

DATE: June 14, 2006

---

In Re:

-----

SSN:-----

Applicant for Security Clearance

---

ISCR Case No. 04-03720

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

Melvin A. Howry, Department Counsel

#### FOR APPLICANT

#### *Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 1, 2005, 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 decision based on the written record. On November 30, 2005, Administrative Judge Shari Dam 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's application of Foreign Influence Mitigating Condition 1 is arbitrary, capricious or contrary to law; whether the Administrative Judge's application of Foreign Influence Mitigating Condition 5 is arbitrary, capricious or contrary to law; and whether the Administrative Judge's overall favorable security clearance decision is arbitrary and capricious in light of the record evidence.

### **Whether the Record Supports the Administrative Judge's Factual Findings**

#### A. Facts

The Administrative Judge made the following dispositive findings of fact:

Applicant was born in Taiwan in 1969. At the age of 11, Applicant left Taiwan to come to the United States on a student visa. After arriving here in 1981, he stayed with his uncle until 1983, when his father, mother, sister and brother arrived as legal alien residents. Applicant's mother became a naturalized United States citizen in 1989, he and his sister in 1990, and his brother in 1993. All of these relatives continue to reside in the United States. Applicant's 66-year-old father is a legal permanent resident of the United States who maintains his Taiwanese citizenship and residency. His father travels back and forth to the United States several times a year because he owns a small business in Taiwan which provides income to support his family. While in the United States, the father stays with Applicant for at least four months annually. Eventually, Applicant's father intends to retire, apply for citizenship and live permanently in the United States.

Applicant attended an American university and graduated in June 1995. After graduating from college, Applicant

worked in the field of architecture for a period of time. He later returned to school and in December 2003, completed a Master of Science degree in Computer Science. Since July 2003, he has been employed as a software engineer for a defense contractor. In September 2003, he completed a Security Clearance Application (SCA).

Applicant did not know that he owned property in Taiwan until January 2004, when Applicant's father told him that in 2002 he had deposited monies into a Taiwanese bank account in Applicant's name as a way to avoid inheritance taxes, and later used some of the monies to purchase commercial property. In his Response to the SOR, Applicant acknowledged that the property is worth \$230,000, but pointed out that he has no financial interest in it and intends to sell his share by the end of 2005. Applicant also claimed that he no longer has the bank account previously disclosed to the government.

Applicant returned to Taiwan at the end of 1996, in 1997, 1998, 2001, and 2002. He went for pleasure and stayed with his father while he was there. He did not go in 2000.

Administrative notice is taken of the fact that Taiwan is a stable democracy and it has a strong and well-developed economy. At the same time, it also has been identified as one of the most active collectors of foreign economic information and industrial espionage against the United States.

## B. Discussion

None of these findings of fact are in issue.

### **Whether the Record Supports the Administrative Judge's Ultimate Conclusions**

Based on these findings of fact, the Administrative Judge concluded that the Department Counsel established a *prima facie* case due to Applicant's family ties.<sup>(1)</sup> Also, the Judge found that even though "Applicant did not purchase the commercial property [in Taiwan], valued at \$230,000, he is the legal owner of it, which constitutes a second disqualifying condition."<sup>(2)</sup> As the Judge indicated, in such situations an 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. Department Counsel challenges the Judge's conclusions, contending that Applicant's evidence did not allow her to apply Foreign Influence Mitigation Conditions (FIMC) 1<sup>(3)</sup> and 5<sup>(4)</sup>, or to conclude overall that it was clearly consistent with the national interest to grant or continue a security clearance for Applicant. In effect, Department Counsel maintains that the Judge erred by improperly shifting the burden of proof on mitigation to the government where the Applicant failed to produce sufficient record evidence to mitigate the security concerns.

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*.

For the following reasons, the Board concludes that Department Counsel's position has merit:

There is no evidence indicating that Applicant's father is an agent of a foreign power. However, Department Counsel challenges the Administrative Judge's conclusion that the father was not "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 involved and the United States." The Judge concluded that the father did not pose a "discernible vulnerability to pressure or coercion sufficient to create a potential for foreign influence that could result in the compromise of classified information." Decision at 6. The Judge reached this conclusion because the father is "an ordinary citizen who maintains a small business in Taiwan as a means

of support for his family in the United States until he can retire and live here permanently," he spends several months each year in the United States with Applicant and other family members, and all other family members are U.S. citizens. Decision at 6. In effect, Department Counsel contends that the Judge improperly shifted onto the government the burden of demonstrating that the father is not in a position to be exploited. Given the burden of proof on Applicant, and considering the nature of the United States/Taiwan economic relationship as the Judge found it, the Board concludes that it is not plausible for the Judge to conclude, based on this record, that Applicant's father is not vulnerable to exploitation or influence. The fact that Applicant's father is an ordinary citizen and small businessman with family members in the United States does not eliminate the need for Applicant to offer substantial evidence as to why the father's situation would not lead to exploitation by a foreign power that is an active collector of foreign economic information and industrial espionage against the United States, especially when: (a) Applicant's father and his family are dependent on his business in Taiwan; (b) the father lives in Taiwan most of the year; (c) the father purchased and placed property in Applicant's name in Taiwan without Applicant's knowledge; and (d) the father deposited money in a Taiwanese bank account in Applicant's name admittedly as a way of avoiding inheritance taxes.

