DATE: October 26, 2007

| | | |
|---|---|---|
| In re: | ) | |
| | ) | |
| ---------- | ) | ISCR Case No. 03-21434 |
| SSN: ---------- | ) | |
| | ) | |
| Applicant for Security Clearance | ) | |

**REMAND DECISION OF ADMINISTRATIVE JUDGE**
**MICHAEL J. BRESLIN**

## APPEARANCES

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

**FOR APPLICANT**
*Pro Se*

## SYNOPSIS

Applicant is a retired naval officer, who successfully held a security clearance during his military career. His wife is a naturalized citizen and resident of the U.S. Her parents are citizens of the People's Republic of China and have permanent resident status in the United States. She also has a sister who is a citizen and resident of China. Applicant mitigated the security concerns arising from possible foreign influence. Clearance is granted.

## STATEMENT OF THE CASE

Applicant submitted an SF 86, Security Clearance Application, on June 6, 2001. The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance

for Applicant under Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (the "Directive"). On July 7, 2004, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns raised under the Directive, specifically, Guideline B, Foreign Influence.

Applicant answered the SOR in writing on July 15, 2004. He elected to have a hearing before an administrative judge.

The case was originally assigned to other administrative judges, but was re-assigned to me on November 28, 2005, because of workload considerations. With the concurrence of Applicant and Department Counsel, I convened the hearing on April 10, 2006. DOHA received the final transcript of the hearing (Tr.) on May 3, 2006.

I issued a decision on May 24, 2006, granting Appellant a security clearance. The government appealed on several grounds, including my refusal to consider certain documents for the purpose of administrative notice.

On February 27, 2007, the Appeal Board found error in my refusal to take administrative notice of Exhibit 7, and ordered that it be considered for this purpose. The Appeal Board remanded the case, and ordered that I re-convene the hearing and allow Department Counsel the opportunity to attempt to offer certain previously rejected documents as ordinary evidence, even though Department Counsel had made no such request in the first hearing. (ISCR Case No. 03-21434 at 5 (App. Bd. February 20, 2007).

With the concurrence of both parties, I reconvened the hearing on April 3, 2007. At the hearing on remand, I advised the parties that Exhibit 7 would be considered for the purposes of administrative notice. (Tr. at 3.) As suggested by the Appeal Board, Department Counsel offered Exhibit 9 as ordinary evidence. For the reasons discussed below, I denied the request. Appellant offered no additional evidence. DOHA received the transcript of the hearing on remand on April 11, 2007.

## EVIDENTIARY RULINGS

The Appeal Board found error in my refusal to admit Exhibit 7 for the purposes of administrative notice. It is helpful to review the concept of administrative notice, and the Appeal Board's handling of this issues relating to administrative notice.

**Administrative Notice**

Administrative notice is a legal concept similar to judicial notice, which allows an administrative judge to consider certain facts without requiring the formal presentation of evidence. The law recognizes two categories of facts that may be the subject of administrative notice: "legislative facts" and "adjudicative facts." The kinds of facts that may be administratively noticed depends upon the function performed by the administrative judge. (Kenneth Culp Davis, 1 *Administrative Law Text*, *3d Ed.*, § 15.03, West Publ. (1972).)

If the administrative judge is performing an essentially legislative or regulatory function, such as establishing soybean subsidies, setting highway tariffs for truckers, or allocating service areas for television stations, he or she may consider "legislative facts," a broad concept encompassing matters relevant to the regulatory function. (*Id.*) These may include evidence of industry practices, economic impact, scientific data, and agency expertise. (Jacob Stein, et al, *1 Administrative Law*, § 1.02[3], fn. 57, LexisNexis (2006).) Also, appellate courts frequently go beyond the record for legislative facts to guide the making of law and policy. (Davis, 1 A*dministrative Law Text, 3d Ed., supra*, at § 15.03.) The ability to find and rely on legislative facts is limited to administrative judges making similar public-policy decisions.

If the administrative judge is performing an adjudicative function (i.e., determining individual rights or benefits), he or she may take administrative notice only of "adjudicative facts." Examples of adjudicative functions include settling FEMA claims, or deciding appeals from the denial of a security clearance. Because the adjudicative function directly affects the rights of a specific individual, due process requires that the party be given notice of the proposed adjudicative fact and an opportunity to dispute it.

I note some cases, such as hearing an immigrant's request for asylum, involve taking administrative notice of public policy (i.e. "legislative facts"), as well as specific facts about an individual (i.e. "adjudicative facts"). In such cases, practitioners must be especially careful to consider whether it is deciding a public policy (i.e., legislative) function or determining specific relevant facts. In *Kowalczyk v. INS,* 245 F.3d 11431147 (10th Cir. 2001), the court noted:

> However, "simply because we have approved of [taking administrative notice] in one context does not mean that it is appropriate in all. An agency's discretion to take administrative notice depends on the particular case before it." *Llana-Castellon*, 16 F.3d at 1097; *see also Castillo-Villagra v. INS,* 16 F.32d 1017, 1027 (9th Cir. 1992) ("The administrative desirability of notice as a substitute for evidence cannot be allowed to outweigh fairness to individual litigants."

The purpose for taking administrative notice is convenience–it avoids the difficulty and expense of adducing testimony or evidence. (Davis, 1 A*dministrative Law Text, 3d Ed., supra*, at § 15.09.) However, the desire for this convenience must be tempered by respect for the due process rights of the parties. It would be unfair to notice contested facts subject to reasonable dispute, and require the opposing party to produce evidence in rebuttal or refutation at an administrative hearing where there is no subpoena power. As Professor Davis wrote, "convenience should always yield to the requirement of procedural fairness that parties should have the opportunity to meet in the appropriate fashion all facts that influence the disposition of the case." (*Id.*)

In an adjudicative hearing, the nature of the matters that may be administratively noticed is limited. Only easily verifiable, indisputable facts are appropriate for administrative notice in an adjudicative hearing. (ISCR Case No. 99-0511 (App. Bd. December 19, 2000).) Facts to be administratively noticed must be not subject to reasonable dispute and must be either generally known within the area or capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned. For these reasons, an administrative judge normally may take administrative notice only of general facts, not specific facts. (Stein, et al, *Administrative Law, supra*, at § 25.02.)

> This is especially true of adjudicative facts. The Supreme Court has held that the types of adjudicative facts subject to official notice include the fact that there is an economic depression, but not how a particular industry has been affected by the depression; the fact that Confederate money had depreciated during the course of the Civil War, but not the extent of depreciation. The specifics, the Court has held, are the subject of differences of opinion, even among experts, and must be proven by presentation of evidence, not official notice.

(*Id.,* citing *Ohio Bell Tel. Co. v. Public Utils. Comm'n*, 301 U.S. 292, 300-02 (1937).)

**a. Scope of Administrative Notice**

DoD Directive 5220.6, ¶ E3.1.19, provides that the Federal Rules of Evidence shall serve as a guide for administrative hearings. Fed. R. of Evid. 201, Judicial Notice of Adjudicative Facts, provides useful guidance, especially because an administrative judge for DOHA is performing an adjudicative function. The Advisory Committee's Note makes it clear the rule applies only to adjudicative facts, not legislative facts.

The Appeal Board has not properly handled matters relating to administrative notice, to the prejudice of applicants. This includes considering matters beyond the permissible scope of administrative notice in adjudicative hearings, and engaging in improper fact-finding beyond the Board's power of review.

The Appeal Board routinely allows government counsel to supplement the record with material that is not a proper subject for administrative notice in an adjudicative hearing. (ISCR Case No. 03-08813 (App. Bd. November 15, 2005) (admitting any fact in any official "pronouncement" of the United States or an "unofficial publication" prepared by a private contractor for the U.S.); ISCR Case No. 99-0452 (App. Bd. March 21, 2000) (admitting the content of official documents posted by federal departments or agencies on their website); ISCR Case 99-0511 (App. Bd. December 19, 2000) (admitting records that the U.S. sanctioned a project in a foreign country through foreign military aid and official U.S. cooperation); ISCR Case No. 02-29739 (App. Bd. October 13, 2005) (noticing specific properties of a drug from a medical text). By allowing the government to introduce and rely on matters exceeding the proper scope administrative notice, the Appeal Board is denying appellants the administrative due process granted by Executive Order 12968, Sec. 5.2, and DoD Directive 5220.6, ¶ 4 and ¶ E3.1.29.

