

DATE: October 27, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-22461

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

William D. Byassee, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated November 10, 2003, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline B (Foreign Influence). Administrative Judge Henry Lazzaro issued a favorable security clearance decision, dated January 5, 2005.

Department Counsel appealed the Administrative Judge's favorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

The following issues have been raised on appeal: (1) whether the Administrative Judge erred by concluding Foreign Influence Mitigating Condition 1 applied; (2) whether the Administrative Judge erred by concluding Foreign Influence Mitigating Condition 3 applied; (3) whether the Administrative Judge erred by concluding Applicant was entitled to some consideration under Foreign Influence Mitigating Condition 5; and (4) whether the Administrative Judge's favorable decision is sustainable under the whole person concept. For the reasons that follow, the Board reverses the Administrative Judge's decision.

Scope of Review

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. Directive, Additional Procedural Guidance, Item E3.1.32. *See also* ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. Directive, Additional Procedural Guidance, Item E3.1.32.3. In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an

explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3 (citing Supreme Court decision). In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Article VI, clause 2 (Supremacy Clause). *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3 (citing Supreme Court decisions).

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

When an appeal issue raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

Is the error harmful or harmless? *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine);

Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (citing federal cases); and

If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded? (Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3).

Appeal Issues

1. Whether the Administrative Judge erred by concluding Foreign Influence Mitigating Condition 1 applied. The Administrative Judge concluded that security concerns were raised under Guideline B (Foreign Influence) because of Applicant's ties and contacts with four brothers and two sisters who are citizens and residents of Taiwan. Department Counsel challenges the Judge's conclusion those security concerns were mitigated under Foreign Influence Mitigating Condition 1. ⁽¹⁾ In support of that challenge, Department Counsel argues:

(a) the Judge impermissibly shifted the burden of proof to Department Counsel to disprove the applicability of Mitigating Condition 1;

(b) the Judge gave undue weight to his conclusion that there is no evidence that Taiwan has sought to exploit Applicant's relatives in the past;

(c) the Judge gave undue weight to his finding that Taiwan is a friendly country;

(d) the Judge ignored record evidence that runs contrary to the Judge's characterization of U.S.-Taiwan relations and shows security concerns exist despite the friendly nature of U.S.-Taiwan relations; and

(e) the Judge evaluated the security significance of Applicant's family ties in a piecemeal manner.

In support of the Judge's application of Foreign Influence Mitigating Condition 1, Applicant argues:

- (i) the Judge specifically stated that the burden of proof rests with Applicant;
- (ii) although the Judge mentions the absence of evidence of past coercion by Taiwan, that portion of the decision does not constitute the focus of the Judge's analysis;
- (iii) it was proper for the Judge to take into account the friendly nature of U.S.-Taiwan relations; and
- (iv) in the alternative, even if the Board were to conclude that the Judge erred, any such error was harmless because the Judge's application of Foreign Influence Mitigating Condition 1 "was ultimately based on [Applicant's] evidence regarding himself, his family and his life and not on Taiwan's friendliness or the absence of evidence of prior coercion by Taiwan."

For the reasons that follow, the Board concludes Department Counsel has demonstrated the Judge erred by applying Foreign Influence Mitigating Condition 1.

(a) Applicant correctly notes that the Administrative Judge specifically states that the burden of persuasion rests with Applicant. However, there are passages in the decision below that indicate the Judge based his conclusion about Foreign Influence Mitigating Condition 1 on the absence of certain kinds of evidence, which makes sense only if the Judge was assuming or deciding that Department Counsel had the burden of presenting such evidence in order to disprove Foreign Influence Mitigating Condition 1 was applicable to Applicant's case. Although the Judge stated the burden of proof standard properly, the Judge's decision exhibits reasoning that runs contrary to that standard. When faced with what appears to be a conflict or divergence between a Judge's statement of the correct legal standard to be applied and the Judge's application of that legal standard in a particular case, the Board must decide the following: (i) whether the conflict or divergence is real or only apparent; and (ii) if the conflict or divergence is real, whether harmful error has occurred. ⁽²⁾

Considering the Administrative Judge's decision as a whole, the Board concludes the Judge misapplied the burden of proof. Applicant has the burden of proving the applicability of Foreign Influence Mitigating Condition 1. Department Counsel does not have the burden of presenting evidence to disprove the applicability of Foreign Influence Mitigating Condition 1. ⁽³⁾ By relying on the absence of certain kinds of evidence to draw conclusions favorable to Applicant concerning Foreign Influence Mitigating Condition 1, the Judge was -- for all practical purposes -- shifting the burden of proof from Applicant to Department Counsel.

