

DATE: June 30, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-23860

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Nichole L. Noel, Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated October 20, 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 Kathryn Moen Braeman issued a favorable security clearance decision, dated January 21, 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.

Department Counsel's appeal raises the following issues: (1) whether the Administrative Judge's application of Guideline B (Foreign Influence) Mitigating Conditions 1 and 3 was arbitrary, capricious, or contrary to law, and (2) whether the Administrative Judge erred by failing to consider the security significance of Applicant's business contacts in Taiwan. For the reasons set forth below 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 Issue

Before addressing the main appeal issue, the Board will discuss a threshold issue raised by a portion of the Department Counsel's brief, which sets forth proposed "additions" to the Administrative Judge's Findings of Fact. Although the parties are free -- within the bounds of zealous advocacy -- to argue about what the record evidence shows, it is the Judge, not the parties, that makes the findings of fact in a case. Moreover, the Directive authorizes the Board to review a Judge's findings of fact, not engage in *de novo* fact-finding on appeal. Accordingly, the Board will consider Department Counsel's proffered "additions" only to the extent they constitute argument about the record evidence in support of any specific appeal issues raised by Department Counsel.⁽¹⁾

(1) Whether the Administrative Judge's application of Guideline B (Foreign Influence) Mitigating Conditions 1⁽²⁾ and 3⁽³⁾

was arbitrary, capricious, or contrary to law. The Administrative Judge found that Applicant is 41 years old, was born in the Republic of China (Taiwan) and became a United States citizen in 2000. She found that Applicant's wife became a US citizen in 2003, his sister in 1999 and his brother in 2001. The Judge found that Applicant's parents and father-in-law are citizens and residents of Taiwan. The Judge found that Applicant traveled to Taiwan from 1994 to 1998 for business and pleasure but that the primary reason was to care for his parents. The Judge found that Applicant took an oath of allegiance to the United States and that he attests that he will not be pressured or influenced by any foreign power or by foreign relatives. The Administrative Judge concluded that Applicant's only ties to Taiwan were his elderly relatives with whom he has only limited contact. The Judge further concluded that Applicant's relatives had no ties to the Taiwan government and it was unlikely they or he could be exploited by the government of Taiwan in a way that could force Applicant to choose between loyalty to his parents and his father-in-law and his loyalty to the United States.

The Judge applied Guideline B Mitigating Conditions (MC) 1 and 3 in Applicant's favor. Department Counsel's appeal raises the issue of whether the Judge's application of MC 1 and MC3 was arbitrary, capricious, and contrary to law in light of the Judge's findings.

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.

Department Counsel correctly points out that the Administrative Judge's heavy reliance on the notion that Taiwan is a friendly country and a "commercial ally" is misplaced. The Board has held that certain historical realities caution against reliance on overly simplistic distinctions between "friendly" nations and "hostile" nations when adjudicating cases under Guideline B. *See, e.g.*, ISCR Case No. 00-0317 (March 29, 2002) at p. 6. Moreover, other findings of the Administrative Judge do not rationally support the application of Guideline B MC 1. The Judge cites the following in support of her conclusion that it is unlikely that Applicant's relatives would be exploited by the government in a way that could force Applicant to choose between loyalty to his Taiwan relatives and his loyalty to the United States: (a) the fact that the relatives are elderly; (b) the fact that the relatives are financially self-sufficient; and (c) the fact that the relatives are eager to become permanent residents of the United States and eventually citizens. The Judge failed to articulate a rational basis for her conclusion that the age of Applicant's relatives reduces the security risk. To the extent that Applicant's relatives are vulnerable to the power of the Taiwan government to exert pressure on them, their age is irrelevant. *See, e.g.*, ISCR Case No. 02-04786 (June 27, 2003) at p. 5. Similarly, the security concerns raised by the presence of Applicant's family members in Taiwan are not mitigated in any meaningful way by their desire to emigrate to the United States. It is not reasonable to base a security adjudication on the possibility of a safe and speedy exit of several potential emigrants from a foreign country. *See, e.g.*, ISCR Case No. 01-20908 (November 26, 2003) at p. 4. Lastly, the Judge fails to articulate a rational basis for why Applicant's relatives' financial self-sufficiency lessens the potential threat of exploitation or coercion. As the Board can discern no basis in the Judge's decision for her application of the second prong of MC 1 other than the ones discussed here, it concludes that the Judge's application of the mitigating factor reflects an arbitrary and capricious analysis.

Regarding Guideline B MC 3, the Board has also 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 travel to Taiwan to take care of his family there, 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.

(2) Whether the Administrative Judge erred by failing to consider the security significance of Applicant's business contacts in Taiwan. The Administrative Judge found that from August 1999 to February 2000, Applicant worked for a U.S. company that conducted a product export business with businesses in Taiwan. She also found that Applicant made five business trips to Taiwan during that time and made contact with various clients. The Judge found that Applicant terminated his employment with the company in 2000 and all contact with his Taiwanese clients ceased. The Judge concluded that the travel and business contacts Applicant made, by itself, did not raise security concerns and that, in any event, his business contacts in Taiwan on behalf of the company ceased when Applicant's employment terminated in 2000. On appeal, Department Counsel argues that the Administrative Judge erroneously concluded that Applicant's

business trips to Taiwan did not raise security concerns. Department Counsel's argument is not persuasive. Given her findings, the Judge was not required as a matter of law to conclude that Applicant's prior business activities in Taiwan were disqualifying under Guideline B.

Conclusion

Department Counsel has met its burden on appeal of demonstrating harmful error warranting reversal of the Administrative Judge's January 21, 2005 decision. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.3, the Board reverses the Administrative Judge's favorable security clearance decision.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. If a party believes the Administrative Judge's decision does not set forth pertinent findings of fact, then the party can consider whether to raise a claim that the Judge failed to comply with the requirements of Directive, Additional Procedural Guidance, Item E3.1.25. If a party believes the Judge reached conclusions that do not rationally follow from, or are not adequately supported by, the Judge's findings of fact, then the party can consider whether to raise a claim that the Judge's conclusions are arbitrary or capricious.

2. "A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States." Directive, Adjudicative Guidelines, Item E2.A2.1.3.1.

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