KEYWORD: Guideline B

DIGEST: There is merit in Department Counsel argument that the Judge underestimates the significance of terrorist operations in Lebanon. Additionally the Board notes significant official pronouncements regarding the situation in Lebanon since the close of the record. Noting the harmful error, and case law regarding official notice the Board remands the case for the Judge to reopen the record. Favorable decision remanded.

CASENO: 05-11292.a1

DATE: 04/12/2007

DATE: April 12, 2007

In Re:	)	
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SSN: ------	)	
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT
Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 28, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence), pursuant

to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 27, 2006, after the hearing, Administrative Judge Barry M. Sax granted Applicant's request for a security clearance. Department Counsel submitted a timely appeal pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge's application of Foreign Influence Mitigating Condition (FIMC) 1 was arbitrary, capricious, and contrary to law; whether the Judge's application of FIMC 5 was arbitrary, capricious, and contrary to law; and whether the Judge's whole person analysis was unsupported by record evidence and was arbitrary, capricious, and contrary to law. We remand the case to the Judge.

Whether the Record Supports the Administrative Judge's Factual Findings

A. Facts

The Judge made the following findings of fact: Applicant's mother is a citizen and resident of Lebanon, but holds a U.S. permanent resident card, visiting the U.S. most recently in 2005. His five siblings are citizens and residents of Lebanon.

Applicant's parents-in-law have immigrated to the U.S. and hold permanent resident alien cards. His three brothers-in-law have received approval to immigrate to the U.S. and are awaiting visas. His two sisters-in-law are citizens and residents of Lebanon.

Applicant sends his mother around $500 in financial assistance every two or three months. Applicant owns a home in Lebanon, valued at about $78,000. Applicant travels to Lebanon every five years or so to enable his daughters to become acquainted with his family. Applicant possesses only a U.S. passport.

Applicant has been a U.S. citizen since 1984. He served in the U.S. Navy from 1986 to 1990, which included a tour of duty aboard an aircraft carrier. After his honorable discharge, Applicant went to work for a civilian contractor. He has held a security clearance for over 20 years, first a secret and subsequently a top secret. Applicant earned an engineering degree while working for the contractor and currently supervises 160 employees. Applicant's wife, born in Lebanon, became a U.S. citizen in 1991. She is a nurse at a V.A. hospital. Applicant's children are all native-born U.S. citizens.

Applicant's work performance has earned him numerous awards and evaluations. Applicant has "significant assets," all located in the U.S. except the house in Lebanon. His friends and colleagues view him as "dedicated to the U.S. and U.S. security interests."

The Judge made no explicit finding about political tensions within Lebanon. However, in his Conclusions section, he stated the following: "Lebanon is not officially recognized as hostile to the U.S., but...it does contain some terrorist and other groups that are not friendly to the U.S." We treat this as a finding of fact. *See* ISCR Case No. 02-20110 at n.2 (App. Bd. Jun. 3, 2004) ("The Board will treat a finding of fact [as such] regardless of where it appears in the Judge's decision").

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 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, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966)). In evaluating the Administrative Judge's finding, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1.

Department Counsel does not challenge the Judge's findings as to Applicant's and his family's citizenship and residence status. However, in his discussion of the Judge's application of FIMC 1, the Department Counsel argues that the Judge underestimates the significance of terrorist organizations operating within Lebanon. Counsel asserts that it is error for the Judge not to "take into consideration the substantial impact of terrorists, para-military organizations, and other extra-governmental groups."

We have examined the record and conclude that there is merit in Department Counsel's argument. Government Exhibit 2 contains information about terrorist organizations operating inside Lebanon, such as Al Qaida and Hizballah. Exhibits 3 and 4 also provide evidence as to the political conditions in Lebanon. The Judge's one passing reference to these matters is an inadequate basis for an in-depth analysis of Applicant's case. We conclude that the Judge's finding on this matter does not adequately take into account record evidence.

Additionally, we note that, after the close of evidence in this case, the United States government issued official pronouncements concerning the changing political situation in Lebanon which have a direct bearing upon the issues to be resolved in this case. Because these pronouncements are issued in response to fluid world events independent of any personal circumstances of Applicant, and because it is important to make accurate and timely assessments of the political landscape in foreign countries when adjudicating Guideline B cases, the Board takes official notice of the following:

(1) Statement on the Situation in Lebanon, Public Papers of the Presidents (Feb. 5, 2007) ("Syria, Iran, and Hizballah are working to destabilize Lebanese society. Their goals are clear. They foment violence in order to prevent the establishment of a special tribunal in response to former Prime Minister Hariri's assassination, to prevent full implementation of U.N. Security Council resolutions calling for Hizballah's disarmament, and to bring down Lebanon's democratically elected Government...");

