DATE: December 21, 2006

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 03-08883

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

L. James D'Agostino, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 18, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision - security concerns under Guideline L (Outside Activities), Guideline E (Personal Conduct), and Guideline B (Foreign Influence), of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On March 30, 2006, after the hearing, Administrative Judge Joan Caton Anthony denied Applicant's request for a security clearance.[(1)] Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised four issues on appeal: (1) The Judge erred in her material findings of fact concerning Applicant's falsification on his security clearance application; (2) The Judge failed to properly apply Guideline B Mitigating Conditions (FIMC) 1 and 3; (3) The Judge failed to consider the relative extent of Applicant's foreign financial interests in mitigation under Guidelines B and E; and (4) The Judge failed to apply the "whole person concept" in reaching her decision.[(2)] The Board does not find Applicant's assertions of error to be persuasive.

Issue (1): The Judge's Findings of Fact Concerning Guideline E.

The Judge's extensive findings of fact are supported by substantial evidence. The possibility of drawing different conclusions from the evidence does not mean that the Judge erred, and we are required to give deference to her credibility determinations. The Judge relied on Applicant's failure to disclose anything on his February 2001 security clearance application about his recent, active advising and consulting with a close South Korean friend about a joint business venture,[(3)] in finding the omission to have been deliberate.[(4)] Throughout the record, Applicant alternatively asserted: (a) that the omission was the fault of his daughter who filled out the form for him in her role as facility security officer of his other large U.S. corporation (of which he is president, CEO and 92% owner); (b) that he did not list it because he did not think it was a significant company/business investment; and (c) that his role as owner of this business did not come to mind when the question asked about "employment or consultancy with a foreign government, firm or agency." He consistently denied that the omission was deliberate, but the Judge found otherwise, concluding that he was personally responsible for the contents of the application when he signed it. His statement that he did not think it was significant enough to list indicates a choice not to list it, not an oversight. The Judge found, based on Applicant's hearing testimony, that he was aware of the security significance of his foreign financial interest. Her unfavorable credibility

determination, concerning Applicant's denials of deliberately omitting this information, is supported by the record evidence and is sustainable. Further, her reliance on written exhibits to establish when Applicant disclosed these Korean business interests, again contrary to Applicant's otherwise uncorroborated assertions, is sustainable. Applicant asserts that he voluntarily disclosed his involvement in this venture during his first Defense Security Service (DSS) interview in May 2003, but his resulting sworn statement contains no such information. Only his second sworn statement to DSS, dated July 23, 2004, contains this information, together with his explanation that he did not list it on the security form because he did not then, and still did not as of the time of that statement, consider it to be a significant company/business investment. He further stated, "As part owner of the company, I am interested only as a businessman in obtaining contacts with Korea companies and the Korean government." The Judge's finding that his disclosure of these interests did not occur until this 2004 interview is supported by the record evidence in the form of Applicant's own sworn statements, and is sustainable. The Government does not have any burden to disprove possible Mitigating Conditions. The Judge's derivative finding that the falsification was not an isolated incident and occurred recently is therefore also sustainable. Applicant has not demonstrated any material error in the Judge's findings of fact or her conclusions and their bearing on the pertinent Guideline E Disqualifying and Mitigating Conditions. Her findings 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 record. (Directive ¶ E3.1.32.1.)

Issue (2): Guideline B Mitigating Conditions.

Applicant asserts that the Judge's conclusion that neither FIMC 1[(5)] nor FIMC 3[(6)] apply to Applicant's relationship with his Korean sister-in-law is arbitrary and capricious.[(7)] The Judge concluded that Applicant's sister-in-law had not been shown to be an agent of a foreign power, but that Applicant had not demonstrated that she could not be exploited by a foreign power or that his wife's relationship with her could not be exploited in a way that could force him to choose between loyalty to his wife or her sister and the security interests of the United States. She noted that his high visibility in Korea, as a successful Korean-American businessman with extensive U.S. Government contracts, increases his and his family's vulnerability to exploitation. Applicant points to no record evidence that makes such a conclusion arbitrary and capricious but merely asserts that it is a difficult, if not impossible, burden of proof to meet and that the Judge should have interpreted the record evidence differently. The Judge's conclusion in this regard is rational and sustainable. She was not required, as a matter of law, to apply FIMC 1 in light of extensive Board precedent that it is the potential for having to choose, not the choice that would be made, which fails to mitigate the Guideline B security concern.

The Judge's conclusion not to apply FIMC 3 was also rationally explained and supported by the record evidence. Applicant made at least annual and, more recently, biannual visits to Korea. On every such visit since 2000 he reported seeing both his business partner, and his sister-in-law who has no permanent home and stays with Applicant and his wife in their hotel during each visit. The Judge assessed the nature of Applicant and his wife's personal and financial relationship with his Korean sister-in-law and rationally found it to be familial and their contact to be neither casual nor infrequent. Applicant has not demonstrated that the Judge's conclusions that FIMC 1 and FIMC 3 do not apply were arbitrary and capricious.

