

DATE: May 11, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-27157

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Richard Murray, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 4, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline C (Foreign Preference) and Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 30, 2005, after the hearing, Administrative Judge Charles D. Ablard 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 adverse security clearance decision under Guidelines C and B is arbitrary, capricious and contrary to law.

Applicant argues that the evidence he provided in the proceeding below was sufficient to require the Administrative Judge to conclude, as a matter of law, that he had rebutted, mitigated or extenuated the security concerns raised by the Guideline C (Foreign Preference) and Guideline B (Foreign Influence) allegations. Specifically, Applicant contends that the Judge's adverse decision should be reversed because the Judge: (a) erred in not applying Guideline C Mitigating Conditions 1, (1) 3, (2) and 4, (3) (b) erred in not applying Guideline B Mitigating Conditions 5, (4) (c) made an unfavorable decision that is unsupported by the record as a whole, (d) relied on some facts that were not originally alleged in the Statement of Reasons (SOR), and (e) erred in finding Applicant used his foreign passport in 2001 and 2002.

The Administrative Judge made the following findings that are not challenged on appeal: (1) Applicant's mother, four siblings, mother-in-law, father-in-law, a brother-in-law and two sisters-in-law, are citizens of Taiwan, residing in Taiwan, (2) Applicant owns property in Taiwan valued at approximately \$100,000 to \$125,000, (3) Applicant became a U.S. citizen and acquired a U.S. passport in 1999, and (4) Applicant, after becoming a U.S. citizen, continued to possess a Taiwan passport that he renewed in April 2003. Given those findings, the Administrative Judge concluded that: (a) Applicant's possession and use of a foreign passport raised security concerns under Guideline C and that Disqualifying Conditions 1 and 2 applied, and (b) Applicant's ties with immediate family members and his foreign financial interests raised security concerns under Guideline B and that Disqualifying Conditions 1 and 8 applied. Those conclusions shifted the burden of persuasion to Applicant. If there are admitted or proven facts and circumstances that raise security concerns, "[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or

mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15.

Applicant argues that the Administrative Judge gave insufficient weight to evidence that: (a) Applicant's dual citizenship was based solely on birth, (b) Applicant's use of his Taiwan passport was sanctioned by the U.S., (c) Applicant has surrendered his Taiwan passport and renounced his Taiwan citizenship, and (d) his financial interests in Taiwan are minimal compared to his substantial U.S. financial interests. Applicant also argues that the Judge relied on some facts not alleged in the SOR and that there are many Hearing Office decisions in which an applicant with ostensibly more significant ties to Taiwan were granted clearances. The Board does not find Applicant's arguments persuasive.

Applicant argues that the Administrative Judge erred in allowing Department Counsel to amend the SOR at the hearing and add Applicant's property interests in Taiwan as an additional security concern, based upon Applicant's testimony about that interest at the hearing. The Board does not find this argument to be persuasive. A Judge has discretion to amend the SOR at the hearing to render it in conformity with the evidence admitted or for other good cause. Directive ¶ E3.1.17. Although an applicant is entitled to receive an SOR that places him on reasonable notice of the allegations being made against him, an SOR is an administrative pleading that is not required to satisfy the strict requirements of a criminal indictment, and it does not have to allege every possible fact that may be relevant at the hearing. *See, e.g.*, ISCR Case No. 00-0633 at 4 (Oct. 24, 2003). Considering the record as a whole, the Board concludes that the SOR issued to Applicant placed him on adequate notice of the allegations being made against him. Furthermore, a review of the hearing transcript does not leave the Board with the impression that the SOR prejudiced in any identifiable way Applicant's ability to prepare for the hearing, his ability to participate in the hearing, his ability to raise objections or make arguments on his behalf, or his ability to present evidence for the Judge to consider in his case.

With respect to the Guideline C allegations, the Administrative Judge did not err by concluding that the security concerns raised by Applicant's possession and use of a foreign passport had not been mitigated by application of Guideline C Mitigating Condition 1.

