

DATE: June 7, 2006

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In Re:

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SSN:-----

Applicant for Security Clearance

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CR Case No. 03-02878

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Eric Borgstrom, Esq., Department Counsel

#### **FOR APPLICANT**

Andrew W. Dyer, Jr., Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 2, 2004, DOHA issued a statement of reasons (SOR) 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 October 31, 2005, after the hearing, Administrative Judge Katherine Moen Braeman granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Administrative Judge's application of Foreign Influence Mitigating Condition (FIMC) 1 [\(1\)](#) and FIMC 3 [\(2\)](#) is unsupported by the record evidence and is arbitrary and capricious; and whether the Judge's whole-person analysis is unsustainable because the whole-person considerations relied upon are unsupported by the record evidence and their application is arbitrary, capricious, and contrary to law.

### **Whether the Record Supports the Administrative Judge's Factual Findings**

The Administrative Judge made the following relevant findings of fact:

Applicant was born in Taiwan. She earned a BA and an MA there and then emigrated to the United States in 1984 for further education. In the United States, she met and married a native of Taiwan. Both are now U.S. citizens. Applicant's children, at the time of the hearing 17 and 15, were born in the U.S. Applicant's parents and four of her siblings are residents and citizens of Taiwan. No one in Applicant's family in Taiwan works for the Taiwanese government, the military, or any intelligence agency. Applicant speaks regularly with her family members and travels to Taiwan yearly. While the Taiwanese government has a "strong unofficial relationship" with the U.S., Taiwan is an active collector of economic espionage.

#### Discussion

The appeal issues in this case will be resolved with reference to the Administrative Judge's conclusions, which are described in succeeding paragraphs.

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

An Administrative Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Appeal Board may reverse the Administrative Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow, and we may not substitute our judgment for that of the Administrative Judge. We may not set aside an Administrative Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency..." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. We review matters of law *de novo*.

Department Counsel's argument that the Administrative Judge's application of FIMC 1 and FIMC 3 is unsupported by the record evidence, and arbitrary and capricious has mixed merit. The Administrative Judge stated that the government had raised foreign influence security concerns and that Applicant had mitigated those concerns. The Judge then cited FIMC 1 and FIMC 3 in a footnote without a complete explanation of how Applicant had mitigated the security concerns. For the application of FIMC 1, the record must demonstrate that Applicant's family members are not agents of a foreign power or in a position to be exploited by a foreign power. The Judge accepted Applicant's testimony that no one in her family had government ties or was vulnerable to coercion. However, in her testimony, Applicant was not sure as to whether some of her family's employment was government employment and therefore whether those family members were subject to government influence. As to the application of FIMC 3, Applicant stated that she speaks to her parents two to three times per month and to her siblings four times per year. She also e-mails her relatives. She travels to Taiwan about once a year and stays two to three weeks. Although the Judge characterized Applicant's contact with her family as "dutiful," the frequency of contact appears to be significantly more than "casual and infrequent," as expressed in FIMC3.

Department Counsel also argues that the Administrative Judge's whole person analysis is not sustainable because the considerations relied upon are unsupported by the record evidence and their application is arbitrary, capricious, and contrary to law. The Board does not find this argument persuasive.

As indicated above, the Administrative Judge erred in her application of FIMC 1 and 3. However, that error is harmless under the facts and circumstances in this case in that the Judge did not rely heavily on those two mitigating conditions in reaching her ultimate security clearance decision. Absent the applicability of those conditions, it is clear that the Judge would have reached the same result based upon the record as a whole. The continued viability of the Judge's favorable conclusions about Applicant's security eligibility under Guideline B turns on whether the Judge articulated a rational basis for those favorable conclusions that is consistent with a whole person analysis. *See, e.g.*, ISCR Case No. 03-04300 at p. 7 (App. Bd. Feb. 16, 2006).

In her whole person analysis in this case, the Judge relied on numerous facts which cumulatively support the Judge's ultimate conclusion that Applicant has strong ties to the United States. Applicant has been in the U.S. for twenty years and a naturalized citizen for seven. Her husband is also a naturalized citizen, and her children are U.S. citizens by birth. Her ties to these family members are stronger than her ties to family members in Taiwan. She has significant financial interests in the U.S., and none in Taiwan. She testified credibly that she takes her loyalty to the U.S. very seriously and would defend the interests of the U.S. Her supervisors and co-worker assess her as very loyal and trustworthy. In this case, the Judge has articulated a detailed, rational explanation for her favorable determination under the whole person concept. The Board need not agree with the Judge's whole person analysis to conclude that it is sustainable.

### Order

The Administrative Judge's favorable security clearance decision is AFFIRMED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman (Acting), Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

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 ¶ E2.A2.1.3.1).

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