

KEYWORD: Guideline B; Guideline C

DIGEST: The Board does not have the authority to pass judgment on the adjudicative guidelines. Adverse decision affirmed.

CASENO: 12-03783.a1

DATE: 08/12/2013

DATE: August 12, 2013

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In Re:	)	
	)	
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	)	
Applicant for a Public Trust Position	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

*Pro se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant eligibility for a public trust position. On September 12, 2012, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline

B (Foreign Influence) and Guideline C (Foreign Preference) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On May 15, 2013, after the close of the record, Administrative Judge LeRoy F. Foreman declined to grant Applicant eligibility for a public trust position. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge's adverse trustworthiness determination is arbitrary, capricious, and contrary to law. For the following reasons, the Board affirms the Judge's unfavorable trustworthiness determination.

The Judge made the following findings of fact: Applicant is 36 years old and was born in Taiwan. He came to the United States in the late 1980's and became a U.S. citizen in the late 1990's. In the late 2000's he married a citizen of Taiwan, who now resides with him in the United States.

Applicant's father is a retired employee of a county government in Taiwan. His mother has never worked outside the home. He has monthly telephonic contact with his parents. Applicant also has two sisters who are citizens and residents of Taiwan. One is employed by a Chinese University in Taiwan. Applicant has weekly internet contact with them. Applicant's father-in-law and mother-in-law are citizens and residents of Taiwan.

Applicant renewed his Taiwanese passport after becoming a U.S. citizen. He has not used his Taiwanese passport since obtaining a U.S. passport, and he is willing to surrender his Taiwanese passport because he does not use it. However, he is required to enter Taiwan with a Taiwanese passport to avoid being subject to compulsory military service in Taiwan. He has not surrendered, destroyed, or otherwise invalidated his Taiwanese passport.

Applicant voted in two Taiwanese presidential elections during the 2000's. He voted in Taiwan to ensure that the country would elect a president who favors interaction with the United States instead of one who befriends China.

Taiwan is a multi-party democracy, established as a separate, independent government by refugees from mainland China in 1949. The U.S. recognized Taiwan as an independent government until January 1979, when it formally recognized the Chinese government as the sole legal government of China. Taiwan has a strong economy and has significant economic contacts with China. China aggressively targets sensitive and protected U.S. technology and military information, using worldwide intelligence operations, including those in Taiwan. For many years, Taiwan has been one of the most active collectors of U.S. economic intelligence. There have been numerous instances involving illegal export or attempted export of sensitive, dual-use technology to Taiwan.

The Judge reached the following conclusions: Regarding Guideline B, none of Applicant's family members or in-laws is employed by the government of Taiwan or its military forces. However, one of his sisters is employed by a Chinese university in Taiwan. Taiwan's record of economic espionage, the connection of Applicant's sister to a Chinese university, and China's intelligence operations in Taiwan are sufficient to establish a "heightened risk," and raise the

potential of conflict of interest. Mitigating conditions are not established. Applicant has multiple family members in Taiwan, his sister is employed by a Chinese university, and Taiwan has a record of active economic espionage targeting U.S. restricted technology. China employs aggressive intelligence operations in Taiwan. Applicant's family ties with his Taiwanese relatives are strong. Applicant has not rebutted the presumption that contacts with an immediate family member in a foreign country are not casual.

Regarding Guideline C, although Applicant acquired his Taiwanese citizenship by virtue of his parents' citizenship and place of birth, he has actively exercised his citizenship by obtaining a Taiwanese passport and voting in Taiwanese elections. He has not expressed a willingness to renounce his dual citizenship and has not destroyed, surrendered, or otherwise invalidated his Taiwanese passport. None of the Guideline C mitigating conditions are established.

Under a whole-person analysis, Applicant has not mitigated the trustworthiness concerns based on foreign influence and foreign preference. Accordingly, he has not carried his burden of showing that it is clearly consistent with national security to grant him eligibility for a public trust position.

Applicant argues that the Judge made a factual error in finding that his sister is employed by a Chinese university. He states that the institution was founded in Taiwan, and it has no connection to communist China. He suggests that the name of the institution may have been misunderstood by the Judge. Given these facts, Applicant asserts the Judge's analysis regarding the employment of his sister is inaccurate. Applicant's statements on this point rely on matters not included in the evidentiary record. The Board cannot consider new evidence on appeal. Directive ¶ E3.1.29. The Judge's finding of fact regarding the sister's employment is based on an entry in a report of investigation included in the evidentiary record. Moreover, even absent a finding that Applicant's sister is employed by an entity with connections to China, the record evidence is sufficient to sustain the Judge's adverse security clearance determination under Guideline B.

