

DATE: January 10, 2007

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 05-03979

## 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 October 20, 2005, DOHA issued a statement of reasons (SOR) 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 a hearing. On May 24, 2006, after the hearing, Administrative Judge James A. Young 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 issue on appeal: whether the Administrative Judge erred by concluding that the security concerns raised under Guideline B had not been mitigated. [\(1\)](#)

Applicant argues that the evidence he provided in the proceeding below was sufficient to require the Administrative 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. Applicant is essentially contending that the Judge's adverse decision should be reversed because the Judge erred in not applying Guideline B Mitigating Conditions 1 [\(2\)](#) and 3, [\(3\)](#) and made an unfavorable decision that is unsupported by the record as a whole.

In this case, the Administrative Judge made sustainable findings that: (1) Applicant's parents, parents-in-law, and brother are citizens and residents of the People's Republic of China (PRC), (2) Applicant provides financial support of about \$1,000 to \$2,000 a year to his parents and speaks with them by telephone approximately once a month, (3) Applicant traveled to the PRC to visit his family and his wife's family in 1994, 2001, and 2004, and (4) the PRC is an authoritarian state, has a poor human rights record, is among the most active collectors of intelligence from U.S. sources, and is known to attempt to exploit U.S. citizens through their relatives in the PRC. Given those findings, the Administrative Judge concluded that Applicant's ties with his family members in the PRC raised security concerns under Guideline B and that Disqualifying Condition 1 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 and 3, in that the Judge gave insufficient weight to evidence that Applicant has lived in the United States for many years, has extensive ties to this country, and does not have strong ties to his relatives in the PRC. 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 Administrative 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 not arbitrary and capricious for the Administrative Judge to conclude that Applicant had not met his burden of demonstrating that his contacts with his family members in the PRC were casual and infrequent, and 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. 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 Judge was not required, as a matter of law, to favorably apply Guideline B Mitigating Conditions 1 and 3, and the Judge's overall adverse security clearance decision is sustainable.

### 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: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in favor of Applicant under Guideline E. That favorable finding is not at issue on appeal.
2. 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.")

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