

DATE: June 7, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-02181

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 4, 2005, 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 November 15, 2005, after the hearing, Administrative Judge Barry . Sax 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 issues on appeal: whether the Administrative Judge's conclusion that Foreign Influence Mitigating Condition 1 [\(1\)](#) applies is arbitrary and capricious and is unsupported by the record evidence, and whether the Judge's overall favorable security clearance decision is arbitrary and capricious. 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 issues raised on appeal: (a) Applicant's wife is a citizen of the People's Republic of China (PRC); (b) she resides in the PRC six months out of the year and the United States the other six months; (c) the time in the PRC is usually broken up into several one or two month periods; (d) Applicant's wife works for an American University that has a partner university in the PRC; she married Applicant in 1996; (e) she has a U.S. "green card"; (f) she has not yet applied to become a U.S. citizen but will likely do so if she and Applicant have children; (g) Applicant's father-in-law and mother-in-law are citizens and residents of the PRC; (h) the in-laws are retired college professors and live in university housing in a government run university; (i) they speak little English; (j) the in-laws have a government pension and do not need financial help from Applicant; (k) Applicant's brother-in-law and his family are citizens and residents of the PRC; (l) the brother-in-law works in a steel mill and speaks no English; (m) Applicant has traveled to the PRC in at least 1996, 1999, 2000, 2001 and 2003, usually to visit his wife while she is working there; (n) Applicant has never called his wife's family, and has not helped them financially or otherwise; (o) Applicant knows only a few words of Chinese; (p) Applicant has received yearly security training from his employer and understands his obligation to protect U.S. security interests; (q) he never

takes his work to the PRC, does not discuss it with anyone there, and reports each trip to the PRC to his company security office; (r) he avers that if his in-laws or anyone asked him to act improperly, he would immediately report it; (s) Applicant has received several technical awards for his accomplishments and his work evaluation describes him as a "conscientious worker"; and (t) the PRC is an active gatherer of classified and proprietary information in the U.S.

There is other record evidence not made the basis of a finding of fact by the Administrative Judge that nevertheless is pertinent to the issues raised on appeal. That evidence is: (a) Applicant's wife stays with her mother and father during her trips to the PRC; and (b) Applicant talks to his father-in-law and mother-in-law on the telephone occasionally as he is able given their limited command of English.

B. Discussion

The Administrative Judge's findings of fact are not challenged on appeal. Therefore, the appeal issues in this case can 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

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*.

The Administrative Judge reached the following conclusions in the case: (a) there is a valid concern when any applicant for a DoD security clearance has relatives or close friends or associates in a foreign country; (b) the PRC is an active gatherer of classified and proprietary information in the U.S.; (c) since 1996 there is no indication of any efforts by Applicant's in-laws to seek to influence him to act improperly in any way; (d) there is no evidence suggesting any connection between Applicant's in-laws and the PRC military or intelligence organizations; (e) Applicant is a hard working and conscientious employee; (f) the part the in-laws play in Applicant's life is minimal and hindered by a language barrier; (g) Applicant has been involved in DoD programs and has received periodic security training; (h) all the evidence indicates that Applicant has established his positive character and that he would reject any efforts on behalf of the PRC or other country to act against his own and his country's security interests; (i) Foreign Influence Mitigating Condition 1 applies; (j) all the evidence shows Applicant to be a man of integrity who understands his responsibilities to his country; and (k) he can be relied upon to place the nation's security interests above any feelings for his wife or her relatives in the PRC.

On appeal, Department Counsel argues: (i) no evidence was produced to rebut the presumption that Applicant's wife has close ties of affection and obligation toward her immediate family members in the PRC and the corresponding presumption that Applicant has ties of affection and obligation toward his wife's family members; (ii) by basing his decision, in part, on the lack of evidence of past attempts at coercion, the Administrative Judge improperly shifted the burden to Department Counsel, when Applicant bears the burden of establishing mitigation; (iii) the Judge erroneously rests his application of Mitigating Condition 1 on evidence that Applicant has positive character and would therefore reject all efforts to compromise classified information--evidence that does not address the issues inherent in Mitigating Condition 1; (iv) the Judge did not provide an analysis of Mitigating Condition 1; (v) it was arbitrary and capricious for the Judge to apply Mitigating Condition 1 without a factual basis for doing so; (vi) the Judge failed to analyze and discuss the security problems inherent in the circumstances presented by Applicant's in-laws in the PRC; and (vii) the Judge failed to address the PRC's human rights violations and the nature of the PRC government in assessing the security significance of the presence of Applicant's in-laws in the PRC. Department Counsel's appeal arguments have mixed merit.

