

DATE: July 19, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-10821

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

#### FOR APPLICANT

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 5, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline B (Foreign Influence) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested the case be decided on the written record. On January 26, 2006, after considering the record, Administrative Judge Carol G. Ricciardello 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 issues on appeal: whether the Administrative Judge's unfavorable clearance decision under Guidelines B is arbitrary, capricious or contrary to law; whether the Administrative Judge erred in concluding that Applicant's falsification of her security clearance application was deliberate.

Applicant argues that the Administrative Judge's adverse clearance decision should be reversed because it resulted from bias on the part of the Judge, discrimination against the Applicant based upon her ethnic origin, and an erroneous application of the relevant disqualifying and mitigating conditions. Applicant also argues that the Judge erred in concluding that she had deliberately falsified her security clearance application because the omission of the information at issue was the result of a mistake or misunderstanding on the part of the Applicant. Finally, Applicant requests that the Judge's adverse decision be reversed because it will result in irreparable harm to the Applicant in the form of lost employment. The Board does not find Applicant's arguments persuasive.

There is a rebuttable presumption that federal officials and employees carry out their duties in good faith. *See, e.g.*, ISCR Case No. 00-0030 at 5 (App. Bd. Sep. 20, 2001). There is also a rebuttable presumption that an Administrative Judge is impartial and unbiased. *See, e.g.*, ISCR Case No. 99-0710 at 5 (App. Bd. Mar. 19, 2001). A party seeking to rebut either of those presumptions has a heavy burden of persuasion on appeal. The issue is not whether Applicant personally believes that she has been discriminated against, but whether the record of the proceedings below contains any indication that the Judge acted in a manner that would lead a reasonable person to question the fairness and impartiality of the Judge. *See, e.g.*, ISCR Case No. 01-04713 at 3 (App. Bd. Mar. 27, 2003). After reviewing the record and the Judge's decision, the Board concludes that Applicant has not met her heavy burden of persuasion on the issue of bias. Applicant fails to identify anything in the record below that indicated or suggests a basis for a reasonable person to question the fairness or impartiality of the Judge in this case. The Judge's findings about the People's Republic of

China's (PRC) history of human rights violations and active participation in industrial espionage are relevant to application of Guideline B Mitigating Condition 1.<sup>(1)</sup>

The Administrative Judge's adverse conclusions under Guideline B were not based upon Applicant's status as a former citizen of the People's Republic of China. Rather, they were based on the record evidence that Applicant's ties with her foreign family members and in-laws pose a security risk under the particular facts of this case. *See, e.g.*, ISCR Case No. 99-0457 at 6 (App. Bd. Jan. 3, 2001). The Board notes that this program has adjudicated Guideline B and C cases involving applicants with ties to a wide variety of countries. To the extent that Applicant asserts that the components of Guideline B discriminate against her, the Board does not have the jurisdiction or authority to entertain challenges to the wisdom or authority of provisions of the Directive. *See, e.g.*, ISCR Case No. 02-29279 at 5 (App. Bd. Feb. 9, 2005).

The Administrative Judge had the opportunity to consider Applicant's explanation for why she failed to disclose the information in question. The Judge was not bound--as a matter of law--to accept or reject Applicant's explanation. Rather, the Judge had to consider Applicant's explanation in light of the record evidence as a whole. Considering the record as a whole, the Judge had a sufficient basis to find that Applicant's omissions were deliberate and intentional. Accordingly, the Judge's finding that Applicant's falsification was deliberate is sustainable. *See* Directive ¶ E3.1.32.1.

The application of disqualifying and mitigating conditions does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application 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). Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. An applicant's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law.

In this case, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and circumstances, and considered the possible application of relevant mitigating conditions. The Judge articulated a rational basis for not favorably applying any mitigating conditions in this case, and explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns. Given the record that was before her, the Judge's ultimate unfavorable clearance decision under Guideline B and E is not arbitrary, capricious, or contrary to law.

Finally, the possibility that an unfavorable clearance decision could have adverse consequences for an applicant's job situation is not relevant or material to an evaluation of the security significance of that applicant's situation. *See, e.g.*, ISCR Case No. 01-21070 at 4 (App. Bd. Dec. 7, 2004). The security significance of Applicant's conduct and circumstances is not diminished or reduced by the fact that an unfavorable security clearance decision could result in the loss of her job.

Thus, the Administrative Judge did not err in denying Applicant a clearance.

### Order

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

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Signed: Mark W. Harvey

Mark W. Harvey

Administrative Judge

Member, Appeal Board

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" (Directive ¶ E2.A2.1.3.1).