

DATE: January 6, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-10128

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated December 17, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline B (Foreign Influence). Administrative Judge Roger C. Wesley issued a favorable security clearance decision dated July 30, 2004.

Department Counsel appealed the Administrative Judge's favorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

The following issues have been raised on appeal: (1) whether the Administrative Judge misapplied Foreign Influence Disqualifying Condition 2; and (2) whether the Administrative Judge's conclusion that Foreign Influence Mitigating Condition 1 applied to the case was arbitrary, capricious and contrary to law. For the reasons that follow, the Board reverses the Administrative Judge's decision.

Scope of Review

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. Directive, Additional Procedural Guidance, Item E3.1.32. *See also* ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. Directive, Additional Procedural Guidance, Item E3.1.32.3. In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an

explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3 (citing Supreme Court decision). In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Article VI, clause 2 (Supremacy Clause). *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3 (citing Supreme Court decisions).

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

When an appeal issue raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

Is the error harmful or harmless? *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine);

Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (citing federal cases); and

If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded? (Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3).

Appeal Issues

1. Whether the Administrative Judge misapplied Foreign Influence Disqualifying Condition 2. Department Counsel maintains that Foreign Influence Disqualifying Condition 2⁽¹⁾ applies in this case because Applicant is married (since 1995) to a woman from the People's Republic of China (PRC). Applicant's wife came to the United States in 1995 and obtained United States citizenship in 2000. Her son (Applicant's stepson), a citizen of the PRC, once resided with Applicant and his wife for two periods in 2001 and 2002. Department Counsel asserts that the record evidence establishes that Applicant's stepson is planning to return to the United States. The Administrative Judge concluded that Foreign Influence Disqualifying Condition 2 had possible application to the case only because of Applicant's stepson's prior residence with Applicant and his wife. The Judge then stated that the disqualifying condition appeared to have very limited applicability since the stepson's stay was short, and he returned to the PRC amidst very speculative prospects for returning.

Department Counsel argues that it was error for the Administrative Judge not to apply Disqualifying Condition 2 to Applicant's wife. Department Counsel cites the wife's history of negative interactions with the Chinese government and the fact that her family was once targeted by the Chinese government because of their social status as a basis for the existence of the potential for foreign duress because of Applicant's sharing living quarters with his wife.⁽²⁾ Department Counsel also argues that the Administrative Judge erred in holding that Disqualifying Condition 2 has only limited applicability in relation to Applicant's stepson. In support of its argument, Department Counsel points to evidence that Applicant holds a facility clearance for his private residence and has been allowed to handle classified materials in the home. Department Counsel also pointed to evidence that Applicant worked on classified documents in his home office during the period that his stepson was living there. Department Counsel asserts that the evidence indicates that

Applicant's stepson's return to the United States is likely and cannot be characterized as "very speculative." Department Counsel has failed to demonstrate harmful error on the part of the Administrative Judge.

The resolution of a security clearance case is not dependent upon the application or non-application of a particular disqualifying or mitigating condition. Rather, the applicability of a particular disqualifying condition must be evaluated in light of all the record evidence in the case and in light of the potential applicability of other disqualifying factors. Regarding Applicant's wife, Department Counsel fails to articulate a basis for the potential for foreign duress that is based exclusively on Applicant's wife's presence in Applicant's home. There is no record evidence to the effect that Applicant's wife, a United States citizen, is a direct threat to the national security by virtue of her cohabiting with her husband. There is considerable record evidence indicating that Applicant's wife is strongly loyal to and supportive of her adopted country and that her past thoughts and actions have been strongly antithetical to the PRC government. Department Counsel concedes that the Administrative Judge correctly applied Foreign Influence Disqualifying Condition 1 ⁽³⁾

to the case. In its appeal brief, with reference to Applicant's wife, Department Counsel makes arguments in support of the application of Disqualifying Condition 2 that are more supportive of the application of Disqualifying Condition 1. Department Counsel discusses the fact that Applicant's wife still has immediate family members in the PRC and that she and her family have gained considerable notoriety in China. To the extent that Disqualifying Condition 2 addresses concerns about a person in Applicant's wife's position, those concerns overlap and are subsumed by the concerns articulated in Disqualifying Condition 1. Thus, any error committed by the Administrative Judge in not applying Foreign Influence Disqualifying Condition 2 is harmless under the facts of this case.

