

DATE: September 26, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-07766

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Candace Le'i, Department Counsel

#### **FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 2, 2005, 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), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 27, 2006, after the hearing, Administrative Judge Darlene Lokey Anderson 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 erred in applying Foreign Influence Mitigating Condition (FIMC) 1 and concluding that Applicant's family in Taiwan are not agents of a foreign power and not in a position to be exploited by the Taiwanese government; whether the Judge erred in applying FIMC 3 and concluding that Applicant's contact with his family in Taiwan is casual and infrequent; and whether there is sufficient evidence to sustain the Judge's favorable security clearance decision.

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

The Judge made the following pertinent findings of fact: [\(1\)](#)

Applicant's eight siblings and mother-in-law and brother-in-law are residents of Taiwan. One of Applicant's brothers works in the personnel department at the city hall in his hometown. Another has a street cleaning job. One brother is retired from a chemical plastics company, and another works for a company that makes boat parts. Applicant's four sisters are housewives. One sister is a widow. The husbands of the other three sisters work as a street cleaner, for an insurance company, and for a chemical byproduct company. None of them work for companies that are affiliated with the Taiwanese government, and no one in Applicant's family is a member of the Communist Party. Applicant's mother-in-law is retired. For between fifteen and eighteen years, Applicant's brother-in-law has worked for the Taiwanese Army in a "desk job."

The only contact Applicant has with anyone in Taiwan is with one sister whom he calls every month or two. Applicant's wife calls her mother about once every couple of months and sends her a total of \$1,000 a year. Applicant's wife calls her brother once a year. Applicant traveled to Taiwan in 1997 to sell a house he inherited from his father and in 1999

when his mother died. Applicant has no plans at this time to travel to Taiwan.

There is other record evidence not made the basis of a finding of fact by the Administrative Judge that nevertheless is pertinent to the issues raised on appeal. That evidence is: Taiwan ranks sixth in the ranking of the seven countries most actively engaging in foreign economic collection and industrial espionage against the United States.

## Discussion

The appeal issues deal primarily with the Administrative Judge's conclusions.

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

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*.

Department Counsel argues that the Administrative Judge erred in applying FIMC 1<sup>(2)</sup> and concluding that Applicant's family in Taiwan are not agents of a foreign power and not in a position to be exploited by the Taiwanese government. Department Counsel's argument has merit. When the government has established a security case, the burden shifts to the Applicant to rebut, explain, extenuate, or mitigate the security concerns. Based on Applicant's testimony, the Judge applied FIMC 1. The record evidence does not support the Judge's conclusion that none of Applicant's family members are agents of a foreign power. Applicant has eight siblings in Taiwan. At least one brother is a municipal employee there, and Applicant's brother-in-law has worked for the Taiwanese military for almost twenty years. Moreover, the Judge has failed to articulate a rational basis for concluding that Applicant's family members are not in a position to be exploited by the Taiwanese government. The Judge merely stated in purely conclusory terms, without elaboration, that the relatives were not in a position to be exploited. For these reasons, the Judge's favorable application of FIMC 1 is arbitrary, capricious, and contrary to law. *See, e.g.*, ISCR Case No. 04-03720 at 3-4 (App. Bd. Jun. 14, 2006).

As part of its argument regarding the Administrative Judge's application of FIMC 1, Department Counsel complains on appeal that the Administrative Judge erred in not discussing the intelligence gathering posture and past record of the government of Taiwan with reference to the United States. Department Counsel's argument on this point is persuasive. Although an Administrative Judge is not required to discuss each and every piece of record evidence in making a decision, the Judge cannot simply ignore, disregard, or fail to discuss significant record evidence that a reasonable person could expect to be taken into account in reaching a fair and reasoned decision. *See, e.g.*, ISCR Case No. 02-19479 at 6 (App. Bd. Jun. 22, 2004) ("...the Judge's decision cannot simply be silent about what, as a matter of common sense, appears to be a relevant factor that could be an important aspect of the case"). In Foreign Influence cases, the nature of the foreign government involved in the case and the intelligence gathering history of that government are important evidence that provides context for all the other evidence of record and must be brought to bear on the Judge's ultimate conclusions in the case. Here, the Judge's decision is completely silent as to the evidence of record regarding Taiwan's history of intelligence gathering and industrial espionage. The Judge's omission was arbitrary and capricious and affected her ability to properly evaluate the significance of Applicant's relatives' citizenship and residency in Taiwan and to properly evaluate the applicability of the Guideline B mitigating factors.

Department Counsel also argues that the Administrative Judge erred in applying FIMC 3 and concluding that Applicant's contact with his family in Taiwan is casual and infrequent.<sup>(3)</sup> That argument also has merit. There is a rebuttable presumption that an applicant's contacts with immediate family members, including in-laws, are not casual.

Applicant testified that he contacted his sister every one to two months and that his wife contacted her mother with about the same frequency and sent her money periodically. Applicant has not rebutted the presumption. *See, e.g.*, ISCR Case No. 02-24267 at 7 (App. Bd. May 24, 2005). The record in this case does not support the Judge's conclusion that Applicant's contacts with family members are casual and infrequent.

Department Counsel argues that there is insufficient evidence to support the Administrative Judge's overall favorable security clearance decision. Because the Judge erred in her application of FIMC 1 and FIMC 3, and because she erred in not including and evaluating evidence of the intelligence gathering posture of Taiwan in her decision, the continued viability of the Judge's ultimate favorable conclusion about Applicant's security eligibility under Guideline B rests on whether there is any sustainable basis for her ultimate decision independent of those errors and omissions. Beyond the establishment of the basic facts that give rise to the government's security concerns (i.e., the establishment of the fact that Applicant has family ties to citizens and residents of foreign countries), there is a paucity of evidence in this case. The only favorable facts cited by the Judge are that Applicant has cut all ties with Taiwan other than his relationship with his sister, that he understands his responsibility to the United States in holding a security clearance, and that he would report any attempts to blackmail him or his family to his supervisor. Those facts either do not readily suggest refutation, extenuation, or mitigation of the government's security concerns, or they have low probative value. *See, e.g.*, ISCR Case No. 04-00109 at 5 (App. Bd. July 13, 2006); and ISCR Case No. 02-22461 at 12-13 (App. Bd. Oct. 27, 2005). Given the totality of the record evidence, and given the errors in the Judge's application of the two mitigating factors and the Judge's failure to address significant evidence relating to the government of Taiwan, the Judge's recitation of these facts was not sufficient to support her favorable conclusions under Guideline B.

Department Counsel has demonstrated several errors below that cannot be corrected by remanding the case, given the record evidence. Taken cumulatively, these errors warrant reversal.

### **Order**

The Administrative Judge's favorable security clearance decision is REVERSED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board

1. Department Counsel did not appeal the Judge's decision as to Guideline C. Therefore, only facts regarding Guideline B are pertinent.
2. "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.

3. "Contact and correspondence with foreign citizens are casual and infrequent;" Directive ¶ E2.A2.1.3.3.