

DATE: October 10, 2006

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In Re:

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 SSN: -----

Applicant for Security Clearance

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ISCR Case N04-08560

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Candace Le'i, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 24, 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 25, 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's conclusion that Guideline B Mitigating Condition E2.A2.1.3.1 applied to Applicant's case was error; whether the Administrative Judge's conclusion that Guideline B Mitigating Condition E2.A2.1.3.3 applied to Applicant's case was error; whether the Administrative Judge erred in not discussing the nature of the Taiwan government and its intelligence gathering posture with reference to the United States; and whether there is sufficient record evidence to support the Administrative Judge's overall favorable security clearance determination. We reverse the Administrative Judge's decision to grant the clearance.

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

A. Facts

The following findings of fact made by the Administrative Judge are pertinent to the issues raised on appeal: [\(1\)](#)

Applicant was born in Taiwan in 1962 and served in the Taiwanese Army from 1984 to 1986. He moved to the United States in 1986 on a student visa to attend graduate school. After receiving his doctorate in 1992, he returned to Taiwan because his student visa was no longer valid. From 1993 to 1996 he worked as a contractor for the Taiwanese government. In 1998 Applicant resigned from his job in Taiwan, obtained a job in the United States, and returned permanently to the U.S. In April 2003, he became a naturalized citizen of the United States. The Applicant's mother, mother-in-law and brother-in-law are citizens of and reside in Taiwan. His sister is a citizen and resident of Indonesia. Applicant's mother and mother-in-law are retired school teachers. Applicant's brother-in-law is on disability. Applicant talks to his mother via telephone on a monthly basis. He contacts his sister in Indonesia by telephone approximately

once every three months. His wife, who is a U.S. citizen, contacts her family in Taiwan every two weeks by telephone. None of Applicant's family in Taiwan or Indonesia are any longer affiliated with the Taiwanese or Indonesian governments. The Applicant stated unequivocally that if he were ever placed in a compromising situation that concerned classified information, under any circumstances he would immediately report the situation to his security department.

Applicant traveled to Taiwan in 1997, 2001, and 2003. He traveled to Indonesia in 2003. The trips were taken for vacation purposes or to visit family. Applicant maintained a small savings account in Taiwan which was closed by his mother in July 2005. In the United States, Applicant owns his own home worth approximately one million dollars. He also has a 401K and a Roth IRA. His three children were born in the United States. A letter of recommendation from Applicant's supervisor indicates that Applicant is dependable, motivated, hardworking and trustworthy.

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 intelligence collection and industrial espionage against the United States; and (ii) official U.S. government documents report the significant presence of terrorist organizations in Indonesia.

## B. Discussion

The Appeal Board's review of the Administrative Judge's findings of fact is limited to determining if they are supported by substantial record evidence--such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record. Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21 (1966). In evaluating the Administrative Judge's findings, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1.

To the extent necessary to resolve the issues raised on appeal, the Administrative Judge's findings of fact will be discussed below in conjunction with the analysis of her ultimate 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*.

(1) Department Counsel argues that the Administrative Judge committed reversible error by applying Guideline B Mitigating Condition E2.A2.1.3.1 [\(2\)](#) and concluding that Applicant's family in Taiwan are not in a position to be exploited by the Taiwan government and that his sister in Indonesia is not in a position to be exploited. Department Counsel's argument has merit. A review of the Judge's decision indicates that it lacks any analysis that relates the facts of the case to the Mitigating Factor. The Judge merely states, in conclusory terms without elaboration, that Applicant's relatives in Taiwan, and Applicant's sister in Indonesia are not in a position to be exploited. The Judge does not articulate a rational basis for her conclusion that the mitigating factor applied. Therefore, the Judge's application of the mitigating condition is not sustainable.

(2) Department Counsel argues that the record evidence does not support the Judge's conclusion that Applicant's relatives are not agents of a foreign power. There is a paucity of evidence in this case. When the government has established a security concern, as the Judge concluded it had in this case, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate that security concern. Regarding the application of Guideline B Mitigating Condition

E2.A2.1.3.1, the Board concludes after a review of the evidence that there was an insufficient basis in the record for the Judge to apply the mitigating factor in this case.

