

KEYWORD: Foreign Influence

DIGEST: Applicant emigrated from China to the United States in 1989 and became a U.S. citizen in 1999. She does maintain a relatively close relationship with her parents, who are citizen residents of China. Her husband, who also emigrated from China to the United States maintains a similar relationship with his parents, who are also citizen residents of China. Applicant did not mitigate security concerns pertaining to foreign influence. Clearance is denied.

CASENO: 06-18097.h1

DATE: 07/27/2007

DATE: July 27, 2007

In Re:	)	
	)	
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SSN: -----	)	ISCR Case No. 06-18097
	)	
Applicant for Security Clearance	)	
	)	

**DECISION OF ADMINISTRATIVE JUDGE  
ROBERT J. TUIDER**

**APPEARANCES**

**FOR GOVERNMENT**

Francisco Mendez, Esq., Department Counsel

**FOR APPLICANT**

Richard Murray, Esq.

**SYNOPSIS**

Applicant emigrated from China to the United States in 1989 and became a U.S. citizen in 1999. She does maintain a relatively close relationship with her parents, who are citizen residents of China. Her husband, who also emigrated from China to the United States maintains a similar relationship with his parents, who are also citizen residents of China. Applicant did not mitigate security concerns pertaining to foreign influence. Clearance is denied.

## STATEMENT OF THE CASE

On July 27, 2005, Applicant submitted a Security Clearance Application (SF 86).<sup>1</sup> On September 26, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to her, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised.<sup>2</sup>

The SOR alleges security concerns under Guideline B (Foreign Influence). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for her, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In an answer notarized on October 20, 2006, Applicant responded to the SOR allegations, and elected to have her case decided at a hearing.<sup>3</sup> On January 3, 2007, the case was assigned to me. Her hearing was held on January 31, 2007. DOHA received the hearing transcript (Tr.) on February 8, 2007.

## PROCEDURAL RULINGS

### Administrative Notice

Department Counsel requested administrative notice of the facts in Exhibit (Ex.) 2 through 6. Tr. 14-15. Department Counsel also provided a supporting document (Ex.

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<sup>1</sup>Government Exhibit (GE) 1 (Electronic Standard Form (SF) 86, Security Clearance Application).

<sup>2</sup>On August 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guidelines to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated January 1987, as amended, in which the SOR was issued on or after September 1, 2006. Applicant's case is resolved under the revised Adjudicative Guidelines.

<sup>3</sup>(Applicant's response to SOR, notarized on October 20, 2006, received at DOHA on October 23, 2006).

1) to show the basis for the facts in Exs. 2 through 6. Applicant did not object to my taking administrative notice. Tr. 15.

Administrative or official notice is the appropriate type of notice used for administrative proceedings. *See* ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004)); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings, is to notice facts that are either well known or from government reports. *See* Stein, *Administrative Law*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice). I took administrative notice of various facts derived from Exs. 2 through 6 as indicated under subheading “People’s Republic of China” of this decision.

### FINDINGS OF FACT

As to the SOR’s factual allegations, Applicant admitted the allegations in SOR except ¶ 1.c.<sup>4</sup> Her admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 50 years old.<sup>5</sup> She was born in China in 1956, and she received a bachelor of science degree majoring in electrical engineering from a Chinese university in August 1985. Tr. 65. She came to the U.S. in May 1989 on a student visa to further her education. After her arrival in the U.S. she was awarded a master of science degree in electrical engineering, and a Ph.D. in electrical engineering, both from U.S. universities.

While she was a student in the U.S., the Chinese government suppressed the student demonstrations in Tiananmen Square in June 1989 prompting Congress to pass the Chinese Student Protection Act of 1992. This Act applied to approximately 40,000 Chinese students, to include Applicant, living and studying in the U.S. at that time. AE A.

She sought expedited processing to become a U.S. citizen at the earliest opportunity under the Chinese Student Protection Act of 1992, and was awarded her citizenship in August 1999. She was issued a U.S. passport in March 2000. As part of becoming a U.S. citizen, Applicant took an Oath of Allegiance. AE D. Applicant credibly testified she took that oath “seriously.” Tr. 34. When she became a U.S. citizen, under Chinese law, she automatically lost her Chinese citizenship and her Chinese passport was voided. Tr. 34-35, AE E.

