DATE: February 18, 2004

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 01-22134

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Kathryn A. Trowbridge, Esq., Department Counsel

FOR APPLICANT

Charles J. Ware, Esq.

SYNOPSIS

Applicant, who held a security clearance while working for another federal agency from which he has retired, has two sisters who are citizens and residents of the People's Republic of China; another sister who is a citizen and resident of Taiwan; and in-laws who are Taiwanese citizens, permanent residents of the U.S., and who spend considerable time in Taiwan. Applicant failed to sufficiently extenuate or mitigate foreign influence security concerns. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 24 January 2003, under the applicable Executive Order[(1)] and Department of Defense Directive,[(2)] DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision-security concerns raised under Guideline B (Foreign Influence) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on 14 February 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on 14 October 2003. I originally scheduled a hearing for 5 December 2003, but it was postponed at the request of Applicant's newly acquired attorney. On 7 January 2004, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the transcript (Tr.) of the proceeding on 15 January 2004.

RULING ON EVIDENCE

At the hearing, over the objection of the Government, Applicant called a witness to testify as an expert concerning the denial of Applicant's security clearance. The witness had served as a clearance adjudicator and a polygrapher in a Department of Defense agency for a period of years. He has most recently been employed as a consultant by government contractors concerning security clearance issues. Applicant wanted the witness to testify that, based on 20-30 hours of interviews with Applicant, he was convinced Applicant was not a security risk. Applicant attorney contended that, "[w]ith his background dealing with these issues and dealing with people of different cultures who are in

America working at [the federal agency at which the witness formerly worked], he brings an appreciation here for the trustworthiness and the credibility, and the key issue of whether someone can be trusted with our national secrets that I haven't seen before." Tr. 31.

In evaluating the admissibility of evidence, an administrative judge is not bound by the Federal Rules of Evidence. Instead, we use them as a guide. We are bound to admit evidence that is authentic and relevant and material to an issue to be decided. *See* Directive ¶ E3.1.19. While the rules of evidence may be relaxed in administrative hearings, there is no reason to clutter the record with "junk science." Thus, it is appropriate to apply the Federal Rules of Evidence as a framework for analyzing the proposed testimony.

If scientific, technical, or other specialized knowledge will assist the tier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. Neither the witness nor Applicant's counsel was prepared to discuss this case in terms of this standard. The witness took notes during his many hours of interviews with Applicant, but did not bring them to the hearing or otherwise make them available to Department Counsel. *See* Fed. R. Evid. 705 (giving judge authority to require witness to disclose underlying facts on cross-examination).

After carefully considering the witness's testimony, I concluded Applicant failed to establish Applicant was an expert within the meaning of the Federal Rules of Evidence. Applicant failed to demonstrate that the testimony was the product or reliable principles and methods or that the witness had applied the principles and methods reliably to the facts of this case. More importantly, Applicant failed to demonstrate how the witness's testimony would assist the trier of fact. The fact that, based on his experience as an adjudicator at a different agency some years in the past, the witness believed the DOHA adjudicator's erred by issuing an SOR is not an issue within my purview. My jurisdiction is limited to deciding whether it is in the national interest to grant or continue a security clearance for Applicant. The witness was certainly not qualified as an expert on whether Applicant should be granted a clearance. Therefore, I denied the request to permit the witness to testify as an expert, but ruled that he could testify as a character witness.

FINDINGS OF FACT

Applicant is a 70-year-old native of China. His father was a high-ranking official in the Chinese government before the communists overthrew it in 1949. The family fled from what is now the People's Republic of China (PRC) to Taiwan, where Applicant was educated and performed his military service. He became a naturalized U.S. citizen in 1972. He worked for an agency of the U.S. government as a Chinese Language Officer for 27 years before he retired. He held a top secret clearance at that agency.