(b) Department Counsel persuasively argues that the Administrative Judge gave undue weight to his conclusion that there is no evidence Taiwan has sought to exploit Applicant's relatives in the past. There is no requirement that Department Counsel present evidence that an applicant poses a clear and present danger or imminent threat to national security. ⁽⁴⁾ Nor is Department Counsel required to present evidence that Taiwan has sought to exploit Applicant's relatives in the past. ⁽⁵⁾ By focusing on the absence of such evidence, the Judge was drawing conclusions favorable to Applicant because Department Counsel did not present a kind of evidence that it had no obligation to present. Applicant's counter-argument -- (*i.e.*, the Judge mentioned the absence of evidence of past coercion, but it does not constitute the "focus" of the Judge's analysis) -- is not persuasive.

(c) The Administrative Judge used his finding that Taiwan is a friendly country in an arbitrary and capricious manner. Given the wording of the decision (especially Decision at pp. 6-7, where Judge specifically states that certain information "is significant in determining whether a security concern exists . . ."), we conclude the Judge was plainly signaling that he was giving great weight to such evidence -- and in the process cited reasons that fail to provide rational support for his favorable conclusions.

First, the United States, Great Britain, Canada, Australia, and other countries with stable, democratic or representative forms of government engage in intelligence gathering. Totalitarian regimes and dictatorial governments are not the only ones engaging in espionage. Accordingly, the Judge articulated no rationale for his conclusion that the stability of Taiwan's democratic form of government reduces the security risk in Applicant's case.

Second, the countries cited in the preceding paragraph, and others, have good human rights records, yet engage in

intelligence gathering. The Judge's conclusion that Taiwan's improved human rights record reduces the security risk makes sense only if the Judge was focusing on coercive forms of influence or pressure and ignoring the risk of noncoercive forms of influence or pressure. Nothing in Guideline B limits or restricts its scope to coercive forms of foreign influence.⁽⁶⁾ Furthermore, although evidence that a foreign country engages in human rights violations can have probative value in showing that an applicant's immediate family members in that country may be more vulnerable to coercive pressure from the foreign government, such evidence is not a requirement under Guideline B. Not all forms of influence or pressure that a foreign government may try exert on an individual involve violations of human rights.

Third, the Administrative Judge's discussion about Taiwan's trade contacts with the People's Republic of China is irrelevant to whether Applicant's family ties render him vulnerable to foreign influence or pressure.

Fourth, the Administrative Judge failed to articulate how sales of U.S. military equipment to Taiwan have anything to do with assessing Applicant's security eligibility. The fact that the United States sells military equipment to a particular country does not have any apparent relevance to the security eligibility of a particular applicant, nor does it have any apparent probative value as to whether that country has an interest in gaining unauthorized access to U.S. classified information.

Fifth, Department Counsel correctly notes that Guideline B (Foreign Influence) does not differentiate between friendly and hostile countries. The compelling government interest in protecting classified information,⁽⁷⁾ is not limited to protecting classified information only from persons, organizations, or countries that have interests that are inimical to the United States.⁽⁸⁾

For all these reasons, taken cumulatively, the Board concludes the Administrative Judge relied on his finding that Taiwan is a friendly country in a manner that is arbitrary and capricious.

(d) There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically stated otherwise.⁽⁹⁾ A party's personal belief, however sincerely held, is not sufficient to raise a serious question as to whether a Judge considered the record evidence; rather, there must be some basis in the record that would permit a reasonable, disinterested person to fairly question whether the Judge considered the record evidence.⁽¹⁰⁾ The presumption that the Judge considered all the record evidence can be rebutted when a party can point to significant record evidence that runs contrary to a Judge's findings and conclusions, and which -- as a matter of common sense or practical reasoning -- should have been explicitly acknowledged and expressly taken into account in order for the Judge's analysis to be reasonable and not arbitrary or capricious.⁽¹¹⁾ In this case, Department Counsel is correct in pointing out that the Judge focused on the evidence concerning the friendly nature of U.S.-Taiwan relations and failed to mention or discuss contrary record evidence that indicated Taiwan could pose a security risk.

(e) There is merit to Department Counsel's contention that the Administrative Judge evaluated the security significance of Applicant's family ties in a piecemeal manner. Given the evidence concerning the totality of Applicant's ties with relatives in Taiwan,⁽¹²⁾ the Judge failed to articulate a rational basis for his conclusion that the totality of those family ties did not pose a security concern under Guideline B (Foreign Influence).