In this case, the Appeal Board found error in declining to consider for the purpose of administrative notice Exhibit 7, the February 2004 testimony of the Director, Defense Intelligence

Agency, before a Senate subcommittee. The Board stated that "courts can and do take 'judicial notice of the content of hearings and testimony before . . . congressional committees and subcommittees . . . ,'" and cited two cases in support of the proposition. However, a review of these authorities reveals that both cases involve appellate courts noticing *legislative* facts; neither involves a court considering *adjudicative* facts.

In the first case, *Adarand Constructors v. Slater*, 228 F.3d 1147, 1168 at n.12 (10th Cir. 2000), the appellate court considered the government's race- and gender-conscious contract program under a "compelling interest" test newly promulgated by the Supreme Court. As the court explained, "Our 'benchmark for judging the adequacy of the government's factual predicate for affirmative action legislation is whether there exists a 'strong basis in evidence for [the government's] conclusion that remedial action was necessary.'" (*Id.* at 1166 (internal citations omitted).) Although the appellate court used the phrase "judicial notice," clearly the matters it noticed were legislative facts, not adjudicative facts. Indeed, in footnote 12 of the opinion, cited by the Appeal Board, the court commented, "Furthermore, we note in passing that there is an even more substantial body of *legislative history* supporting the compelling interest in the present case than that cited by the government." (Emphasis added.)

The Appeal Board also cited *United States v. Darby*, 312 U.S. 100 (1941), in which the Supreme Court considered the constitutionality of the Fair Labor Standards Act. The Court specifically took notice of the purpose of the Act, which was set out in the declaration of policy in § 2(a) of the Act, and in Senate and House of Representatives Committee reports. *Darby*, 312 U.S. at 109. This is a classic example of an appellate court taking notice of legislative facts for the purpose of determining policy. It does not provide a legal basis for an administrative judge to notice legislative facts to perform an adjudicative function.

**b. Unauthorized Fact-Finding.**

The Appeal Board uses the guise of administrative notice to consider entire documents as evidence, instead of limiting itself to the notice of adjudicative facts. This enables the Board to engage in improper *de novo* fact-finding, denying appellants the right to a fair hearing on appeal under the Regulation.

The normal process for taking judicial notice is for a party to request the judge to take notice of certain adjudicative facts, and to supply the court with the necessary information to support the request. (Fed. R. Evid. 201(d).) "The usual method of establishing adjudicative facts is through the introduction of evidence, ordinarily consisting of the testimony of witnesses." (Rule 201, Advisory Committee's Note.) Parties may also support requests for administrative notice by providing documents, such as official government publications relating to the subject at issue. The opposing party has the opportunity to object and to submit matters in opposition to the request.

The administrative judge takes administrative notice of adjudicative facts, not documents. The facts administratively noticed become part of the administrative judge's findings of fact. The materials supplied in support of a party's request become part of the record, but are not admitted as evidence.

The Appeal Board has adopted an entirely different procedure for administrative notice. Where a party (almost always the government) offers a document to support a request for administrative notice, the Board holds that the entire document is admitted into evidence. The Board then concludes that every fact asserted in the document is also evidence at the hearing and considers those facts as conclusively established in conducting a *de novo* review of the case. (*See* ISCR Case No. 04-11463 at 4 (App. Bd. Aug. 4, 2006) (the Appeal Board properly found error where the AJ failed to consider a foreign country's record of hostility toward the U.S., but then the Board went on the consider this fact in reversing the decision, stating "Exhibits introduced by Department Counsel clearly established this factual element . . . "); ISCR Case No. 04-07766 at 2 (App. Bd. Sept. 26, 2006) (Appeal Board specifically relied on "other record evidence not made the basis of a finding of fact by the Administrative Judge" in reversing the decision); ISCR Case No. 04-08560 at 2 (App. Bd. Oct.10, 2006) (explicitly relying on evidence "not made the basis for a finding of fact by the Administrative Judge").

Of course, the Appeal Board's authority is limited to issues of law; it has no authority to engage in fact-finding. (DoD Directive 5220.6, ¶ E3.1.29, ¶ E3. 1.32.) The Appeal Board has repeatedly acknowledged this limitation on its authority. (ISCR Case No. 03-19925 at 1 (App. Bd. Aug 18, 2006) (the Board may not consider new evidence on appeal).)

**c. Notice requirement**

The Appeal Board has made contradictory rulings about whether the parties must be informed of matters administratively noticed and provided an opportunity to challenge or respond to the proposed notice. The Board has held that an administrative judge taking administrative notice is not required to inform the parties in advance or provide an opportunity to respond. (*See* ISCR Case No. 99-0452, 2000 DOHA LEXIS 108 (App. Bd. Mar. 21, 2000) ("As a general rule, the parties are entitled to know what information an Administrative Judge is relying on in making a decision. There are some narrow exceptions to this general rule: official or administrative notice, and matters known to an agency through its cumulative expertise."); ISCR Case No. 02-29739 (App. Bd. Oct. 13, 2005) ("This basic definition [from a medical dictionary] is not subject to reasonable dispute and as such is a proper subject for the taking of administrative notice. Therefore the Judge's introduction of the definition into his factual findings did not require prior notice to the parties.").)

At other times the Board has recognized that when an administrative judge takes administrative notice of an adjudicative fact, the parties must be given notice and an opportunity to respond. (*See* ISCR Case No. 01-26893 (App. Bd. Oct. 16, 2002) ("official or administrative notice can be taken . . . . Of course, such action should be undertaken with reasonable notice to applicants to avoid undue surprise or unfairness in these proceedings").

**2. Admissibility Under the Federal Rules of Evidence**

As noted above, the Appeal Board remanded the case with instructions that I take administrative notice of Exhibit 7, and that I reconvene the hearing to allow Department Counsel the opportunity to attempt to admit the other excluded documents as ordinary evidence. Department Counsel asked that I admit into evidence Exhibit 9, the annual report to Congress on foreign

economic collection and industrial espionage prepared by the National Counterintelligence Center for the year 2000. (Tr. at 4.) He offered several arguments in an attempt to demonstrate that Exhibit 9 was both authentic and relevant. (Tr. at 4-5.)

**a. Federal Rule of Evidence 901(b)(4)**

Department Counsel argued that the authenticity of the document was established under Federal Rule of Evidence 901(b)(4). Generally, Rule 901(a) provides, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Subparagraph (b) of the rule offers illustrations of the types of evidence which could prove authenticity of a document, such as: (1) testimony of a witness with knowledge, (2) opinion of a non-expert witness concerning the genuineness of handwriting, or (3) the in-court comparison of writing samples by the trier of fact or an expert witness.

In this case, Department Counsel argued that I should find the document to be authentic under Rule 901(b)(4), "Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances." Courts often admit documents under this rule, where other evidence demonstrates that the distinctive characteristics of the document establish its authenticity. (*See United States v. Firischak*, 468 F.3d 1015, 1022 (7th Cir. 2006) (expert's testimony about contents, location, and appearance of documents sufficient for authentication); *United States v. Thompson*, 449 F.3d 267, 274 (1st Cir. 2006) (anonymous letter met authentication requirement through circumstantial indicia of authorship); *U.S. v. Gordon*, 634 F.2d 639, 643 (1st Cir. 1980) (documents authenticated by evidence corroborating distinctive content and characteristics).) However, Department Counsel did not indicate what specific characteristics of the document proved its authenticity. He argued only that it was (1) a document, and (2) contained information prepared by several federal agencies. (Tr. at 5.) Department Counsel did not indicate what specific information within Exhibit 9 for Identification was so unique or distinctive that it proved its genuineness. I considered the document offered as Exhibit 9 and find none of the unique characteristics probative of authenticity under Rule 901(b)(4).

**b. Federal Rule of Evidence 901(b)(7)**

Department Counsel argued that Exhibit 9 was admissible under Federal Rule of Evidence 901(b)(7). The rule, in pertinent part, provides that a proponent may establish authenticity of a public record or report by presenting "Evidence that a . . . purported public record, report, statement, or data compilation, in any form is from the office where items of this nature are kept." The Advisory Committee's Note to the Rule indicates "Public records are regularly authenticated by proof of custody, without more." Finally, I note that Rule 1005 specifically provides that the contents of public records "may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original." In practice, public records are authenticated by having the custodian of the record submit a certificate attesting to the authority of the custodian and that the documents are public records. No such evidence was presented in this case.

**c. Federal Rule of Evidence 902(5)**

Department Counsel also maintained that Exhibit 9 for Identification was self-authenticating as an official publication under Rule 902(5). Federal Rule of Evidence 905(5) provides, "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: . . . (5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority." Under this rule, official publications of the U.S. government are self-proving, making it relatively simple to establish the authenticity of such a document. As the court observed in *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007), "When combined with the public records exception to the hearsay rule, Rule 803(8), these official publications posted on government agency websites should be admitted into evidence easily."