(3) Department Counsel argues that the Administrative Judge erred in applying Guideline B Mitigating Factor E2.A2.1.3.3<sup>(3)</sup> and concluding that Applicant's contact with his family in Taiwan and Indonesia is casual and infrequent. This argument also has merit. There is a rebuttable presumption that an applicant's contacts with immediate family members are not casual and that applicant has ties of affection for, or obligations to, his spouse's immediate family members. In this case, the evidence indicates that Applicant and his foreign relatives have a positive relationship that includes regular, frequent telephonic contact, and occasional face-to-face contact. This evidence tends to support, rather than rebut, the presumption that Applicant's contacts are not casual, and that he has ties of affection for, or obligations to, those family members. Given the state of the evidence, the Judge failed to articulate a rational basis for her conclusion that Applicant's contacts with his foreign relatives are very limited, and are not of a nature to influence his security worthiness. The Judge's conclusory statement that Applicant's contacts with his foreign relatives is very limited and not of a nature to influence his security worthiness is, without elaboration, arbitrary and capricious.

(4) Department Counsel contends 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, and the presence of terrorist threats in Indonesia. 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, the intelligence gathering history of that government, and the presence of terrorist activity is important evidence that provides context for 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, and terrorist threats in Indonesia. The Judge's omission rendered arbitrary and capricious her evaluation of the significance of Applicant's relatives' citizenship and residency in Taiwan and Indonesia, and her evaluation of the applicability of the Guideline B mitigating factors.

(5) 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 Guideline B Mitigating Conditions E2.A2.1.3.1 and E2.A2.1.3.3, and because she erred in not including evidence of the security/intelligence profile of Taiwan and Indonesia 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. As stated earlier in this decision, 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 dearth of evidence in this case. The only other favorable facts cited by the Judge are that Applicant has cut all non-family ties with Taiwan and that he understands his responsibility to the United States in holding a security clearance. 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. Jul. 13, 2006); ISCR Case No. 02-22461 at 12-13 (App. Bd. Oct. 27, 2005). Accordingly, the Judge's recitation of those 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 judgment of the Administrative Judge granting Applicant a clearance is REVERSED.

Signed: Jeffrey D. Billet

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

### **Separate Opinion of Member David M. White**

I agree with the opinion of my colleagues insofar as they hold that the Administrative Judge's conclusions concerning application of Guideline B (Foreign Influence) Mitigating Conditions (hereinafter FIMC) 1-(4) and 3-(5) are arbitrary, capricious or contrary to law, and that this is harmful error. I disagree with the decision to reverse the Judge's decision because correction of these properly identified errors neither mandates nor supports reversal, with the resultant final denial of a clearance to this Applicant. I would remand the case for a properly reasoned and articulated decision, based on consideration of all the relevant and material information.

#### **I. Material Issues Raised on Appeal**

Department Counsel identified the two issues raised on appeal as follows:

- A. Whether the Administrative Judge committed reversible error by applying Foreign Influence Mitigating Condition 1 and concluding that Applicant's family in Taiwan (China) are not agents of a foreign power and not in a position to be exploited by the Taiwanese or Chinese governments, and that his sister in Indonesia is not in a position to be exploited.
- B. Whether the Administrative Judge committed reversible error by applying Foreign Influence Mitigating Condition 3 and concluding that Applicant's contact with his family in Taiwan (China) and Indonesia is casual and infrequent. (6)

Whether the Judge erred in not discussing the nature of, and threat presented by, the foreign countries (7) involved was raised by the Government as one of several matters in support of its assertion of error with respect to FIMC 1, not as a separate material issue. That allegation of error implicates not only the applicability and weight attributable to FIMC 1, but also the necessary "whole person concept" analysis of, "the potential for pressure, coercion, exploitation or duress." (8)

#### **II. Statement of Dispositive Facts**

The majority accurately recites the facts found by the Judge and the additional record evidence relevant to deciding whether her rulings and conclusions with respect to FIMC 1 and FIMC 3 were arbitrary, capricious or contrary to law, and constituted harmful error. The accuracy, as distinguished from the completeness, of the Judge's fact finding was not disputed by the Government. (9) Additional facts which I consider dispositive of the issues on appeal concern the contents of the Judge's written decision itself.