The Board does not find persuasive Applicant's argument that it is improper for Department Counsel to argue about relatives of his in Taiwan who were not specifically referenced in the SOR. An SOR is not a criminal indictment, and not every relevant piece of evidence has to be cited in an SOR. Matters not specifically alleged in an SOR, but fairly raised during a hearing (with the applicant having notice and an opportunity to respond) can be considered to be part of the case.⁽¹³⁾ Significantly, during the proceedings below Applicant did not object to references about the children of his siblings (*see* Applicant's answer to SOR; Hearing Transcript at pp. 73, 116-117). Nor did Applicant object when he was asked about his wife's parents in Taiwan (Hearing Transcript at pp. 106-107), his wife's siblings (Hearing Transcript at pp. 115-116), his wife's ties to Taiwan (Hearing Transcript at pp. 107, 121), whether he was providing support to anyone in Taiwan (Hearing Transcript at p. 128), or whether he had contacts with professionals in either Taiwan or the People's Republic of China (Hearing Transcript at pp. 129, 132-133). Applicant had ample opportunity to object to any questions about relatives of his or other people not listed in the SOR, and he did not do so. And, during closing argument, Applicant's counsel said his client should get credit for being open about his nieces and nephews (Hearing

Transcript at p. 192). In view of the foregoing, Applicant waived any objection to references about his nieces and nephews.

Moreover, as a matter of common sense and practical experience, an applicant's ties with his or her siblings cannot be considered in isolation from the immediate families of those siblings. The facts and circumstances of the immediate family of an applicant's siblings may be relevant to assessing the security significance of the applicant's ties with those siblings. The Board has held that a Judge can consider the security significance of an applicant's ties with his or her in-laws (who are not immediate family members, as defined in Foreign Influence Mitigating Condition 1) on the premise that the applicant could be influenced or pressured through the parents of his or her spouse.⁽¹⁴⁾ Furthermore, although Foreign Influence Mitigating Condition 1 refers to "immediate family members," Foreign Influence Disqualifying Condition 1 refers to "[a]n immediate family member, or a person to whom the individual has close ties of affection or obligation. . . ."⁽¹⁵⁾ Similarly, Foreign Influence Disqualifying Conditions 2, 3, and 4⁽¹⁶⁾ refer to categories of persons other than an applicant's immediate family members. Accordingly, security concerns can be raised under Guideline B (Foreign Influence) by ties to persons other than immediate family members. Accordingly, it is not persuasive for Applicant to contend that evidence concerning the children of his siblings is not pertinent to an evaluation of his security eligibility under Guideline B.

Applicant's counter argument about his family ties is not persuasive, because it focuses largely on the lack of family ties to the Taiwanese government, and the lack of prominence of his relatives in Taiwan. Because Mitigating Condition 1 is bifurcated in nature, the absence of evidence that Applicant's relatives are agents of the Taiwanese government is not dispositive.⁽¹⁷⁾ Moreover, the Board has rejected the assumption that the lack of prominence means there are no security concerns under Guideline B (Foreign Influence). There is no good reason to assume that a foreign government interested in gaining unauthorized access to classified U.S. information would consider exerting influence or pressure only when an applicant has relatives abroad who are prominent persons.⁽¹⁸⁾

(f) The Board does not find persuasive Applicant's argument that it is "inconceivable" to him that anyone could seek to exploit him through his relatives in Taiwan. Applicant's personal opinion about the security significance of his family ties is not entitled to much weight. In making security clearance decisions, the federal government is not constrained by an applicant's opinion about the security significance of the applicant's conduct and circumstances.⁽¹⁹⁾ Furthermore, what is or is not conceivable to an applicant does not have probative value as to what is or is not conceivable to a foreign government.⁽²⁰⁾

Applicant's reliance on the Administrative Judge decision in ISCR Case No. 02-20356 (November 26, 2003) is misplaced. Apart from the fact that the decision in that case is not legally binding on the Board, that decision is wholly unpersuasive because the Judge explicitly used reasoning that has not been accepted by the Board in similar Guideline B (Foreign Influence) cases. Moreover, the Judge's analysis in that case appears to be based, in part, on reasoning that treats a favorable credibility determination as record evidence and says that credible testimony must be given significant weight. Although a credibility determination is an important part of a Judge's evaluation of witness testimony, a credibility determination -- whether it is favorable or unfavorable -- is not a substitute for record evidence in support of a party's case.⁽²¹⁾

Applicant's reliance on the Board decision in ISCR Case No. 99-0331 (May 26, 1999) also is misplaced. Department Counsel is not arguing for a *per se* rule in this case. Rather, Department Counsel is arguing that the facts and circumstances of Applicant's ties and contacts with family members in Taiwan and his ownership of property interests in Taiwan raise security concerns under Guideline B (Foreign Influence) and that Applicant did not meet his burden of presenting evidence sufficient to rebut, extenuate, or mitigate those security concerns.