The Administrative Judge's analysis of FIMC 5 is facially inconsistent. The Judge found that Applicant is the legal owner of property in Taiwan valued at \$230,000, and concluded that Applicant fell within FIDC 8. Yet, when considering mitigation, the Judge relied on Applicant's uncorroborated statement that "he personally has no financial interest in the parcel and that it was essentially, a gift . . ." The Judge also then concluded that Applicant was only a "partial" owner based on his use of the word "share" in his SOR Response. Decision at 6.

The Judge's analysis of Applicant's "partial" interest is incomplete. If Applicant owns the property, by gift or otherwise, he has a financial interest in it. If Applicant's interest really is "partial," the record does not indicate what part Applicant owns, who the other owners are, and other details of ownership. Applicant stated that the property was being used for the father's retail watch business. Government Exhibit 5 at 4. The Judge seems to assume, without evidence, that a "partial" interest in real property valued at \$230,000 is minimal. Moreover, as explained below under the "whole person" analysis, the Judge relied, at face value, on Applicant's promise that he would divest himself of the property. A promise to take a specific action at a future date should be given little weight where a person previously made such a promise and failed to perform on it. The record shows that in his sworn statement to a Defense Security Service agent in January 2004, Applicant stated he would "sell the property under my name in Taiwan and transfer all the proceeds to my bank account in the U.S. no later than 2004" (Government Exhibit 5 at 4)--but when he responded to the SOR in April 2005, he admitted that he still owned the property and again promised he would divest himself of "my share" by the end of 2005. Applicant provided little information about his overall financial interests compared to his financial interests in Taiwan, and as explained above, there are significant gaps as to the nature of his property interest in Taiwan. Given the burden of proof on Applicant, and considering the available record, the Judge's conclusion that Applicant demonstrated that his foreign financial interests are minimal and not sufficient to affect Applicant's security responsibilities, is arbitrary and capricious.

Finally the Administrative Judge concluded that, based on the whole person theory, it was clearly consistent with the national interest to grant Applicant a security clearance. Included in the Judge's analysis was a review of Applicant's educational achievements, citizenship of family members residing in the United States, his partial interest in a gift from his father, and his claim that he intends to sell his Taiwanese property. A Judge's decision is not measured by a standard of perfection, and we assume that the Judge did consider record evidence unless otherwise stated. The problem here is Applicant's failure to present substantial evidence that the potential for pressure, coercion, exploitation or duress in his particular case is sufficiently low so as to overcome the government's significant security concerns. *See, e.g.*, ISCR Case No. 04-02233 at 5 (App. Bd. May 9, 2006). Even if Applicant's interest was "partial," the Judge drew speculative inferences about the lack of security significance in such an interest instead of relying on record evidence. The Judge's decision indicates that she relied on Applicant's promise to dispose of the property interest, but as indicated in the discussion of FIMC 5, it was not reasonable for a fact finder to rely on such a promise to take future action, where the limited record that was available already demonstrated that Applicant had failed to perform on such a prior promise to do so. Significantly, in this case, Applicant did not appear at a hearing before the Judge where the Judge would have had the opportunity to evaluate Applicant's demeanor and credibility. A "whole person" analysis also considers the potential for pressure, coercion, exploitation or duress (Directive ¶ E2.2.1.8) and the likelihood of continuation or recurrence (Directive ¶ E2.2.1.9), and for whatever reason, Applicant continued to hold an interest in a substantial business property in Taiwan beyond the point where he promised he would sell what he owned and recover the assets into

American accounts.

The Administrative Judge erred in her application of FIMC 1 and 5 and in her whole person analysis, and these harmful errors cannot be corrected by remand.

### Order

The Administrative Judge's decision granting Applicant a security clearance is REVERSED.

Signed: Michael D. Hipple

Michael D. Hipple

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. Foreign Influence Disqualifying Condition (FIDC) 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" (Directive ¶ E2.A2.1.2.1).

2. Foreign Influence Disqualifying Condition(FIDC) 8: "A substantial financial interest in a country, or in any foreign-owned or operated business that could make the individual vulnerable to foreign influence" (Directive ¶ E2.A2.1.2.8).

3. "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" (Directive ¶ E2.A2.1.3.1).

4. "Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities" (Directive ¶ E2.A2.1.3.5).