The concern in this case is that the document offered as Exhibit 9 was not from an official government website. The Appeal Board specifically commented, "We also note that Exhibit 9 appears to have been obtained from a non-governmental web site, which impairs its status as an official publication of the United States." (ISCR Case No. 03-21434 at n.5 (App. Bd. Feb. 20, 2007).) Absent some other evidence from the government, I hesitate to conclude that Exhibit 9 is an official government publication where the Appeal Board previously ruled in the same case that its status was questionable.

Assuming *arguendo* that Exhibit 9 is self-proving under Rule 902(5), that does not mean it is admissible. The rule "[dispenses] with preliminary proof of the genuineness of purportedly official publications . . . . [but] does not confer admissibility upon all official publications; it merely provides a means whereby their authenticity may be taken as established for purposes of admissibility." (Fed. R. Evid. 902(5), Advisory Committee's Note.)

It is axiomatic that evidence must be relevant to be admissible. (Fed. R. Evid. 402.) At the initial hearing on this case, I did not admit Exhibit 9 largely because it was not relevant. First, it was rather old, and I admitted Exhibit 10, a more recent version of the same report. Secondly, it was not relevant because it repeated information already presented in Exhibit 10 and other documents. Department Counsel maintained the 2000 report was necessary because it listed the countries thought to be the most active collectors of foreign economic information. I noted the list was the result of a survey of "nearly a dozen selected Fortune 500 companies." However, the report does not indicate what companies were selected, how they were selected, who selected them, or who provided the responses. Moreover, the survey focused on the collection, by legal and illegal means, of foreign economic information generally, rather than espionage having security significance. Therefore, I found the proffered exhibit incompetent, irrelevant, and immaterial to the issues in this case.

The Appeal Board considered these rulings carefully, and noted that I found "the appendix appeared to be based upon insufficient data to be relevant." ISCR Case No. 03-21434 at 4 (App. Bd. Feb. 20, 2007.) The Appeal Board specifically held "we find no basis to conclude that he abused his discretion" in this ruling. In the absence of some additional evidence, I find Exhibit 9 is still not relevant. I also find it is not material, especially in light of the other documents properly considered in this case.

In the opinion remanding this case, the Appeal Board noted that the Federal Rules of Evidence serve only as a guide, and may be relaxed by the administrative judge. (ISCR Case No. 03-21434 at 5 (App. Bd. Feb 20, 2007).) DoD Directive 5220.6, ¶ E3.1.19, provides:

> The Federal Rules of Evidence (28 U.S.C. 101 *et seq*.) shall serve as a guide. Relevant and material evidence may be received subject to rebuttal, and technical rules of evidence may be relaxed, except as otherwise provided herein, to permit the development of a full and complete record.

Under the terms of the Directive, only "technical" rules of evidence may be relaxed. More significantly, the rule makes it clear that only relevant and material evidence may be received. Even if one relaxed the technical rules concerning authentication, Exhibit 9 is still not relevant or material. Therefore it will not be considered in this case.

Finally, I note that we do not take administrative notice of documents; rather, we take administrative notice of adjudicative facts. The documents submitted by the parties serve only to support requests for administrative notice, and do not constitute independent evidence. I considered carefully the relevant and material documents, including Exhibit 7, as ordered by the Appeal Board. The adjudicative facts I administratively noticed are set out in my factual findings, below.

## FINDINGS OF FACT

Applicant admitted, in whole or in part, the factual allegations in ¶¶ 1.b, 1.c, 1.d, 1.e, and 1.f of the SOR. (Applicant's Answer to SOR, dated July 15, 2004.) Those admissions are incorporated herein as findings of fact. He denied the allegations in ¶ 1.a of the SOR. (*Id.*) After a complete and thorough review of the evidence in the record, I make the following additional findings of fact.

Applicant was born in December 1949. (Ex. 1 at 1.) He enlisted in the U.S. Navy in September 1969. (Ex. 1 at 6; Ex. 3 at 2.) Applicant was rated as an Electrician's Mate and served aboard nuclear submarines, where he held a security clearance. For his exceptional performance, Applicant was selected as the best sailor in the submarine force in 1978. (Tr. at 60; Ex. A at 10.) In September 1984, he received a Navy Commendation Medal for his exemplary service. (Ex. A at 5.) Applicant rose to the rank of Senior Chief Petty Officer (E-8). (Ex. 3 at 6.)

In 1984, Applicant applied for the Navy's limited duty officer program. His commander strongly endorsed the application, and praised Applicant's record of dedicated performance of duty. (Ex. A at 6-7.) Previous commanders added their emphatic endorsements. (Ex. A at 8, 9, 14, 15.) The Navy accepted him into the program and awarded him a commission. (Tr. at 60; Ex. A at 12.) In June 1987, he qualified as a Surface Warfare Officer. (Ex. A at 11.) Applicant worked in the nuclear engineering field and held a high-level security clearance from about 1984 until he retired from the U.S. Navy in 1991. (Ex. 1 at 6; Ex. 3 at 2.)

Applicant was married in November 1971. (Ex. 3 at 3.) By the early 1990s, Applicant and his wife developed marital difficulties. He filed for divorce, but allowed it to lapse. (Tr. at 64.) They continued to reside in the same house, but not as husband and wife. (*Id.*) His wife moved from the marital home in March 1997. (Ex. 4.) Applicant was divorced from his wife in December 1998. (Ex. 3 at 3.)

In 1991, shortly after his retirement from the Navy, he purchased a travel agency and operated the business for about six years. (*Id.*) In 1996, he was asked to provide travel assistance

to a group of businessmen from the People's Republic of China (P.R.C.) who were having troubles with airline tickets and hotel reservations. (Tr. at 65, 70.) Applicant helped the group with their arrangements and met the Chinese travel agent accompanying them, along with his female assistant who served as a translator. (Tr. at 65.) As travel agents, each was interested in making contact with an agency in the other country in an attempt to facilitate each other's tours. (Tr. at 68.) The Chinese travel agent arranged for Applicant to take a tour of China for about two weeks in March 1996. (Tr. at 69.) The Chinese travel agent's female assistant served as his tour guide and translator. (Tr. at 71-72.)

Applicant believed the tour package he was shown would be highly profitable and competitive with larger companies. (Tr. at 74.) He later arranged a group tour of China for clients, and visited the P.R.C. in June 1996 to arrange for visas and tickets. (Ex. 3 at 3.) The travel assistant/translator again served as his guide. (*Id.*) During this trip, they became romantically involved. (Tr. at 78; Ex. 3 at 3.)

Over the ensuing months, Applicant returned to China several times to pursue his relationship with her, to meet her parents, to arrange trips for clients, and for his personal travel in the region. (Ex. 1 at 7; Ex. 3 at 3; Tr. at 86.) After a significant set-back in the travel industry, Applicant sold his travel agency in about April 1997. (Tr. at 100.) He began working as an independent contractor doing small home repair. (Tr. at 100; Ex. 1 at 2.)

He continued to travel to China to further the relationship. In January 1999, Applicant brought her to the U.S. and they were married in February 1999. (Ex. 3 at 3.)

Applicant then worked for about one year as the comptroller for a sports company. (Ex. 1 at 2.) In May 2001, he assumed his present position with a defense contractor serving as a senior nuclear test engineer. (Ex. 1 at 1; Ex. 2 at 2.)

Applicant currently lives with his second wife, their daughter, and his wife's parents. (Tr. at 62.) His wife's parents care for their child. (Tr. at 89.)

Applicant is active in the local community; he has worked with the boy scouts for 20 years, taught hunting safety courses, instructed grade school students in archery and wilderness survival courses, and worked with the 4-H Club. (Tr. at 59.) He was nominated as the Military Citizen of the Year for 1990 for his support to the community. (Ex. A at 2.)

He obtained a bachelor of arts degree, *cum laude*, in 1994. (Ex. A at 3.) At the time of the hearing, he was pursuing a master's degree in business administration specializing in criminal justice administration and expecting to graduate in June 2006, *magna cum laude*. (Ex. A at 4; Tr. at 59, 104.)

Applicant's wife was born in 1973. (Tr. at 79.) She received an academic scholarship and attended college in China where she studied tourism. (Tr. at 79, 96.) She was not a member of the Communist Party. (Tr. at 96.) She became a U.S. citizen in February 2004. (Ex. C.) She is currently a student at a U.S. law school.