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<sup>4</sup>*Id.*

<sup>5</sup>GE 1, *supra* n. 1, at Sections 2 (date of birth), 10 (education), 11 (employment), 8 (spouse), 13/15 (relatives), 16 (military service), 22 (employment), 23 (police record), 24 (illegal drug use), and 27 (financial record), is the source for the facts in this paragraph, unless otherwise stated.

She does not currently hold a security clearance. She has never been fired from a job. In July 2005, she began her current employment as a senior professional staff member at a prestigious U.S. university that does contract work for the government. There is no derogatory information concerning her police or financial records. She has never used illegal drugs.

She has no prior U.S. military service. Her husband was also born in China. He came to the U.S. in August 1989. Applicant and her husband met in the U.S., and were married in the U.S. in June 1993. They have a 16-year-old U.S.-born son, who is currently a high school student. Tr. 66.

Applicant's mother is 72 years old, and she is a citizen resident of China. During her working life, she was an engineer. Applicant's father is 76 years old, and he is also a citizen resident of China. During his working life, he was a musician. Both of her parents retired at age 56, are in good health, and receive pensions from the Chinese government. Tr. 47, 57. Applicant communicates with her parents by telephone, "usually once every 2 or 3 months." Tr. 36. She sends her parents money and over the past five years averaged sending them \$1,000.00 to \$2,000.00 per year. Tr. 48. Applicant testified she is "close" to her parents. Tr. 51, 69.

Applicant visited China in June 1991 for "[t]en days, two weeks." Tr. 52, 62. During this visit to China, she stayed with her parents. Tr. 64. Applicant's father visited Applicant and her family in the U.S. in 1994 and 1998, and each visit lasted approximately one year. Tr. 62-63.

Additionally, Applicant's husband is 42 years old and was awarded a bachelor of science degree in electrical engineering in 1986, and a master of science degree in electrical engineering in 1989 in China. After coming to the U.S., he was awarded a second master's degree in electrical and computer engineering in 1991, and a Ph.D. in electrical engineering. Tr. 73. He, like his wife, applied for U.S. citizenship pursuant to the Chinese Student Protection Act and became a naturalized citizen in November 1999. Tr. 76-77, AE F. He was issued a U.S. passport in March 2000. Tr. 78, AE G.

SOR ¶ 1.c. alleged Applicant's mother-in-law was in the process of applying for permanent residence status in the U.S. Applicant denied this allegation and the government did not offer any rebuttal to Applicant's denial. Tr. 55-56.

Applicant's mother-in-law is 70 years old, and she is a citizen resident of China. Applicant's father-in-law is 76 years old, and he is also a citizen resident of China. Both of her in-laws are retired medical doctors. Tr. 80. They receive pensions from private sources. Tr. 97. Applicant's husband typically communicates with his parents by telephone "every two or three months." Tr. 37, 80. Applicant's husband also sends his parents money comparable to the amounts his wife sends to her parents. Tr. 84.

Applicant's husband works at the same place of employment as she does and they share the same supervisor. Applicant's supervisor testified on her behalf and stated "she's done an outstanding job," and is a very dedicated, trustworthy and valued employee. Tr. 110-113.

Applicant testified that if the Chinese government attempted to exert pressure on her through family members to extract sensitive information, she would immediately report such contact to the appropriate security official. Tr. 43.

Applicant is registered and exercises her right to vote in the U.S. and volunteers at her son's school. Tr. 66-67. Applicant and her husband own a home in the U.S. valued at \$800,000.00 and they own two automobiles. Tr. 41. Applicant's husband earns \$112,400.00 per year and Applicant earns \$115,900.00 per year. They both have 401(k) plans through work, conduct all their banking in the U.S., and maintain investments in the U.S. Applicant and her husband's net worth is approximately \$1.1 million. Tr. 92.

### **People's Republic of China<sup>6</sup>**

China has an authoritarian, Communist government. China has a poor human rights record, suppresses political dissent, and practices arbitrary arrest and detention, forced confessions, torture, and other prisoner mistreatment.

China is a nuclear power with a large Army. China is geographically vast, and has a population of over one billion people. It has significant resources, and an economy that in recent years has expanded about 10% per year. China aggressively competes with the United States in many areas. China's competitive relationship with the United States exacerbates the risk posed by Applicant's Chinese connections.

