

DATE: November 26, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-20908

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

Rita O'Brien, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated May 10, 2002 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence). Administrative Judge Burt Smith issued a favorable security clearance decision dated May 19, 2003.

Department Counsel appealed the Administrative Judge's favorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

The following issues have been raised on appeal: (1) Whether the Administrative Judge's application of Foreign Influence Mitigating Condition 1 was arbitrary, capricious, or contrary to law; (2) Whether the Administrative Judge failed to consider all the record evidence in his analysis of Guideline B (Foreign Influence); and (3) Whether the Administrative Judge's analysis under Guideline C (Foreign Preference) was arbitrary, capricious, or contrary to law. For the reasons that follow, the Board reverses the Administrative Judge's 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. 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 the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. Directive, Additional Procedural Guidance, Item E3.1.32.3. In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider

relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3 (citing Supreme Court decision). In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Article VI, clause 2 (Supremacy Clause). *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3 (citing Supreme Court decisions).

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, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

When an appeal issue 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).

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

Is the error harmful or harmless? *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine);

Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (citing federal cases); and

If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded? (Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3)

Appeal Issues

1. Whether the Administrative Judge's application of Foreign Influence Mitigating Condition 1 was arbitrary, capricious, or contrary to law. Department Counsel argues on appeal that the Administrative Judge's application of Foreign Influence Mitigating Condition 1 ⁽¹⁾ was arbitrary, capricious, or arbitrary to law. Department Counsel bases its claim on the fact that Applicant still has immediate family members present in Iran, and that Applicant has failed to satisfy his burden of showing that his family members in Iran are not vulnerable to exploitation by the Iranian government. Department Counsel also argues that the Judge's favorable conclusions amounted to an unfair shifting of the burden on Foreign Influence Mitigating Condition 1.

There are only two plausible ways to read the Administrative Judge's decision in this respect: Either (a) the Judge shifted the burden of proof on Foreign Influence Mitigating Condition 1 from the Applicant (to demonstrate its applicability) to the government (to demonstrate its inapplicability), or (b) the Judge concluded that Applicant had met his burden of showing the applicability of that mitigating condition. In either case, the Judge erred. If the Judge shifted the burden to Department Counsel to disprove the applicability of Foreign Influence Mitigating Condition 1, he erred as a matter of law. *See, e.g.*, ISCR Case No. 01-17496 (October 28, 2002) at p. 5 (applicant has burden of presenting evidence to support application of Adjudicative Guidelines mitigating condition; Department Counsel does not have the burden of proving the inapplicability of such a mitigating condition). If the Judge concluded that Applicant had met his burden of showing the applicability of that mitigating condition, he erred given the record evidence in this case.

Department Counsel cites a Board decision in which the Board noted the U.S. State Department has indicated that Iran's government is hostile to the United States and that such hostility goes beyond diplomatic disagreement. Department

Counsel also cites the same decision for the proposition that Iranian citizens are vulnerable to significant pressures. *See* ISCR Case No. 02-04786 (June 27, 2003). Given the presence of Applicant's immediate family members in Iran, Department Counsel argues that Applicant had a very heavy burden to demonstrate that his relatives in Iran are not in a position to be exploited by a foreign government, and contends the Administrative Judge erred by concluding Applicant had satisfied his burden of showing that his family members in Iran did not raise security concerns. Department Counsel's claim of error is persuasive.

The sources of mitigation cited by the Administrative Judge are the absence of evidence that Applicant's family members have connections with the Iranian government and the intent of some of those relatives to move to the United States. The absence of evidence that Applicant's family members in Iran are associated with the Iranian government is relevant and material, but it is not dispositive of the analysis that the Judge had to perform with respect to deciding whether Applicant satisfied Foreign Influence Mitigating Condition 1. *See, e.g.*, ISCR Case No. 99-0511 (December 19, 2000) at p. 10 (discussing bifurcated nature of Foreign Influence Mitigating Condition 1). Furthermore, given the human rights record of the Iranian government, the status of individual residents of that country as "unemployed homemakers" is not a reliable indicator of their freedom from governmental pressure.

Department Counsel also challenges the Administrative Judge's finding that both of Applicant's sisters in Iran have been approved to come to the United States and the Judge's reliance on that finding to conclude there was mitigation under Guideline B (Foreign Influence). Department Counsel specifically notes that Applicant stated at the hearing that only one sister has been approved. Given the record evidence in this case, it was arbitrary and capricious for the Judge to give mitigating weight to the desire of Applicant's relatives to come to the United States. The security concerns raised by the presence of Applicant's family members in Iran are not mitigated in any meaningful way by their desire to emigrate to the United States. It is not reasonable to base a security adjudication on the possibility of a safe and speedy exit of several potential emigrants from a foreign country, least of all one with a government like Iran's.

2. Whether the Administrative Judge failed to consider all the record evidence in his analysis of Guideline B (Foreign Influence). Department Counsel also argues on appeal that the Administrative Judge erred by not considering the evidence that one of Applicant's nephews, an Iranian citizen, lives with Applicant, or the evidence that one of Applicant's brothers is an Iranian citizen living in Iran.

