

DATE: September 22, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-22693

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Daniel C. Schwarz, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated July 29, 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 Darlene Lokey Anderson issued an unfavorable security clearance decision dated February 13, 2003.

Applicant appealed the Administrative Judge's unfavorable decision. 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 security clearance decision is so deficient as to constitute a violation of the Directive and deny Applicant the possibility of an effective appeal; (2) whether certain factual findings by the Administrative Judge are not supported by substantial record evidence; and (3) whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board affirms 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 security clearance decision is so deficient as to constitute a violation of the Directive and deny Applicant the possibility of an effective appeal. Applicant argues: (a) to be meaningful, the right to appeal under the Directive requires an Administrative Judge to issue a decision that provides a written explanation "sufficient to allow him to exercise his right of appeal"; (b) to be legally sufficient, a Judge's decision must satisfy the requirements of Directive, Additional Procedural Guidance, Item E3.1.25; (c) the Judge's decision in this case does not satisfy the requirements of Item E3.1.25; and (d) therefore, the Judge's decision is in violation of the Directive and makes "it impossible for Applicant to address meaningfully, on appeal, the Judge's failure to consider his evidence of mitigation, because she failed to explain her reasons for ignoring that evidence." For the reasons that follow, the Board concludes Applicant's arguments are not persuasive.

(a) Applicant's first argument is not persuasive. The right to appeal exists independent of whether an Administrative Judge's decision is legally sufficient or not. Even if a Judge were to issue a decision that is (i) incomplete, (ii) incomprehensible or unintelligible, or (iii) legally insufficient, the appealing party still could appeal the decision based on a claim that such a decision violates Directive, Additional Procedural Guidance, Item E3.1.25, and possibly other pertinent provisions of the Directive. For example, even if a Judge were to issue a one-sentence decision that reads "Considering the record evidence as a whole, I conclude it is not clearly consistent with the national interest to grant or continue a security clearance for the applicant," an applicant could appeal the adverse decision on the grounds that it violates Directive, Additional Procedural Guidance, Item E3.1.25 and other provisions of the Directive.

(b/c) Applicant correctly notes that an Administrative Judge's decision must comply with the requirements of Directive, Additional Procedural Guidance, Item E3.1.25. ⁽¹⁾ In addressing a challenge to the sufficiency of a Judge's decision, the Board has stated the following:

"Administrative Judges have broad latitude and discretion in how they write their decisions. However, that latitude and discretion must be exercised within the legal constraints of the Directive and basic concepts of due process. A Judge must issue a written decision that sets forth 'pertinent findings of fact, policies, and conclusions as to the allegations in the SOR . . .' Directive, Additional Procedural Guidance, Item 25. A Judge's decision must set forth findings and conclusions with sufficient specificity and clarity that the parties and this Board can discern what the Judge is finding and concluding. Furthermore, a Judge must consider pertinent factors and Adjudicative Guidelines, and articulate a rational explanation for any deviations from them. Finally, a Judge cannot make rulings or reach conclusions that are arbitrary, capricious or contrary to law. Some actions that would be arbitrary and capricious include: failure to articulate a satisfactory explanation for conclusions; failure to consider relevant factors; and failure to consider an important aspect of a case. Such failures could be manifested in the form of an inadequate decision. Nothing in the Directive or general principles of due process require[s] that a decision be of any particular length. The issue is not the particular length of a decision, but whether the decision contains findings, conclusions, and pertinent discussion that satisf[y] the requirements of the Directive and due process. A short decision may be sufficient to satisfy those requirements while a long decision may fail to do so.

"In view of the foregoing, a decision may be challenged on appeal if it: (a) does not satisfy the requirements of the Directive; (b) has deficiencies that preclude the parties and this Board from being able to discern what the Judge is finding or concluding; or (c) it has deficiencies that render it arbitrary and capricious."

ISCR Case No. 98-0809 (August 19, 1999) at pp. 2-3 (footnote and citations omitted). However, in that decision, the Board did not hold or even suggest that any deficiency in a Judge's decision warranted remand or reversal. Indeed, in that decision, the Board concluded the Judge had committed some errors but that they constituted only harmless error under the particular facts of that case. *See, e.g.*, ISCR Case No. 98-0809 (August 19, 1999) at p. 3 (considering the totality of the record evidence, the Judge's failure to address the likelihood of recurrence under Section F.3.f [predecessor to Section 6.3.6] was harmless error) and pp. 4-5 (Judge's error in characterizing the applicant's conduct as establishing a "pattern" was not harmful error because it was not outcome determinative). Accordingly, Applicant's argument is unpersuasive to the extent it suggests that any failure by a Judge to comply with the requirements of Directive, Additional Procedural Guidance, Item E3.1.25 renders the Judge's decision fatally deficient.

