

DATE: February 20, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-03120

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Darlene Lokey Anderson issued a decision, dated October 3, 2001, in which she concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. For the reasons set forth below, the Board affirms the Administrative Judge's decision.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the issue of whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated April 24, 2001. The SOR was based on Guideline B (Foreign Influence) and Guideline C (Foreign Preference). A hearing was held on September 13, 2001. The Administrative Judge issued a written decision, dated October 3, 2001, in which she concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Applicant's appeal from the Judge's adverse security clearance decision.

Scope of Review

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. See Directive, Additional Procedural Guidance, Item E3.1.32. See, e.g., ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural

Guidance, Item E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings. *See, e.g.*, ISCR Case No. 99-0205 (October 19, 2000) at p. 2.

When a challenge to an Administrative Judge's rulings or conclusions raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

Administrative Judge's Findings and Conclusions

The Administrative Judge entered formal findings in favor of Applicant with respect to Guideline C. Those favorable formal findings are not at issue on appeal. Therefore, the Board need not discuss the Judge's findings and conclusions about the matters covered by SOR paragraphs 1.a and 1.b.

Applicant was born and raised in a foreign country (FC). In 1986, Applicant came to the United States as an employee of an FC company. In 1990, Applicant was hired by a United States company. In 1998, Applicant became a naturalized U.S. citizen. Applicant's wife also was born in FC. She became a naturalized U.S. citizen in 1999. Applicant and his wife have a son who was born in the United States. Applicant and his wife are dual citizens of FC and the United States. Applicant recently has taken steps to renounce his FC citizenship.

The following relatives of Applicant are FC citizens and live there: Applicant's mother and sister; Applicant's wife's mother, father, brother, and sister; and Applicant's aunts and uncles, cousins and other extended family. There is no evidence that any of Applicant's family members work for the FC government.

Applicant visits his family when he travels to FC. Since 1990, Applicant has traveled to FC every year or two to visit his ailing mother. Applicant and his wife traveled to FC in 1993, 1995, 1996, 1998, 1999, and 2000. Applicant and his wife have maintained a continuing relationship with their relatives in FC.

Applicant has recently applied to have his mother and sister immigrate to the United States. Applicant's wife has applied to have her mother and father immigrate to the United States.

Applicant has substantial foreign contacts, as well as emotional and family ties in FC. Applicant's family ties in FC raise a security concern under Guideline B and it is Applicant's burden to show that his family ties are not of a nature that could make him vulnerable to coercion or influence. Applicant has not met that burden. Accordingly, Applicant's request for a security clearance must be denied under Guideline B.

Appeal Issue

Applicant contends the Administrative Judge's adverse decision should be reversed because: (1) the Judge "arbitrarily disregarded" Applicant's Exhibits B, C, D, and E; (2) the family members of Applicant and his wife in FC are not agents of the FC government; (3) the facts and circumstances of Applicant's family ties in FC do not pose a security risk; (4) Applicant does not have a close relationship with relatives in FC who cannot be characterized as immediate family members; (5) FC is a country that has friendly relations with the United States; (6) the Judge should have applied Foreign Influence Mitigating Condition 1; and (7) the Judge failed to provide an adequate explanation for her adverse decision despite the favorable evidence presented by Applicant. The Board construes Applicant's arguments as raising the issue of whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

Applicant argues the Administrative Judge disregarded Applicant's Exhibits B, C, D, and E by not acknowledging that two of his relatives' applications for immigration to the United States have been approved. In the decision, the Judge briefly noted the applications themselves. Since the two relatives whose applications were approved have not actually immigrated to the United States, whether the Judge noted the approval of the applications is not significant. A Judge has discretion in weighing the record evidence, and the Board will not disturb a Judge's weighing of the evidence unless the appealing party shows the Judge acted in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 00-0621 (January 30, 2002) at p. 3. Given the record evidence in this case, Applicant's argument does not persuade the Board that the Judge failed to give due weight to Applicant's Exhibits B, C, D, and E.

Applicant's second, third, fourth, and sixth arguments overlap somewhat. The fact that Applicant's immediate family members and the immediate family members of his wife (who were FC citizens and still living in FC as of the hearing date) are not members of the FC government is not dispositive of the case under Guideline B (Foreign Influence). The fact that Applicant presented evidence to show his and his wife's immediate family members who live in FC are not members of the FC government did not preclude the Administrative Judge from considering the security significance of Applicant's family ties in FC and making an adverse decision based on those family ties. *See, e.g.*, ISCR Case No. 99-0511 (December 19, 2000) at p. 10 (noting bifurcated nature of Foreign Influence Mitigating Condition 1 and indicating that applicability of Foreign Influence Mitigating Condition 1 does not turn solely on the question of whether an applicant's relatives have official ties with foreign government).

Applicant correctly notes that some of his relatives in FC are not immediate family members. Given the absence of record evidence that Applicant has ties of affection or obligation to relatives who are not immediate family members, the Administrative Judge erred by referring to Applicant's "aunts, uncles, cousins and other extended family members" without differentiating between those relatives and Applicant's immediate family members. *See* Foreign Influence Disqualifying Condition 1-[\(1\)](#) and Foreign Influence Mitigating Condition 1-[\(2\)](#) However, as a matter of common sense and human experience, there is a rebuttable presumption that a person has ties of affection for, *or* obligation to, the immediate family members of the person's spouse. Accordingly, the Administrative Judge did not err in considering the immediate family members of Applicant's spouse as raising security concerns similar to those of Applicant's immediate family members.

Applicant fails to demonstrate the Administrative Judge erred by not making a favorable security clearance decision based on applying Foreign Influence Mitigating Condition 1. Applicant's immediate family ties in FC raised a security concern sufficient to place on him the burden of demonstrating the facts and circumstances of those family ties do not place him in a position of vulnerability through possible foreign influence. *See, e.g.*, ISCR Case No. 00-0484 (February 1, 2002) at p. 3; ISCR Case No. 00-0489 (January 10, 2002) at p. 11. Because the Judge concluded that Applicant had not met that burden, the Judge properly declined to apply Foreign Influence Mitigating Condition 1.

Applicant's fifth argument is based on factual assertions that go beyond the record evidence. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. Accordingly, Applicant's fifth argument fails to demonstrate the Judge erred.

Applicant's seventh argument also fails to demonstrate the Administrative Judge erred. The Administrative Judge had to weigh the record evidence as a whole and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. Accordingly, Applicant's ability to cite to favorable record evidence is not sufficient to demonstrate the Judge erred. *See, e.g.*, ISCR Case No. 00-0525 (November 15, 2001) at p. 3. Given the record evidence in this case, the Judge articulated a sufficient basis for her conclusion that Applicant's family ties in FC raised security concerns that Applicant had failed to rebut or overcome.

Conclusion

Applicant has failed to meet his burden of demonstrating error below that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. "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."
2. Defining "immediate family member(s)" as "spouse, father, mother, sons, daughters, brothers, sisters."