Applicant's assertion that the Judge erred in not applying Guideline C Mitigating Condition 3 because Applicant's use and renewal of his foreign passport was "legal and therefore sanctioned by the United States" is similarly flawed. Merely because an applicant's conduct is legal it does not follow that the applicant's conduct has been sanctioned by the federal government within the meaning of Mitigating Condition 3. What is required under Mitigating Condition 3 is evidence that the federal government has indicated that it affirmatively approves, authorizes, consents to, or otherwise sanctions a particular type of act or conduct, either as part of an official policy or with respect to a particular applicant. *See, e.g.*, ISCR Case No. 98-0252 at 4 (App. Bd. Sep. 15, 1999). In this case, there is no evidence that Applicant's use of a foreign passport received official U.S. Government approval.

Given the totality of the evidence, including the timing of Applicant's surrender of his Taiwan passport and the renunciation of his Taiwanese citizenship, and the other evidence of record, the Administrative Judge was not required to conclude, as a matter of law, that the security concerns presented under Guideline C had been fully mitigated by application of Mitigating Condition 4. The Board need not agree with the Judge's weighing of the evidence in this regard to conclude that it was not arbitrary, capricious or contrary to law.

Applicant asserts that the Administrative Judge erred by finding that Applicant used his Taiwan passport to travel to Taiwan in 2001 and 2002 based on the Applicant's testimony of his recollection, albeit uncertain, that he thought he had used it on those trips. In support of that assertion, he offers new evidence which indicates Applicant used his U.S. passport on those trips. The Board cannot receive or consider new evidence on appeal. Directive ¶ E3.1.29. Therefore, the Judge's finding is sustainable.

Whether an applicant's financial interest in a foreign country is "substantial" for purposes of applying Guideline B Disqualifying Condition 8, or "minimal" for purposes of applying Guideline B Mitigating Condition 5, does not turn simply on consideration of the dollar amount of that financial interest. The Administrative Judge is not required to engage in a piecemeal analysis of an applicant's financial ties separate from the other security concerns presented in the case. In assessing the significance of the foreign financial interest involved, a Judge must not only consider its value in comparison to the applicant's financial interests in the United States, but also other record evidence concerning the facts

and circumstances of the applicant's foreign financial interest and foreign family and other ties. *See, e.g.*, ISCR Case No. 01-18860 at 4 (Mar. 17, 2003). Considering the record as a whole, it was not arbitrary, capricious or contrary to law for the Judge to consider Applicant's foreign financial interests in conjunction with his foreign family ties and the record as a whole, and to conclude that Applicant had not met his burden of producing sufficient evidence to warrant the application of Mitigating Conditions 5 or to conclude that Applicant had not mitigated the security concerns raised under Guideline B.

In its reply brief, Department Counsel correctly points out that, on appeal, Applicant does not challenge the Administrative Judge's adverse conclusions regarding the security concerns associated with the presence in Taiwan of Applicant's mother, parents-in-law, four siblings and other in-laws, all of whom are citizens of Taiwan. There is no presumption of error below. Having gone unchallenged, the Judge's findings and conclusion regarding the presence of Applicant's immediate family members in Taiwan stand, and these findings and conclusions provide a sufficient basis for the Judge's overall adverse security clearance decision.

Finally, the Administrative Judge's decision shows that he did more than merely verbalize an adherence to the "whole person" concept. The Judge's decision exhibits consideration of a number of variables to reach a common sense determination. Directive ¶ E2.2. The Judge articulated a reasonable concern that the totality of Applicant's circumstances make him vulnerable to coercion, exploitation or pressure, an important consideration in the "whole person" analysis. Directive ¶ E2.2.1.8. The Board need not agree with the Judge's decision to conclude that it is sustainable.

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 (Acting), Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. Directive ¶ E2.A3.1.3.1 ("Dual citizenship is based solely on parents' citizenship or birth in a foreign country").
2. Directive ¶ E2.A3.1.3.3 ("Activity is sanctioned by the United States").
3. Directive ¶ E2.A3.1.3.4 ("Individual has expressed a willingness to renounce dual citizenship").
4. Directive ¶ E2.A2.1.3.5. ("Foreign financial interests are minimal and not sufficient to affect the individual's security

responsibilities.")