In the "**CONCLUSIONS**" section of her decision, the Judge stated, without any analysis or explanation (albeit with ample and self-evident support from her findings of fact), that the Government established its case as to all allegations in the SOR, that Guideline B Disqualifying Condition (FIDC) 1-(10) applies to Applicant and that his foreign contacts have a direct and negative impact on his suitability for access to classified information. The Judge's favorable ruling for the Applicant under Guideline C (Foreign Preference) was not appealed. As the majority correctly points out, the Administrative Judge then recited nothing more than analytically unsupported brief and conclusory determinations stating the applicability of FIMC 1 and FIMC 3, engaged in no weighing of potentially mitigating versus potentially disqualifying factors, (11) and summarily ruled for the Applicant. (12)

### III. Whether the Administrative Judge Committed Harmful Error

I concur with the majority that the Administrative Judge committed harmful error. The decision does not set forth her analysis of the relevant facts; nor does it explain her rationale for concluding that FIMC 1 and FIMC 3 were proven sufficiently to mitigate her stated security concerns, under FIDC 1, and to therefor grant Applicant a security clearance.

With respect to both FIMC 1 and any "whole person" analysis, the decision failed to articulate any factual findings or conclusions concerning the nature of the foreign countries involved in evaluating potential security risks. Nor did it explain which circumstances led to the conclusion that neither the family members in Taiwan nor those in Indonesia were in a position to be exploited.

With respect to FIMC 3, the decision neither recognized the rebuttable presumption that an applicant's contacts with immediate family members are not casual, <sup>(13)</sup> nor explained which facts were considered to have rebutted this presumption. There is no explanation why the regular and enumerated telephone contacts and personal visits, most of which are described in the findings of fact, <sup>(14)</sup> were determined to be, "very limited" and "infrequent".

A decision is held to be erroneous under the arbitrary and capricious standard when, "it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made." <sup>(15)</sup>

Taken together, these errors render the Judge's conclusions arbitrary and capricious. These errors were harmful because the Judge's application of the mitigating conditions was central to her ultimate determination to grant this Applicant a security clearance after she expressly found that his foreign contacts have a direct and negative impact on his suitability for access to classified information. In the absence of a rationally articulated basis for the conclusions reached by the Judge, I am not in a position to find that either party received the fair process and reasoned judgment required by the Directive. <sup>(16)</sup>

### IV. Whether Reversal or Remand is the Appropriate Remedy

The Directive gives the Appeal Board authority to take one of three actions in its written clearance decision addressing the material issues raised on appeal: to affirm the decision below; to remand the case specifying action to be taken to correct identified error; or to reverse the decision of the Administrative Judge if correction of identified error mandates such action. <sup>(17)</sup> The identified harmful errors that require correction in this case are the arbitrary and capricious conclusions applying FIMC1 and FIMC 3 to sufficiently mitigate the security concerns raised by the Government's evidence and warrant granting the clearance in question.

Even though this case does not turn on any narrowly defined credibility determinations in the fact-finding process, I am in no position after merely reading a cold record to reach my own "fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in [the Adjudicative Guidelines]." <sup>(18)</sup> Applicant is entitled to a hearing and to personally appear before the Judge so that the decision maker will be able to assess him as a "whole person" in reaching a proper clearance decision. Both parties to this appeal are entitled to a reasoned articulation, by the Judge who heard the evidence, supporting a sustainable judgment.

Under appropriate circumstances, the Judge can "render a favorable decision in the absence of an[y] Adjudicative Guidelines mitigating condition." <sup>(19)</sup> Thus even a finding by this board that FIMC 1 and 3 are not applicable as a matter of law, as opposed to the more narrow legal holding that the decision inadequately explains why and how they do apply, would not compel denial of Applicant's clearance. Only a remand, not a reversal, can cure the arbitrary and capricious nature of the decision in this case because the Board is not permitted to conduct a de novo review of the evidence.

Accordingly, I would set aside this decision and remand the case for a new decision by the Judge that sufficiently analyzes and articulates the relevant and material information, the pertinent criteria and adjudication policy, to reach supportable conclusions with respect to both Guideline B and the ultimate determination of whether granting a security

clearance in this case is clearly consistent with the interests of national security.

