

DATE: October 12, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-24875

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

Jason Perry, Esq., 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. On March 29, 2006, the Appeal Board remanded the case to the Administrative Judge. On May 5, 2006, the Administrative Judge issued a new decision which again 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 23, 2001*; whether the Administrative Judge erred by concluding that the security concerns raised under Guideline B had not been mitigated.

(1) Applicant contends that the Administrative Judge erred in taking administrative notice of *U.S. Department of State, Country Reports on Human Rights 2000: Laos, dated February 23, 2001*.<sup>(1)</sup> In support of that contention, Applicant argues that the document was irrelevant.<sup>(2)</sup> The Board does not find this argument persuasive.

In DOHA proceedings, the Federal Rules of evidence serve only as a guide. They may be relaxed by the Administrative Judge (with one exception not applicable to this appeal<sup>(3)</sup>) in order to permit the development of a full and complete record by the parties. Directive ¶ E3.1.19. In this regard, the Board has previously noted that administrative or official notice in administrative proceedings is broader than judicial notice under the Federal Rules of Evidence. *See, e.g.*, ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004) citing *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n. 4 (3d Cir. 1986).

After reviewing the document at issue, the Board concludes that the Judge reasonably acted within his discretion in taking administrative notice of it. The document was an official U.S. Government report and it was relevant to the issues presented in the case. The document was provided in advance to the Applicant as part of the discovery process of the case, so Applicant had an appropriate opportunity to rebut its contents, or present any alternative information for the Judge to notice.

(2) Applicant argues that the evidence she provided in the proceeding below was sufficient to require the Administrative Judge to conclude, as a matter of law, that she had rebutted, mitigated or extenuated the security concerns raised by the Guideline B (Foreign Influence) allegations. Specifically, Applicant contends that the Judge's adverse decision should be reversed because the Judge erred in not applying Guideline B

Mitigating Conditions 1 <sup>(4)</sup> and 3, <sup>(5)</sup> and made an unfavorable decision that is unsupported by the record as a whole.

In this case, the Administrative Judge made sustainable findings that: (1) four of Applicant's siblings are citizens and residents of Laos, (2) Applicant maintains regular contact with her siblings in Laos, and returned to Laos in 1989, 1993, 1994, 2001, and 2004 to visit them, (3) these visits typically ran 2-5 weeks, (4) three of Applicant's siblings in Laos are employed by the Laotian government, one as a diplomat in the Laotian foreign service, (5) one sibling retired from government service, (6) Applicant speaks by telephone with one of her sisters in Laos several times a month, (7) Laos is an authoritarian, Communist, one-party state with a poor human rights record, where Government officials use arbitrary arrest, detention, and intrusive surveillance, and (8) the government of Laos infringes privacy rights, possesses a vast surveillance network, and its security laws allow it to monitor individual's communications and movements. Given those findings, the Administrative Judge concluded that Applicant's ties with her family members in Laos raised security concerns under Guideline B, and that Disqualifying Conditions 1 and 3 applied. That conclusion shifted the burden of persuasion to Applicant. If there are admitted or proven facts and circumstances that raise security concerns, "[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15.

Applicant argues that the Administrative Judge erred in not applying Guideline B Mitigating Conditions 1 and 3. She also argues that the Judge gave insufficient weight to evidence that Applicant has lived in, and been a citizen of, the United States for many years, and has extensive ties to this country. Applicant's arguments do not demonstrate that the Judge erred.

The application of Adjudicative Guidelines disqualifying and mitigating conditions does not turn simply on a finding that one or more of them applies to the particular facts of a case. Rather, the application of a disqualifying or mitigating condition requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan. 15, 2003). As the trier of fact, the Administrative Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.

Given the record in this case, it was not arbitrary and capricious for the Administrative Judge to conclude that Applicant had not met her burden of demonstrating that her contacts with her family members in Laos were casual and infrequent, and that her family members were not in a position to be exploited by a foreign power in a way that could force the Applicant to choose between loyalty to them and the U.S. A review of the Judge's decision indicates that the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying circumstances, and considered the possible application of relevant mitigating conditions and factors. The Judge articulated a rational basis for not favorably applying any mitigating conditions or factors and reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns. The Judge was not required, as a matter of law, to favorably apply Guideline B Mitigating Conditions 1 and 3, and the Judge's overall adverse security clearance decision is sustainable.

### **Order**

The decision of the Administrative Judge denying Applicant a clearance is AFFIRMED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman, Appeal Board

Signed: Jean E. Smalin

Jean E. Smalin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. Applicant incorporates the issues from his first appeal, but also argues that the Board or the parties cannot know what the Administrative Judge was actually looking at when he took administrative notice, since the document provided was printed at a later date than the one offered by Department Counsel. The Board concludes that this error is harmless, in this instance, because the document in question is a reproduction of an official document from an official web-site. However, Applicant's concern underscores why it is important for the Administrative Judge to keep an evidentiary record with copies of all documents or exhibits that are identified or discussed on the record at the hearing, so that the Board or other body can have a complete and accurate record for its review.

2. On appeal, Applicant also argues that the document was outdated. However, Applicant did not challenge the document for that reason at the hearing, so the Board need not address it at this time.

3. *See* ISCR Case No. 01-23356 at 7-8 (App. Bd. Nov. 24, 2003)(addressing the exception that is established by Directive ¶ E3.1.20).

4. Directive ¶ E2.A2.1.3.1. ("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.")

5. Directive ¶ E2.A2.1.3.3. ("Contact and correspondence with foreign citizens are casual and infrequent.")