

DATE: February 8, 2007

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-11571

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

D. Michael Lyles, Esq., Department Counsel

FOR APPLICANT

David P. Price, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 11, 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) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On June 22, 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. [\(1\)](#)

Applicant raised the following issues on appeal: whether the Judge's material findings are supported by substantial evidence; whether the Judge erred in taking administrative notice of Government Document XV-- the decision of the United States District Court for the Eastern District of Virginia in the case of *United States v. Kim*, Criminal No. 97-117-A; whether the Judge erred by concluding that the security concerns raised under Guideline B had not been mitigated.

(1) Applicant argues generally that the Judge's findings of fact with respect SOR paragraphs 2.a through 2.d are not supported by substantial evidence. Applicant also specifically identifies two errors in the Judge's findings--that Applicant's stepfather is not employed by the U.S. government in South Korea, he is employed as a U.S. government contractor located there, and that in the text of the decision, the Judge mistakenly states that the allegation set forth in paragraph 2.b of the SOR, rather than paragraph 1.b, was resolved in Applicant's favor. The Board does not find Applicant's argument persuasive.

The Board's review of a Judge's findings is limited to determining if they are supported by substantial 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, (1966). The Board does not review a case *de novo*. Considering the record evidence as a whole, the Judge's material findings with respect Applicant's circumstances of security concern reflect a plausible interpretation of the record evidence and are supported by substantial evidence. They are therefore sustainable. The two specific errors noted by the Applicant are harmless in that they did not materially affect the outcome of the case.

(2) Applicant contends that the Judge erred in taking administrative notice of Government Document XV--the decision of the United States District Court for the Eastern District of Virginia in the case of *United States v. Kim*, Criminal No. 97-117-A. In support of that contention, Applicant argues that the document was irrelevant, in that it is "speculative, conjectural, and improperly prejudicial in nature." The Board does not find this argument persuasive.

In DOHA proceedings, the Federal Rules of evidence serve only as a guide. They may be relaxed by the Judge (with one exception not applicable to this appeal⁽²⁾) in order to permit the development of a full and complete record by the parties. Directive ¶ E3.1.19. In this regard, the Board has previously noted that administrative or official notice in administrative proceedings is broader than judicial notice under the Federal Rules of Evidence. *See, e.g.*, ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004) citing *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n. 4 (3d Cir. 1986). By design, the DOHA process encourages Judges to err on the side of initially admitting evidence into the record, and then to consider a party's objections when deciding what, if any, weight to give to that evidence. Because DOHA proceedings are conducted before impartial, professional fact-finders, there is less concern about the potential prejudicial effect of specific items of evidence than there is in judicial proceedings conducted before a lay jury.

Citation to a court decision by the parties or the Judge is generally permissible. However, it is important to remember that DOHA decisions are about the security suitability of the Applicant in the given case. For that reason, Judges and parties are cautioned against reaching too far when they cite to the legal outcome of another person's case or the conduct of a person not before DOHA. Moreover, court decisions evidencing a single, anecdotal, incident of espionage on behalf of a foreign country, are not particularly probative as to the overall political and intelligence profile of that country *vis-a-vis* the United States. Therefore, such documents should be accorded considerably less weight than official executive branch documents and reports describing in broader terms the political and intelligence profile, or the human rights record, of a foreign country.

After reviewing the document at issue, the Board concludes that the Judge reasonably acted within her discretion in taking administrative notice of it. The document was an official document of the United States government. The document was provided in advance to the Applicant as part of the discovery process of the case, so Applicant had an appropriate opportunity to rebut its contents, or present any alternative information for the Judge to notice. It was only offered for the limited albeit marginally relevant purpose of providing background information as to the country involved. In her findings of fact, the Judge specifically took notice of, and cited to, Government Documents I, V, VI, XII, and XIV, but did not specifically take notice of, or cite to, Government Document XV. Nor did the Judge otherwise mention it in her decision, aside from the procedural references to it in her statement of the case. Accordingly, based upon the record that is before us, it appears that the Judge appropriately gave Government Document XV little or no weight.

(3) Applicant argues that the evidence he provided in the proceeding below was sufficient to require the Judge to conclude, as a matter of law, that he had rebutted, mitigated or extenuated the security concerns raised by the Guideline B (Foreign Influence) allegations. Specifically, Applicant contends that the Judge's adverse decision should be reversed because the Judge erred in not applying Guideline B Mitigating Condition 1⁽³⁾ and made an unfavorable decision that is unsupported by the record as a whole.

In this case, the Judge made sustainable findings that: (1) Applicant currently resides in South Korea, (2) Applicant's parents and grandparents, and his wife, his wife's parents, and his wife's five sisters are citizens and residents of South Korea, (3) Applicant is close to his mother and stepfather and speaks with them on a daily basis, (4) Applicant speaks with his grandparents by telephone two to three times a year, (5) Applicant provided financial support to help with his grandmothers medical expenses, (6) Applicant's wife receives health benefits from the South Korean government, (7) Applicant and his wife are close to his wife's parents and speak with them by telephone once every one or two weeks, and (8) "South Korea has been aggressive in seeking to acquire U.S. technology from U.S. companies and government contractors. These aggressive tactics are reflected in the industrial espionage and economic information collection South Korea has carried out against U.S. companies, many of whom are U.S. government contractors." Given those findings, the Judge concluded that Applicant's ties with his family members in South Korea raised security concerns under Guideline B and that Disqualifying Conditions 1, 2 and 6 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.

Applicant argues that the Administrative Judge erred in not applying Guideline B Mitigating Conditions 1. He also argues that the Judge gave insufficient weight to evidence that Applicant has renounced his South Korean citizenship, considers himself to be an American, and served honorably for four years in the United States Army. Applicant's arguments do not demonstrate that the Judge erred.

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 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.

Given the record in this case, it was reasonable for the Judge to conclude that Applicant had not met his burden of demonstrating that his family members were not in a position to be exploited by a foreign power in a way that could force the Applicant to choose between loyalty to them and the U.S. (4) A review of the Judge's decision indicates that the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying circumstances, and considered the possible application of relevant mitigating conditions and factors. The Judge articulated a rational basis for not favorably applying any mitigating conditions or factors and reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns. The favorable factors cited by Applicant either do not readily suggest refutation, extenuation, or mitigation, or have low probative value. The Judge was not required, as a matter of law, to favorably apply Guideline B Mitigating Conditions 1, and the Judge's overall adverse security clearance decision is sustainable.

Order

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Judge found in favor of Applicant under Guideline C. That favorable finding is not at issue on appeal.
2. *See* ISCR Case No. 01-23356 at 7-8 (App. Bd. Nov. 24, 2003)(addressing the exception that is established by Directive ¶ E3.1.20).
3. 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.")
4. Applicant argues on appeal that the Judge erred by suggesting that Applicant might feel obligated to his estranged father, if the father were to call him seeking money. This argument has merit. Given the totality of the facts and circumstances in this case the Judge's error in this regard is harmless.