Foreign Influence Disqualifying Condition 2 is more directly applicable to Applicant's stepson, a citizen of the PRC whose loyalties to the United States vis-a-vis the PRC are not established by the record evidence and who has spent time at Applicant's residence during periods where Applicant was handling classified information there. Department Counsel concedes that the Administrative Judge considered Disqualifying Condition 2 with regard to Applicant's stepson but argues the Judge gave it too little weight and by failing to do so, failed to consider an important aspect of the case.

A reading of the totality of the Judge's decision reveals that he accorded very limited applicability to Disqualifying Condition 2 in relation to the stepson because the stepson stayed in the United States only for a short time and the stepson has only very speculative prospects for returning. The record evidence indicates that the stepson returned to the PRC in December 2002 to marry his fiancé. He remained there at the time of the hearing and there is conflicting evidence concerning the likelihood of his return. Applicant indicated in December 2002 that his stepson had not adjusted well to living in the United States ⁽⁴⁾

and would be returning to the PRC to marry and live permanently there. At the hearing, Applicant's wife testified that her son was planning to return to the United States, work in a restaurant, and live with her and Applicant. Applicant's wife testified that her son would come to the United States without his new wife even if the wife might have to wait 5 years to join him here.

There is no presumption of error below. Given the state of the record evidence, the Judge had a rational basis for concluding that Applicant's stepson's return was speculative in nature. He also had a rational basis for concluding that the applicability of Disqualifying Condition 2 was limited, based on the evidence concerning the stepson's return and considering the fact that Applicant's stepson does not currently live with him. Department Counsel bears the burden of establishing that the Judge assigned improper weight to Disqualifying Condition 2. For the preceding reasons and because it does not argue with precision just how much additional weight the Judge should have given Disqualifying Condition 2 as it relates to Applicant's stepson, Department Counsel has failed to demonstrate error on this point.

2. Whether the Administrative Judge's conclusion that Foreign Influence Mitigating Condition 1 applied to the case was arbitrary, capricious or contrary to law. Department Counsel argues that Foreign Influence Mitigating Condition 1 ⁽⁵⁾ cannot rationally be applied to this case. Department Counsel's contention has merit.

In applying Mitigating Condition 1, the Administrative Judge concluded that neither Applicant's wife nor any of her

immediate family members (son, sister and two brothers) residing in the PRC have any financial or political affiliations with the PRC government, have any history to date of being subjected to any coercion or influence, or appear to be vulnerable to coercion or influence.

The Judge concluded that any realistic risk of a hostage situation or undue influence brought against Applicant's wife's family in the hopes of eliciting classified information or economic or proprietary data out of Applicant is lacking. The Judge articulated his assessment that mitigating Condition 1 must be construed to encompass realistic possibilities, not merely theoretical ones. On appeal, Department Counsel points to Applicant's wife's close ties to her son, Applicant's ties of obligation to his stepson, the history of Applicant's wife with the PRC government, her immediate family members' history of mistreatment by the PRC government, Applicant's wife's regular visits to her siblings in the PRC and the fact that Applicant's son has lived in a home where classified documents are stored and he may live there in the future. Department Counsel then argues that the Judge erred by failing to accord appropriate weight to Applicant's wife's history in relation to the PRC government. It also argued that the Judge's conclusion that there is no potential for exploitation or coercion by the PRC government is not rationally supported by the evidence.