Applicant asserts that policy in Taiwan has changed and males over the age of 36 are no longer subject to the country's requirements regarding military service. Thus, he argues that he no longer needs his Taiwanese passport, and he can surrender it at any time upon request. This argument, too, relies on matters outside the record, which the Board cannot consider. Moreover, the mere ability of Applicant to surrender the passport has little significance in terms of mitigation, inasmuch as the applicable mitigating condition speaks in terms of destruction, actual surrender or invalidation of the foreign passport.<sup>1</sup> Applicant has not established error on the part of the Judge.

Applicant states that the United States is a country of immigrants and that foreign contacts are unavoidable. He asserts that first generation immigrants are more likely to have contacts with family members and should be given special consideration in determining their status. Applicant does not specify precisely what form that special consideration should take. He appears to be arguing for a standard that deviates from the "clearly consistent with the interests of national

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<sup>1</sup> Directive, Enclosure 2 at ¶11(e).

security” standard articulated for persons seeking access to sensitive positions. The Board has neither the authority to review or pass judgment on the guidelines established for the adjudication of ADP cases, nor the ability to apply any standard other than those contained in the applicable regulation.

Applicant asserts that he was not presented with information or a choice relating to his surrender of his Taiwanese passport. He formally requests an investigation “on the process towards the handling of the passport issue.” Although his appeal assertion is not a model of clarity, Applicant appears to be objecting to the fact that he was not presented with options by third parties regarding his Taiwanese passport that might have had the effect of allowing him to mitigate his possession of same. The Board notes that Applicant was provided with the Adjudicative Guidelines, including the mitigating conditions, with the SOR on September 12, 2012. He signed a receipt for the package on September 25, 2012 (FORM, Item 2). Regarding the request for an investigation, Applicant seeks relief that the Board has no authority to grant. Moreover, the Government is under no obligation to influence or direct the behavior of applicants in a manner that may be mitigating under the Adjudicative Guidelines. *Compare*, ISCR Case No. 03-01578 at 4 (May 27, 2004)(“Giving advice to Applicant on what to do to qualify for a security clearance would be inconsistent with the Board’s obligation to conduct itself in a fair and impartial manner”).

Applicant argues that his actions with regard to his Taiwanese passport are not relevant to the case inasmuch as the United States government does not maintain an official relationship with Taiwan and this is tantamount to saying that Taiwan is not a country. He also states that the “statehood of Taiwan is not complete in the international arena.” This argument lacks merit. Regardless of the issue of current diplomatic recognition, Taiwan is a foreign entity. The current status of diplomatic recognition does not vitiate the security concerns that arise out of Taiwan’s posture as an active collector of U.S. economic intelligence and technology.

Applicant argues that Guideline B does not apply to his family members, as they are not under any risk for foreign exploitation, inducement, manipulation, pressure or coercion. He also argues that various mitigating conditions apply to his case as well as a favorable determination under a whole-person analysis. He states that it is unlikely that he will be put in the position to have to choose between the interests of a foreign entity and the United States, that his contacts with his immediate family members in Taiwan are casual, and that his relatives are not subject to coercion from China. His assertions fail to establish error on the part of the Judge. Under the Directive, once the Judge finds that security concerns have been raised, the burden shifts to an applicant to extenuate or mitigate those concerns. Department Counsel is not required to prove a threat of espionage. *See, e.g.*, ISCR Case No. 02-09907 at 7 (App. Bd. Mar. 17, 2004). The Board has consistently held that factors such as an applicant’s relatives’ obscurity or the failure of foreign authorities to contact those relatives in the past do not provide a meaningful measure of whether an applicant’s circumstances pose a security risk. *See* ISCR Case No. 07-13696 at 5 (App. Bd. Feb. 9, 2009). Additionally, there is a rebuttable presumption that an applicant’s contacts with immediate family members are not casual. *See, e.g.*, ISCR Case No. 04-08560 at 4 (App. Bd. Oct. 10, 2006). The Board has considered the totality of Applicant’s arguments on appeal and finds no error in the Judge’s ultimate conclusions regarding mitigation and the whole-person analysis.

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*. *See, e.g.*, ADP Case No. 09-04275 at 2 (App. Bd. Apr. 18, 2011). A party'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. *See, e.g.*, ADP Case No. 10-01100 at 2 (App. Bd. Jun. 13, 2011). Portions of Applicant's brief essentially argue for a more favorable interpretation of the record evidence.

The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for his 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)).

### Order

The decision of the Judge declining to grant Applicant eligibility for a public trust position is AFFIRMED.

Signed: Michael Y. Ra'anan  
Michael Y. Ra'anan  
Administrative Judge  
Chairperson, Appeal Board

Signed: Jeffrey D. Billett  
Jeffrey D. Billett  
Administrative Judge  
Member, Appeal Board

Signed: Jean E. Smallin  
Jean E. Smallin  
Administrative Judge  
Member, Appeal Board