Considering the record as a whole, the Board concludes there is insufficient evidence to support a finding that one of Applicant's brothers lives in Iran. Accordingly, Department Counsel's claim of error by the Administrative Judge with respect to Applicant's brother is unpersuasive. Furthermore, the Administrative Judge's silence about the matter of Applicant's nephew is not sufficient, under the particular facts of this case, to overcome the rebuttable presumption that the Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2.

3. Whether the Administrative Judge's analysis under Guideline C (Foreign Preference) was arbitrary, capricious, or contrary to law. Department Counsel argues that the Administrative Judge erred in finding for Applicant under Guideline C (Foreign Preference) because: (a) Applicant's dual citizenship was not based solely on his Iranian birth; (b) Applicant's use of an Iranian passport was not sanctioned by the United States government; (c) Applicant can renew his Iranian passport at any time; (d) Applicant took no steps to surrender his Iranian passport or inquire how to surrender it for over a year after he was informed of the security concerns raised by the possession and use of a foreign passport; and (e) none of the Foreign Preference mitigating conditions apply.

Department Counsel's first two arguments fail to demonstrate any error by the Administrative Judge. The Judge did not conclude Applicant's dual citizenship was based solely on his Iranian birth. Furthermore, the Judge did not conclude that Applicant's use of an Iranian passport was sanctioned by the United States government.

Department Counsel's third argument also fails to demonstrate the Administrative Judge erred. The possibility that Applicant could renew his foreign passport at any time does not have the significance that Department Counsel attributes to it. If the Board were to accept Department Counsel's argument then almost all dual citizens would be ineligible for a security clearance even if they were born in the United States and had never acted upon their foreign citizenship. Furthermore, acceptance of Department Counsel's argument would render meaningless that portion of the

ASDC3I memorandum on foreign passports ⁽²⁾ that indicates surrender of a foreign passport can be a mitigating factor. The Board declines to accept an argument that would have such a result.

Department Counsel's fourth argument is somewhat unclear. If Department Counsel is trying to contend the Administrative Judge failed to consider the record evidence concerning the facts and circumstances surrounding Applicant's surrender of his Iranian passport, then Department Counsel's claim of error is not sufficient to overcome the rebuttable presumption that the Judge considered all the record evidence. If Department Counsel is trying to contend the Judge could not conclude, as a matter of law, that Applicant's surrender of the Iranian passport satisfied the language in the ASDC3I memorandum concerning surrender of a foreign passport, then Board does not find such a contention persuasive. The ASDC3I memorandum is silent on when an applicant must surrender a foreign passport in order to have the surrender considered to be mitigating. If Department Counsel is trying to contend that the facts and circumstances of Applicant's surrender of the Iranian passport are not mitigating under the general factors of Directive, Section 6.3, then the Board is not persuaded that Department Counsel has demonstrated the Judge erred in this case. The Board need not agree with the Judge to conclude that, given the record evidence in this case, the Judge's favorable conclusion about Applicant's surrender of the Iranian passport is within the bounds of his discretion and judgment under the Directive. As noted earlier in this decision, the Board does not review a case *de novo*.

Department Counsel's fifth argument is not persuasive. To the extent that Department Counsel fails to articulate any particular claim of error with respect to the Administrative Judge's application of two Foreign Preference mitigating conditions (Decision at p. 4), Department Counsel's argument lacks specificity. *See* ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity). To the extent that Department Counsel's argument suggests that the Judge could not enter formal findings in favor of Applicant under Guideline C without the benefit of any Foreign Preference mitigating conditions, it runs afoul of well-established Board precedent that the mere presence or absence of any disqualifying or mitigating condition under the Adjudicative Guidelines is not dispositive of a case.

Conclusion

Given the Administrative Judge's errors identified on appeal, the Board concludes that Department Counsel has met its burden on appeal of demonstrating reversible error. Pursuant to Item E3.1.33.3 of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's favorable security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Concurring Opinion of Administrative Judge Michael Y. Ra'anan

I agree with my colleagues on all aspects of this case save one: their analysis under section 3 (Foreign Preference). Department Counsel argues that the Administrative Judge erred in finding for Applicant under Guideline C (Foreign Preference). Department Counsel correctly points out that Applicant was advised his Iranian passport was a problem in May 2001. A full year later, in May 2002, Applicant received the Assistant Secretary of Defense Memorandum of August 16, 2000 which clarified policy on possession of foreign passports. Yet, Applicant failed to surrender the

passport until after the hearing in 2003. Furthermore, Applicant traveled on the Iranian passport after being advised of the problem his retention of the passport presented. While it is certainly true that the August 16, 2000 memorandum is silent as to timing, Applicant's conduct for a year and a half after being alerted to the issue of likely security consequences of his possession of an Iranian passport was unreasonable and inconsistent with the objectives of the memorandum. Department Counsel is correct in arguing that no mitigating condition covers Applicant's conduct. Similarly, Applicant's conduct should not allow him to receive cover from the memorandum for surrendering the passport.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. "A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or 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(s) involved and the United States."
2. August 16, 2000 memorandum by Assistant Secretary of Defense for Command, Control, Communications, and Intelligence entitled "Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guideline."