

DATE: March 17, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-09907

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

Daniel C. Schwartz, Esq.

Anna C. Ursano, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated January 6, 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) and Guideline C (Foreign Preference). Administrative Judge James A. Young issued an unfavorable security clearance decision dated July 25, 2003.

Applicant appealed the Administrative Judge's unfavorable 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's decision reflects a fundamental shift in public policy and poses a significant threat to the defense industry; (2) whether the Administrative Judge's failed to evaluate Applicant's security eligibility under the whole person concept; and (3) whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law because it is contrary to DOHA precedent, is unsupported by the record evidence, and effectively nullifies Foreign Influence Mitigating Conditions 1 and 3 as to Applicant and all similarly situated applicants. For the reasons that follow, the Board affirms 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** [\(1\)](#)

The Administrative Judge entered formal findings in favor of Applicant with respect to Guideline C (Foreign Preference) and SOR paragraph 2.a. Those favorable formal findings are not at issue on appeal.

1. Whether the Administrative Judge's decision reflects a fundamental shift in public policy and poses a significant threat to the defense industry. On appeal, Applicant contends the decision below reflects a fundamental shift in public policy and poses a significant threat to the defense industry. In support of this contention, Applicant argues: (a) DOHA Administrative Judges should not rely on their personal views on foreign policy and foreign relations issues in deciding cases involving Guideline B (Foreign Influence); (b) affirmance of the decision below would have "a substantial, adverse impact on the defense contracting community"; and (c) affirmance of the decision below would deny Applicant her procedural and due process rights under Executive Order 10865 and the Directive. The Board will address each argument in turn.

(a) Although DOHA Administrative Judges have authority to adjudicate the security eligibility of applicants under Executive Order 10865 and the Directive, that authority does not extend to adjudicating foreign policy and foreign relations issues. Pronouncements about the relationship between the United States and any given foreign country are committed to the President of the United States, the Secretary of State, and other duly authorized Executive Branch officials. *See* ISCR Case No. 02-00318 (February 26, 2004) at pp. 6-7. Furthermore, the nature and status of United States relations with other countries or foreign entities involve sensitive policy decisions and judgments with potentially serious international, diplomatic, national security, and legal ramifications that are not suitable for adjudication in

adversarial proceedings such as these.

Although Applicant's general point is well taken, it does not demonstrate harmful error by the Administrative Judge in this case. The Judge's finding about the nature of the government of the People's Republic of China is not supported by record evidence in this case. However, the Judge's finding about the nature of relations between the United States and the People's Republic of China is adequately supported by the record evidence.

(b) Attached to Applicant's appeal brief is a September 4, 2003 letter from the president of an industry group or association. That letter contains many factual assertions that constitute new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E.3.1.29. Applicant's argument in support of the claim that the September 4, 2003 letter does not constitute new evidence lacks merit.

Portions of the September 4, 2003 letter and portions of Applicant's appeal brief make arguments that the defense contracting industry and other applicants would be adversely affected if the decision below is affirmed. Those arguments seek to adjudicate matters outside the scope of these proceedings. DOHA proceedings are intended to adjudicate an applicant's security eligibility under Executive Order 10865 and the Directive. They are not intended to adjudicate claims by the defense contracting industry. Furthermore, nothing in Executive Order 10865 or the Directive authorizes third parties to join these proceedings in the form of joinder<sup>(2)</sup> or intervention,<sup>(3)</sup> or as members of a group seeking a class action-type litigation.<sup>(4)</sup> Nothing in Executive Order 10865 or the Directive gives a Hearing Office Administrative Judge or the Board jurisdiction or authority to adjudicate claims by third parties about the merits or possible collateral consequences of a security clearance adjudication. If any member or entity of the defense contracting industry wishes to raise concerns about the industrial security clearance program, these proceedings are not the proper forum to do so.<sup>(5)</sup> To the extent that other applicants wish to raise issues about the adjudication of their security clearance cases, they have the opportunity to do so in their own security clearance adjudication proceedings.

(c) Applicant's claim that affirmance of the decision below would deny her procedural and due process rights under Executive Order 10865 and the Directive lacks specificity. As a general principle, there is no presumption of error below and an appealing party must raise a claim of error with sufficient specificity. *See* ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (explaining why appeal issues must be raised with specificity). Furthermore, a party making a claim that he or she has been denied due process must set forth such a claim with particular specificity. *See* ISCR Case No. 02-06478 (December 15, 2003) at p. 6 n. 3 (explaining why due process claims must be made with particular specificity). Applicant's bare assertion that she was denied her procedural and due process rights is too general, vague, and unspecific to raise any meaningful appeal issue. The Board will not speculate or guess as to what provisions of Executive Order 10865 or the Directive Applicant believes were violated or not complied with during the proceedings below, nor will the Board speculate or guess as to what due process rights Applicant believes were violated or contravened.

