

DATE: May 9, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-02233

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

#### FOR APPLICANT

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 5, 2005, DOHA issued a statement of reasons (SOR) 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. <sup>(1)</sup> On September 20, 2005, Administrative Judge David S. Bruce 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 whole-person analysis is unsustainable because the whole-person considerations relied upon are unsupported by the record evidence and their application is arbitrary, capricious, and contrary to law; and whether the Administrative Judge's whole-person analysis impermissibly shifted the burden of proof to Department Counsel by relying upon the absence of derogatory evidence to disprove mitigation. 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:

Applicant is 46 years of age and was married in 1987 in the People's Republic of China (PRC). Applicant and his wife have lived in the United States since 1991, and they both became naturalized American citizens on October 19, 2001. They have not exercised the rights and privileges of their former PRC citizenship since becoming U.S. citizens. Applicant has no foreign holdings or foreign ties other than family members living abroad. Based on Applicant's answers to his security clearance application, his finances are in order, and he has no criminal record or alcohol or drug involvement. Applicant has traveled to the PRC twice--in 2000 for a family visit and in 2004 for his employer.

Applicant's elderly parents are both citizens and residents of the PRC. Both parents are retired teachers, and his mother also worked in a factory and later as an office assistant for a private firm. Neither parent was ever connected with the Chinese government or military or with any other government. Neither has any substantial financial interest in any

Chinese or foreign-owned business. Applicant's father-in-law is a retired factory worker, and his mother-in-law is a homemaker. Neither in-law has ever worked for the PRC or had any other ties to the PRC or any other government. Neither has any substantial financial interest in any Chinese or foreign-owned business. Applicant's only sister is a resident and naturalized citizen of the United States. Applicant's only brother is a citizen of the PRC who has lived in the United States for 15 years and plans on becoming an American citizen when he becomes eligible in a year or two. His brother has no Chinese or other foreign ties.

The PRC is the most populous country and is controlled by the Chinese Communist Party. The country has been undergoing rapid and profound economic and social change and development. It also has a history of aggressive intelligence gathering endeavors directed at the United States. Human rights abuses committed against its own citizens are exacerbated by the lack of due process protections and the operation of a non-independent judiciary. Chinese security personnel may place foreign visitors with access to advanced proprietary technology under surveillance without their consent or knowledge. Reports issued by cognizant U.S. government agencies indicate that China has increased its military spying against the United States while at the same time using political influence programs to manipulate U.S. policy. U.S. military and U.S. private corporations are the primary targets of Chinese intelligence. Chinese companies play a significant role in the country's pursuit and acquisition of secret U.S. technology.

## B. Discussion

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

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 initially concluded that Foreign Influence Disqualifying Conditions (FIDC) 1-(2) and FIDC 2 (3) applied, and that Foreign Influence Mitigating Condition (FIMC) 1-(4) and FIMC 3-(5) did not apply. In applying the "whole person" concept, the Judge relied on the following considerations: (1) Applicant remains in contact with his family members in the PRC, although his travels to the PRC have been infrequent; (2) since no one in his family or his wife's family has ever been employed by, or associated with, the Chinese government, it is unlikely that any of them has ever been a member of the Chinese Communist Party; (3) Applicant has worked steadily and been financially responsible and law-abiding; (4) Applicant's brother will probably become a naturalized American citizen soon; (5) Applicant and his wife own no property in China or have no other foreign ties, and Applicant has not used a foreign passport since becoming an American citizen; (6) it is unlikely that Applicant's parents or in-laws know the details of Applicant's job; (7) Applicant's closest family members reside permanently in the United States and therefore are not vulnerable to foreign pressure.