From 1964-87, Applicant was married to his first wife, a U.S. naturalized citizen born in the PRC. In 1988, he married his current wife, a U.S. naturalized citizen born in the Republic of China (Taiwan). His current wife's parents are citizens of Taiwan, but permanent alien residents of the U.S. They resided for some time with Applicant and his wife, but now reside with one of Applicant's wife's sisters who immigrated to the U.S. They still spend considerable time in Taiwan. Tr. 85. Applicant's father-in-law was a high-ranking government official. Tr. 98.

One of Applicant's sisters, A, is a citizen and resident of Taiwan, but spends most of her time with her daughter who lives in Thailand. She has lived, on occasion, with Applicant. This sister and her daughter visited Applicant for a few days in 1998. Applicant has two other sisters, Z and M, who are citizens and residents of the PRC. Answer. One of them was put in prison by the communists. Tr. 104. In 1997, Applicant traveled to Thailand for a family reunion, where he met with his sisters.

Applicant played mahjong with a small group of friends. One of these friends, C, was married to L, an employee of the same federal agency for which Applicant worked. L was convicted of espionage in 1986, after admitting he provided the PRC sensitive information over an 11-year period. Applicant met L and attended some social events at which L and his wife were present. When the story broke that L had been involved in espionage, Applicant reported to his supervisor his

contacts with C and L.

While on assignment in Bangkok, Thailand, for the federal agency at which he was employed, Applicant went to a massage parlor for a massage. Unbeknown to him, the individual he chose to give him a massage was a transvestite. As soon as he discovered it, he terminated the encounter.

While he was on assignment in Singapore, Applicant's supervisor in the federal agency for which he worked directed him to rent a kiosk with government funds. The supervisor later wanted the lease canceled. "As the [agency] would suffer a loss of deposit if we canceled the lease, my [first] wife . . . and her friend took over the lease without knowing of the [federal agency] involvement and hired a cook." Answer at 5. *See* Ex. 4 at 18.

Applicant retired from his job at the federal agency in 1993. In 1997, another federal agency found Applicant unsuitable for employment in accordance with Exec. Or. 10450 and the adjudicative guidelines. Ex. 12.

On 20 April 1996, Applicant executed his Questionnaire for National Security Positions (SF 86). In answer to question 14, he listed his sister Z's address as being in the U.S. Z had been staying with her son, who is a U.S. citizen residing in the U.S., but had returned to the PRC. Her son told Applicant that he expected her to return and live with him.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

CONCLUSIONS

Guideline B-Foreign Influence

In the SOR, DOHA alleged two of Applicant's sisters are citizens and residents of the PRC (¶ 1.a., 1.b.); another sister (¶ 1.c.) and his parents-in-law (¶¶ 1.d., 1.e.) are citizens and residents of Taiwan; and he traveled to Thailand in 1997 for

a family reunion (¶ 1.f.). A security risk may exist when an individual's immediate family and other persons to whom he may be bound by affection, influence, or obligation are not citizens of the U.S. or may be subject to duress. E2.A2.1.1.

The Government established by substantial evidence and Applicant's admissions that members of his immediate family, and other persons to whom he has close ties of affection or obliation are citizens or residents of foreign countries (DC E2.A2.1.2.1)-two sisters who are citizen residents of the PRC; another sister is a citizen and resident of Taiwan; and his in-laws who are citizens of Taiwan and spend considerable time there. *See* ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at *8 (App. Bd. Oct. 16, 2002) (there is a rebuttable presumption that an applicant has ties of affection, or at least obligation, to the members of his wife's immediate family).

Although it appears he had no contacts with his sisters while he was employed by the other federal agency, since retiring from that agency he has re-established relations with his sisters, even visiting Thailand for a family reunion. While his contacts with his sisters in the PRC are not frequent, they are not so casual as to keep him from a position of vulnerability. His contacts with his sister in Taiwan have been closer and more frequent. Applicant's relationship with his in-laws is neither casual nor infrequent.

