

DATE: September 22, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-31154

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

John F. Mardula, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated January 28, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence). Administrative Judge Michael J. Breslin issued a favorable security clearance decision, dated January 27, 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 in his application Foreign Influence Mitigating Condition 3; (2) whether the Administrative Judge erred in his application of Foreign Influence Mitigating Condition 1; and (3) whether the Administrative Judge's favorable security clearance determination should be affirmed on alternate grounds. 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 in his application of Foreign Influence Mitigating Condition 3. ⁽¹⁾ In his decision, the Administrative Judge concluded that Applicant maintained regular contact with his father, his younger brother, and his mother-in-law, who were citizens and residents of Taiwan. The Judge then declined to apply Foreign Influence Mitigating Condition 3 to Applicant's relationships with these people. However, the Judge also concluded that Applicant had not seen his older brother or his sister-in-law in several years and does not maintain regular contact. The Judge then concluded that Foreign Influence Mitigating Condition 3 applied to mitigate Applicant's relationships with these two individuals. On appeal, Department Counsel asserts that: (a) the Judge's conclusion that Applicant had not seen his older brother or sister-in-law in several years and does not maintain regular contact was not supported by the record evidence; and (b) the Judge's application of Foreign Influence Mitigating Condition 3 in this instance was arbitrary and capricious.

Portions of Department Counsel's arguments regarding the Judge's application of Foreign Influence Mitigating Condition 3 appear to address Applicant's relationships with all of his Taiwanese relatives. As stated previously, the Judge applied Foreign Influence Mitigating Condition 3 only to Applicant's relationships with his older brother and his sister-in-law. Accordingly, the Board will consider Department Counsel's arguments only to the extent that they address Applicant's relationship with these two relatives.

A review of the record evidence reveals that Applicant traveled to Taiwan as recently as 2003 and 2004 and that he routinely visited his family on all of his trips to Taiwan. The record evidence also specifically establishes that Applicant visited his older brother in Taiwan during his 2004 visit. Therefore, the Judge's conclusion that he had not seen his older brother in Taiwan for several years was contrary to the record evidence. Regarding the frequency of contact other than visits, the evidence established that Applicant maintained some telephonic contact with his older brother and that Applicant's wife contacted her sister by telephone as frequently as twice a month. In assessing the strength of

Applicant's ties to relatives who reside in, and are residents of, foreign countries, the strength of the ties and affections between Applicant's wife and her relatives are pertinent.⁽²⁾ There was thus no evidentiary basis for the Judge's conclusion that Applicant maintained no regular contact with his older brother and his sister-in-law.

Foreign Influence Mitigating Condition 3 applies where the contacts with foreign citizens are casual *and* infrequent (emphasis added). Department Counsel correctly asserts that the Administrative Judge's decision focused on the frequency of contact. There is no discussion in the Judge's decision concerning the rebuttable presumption that Applicant's relationships with his immediate family members (including his in-laws) are not casual.⁽³⁾ Absent a discussion, supported by the record evidence, that articulates a rationale as to why the presumption has been overcome, there is no basis to apply Foreign Influence Mitigating Condition 3. Therefore, it was error for the Judge to conclude that Applicant's relationships with his older brother and his sister-in-law did not have continuing security significance.

2. Whether the Administrative Judge erred in his application of Foreign Influence Mitigating Condition 1. The Administrative Judge concluded in his decision that the presence of Applicant's immediate family members in Taiwan and their status as citizens of Taiwan made applicable Foreign Influence Disqualifying Condition 1.⁽⁴⁾ Because Applicant's mother-in-law, a citizen of Taiwan, lived with Applicant's family for a portion of the year, the Judge also concluded that Foreign Influence Disqualifying Condition 2⁽⁵⁾ applied to the case. The Judge also found Foreign Influence Disqualifying Condition 8⁽⁶⁾ applicable based on his finding that Applicant's real estate holding in Taiwan was a substantial financial interest. The Judge ultimately concluded that Foreign Influence Mitigating Condition 1⁽⁷⁾ applied for the following reasons: (a) the possibility that the government of Taiwan or any other foreign power would attempt to exploit Applicant's relatives in Taiwan to force Applicant to act adversely to the interests of the United States is limited; (b) Applicant's relatives are not especially vulnerable to adverse influence by a "foreign power"; and (c) because of his extensive ties to the United States, Applicant is not vulnerable to pressure or duress through his relatives in Taiwan.

On appeal, Department Counsel maintains the Administrative Judge's application of Foreign Influence Mitigating Condition 1 was arbitrary and capricious because: (a) by concluding that there was no evidence that Taiwan has ever attempted to exploit a Taiwanese citizen to compromise a security clearance holder and citing this lack of evidence as a factor in mitigation, the Judge, in essence, improperly shifted the burden of proof; (b) the Judge erroneously concluded that Applicant's Taiwanese relatives were not in a position to be exploited by the government of Taiwan; and (c) the Judge erroneously relied on his conclusion that Taiwan is "friendly" to the United States while giving inadequate weight to evidence of Taiwan's aggressive intelligence gathering posture. Department Counsel's arguments have merit.