Applicant's wife has one sister, who is a citizen and resident of the P.R.C. (Tr. at 81.) The sister works in real estate with her husband. (Tr. at 82.) They have one child. (Tr. at 93.) Applicant and his wife are not close to her sister. (Tr. at 82.)

His wife's parents are citizens of the P.R.C. Her father was a professional soccer player for a city team and her mother worked in a factory. (Tr. at 97.) They came from affluent families and were anti-communist. (Tr. at 95.) During the Cultural Revolution in China, they were required to work on a labor farm. (Tr. at 88.) Both parents are now over 60 years old and are retired. (Tr. at 94.) They receive a small pension from the government that goes into a bank account in China. (Tr. at 97.) They came to the U.S. in 2003. (Tr. at 89) They have permanent resident status in the United States. (Ex. D.) In about 2005, her parents went back to China for her mother's medical treatment in order to take advantage of lower costs, but later returned to the U.S. (Tr. at 88, 93.) Applicant now provides medical insurance coverage for them.

I take administrative notice of the following facts. According to the U.S. State Department, the People's Republic of China is controlled by the Communist Party. (Ex. 5 at 1.) The Consular Information Sheet indicates Chinese security personnel may place under surveillance business people with access to advanced proprietary information. (*Id.* at 2.) The People's Republic of China is a collector of foreign intelligence. (Ex. 7 at 10-11.) The U.S. State Department reports that terrorism is rare in China and that there "is no indication that acts of public violence have been directed against foreigners or that foreign elements in China have carried out terrorist attacks." (Ex. 5 at 2-3.) The State Department also reports that China's record on human rights is poor. (Ex. 11.)

## POLICIES

The President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position … that will give that person access to such information." (*Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).) In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. Under the Directive, ¶ E2.A2.1.1, the adjudicative guideline at issue in this case is:

> Guideline B, Foreign Influence: A security risk may exist when an individual's immediate family, including cohabitants, or other persons to whom he may be bound by affection, influence, or obligation, are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to this adjudicative guideline, are set forth and discussed in the conclusions below.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." (Directive, ¶ E2.2.1.) An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. (*Id.*) An administrative judge should consider the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. (*Id.*)

Initially, the Government must present evidence to establish controverted facts in the SOR that may disqualify the applicant from being eligible for access to classified information. (Directive, ¶ E3.1.14.) Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. (Directive, ¶ E3.1.15.) An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." (ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).) "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." (Directive, ¶ E2.2.2.)

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. (Exec. Ord. 10865, § 7.) It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

## LEGAL PRECEDENT

It is helpful to review the legal precedents relevant to Guideline B cases established by the DOHA Appeal Board. As noted above, Guideline B of the Directive addresses potential security concerns arising when applicants may be subject to foreign influence.

> Guideline B, Foreign Influence: A security risk *may* exist when an individual's immediate family, including cohabitants, or other persons to whom he may be bound by affection, influence, or obligation, are not citizens of the United States or may be subject to duress. These situations *could* create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries *are also relevant* to security determinations *if* they make an individual potentially vulnerable to coercion, exploitation, or pressure.

(Directive, ¶ E2.A2.1.1, *emphasis added*.) It is important to note that the Directive does not establish a per se rule for the guideline; for example, the mere fact that family members or friends are citizens or residents of a foreign country is not automatically disqualifying. The Appeal Board has acknowledged many times that the:

> mere possession of family ties with persons in a foreign country is not, as a matter of law, automatically disqualifying . . . . [It] does raise a prima facie security concern sufficient to require an applicant to present evidence of rebuttal, extenuation or mitigation sufficient to meet the applicant's burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for the applicant.

(ISCR Case No. 99-0424, 2001 DOHA LEXIS 59 at **33-34 (App. Bd. Feb. 8, 2001).)

In order for many diverse adjudicators, counsel, and administrative judges to apply this guideline uniformly and consistently, the Directive sets out various conditions illustrating the sort of matters that may raise security concerns and those that might alleviate such concerns. The Directive refers to these as potentially "disqualifying" or "mitigating" conditions. An administrative judge must consider these conditions as part of a "whole person" concept in determining whether a security concern exists and whether an applicant has mitigated or extenuated those concerns.

**Mitigating Condition 1**

Under Guideline B, Mitigating Condition 1 (Directive, ¶ E2.A2.1.3.1) provides that it is potentially mitigating where the "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 involved and the United States." Notwithstanding the facially disjunctive language, applicants must establish both: (1) that the individuals in question are not "agents of a foreign power," and (2) that they are not in a position to be exploited by a foreign power in a way that could force the applicant to chose between the person(s) involved and the United States. (ISCR Case No. 02-14995 at 5 (App. Bd. Jul. 26, 2004).)

**"Agent of a Foreign Power"**

The Appeal Board has greatly reduced the applicability of this potentially mitigating condition by adopting an expansive definition of the phrase "agent of a foreign power." The federal statute dealing with national security and access to classified information, 50 U.S.C. § 438(6), includes a definition for the term "agent of a foreign power." For the purposes of the statute, Congress adopted the definitions of the phrases "foreign power" and "agent of a foreign power" from 50 U.S.C. § 1801(a) and (b), respectively. 50 U.S.C. § 1801(b) defines "agent of a foreign power" to include anyone who acts as an officer or employee of a foreign power in the United States, engages in international terrorism, or engages in clandestine intelligence activities in the U.S. contrary to the interests of the U.S. or involving a violation of the criminal statutes of the United States. The definition was added to 50 U.S.C. § 438 by the Intelligence Authorization Act for Fiscal Year 1995, Public Law 103-359, October 14, 1994. The term was subsequently included in the Directive through Change 4, dated April 20, 1999.

The Appeal Board, however, does not apply the statutory definition of "agent of a foreign power." Instead, it adopted a much broader definition of its own invention. The Appeal Board seems to have taken the definition of "foreign power" from 50 U.S.C. § 1801(a), but then uses a general definition for the term "agent," so that the phrase has the widest possible scope, to include anyone who has any connection to any government within a foreign country.

Following this expansive construction, the Appeal Board has held that, "An employee of a foreign government need not be employed at a high level or in a position involving intelligence, military, or other national security duties to be an agent of a foreign power for purposes of Foreign Influence Mitigating Condition 1." (ISCR Case No. 02-24254, 2004 WL 2152747 (App. Bd. Jun. 29, 2004).) The Appeal Board applies its definition very broadly. (S*ee* ISCR Case No. 03-10954 at 3 (App. Bd. Mar. 8, 2006) (attorney/consultant to an entity controlled by a foreign ministry is an "agent of a foreign power"); ISCR Case No. 03-19101 at 6 (App. Bd. Jan. 21, 2006) (part-time secretary for the Ministry of Religion is an "agent of a foreign power"); ISCR Case No. 02-2454 at 4-5 (App. Bd. June 29, 2004) (employee of a city government was an "agent of a foreign power"); ISCR Case No. 03-04090 at 5 (App. Bd. Mar. 3, 2005) (employee of the Israeli government is an "agent of a foreign power"); ISCR Case No.02-29143 at 3 (App. Bd. Jan. 12, 2005) (a member of a foreign military is an "agent of a foreign power").) The effect of the Appeal Board's broad application of this term is to greatly increase the numbers of applicants who are automatically excluded from the provisions of Mitigating Condition 1.

Very recently, the Appeal Board explained its refusal to use the statutory definition of the term. In ISCR Case No. 03-10954 at 4 (App. Bd. Mar. 8, 2006), the Board opined that the definition of "agent of a foreign power" in 50 U.S.C. § 1801(b) did not apply because it is part of the Foreign Intelligence Surveillance Act (FISA) and that statute had a narrower scope than the security concerns in the Directive. However, the Appeal Board did not explain why the definition would not apply where it was specifically incorporated by reference in 50 U.S.C. § 438, the federal statute directly concerning the grant of access to classified information.

The Appeal Board's position is inconsistent with a reasonable interpretation of the Directive. Had the drafters intended to exclude all relatives and associates who were "connected to a foreign government," they would have employed such terminology; indeed, that very language was used in Disqualifying Condition 3 of Guideline B. Moreover, for the drafters to use that language as the basis for Disqualifying Condition 3 and then repeat it as an exception to Mitigating Condition 1 is not logical. The only reasonable and rational interpretation is that the phrase "agent of a foreign power" is a term of art defined by 50 U.S.C. § 438(6), the statute dealing with access to classified information. The Appeal Board's decision not to use the statutory definition of the term greatly restricts the applicability of Mitigating Condition 1 for applicants.