Under Guideline B (Foreign Influence) Department Counsel is not required to prove that a foreign country has specifically targeted a particular applicant or applicant's spouse with immediate family members in that foreign country. [\(6\)](#)

Facts and circumstances that raise security concerns about an applicant's security eligibility can warrant an adverse security clearance decision without any proof that a foreign intelligence service has specifically targeted the applicant or sought to exploit those facts or circumstances. The Administrative Judge's conclusion in this case that the risks of undue foreign influence created by Applicant's family ties to PRC citizens are too theoretically remote to warrant an adverse security clearance decision is arbitrary and capricious in light of the substantial body of record evidence establishing a history of negative interactions between the PRC government and members of Applicant's wife's family and the fact that Applicant's wife and her family have been specific targets of the PRC government in the past. The second prong of Mitigating Condition 1 requires Applicant to establish that his in-laws in the PRC are not in a position to be exploited by the PRC in a way that could force Applicant to choose between those persons and the United States. There is no record evidence in this case that supports application of the second prong of Mitigating Condition 1, and the Administrative Judge erred by applying it.

The Board recognizes that the Administrative Judge applied Foreign Influence Mitigating Condition 4 [\(7\)](#)

in this case and that application was not challenged on appeal. The Board has frequently noted that the applicability or inapplicability of a specific disqualifying or mitigating condition is not necessarily dispositive of a case. In light of the totality of the facts and circumstances in this case, the survival of the Judge's application of Foreign Influence Mitigating Condition 4 on appeal is not sufficient to justify affirming or remanding the case.

Conclusion

Department Counsel has met its burden of demonstrating harmful error below that warrants reversal. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.3, the Board reverses the Administrative Judge's favorable security clearance decision.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Concurring Opinion of Administrative Judge Michael Y. Ra'anan

I concur in the result reached by my colleagues. However, I get there by another route. This case is less about specific disqualifying or mitigating conditions than about a whole person analysis. Applicant here has twice sought out foreign spouses. In the most recent case he has entangled himself with a family much of which is still in the People's Republic of China (PRC). I think that the applicability of individual conditions is less telling than the fact that Applicant has twice deliberately set out to enmesh his life with women from other countries including a country with as problematic a history as the PRC. It simply makes no sense to conclude that granting access to the nation's secrets to such a person is clearly consistent with the national interest.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. "Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists."
2. The record evidence showed that Applicant's wife's family were exiled to rural China and made to perform forced labor during the Cultural Revolution because of their relatively high socio-economic status. Despite her status as a professional (doctor), Applicant's wife was forced to perform menial labor as well. When she tried to escape her situation, she was beaten and her head was shaved. Applicant's wife was politically active during the Tiananmen Square demonstrations in 1989. She wrote articles protesting the government's actions and provided aid to the demonstrators. She was once wounded by police gunfire while providing aid. In the Tiananmen Square aftermath, she did not leave her residence for a month in fear of government soldiers and she feared the government might prosecute her for helping the protesters.
3. "An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country."
4. In terms of learning English and securing employment.
5. "A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the persons involved and the United States."
6. *See, e.g.*, ISCR Case No. 02-14995) at pp. 4-5; ISCR Case No. 00-0628 (February 24, 2003) at p. 5. In this case it should be pointed out that the fact that Applicant's wife's son and her siblings in the PRC are not blood relatives of Applicant does not affect the potential threat analysis. Citizens of the PRC connected to the Applicant by marriage could become targets of the PRC government as part of a plan to try to bring coercive or noncoercive influence or pressure to bear against Applicant's spouse in an effort to influence or pressure him. *See, e.g.*, ISCR Case No. 02-02195 (April 9, 2004) at pp. 5-6.
7. "The individual has promptly reported to proper authorities all contacts, requests, or threats from persons or organizations from a foreign country, as required." The Judge applied the factor because Applicant, who held a facility clearance for his residence at the time, informed a security investigator dealing with the facility clearance about the circumstances of his wife and stepson.