

DATE: March 29, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-09053

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

#### FOR APPLICANT

#### *Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 26, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested the case be decided on the basis of the written record. [\(U\)](#) On May 31, 2005, Administrative Judge Paul J. Mason granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Administrative Judge erred in his analysis of Foreign Influence Mitigating Condition 1. We reverse the Administrative Judge's decision to grant the clearance.

### **Whether the Record Supports the Judge's Factual Findings**

#### **A. Facts**

The following findings of fact made by the Administrative Judge are pertinent to the issue raised on appeal: (a) Applicant was born in the People's Republic of China (PRC) in 1964; (b) he came to the United States on a student visa in 1986; (c) he was awarded a PhD from a U.S. university in 1991 and he decided to stay and work in the U.S.; (d) he became a United States citizen in October 1999; (e) Applicant's 67-year-old mother and his 30-year-old sister are resident citizens of the PRC; (f) Applicant talks to his mother twice a week and visits her once a year; (g) Applicant's mother owns a small business measuring instruments for construction companies; (h) Applicant does not provide financial assistance to his mother, and she has no ties to the PRC government; (i) Applicant's sister is an accountant and receives a telephone call from him every other week; (j) Applicant visits his sister once a year; (k) Applicant has traveled to the PRC in 1994, 1997, 2001, and twice in 2002 and 2003; (l) on March 27, 2003, Applicant sponsored his mother for entry into the United States; (m) Applicant has no cultural ties with any foreign government, and no financial ties or financial interests in a foreign country; (n) Applicant has not been approached by any suspicious people, and if he were, he would report such activities to the FBI; (o) Applicant has no other family or friends that are residing in a foreign country and no other family or friends residing in the U.S. that are U.S. citizens; (p) none of Applicant's relatives have ever been threatened in an effort to have Applicant cooperate with the foreign service; (q) Applicant has never been threatened because his relatives, friends or contacts live in a foreign country; (r) the PRC has an

authoritarian Communist government, still engages in espionage activities in the U.S. and other foreign countries, and also has a poor record of occasional mistreatment of its own citizens; and (s) the PRC is trying to develop a free enterprise system and make positive changes in other areas of its political structure.

## B. Discussion

The Administrative Judge's findings of fact are not challenged on appeal. Therefore, the appeal issue in this case will be resolved with reference to the Judge's conclusions, which are described in succeeding paragraphs.

### **Whether the Record Supports the Administrative Judge's Ultimate Conclusions**

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 ¶ 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, for example, whether it: does not examine relevant evidence; fails to articulate a satisfactory explanation for its conclusions; does not consider relevant factors; fails to consider an important aspect of the case; offers an explanation for the decision that runs contrary to the record evidence; or is so implausible that it cannot be ascribed to a mere difference of opinion. 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.

The Administrative Judge reached the following conclusions in the case: (a) considering the familial contacts, travel to the PRC seven times in 10 years, and the politics and ideology of the country, the government has established a case under the Foreign Influence Guideline; (b) the potential for foreign influence is reduced significantly because Applicant's mother is 67 years old and he provides her no financial support; (c) Applicant's mother's business is not connected to the government of the PRC; (d) Applicant provides no support to his sister and the sister is not connected to the PRC government; (e) there has been no instance of any efforts by the PRC government to capitalize on the residence and citizenship of Applicant's mother and sister or Applicant's employment or security clearance status; (f) Applicant stated that his foreign relatives could not adversely affect his willingness to protect classified information; (g) Applicant's statement that he would notify the FBI should any suspicious person or organization approach him is believable; (h) Applicant's potential for vulnerability to foreign influence has not increased simply because he has begun the process of sponsoring his mother for entry into the United States; and (i) considering the entire record and the "whole person" concept, Applicant has established his case in mitigation under Foreign Influence Mitigating Condition 1 <sup>(2)</sup> by successfully demonstrating his immediate family members are not in a position to be exploited in a way that will cause Applicant to choose between the family member and the U.S.