China actively collects military, economic and proprietary, and industrial information about the United States because of the following circumstances: (1) its position as a global superpower; (2) its military, political, and economic investments in the Pacific Rim and Asia; (3) its leading role in development of advanced technology that China desires for economic growth; and (4) China considers the large number of Americans of Chinese ancestry as intelligence targets. China's active intelligence gathering programs focus on sensitive and protected U.S. technologies.

### **POLICIES**

In an evaluation of an applicant's security suitability, an administrative judge must consider the "Adjudicative Guidelines for Determining Eligibility For Access to Classified Information" (Guidelines). In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into Disqualifying Conditions (DC) and Mitigating Conditions (MC), which are used to determine an applicant's eligibility for access to classified information.

These guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the

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<sup>6</sup>The contents of the PRC section are from Exs. 2 through 8.

factors listed in the adjudicative process. Guideline ¶ 2. An administrative judge's overarching adjudicative goal is a fair, impartial and common sense decision. Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge considers all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. Guideline ¶ 2(c).

Specifically, an administrative judge should consider the nine adjudicative process factors listed at Guideline ¶ 2(a): "(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence."

Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." Guideline ¶ 2(b). In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, facts must be established by "substantial evidence."<sup>7</sup> The Government initially has the burden of producing evidence to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to present "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).<sup>8</sup>

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<sup>7</sup> "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Dir evidence in the ective ¶ 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 [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994).

<sup>8</sup>"The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15. ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006)."

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

The scope of an administrative judge's decision is limited. Section 7 of Executive Order 10865 specifically provides that any adverse industrial security clearance decision shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." An adverse determination is not a finding that an applicant is disloyal to the United States, but merely that he or she has not met the stringent standards, established by the President, to be eligible for access to classified information.

## CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

Guideline ¶ 6 explains the Government's concern about "foreign contacts and interests" stating, "if the individual has divided loyalties or foreign financial interests, [he or she] may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism."

Guideline ¶ 7 indicates conditions that could raise a security concern and may be disqualifying in this case, including:

- (a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;
- (b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information;

(d) sharing living quarters with a person or persons; regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion;

The mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if only one relative lives in a foreign country, and an applicant has contacts with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

Applicant has relatively frequent and regular contact with her parents as does her husband with his parents. These contacts, whether out of affection or obligation with her immediate family members, create a heightened risk of foreign pressure or attempted exploitation. Her relationship with these immediate family members also creates a potential conflict of interest because it is sufficiently close to raise a security concern about her desire to help her parents and brothers by providing sensitive or classified information.

Applicant admitted and the Government produced substantial evidence of these three disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove mitigation. As previously indicated, the burden of disproving a mitigating condition never shifts to the Government.

Three Foreign Influence Mitigating Conditions under Guideline ¶ 8 are potentially applicable to these disqualifying conditions:

(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation;

Guideline ¶ 8(a) does not apply to her relationships with her parents. Her contacts with these immediate family members are not casual and infrequent. If she does not contact these family members out of affection, she certainly does so



understandably out of obligation. Applicant could be placed in a position of having to choose between her parents and the interests of the United States.

Guideline ¶ 8(b) does not apply because Appellant has not demonstrated, in the evidence she presented, a sufficient relationship and loyalty to the U.S. that she can be expected to resolve any conflict of interest in favor of the U.S. interest. Although she lived in the United States since 1989, and became a U.S. citizen in 1999, she has not demonstrated that she has such deep and longstanding relationships and loyalties in the U.S. such that she can be expected to resolve any conflict of interest in favor of the U.S. interest. The facts presented by Applicant are insufficient to overcome the security concerns as discussed in the “whole person” analysis, *infra*.

Guideline ¶ 8(c) does not apply because of the regularity and consistency of her contact with immediate family members in China.

### **“Whole Person” Analysis**

In addition to the enumerated disqualifying and mitigating conditions as discussed previously, I have considered the general adjudicative guidelines related to the whole person concept under Directive ¶ E2.2.1. “Under the whole person concept, the Administrative Judge must not consider and weigh incidents in an applicant’s life separately, in a piecemeal manner. Rather, the Judge must evaluate an applicant’s security eligibility by considering the totality of an applicant’s conduct and circumstances.”<sup>9</sup> The directive lists nine adjudicative process factors (APF) which are used for “whole person” analysis. Because foreign influence does not involve misconduct, voluntariness of participation, rehabilitation and behavior changes, etc., the eighth APF, “the potential for pressure, coercion, exploitation, or duress,” Directive ¶ E2.2.1.8, is the most relevant of the nine APFs to this adjudication.<sup>10</sup> In addition to the eighth APF, other “[a]vailable, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.” Directive ¶ E2.2.1. Ultimately, the clearance decision is “an overall common sense determination.” Directive ¶ E2.2.3.