2. Whether the Administrative Judge failed to evaluate Applicant's security eligibility under the whole person concept. Applicant contends the Administrative Judge failed to evaluate her case in light of the whole person concept, and gave undue weight to Applicant's country of origin (People's Republic of China) and the location of her relatives in the People's Republic of China. Applicant's contention is not persuasive.

Applicant correctly notes that the Administrative Judge had to evaluate her security eligibility in terms of the totality of her conduct and circumstances under the whole person concept. *See* Directive, Section 6.3; Enclosure 2, Item E2.2.1. However, Applicant's assertion that the Judge evaluated her security eligibility in a "piecemeal" manner that overlooked pertinent information is not persuasive.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.,* ISCR Case No. 99-9020 (June 4, 2001) at p. 2. An appealing party's disagreement with a Judge's findings and conclusions is not sufficient to rebut or overcome that presumption. *See, e.g.,* ISCR Case No. 00-0633 (October 24, 2003) at p. 5. Applicant's conclusory claim that the Judge "overlooked pertinent information" is not sufficient to rebut or overcome the presumption that the Judge considered all the record evidence in this case. *Compare* ISCR Case No. 02-00318 (February 25, 2004) at pp. 7-8 (presumption rebutted or overcome when the appealing party shows (i) the Judge did not discuss, mention, or acknowledge significant record evidence that runs

contrary to the Judge's findings and conclusions, and (ii) the Judge's failure to do so indicates an arbitrary and capricious analysis of the case).

Applicant's argument that the Administrative Judge simply ignored her testimony (Brief at p. 8 and n.6) is not persuasive. A Judge is not required to accept a witness's testimony in an uncritical manner or weigh such testimony in isolation from the record evidence as a whole. *See, e.g.*, ISCR Case No. 99-0519 (February 23, 2001) at p. 12. Moreover, a Judge is not compelled to accept a witness's testimony at face value merely because it is unrebutted. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 4 and n.9; ISCR Case No. 99-0005 (April 19, 2000) at p. 3. Merely because the Judge did not give more weight to Applicant's testimony than she would have liked, it does not follow that the Judge simply ignored her testimony. Finally, to the extent Applicant's testimony went beyond merely factual statements about her relationships with relatives in the People's Republic of China and stated her opinion or conclusion about the security significance of those relationships, Applicant's testimony can be discounted by the Judge. *See, e.g.*, ISCR Case No. 99-0519 (February 23, 2001) at p. 12 (applicant's opinion about the security significance of the applicant's conduct or circumstances is not dispositive and does not relieve Judge of the responsibility to evaluate the applicant's security eligibility).<sup>(6)</sup>

The Board will not disturb an Administrative Judge's weighing of the record evidence unless there has been a showing that the Judge did so in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 02-11489 (September 11, 2003) at p. 4. Applicant's strong disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 01-18860 (March 13, 2003) at pp. 3-4.

3. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law because it is contrary to DOHA precedent, is unsupported by the record evidence, and effectively nullifies Foreign Influence Mitigating Conditions 1 and 3 as to Applicant and all similarly situated applicants. Applicant contends the decision below is arbitrary, capricious, and contrary to law because: (a) it is contrary to DOHA precedent; (b) it is not supported by the record evidence; and (c) it effectively nullifies Foreign Influence Mitigating Condition 1 and Foreign Influence Mitigating Condition 3 as to Applicant and all similarly situated applicants. With one exception that identifies harmless error, Applicant's arguments are not persuasive.

(a) To the extent that Applicant relies on decisions by Hearing Office Administrative Judges in other case, the Board notes those decisions are not legally binding precedent. *See* ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing precedential value of decisions by Hearing Office Judges). To the extent Applicant cites to Board decisions, the Board concludes Applicant's arguments about the meaning and application of those decisions does not demonstrate error below.