Issue (3): Relative Extent of Foreign Financial Interests as Mitigation.

Applicant asserts the Judge erred in failing to consider the size of his Korean financial dealings relative to his substantial wealth, income and charitable giving as mitigating evidence under Guidelines B and E[(8)]. The Judge accurately recited all pertinent financial data in her findings of fact and conclusions under Guideline L with respect to the foreign business venture. Applicant had provided some $835,000 to $850,000 in cash and in-kind contributions to the venture, whose only other substantial source of revenue was three grants totaling $425,000 from the Korean Government. Applicant has a large net worth and averages around $200,000 in annual charitable donations in the United States. From 2000 through 2004, he also gave $200,000 to his Korean alma mater, which selected him from over 100,000 graduates for an honorary doctorate degree. Applicant stopped providing funding for the Korean business venture in 2004, and transferred all of his interest in the business back to the U.S. holding corporation after the hearing. The Judge further analyzed all of these factors in deciding Guideline L for Applicant, and in her "whole person" analysis. The security concerns under Guideline B were not his financial interests in Korea, but rather the nature and extent of his and his family's personal connections there. Other than its overlap with Guideline L concerns found in his favor, FIMC 5 does not mitigate

[(9)] [(10)]

Disqualifying Conditions 1 or 2 which the Judge applied, because these concerns focus on familial relationships, not finances. Applicant has not demonstrated either that the Judge did not consider the financial context of his foreign business dealings or that, outside her "whole person" analysis, that context would be mitigating of the Guideline B and E concerns.

Issue (4): Whole Person Analysis.

Applicant asserts that the Judge could not have engaged in the required "whole person" analysis[(11)] because, "[l]ooking at the whole person concept, [Applicant's] allegiance to the United States should be apparent from the record - his activities simply do not evidence a threat to national security."[(12)] He goes on to discuss several factors he concludes should warrant a decision to grant him a clearance, most of which are mentioned and considered by the Judge in her decision. Disagreement with the Judge's weighing of the evidence, both favorable and unfavorable, is not a sufficient grounds to overturn her decision if it reflects reasonable interpretation of the evidence and resolution of the material issues in the case. The decision below, read in its entirety, demonstrates that the Judge did meet her obligation to weigh the evidence as a whole, and reach a common sense determination reflecting all pertinent factors.[(13)]

Order

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

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board

Signed: David M. White

David M. White

Administrative Judge

Member, Appeal Board

1. The original transcript of the hearing was received by the Judge on November 1, 2005 and was cited throughout her decision. Presumably Applicant also received his copy, since it is cited throughout his appeal brief. The transcript was not in the case file when the Board began consideration of the appeal, and could not be located in any DOHA files. An electronic copy of the transcript was obtained from the court reporter for the Board's review and consideration.

2. The Judge found that Applicant's post-hearing resignation as President and Chairman of the Board, and transfer of his majority ownership back to the U.S. corporation that wholly owned the Korean business in question sufficiently mitigated security concerns under Guideline L and found for applicant under that Guideline. Those findings were not appealed.

3. Their collaboration, ongoing since sometime in 1999 or 2000 already included creation of interdependent U.S. and

South Korean corporations (with that friend and several other people in both countries), into which Applicant eventually invested over $835,000. In his response to the SOR, which the Judge incorporated into her findings of fact, Applicant admitted that both the U.S. and Korean ventures were incorporated in 2000, and that his capital contribution to the venture, totaling about $500,000 or slightly less, was made between 1999 and 2003. The remaining investment comprised 'in-kind' support funded by Applicant's U.S. based government contracting business.

4. SOR ¶2.a. reads: "You falsified material facts on a Security Clearance Application (SF-86), executed by you on February 7, 2001, on which you were required to reply to the following question: '**13. Your Foreign Activities - Employment** Are you now or have you ever been employed by or acted as a consultant for a foreign government, firm or agency?'; to which you answered, 'No'; whereas in truth, you deliberately failed to disclose your part ownership of [company name, Inc.], and its operation in Korea, as set forth in paragraphs 1.c. and 1.d. [Guideline L allegations], above."

5. 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."

6. Directive ¶ E2.A2.1.3.3: "Contact and correspondence with foreign citizens are casual and infrequent."

7. 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 or remand the 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 Judge. We may not set aside a 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.

8. Applicant's brief initially asserts that the small present value of Applicant's business interests in Korea relative to his net worth should have mitigated security concerns under both Guidelines B and E, but in discussing this issue the brief only addresses Guideline B and Mitigating Condition (FIMC) 5 thereunder, "Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities." Directive ¶ E2.A2.1.3.5.

9. Directive ¶ E2.A2.1.2.1: "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."

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

11. Directive E2.2.1: "The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. In evaluating the relevance of an individual's conduct, the adjudicator should consider the following factors: [list of nine general factors to consider]." See also, Directive ¶ 6.3.

12. Applicant's appeal brief at 20-21.

13. Moreover, she specifically concluded that, "Applicant's allegiance, loyalty and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that industrial security clearance decisions shall be 'in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.'"