The Appeal Board has held that the whole person analysis can properly factor in “[o]ther matters such as evidence of an applicant’s personal loyalties; the nature and extent of an applicant’s family’s ties to the U.S. relative to his [or her] ties to a foreign

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<sup>9</sup>ISCR Case No. 03-04147 at 3 (App. Bd. Nov. 4, 2005) (quoting ISCR Case No. 02-01093 at 4 (App. Bd. Dec. 11, 2003)); ISCR Case No.05-02833 at 2 (App. Bd. Mar. 19, 2007) (citing *Raffone v. Adams*, 468 F.2d 860 (2nd Cir. 1972) (taken together, separate events may have a significance that is missing when each event is viewed in isolation).

<sup>10</sup> See ISCR Case No. 02-24566 at 3 (App. Bd. July 17, 2006) (stating that an analysis under the eighth APF apparently without discussion of the other APFs was sustainable); ISCR Case No. 03-10954 at 5 (App. Bd. Mar. 8, 2006) (sole APF mentioned is eighth APF); ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006) (remanding grant of clearance because Judge did not assess “the realistic potential for exploitation”), *but see* ISCR Case No. 04-00540 at 6 (App. Bd. Jan. 5, 2007) (rejecting contention that eighth APF is exclusive circumstance in whole person analysis in foreign influence cases).

country; his or her social ties within the U.S.; and many others raised by the facts of a given case.” ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007).

Substantial mitigating evidence weighs towards granting Applicant’s security clearance. Applicant has lived in the United States for 18 years, and she has been a naturalized citizen for eight years. When she became a U.S. citizen, she swore allegiance to the United States. Her husband is also a naturalized U.S. citizen and her son is a U.S.-born citizen. There is no evidence she has ever taken any action which could cause potential harm to the United States. Applicant does appear to take her loyalty to the United States very seriously, and she has worked diligently for a defense contractor for two years.

Five circumstances weigh against Applicant in the whole person analysis. First, China is a nuclear power and China’s government is a rival of the United States. China is an authoritarian, Communist state. More importantly for security purposes, China actively seeks classified and industrial/economic information. China may attempt to use her parents and in-laws who live in China to obtain such information. Second, she had significant connections to China before she emigrated to the United States in 1989. She was born in China, and spent her formative years there. Third, her parents and in-laws are citizen residents of China. Her contacts with her parents as well as her husband’s contacts with his parents demonstrate a sense of loyalty and obligation to them which continues. Fourth, she visited China one time in 1991 for approximately two weeks to see her family since she arrived in the U.S. Her father has visited Applicant and her family in the U.S. two times in 1994 and 1998 and stayed approximately one year for each visit. Individually, these contacts may appear minimal, but collectively they demonstrate a sense of obligation and a connection with family members in China. Fifth, other than her husband, she has no other known immediate family members or other persons with whom she maintains a close relationship living in the U.S.

Applicant successfully refuted the allegation alleged in SOR ¶ 1.c. as factually incorrect. The government did not present any evidence in rebuttal.

“Because of the extreme sensitivity of security matters, there is a strong presumption against granting a security clearance. Whenever any doubt is raised . . . it is deemed best to err on the side of the government’s compelling interest in security by denying or revoking [a] clearance.” *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9<sup>th</sup> Cir. 1990). After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude Applicant has not mitigated the security concerns pertaining to foreign influence. This is a close case, but ultimately the evidence leaves me with doubts as to Applicant’s security eligibility and suitability.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my “careful consideration of the whole person factors”<sup>11</sup> and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has

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<sup>11</sup> See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

not mitigated or overcome the government's case. For the reasons stated, I conclude she is not eligible for access to classified information.

### **FORMAL FINDINGS**

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline B:           AGAINST APPLICANT

Subparagraph 1.a:                 Against Applicant

Subparagraph 1.b:                 Against Applicant

Subparagraph 1.c:                 For Applicant

### **DECISION**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Clearance is denied.

Robert J. Tuidier  
Administrative Judge