2. Whether the Administrative Judge erred by concluding Foreign Influence Mitigating Condition 3 applies. Department Counsel contends the Judge erred by applying Foreign Influence Mitigating Condition 3⁽²²⁾ because: (a) the frequency of contacts is separate from the nature of the contacts; and (b) the record evidence -- viewed in its entirety -- indicates Applicant's ties are not casual in nature. Applicant asserts the Judge's application of this mitigating condition is warranted because he presented evidence showing his contacts with his relatives in Taiwan are limited and casual in nature.

Applicant is correct in noting there is a rebuttable presumption that contacts with immediate family members are not casual in nature, ⁽²³⁾ and correct that an applicant has the opportunity to present evidence to rebut or overcome that presumption. However, Applicant's argument that the evidence shows he has limited contacts with relatives in Taiwan does not have the significance that he seeks to attribute to it. Department Counsel is correct in noting that the frequency of an applicant's contacts is not the same as the nature of those contacts. ⁽²⁴⁾ Given the record evidence in this case concerning the nature of Applicant's contacts with his relatives in Taiwan, Department Counsel's claim of error is persuasive. Given the Administrative Judge's own findings of fact about Applicant's contacts and ties with relatives in Taiwan (including Applicant's potential for future travel to Taiwan in the event of any serious health problem involving his family there, or their death), the Judge failed to articulate a rational basis for concluding that application of Foreign Influence Mitigating Condition 3 was warranted.

3. Whether it was arbitrary and capricious for the Administrative Judge to conclude Applicant was entitled to some consideration under Foreign Influence Mitigating Condition 5. Department Counsel contends the Administrative Judge properly concluded that Foreign Influence Disqualifying Condition 8 ⁽²⁵⁾ applied because of Applicant's property interests in Taiwan, but erred by then concluding Applicant was entitled to some consideration under Foreign Influence Mitigating Condition 5 ⁽²⁶⁾ because: (a) the Judge undervalued Applicant's Taiwan property; (b) there is no record evidence that Applicant is currently entitled to his disability benefits, and the Judge neglected to consider the testimony that Applicant would be liable for an early withdrawal penalty; (c) the Judge failed to give due weight to Applicant's sentimental and familial connections to his property in Taiwan; and (d) the record evidence shows Applicant has taken steps to retain his property in Taiwan, and that evidence shows it is valuable to him. Applicant responds that the Judge did not err, arguing that the record evidence supports the Judge's application of Foreign Influence Mitigating Condition 5.

Given the Administrative Judge's conclusion that Applicant's property interests in Taiwan are not minimal, the Judge properly noted that Foreign Influence Mitigating Condition 5 was not applicable in light of its wording (Decision at p. 8). The question before the Board is whether the Judge articulated a sustainable rationale for his decision that Applicant "is entitled to some consideration under [Foreign Influence Mitigating Condition 5]." That decision is predicated on his conclusion that Applicant's property interests in Taiwan "are not sufficient to affect his security responsibilities" (Decision at p. 8).

Given the Administrative Judge's own findings of fact about Applicant's property interests in Taiwan, and the Judge's conclusion that those foreign property interests are significant enough to fall under Foreign Influence Disqualifying Condition 8, the Judge failed to articulate a rational basis for his conclusion that those foreign property interests "are not sufficient to affect [Applicant's] security responsibilities." Department Counsel persuasively argues that the record evidence shows Applicant has sentimental and familial connections to his property in Taiwan, and he has taken various steps with respect to the handling of his property in Taiwan that show it is valuable to him. ⁽²⁷⁾ Moreover, the Judge failed to explain how Applicant's stated intent to divest himself of the property in Taiwan over the next three to five years is mitigating at this time.

4. Whether the Administrative Judge's favorable decision is sustainable under the whole person concept. In challenging the Administrative Judge's decision, Department Counsel also contends the Judge's favorable conclusions about Applicant's security eligibility are arbitrary and capricious and not supported by the record evidence as a whole. And, Applicant's reply brief asks the Board to affirm the Judge's decision as being consistent with the whole person concept. Taken together, those arguments raise the issue of whether the Judge's favorable decision is sustainable under the whole person concept. ⁽²⁸⁾

