

DATE: October 19, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-02058

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Leigh T. Hansson, Esq.; Kurt D. Ferstl, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 15, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline B (Foreign Influence), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) 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 adverse security clearance decision under Guidelines B, E, and J is arbitrary, capricious or contrary to law. ⁽¹⁾

(1) Applicant contends that the Administrative Judge's adverse decision should be reversed because the Judge failed to consider all the evidence and erred in not applying Guideline B Mitigating Condition 1 ⁽²⁾ In support of that contention, Applicant argues that his family member in Hong Kong is not an agent of a foreign power and not in a position to be exploited by a foreign power in any way. He also argues that when the circumstances presented in each subparagraph of the SOR, such as his foreign travel, are considered separately, they present no security concern. The Board does not find these arguments persuasive.

The Administrative Judge made sustainable findings that: (1) Applicant was born in Taiwan, received his high school education there, and served mandatory military duty in the Taiwanese army; (2) Applicant was a member of a political party in Taiwan until 1981, when he became a U.S. citizen; (3) Applicant's brother has resided in Hong Kong and Shanghai since 1991 or 1992; (4) Applicant has monthly e-mail and telephonic contact with this brother; (5) Applicant traveled to Taiwan in 1991, 1998, and two times in 2000; (6) Applicant traveled to Hong Kong in 1998; (6) Taiwan is an active collector of competitive information and a perpetrator of industrial espionage against U.S. companies producing military critical technologies; (7) Hong Kong is a special administrative region of the People's Republic of China (PRC), a totalitarian state rule by the Chinese Communist Party; and (8) the PRC is an active collector of competitive information and a perpetrator of industrial espionage against U.S. companies producing militarily critical technologies. Given those findings, the Judge concluded that Applicant's ties with those immediate family members raised security concerns under Guideline B and that Disqualifying Conditions 1 ⁽³⁾ and 6 ⁽⁴⁾ applied. That conclusion

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.

The application of Adjudicative Guidelines disqualifying and mitigating conditions does not turn simply on a finding that one or more of them applies to the particular facts of a case. Rather, the application of a disqualifying or mitigating condition requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan. 15, 2003). As the trier of fact, the Administrative Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.

Applicant had the burden of demonstrating that his family member was not in a position where he is likely to be exploited by a foreign power. Applicant's arguments do not demonstrate that it was arbitrary, capricious, or contrary to law for the Administrative Judge to conclude that Applicant had not met his burden of establishing that his relative was not in a position to be exploited by a foreign power in a way that could force him to choose between loyalty to his relative and the United States. The Board does not review a case *de novo*.

Having relatives, cohabitants or associates who are connected with a foreign government is a disqualifying condition under Guideline B. ⁽⁵⁾ However, the absence of such a connection with a foreign government does not mean that there is no security concern under Guideline B. *See, e.g.*, ISCR Case No. 02-29665 at 5 (App. Bd. Nov. 10, 2004). A reading of Guideline B in its entirety shows that security concerns can be raised by a variety of foreign connections, not just having family members with foreign government connections. Additionally, the absence of a particular disqualifying condition does not compel a favorable security clearance decision. *See, e.g.* ISCR Case No. 02-08052 at 3 (App. Bd. Jun. 23, 2003). In her decision, the Administrative Judge articulated a rational basis for her conclusion that Applicant's circumstances, including the PRC's and Taiwan's political and intelligence profile, increased Applicant's vulnerability to foreign influence. The Judge was not required to engage in a piecemeal analysis of each subparagraph of the SOR out of context from the security concerns presented by Applicant's circumstances as a whole. Considering the record as a whole, the Judge's application of Guideline B Mitigating Condition 1 is sustainable, and her overall unfavorable security clearance decision is not arbitrary, capricious, or contrary to law.

(2) Applicant argues that the Administrative Judge's adverse clearance decision under Guidelines E and J should be reversed because the Applicant did not deliberately or intentionally make false statements in an interview with a government investigator. Alternatively, Applicant argues that the Judge should have concluded that the security concerns raised under Guidelines E and J had been mitigated, as a matter of law, because the disqualifying conduct was an isolated incident, and the Applicant subsequently provided correct information. The Board does not find Applicant's arguments persuasive.

Applicant's statements about his intent and state of mind when he provided information to the government agent was relevant evidence, but they were not binding on the Administrative Judge. *See, e.g.*, ISCR Case No. 01-19278 at 6-7 (App. Bd. Apr. 22, 2003). As the trier of fact, the Judge had to consider Applicant's statements in light of the record evidence as a whole, and Applicant's denial of any intent to provide false information did not preclude the Judge from weighing the record evidence and making findings that contradicted Applicant's denials. The security concerns raised by Applicant's falsification were not necessarily mitigated by Applicant's subsequent disclosures to the government. *See* ISCR Case No. 01-19513 at 5 (App. Bd. Jan. 22, 2004). Similarly, such concerns were not necessarily mitigated by the fact that the falsification was an isolated incident. *See, e.g.*, ISCR Case No. 04-00789 (App. Bd. June 28, 2006). Given the record that was before her, the Judge's ultimate unfavorable clearance decision under Guidelines E and J is not arbitrary, capricious, or contrary to law.

Order

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

Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in Applicant's favor with respect to SOR paragraphs 1.b and 1.d.. Those favorable findings are not at issue on appeal.

2. 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.")

3. 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.")

4. Directive ¶ E2.A2.1.2.6. ("Conduct which may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government.")

5. Directive ¶ E2.A2.1.2.3. ("Relatives, cohabitants, or associates who are connected with any foreign government").