

DATE: December 6, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-23697

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esq., Department Counsel

FOR APPLICANT

Robert R. Sparks, Jr., Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 29, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline B (Foreign Influence), of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On March 31, 2006, after the hearing, Administrative Judge Joan Caton Anthony denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Administrative Judge's unfavorable security clearance decision under Guideline B is arbitrary, capricious, or contrary to law. Specifically, Applicant contends that the Administrative Judge committed harmful error by failing to apply Foreign Influence Mitigating Conditions (FIMC) 1⁽¹⁾ and 3.⁽²⁾ Applicant points out his unblemished security record and the letters of reference he submitted. Applicant also maintains that the security concerns raised against him will soon become moot, because he intends to move back to the United States. Applicant's arguments are without merit.

Applicant argues that the Administrative Judge should have applied FIMC 1 because his wife, in-laws, and friend are not in a position to be exploited by a foreign power in a way that could force him to choose between loyalty to them and the United States. He contends that his contacts with his in-laws and friend should be considered casual because they are infrequent and that FIMC 3 is therefore applicable.

Applicant had the burden of presenting evidence to rebut, explain, extenuate or mitigate facts that Department Counsel proved or Applicant admitted regarding his family ties to South Korea, and Applicant had the ultimate burden of persuasion as to obtaining a favorable security clearance decision. Directive ¶ E3.1.15. The Administrative Judge had to consider the record evidence as a whole, both favorable and unfavorable, evaluate the facts and circumstances of Applicant's circumstances in light of the pertinent provisions of the Directive, and decide whether Applicant had met his burden of persuasion under Directive ¶ E3.1.15.⁽³⁾

The fact that Applicant's explanations and mitigating evidence did not lead the Administrative Judge to the decision desired by Applicant does not establish error. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a

whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. An applicant's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Administrative Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious or contrary to law.

The Administrative Judge did not apply FIMC 1 and 3 because she concluded that Applicant had not met his burden of persuasion that his family and friend were not in a position to be exploited by the South Korean government and that his ties, while infrequent, were casual. The Judge articulated a rational basis for not applying the above mitigating conditions and reasonably explained why the evidence which Applicant had presented in mitigation was insufficient to overcome the government's security concerns. Given the record that was before her, the Judge's unfavorable clearance decision under Guideline B is sustainable.

Finally, Applicant maintains that the government's security concerns about Applicant will soon be moot because he plans to move back to the United States in conjunction with a job change. Applicant's future job plans are speculative and are not relevant to a current security clearance determination.

Order

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: David M. White

David M. White

Administrative Judge

Member, Appeal Board

1. "A determination that 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.
3. The favorable evidence includes the letters of reference which Applicant submitted.