Department Counsel's arguments regarding the Administrative Judge's application of Foreign Influence Mitigating

Condition 1 overlap and may be addressed together. Department Counsel asserts that the Judge rested his application of Mitigating Condition 1 on his conclusion that Applicant established positive character and that he would reject any efforts made to get him to act against his own or his country's security interests. After a review of the Judge's decision, the Board is not convinced that the Judge rested his application of Mitigating Condition 1 on the conclusion stated by Department Counsel. This is because the Judge states only in conclusory terms that Mitigating Condition 1 applies, without any elaboration, any reference to the rest of his decision, and without any analysis that ties his application of the mitigating condition to his conclusions or to the evidence in the case. Department Counsel is correct in its assertion that the Judge failed to address any of the issues raised by the language of Mitigating Condition 1. The elements of Mitigating Condition 1 are not discussed by the Judge. Such failure to provide a rational basis for the application of Mitigating Condition 1 is error. Moreover, Department Counsel is correct in its assertion that Applicant, who bears the burden of proof in presenting matters in mitigation, failed to present evidence that provided a reasonable basis for the application of Mitigating Condition 1. While the evidence arguably supports the conclusion that, as retired university professors and a steel mill worker, Applicant's in-laws are not agents of the PRC government, there is no record evidence to support the conclusion that Applicant's in-laws are not in a position to be exploited by the government of the PRC. The Judge's application of Mitigating Condition 1 was erroneous.

Department Counsel argues that, apart from the erroneous application of Foreign Influence Mitigating Condition 1, the Administrative Judge failed to articulate a sustainable basis for his favorable security clearance decision. This assertion has merit.

The Administrative Judge concluded that the part Applicant's in-laws play in his life is minimal and hindered, in any case, by a language barrier. The Judge fails to articulate a rational explanation as to how this conclusion is supported by the record evidence or how the security significance of having these in-laws in the PRC, as citizens of the PRC, is lessened by a supposed minimal role. There is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse. *See, e.g.*, ISCR Case No. 01-03120 at 4 (App. Bd. Feb. 20, 2002). Department Counsel persuasively argues that neither the presumption that Applicant's wife has close ties to her family in the PRC nor the presumption that Applicant has ties of affection or obligation toward his wife's family members are rebutted by the record evidence in this case. The record evidence establishes that Applicant's wife spends approximately half of her year in the PRC and resides largely with her parents. The record evidence also establishes that Applicant occasionally travels to the PRC when his wife is there, and that at other times he speaks

to his in-laws by telephone within the confines of their limited English language capabilities. Given this record evidence, and given the Judge's other finding that the PRC is an aggressive intelligence gatherer that targets the United States, the Judge has failed to articulate a rational basis for his conclusion that the presence of Applicant's in-laws in the PRC is of minimal security significance.

In terms of his favorable security clearance decision, the Administrative Judge indicated that among the most significant information about Applicant's in-laws are the facts that they have been Applicant's in-laws since 1996 and there is no indication of any efforts by them to seek to influence Applicant to act improperly in any way, and there is no evidence suggesting any connection with the PRC military or intelligence organizations. The Judge's analysis on these points is flawed. Applicant's vulnerability to possible foreign influence through his in-laws 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). Additionally, by noting the absence of evidence of prior efforts to influence Applicant and the absence of evidence suggesting a connection with the PRC military or intelligence organizations, and by referencing these factors in the context of mitigation, the Judge's analysis had the practical effect of improperly shifting the burden of proof to Department Counsel to disprove matters in mitigation. There is no presumption in favor of granting a security clearance. *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). An Applicant has the burden of presenting evidence to: (a) refute or rebut the government's case against the applicant, or (b) extenuate or mitigate the facts and circumstances of the applicant's case that have been admitted or proven. *See* Directive ¶E3.1.15.

The Administrative Judge found that Applicant has been involved in DoD programs and has received periodic security training. He also concludes that Applicant has a positive character, is a man of integrity, and understands his responsibilities to his country. He then concludes that Applicant could be relied upon to reject any efforts on the part of

the PRC or another country to act against his own and his country's security interests. Apart from simply reciting these favorable facts, the Judge did not discuss or explain how they refute, extenuate, or mitigate the security concerns raised under Guideline B by the record evidence of Applicant's ties and contacts with his wife's immediate family members in the PRC. Having reasonably concluded that the record evidence raised security concerns under Guideline B, the Judge failed to articulate a rational basis for why he concluded the favorable facts he recited showed refutation, extenuation, or mitigation of those security concerns. Because the favorable facts recited by the Judge do not readily suggest refutation, extenuation, or mitigation of the security concerns raised under Guideline B, the Judge's recitation of those favorable facts was not sufficient to support his favorable conclusions under Guideline B.

Department Counsel has demonstrated several errors below that, taken cumulatively, warrant reversal.

Order

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman (Acting), Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. "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."