

DATE: August 17, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-04265

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 25, 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 a hearing. On January 19, 2006, after the hearing, Administrative Judge Richard A. Cefola 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's favorable security clearance decision under Guideline B is arbitrary, capricious, and contrary to law.

Whether the Record Supports the Administrative Judge's Factual Findings

A. The Administrative Judge made the following pertinent findings of fact:

In the late 1940s, Applicant's now elderly parents fled China for British Hong Kong in order to escape the communists. Applicant attended college in Scotland, and continued his university education in the U.S. in 1979 on a scholarship. He became a naturalized U.S. citizen in 1989.

Applicant's elderly parents and three siblings are citizens of and reside in Hong Kong. A fourth sibling is a citizen of and resides in Canada. Two of Applicant's Hong Kong siblings are civil servants. Both of those siblings became civil servants in the 1970s, long before Hong Kong's reversion to the People's Republic of China (PRC) in 1997. Applicant's other sibling is the principal of a school associated with the YMCA. None of Applicant's relatives have been nor are now members of the Communist Party.

Applicant traveled to Hong Kong in 1995, 1996, 2000 and 2002 to visit his relatives. He also visited the PRC in 2002 to visit an American friend and to sight see. During those trips, Applicant was not approached by anyone inquiring as to his employment, and he knows he must report any such inquiries.

B. Discussion

The Judge's findings of fact are not challenged on appeal.

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 contends that the Judge's favorable application of Guideline B Mitigating Condition 1 [\(1\)](#) is arbitrary, capricious, and contrary to law. This argument has merit.

Having found that two of Applicant's siblings were civil servants of the Hong Kong Government, the Administrative Judge articulated no rational basis for a conclusion that those siblings were not agents of a foreign power. An employee of a foreign government need not be employed at a high level or in a position involving intelligence, military, or other national security duties to be an agent of a foreign power for purposes of Guideline B Mitigating Condition 1. *See, e.g.*, ISCR Case No. 02-24254 at 5-6 (App. Bd. June 29, 2004). Given the record evidence and his findings, the Judge's application of the Guideline B Mitigating Condition 1 is unsustainable.

The Administrative Judge's error is not harmless. In this case, the Judge did not articulate a detailed, rational explanation for his favorable determination under the "whole person" factors. *See, e.g.*, ISCR Case No. 03-04300 at 7-8 (App. Bd. Feb. 16, 2006). The Judge identified evidence that may be relevant in a whole person evaluation; however, he did not offer a clear analysis or rationale of how that evidence, in its totality, overcomes the significant security concerns considering the situation in and nature of the country involved. *See, e.g.*, ISCR Case No. 02-24566 at 3 (App. Bd. July 17, 2006). Moreover, most of the favorable facts recited by the Judge either do not readily suggest refutation, extenuation, or mitigation or have low probative value in that regard. *See, e.g.*, ISCR Case No. 02-22461 at 12-13 (App. Bd. Oct. 27, 2005).

Order

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman, 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. "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.