A determination that the immediate family members or associates are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force an applicant to choose between loyalty to the family member or associate and loyalty to the U.S. is a mitigating condition under Guideline B. C 1. Applicant presented evidence that his sisters and his in-laws are not agents of a foreign government. However, the inquiry in a foreign influence case is not limited to consideration of whether the foreign contacts or connections are agents of a foreign power. Rather, the foreign contacts or connections must also be evaluated in terms of whether they place an applicant in a *position of vulnerability* to be influenced by coercive or noncoercive means, even if there is no evidence that a foreign country has sought to exploit that vulnerability. ISCR Case No. 00-0628 at 5 (App. Bd. Feb. 24, 2003). Such an evaluation requires consideration of the foreign countries involved.

The PRC is a totalitarian state that depends on the suppression of its people. Applicant admits that, because of the prominence of his family in China before 1949, his sisters Z and M, and their husbands have been treated unfairly by the communist regime that now controls the country. The PRC has been involved in espionage against the U.S., both military and economic. Although Taiwan is not hostile to the U.S., it has engaged in economic espionage against the U.S.

While Applicant's sisters and in-laws are not foreign agents, their presence in the PRC and Taiwan, subject to the pressures of the regimes, places Applicant in a position of vulnerability that could force him to choose between loyalty to the persons involved and loyalty to the U.S. I find against Applicant.

Guideline E-Personal Conduct

In the SOR, DOHA alleged Applicant had numerous contacts with a fellow employee of the federal agency who turned out to be a spy (¶ 2.a.); while working undercover in another country for the federal agency from which he retired, he operated an unlicensed kiosk in violation of law (¶ 2.b.); solicited a transvestite prostitute in Thailand in 1972 (¶ 2.c.); deliberately falsified his SF 86 by failing to give an accurate address for his sister (¶ 2.d.); was determined unsuitable for employment with another federal agency in 1997 (¶ 2.e.). Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the applicant may not properly safeguard classified information. Directive ¶ E2.A5.l.l.

The Government established by substantial evidence and Applicant's admissions that Applicant knew L, the spy. However, Applicant's contacts with the spy were casual, infrequent, and not as a result of any espionage activity. L was a simply a member of the same federal agency whose wife happended to play mahjong with Applicant. These circumstances do not create a security concern. I find for Applicant on ¶ 2.a.

The Government established that, while assigned to Singapore, Applicant leased a kiosk, at the direction of his supervisor, as part of a U.S. operation,. When the supervisor decided to abandon the project, Applicant notified his wife at the time, who took over the lease and operated a noodle shop out of it. It appears the shop was not licensed to do business, but the evidence does not support a finding Applicant actually operated the noodle shop or was aware it may

have been in violation of Singapore law. I find for Applicant on ¶ 2.b.

The Government failed to establish Applicant knowingly solicited a transvestite at a massage parlor in Thailand. The evidence established Applicant sought a massage and only later discovered the masseuse was actually a male, upon which he terminated the massage. The Government failed to establish that seeking a massage demonstrated a lack of judgment or made Applicant susceptible to being exploited or blackmailed. I find for Applicant on ¶ 2.c.

The Government failed to establish Applicant deliberately falsified his SCA by listing one of his sisters as living with her son in the U.S. I find Applicant's explanation that his nephew thought his mother would return and live with him is credible. Finding is for Applicant on ¶ 2.d.

The Government established Applicant was found to be unsuitable for employment with another federal agency. Ex. 12. This fact could be considered to be unfavorable information by other employers or acquaintances that could raise a security concern. DC E2.A5.1.2.1. However, such a decision is no more binding on the decision in this case than would the fact Applicant had received a favorable clearance from another federal agency. The reasons for the other agency's decision are not clear. Thus, there is no way of knowing whether the decision was based on a condition that no longer exists, and what, if any, mitigating conditions might apply. I find for Applicant on ¶ 2.e.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline B: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For Applicant

Subparagraph 2.d.: For Applicant

Subparagraph 2.e.: For Applicant

DECISION

Applicant failed to establish it is clearly consistent with the national interest to grant or continue his security clearance. Clearance is denied.

James A. Young

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.

2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.