DATE: February 20, 2007

In Re:

SSN: ------

Applicant for Security Clearance

ISCR Case No. 03-21434

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 7, 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 May 24, 2006, after the hearing, Administrative Judge Michael J. Breslin granted Applicant's request for a security clearance. Department Counsel submitted a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge improperly refused to take administrative notice of Government Exhibits 6, 7, 8, and 9; and whether the Judge's decision is arbitrary, capricious, and contrary to law. We remand the case to the Judge.

Whether the Record Supports the Administrative Judge's Factual Findings

A. Facts

The Administrative Judge found as follows:

Applicant is a retired Naval Officer, having served in the nuclear engineering career field with a high level security clearance. He retired from the Navy in 1991.

After his retirement from the Navy, Applicant operated a travel agency. In 1996, he assisted a group of businessmen in arranging a trip to the People's Republic of China (China). In the course of this assistance he met a Chinese travel agent who was accompanying the businessmen. This person arranged for Applicant to take a tour of China in March 1996, in order to facilitate business arrangements between their respective agencies. Applicant became acquainted with an assistant working for his Chinese counterpart. She served as a guide and translator for Applicant during his tour of China in March and again on a second visit in June of 1996. During this latter visit the two became romantically involved.

Applicant's tour business did not prosper, and he sold it in 1997. He became an independent contractor doing home repair and now holds a job with a defense contractor.

Despite the setback in his tourist agency, Applicant continued his relationship with the female tour guide, traveling to China "several times" in order to meet her parents. In January 1999 she accompanied him to the U.S., and the following month they were married. Applicant's wife became a U.S. citizen in February 2004. They have a child, a three year old daughter.

Applicant's mother-in-law and father-in-law are citizens of China. The parents "came from affluent families and were anti-communist. During the Cultural Revolution in China, they were required to work on a labor farm." The parents are now retired (the father-in-law was a professional athlete, the mother-in-law a factory worker) and they live with Applicant and his wife. Both parents-in-law hold resident alien status in the United States. They traveled to China in 2005 for medical treatment, although Applicant now provides medical insurance coverage for them.

Applicant holds a B.A. degree *cum laude* and, as of the date of the decision, was working on a M.B.A. with an expected graduation date of June 2006. He is active in his local community, working with the Boy Scouts and the 4-H Club and teaching hunting safety courses, instructing "grade school students in archery and wilderness survival." Applicant was nominated as Military Citizen of the Year in 1990.

B. Discussion

The Appeal Board's review of the Judge's findings of fact 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 (1966). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

The Judge's findings are not at issue at this time.

Whether the Record Supports the Administrative Judge's Ultimate Conclusions

A 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 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 review matters of law *de novo*.

In this case, the Judge refused Department Counsel's request to take official notice of four documents. 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).

The first of the documents at issue, Exhibit 6, is entitled *Operations Security Intelligence Threat Handbook*. The preface to this work states that its purpose is to serve as an unclassified reference book for operational security personnel. Immediately preceding the preface is this caveat: "This is an unofficial publication of the U.S. Government. Contents are not necessarily the views of, or endorsed by, any Government agency." In light of the caveat quoted above, we find no reason to conclude that the Judge abused his discretion in declining to take official notice of this document.

The second document, Exhibit 7, is entitled *Current and Projected National Security Threats to the United States*. The title page identifies the document as a "Statement for the Record" before the Senate Armed Services Committee by Vice Admiral Lowell E. Jacoby, USN. Admiral Jacoby is the Director of the Defense Intelligence Agency (DIA), and the title page of the document bears the DIA seal. In declining to admit this exhibit, the Judge stated that he was not persuaded that it reflected the official position of the United States. However, courts can and do take "judicial notice of the content of hearings and testimony before . . . congressional committees and subcommittees . . ." *Adarand Constructors v. Slater*,

228 F.3d 1147, 1168 at n.12 (10th Cir. 2000). *See also United States v. Darby*, 312 U.S. 100, 109 (1941). The Judge also stated that this particular document "was not sufficiently relevant or material to the specific issues in this case to be helpful." In fact, the exhibit discusses various threats posed by China to the United States, such as its efforts to modernize its ballistic and cruise missile inventory; its support of WMD proliferation in the Middle East; and its development of information operations capacities, "targeting both Western and regional nations that will pose a long-term strategic threat to U.S. interests." There is a rational connection between an applicant's family ties in a country whose interests are adverse to the United States and the risk that the applicant might fail to protect and safeguard classified information. *See, e.g.,* ISCR Case No. 01-26893 (App. Bd. Oct. 16, 2002). Therefore, evidence of such threats is generally relevant in a Guideline B case. *See, e.g.,* ISCR Case No. 02-08813 (App. Bd. Nov. 15, 2005). We conclude that the Judge erred in failing to take official notice of this document.