(2) Statement on the Government of Syria, Public Papers of the Presidents (Dec. 18, 2006) ("Syria should disclose the fate and whereabouts of the many missing Lebanese citizens who 'disappeared' during the decades of Syrian military occupation. The Syrian regime should also cease its efforts to undermine Lebanese sovereignty by denying the Lebanese people their right to participate in the democratic process free of foreign intimidation and interference");

(3) State of the Union Address, Public Papers of the Presidents (Jan. 29, 2007) ("Hizballah terrorists, with support from Syria and Iran, sowed conflict in the region and are seeking to undermine Lebanon's legitimately elected Government"); and

(4) Travel Warning, United States Department of State (Dec. 22, 2006) ("Since the August 14 [2006] cessation of hostilities between Israel and Lebanon, political tensions in Lebanon have increased and have become a cause for concern in recent weeks. Hizballah maintains a strong presence in many areas of Lebanon...").

The presence of immediate family members in a country which a hostile foreign power like Syria is attempting to destabilize, and in which terrorist groups operate with a substantial degree of autonomy, poses a real concern in the adjudication of Applicant's request for a security clearance. *See, e.g.*, Executive Order 13338 (May 11, 2004), declaring a state of emergency to address, *inter alia*, Syria's interference in Lebanon; ISCR Case No. 02-29403 at 5 (App. Bd. Dec. 14, 2004).

In Applicant's case, we are not basing a final agency decision on matters officially noticed at the Appeal Board level. Rather, we are returning the case to the Judge for expansion of the record to take into account significant changes in world events which have a direct bearing upon Applicant's case. We note *Cytacki v. INS*, 996 F.2d 1214 (6th Cir. 1993), in which the Board of Immigration Appeals upheld an immigration judge's denial of an application for asylum in the U.S. The Board took official notice of events in Poland which occurred after the close of the record, events which it concluded buttressed the decision of the immigration judge. The Sixth Circuit upheld the Board's decision, stating that the Board "may take official notice of uncontroverted facts concerning political conditions in asylum seekers' home countries..."[1]

In Applicant's case, having already found harmful error, we rely upon *Cytacki* for the proposition that decisions in Guideline B cases should be made to the greatest extent possible in the context of current political conditions in the country at issue. We remand the case to the Judge with instruction that he reopen the record, allow Department Counsel an opportunity to proffer for official

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[1]Official notice is a broader concept than judicial notice, incorporating within its scope the subject matter expertise of the administrative agency. *See de la Llana-Castellon v. INS*, 16 F.3d 1093, 1096 (10th Cir. 1994); *McLeod v. INS*, 802 F.2d 89, 93 (3d Cir. 1986). Even judicial notice, however, may be taken at the appellate level. Fed. Rule Evid. 201, Advisory Committee Notes. *See Hope v. Pelzer*, 536 U.S. 730, 737 at n.7 (2002); Directive E3.1.19 ("The Federal Rules of Evidence . . . shall serve as a guide" in cases adjudicated under the Directive). Federal evidentiary law recognizes a distinction between legislative and adjudicative facts insofar as they are subjects of notice. A legislative fact is one which is necessary to understand a principal of law, such as the probable adverse consequences of failing to honor the spousal privilege in criminal prosecutions. By its nature, such a fact is not subject to evidentiary proof. Fed. Rule Evid. 201, Advisory Committee Notes. Official pronouncements by the President, State Department, Department of Defense, or other appropriate federal agency on matters of national security are equivalent to legislative facts for purposes of DOHA adjudications in that they bind the Judge and are not subject to refutation. *See* ISCR Case No. 02-04786 at n.6 (App. B. Jun. 27, 2003)("Official statements by the U.S. State Department concerning foreign relations of the United States are legislative facts that can be taken into consideration by DOHA Administrative Judges or the Board in these proceedings"); ISCR Case No. 01-26893 (App. Bd. Oct. 16, 2002)("The official positions taken by the President of the United States and other appropriate federal officials concerning the war on terrorism are not proper subjects to be litigated in DOHA proceedings"). Recognizing the Supreme Court's observation that security clearance determinations are "an inexact science at best," (*Dept. Of the Navy v. Egan*, 484 U.S. 581, 529 [1988] (internal citation omitted), the Board acknowledges that an accurate geopolitical context is crucial in Guideline B cases. Indeed, an applicant's having relatives living in a country hostile to the United States is one explicit concern cited by the Supreme Court for denying a clearance. *Id*.

notice matters such as those discussed above, allow Applicant an opportunity to offer evidence, and allow the parties to reargue the case. The other issues in the case are not ripe for consideration at this time.

Order

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

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