to a person living in Canada who falls within the specific list of acceptable relatives described in s. 83(5). One of the listed relationships is "a child of the father or mother of their father or mother" (s. 83(5)(a)(vi)). Stated differently, the maternal uncle of a skilled worker or his spouse – provided that he is a citizen or permanent resident living in Canada – would qualify for the five points.

[46] At the time that the application of permanent residence was submitted, the Applicant's wife had an uncle in Canada. When the application was processed, the Officer noted that the uncle no longer lived in Canada; this is not disputed by the Applicant. The application listed no other relatives in Canada. Accordingly, the Officer did not award the Applicant five points for a relative in Canada.

[47] The Applicant submits that the Officer erred since the residence of his wife's uncle should have been "locked in" as of the date of his application. The Applicant relies on the case of *Hamid v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1632 [*Hamid* (FC)]. In the alternative, the Applicant appears to argue that the Officer was under a duty to ask the Applicant if he had any other relatives in Canada.

[48] These arguments must fail.

[49] The first point to be made is that s. 77 of the Regulations provides that "the requirements and criteria set out in sections 75 and 76 must be met at the time an application for a permanent resident visa is made as well as at the time the visa is issued". If we turn to s. 76(1)(a)(vi), we can see that "adaptability, in accordance with section 83" is included. It follows that the points to be awarded in respect of any of the elements set out in s. 83 – including family relationships in Canada – must be met at the time the visa is granted. Thus, on a simple reading of the applicable Regulations, the Applicant's wife's uncle who no longer resides in Canada did not meet the requirement of the Regulations at the time the application was processed.

[50] The second problem with the Applicant's submissions on this issue is his reliance on *Hamid* (FC). That case was reversed by the Court of Appeal in 2006 (*Hamid v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 217 [*Hamid* (FCA)]). In *Hamid* (FCA), the Court of Appeal was required to consider whether an officer erred by excluding children that were dependants at the time that the application was submitted, but no longer met the definition of a dependant at the time the application was processed. This Court held that the status of the dependants was "locked in" as of the date of application. In overturning the decision of the lower court, the Federal Court of Appeal (at paragraph 8) concluded that:

> [T]he visa officer was right to exclude Mr Hamid's two oldest sons from his visa application. In my opinion, the Regulations require that a person of 22 years of age or over who applies for a visa as a "dependent child" must meet the selection criteria of being financially dependent and a student at the time when the visa officer assesses the application. Since they had ceased to be full-time students by that time, they were not eligible for permanent resident visas as family members.

[51] The reasoning in *Hamid* (FCA) is directly applicable to the case before me. There is no "lock in" of the uncle's status in Canada.

[52] Finally, there is also no merit to the Applicant's argument that he ought to have been asked whether he had other relatives in Canada. It is trite law that the Applicant bears the burden of providing all relevant information and submissions to the Officer. As evidenced by a letter, dated August 20, 2010, sent to the Officer by the Applicant's consultant, the Applicant knew that the uncle no longer lived in Canada. He could have provided more information at that time of other relatives in Canada. He failed to do so. In the circumstances there was no obligation on the Officer to do anything further.

[53] The Officer's decision not to award five points for a family relationship was not unreasonable.

E. *Issue #5 Substituted Evaluation*

[54] As noted above, an immigration officer has discretion to override a negative points assessment (Regulations, s. 76(3)). In this case, the Applicant made no specific request for a substituted evaluation, even though he had been advised (in a letter dated June 23, 2010) that there were problems with the assessment of his application in the federal skilled worker class.

[55] In spite of the failure of the Applicant to seek a substituted evaluation, the Officer addressed this issue. In her CAIPS notes, she states:

> I have considered substitution of evaluation but I am satisfied that the pts awarded are sufficient indicators to reflect the capacity of subj to become successfully established in Cda.

[56] The Applicant submits that a reasonable analysis of the facts before the Officer and the purpose of Canada's immigration program would result in a finding that the Applicant and his family would be self-supporting in Canada. The Applicant notes that the following evidence was before the Officer:

- the Applicant was an executive vice president of the Philippine branch of one of the world's 200 largest banks;
- he had a net worth in excess of $1 million;
- he had a leadership role in the Rotary Club;
- he had transferable skills;
- he had an MBA from the Philippines' premier business school; and
- he had years of experience working in an English-speaking environment and stronger English skills than CIC requires.

[57] The Applicant asserts that all this evidence would lead a reasonable person to conclude that Canadian banks would compete for him. The Applicant further notes that the Officer was aware that the Applicant's children were adults and could thus help support the family immediately or after graduation, on a long-term basis in a higher-paying professional position. The Applicant submits that, had the Officer considered the facts, she would have realized that the Applicant only had to support his wife and himself. The Applicant claims that, had the Officer not rendered her decision on outdated forms, she would have been aware of how well his daughters were doing in school and that one of them was in medical school, which would have assuaged any basis for fearing that the family is likely to become wards of the Crown if permitted to immigrate.

[58] As I understand the argument of the Applicant, he asserts that: (a) the Officer, in reaching a conclusion not to substitute a positive evaluation, failed to have regard to the evidence before her; or (b) the reasons for the refusal on this issue were inadequate. In my view, neither of these arguments can succeed.

