

DATE: May 30, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-06564

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Julie R. Edmunds, Esq., Department Counsel

#### **FOR APPLICANT**

Sheldon I. Cohen, Esq.

The Department of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 15, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns under Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (January 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 7, 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 3.1.30.

On appeal, Department Counsel argues that the Administrative Judge's application of Foreign Influence Disqualifying Condition 1 [\(1\)](#) and Foreign Influence itigating Conditions 1 [\(2\)](#) and 3 [\(3\)](#) are arbitrary and capricious and unsupported by the record evidence. Department Counsel also contends that the Judge's whole person analysis is unsustainable because the considerations relied upon are unsupported by the record evidence and its application is arbitrary, capricious, and contrary to law.

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

#### **A. Administrative Judge's pertinent findings of fact:**

Applicant is a 49-year old Navy veteran and physicist with a master's degree. Applicant married for the first time in December 2003. His wife, whom he met through an on-line service, was born in the People's Republic of China (PRC). Applicant and his wife became acquainted by e-mail, instant messaging, and telephone. Applicant has traveled to the PRC only once, in October 2002. He went there only because the United States Citizenship and Immigration Services required him to meet his future wife in person before it would issue her a fiancee visa. Applicant traveled to Hong Kong to meet his then-fiancee. After a week in Hong Kong, they visited the PRC briefly for Applicant to speak with his future father-in-law about Applicant's marital intentions. Applicant also met two friends of his future wife at that time, but did not meet any of her other relatives. They returned to Hong Kong for two days. Then Applicant returned to the United States and completed the paperwork for a fiancee visa. They married a month after she arrived in the United States. While in the PRC, Applicant's wife was in the real estate business, and did not work for the PRC government or military.

When Applicant was in the PRC, an Asian couple approached Applicant and his fiancée and asked to take their picture. Upon his return, Applicant reported this encounter to his security officer at work. Nothing more occurred as a result of the incident. Applicant has no plans to return to the PRC. His wife has not returned there. She has a lawful visa and is pursuing permanent resident status.

Applicant does not speak Chinese. His wife speaks, writes, and understands English, but not well. Her parents and brothers do not speak English, and her sister speaks only a little English. Applicant's wife is estranged from her mother, having been raised by a grandmother. Applicant does not communicate with his wife's family, except to say "hi" when they call. Applicant's wife speaks to her father by phone once every other month or so. She does not speak to her mother or her brothers. She talks to her sister by phone about once a month and occasionally by e-mail. Applicant's wife has not developed friendships in this country. She is not working, but is learning English. At the time of the hearing, Applicant's wife was expecting a baby in January 2006, and the baby would be a U.S. citizen by birth.

Applicant's father-in-law is a retired businessman with no government or military ties, and his mother-in-law is a homemaker. Neither is a member of the Communist Party. Applicant's two brothers-in-law and sister-in-law are all involved in private businesses with no PRC government or military ties. None are members of the Communist Party. Applicant owns no property, business interests, or bank accounts in the PRC. Applicant's wife owns the house where her parents live. Applicant has not discussed the nature of his work with his wife or her family. He has said only that he is a physicist, and they have not asked him to divulge any classified information. Applicant credibly testified that he would not divulge confidential information if pressure were put on his in-laws and that he could do nothing to help them if the PRC government attempted to coerce them.

Two friends/co-workers and Applicant's boss testified on behalf of Applicant. All described him as a man of integrity, honesty, and character. They characterized him as hardworking, competent, and capable in his job. They testified without qualification that he would safeguard the security of the United States. One also stated that Applicant had never discussed classified work outside of the office.

## 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' 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 findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

In this case, the appealing party does not challenge the Administrative Judge's findings of fact.

### **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*.

Department Counsel argues that the Administrative Judge's application of Foreign Influence Disqualifying Condition and Foreign Influence Mitigating Conditions 1 and 3 are arbitrary and capricious and unsupported by the record evidence. Department Counsel's argument is without merit. The Judge concluded that the government had established a *prima facie* case under Guideline B. The burden of persuasion then shifted to Applicant to present evidence sufficient to

rebut, extenuate, or mitigate the security concerns raised. In this case, the Judge thoroughly explained why she concluded that Applicant had met his burden of persuasion. The Judge explained her reasons for applying Foreign Influence Mitigating Condition 1 and 3. She stated that Applicant's father-in-law did not work for the PRC government before he retired and that none of the in-laws who are currently working have ties to the government. None are PRC agents or receive benefits from the PRC government. She noted that Applicant does not speak Chinese, and only one of his wife's relatives speaks even limited English. Applicant's wife has no contact with her mother and brothers and has no strong emotional ties with them, evidencing a lack of affection between her and Applicant, and her family. Applicant has made only one trip to the PRC, and that trip was made only because the U.S. government would not issue a fiancée visa to his future wife unless he met her before she emigrated. Among his future in-laws, he met only his father-in-law on that trip. The Judge stated that Applicant had carefully complied with security procedures regarding his trip to the PRC to meet his fiancée and noted that Applicant had once reported to his security officer an incident in China where strangers asked to take his picture. Neither Applicant nor his wife plan to travel to the PRC in the future, and none of her family have traveled to the United States. The Judge emphasized that Applicant credibly testified that he realized the security implications of his marriage and had repeatedly told his wife in blunt and graphic terms that he would not compromise national security under any circumstances, even if her family members were harmed by the PRC. Applicant has successfully rebutted the normal presumption that an applicant has ties of obligation or affection to his in-laws. The record supports the Judge's conclusions, which are not arbitrary or capricious.

Department Counsel's argument that the Judge's whole person analysis is unsustainable is also without merit. Under the whole person concept, the Judge restated her conclusion that Applicant was not vulnerable to pressure from a foreign power and had mitigated the government's case under Guideline B. She restated some of the mitigating factors discussed above. The Judge presented a reasonable explanation for her decision, given the relevant factors in this case. The decision is sustainable.

### **Order**

The Administrative Judge's favorable security clearance decision is AFFIRMED.

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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. "An immediate family member, or a person to whom the individual has ties of affection or obligation, is a citizen of, or a resident or present in, a foreign country" (Directive ¶ E2.A2.1.2.1).

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" (Directive ¶ E2.A2.1.3.1).

3. "Contact and correspondence with foreign citizens are casual and infrequent" (Directive ¶ E2.A2.1.3.3).