The Administrative Judge stated that "there is no evidence indicating that the government of Taiwan, or any other entity meeting the definition of a 'foreign power,' sponsored or encouraged efforts to exploit citizens or residents of Taiwan for that purpose." Based on this, the Judge concluded the possibility that a "foreign power" would attempt to exploit or pressure Applicant's relatives in Taiwan is limited. An applicant has the burden of demonstrating that a mitigating condition under the Adjudicative Guidelines applies and that burden of proof is not met merely because a Judge concludes that Department Counsel did not present evidence to disprove the applicability of a mitigating condition. *See, e.g.,* ISCR Case No. 00-0489 (January 10, 2002) at p. 11; ISCR Case No. 99-0519 (February 23, 2001) at p. 12; and ISCR Case No. 99-0601 (January 30, 2001) at p. 7 and n. 1. There are only two plausible ways to read the Administrative Judge's decision: Either (a) the Judge shifted the burden of proof on Foreign Influence Mitigating Condition 1 from the Applicant (to demonstrate its applicability) to Department Counsel (to demonstrate its inapplicability), or (b) the Judge concluded that Applicant had met his burden of showing the applicability of that mitigating condition. In either case, the Judge erred. If the Judge shifted the burden of proof to Department Counsel to disprove the applicability of Foreign Influence Mitigating Condition 1, he erred as a matter of law. *See, e.g.,* ISCR Case No. 01-17496 (October 28, 2002) at p. 6. If the Judge concluded that Applicant had met his burden of showing the applicability of that mitigating condition, he erred given the record evidence in this case.

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 Foreign Influence Mitigating Condition 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 Foreign Influence Mitigating Condition 1 was arbitrary and capricious.

While the Judge properly cited the lack of a connection between Applicant's relatives and the government of Taiwan in support of his conclusion that the first prong of Mitigating Condition 1 (relatives are not agents of a foreign power), he erred to the extent that he relied on the lack of a government connection in support of his conclusion that the second prong of Mitigating Condition 1 (vulnerability to exploitation) was established. The Administrative Judge notes that Applicant's relatives in Taiwan are not and have never been employees of the Taiwanese government. He cites the facts that Applicant's father is retired from a private company and does not draw a government pension and that his sister-in-law operates a private business. Nothing in the language of Guideline B indicates or suggests that foreign influence is of security concern only if an applicant has ties and contacts with foreign citizens or entities involved with a foreign government. *See, e.g.*, ISCR Case No. 02-29665 (November 10, 2004) at p. 5.

The Administrative Judge also noted the facts that Applicant's father and brothers have the educational backgrounds and skills to be financially independent and that Applicant's father-in-law and mother-in-law are retired and spend a significant part of each year in the United States. The Judge concludes these circumstances make Applicant's relatives "not especially vulnerable" to adverse influence by a foreign power. The Judge fails to articulate a rational basis for his conclusion that financial security renders Applicant's father and brothers less vulnerable to exploitation by the Taiwanese government to the point that their presence in Taiwan as citizens of Taiwan no longer raises security concerns. Likewise, the Judge fails to explain how the fact that Applicant's in-laws spend part of the year in the United States makes them less vulnerable to exploitation.

Department Counsel persuasively argues that the Administrative Judge's heavy reliance on the fact that Taiwan is a democracy and ally of the United States is misplaced. Nothing in Guideline B indicates or suggests that it is limited to countries that are hostile to the United States. *See, e.g.*, ISCR Case No. 00-317 (March 29, 2002) at p. 6; ISCR Case No. 00-0489 (January 10, 2002) at p. 12. The Board has warned "against reliance on overly simplistic distinctions between 'friendly' nations and 'hostile' nations when adjudicating cases under Guideline B." *See* ISCR Case No. 00-0317 (March 29, 2002) at p. 6. Department Counsel cites to portions of the record evidence that establish the aggressive intelligence gathering posture of entities within Taiwan and specific examples of how that posture resulted in attempts to obtain United States technology. Given this record, the Judge fails to articulate a rational basis for his conclusion that the nature of the relationship between Taiwan and the United States lessens the potential threat of exploitation or coercion in this case.

For these reasons, Department Counsel persuasively argues that the Administrative Judge's application of Foreign Influence Mitigating Condition 1 was arbitrary and capricious.

3. Whether the Administrative Judge's favorable security clearance decision should be affirmed on alternate grounds. In his reply brief, Applicant asserts that the Administrative Judge's decision should be affirmed on alternate grounds. In support of this position Applicant argues: (a) a fellow worker and immediate supervisor of Applicant testified that Applicant takes his security responsibilities very seriously and testified that they have no doubts about Applicant's integrity, trustworthiness, and ability to handle classified information; and (b) Applicant has been handling sensitive matters for many years.

Applicant is essentially arguing that his good character and trustworthiness negate any concerns the government may have concerning the fact that numerous family members of Applicant are citizens of Taiwan who reside in Taiwan. While evidence of Applicant's good character and trustworthiness is relevant to consider under the "whole person" concept, Applicant has not explained how this evidence lessens the vulnerability Applicant faces as a result of his foreign relatives. The government need not wait until there is an actual threat posed by Applicant's foreign relatives or until Applicant finds himself in a position where he must react to a foreign power's attempt to exploit him or his relatives. Applicant has failed to establish a basis for affirming the Judge's favorable security clearance decision on alternate grounds.

Conclusion

Department Counsel has demonstrated error below that warrants reversal. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.3, the Board reverses the Administrative Judge's favorable security clearance decision.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

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

2. As a matter of common sense and human experience, there is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse. *See*, ISCR Case No. 01-03120 (February 20, 2002) at p. 4. There is nothing in the record of this case that rebuts the presumption such that the frequency of contact between Applicant's wife and her sister becomes irrelevant.

3. *See, e.g.*, ISCR Case No. 02-02195 (April 9, 2004) at pp. 7-8 (MC3 applies only if contacts are both casual and infrequent); and *see, e.g.*, ISCR Case No. 02-09907 (March 17, 2004) at p. 9 (discussing the nature of contacts verses the frequency of contacts).

4. "An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country" Directive, Adjudicative Guidelines, Item E2.A2.1.2.1.

5. "Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists" Directive, Adjudicative Guidelines, Item E2.A2.1.2.2.

6. "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.

7. "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.