

DATE: April 17, 2006

In Re:

SSN:-----

Applicant for Security Clearance

ISCR Case No. 03-17620

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Sabrina E. Redd, Esq., Department Counsel

FOR APPLICANT

Mark S. Zaid, Esq.

APPEAL BOARD DECISION

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 21, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline B (Foreign Influence) and Guideline E (Personal Conduct), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 22, 2005, after the hearing, Administrative Judge Christopher Graham 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 erred by concluding that Applicant had mitigated security concerns regarding his family ties to South Korea; and whether the Administrative Judge's favorable findings and conclusions under Guideline E were sustainable in light of the contrary record evidence. We remand the Administrative Judge's decision to grant the clearance.

Whether the Record Supports the Administrative Judge's Factual Findings

A. Administrative Judge's pertinent findings of fact:

Applicant was born in South Korea, immigrated to the United States in 1981 and became a naturalized U.S. citizen in 1988. His mother and one brother are citizens of South Korea living in the U.S. Applicant has two brothers who are citizens of South Korea and live in that country (one is self-employed and the other is a university faculty member).

Applicant is married, 55-years-old and the owner and president of a computer services company. Applicant's company has contracts with federal agencies. Applicant has no dealings with South Korea. Three witnesses testified that they believed Applicant would not commit acts of espionage against the U.S. and that he would report any approach to the U.S. authorities. They recommended Applicant for a position of trust.

Applicant's company had done some foreign business prior to 1992. The company website reflected a capability to do work in foreign countries after that year. Applicant's brother was fluent in Japanese and was listed on the website as the contact point. Applicant's testimony about the website was credible. The website was an advertising or marketing tool.

Applicant's brothers in South Korea have no political, scientific or commercial involvement with the South Korean government. Applicant has not been approached by foreign agents and said that were he to be approached he would contact the appropriate officials. If forced to make a choice, he would choose loyalty to the U.S. over loyalty to his brothers. Applicant renounced his South Korean citizenship when he became a U.S. citizen.

B. Discussion

The Appeal Board's review of the Administrative Judge's finding of facts is limited to determining if they are supported by substantial evidence--such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record. Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966). In evaluating the Administrative Judge's findings, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1.

On appeal, Department Counsel cites record evidence not discussed by the Administrative Judge. Department Counsel cites to Applicant's testimony regarding his brothers in South Korea and categorizes that testimony as uncertain and speculative. The Board's reading of that testimony is not consistent with Department Counsel's categorization. Department Counsel also cites Applicant's answer to the SOR in a similar vein, and that argument is also not persuasive. Department Counsel points to two places in the record where Applicant described his relations with his younger brothers in Korea as more father-son than brothers. Department Counsel also discusses record evidence in the context of the Judge's findings of fact under the Guideline E allegations. Department Counsel notes that language on Applicant's company's web site said that they "also have international clients on three continents." Department Counsel disputes Applicant's assertion that the company was advised to make such claims by the Small Business Administration, citing Applicant's Statement that if a company "has any foreign involvement whatsoever then they are not eligible for this certification." The Board does not conclude that Applicant's lay description of a U.S. government agency's requirements is authoritative. Nor is it necessarily inconsistent with the claim that Applicant's company was advised to engage in some puffery for marketing purposes. Department Counsel challenges Applicant's claim not to have reviewed the web page for years, relying on testimony of Applicant's employee that Applicant oversees every facet of the organization. Department Counsel's point is valid only to the extent that the Administrative Judge relied on Applicant's claim. Department Counsel is correct that the Administrative Judge failed to make any factual findings which would be the basis for adjudicating SOR allegation 2.b. Department Counsel challenges the Administrative Judge's finding of fact that Applicant was candid in his statement to the investigator that his brother's sole duties involved bookkeeping.

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*.

The issues raised by Department Counsel's appeal regarding the Administrative Judge's favorable conclusions under Guideline B are significant. The Judge found that Applicant has immediate family members in South Korea. The Judge concluded these ties were mitigated because under two portions of Guideline B, namely Mitigating Condition 1 (MC1) (1) and Mitigating Condition 3 (MC3). (2) Neither of the cited conditions apply in Applicant's case. MC1 does not apply because, as is well settled, it requires that Applicant demonstrate that his relatives are not in position which could force Applicant to choose between his loyalty to them and his loyalty to the United States. The Judge himself implicitly

recognized that such was not the case. He actually discussed what choices Applicant would make if he were forced to choose. The Board has previously noted the existence of a presumption that contacts with immediate family members are not casual. The Judge's findings of fact did not detract from that presumption. Therefore, the Judge erred when he applied MC3 to Applicant's situation.

When an appealing party demonstrates factual or legal error, the Board must consider whether: (a) the error is harmful or harmless; (b) the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds; and (c) if the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded. In this case, the error is not harmless in that the Judge relied heavily on Foreign Influence Mitigating Conditions 1 and 3 in reaching his favorable clearance decision under Guideline B. Absent the applicability of those conditions, there is a significant chance that the Judge could have reached a different result based upon the record as a whole.⁽³⁾

However, a Judge is not limited to Adjudicative Guidelines mitigating conditions when deciding whether an applicant has demonstrated extenuation or mitigation.⁽⁴⁾ Here, because the Judge's decision indicates, among other things, that Applicant has been a United States citizen for many years, his financial assets are in the United States, as is most of his immediate family, he has previously held a confidential clearance without incident, he has favorable character references from U.S. government officials, and he is now alert to the security concerns presented by his circumstances and the responsibilities incumbent on him as a result, remand of the case to the Judge for reconsideration under the Directive's general factors⁽⁵⁾ is appropriate. Although the position of an applicant's foreign family members is significant and may preclude the favorable application of Foreign Influence Mitigating Condition 1,⁽⁶⁾ the totality of an applicant's conduct and circumstances (including the realistic potential for exploitation⁽⁷⁾) may still warrant a favorable application of the relevant general factors. On remand, the Judge should also make the requisite findings with respect to SOR paragraph 2.b.

Order

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, 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. 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."

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

3. *Compare*, ISCR Case No. 02-27133 at 4 (App. Bd. Mar. 3, 2005); ISCR Case No. 00-0250 at 6 (App. Bd. Jul. 11, 2001).

4. *See, e.g.*, ISCR Case No. 02-05110 at 5, n7 (App. Bd. Mar. 22, 2004); ISCR Case No. 99-0452 at 7 (App. Bd. Mar. 21, 2000); ISCR Case No. 97-0765 at 6 (App. Bd. Dec. 1, 1998); ISCR Case No. 02-33581 at 3 (Jul. 20, 2004).

5. Directive ¶¶ E2.2.1.1 through E2.2.1.9. *See* ISCR Case No. 03-19101 at 9-10 (App. Bd. January 31, 2006).

6. Directive ¶ E2.A2.1.3.1 ("A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brother, 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").

7. Directive ¶ E2.2.1.8 ("The potential for pressure, coercion, exploitation, or duress").