An Administrative Judge must apply pertinent Adjudicative Guidelines disqualifying and mitigating conditions. ⁽²⁹⁾ However, a Judge's obligation to apply pertinent provisions of the Adjudicative Guidelines does not override the Judge's obligation to evaluate an applicant's security eligibility in light of the whole person concept. ⁽³⁰⁾ Accordingly, the mere presence or absence of an Adjudicative Guidelines disqualifying or mitigating condition is not solely dispositive of a case. ⁽³¹⁾ Even if there is an Adjudicative Guidelines disqualifying or mitigating condition that is applicable, a Judge

must consider the applicable disqualifying or mitigating condition in light of the record evidence as a whole and any pertinent general factors, ⁽³²⁾ and decide what weight can reasonably be given to the applicable disqualifying or mitigating condition. ⁽³³⁾ And, if a Judge reasonably concludes that particular Adjudicative Guidelines disqualifying or mitigating conditions do not apply to the specific of a case, the Judge still must evaluate the applicant's security eligibility under the general factors of Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1 (which refers to the whole person concept). ⁽³⁴⁾

In view of the foregoing, the Board concludes: (a) the Department Counsel's claims of error regarding specific provisions of the Adjudicative Guidelines do not preclude its claims that the Judge reached favorable conclusions about Applicant's security eligibility that are arbitrary and capricious and not supported by the record evidence; and (b) the Board's rulings that Department Counsel has demonstrated error in the Judge's application of the Adjudicative Guidelines do not foreclose Applicant from arguing that the Judge's decision is sustainable under the whole person concept.

Applicant correctly argues that deference should be given to the Administrative Judge's credibility determinations. ⁽³⁵⁾ However, Department Counsel is not required to challenge the Judge's credibility determinations in order to raise claims of error based on grounds unrelated to those credibility determinations. ⁽³⁶⁾ Moreover, as noted earlier in this decision, a credibility determination is not a substitute for record evidence, and it does not relieve a Judge of the obligation to consider a witness's testimony in light of the record evidence as a whole. ⁽³⁷⁾ Accordingly, the Judge's favorable assessment of Applicant's credibility does not satisfy the Judge's obligation to evaluate Applicant's security eligibility in light of the record evidence as a whole.

As discussed earlier in this decision, there is merit to Department Counsel's contention that the Administrative Judge evaluated the security significance of Applicant's family ties in a piecemeal manner. Such a piecemeal analysis of Applicant's ties with relatives in Taiwan is not consistent with the whole person concept.

Because the Administrative Judge erred in his application of pertinent provisions of the Adjudicative Guidelines, the continued viability of the Judge's favorable conclusions about the Applicant's security eligibility under Guideline B (Foreign Influence) turns on whether the Judge articulated a rational basis for those favorable conclusions that is consistent with a whole person analysis in light of the record evidence as a whole. The Judge's whole person analysis focuses on a brief recitation of Applicant's employment record, Applicant's scholarly accomplishments, his reputation with supervisors and coworkers, his stable family life, his financial acquisitions in the United States, and the academic accomplishments of his daughter (Decision at p. 8). Apart from simply reciting these favorable facts, the Judge did not discuss or explain how they refute, extenuate, or mitigate the security concerns raised under Guideline B (Foreign Influence) by the record evidence of Applicant's ties and contacts with immediate family members and other relatives in Taiwan and Applicant's not insignificant property interests in that country. ⁽³⁸⁾ Having reasonably concluded that the record evidence raised security concerns under Guideline B, the Judge failed to articulate a discernable, rational basis for why he concluded the favorable facts he recited showed refutation, extenuation, or mitigation of those security concerns. Because the favorable facts recited by the Judge do not readily suggest refutation, extenuation, or mitigation of the security concerns raised under Guideline B, ⁽³⁹⁾ the Judge's recitation of those favorable facts was not sufficient to support his favorable conclusions under Guideline B. ⁽⁴⁰⁾ The Judge's recitation of favorable facts not having any discernible connection to the security concerns raised under Guideline B suggests an arbitrary and capricious analysis. ⁽⁴¹⁾ Applicant's arguments in support of affirming the Judge's evaluation of his security eligibility under the whole person concept are not persuasive.

Conclusion

Department Counsel has demonstrated several errors below that, taken cumulatively, warrant reversal. Accordingly, pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.3, the Board reverses the Judge's favorable security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Dissenting Opinion of Administrative Judge Michael Y. Ra'anan

My analysis of this case differs considerably from my colleagues' view. Therefore I set it forth below.

(1) Whether the Administrative Judge erred in his application of Guideline B Mitigating Condition 1. Department Counsel argues that the Administrative Judge misapplied Guideline B (Foreign Influence) Mitigating Condition (MC) 1 [\(42\)](#) for three reasons: (a) the Judge erroneously shifted the burden from Applicant to the Department Counsel, (b) the Judge misused his finding that Taiwan is a friendly country and (c) Applicant had failed to meet his burden of demonstrating that the second prong of MC 1 applied to Applicant's situation. Only the third argument is persuasive.