The third document, Exhibit 8, is entitled *Espionage by the Numbers: a Statistical Overview*. In proffering this document to the Judge, the Department Counsel described it as "a summary of 150 cases involving U.S. citizens that committed espionage."(1) The document describes itself as an "article" and apparently was obtained through the web site of the Defense Security Service. It presents certain demographic conclusions about people who commit espionage, obtained by examining a database maintained by the Defense Personnel Security Research Center (PERSEREC). The second paragraph of this article contains the following caveat: "Because [PERSEREC's database] uses only unclassified information, while most information on espionage is highly classified, the findings should be regarded as suggestive rather than conclusive." Additionally, the Department Counsel admitted during the hearing that the exhibit makes no reference to China.(2) Given these limitations, we conclude that the Judge did not abuse his discretion in declining to take official notice of this exhibit, especially in light of the above-mentioned caveat.(3)

The final challenged document, Exhibit 9, is entitled *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage*. Dated in the year 2000, this publication is one of a series of annual examinations "by U.S. government agencies of the threat of foreign economic collection and industrial espionage . . ." Prepared under the auspices of the National Counterintelligence Center (NACIC), this document collates and summarizes information on economic espionage provided by numerous government agencies, such as the Central Intelligence Agency, the Department of States, the Federal Bureau of Investigation, and the Naval Criminal Investigative Service, to mention only a few. This document also contains an appendix, which distills the responses of "nearly a dozen selected Fortune 500 companies" on the problem of foreign economic collection and industrial espionage. The appendix does not identify these companies nor does it state precisely how many actually did respond, only that it was a number less than twelve. Therefore, the appendix on its face provides no means for verifying the reliability of its contents, nor does it provide a reason to believe that it represents the official position of the U.S.

In ruling on Exhibit 9, the Judge stated that the document as a whole was too attenuated to be probative (he did admit a similar one prepared in 2003).(4) He also stated that the appendix appeared to be based upon insufficient data to be relevant. In examining the Judge's reasons, and given the fact that he did admit a more recent version of the report, we find no basis to conclude that he abused his discretion in declining to take official notice of this document.(5)

Although the Judge did not abuse his discretion by declining to take official notice of Exhibits 6, 8, and 9, the Board notes that the fact that a document is ineligible for notice need not mean that a party cannot submit the document for inclusion in the record as an ordinary exhibit. In this case, it is premature for the Board to address whether the aforesaid documents might otherwise be admissible. However, the Board has previously noted that in DOHA proceedings, the Federal Rules of evidence serve only as a guide. They may be relaxed by the Judge (with one exception not applicable to this appeal(6)) in order to permit the development of a full and complete record by the parties. Directive ¶ E3.1.19. By design, the DOHA process encourages Judges to err on the side of initially admitting evidence into the record, and then to consider a party's objections when deciding what, if any, weight to give to that evidence. Because DOHA proceedings are conducted before impartial, professional fact-finders, there is less concern about the potential prejudicial effect of specific items of evidence than there is in judicial proceedings conducted before a lay jury. Adhering to the approach contemplated by the Directive can keep the focus on the substantive merits of the case and avoid unnecessary remands resulting from a misapplication of the technical rules of evidence.

The case is remanded to the Judge with instruction that he reopen the record, take administrative notice of Exhibit 7,

allow Department Counsel the opportunity to offer Exhibits 6, 8, and 9 into evidence as ordinary documentary evidence, allow the Applicant to offer his objections as appropriate and any rebuttal evidence, and allow the parties to reargue the case. The other issues are not yet ripe for consideration.

Order

The case is REMANDED to the Judge.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Signed: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board

1. Tr. at 35.

2. Tr. at 36.

3. Decision at 3

4. This later document does not contain an appendix similar to the one in the 2000 report.

5. We also note that Exhibit 9 appears to have been obtained from a non-governmental web site, which impairs its status as an official publication of the United States.

6. *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).