

DATE: March 29, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-24875

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

August Bequai, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 2, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline B (Foreign Influence) pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On September 13, 2005, after the hearing, Administrative Judge John Grattan etz, Jr. denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Administrative Judge erred in taking administrative notice of *U.S. Department of State, Country Reports on Human Rights 2000: Laos, dated February 13, 2001*; whether the Administrative Judge erred by concluding that the security concerns raised under Guideline B had not been mitigated. We remand the case to the Administrative Judge.

Whether the Record Support the Administrative Judge's Factual Findings.

A. Facts

The Administrative Judge found the following:

Applicant is a 43-year-old micro electronic assembler employed by a defense contractor since May 2000. She held an industrial security clearance from 1992 to 1999.

Applicant was born in Laos in 1961 and raised there. She fled the country in 1979 and came to the U.S., where she became a naturalized citizen in June 1988. Applicant obtained her first U.S. passport in December 1988 and renewed it in April 2001. By operation of Laotian law, Applicant lost her Laotian citizenship when she became a U.S. citizen. She has lived in the U.S. since 1979.

Applicant has eleven siblings (seven sisters and four brothers). Four of her siblings live in the U.S. and are naturalized citizens. They have lived in the U.S. over 20 years. A fifth sibling lives in the U.S., but retains her Laotian citizenship as she seeks legal permanent resident status. Two sisters live in Switzerland and have obtained Swiss citizenship. They have lived in Switzerland over 20 years. Four siblings remain citizens and residents of Laos. Applicant maintains

regular contact with her siblings in Laos, and returned to Laos in 1989, 1993, 1994, 2001, and 2004 to visit them. These visits typically ran 2-5 weeks, given the time and expense of flying to Laos. Three of her siblings in Laos are employed by the Laotian government. One retired from government service.

Of Applicant's siblings living in Laos, one brother is employed as an electrician with the government-owned electric utility. Another brother retired from employment as an electrician with the government-owned electric utility. A third brother is a diplomat in the Laotian foreign service. Her sister is a doctor, employed in a government-run health clinic. She speaks to her sister by telephone several times per month. She usually sees her brothers only when she is in Laos. In addition, she has had family members in Laos and Switzerland visit her in the U.S.

Applicant's character references, both at and outside work, consider her a reliable and trustworthy person. She has an excellent work record and her employer recommends her for a clearance.

Laos is an authoritarian, Communist, one-party state with a poor human rights record. Government officials use arbitrary arrest, detention, and intrusive surveillance. The government infringes privacy rights and possesses a vast surveillance network. Security laws allow the government to monitor individual's communications and movements.

B. Discussion

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 ¶ 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.

There are no issues relating to the Administrative Judge's findings that are ripe for consideration at this time.

Whether the Record Supports the Administrative Judge's Ultimate Conclusions.

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 ¶ 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, for example, whether it: does not examine relevant evidence; fails to articulate a satisfactory explanation for its conclusions; does not consider relevant factors; fails to consider an important aspect of the case; offers an explanation for the decision that runs contrary to the record evidence; or is so implausible that it cannot be ascribed to a mere difference of opinion. 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.

At the hearing, Department Counsel asked the Administrative Judge to take administrative notice of *U.S. Department of State, Country Reports on Human Rights 2000: Laos, dated February 13, 2001*. Applicant objected, based upon her contention that "it's not relevant to the security concern at issue." After conducting a discussion with both counsel about the document, the Judge ruled that he would take administrative notice of it. ⁽¹⁾ Applicant contends the Judge erred by taking administrative notice of the document because it is outdated and irrelevant.

A copy of the document in question is not in the case file. The Board cannot consider in a vacuum, without reference to a properly developed record, whether a document was properly noticed by an Administrative Judge. *See* ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004). There is no indication from the hearing transcript that the Judge marked the document for identification and placed it in the case file. Accordingly, we remand the case to the Judge for the purpose of locating the document in question and making it part of the record. The Judge has the discretion to seek the cooperation of the parties in locating the document and making it part of the case record. The other issue raised by the Applicant is not ripe

for consideration at this time.

Order

The decision of the Administrative Judge granting Applicant a clearance is REMANDED.

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Concurring Opinion of Chairman Emilio Jaksetic:

At the hearing, Applicant objected to Department Counsel's request that the Administrative Judge take administrative notice of a State Department document.⁽²⁾ The Judge overruled Applicant's objection and indicated he would take administrative notice of the State Department document. On appeal, Applicant challenges the Judge's ruling and the Judge's reliance on that State Department document. No copy of the State Department document at issue is in the case record.⁽³⁾

When the action or inaction of a Hearing Office Administrative Judge has the practical effect of interfering with a party's ability to raise an appeal issue, the Board's ability to carry out its appellate functions under the Directive, or both, then the Board must deal with the threshold problem of how to handle the dilemma posed by the Judge's action or inaction.⁽⁴⁾ Without a copy of the State Department document in the case record, the Board is not in a position to conduct a meaningful review of the appeal issue raised by Applicant.⁽⁵⁾

The particular evidentiary nature of the State Department document at issue is not relevant to the procedural problem the Board is faced with. A distinction can be drawn between the evidentiary nature of: (a) proof of matters through hearing testimony or exhibits, and (b) proof of matters through administrative or official notice.⁽⁶⁾ However, the possibility of making such a distinction between the two evidentiary categories does not supersede or override the practical need for the development of an intelligible case record so that the appeal rights of the parties and the ability of the Board to carry out its appellate responsibilities are not impaired. When an evidentiary matter is contested at the hearing -- regardless of how the evidentiary matter might be characterized -- if the case record is not adequately developed or preserved concerning the disputed evidentiary matter, then the appeal rights of the parties and the ability of the Board to carry out its appellate functions are impaired.

In view of the foregoing, I agree with my colleagues that the case should be remanded with the particular instructions given.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. Hearing Transcript at 15-16.
2. Although Department Counsel asked the Administrative Judge to take administrative notice of three State Department documents, Applicant objected only to the admissibility of one of those three documents.
3. It is not clear from the case record whether the challenged State Department document offered by Department Counsel was published, posted on the State Department Web site or some other Web site, or some combination thereof. Because of the dynamic nature of the Internet, a reference to a document's URL in the case record would not necessarily be sufficient to preserve the matter for meaningful appellate review. *See, e.g.*, ISCR Case No. 00-0628 at 4 (App. Bd. Apr. 26, 2002).
4. *See, e.g.*, ISCR Case No. 02-20365 at 3 n.3 (App. Bd. Nov. 2, 2004).
5. *See, e.g.*, ISCR Case No. 02-18668 at 4 (App. Bd. Feb. 10, 2004). Although the Board decision in ISCR Case No. 02-18668 involved a challenge to the *exclusion* of a document offered as evidence at the hearing, its reasoning is applicable to this case because the procedural posture of that case and this one is analogous. An appellate challenge to the admission of evidence over a party's objection generally does not pose a similar dilemma because the admitted evidence has been made part of the case record and is available for appellate review. This case poses the unusual situation of the Judge stating he would consider evidence over Applicant's objection without making a copy of the challenged document a part of the case record.
6. *Cf.* Federal Rules of Evidence, Advisory Committee's Note to Rule 201.