**"In a Position to be Exploited"**

As noted above, the second prong of Mitigating Condition 1 (Directive, ¶ E2.A2.1.3.1) provides that it is potentially mitigating where the "associate(s) in question are not . . . 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 involved and the United States." The language "in a position to be exploited" is subject to interpretation. As discussed below, the reasonable and rational interpretation consistent with the intent of the Directive is that the language requires a judge to consider all the circumstances,

assess the likelihood of improper exploitation, and determine whether it presents an unreasonable security concern.

The Appeal Board applies Mitigating Condition 1 very narrowly, however. The Appeal Board interprets the language as establishing an absolute standard; i.e., an applicant must affirmatively prove that there is *no possibility* that anyone might attempt to exploit or influence a foreign relative or acquaintance in the future. (*See* ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006) ("MC1 does not apply because, as is well settled, it requires that Applicant demonstrate that his relatives are not in a position which could force Applicant to choose between his loyalty to them and his loyalty to the United States.").) The Appeal Board does not permit an administrative judge to engage in a balancing test to assess the extent of any security risk in a case. Rather, the Appeal Board requires an applicant to prove that the presence of family members in a foreign country does not create even the possibility of pressure or coercion in the future. (ISCR Case No. 03-02382 at 5 (App. Bd. Feb 15, 2005).) In determining the applicability of this potentially mitigating condition, the Appeal Board does not consider whether an applicant is likely to be improperly influenced by a foreign relative, holding that "Foreign Influence Mitigating Condition 1 hinges not on what choice Applicant might make if he is forced to choose between his loyalty to his family and the United States, but rather hinges on the concept that Applicant should not be placed in a position where he is forced to make such a choice." (ISCR Case No. 03-15205 at 3-4 (App. Bd. Jan. 21, 2005); *see also* ISCR Case No. 03-24933 at 8 (App. Bd. Jul. 28, 2005).)

Because the Appeal Board has set an absolute standard, it refuses to allow an administrative judge to consider any evidence that does not conclusively establish the impossibility of a future attempt at influence. Even though ¶¶ E2.2.1, E2.2.2, and E2.2.3 of the Directive specifically require an administrative judge to consider all the facts and circumstances when evaluating each individual case, the Appeal Board nonetheless holds it is error for a judge to do so when considering the applicability of Mitigating Condition 1. For example, the Appeal Board finds it legal error to consider any of the following facts because they are not "dispositive": a foreign relative's fragile health (ISCR Case No. 02-29403 at 4 (App. Bd. Dec. 14, 2004)); a foreign relative's advanced age (ISCR Case No. 02-00305 at 7 (App. Bd. Feb. 12, 2003)); a foreign relative's financial independence (ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005)); the number of family members in a foreign country (ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2005)); the fact that foreign relatives spend part of each year in the U.S. (ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005)); the lack of any connection between the foreign relative and the foreign government in question (ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005)); the absence of any attempt at exploitation in the past (ISCR Case No. 03-15205 at 4 (App. Bd. Jan. 21, 2005)); the lack of a relative's financial dependency upon an applicant (ISCR Case No. 03-15205 at 4 (App. Bd. Jan 21, 2005)); a foreign country's friendly relationship with the U.S., its stable, democratic government, or its extensive foreign military agreements with the U.S. (ISCR Case No. 02-22461 at 5-6 (App. Bd. Oct. 27, 2005)).

While the Appeal Board refuses to consider any facts tending to mitigate security concerns under Mitigating Condition 1, it absolutely requires judges to consider factors that might increase security concerns. For example, while the Appeal Board holds it is error for an administrative judge to consider a foreign country's friendly relationship with the U.S., it also holds that it is error for a judge to fail to consider a hostile relationship between the U.S. and a foreign country. (ISCR Case No. 02-13595 at 4 (App. Bd. May 10, 2005).) Similarly, the Appeal Board holds that a foreign

state's favorable human rights record is irrelevant, but that "a country's poor human rights record and its differences with the United States on important security issues such as terrorism are factors" that a judge must consider. (ISCR Case No. 04-05317 at 5 (App. Bd. June 3, 2005).)

The general rules of statutory construction apply to administrative regulations. (*M. Kraus & Bros. v. U.S.,* 327 U.S. 614, 621 (1946); 2 Am. Jur. 2d *Administrative Law* § 245 (2006).) However, ordinary rules of regulatory construction do not support the Appeal Board's interpretation of the language in question.

The primary rule of regulatory construction is to determine the intent of the drafters and to give it effect. To that end, judges must interpret a regulation consistent with the purpose and policy within the overall regulatory plan. (*Public Citizen v. United States Dep't of Justice,* 491 U.S. 440, 454-55 (1989); *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945).) The Directive does not establish per se rules prohibiting the issuance of security clearances in specific situations. To the contrary, it requires administrative judges to balance various factors–some potentially disqualifying, and some potentially mitigating–to determine whether an individual is a security concern. To that end, ¶ 6.3 of the Directive provides general guidance:

> 6.3. Each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:
>
> > 6.3.1. Nature a seriousness of the conduct and surrounding circumstances.
> > 6.3.2. Frequency and recency of the conduct.
> > 6.3.3. Age of the applicant.
> > 6.3.4. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.
> > 6.3.5. Absence or presence of rehabilitation.
> > 6.3.6. Probability that the circumstances or conduct will continue or recur in the future.

The Appeal Board's narrow interpretation creates a requirement of proof impossible to achieve and effectively eliminates the possibility that Mitigating Condition 1 could ever apply. Also, the Appeal Board's rulings exclude from consideration all evidence that could tend to mitigate or extenuate the potential security concern. Clearly, the Appeal Board's inflexible interpretation of the language would "compel an odd result." (*Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 509 (1989).) This is inconsistent with the regulatory policy established in the Directive, and effectively denies due process to applicants.

Another rule of regulatory construction is that judges should not interpret language in such a way that renders it meaningless or leads to an absurd result. (*United States v. Turkette,* 452 U.S. 576, 580 (1981).) Of course, the issue of the applicability of Mitigating Condition 1 only arises when an applicant has immediate family members or close acquaintances who are citizens or residents of a foreign country. The Appeal Board presumes that the fact of such foreign citizenship or residency creates a vulnerability to possible influence. Under such circumstances, it is impossible

for an applicant to affirmatively prove that no attempt at exploitation or influence could ever occur in the future. It is not logical that the drafters of the Directive would implement a mitigating condition that could never apply.

It is helpful to consider the historical antecedents for this provision to shed light on the drafter's intent. The version of Mitigating Condition 1 set out in DoD Directive 5220.6 promulgated in January 1992, couched this mitigating condition in these terms. "Conditions that could mitigate security concerns include: (1) a determination that the immediate family member(s) , cohabitant, or associate(s) in question would not constitute an unacceptable security risk." Clearly, the earlier version of MC1 did not establish a per se rule–rather it required the administrative judge to weigh all factors and determine whether the risk was "unacceptable."

Significantly, this earlier version of Mitigating Condition 1 is still in effect for security clearance cases for military members and civilian employees of DoD that are processed under DoD Regulation 5200.2-R. It is anomalous to apply a per se rule in some cases and a rule of reasonableness in others, where the implementing regulations require a uniform process.

It is also helpful to review a later-enacted version of the same guideline to determine the drafter's original intent. (*Branch v. Smith*, 538 U.S. 254, 281 (2003) (citing *United States v. Freeman*, 44 U.S. 556 (1845).) On December 29, 2005, the President approved the following new language to replace Mitigating Condition 1:

> 8. Conditions that could mitigate security concerns include: (a) the nature of the relationships with foreign persons, the country in which the persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.

Notably, the new language requires an administrative judge to weigh numerous factors and assess the likelihood that an individual will be placed in a position of conflict. Unlike the Appeal Board's present interpretation, the new language does not require an applicant to affirmatively prove that an attempt at influence is impossible, nor does it bar consideration of evidence that might mitigate or extenuate security concerns. Most importantly, when one consider's the previous version of this rule, the general policy of the Directive, and this recent language, it is apparent that the drafters did not intend the present language to be interpreted as a *per se* rule as the Appeal Board now applies it.

**Terrorism**

The Appeal Board also construes Mitigating Condition 1 to make it inapplicable any time there is a history of terrorist acts within the foreign country in question. Obviously, this greatly decreases the chance that any applicant could obtain the benefit of Mitigating Condition 1.

As noted above, Mitigating Condition 1 applies where a judge determines the applicant's relatives and associates in a foreign country are not "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." While the definition of "foreign power" from 50 U.S.C. § 438(6) (incorporating the definition from 50 U.S.C. § 1801(a)) includes terrorist groups, it also includes foreign governments, foreign-based political organizations, and foreign non-governmental organizations.

