

DATE: May 29, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-16098

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

-----, Personal Representative

Administrative Judge Michael H. Leonard issued a decision dated December 17, 2002 in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed.

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

Applicant's appeal presents the following issues: 1. Whether the Administrative Judge's findings of fact are reasonably based on the record evidence; 2. Whether the Administrative Judge's conclusions were arbitrary, capricious or contrary to law; 3. Whether Applicant was at a procedural disadvantage because she lacked legal experience; and 4. Whether the Administrative Judge's decision was arbitrary, capricious or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant dated March 26, 2002. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence). Applicant requested a hearing which was held on August 23, 2002.

The Administrative Judge issued a decision in which he denied Applicant a security clearance. Applicant appealed.

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 also* 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 the same record. 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).

Appeal Issues

1. Whether the Administrative Judge's findings of fact are reasonably based on the record evidence. Applicant challenges several of the Administrative Judge's findings of fact.

Applicant asserts the Judge erred when he concluded she "actively possessed and used her Mexican passport twice since her naturalization" [as a United States citizen]. On one of the two cited occasions Applicant carried her Mexican passport but was not asked to present it. The Judge indicated he was aware of this but made the finding because he presumed Applicant carried the Mexican passport to have it if she needed to use it. The Board concludes that there is sufficient record evidence to support the Administrative Judge's finding.

Applicant asserts that the Administrative Judge erred by finding that Applicant was exercising her Mexican citizenship by owning property in Mexico. Applicant asserts that the evidence showed that the privilege of property ownership is bestowed by virtue of birth in Mexico, rather than Mexican citizenship. The record contains assertions of Applicant's ownership of land based on her Mexican citizenship and the fact that she was born in Mexico without drawing any distinction between the two. The Judge's finding is reasonably supported by the record evidence.

Applicant asserts that the Administrative Judge erred by finding that Applicant's willingness to renounce her Mexican citizenship, is conditional. The Board concludes that there is sufficient record evidence to support the Judge's finding.

Applicant asserts the Administrative Judge erred by finding that Applicant's ownership of Mexican real property increased her potential to be subject to foreign coercion or pressure because she would have to visit and maintain the property and deal with Mexican government officials. The Board concludes that the Judge's finding and inferences are reasonable and sustainable given the record evidence as a whole.

2. Whether the Administrative Judge's conclusions were arbitrary, capricious, or contrary to law. Applicant challenges the Administrative Judge's conclusion that her property interests in Mexico could not be mitigated. Applicant's challenge is based in part on new evidence which the Board cannot consider (See Directive, Additional Procedural Guidance, Item E3.1.29). The remainder of Applicant's challenge is not persuasive. The record evidence concerning the totality of Applicant's circumstances including the value of her property (real property and a bank account) in Mexico and the value of her assets in the United States did not require the Judge to conclude as a matter of law that her foreign property interests were minimal enough to mitigate their security significance.

Applicant contends on appeal that the Administrative Judge erred in concluding that Applicant's trips to visit friends and family in Mexico make her vulnerable to exploitation and coercion. The Judge failed to explain why he concluded (i) Applicant's brothers in Mexico did not raise a significant security concern under Guideline B, yet (ii) Applicant's brothers in Mexico raised security concerns under Guideline C. Given the portions of the Judge's decision which are sustainable there is no point in remanding the case to clarify this matter.

3. Whether Applicant was at a procedural disadvantage because she lacked legal experience.

Applicant cites her lack of legal experience and understanding of the procedures at a DOHA hearing. Applicant received written prehearing guidance from DOHA which informed her that she had the option of being represented by an attorney selected and paid for by herself. Also, the Administrative Judge asked her if she was represented by an attorney. The record shows that the Administrative Judge made reasonable effort to ensure that Applicant understood the proceedings. It is too late for Applicant to decide on appeal that she would have been better off with an attorney. She waived the opportunity for legal representation at the hearing.

4. Whether the Administrative Judge's decision was arbitrary, capricious or contrary to law. Applicant raises her loyalty and devotion to the United States, the concept of a common sense determination, and the nature, recency and frequency of her conduct. The Board construes these arguments as an assertion that the Administrative Judge's decision was arbitrary, capricious or contrary to law. The Board does not agree. The Judge notes that Applicant's ties to Mexico are not inappropriate in general legal or ethical terms. However, the issuance of a security clearance requires that Applicant meet a burdensome standard - that she demonstrate such a clearance is clearly consistent with the national interest. The adjudicator, in considering an applicant's case, must apply pertinent guidelines. In this case the Judge had a sufficient basis in the record evidence to conclude that the application of the specific guidelines superceded whatever mitigation Applicant was entitled to from the more general concepts she cites on appeal. Furthermore the denial of a security clearance is in no sense a loyalty determination (*see* Executive Order 10865, Section 7, "Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned").

Conclusion

Applicant has failed to demonstrate any error which would mandate remand or reversal. The Administrative Judge's decision is affirmed.

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