Department Counsel's first argument is not persuasive because (with one exception which will be discussed in the context of Department Counsel's third argument) there is nothing in the Administrative Judge's decision which suggests that he shifted the burden to the government of disproving a mitigating condition. Indeed, the Judge specifically noted that the burden shifts to the Applicant to demonstrate mitigation once the government has met its burden of proving controverted facts. The Judge specifically noted, "Still, the Applicant bears the burden of demonstrating his family ties with relatives living in Taiwan do not pose a security risk."

Department Counsel's second argument is not persuasive. The Administrative Judge did cite Taiwan's friendly relations with the United States which is a reasonable interpretation of the government's exhibits. However, a full reading of the Judge's decision leads me to conclude that the Judge did not rely disproportionately on Taiwan's friendly status in reaching his conclusions. Rather, the Judge focused on his perception of the quality and quantity of Applicant's family ties.

Department Counsel's third argument [\(43\)](#) is persuasive.

The Board has previously noted that an Administrative Judge does not have unfettered discretion when deciding whether particular provisions of the Adjudicative Guidelines are applicable. Rather, a Judge must exercise sound judgment within the parameters set by the Directive when deciding which Adjudicative Guidelines disqualifying or mitigating conditions are applicable to the particular facts of a given case. Accordingly, when a Judge's application of the Adjudicative Guidelines is challenged on appeal, the Board must consider whether the appealing party has shown the Judge's application is (a) not supported by the record evidence; (b) arbitrary or capricious; or (c) contrary to law. *See, e.g.*, ISCR Case No. 02-15339 (April 29, 2004), at p. 4.

Department Counsel did not challenge the Judge's conclusion that Applicant's relatives in Taiwan were not agents of a foreign power. However, the Board has previously noted that Guideline B MC 1 is bifurcated in nature and places the burden on applicants to establish that their immediate family members or other persons to whom they have close ties of affection or obligation and who reside in a foreign country are not in a position to be exploited in a way that could force Applicant to choose between loyalty to the persons involved and the United States. *See, e.g.*, ISCR Case No. 02-15339 (April 29, 2004) at p. 4. Department Counsel persuasively argues that the Judge's application of this second prong of MC 1 was arbitrary and capricious.

The Judge wrote that "The best predictor of whether Applicant's relatives are in a position to be exploited in the future is the Taiwan government's past conduct." He went on to say that the Taiwanese government had not taken any action to exploit Applicant's relationship with his Taiwanese relatives. The Judge's reasoning here is erroneous for several reasons. There is no basis in this record nor does the Judge explain a logical basis for the supposition as to what is the best predictor. Neither the Government of Taiwan nor any other entity had a known incentive to exploit Applicant's relationships when he did not yet have a security clearance. It is not a reasonable supposition that the only entity which might seek to exploit Applicant's foreign relationships is the government of Taiwan. The Judge's reasoning implicitly shifted the burden of production in the application of this mitigating condition from Applicant to Department Counsel. For all these reasons the Judge's reasoning is unpersuasive. The Judge also cited other factors albeit with less vigor. None of the factors cited by the Judge justify the application of the second prong of MC 1.

(2) Whether the Administrative Judge erred in his application of Guideline B Mitigating Condition 3. The Administrative Judge applied Guideline B MC 3⁽⁴⁴⁾ to Applicant's benefit. Regarding MC 3, the Board has previously noted that there is a rebuttable presumption that contacts with immediate family members are not casual. Given the Administrative Judge's own findings of fact concerning Applicant's potential for future travel to Taiwan in the event of serious health problem involving his family there or their death, that presumption is actually bolstered by the facts of this case. Therefore, the Judge had no rational basis to apply MC 3 (which requires the contact with foreign citizens to be both casual and infrequent) in this case. *See, e.g.*, ISCR Case No 02-15339 (April 29, 2004) at p. 5.

(3) Whether the Administrative Judge erred in his application of Guideline B Mitigating Condition 5. The Administrative Judge gave Applicant some credit under Guideline B MC 5.⁽⁴⁵⁾ Although not a model of clarity, the Judge analysis is plausible. He apparently recognized that Applicant's situation did conform to the language of MC5, but reasoned that Applicant was entitled to some credit under one portion of the guideline and explained the basis for his deviation from the plain language of the guideline. The Judge's analysis was within the bounds of his discretion.