On appeal, Department Counsel argues that the Administrative Judge's whole person analysis is not sustainable because the considerations relied on by the Judge are unsupported by the record evidence and therefore arbitrary, capricious, and contrary to law. Department Counsel's argument has merit. Department Counsel correctly notes that among the adjudicative factors listed in ¶ E2.2.1 of the Directive, only the eighth factor-(6) is fully relevant to Guideline B (Foreign Influence). Department Counsel also correctly contends that a number of the Judge's statements with regard to that factor are unsupported by the record evidence. Specifically, Department Counsel notes the following: (1) The Judge stated that because Applicant's parents and in-laws have never been employed by, or associated with, the government of the PRC, it is unlikely that any of them have ever been members of the Communist Party. The record states that

Applicant's parents are retired teachers, and his mother was also a factory worker and office assistant. His in-laws are a retired factory worker and a homemaker. There is no record evidence that supports the conclusion that none of them had ties to the government in their working lives. There is no evidence to support the conclusion that Applicant's family members are unlikely to have ever been Communist Party members. There is also no evidence that non-membership in the Communist Party reduces the security concerns under Guideline B, a circumstance that the Judge pointed out when discussing Department Counsel's establishment of a basic case against Applicant. (2) Since the Judge reached his decision without a hearing, his comments regarding Applicant's character have no basis in the record other than Applicant's responses to questions in the security application. (7) (3) The Judge stated that Applicant and his wife have no business or property interests in the PRC. The record does not support that statement, because Applicant actually indicated that they have no "substantial" interests in the PRC. Moreover, the security concerns raised by Applicant's relatives in the PRC are not mitigated by Applicant's lack of foreign financial interests. *See, e.g.*, ISCR Case No. 99-0254 at 3 (App. Bd. Feb. 16, 2000). (4) There is no evidence in the record to support the Judge's conclusion that Applicant's relatives in the PRC are unlikely to have knowledge of Applicant's work. (5) There is no evidence in the record to support the Judge's statement that Applicant's "closest" relatives are those who have emigrated to the United States. Thus, the record evidence does not support the whole person considerations cited by the Judge, and the Judge's positive conclusions about Applicant's character do not mitigate the government's security concerns under Guideline B. Regarding evidence of Applicant's good character, the Judge does not discuss or explain how that evidence refutes, extenuates, or mitigates the security concerns raised under Guideline B by the record evidence of Applicant's ties and contacts with immediate family members and other relatives in the PRC.

Department Counsel also raised the issue of whether the Administrative Judge impermissibly shifted the burden of proof to Department Counsel by relying on the absence of derogatory evidence to disprove mitigation. In his decision, the Judge stated that the government has established a *prima facie* case as to Guideline B. Under the Directive ¶ E3.1.15, the burden then shifted to Applicant to rebut, explain, extenuate, or mitigate the security concerns raised by the government. In this case, Applicant requested a decision on the basis of a written record. He did not respond to the government's File of Relevant Material. The Administrative Judge did not have an opportunity to evaluate Applicant's character and credibility under cross-examination in the context of a hearing. The Judge's whole person analysis and favorable conclusions are based upon the cryptic, conclusory, and at times ambiguous statements made by Applicant in response to the questionnaire, SOR, and interrogatories. Applicant offered no direct or substantial evidence as to why the potential for pressure, coercion, exploitation, or duress in his particular case is sufficiently low so as to overcome the government's significant security concerns. The Judge used the absence of evidence of financial difficulties, criminal conduct, or questionable employment performance to conclude that Applicant was financially responsible, had never been charged with a crime, and was a productive American citizen, thereby impermissibly shifting the burden back to the government by, in effect, concluding that the mere absence of this evidence constitutes matters in mitigation. *See, e.g.*, ISCR Case No. 01-20908 at 3-4 (App. Bd. Nov. 26, 2003).

An Administrative Judge's decision is arbitrary and capricious if (a) it fails to articulate a satisfactory explanation for its conclusions; or (b) it offers an explanation for the decision based on findings that are not supported by the evidence. Here, the Judge's errors within his whole person analysis, leading to the conclusion that the Guideline B security concerns were mitigated, amounted to harmful error.

### **Order**

The Administrative Judge's decision granting Applicant a security clearance is REVERSED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed Jean E. Smallin

Jean E. Smallin

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 June 15, 2005. Applicant did not respond to the FORM, and the case was assigned to the Administrative Judge on August 1, 2005.

2. "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."

3. "Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists."

4. "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."

5. "Contact and correspondence with foreign citizens are casual and infrequent."

6. "The potential for pressure, coercion, exploitation, or duress;"

7. Department Counsel's further argument that the Judge's comments in this regard impermissibly shift the burden of proof will be discussed below.