

DATE: May 30, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-10955

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Philip D. Cave, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 28, 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 a hearing. On October 31, 2005, after the hearing, Administrative Judge Mary E. Henry granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Administrative Judge erred by finding that applicant had successfully mitigated the government's security concerns regarding Applicant's immediate family members in the People's Republic of China. We reverse the Administrative Judge's decision to grant the clearance.

Whether the Record Supports the Administrative Judge's Factual Findings

A. Facts

The Administrative Judge made the following pertinent findings: Applicant's mother, stepfather, father and sister are citizens of the People's Republic of China (PRC) and reside there. The Judge found that Applicant's immediate family members are not employees or otherwise agents of the PRC government. Applicant's mother and step-father recently spent six months in the U.S. with the permission of the PRC and returned to the PRC. They have decided to immigrate to the U.S. and have started the process. Applicant and her daughter were born in the PRC in 1962 and 1988 respectively and immigrated to the U.S. in 1990, although her daughter moved back to the PRC in 1992 and lived with Applicant's then in-laws until 1995. Applicant's daughter now has a U.S. passport and lives in the U.S. Applicant divorced in 1996 and her ex-husband died in 2005. The Administrative Judge noted that the PRC is an authoritarian, communist-party led state. Human rights violations continue to be problematic. Concerns regarding PRC weapons development, theft of classified information and industrial espionage remain. The Judge noted testimony and exhibits from several persons who know Applicant and trust her integrity and have confidence in her reliability including in the area of safeguarding U.S. national security.

B. Discussion

The Appeal Board's review of the Administrative Judge's finding of facts is limited to determining if they are supported by substantial evidence--such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966). In evaluating the Administrative Judge's finding, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1.

Department Counsel challenges the Judge's finding that Applicant's parents are not agents of a foreign government. Department Counsel notes that the only evidence on the subject is Applicant's testimony. Given the realities of the evidentiary record available to the Judge in most DOHA cases and the substantial evidence rule, it is untenable to *require*, as a matter of law, that Administrative Judge's have more than Applicant's testimony for each finding of fact. Of course, in previous DOHA cases there have been many instances where a Judge has sound reasons not to rely on an applicant's uncorroborated testimony for findings of fact. Furthermore, the fact that a judge has enough evidence to make a finding of fact does not necessarily mean that the finding is entitled to much weight.

Whether the Record Supports the Administrative Judge's Ultimate Conclusions.

An Administrative Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Appeal Board may reverse the Administrative Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow, and we may not substitute our judgment for that of the Administrative Judge. We may not set aside an Administrative Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency ..." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. We review matters of law *de novo*.

In this case, the Administrative Judge noted that "The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence operations against the U.S." As noted in the Facts section, above, the Judge acknowledged that two of the three concerns (authoritarian government and intelligence operations) apply to the PRC. Nonetheless, she concluded that "The likelihood of pressure being placed on her [Applicant's] remaining family in the PRC is de minimus." For each family member in the PRC the Judge cited a circumstance that she believes makes them unlikely to be subject to coercion or exploitation (Applicant's father has little contact with Applicant, Applicant's mother and step father intend to immigrate to U.S. and lack fear to ask for permission to emigrate from PRC, and Applicant's sister's choice of career and non-government work). None of the circumstances cited by the Judge would present a serious obstacle to the PRC (which the Judge noted has an authoritarian regime, a poor human rights record and actively engages in intelligence activities against the U.S.) from exercising control over Applicant's resident family members in order to coerce, exploit or pressure Applicant. Indeed, the desire of Applicant's mother and father to emigrate can be viewed as an adverse circumstance rather than a positive circumstance since it creates a specific pressure point which can be exploited.

Given the totality of facts and circumstances laid out in the Administrative Judge's decision, it is unlikely that correction of the errors discussed above would result in a sustainable favorable decision.

Order

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman (Acting), 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