(4) Whether the Administrative Judge's errors are sufficient to alter the outcome of the case given the unchallenged portions of the Judge's decision. In addition to the Administrative Judge's conclusions challenged by Department Counsel, the Judge analyzed Applicant's situation separately using a whole person approach. The Judge's whole person analysis is not challenged by Department Counsel. Indeed, Department Counsel's brief implies that such a challenge is unnecessary ("Therefore, because none of the Foreign Influence Mitigating Conditions apply in the present case and because the record evidence reflects extensive financial familial and sentimental contacts between Applicant and Taiwan, the Administrative Judge committed harmful error when he concluded that Guideline B security concerns were mitigated.").

The Board has repeatedly rejected the notion that individual adjudicative guidelines are dispositive or that an Administrative Judge cannot render a favorable decision in the absence of an applicable Adjudicative Guideline mitigating condition. (*See*, ISCR Case No. 03-12882 (July 20, 2005), at pp. 5-6 discussing earlier Board decisions).

It is well settled that there is no presumption of error. Since I conclude there is one portion of the Judge's decision which survived the Department Counsel challenge and another portion of the Judge's decision which is unchallenged, the errors demonstrated by Department Counsel are not sufficient to justify remand or reversal of the case.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

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, Adjudicative Guidelines, Item E2.A2.1.3.1).

2. *Cf.* ISCR Case No. 03-16516 (November 26, 2004) at pp. 8-9 (an Administrative Judge's statements in a decision do not bind or control the Board in the exercise of its appellate authority under the Directive).
3. *See, e.g.*, ISCR Case No. 02-02892 (June 28, 2004) at p. 6.
4. *See Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).
5. *See, e.g.*, ISCR Case No. 03-16516 (November 26, 2004) at p. 7.
6. *See, e.g.*, ISCR Case No. 02-02195 (April 9, 2004) at p. 6 n.14; ISCR Case No. 00-0317 (March 29, 2002) at p. 6.
7. *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988).
8. *See, e.g.*, ISCR Case No. 02-26976 (October 22, 2004) at pp. 5-6.
9. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2.
10. *See, e.g.*, ISCR Case No. 02-16657 (September 23, 2004) at p. 4.
11. *See, e.g.*, ISCR Case No. 01-22134 (August 19, 2004) at p. 4.
12. The security significance of an applicant's ties and contacts with foreign relatives must be evaluated by considering the totality of those ties and contacts, not just each one in isolation. *See, e.g.*, ISCR Case No. 02-29403 (December 14, 2004) at p. 4.
13. *See, e.g.*, ISCR Case No. 00-0633 (October 24, 2003) at p.4; ISCR Case No. 01-26479 (September 16, 2003) at p. 4; ISCR Case No. 99-0710 (March 19, 2001) at pp. 2-3.
14. *See, e.g.*, ISCR Case No. 01-03120 (February 20, 2002) at p. 4.
15. Directive, Adjudicative Guidelines, Item E2.A2.1.2.1 (emphasis added).
16. Directive, Adjudicative Guidelines, Items E2.A2.1.2.2 through E2.A2.1.2.4.
17. *See, e.g.*, ISCR Case No. 02-14995 (July 26, 2004) at p. 5.
18. *See, e.g.*, ISCR Case No. 02-02195 (April 9, 2004) at p. 6 n.15. Indeed, a foreign country could conclude it would be easier, and less likely to draw unwanted attention to that country, if it sought to exert influence or pressure on one of its citizens who is not prominent, rather than try to exert influence or pressure on one of its citizens who is prominent.
19. *See, e.g.*, ISCR Case No. 02-26976 (October 22, 2004) at p. 5. Although strict rules of evidence do not apply in DOHA proceedings (Directive, Additional Procedural Guidance, Item E3.1.19), it does not follow that a witness's opinion testimony should be deemed to have the same evidentiary value as the witness's factual testimony. Moreover, an applicant's opinion that his or her conduct or circumstances do not pose a security risk is not controlling. The federal government is not constrained to deny or revoke a security clearance only when an applicant agrees that he or she poses a security risk. *See, e.g.*, ISCR Case No. 02-29403 (December 14, 2004) at pp. 8-9.
20. *Cf.* ISCR Case No. 02-14995 (July 26, 2004) at p. 4 ("Third, Applicant's belief about whether the Iranian government knows about her access to classified information, however sincere, is not very probative as to whether the Iranian government does or does not know about her access to classified information.").
21. *See, e.g.*, ISCR Case No. 02-29403 (December 14, 2004) at pp. 5-6; ISCR Case No. 02-14995 (July 26, 2004) at pp. 6-7.
22. "Contacts and correspondence with foreign citizens are casual and infrequent" (Directive, Adjudicative Guidelines, Item E2.A2.1.3.3).