On appeal, Department Counsel challenges the Administrative Judge's application of Foreign Influence Mitigating Condition 1 to mitigate the government's case. Specifically, Department Counsel argues: (i) the Judge applied an incorrect higher standard when he changed the wording of Foreign Influence Mitigating Condition 1 from "could" to "will" in the conclusions section of his decision; (ii) the Judge concluded without explanation or elaboration that the security risk brought on by the fact that Applicant's mother is a citizen resident of the PRC is significantly reduced because his mother is 67 years old; (iii) other than concluding that Applicant's sister is not connected with the government of the PRC, the Judge did not address her susceptibility any further; (iv) the Judge failed to adequately address the PRC government's hostility toward its own citizens and its hostility toward the United States; and (v) the Judge was arbitrary and capricious in his consideration of Applicant's hypothetical statement as to what he would do if approached by suspicious persons or organizations.

Department Counsel's appeal arguments asserting that the Administrative Judge erroneously applied Foreign Influence Mitigating Condition 1 to mitigate Applicant's case are persuasive.

The Administrative Judge concludes his decision by making a direct reference to the language of Foreign Influence Mitigating Condition 1. He states: "Considering the entire record and the whole person concept Appellant (sic) has established his case in mitigation under MC 1 by successfully demonstrating his immediate family members are not in a

position to be exploited in a way that will cause Applicant to choose between the family member and the U.S." Department Counsel correctly points out that the Judge misquotes the language of the mitigating condition, which speaks in terms of whether Applicant's immediate family members are in a position to be exploited in a way that *could* (as opposed to "will") cause (force) Applicant to choose between the family member and the U.S. The Judge's use of the word "will" when tracking the language of the mitigating condition was error.

Department Counsel asserts that the Administrative Judge erred by concluding that the age of Applicant's mother was mitigating because it significantly reduced the risk posed by her status as a resident citizen of the PRC. Department Counsel establishes error on this point. The Judge failed to articulate a rational basis for his conclusion that the age of Applicant's mother reduces the security risk. To the extent Applicant's mother is vulnerable to the power of the PRC government to exert pressure on her, her age is irrelevant. *See, e.g.*, ISCR Case No. 02-04786 at 5 (App. Bd. Jun. 27, 2003). Absent record evidence to the contrary, there is no basis for the Judge to conclude that an authoritarian foreign government that has a poor human rights record and a record of mistreatment of its own citizens would have any reservations about exerting pressure on one of its citizens merely because of her age. *See also* ISCR Case No. 02-00305 at 7 (App. Bd. February 12, 2003)(age of applicant's parents living in a foreign country does not diminish or reduce the security concerns under Guideline B).

Department Counsel asserts that other than noting the fact that Applicant's sister is not connected to the PRC government, the Administrative Judge did not further elaborate upon her susceptibility to exploitation in the context of Foreign Influence Mitigating Condition 1. Department Counsel is not precisely correct, as the Judge does mention the fact that Applicant does not financially support his sister in the context of applying the mitigating condition to her. However, Department Counsel's broader argument regarding the sister is correct in its assertion that the Judge had no basis for applying the second prong of itigating Condition 1 to her. The Judge did not articulate a rational basis as to why the fact that Applicant does not provide financial support to his sister reduces the security significance of her status as a Chinese citizen living in the PRC. Likewise, the Judge did not articulate a rational basis for why the fact that Applicant does not provide financial support to his mother reduces the risk regarding her. *See, e.g.*, ISCR Case No. 03-15205 at 4 (App. Bd. Jan. 21, 2005)(lack of relatives' dependency upon Applicant for support, among other factors, failed to make an adequate showing that his family ties to Iran did not pose a security risk).