(b) Foreign Influence Mitigating Condition 1.<sup>(7)</sup> Applicant asserts: (i) there is "extensive evidence showing [Foreign Influence Mitigating Condition 1] should apply"; (ii) the Administrative Judge acted in an arbitrary and capricious manner by not considering or analyzing that evidence in a meaningful manner; (iii) Department Counsel did not rebut Applicant's evidence in support of Foreign Influence Mitigating Condition 1; (iv) the Judge should have accepted Applicant's testimony because her credibility was not questioned, and it was not implausible or inconsistent with other record evidence; and (v) the Judge erred with respect to Foreign Influence Mitigating Condition 1 because there is no evidence that Applicant would have access to classified information of interest to and targeted for collection by the People's Republic of China. For the reasons that follow, Applicant's arguments fail to demonstrate harmful error.

Applicant correctly notes that she provided evidence in support of her claim that the Administrative Judge should apply Foreign Influence Mitigating Condition 1. However, the existence of such evidence in the record did not compel the Judge to apply Foreign Influence Mitigating Condition 1; rather, the Judge had to consider and weigh the evidence presented by Applicant in light of the record as a whole. As discussed earlier in this decision, the Judge was not compelled to accept Applicant's testimony at face value without considering it in light of the record evidence as a whole. Furthermore, as discussed earlier in this decision, to the extent Applicant's testimony went beyond merely factual statements about her relationships with relatives in the People's Republic of China and stated her opinion or conclusion about the security significance of those relationships, Applicant's testimony can be discounted by the Judge. Finally, Department Counsel was not required to disprove the applicability of Foreign Influence Mitigating Condition 1; rather,

Applicant had the burden of persuasion as to showing its applicability. *See, e.g.*, ISCR Case No. 01-17496 (October 28, 2002) at p. 5. The Judge had to weigh the record evidence as a whole and exercise sound judgment in deciding whether Applicant had met her burden of persuasion with respect to the applicability of Foreign Influence Mitigating Condition 1. Although Applicant's appeal arguments set forth a plausible alternate interpretation of the record evidence, they do not demonstrate the Judge acted in a manner that is arbitrary, capricious, or contrary to law by concluding Foreign Influence Mitigating Condition 1 was not applicable in light of the record evidence in this case.

Applicant's last argument highlights a problem with the Administrative Judge's analysis under Foreign Influence Mitigating Condition 1, but it fails to demonstrate harmful error by the Judge. Specifically, Applicant notes that the Judge, when analyzing the applicability of Foreign Influence Mitigating Condition 1, referred to "whether the applicant would have access to information of interest to, and targeted for collection by, that foreign nation" (Decision at p. 5). Applicant then asserts there is no record evidence that once she is cleared for access to classified information she will be given access to information "of interest to, and targeted for collection by" the People's Republic of China (Brief at p. 9 n. 8).

The portion of the Administrative Judge's discussion challenged by Applicant on appeal adds a "requirement" to Foreign Influence Mitigating Condition 1 that is not found in its plain language, and which is not required by the Directive. The federal government is not required to wait until an applicant poses a clear and present danger to national security before it can deny or revoke a security clearance. *See, e.g.*, ISCR Case No. 01-00677 (May 21, 2002) at p. 7. The federal government is not required to wait until there is a present case, or imminent threat, of espionage or attempted espionage before it can deny or revoke access to classified information for a given applicant. Accordingly, under Guideline B (Foreign Influence), Department Counsel does not have an affirmative obligation to present evidence that a foreign country is currently targeting a particular applicant to obtain access to specific classified information. *See, e.g.*, ISCR Case No. 01-18860 (March 17, 2003) at p. 7. Furthermore, an applicant does not have an affirmative burden to present evidence as to what classified information a foreign country is currently targeting. Indeed, the Judge's discussion of Foreign Influence Mitigating Condition 1 fails to consider other possibilities that could pose a threat to the national security interests of the United States, for example:

- (1) even if an applicant vulnerable to coercive or noncoercive foreign influence did not currently have access to classified information of specific interest to a given foreign country, the foreign country could exercise its influence to press the applicant to get access to such other classified information as soon as possible;
- (2) even if an applicant vulnerable to coercive or noncoercive foreign influence did not currently have access to classified information of specific interest to a given country, the foreign country could still exercise its influence to press the applicant to provide it with whatever classified information the applicant had access to so the foreign country could use that information as a bargaining chip with, or for sale to, another foreign country that could be interested in it; or
- (3) even if an applicant vulnerable to coercive or noncoercive foreign influence did not currently have access to classified information of specific interest to a given country, the foreign country could decide to bide its time and not exercise its influence until such time as the applicant gains access to classified information that will be of interest to the foreign country.