23. *See, e.g.*, ISCR Case No. 02-15339 (April 29, 2004) at p. 5.
24. *See, e.g.*, ISCR Case No. 02-09907 (March 17, 2004) at p. 9.
25. "A substantial financial interest in a country, or in any foreign-owned or -operated business that could make the individual vulnerable to foreign influence" (Directive, Adjudicative Guidelines, Item E2.A2.1.2.8).
26. "Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities" (Directive, Adjudicative Guidelines, Item E2.A2.1.3.5).
27. Department Counsel's argument that the Administrative Judge undervalued Applicant's property interests in Taiwan is not persuasive in light of the Judge's conclusion that those foreign property interests were not minimal and were substantial enough to fall under Foreign Influence Disqualifying Condition 8.
28. The Board can address issues raised by the parties on appeal, not just those issues raised by the appealing party. *See* Directive, Additional Procedural Guidance, Item E3.1.32.
29. *See* Directive, Section 6.3 and Additional Procedural Guidance, Item E3.1.25.
30. The Adjudicative Guidelines contains language that explicitly states the evaluation of an applicant's security eligibility must include consideration of all available information in light of the whole person concept. *See* Directive, Adjudicative Guidelines, Item E2.2.1. The Administrative Judge's obligation to apply pertinent provisions of the Adjudicative Guidelines does not diminish the Judge's obligation to evaluate an applicant's security eligibility in light of the whole person concept. Those two obligations are complementary, not exclusive, in nature.
31. *See, e.g.*, ISCR Case No. 02-09389 (December 29, 2004) at p. 4; ISCR Case No. 02-32006 (October 28, 2004) at p. 5.
32. Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1.
33. *See, e.g.*, ISCR Case No. 02-05110 (March 22, 2004) at pp. 4-6; ISCR Case No. 01-08565 (March 7, 2003) at p. 5.
34. *See, e.g.*, ISCR Case No. 03-11448 (August 10, 2004) at pp. 3-4.
35. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.
36. *See, e.g.*, ISCR Case No. 03-02486 (August 31, 2004) at p. 7 (noting that appealing party does not have to challenge an Administrative Judge's credibility determinations in order to raise claims of error).
37. *See, e.g.*, ISCR Case No. 02-29403 (December 14, 2004) at p. 6; ISCR Case No. 02-14995 (July 26, 2004) at p. 6; ISCR Case No. 01-26893 (October 16, 2002) at p. 7.
38. An applicant's burden of persuasion involves presenting evidence "to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel" (Directive, Additional Procedural Guidance, Item E3.1.15). Although strict rules of evidence are not applied in these proceedings (Directive, Additional Procedural Guidance, Item E3.1.19), the admission of record evidence does not relieve an Administrative Judge of the need to base his or her findings and conclusions on "relevant and material information" (Directive, Section 6.3) and to reach conclusions that are not arbitrary or capricious (Directive, Additional Procedural Guidance, Item E3.1.32.3).
39. For example, although Applicant can be justifiably proud of the academic accomplishment of his daughter, her academic accomplishments have no apparent relevance to evaluating his security eligibility. Similarly, although Applicant's scholarly accomplishments reflect favorably on him as an individual and a professional, they do not appear to have any discernible bearing on whether Applicant has refuted, extenuated, or mitigated the security concerns under Guideline B. The presence or absence of scholarly accomplishments by an applicant does not have any readily apparent bearing on whether an applicant is vulnerable to foreign influence.

40. An Administrative Judge has broad latitude in writing a security clearance decision. However, that broad latitude is not unfettered and does not permit a Judge to reach conclusions or make rulings for which there is no discernible rationale. *See, e.g.*, ISCR Case No. 98-0809 (August 19, 1999) at p. 2.

41. As discussed earlier in this decision, in deciding whether an Administrative Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether, *inter alia*, it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made.

42. "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, Adjudicative Guidelines, Item E2.A2.1.3.1.

43. Applicant notes correctly that Department Counsel discusses on appeal both Applicant's relatives who were named in the SOR and some who were not named in the SOR. The discussion here is only about those relatives who were named in the SOR. For a discussion regarding the limits of the Board's authority on issues raised for the first time on appeal, *see* ISCR Case No.03-12882 (July 20, 2005), pp. 3-5.

44. "Contact and correspondence with foreign citizens are casual and infrequent."Directive, Adjudicative Guidelines, Item E2.A2.1.3.3.

45. "Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities."Directive, Adjudicative Guidelines, Item E2.A2.1.3.5.