Signed: David M. White

David M. White

Administrative Judge

Member, Appeal Board

1. Department Counsel did not appeal the Judge's ultimate favorable conclusions 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."
3. "Contact and correspondence with foreign citizens are casual and infrequent."
4. Directive ¶ E2.A2.1.3.1 provides, "[Conditions that could mitigate security concerns include:] 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."
5. Directive ¶ E2.A2.1.3.3 provides, "[Conditions that could mitigate security concerns include:] Contact and correspondence with foreign citizens are casual and infrequent."
6. Government Appeal Brief at 9.
7. The majority's statement of issues raised on appeal mentions only Taiwan when, in fact, both Taiwan and Indonesia are countries where Applicant's immediate family members reside, and both were raised by the Government.
8. Directive ¶ E2.2.1.8.
9. "The Government agrees with and adopts those findings of fact for purposes of this appeal,..." Government Appeal Brief at 3.
10. Directive ¶ E2.A2.1.2.1 provides, "[Conditions that could raise a security concern and may be disqualifying include:] 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."
11. The decision is also devoid of any careful weighing of the "whole person concept" as set forth in the Directive ¶ E2.2.1. Many of the nine factors enumerated for evaluating the relevance of an individual's conduct are not particularly useful in a case, like this one, where the security concerns are not raised directly by any improper conduct of the Applicant, but rather by circumstances beyond his control and his otherwise lawful conduct in relation to them. Nevertheless the Directive does still require a careful weighing of available, reliable information about the person, past and present, favorable and unfavorable and the circumstances of his particular case in reaching a determination. For example, the Applicant's connections to the United States, including his own and his immediate family's U.S. citizenship, his substantial financial and real estate holdings and employment history are relevant to the whole person analysis and may be balanced against those same factual connections to the foreign countries involved. Of particular importance in a Guideline B case is analysis of "the potential for pressure, coercion, exploitation or duress," ¶ E2.2.1.8, presented by the particular circumstances of the Applicant's foreign connections and the nature of the country involved.
12. The Judge's entire discussion states:

With respect to Guideline B, the evidence establishes that he is not vulnerable to foreign influence. Disqualifying Condition (1) *an immediate family member, or person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country* applies. However, itigating Conditions (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 the loyalty of the person(s) involved and the United States* and (3) *Contact and correspondence with foreign citizens are casual and infrequent* are applicable. Although the Applicant's mother, mother-in-law, and brother-in-law are citizens and residents of Taiwan, none of the individuals are any longer associated with the Taiwanese government or in a position to place foreign influence on the Applicant, or in a position to be exploited by the Taiwanese Government in a way that could force the Applicant to choose between loyalty to them and loyalty to the United States. Likewise his sister in Indonesia is not a security threat. Furthermore, the Applicant's contacts with his foreign relatives are very limited, and are not of a nature to influence his security worthiness. The Applicant has cut all other ties with Taiwan. The Applicant understands his responsibility to the United States in holding a security clearance. Based on the foregoing, the Applicant does not raise a security concern and Guideline B is found for the Applicant.

Decision at 7.

13. ISCR Case No. 00-0484 at 4-5 (App. Bd. Feb. 1, 2002); ISCR Case No. 02-11570 at 7 (App. Bd. May 19, 2004); ISCR Case No. 02-27081 at 6 (App. Bd. Nov. 10, 2004); ISCR Case No. 02-24267 at 8 (App. Bd. May 24, 2005).

14. In addition to the regular telephone contacts and Applicant's several visits to Taiwan and Indonesia noted in the Decision, the Applicant described visits when his mother comes to the U.S., "once per year or every two years," for up to two weeks at a time, the most recent having been some seven or eight months before the hearing. Transcript at 61, 62.

15. ISCR Case No. 04-04008 at 2 (App. Bd. Dec. 29, 2005) (citing ISCR Case No. 97-0435 at 3 (App. Bd. July 14, 1998)). *See Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42-43 (1983).

16. *See* Directive ¶¶ 4.1, 4.2, and 6.3.

17. Directive ¶¶ E3.1.33.1 through E3.1.33.3.

18. Directive ¶ 6.3 requires each clearance decision to meet this standard.

19. ISCR Case No. 02-09389 at 4 (App. Bd. Dec. 29, 2004). *See* ISCR Case No. 02-32006 at 5 (App. Bd. Oct. 28, 2004); ISCR Case No. 02-30864 at 4 (App. Bd. Oct. 26, 2005); ISCR Case No. 03-11448 at 3-4 (App. Bd. Aug. 10, 2004).