These possibilities are illustrative only, and should not be construed as precluding other possible security threats that might arise in foreign influence situations.

Although Applicant identifies a serious flaw with the Administrative Judge's analysis of Foreign Influence Mitigating Condition 1, the flaw in the Judge's analysis does not warrant remand or reversal because it did not prejudice Applicant in any meaningful way. To the contrary, the flaw in the Judge's analysis is prejudicial to Department Counsel, and Applicant is not entitled to gain a benefit in these proceedings from prejudice to Department Counsel.

Foreign Influence Mitigating Condition 3. <sup>(8)</sup> Applicant asserts the Administrative Judge erred with respect to Foreign Influence Mitigating Condition 3 by: (i) "incorrectly intermingl[ing] all of Applicant's family in [the People's Republic of] China" and concluding Applicant was close to all her immediate family in the People's Republic of China because she was close to her mother and eldest sister there; (ii) finding Applicant has ties of obligation to her in-laws; and (iii)



not finding Applicant's ties with her in-laws are casual and infrequent.

Applicant's first argument is not persuasive. The Board does not read the decision below as indicating the Administrative Judge conflated Applicant's ties with her mother and eldest sister with Applicant's ties with her in-laws. To the contrary, the Judge refers to Applicant's ties with her immediate family members as distinct from her ties with her in-laws.

Applicant's second argument also is not persuasive. Given the record evidence in this case, it was not arbitrary or capricious for the Administrative Judge to conclude that Applicant did not successfully rebut the presumption that she has ties of obligation to her in-laws.

Applicant's third argument blurs the difference between: (a) the nature of a contact between an applicant and other persons; and (b) the frequency of contacts between an applicant and other persons. Although the frequency of contacts could have some probative value with respect to assessing the nature of such contacts, there is not a simple or necessary correlation between the two. For example, an applicant can have frequent contacts with a person selling newspapers, coffee, or lunch in or near their place of employment, yet such contacts can be casual in nature. On the other hand, an applicant with close personal ties to immediate family members may have infrequent contacts with those immediate family members simply because they live far away and are not easily communicated with. The Board need not agree with the Judge's use of dictionary definitions of the words "casual" and "infrequent" (Decision at p. 5) to conclude his evaluation of the nature of Applicant's contacts with her relatives in the People's Republic of China was not arbitrary or capricious. Furthermore, it was not arbitrary, capricious, or contrary to law for the Judge to recognize that Foreign Influence Mitigating Condition 3 is conjunctive, not disjunctive, in nature (*i.e.*, "Contact and correspondence with foreign citizens are casual **and** infrequent" NOT "Contacts and correspondence with foreign citizens are casual **or** infrequent")(emphasis added). Applicant cannot fairly expect the Judge to ignore the plain language of Foreign Influence Mitigating Condition 3, or fairly expect the Judge to apply it in a manner inconsistent with his findings of fact about Applicant's family ties.

Applicant concedes the Administrative Judge was not required to apply Foreign Influence Mitigating Condition 3 to her mother and her sister in the People's Republic of China, but argues that the Judge should have applied it to her contacts with her brothers, her brothers' spouses, and her husband's immediate family members in the People's Republic of China. Given the record evidence in this case, the Judge had a sufficient basis to conclude that Applicant had not met her burden of persuasion to show the nature of her ties with her brothers, her brothers' spouses, and her husband's immediate family members were such that they warranted application of Foreign Influence Mitigating Condition 3. Furthermore, even if the Board were to assume -- solely for purposes of deciding this appeal -- that the Judge erred by not applying Foreign Influence Mitigating Condition 3 to the relatives identified by Applicant's appeal brief, such an error would not warrant remand or reversal in this case. *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine).

(c) Applicant also contends the decision below has the practical effect of nullifying Foreign Influence Mitigating Condition 1 and Foreign Influence Mitigating Condition 3. Applicant's arguments in support of this contention are not persuasive.

