

KEYWORD: Guideline B

DIGEST: In Foreign Influence cases, the nature of the foreign government involved in the case and the intelligence gathering history of that government are important evidence that provides context for all the other evidence of record and must be brought to bear on the Judge's ultimate conclusions. Favorable decision remanded.

CASENO: 06-18400.a1

DATE: 08/02/2007

DATE: August 2, 2007

In Re:)	
)	
-----)	ISCR Case No. 06-18400
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Thomas M. Abbott, Esq., Virginia M. Gomez, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 31, 2006, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 14, 2006, after the hearing, Administrative Judge Martin H.

Mogul granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Administrative Judge erred by finding that Guideline B, Mitigating Condition 1 was applicable in this case, and whether the Judge's whole-person analysis was unsustainable. We remand the case to the Administrative Judge.

Whether the Record Supports the Administrative Judge's Factual Findings

A. Facts

The Judge made the following findings of fact:

Applicant is 25 years old. He is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Applicant was born in Taiwan in 1981. He moved to the United States in 1998, with both of his parents, and he became a naturalized United States citizen in July 1, 2004. When Applicant received his United States citizenship, he petitioned to change his name to a more American sounding name.

Applicant is unmarried and has no children. He received a Bachelor of Science degree in Electrical Engineering from a United States university in 2005. He is in the process of applying to United States universities to pursue a Masters of Business Administration degree.

Applicant's mother and father have also become naturalized United States citizens, residing in the United States. His mother is a retired housewife and lives with Applicant. His father works in the motel industry for Applicant's two uncles in the United States.

Applicant's sister and brother-in-law are citizens and residents of Taiwan. His sister is a stay-at-home mother, and his brother-in-law owns and manages a private auto body shop. Neither of them belong to, participate in, or are active with any government agency of Taiwan, or receive any benefits from the Taiwanese Government. Their daughter was born in the United States and is a dual United States and Taiwanese citizen. Applicant speaks to his sister once a month, and sees her once a year, when she visits the United States. His sister and brother-in-law are in the process of applying for United States residency and citizenship.

Applicant visited Taiwan from December 2004 to January 2005, to see his sister and brother-in-law. He testified that during this trip, he saw no one else whom he knew, except these family members

Applicant does not have any financial interest in Taiwan. At this time he has limited financial holdings, but what he has is only in the United States.

Applicant submitted five letters from individuals who know him in different capacities in his place of employment. These letters all discussed Applicant in extremely positive terms as a hard working, conscientious and trustworthy individual. He also introduced his 2005 Employee

Performance Review for his first year of employment. This first evaluation was fairly positive as all of his assessments met or exceeded expectations.

Applicant testified as to his strong feelings for the United States and his desire to remain here. He also stated that he has registered, as required, for Selective Service.

B. Discussion

The Appeal Board's review of the Judge's finding of facts is limited to determining if they are supported by substantial evidence—such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record.” Directive ¶ E3.1.32.1. “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21 (1966). In evaluating the Judge's findings, we are required to give deference to his credibility determinations. Directive ¶ E3.1.32.1. Department Counsel challenges the Judge's findings as inadequate. The Judge failed to make any findings regarding the nature of the foreign country at issue, Taiwan. This failure will be discussed in context of the Judge's conclusions.

Whether the Record Supports the Administrative Judge's Ultimate Conclusions.

A Judge is required to “examine the relevant data and articulate a satisfactory explanation for” the 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)). The Appeal Board may reverse the Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. We review matters of law *de novo*.

The Board has established that: “In Foreign Influence cases, the nature of the foreign government involved in the case and the intelligence gathering history of that government are important evidence that provides context for all the other evidence of record and must be brought to bear on the Judge's ultimate conclusions in the case.” *See, e.g.*, ISCR Case No 04-07766 at 3 (App. Bd. Sept. 26, 2006).

In the instant case, the Judge's decision is completely silent as to the evidence¹ of record regarding Taiwan's history of intelligence gathering and industrial espionage. The Judge's omission in that regard renders his decision arbitrary and capricious, in that it affected his ability to evaluate properly the significance of Applicant's relatives' citizenship and residency in Taiwan, and to evaluate properly the applicability of the guidelines including the Guideline B mitigating factors.

¹One of the pertinent exhibits was discussed at length in a recent Appeal Board case, ISCR Case No. 03-21434 at 4-5 (App. Bd. Feb. 20, 2007). That exhibit, entitled Annual Report to Congress on Foreign Economic Collection and Industrial Espionage (dated 2000), was one of several stipulated to by both parties in the instant case, so notice and admissibility are not properly at issue here as they were in that case.

In light of the forgoing error and the overall state of the record otherwise, the Board concludes that remand for correction of the error is the appropriate disposition for this case. Therefore, it is premature to address the other appeal issues.

Order

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

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

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board