Mitigating Condition 1 does not, by its express terms, exclude from consideration applicants with relatives or associates in countries where terrorism has occurred, any more than it excludes person from countries where there are foreign governments, foreign political organizations, or foreign non-governmental organizations. Rather, it focuses on a very specific type of threat–the risk of a foreign power exploiting an applicant's foreign relatives in such a way as to cause an applicant to act adversely to the interests of the United States.

The Appeal Board holds Mitigating Condition 1 does not apply where there is a history of terrorist activity–of any kind–in the foreign country in question. (ISCR Case No. 03-22643, 2005 DOHA Lexis 159 (App. Bd. Jun. 24, 2005); ISCR Case No. 02-22461 at 5 (App. Bd. Oct. 22, 2005).) The Appeal Board justifies this as "a matter of common sense" arising from "the war on terrorism." (ISCR Case No. 01-26893, 2002 DOHA LEXIS 505, 22-23 n.2 (App. Bd. Oct. 16, 2002).) To appreciate the extent to which the Appeal Board will consider the risk of terrorist acts, it is helpful to review the opinion in ISCR Case No. 02-29403 at 5 (App. Bd. Dec. 14, 2004). There the Appeal Board declared "it is possible to envision several ways in which terrorists could pose a threat to classified information," and then went on to theorize extensively about what unspecified terrorists might do in hypothetical situations. While such things are possible, they do not fall within the limited language contained in Mitigating Condition 1 of the Directive. The fact that the U.S. is presently engaged in a war on terrorism is a matter to be considered along with all relevant facts; however, it does not amend Mitigating Condition 1 in the Directive.

**"Heavy Reliance"**

Under the Directive, ¶ E3.1.32.3, the Appeal Board's authority is limited to issues of law–it does not have the authority to conduct a *de novo* review of the case. To reverse the decision of an administrative judge, the Appeal Board must find a "legal" error. Frequently in cases under Guideline B, the Appeal Board finds legal error by concluding an administrative judge relied too heavily on a particular factor.

As noted above, the Appeal Board decided that evidence that a foreign country is hostile to the U.S. is so significant that it is legal error for an administrative judge to fail to consider it. At the same time, however, the Appeal Board holds that the fact that a foreign country has friendly relations with the U.S., or that it has long been a U.S. ally, is irrelevant. Moreover, when an administrative judge notes the history of friendly relations as part of the required discussion of all the facts, the Appeal Board infers "heavy reliance" by the administrative judge upon that fact and holds it was legal error.

For example, in ISCR Case No. 02-22461, 2005 WL 1381919 (Jan. 2, 2005), the administrative judge considered the security risk arising from an applicant's relatives in Taiwan. The judge wrote that "The following information about Taiwan . . . is significant," and discussed the evidence the government counsel submitted for administrative notice. Later, while discussing the applicability of potentially mitigating conditions, the judge noted Taiwan's friendly relationship with the U.S. The judge went on to discuss at length specific facts unique to Applicant's situation making

him a good candidate for a clearance, and eventually found in his favor. On appeal, the Appeal Board reasoned that the judge erred in relying too heavily on the finding that Taiwan was friendly. (ISCR Case No. 02-22461 at 6 (App. Bd. Oct. 27, 2005).)

The Appeal Board often employs this analysis to reverse decisions granting clearances under Guideline B. In ISCR Case No. 02-21927 at 7 (Jan. 18, 2005), the administrative judge noted it was "helpful to consider several factors, including the character of the foreign country," and discussed various aspects of Saudi Arabia's government. The Appeal Board concluded this demonstrated inappropriate "heavy reliance" on the fact that Saudi Arabia is an ally of the U.S. (ISCR Case No. 02-21927 at 5 (App. Bd. Dec. 30, 2005).) (*See also* ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005); ISCR Case No. 02-23860, 2005 DOHA LEXIS 43 (App. Bd. Jun. 30, 2005); ISCR Case No. 03-23806, 2005 DOHA LEXIS 162 (App. Bd. Apr. 28, 2005); ISCR Case No. 02-02892, 2004 DOHA LEXIS 621 (App. Bd. Jun. 28, 2004); ISCR Case No. 02-11570, 2004 DOHA LEXIS 653 (App. Bd. May 19, 2004); ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 (App. Bd. Mar. 29, 2002).)

**Shifting Burden of Proof/Persuasion**

The Appeal Board frequently finds "legal error" by deciding that an administrative judge improperly shifted the burden of proof/persuasion to the government to disprove the application of Mitigating Condition 1. (The Appeal Board uses the terms "burden of proof" and "burden of persuasion" interchangeably; a discussion of the merits of that practice is beyond the scope of this discussion.) A careful examination of the cases in question reveals the Appeal Board's rationale for finding error is insufficient to justify reversing the decision of an administrative judge.

According to the Directive, ¶ E3.1.14, the department counsel is responsible for presenting evidence to establish controverted facts alleged in the Statement of Reasons. The Appeal Board interprets this as imposing on department counsel the burden of proving by substantial evidence that a disqualifying condition applies. (ISCR Case No. 02-30587, 2005 DOHA LEXIS 73 (App. Bd. Jun. 15, 2005).) Thereafter, an Applicant has the burden of persuasion as to obtaining a favorable security clearance. (Directive, ¶ E3.1.15.)

In cases arising under Guideline B, Foreign Influence, the Appeal Board holds an applicant must affirmatively prove that no one would in the future attempt to exploit them through their foreign relatives or associates. (As discussed above, this imposes the impossible burden of affirmatively proving that an event will not occur in the future.) In order for an applicant to persuade an administrative judge that he or she is not "in a position to be exploited by a foreign power," he or she often must rely on evidence that a foreign country has not engaged in exploitive behavior in the past, including the absence of any evidence of improper conduct. However, any time an administrative judge comments on the absence of evidence, the Appeal Board concludes the administrative judge improperly shifted the burden of proof to the government to disprove a mitigating condition. (ISCR Case No. 03-15485 (App. Bd. Jun. 2, 2005); ISCR Case No. 03-02382 (App. Bd. Feb. 15, 2005); ISCR Case No. 01-20908 (App. Bd. Nov. 26, 2003).)

The Appeal Board's rulings appear to be based upon the premise that "when a party has the burden of proof on a particular point, the absence of any evidence on that point requires a Judge to find or conclude that point against the party that has the burden of proof." (ISCR Case No. 99-0597,

2000 DOHA LEXIS 229 (App. Bd. Dec. 13, 2000).) However, the concept that the "absence of evidence" must always be deemed a failure of proof by the proponent is contrary to prevailing federal practice. Indeed, the concept that the absence of evidence can be used to prove a negative proposition is so well ingrained in the law that it is included among the statutory exceptions to the hearsay rule in Federal Rule of Evidence 803(7) (absence of entry in records of a regularly conducted activity) and Rule 803(10) (absence of public record or entry).

An applicant attempting to prove the applicability of Mitigating Condition 1 has the burden of proving a negative, i.e., that a foreign power is not likely to engage in exploitive conduct in the future, or has not done so in the past. Proving a negative can be difficult, of course. The law recognizes that the burden of proving a negative can be satisfied by proof which renders probable the existence of the negative fact. (*See Majestic Sec. Corp. v. Commissioner*, 120 F.2d 12, 14 (8th Cir. 1941) ("A negative proposition may appropriately be established by proof of an affirmative opposite."); *CareFirst of Md., Inc. v. First Care, P.C.*, 434 F.3d 263, 269 (4th Cir. 2006) ("the absence of any evidence of actual confusion over a substantial period of time - here, approximately nine years - creates a strong inference that there is no likelihood of confusion."); *Aetna Casualty & Surety Co. v. General Electric Co.*, 758 F.2d 319, 325 (8th Cir. 1985) (citing 22 C. J. *Evidence* § 15 (1940) "Whenever the establishment of an affirmative case requires proof of a material negative allegation, the party who makes such allegation has the burden of proving it, especially where the most appropriate mode of proof is by establishing the affirmative opposite of the allegation."); *Leonard v. St. Joseph Lead Co.*, 75 F.2d 390, 397 (8th Cir. 1935) ("A negative in its very nature usually is susceptible of no more than approximate proof, and generally is sufficiently proved by proving some affirmative fact or state of facts inconsistent with the affirmative of the proposition to be negatived."); *Ake v. GMC*, 942 F. Supp. 869, 874 (D.N.Y. 1996) ("A lack of evidence of prior accidents is never conclusive proof that the defendant exercised due care, but it is a factor that the fact-finder could consider.").)