Department Counsel argues that the Administrative Judge failed to adequately address the PRC government's hostility toward its own citizens and its hostility to the United States. Department Counsel's contention has merit. The Judge does briefly discuss the nature of the PRC regime in his decision, but the discussion is limited to the context of Department Counsel's establishment of a *prima facie* case under the Foreign Influence Guideline. Department Counsel points out that the Judge did not discuss the nature of the PRC regime in his analysis of the applicability of Foreign Influence Mitigating Condition 1. Department Counsel also argues that an applicant with immediate family members living in a country hostile to the United States has a heavy burden to show that those family ties do not pose a security risk. *See* ISCR Case No. 01-26893 at 10 (App. Bd. Oct. 16, 2002). In this case, there is no dispute that Applicant has close ties of affection and obligation to his mother and sister in the PRC--a country that the Judge concluded ". . .still engages in espionage activities in the U.S. and other foreign countries, and also has a poor record of occasional mistreatment of its own citizens. . ." <sup>(3)</sup> Accordingly, Applicant bears a heavy burden of showing that the presence of his immediate family members in the PRC does not pose a security risk. Correspondingly, the Judge could not render a favorable security clearance decision without articulating a rational basis for concluding that Applicant had successfully extenuated or mitigated the security concerns raised by the facts of this case.

Department Counsel claims that the Administrative Judge was arbitrary and capricious in his consideration of Applicant's hypothetical statements as to what he would do if approached by suspicious persons or organizations as a result of the status of his mother and sister. Although the Judge could consider such evidence, statements by an applicant about what he or she will do in the future in response to any attempt to exploit his or her family ties, however sincere or credible, cannot be taken simply at face value. An applicant's stated intention about what he or she might do in the future under some hypothetical set of circumstances is merely a statement of intention that is not entitled to much weight, unless there is record evidence that the applicant has acted in a similar manner in the past under similar circumstances. As a matter of common sense, a person's stated intention to engage in future conduct that is similar to the person's past conduct is entitled to be given more weight than a person's stated intention to engage in future conduct of a kind that the person has never engaged in before. *See, e.g.*, ISCR Case No. 99-0511 at 11 (App. Bd. Dec. 19, 2000).

Moreover, the Judge's focus on what choice Applicant would make if he were approached by anyone seeking information falls outside the inquiry of MC 1, where the issue is not what choice an applicant will make once placed in the position of choosing, but rather whether circumstances exist that might require an applicant to make that choice. *See* ISCR Case No. 03-19101 at 7 (App. Bd. Jan. 31, 2006).

After a review of the Judge's decision, and specifically his determination as to the applicability of Foreign Influence Mitigating Condition 1, the Board concludes that he relied significantly on the Applicant's representations as to what he would do if he were approached by agents or operatives of the PRC government when concluding that Applicant had mitigated the government's case. Such heavy reliance on this evidence was error, particularly given the fact that the Judge did not have an opportunity to evaluate Applicant's credibility in the context of a hearing.

The Administrative Judge also relied significantly on the fact that there have been heretofore no instances of any efforts by the PRC government to capitalize on the status of Applicant's mother and sister. This, too, was error. Applicant's vulnerability to possible foreign influence through his relatives in the PRC is the same, whether or not the PRC government has sought to exert such influence or pressure in the past. *See, e.g.*, ISCR Case No. 03-16516 at 7 (App. Bd. Nov. 26, 2004).

The Judge's conclusion that the PRC government is not likely to target Applicant in the future has no basis in the record evidence in this case.

When an appealing party demonstrates factual or legal error, the Board must consider whether: (a) the error is harmful or harmless; (b) the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds; and (c) the Administrative Judge's decision should be reversed or remanded if it cannot be affirmed. In this case, the Judge's favorable clearance decision is not sustainable and the identified errors cannot be remedied on remand. Therefore, the decision must be reversed.

### **Order**

The judgment of the Administrative Judge granting Applicant a clearance is REVERSED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. Department Counsel submitted a File of Relevant Material (FORM) on July 1, 2004. Applicant did not respond to the FORM and the case was assigned to the Administrative Judge on August 23, 2004.

2. "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."

3. Decision at 3.