[59] The first problem that I have with the Applicant's submissions on this issue is that he now provides submissions to the Court that were not made to the Officer. If the Applicant had made those comments in the context of a request for a substituted evaluation, the Officer may have been obliged to provide further analysis and reasons. That was not done. In *Eslamieh v Canada (Minister of Citizenship and Immigration)*, 2008 FC 722, Justice Mosley stated:

> Visa Officers have the authority to consider an alternative evaluation under subsection 76(3) by their own motion, as held by my colleague Justice Carolyn Layden-Stevenson in *Zheng v. Canada (Minister of Citizenship and immigration)*, 2002 FTR 1115, 26 Imm. L.R. (3d) 72. That said, it is clear from the jurisprudence that they are under no obligation to exercise that discretion unless specifically requested to

> do so. The applicant concedes that she did not make such a request and I cannot therefore find that the Visa Officer was unreasonable in her decision.

[60] Moreover, it must be remembered that the Applicant was applying to come to Canada as a member of the federal skilled worker class. The question before the Officer was not whether this Applicant or his family would end up as "wards of the Crown". Rather the question is whether this person had an ability to become economically established as a skilled worker. The Applicant did not apply to come to Canada as a member of the investor class or the entrepreneur class or the self-employed persons class. The legislative framework requires an applicant to apply in a particular class. It is not up to the Officer to choose a different class if an applicant does not qualify in the class for which he applied. In this case, the Applicant chose to apply as a federal skilled worker. In assessing whether she should exercise her discretion for a substituted positive evaluation, the Officer was not required to look beyond that evidence which related to the federal skilled worker class. In the entirety of the Applicant's application record, there was simply nothing beyond what had already been assessed. His age, his work experience, his education, his wife's education, his language skills had all been evaluated in accordance with the Regulations. Everything that the Applicant has identified as positive factors for a substituted evaluation were either already included in the Officer's assessment or were not relevant to the federal skilled worker class.

[61] Regarding the failure of the Officer to provide adequate reasons, I do not deny that *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 suggests that, in the immigration context, generally speaking, written reasons will be required. However, this Court has repeatedly held that on a substituted evaluation, an officer does not have to provide written reasons for declining to exercise their discretion; evidence that the officer has turned his or her mind to such

an evaluation is sufficient (see, for example, *Fernandes v Canada (Minister of Citizenship and Immigration)*, 2008 FC 243; *Poblano v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1167; *Channa v Canada (Minister of Citizenship and Immigration)* (1996), 124 FTR 290; *Feng v Canada (Minister of Citizenship and Immigration)* (1998), 153 FTR 59).

[62] In sum, the Officer did not err in failing to exercise her discretion positively for the substituted evaluation under s. 76(3) of the Regulations.

VII. Conclusion

[63] For the reasons above, the Applicant has not persuaded me that the decision should be overturned.

[64] The Applicant seeks costs. Since the Applicant has not been successful, I would not exercise my discretion to award costs.

[65] The Applicant submits the following questions for certification:

1. Does the conjunctive requirement of "and a total of at least [X] years of completed full-time or full-time equivalent studies" in section 78 of the Regulations include *all* years of study or may officers exclude years at will: *e.g.*, where a private school requires more years than public schools, from an unfinished program or post-graduation studies?

2. Does the number of years of pre-tertiary schooling have a bearing on the likelihood of a university-educated immigrant becoming successfully established in Canada?

3. In considering an academic program's length, is it the length of the program into which an applicant matriculated or the length of the current program?

4. May CIC equate CLB 8 to any IELTS result it fancies or must the correlation rest on a credible study and be consistent with international standards?

5. If subsection 79(3) of the Regulations requires a principled correlation of IELTS to CLB, does IELTS 6.0, on the basis of the evidence before the Court, equate to CLB 8?

6. Does the *Choi* "lock-in" principle apply to points for relatives?

7. At what point do forms and supporting documentation become "so dated that [they] cannot be used for a comprehensive and legally valid decision?"

[66] In my view, the one question that warrants consideration is the question related to educational qualifications. In *Kabir v Canada (Minister of Citizenship and Immigration)*, 2010 FC 995, Justice Heneghan certified the following question:

> In assessing points for education under section 78 of the *Immigration and Refugee Protection Regulations*, does the visa officer award points for years of full-time or full-time equivalent studies that did not contribute to obtaining the educational credential being assessed?

[67] The answer to this question could be determinative in the application before me. The Applicant was given credit for: (a) 10 years of education up to his graduation from secondary school, rather than for the 11 years that he spent in private school achieving the same result; and (b) two years for his MBA, notwithstanding that he spent the equivalent of more than three years to obtain this master's degree. Had the Applicant been awarded credit for even one additional year of education, he would have received 25 points for education and, thus, reached the qualifying threshold. In the circumstances, I am prepared to certify the same question as was certified by Justice Heneghan.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the application for judicial review is dismissed; and

2. the following question is certified as a question of general importance:

> In assessing points for education under s. 78 of the *Immigration and Refugee Protection Regulations*, does the visa officer award points for years of full-time or full-time equivalent studies that did not contribute to obtaining the educational credential being assessed?

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6513-10
STYLE OF CAUSE:	MARTIN TAN LEE v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	APRIL 19, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	SNIDER J.
DATED:	MAY 26, 2011

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