Normally in cases presented under Guideline B, numerous documents are introduced as evidence of the nature of any security risk posed by the foreign country. Typically these discuss in some detail any history of a friendly or hostile relationship between the foreign power and the United States, the foreign country's human rights practices, and any reports of the history of intelligence-gathering activities by the foreign power. These documents constitute evidence of an "affirmative opposite" tending to establish the negative proposition. For example, evidence that the U.S. and a foreign government have security alliances is some evidence suggesting the foreign government would not act adversely to U.S. security interests Similarly, where a document reflects the extent of any intelligence collecting activity, but does not include any indication that the foreign power has engaged in the kind of exploitive behavior which forms the basis for concern in Mitigating Condition 1, the absence of evidence is some proof, though not conclusive, that such exploitive behavior has not occurred.

Of course, the important point is that this "absence of evidence" is competent evidence upon which an applicant may rely in attempting to prove his or her case, and which an administrative judge is required to consider when weighing all the evidence. The simple fact that an administrative judge does so does not constitute an improper "shifting of the burden of proof."

A close examination of the cases where the Appeal Board has found "burden shifting" is revealing. For example, in ISCR Case No. 02-22461 (App. Bd. January 5, 2005), the administrative

judge carefully set out the proper burdens of proof for the government and the applicant, and found the government had presented evidence raising security concerns under the applicable guideline. The administrative judge then specifically reiterated that, "Once the government meets its burden of proving controverted facts, the burden shifts to an applicant . . . ." (*Id.* at 6.) While discussing all the evidence bearing on the relationship between the foreign country in question and the United States, the administrative judge noted, "further, there is no indication that Taiwan has ever attempted to exploit any resident of Taiwan for the purpose of compromising a security clearance holder within the United States." (*Id*. at 7.) The administrative judge issued a favorable clearance decision and the government appealed. The Appeal Board concluded the administrative judge improperly shifted the burden of proof to the government to disprove the existence of a mitigating condition. (ISCR Case No. 02-22461 at 4 (App. Bd. Oct. 27, 2005).) However, a review of the original opinion reveals the administrative judge did not improperly shift the burden of proof; rather, he was commenting on the state of all the evidence, and making a permissible comment on what the evidence did or did not show. (*Compare* ISCR Case No. 02-31154 at 5-6) (App. Bd. January 27, 2005) *with* ISCR Case No. 02-31154 at 5 (App. Bd. September 22, 2005) (finding "burden shifting"); *and* ISCR Case No. 03-16848 at 3-5 (January 24, 2005) *with* ISCR Case No. 03-16848 at 8 (App. Bd. August 30, 2005) (finding burden shifting).) The Appeal Board's rulings on this issue effectively deny applicants the opportunity to present favorable evidence under Mitigating Condition 1, thereby denying the due process afforded under Executive Order 10865 and Department of Defense Directive 5220.6.

**Rebuttable Presumption**

The Appeal Board has also made it more difficult for an applicant to obtain a favorable decision in cases brought under Guideline B through its application of a "rebuttable presumption," long recognized by the courts as a "troublesome evidentiary device." *(Ulster County Court v. Allen*, 442 U.S. 140, 157 (1979).) The Appeal Board created "a rebuttable presumption that an applicant has ties of affection for, or obligation to, his spouse's immediate family members." (ISCR Case No. 01-03120 at 4 (App. Bd. Feb. 20, 2002).) As applied to these administrative cases, the Appeal Board's presumption is not rationally based and exceeds the scope of its authority.

A rebuttable presumption requires the fact-finder to find the presumed element unless the applicant persuades him or her that such a finding is unwarranted. (*Francis v. Franklin*, 471 U.S. 307, 314 (1985).) Under Rule 301 of the Federal Rules of Evidence (which serve as a guide for administrative hearings under the Directive, ¶ E3.1.19) "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption." In other words, a presumption places upon the opposing party the burden of establishing the non-existence of the presumed fact.

In order for a presumption to meet basic requirements of due process, there must be a "rational connection between the fact proved and the ultimate fact presumed." (*Tot v. United States*, 319 U.S. 463, 467 (1943).) A presumption is "'irrational' or 'arbitrary,' and hence, unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." (*Leary v. United States*, 395 U.S. 6, 36 (1969); *Barnes v. United States*, 412 U.S. 837, 841-43 (1973).)

It is important to keep in mind that the presumption only arises in the narrow circumstance where an Applicant, a U.S. citizen, is married and his or her spouse has immediate family members who are citizens or residents of a foreign country. In such cases, the immediate family members normally reside in a foreign country; often the applicant has never met them or has only met them a few times, and cannot speak their language. Comparing the proved fact (the applicant's spouse's immediate family members are citizens or residents of a foreign country) and the presumed fact (the applicant has close ties of affection or obligation to them), it is readily apparent they do not coincide. Considering the normal circumstances for cases under Guideline B, there is no rational basis for the presumption that an applicant has ties of affection or obligation to his spouse's immediate family members.

The presumption fashioned by the Appeal Board also has the effect of re-writing and expanding the scope of Disqualifying Condition 1 under Guideline B. As currently written, the Directive, ¶ E2.A2.1.2.1, lists as a condition that could raise a security concern: "An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country." Paragraph E2.A2.1.3.1 of the Directive defines immediate family members" as "spouse, father, mother, sons, daughters, brothers, sisters." As written, Disqualifying Condition 1 is raised–essentially automatically–where there is evidence that immediate family members are citizens or residents of a foreign country. For Disqualifying Condition 1 to apply to anyone else, it must be also shown that the applicant has close ties of affection or obligation to them. By applying the presumption, the Appeal Board has effectively re-written Disqualifying Condition 1, expanding it to automatically apply where an applicant's spouse has immediate family members who are foreign citizens or residents. Of course, had the drafters of the Directive intended that application, they could have written DC 1 that way. However, the drafters did not do so, and it is beyond the authority of the Appeal Board to expand the scope of DC 1 through a rebuttable presumption.

**Result**

Comparing the balanced provisions of the Executive Order and the Directive against the absolute standards applied by the Appeal Board in Guideline B cases, it appears the Appeal Board's rulings are not consistent with the Directive. Where the Appeal Board's rulings are inconsistent with the policy and terms of the Directive, it creates enormous difficulties for administrative judges, who are torn between their responsibility to properly apply the Directive and the requirement in remand cases to correct the errors identified by the Appeal Board. (Directive, ¶ E3.1.35.) In such circumstances, the recommended practice is to follow the decision of the higher body, leaving to superior courts the prerogative of overruling incorrect decisions. (*Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477, 484 (1989).) Of course, federal courts have the authority to compel agencies to follow their own regulations. (*Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 892-93 (1960); *Hill v. Department of the Air Force*, 844 F.2d 1407, 1412 (10th Cir. 1988).) Until a higher court intervenes, we are bound by the Appeal Board's holdings.

## CONCLUSIONS

I considered carefully all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

Paragraph E2.A2.1.2.1 of the Directive provides that it may be a disqualifying condition if "an immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country." Paragraph E2.A2.1.3.1 defines "immediate family members" to include a spouse, father, mother, sons, daughters, brothers, and sisters. None of Applicant's immediate family members fall within the terms of this paragraph. His wife's parents are citizens of the P.R.C., although they reside permanently in the U.S. They live with Applicant and his family, care for his young child, and rely on him for support. I conclude Applicant has close ties of affection or obligation for his wife's parents. These circumstances are sufficient to raise possible security concerns.

Applicant's wife also has a sister who is a citizen and resident of the P.R.C. As discussed above, the Appeal Board holds that there is a rebuttable presumption that Applicant has close ties of affection or obligation to his wife's sister. It appears Applicant has little or no contact with his sister-in-law, and what relationship exists is not favorable. Considering all the evidence, I find Applicant has rebutted any presumption that he has close ties of affection or obligation to his wife's sister in the P.R.C.

Under ¶ E2.A2.1.2.2 of the Directive, it may be disqualifying where an applicant is "[s]haring living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists." Applicant shares his living quarters with his wife's parents, who are citizens of the P.R.C. They have several ties to the P.R.C., including their citizenship and a daughter, son-in-law, and grandchild living in China. I find the evidence raises this potential security concern.