Applicant argues the Administrative Judge's decision has the practical effect of nullifying Foreign Influence Mitigating Condition 1 because: (i) the Judge relied solely on the presence of Applicant's relatives in the People's Republic of China, despite "uncontradicted evidence showing that [Foreign Influence Mitigating Condition 1] should be applied"; and (ii) the Judge's analysis in this case has the practical effect of making Foreign Influence Mitigating Condition 1 "virtually unusable." Applicant's first argument is a variation of arguments already discussed and found unpersuasive earlier in this decision. Applicant's second argument also is unpersuasive. The Judge's choice to not apply Foreign Influence Mitigating Condition 1 under the particular facts and circumstances of this case is not the equivalent of nullifying that mitigating condition for all applicants. It is untenable for Applicant to claim that if Foreign Influence Mitigating Condition 1 is not applied in her case, then it can never be applied in any other case. The application of Adjudicative Guidelines for or against clearance is not reducible for a simple formula and requires the exercise of sound judgment, within the parameters of the Directive, after consideration of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-27371 (February 19, 2003) at pp. 3-4. Moreover, the Judge's conclusion that Applicant failed to meet her

burden of presenting evidence to warrant application of Foreign Influence Mitigating Condition 1 does not foreclose other applicants from presenting evidence supportive of their claims that Foreign Influence Mitigating Condition 1 should be applied in their individual cases.<sup>(9)</sup>

Applicant also contends that the Administrative Judge's decision has the practical effect of nullifying Foreign Influence Mitigating Condition 3. Specifically, Applicant argues the Judge engaged in arbitrary and capricious reasoning that involves an impermissible "catch-22" that precludes application of Foreign Influence Mitigating Condition 3 whenever Foreign Influence Disqualifying Condition 1<sup>(10)</sup> is determined to be applicable. Applicant's contention is not persuasive.

The Board has held that nothing in the language of Foreign Influence Mitigating Condition 3 precludes its application to immediate family members. *See, e.g.*, ISCR Case No. 00-0484 (February 1, 2002) at p. 5. However, the conclusion that Foreign Influence Mitigating Condition 3 could be considered for possible application with respect to an applicant's immediate family members is not the equivalent of a conclusion that Foreign Influence Mitigating Condition 3 must be applied to an applicant's immediate family members. Whether Foreign Influence Mitigating Condition 3 reasonably can be applied in a given case depends on the particular facts and circumstances of that case. However, Applicant has not demonstrated the Judge erred by concluding Foreign Influence Mitigating Condition 3 was not applicable in her case. Nothing in the decision below indicates or suggests the Judge relied on the applicability of Foreign Influence Disqualifying Condition 1 to preclude consideration of whether to apply Foreign Influence Mitigating Condition 3 in Applicant's case. There is no merit to Applicant's suggestion that the Judge applied such a *per se* rule when analyzing her case.

### **Conclusion**

The Board affirms the Administrative Judge's decision because Applicant has failed to demonstrate harmful error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. Applicant's appeal raises some novel legal issues. Because Department Counsel did not submit a reply brief, the Board must address and resolve those issues without the benefit of the views of Department Counsel.

2. *Compare* Federal Rules of Civil Procedure, Rule 19 ("Joinder of Persons Needed for Just Adjudication"). The Federal Rules of Civil Procedure do not apply to DOHA proceedings. *See* ISCR Case No. 02-15935 (October 15, 2003) at p. 4.

3. *Compare* Federal Rules of Civil Procedure, Rule 24 ("Intervention").
4. *Compare* Federal Rules of Civil Procedure, Rule 23 ("Class Action").
5. *See* Executive Order 12829 (January 6, 1993), Section 102 ("Policy Direction") and Section 103 ("National Industrial Security Program Advisory Committee"); National Industrial Security Program Operating Manual, DoD 5220.22-M, Section 1-101 ("Authority").
6. Although the technical rules of evidence can be relaxed to allow for the development of a full and complete record (Directive, Additional Procedural Guidance, Item E3.1.19), relaxation of the technical rules of evidence and the absence of any objection to a witness's testimony does not relieve an Administrative Judge of the responsibility to consider and evaluate such testimony and decide what weight reasonably can be given to it in light of the record evidence as a whole.
7. "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 person(s) involved and the United States" (Directive, Enclosure 2, Item E2.A2.1.3.1).
8. "Contact and correspondence with foreign citizens are casual and infrequent" (Directive, Enclosure 2, Item E2.A2.1.3.3).
9. The Board rejects Applicant's contention that resolution of this case will irrevocably decide, favorably or unfavorably, the outcome of all security clearance adjudications involving applicants with ties to family members in the People's Republic of China. Applicant's contention is predicated on two unwarranted assumptions: (a) that the particular facts and circumstances of her case are typical, paradigmatic, and dispositive of all cases involving applicants with ties to family members in the People's Republic of China; and (b) other applicants will be irrevocably bound by the decision in Applicant's case regardless of the record evidence developed in their individual cases.
10. "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" (Directive, Enclosure 2, Item E2.A2.1.2.1).