The Directive, ¶ E2.A2.1.2.7, provides that it may be a security concern where there are "[i]ndications that representatives or nationals from a foreign country are acting to increase the vulnerability of the individual to possible future exploitation, coercion or pressure." Department Counsel argued this concern was raised because Applicant's second wife was a citizen of the P.R.C. when she met and married Applicant, and because a Chinese travel agency provided tours of China to Applicant. However, the available evidence is insufficient to establish that Applicant's second wife or the Chinese travel agent were representatives of the P.R.C. or that they were motivated, in whole or in part, by a desire to increase Applicant's vulnerability to future exploitation, coercion, or pressure. I note Applicant was a travel agent at that time–he had not assumed his present position–and thus had no access to classified material. I find the evidence insufficient to raise this potentially disqualifying condition.

Under the Directive, potentially disqualifying conditions may be mitigated through the application the "whole person" concept and specific mitigating conditions. When the Government produces evidence raising potentially disqualifying conditions, an Applicant has the burden to produce evidence to rebut, explain, extenuate, or mitigate the conditions. (Directive, ¶ E3.1.15.) The government never has the burden of disproving a mitigating condition. (ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).)

Paragraph E2.A2.1.3.1 of the Directive provides that it is potentially mitigating where the "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 involved and the United States." As noted above, applicants must establish: (1) that the individuals in question are not "agents of a foreign power," and (2) that they are not in a position to be exploited by a foreign power in a way that could force the applicant to chose between the person(s) involved and the United States. (ISCR Case No. 02-14995 at 5 (App. Bd. Jul. 26, 2004).)

None of Applicant's in-laws meet the definition of "agent of a foreign power" under 50 U.S.C. § 438(6) and 50 U.S.C. § 1801(b). Similarly, none of them would be considered as an "agent of a foreign power" under the more expansive definition adopted by the Appeal Board. The available evidence indicates his wife's parents are both retired from non-governmental employment and her sister works in the private sector.

The second prong of the test is whether the relatives in question are "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.) The federal statute, 50 U.S.C. § 1801(a), defines "foreign power" to include: a foreign government; a faction of a foreign nation; an entity openly acknowledged by a foreign government to be controlled by that foreign government; a group engaged in international terrorism; a foreign-based political organization; or an entity directed and controlled by a foreign government.

To determine whether Applicant was "in a position to be exploited by a foreign power," I would ordinarily weigh Applicant's connection to his wife's family against his strong ties to the United States. I would note that Applicant's wife and child are citizens and residents of the United States, and therefore entitled to the liberties and protection afforded U.S. citizens. His wife's parents, while citizens of the P.R.C., reside permanently in the U.S. and thus are removed from the physical control of foreign powers in the P.R.C. Moreover, they have no connection to or dependence upon a foreign power in the P.R.C. His wife's sister presents a somewhat greater vulnerability; although she has no connection to or dependence upon a foreign power, she is still under the physical control of the P.R.C. Applicant's record of successfully holding a security clearance for many years, and his career of distinguished service to the U.S. Navy, make it extremely unlikely that he would be vulnerable to improper influence through his wife's relatives.

However, as discussed above, in order to apply the second prong of Mitigating Condition 1, the Appeal Board requires that applicants affirmatively prove that there is no possibility that anyone would attempt to exploit a foreign relative in the future. Also, the Appeal Board prohibits any consideration of evidence that is not dispositive of the issue. Finally, the Appeal Board finds it irrelevant to this issue whether an applicant is likely to be improperly influenced by a foreign relative or associate. Applying that standard, Mitigating Condition 1 does not apply.

Under the Directive, ¶ E2.A2.1.3.3, it may be mitigating where "[c]ontact and correspondence with foreign citizens are casual and infrequent." Applicant's contact with his wife's sister has been isolated and infrequent, but he has regular and frequent contact with his wife's parents. This potentially mitigating condition applies only in part.

**The "Whole Person" Concept.**

The "whole person" concept–not the potentially disqualifying or mitigating conditions–is the heart of the analysis of whether an applicant is eligible for a security clearance. (Directive, ¶ E2.2.3.) Indeed, the Appeal Board has repeatedly held that an administrative judge may find in favor of an applicant where no specific mitigating conditions apply. (ISCR Case No. 03-11448 at 3-4 (App. Bd. Aug. 10, 2004); ISCR Case No. 02-09389 at 4 (App. Bd. Dec. 29, 2004).)

In assessing whether an applicant is a security risk because of his or her relatives or associates in a foreign country, it is necessary to consider all relevant factors. As noted above, ¶¶ E2.2.1, E2.2.2, and E2.2.3 of the Directive specifically require each administrative judge to consider all the facts and circumstances, including the "whole person" concept, when evaluating each individual case. To ignore such evidence would establish a virtual per se rule against granting clearances to any person with ties to persons in a foreign country, contrary to the clear terms of the Directive. "Although the position of an applicant's foreign family members is significant and may preclude the favorable application of Foreign Influence Mitigating Condition 1, the totality of an applicant's conduct and circumstances (including the realistic potential for exploitation) may still warrant a favorable application of the relevant general factors." (ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006) (footnotes omitted); *accord* ISCR Case No. 03-23259 at 3 (App. Bd. May 10, 2006).)

One of the "whole person" factors which must be considered is "the potential for pressure, coercion, exploitation, or duress." (Directive, ¶ E2.2.1.8.) In that regard, an important factor for consideration is the character of any foreign power in question, including the government and entities controlled by the government, within the relevant foreign country. This factor is not determinative; it is merely one of many factors which must be considered. Of course, nothing in Guideline B suggests it is limited to countries that are hostile to the United States. (*See* ISCR Case No. 00-0317 at 6 (App. Bd. Mar. 29, 2002); ISCR Case No. 00-0489 at 12 (App. Bd. Jan. 10, 2002).) The Appeal Board repeatedly warns against "reliance on overly simplistic distinctions between 'friendly' nations and 'hostile' nations when adjudicating cases under Guideline B." (ISCR Case No. 00-0317 at 6 (App. Bd. Mar. 29, 2002)). It is well understood that "[t]he United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." (ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).) Distinctions between friendly and unfriendly governments must be made with extreme caution. Relations between nations can shift, sometimes dramatically and unexpectedly. Moreover, even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, friendly nations have engaged in espionage against the United States, especially in economic, scientific, military, and technical fields. (ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002).) Nevertheless, the relationship between a foreign government and the U.S. may be relevant in determining whether a foreign government or an entity it controls is likely to attempt to exploit a resident or citizen to against the U.S. through the applicant. The nature of the foreign government might also relate to the question of whether the foreign government or an entity it controls would risk jeopardizing its relationship with the U.S. by exploiting or threatening its private citizens in order to force a U.S. citizen to betray this country. A friendly relationship is not determinative, but it may make it less likely that a foreign government would attempt to exploit a U.S. citizen through relatives or associates in that foreign country.

The government of the People's Republic of China is controlled by the Communist Party. The State Department reports it has a poor record of protecting human rights. The P.R.C. has a history of poor relations with the U.S. These factors are not determinative, but suggest it is more likely that China would attempt to exploit its residents or citizens to act adversely to the interests of the United States in the future.

It is also helpful to consider Applicant's relatives' vulnerability to exploitation by foreign powers in the P.R.C. Applicant's parents-in-law reside permanently in the U.S. and are thus out of the physical control of the P.R.C. They are not attached to or economically dependent upon the P.R.C. government. His sister-in-law lives in China and is therefore more vulnerable to the foreign powers there.

Most importantly, it is necessary to consider Applicant's vulnerability to exploitation through his relatives. Applicant is a mature individual with an impressive history of service to this country. He is a U.S. citizen by birth. He provided many years of exceptional service to the U.S. Navy, as an enlisted member and an officer, and successfully held a high-level security clearance during his military career. Applicant has strong ties to the United States. Because of Applicant's deep and long-standing relationships and loyalties in the U.S., he can be expected to resolve any conflict of interest in favor of the United States. I find the potential for pressure, coercion, exploitation, or duress does not constitute a security risk. (Directive, ¶ E2.2.1.8.)

I considered carefully the "whole person" concept, keeping in mind that any doubt as to whether access to classified information is clearly consistent with national security must be resolved in favor of the national security. I conclude Applicant has mitigated any potential security concerns arising from Applicant's family ties to the P.R.C.

## FORMAL FINDINGS

My conclusions as to each allegation in the SOR are:

| | |
|---|---|
| Paragraph 1, Guideline B: | FOR APPLICANT |
| Subparagraph 1.a: | For Applicant |
| Subparagraph 1.b: | For Applicant |
| Subparagraph 1.c: | For Applicant |
| Subparagraph 1.d: | For Applicant |
| Subparagraph 1.e: | For Applicant |
| Subparagraph 1.f: | For Applicant |

## DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Michael J. Breslin
Administrative Judge