To the extent that Applicant's appeal brief makes specific challenges to the Administrative Judge's findings and conclusions, the Board will address them later in this decision. However, whatever flaws the Judge's decision may have, those flaws do not rise to the level of rendering the decision so deficient as to warrant remand for issuance of a new decision.

(d) Applicant last argument overlaps somewhat with his first one. To the extent that Applicant's last argument alludes to his specific appeal arguments concerning several Adjudicative Guidelines mitigating conditions, the Board will address his specific arguments elsewhere in this decision. To the extent that Applicant asserts the Judge's conclusion that no Foreign Preference or Foreign Influence mitigating conditions applied "made it impossible for Applicant to address meaningfully, on appeal" the Judge's conclusion, the Board rejects Applicant's argument for the same reasons it rejects his first argument.

2. Whether certain factual findings by the Administrative Judge are not supported by substantial record evidence. Applicant contends the Administrative Judge erred by making three findings of fact that are not supported by the record evidence and relying on those erroneous findings of fact in reaching her legal conclusions. Specifically, Applicant argues the Judge erred by making the following findings of fact: (a) Applicant's brother is an Israeli citizen and resides in Israel; (b) the living uncle of Applicant's wife is an Israeli citizen residing in the United States; and (c) Applicant's brother-in-law and sister-in-law, who live in Israel, are Israeli citizens. Applicant's arguments have mixed merit.

Given the record evidence in this case, technically the Administrative Judge did not err by finding that Applicant's brother is an Israeli citizen. However, Applicant's brother is a dual national, with United States and Israeli citizenship. The Judge erred by finding that Applicant's brother resides in Israel.

Given the record evidence in this case, the Administrative Judge erred by finding that the living uncle of Applicant's

wife is an Israeli citizen living in the United States. That uncle, living in Germany, is not an Israeli citizen. The record evidence concerning the other uncle of Applicant's wife shows that he was an Israeli citizen who lived in Israel prior to his death.

There is no dispute that Applicant's brother-in-law and sister-in-law live in Israel. However, there is insufficient record evidence to support the Administrative Judge's finding that Applicant's brother-in-law and sister-in-law are Israeli citizens.

For reasons discussed later in this decision, the Board concludes these errors are harmless.

3. Whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. Applicant contends the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law because: (a) the Judge failed to apply the whole person concept in making her decision; (b) the Judge's adverse conclusions under Guideline B (Foreign Influence) are arbitrary, capricious, or contrary to law; and (c) the Judge's adverse conclusions under Guideline C (Foreign Preference) are arbitrary, capricious, or contrary to law.

(a) Applicant correctly notes that an Administrative Judge must evaluate an applicant's security eligibility in terms of the whole person concept. *See* Directive, Enclosure 2, Item E2.2.1. *See also* Directive, Section 6.3. However, application of the whole person concept does not permit the Judge to ignore, disregard, or fail to apply the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence's August 16, 2000 memorandum on foreign passports ("ASDC3I Memorandum"). *See, e.g.*, ISCR Case No. 00-0489 (January 10, 2002) at p. 7 (Hearing Office Administrative Judges and Board must apply ASDC3I memorandum in any case to which it is applicable). Given the record evidence in this case, it was not arbitrary, capricious, or contrary to law for the Judge to conclude that Applicant had not satisfied the terms of the ASDC3I Memorandum with respect to his Israeli passport.

(b) Applicant argues the Administrative Judge's conclusions under Guideline B are arbitrary, capricious, or contrary to law because: (i) they are based, in part, on the Administrative Judge's erroneous factual findings concerning Applicant's brother, his wife's living uncle, and his brother-in-law and sister-in-law living in Israel; and (ii) the Judge failed to consider Foreign Influence Mitigating Condition 1, Foreign Influence Mitigating Condition 3, and Foreign Influence Mitigating Condition 5. The Board will address these arguments in turn.

(b)(i) To the extent that Applicant's brother has Israeli citizenship, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to take that fact into account when making a decision in Applicant's case. Although the Judge erred by finding Applicant's brother resides in Israel, that error is harmless in light of the totality of the record evidence in this case.

The Administrative Judge's erroneous finding about the living uncle of Applicant's wife is harmless error in light of the totality of the record evidence in this case.

To the extent that Applicant's brother-in-law and sister-in-law live in Israel, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to take that fact into account when making a decision in Applicant's case. Because that fact falls within the scope of Foreign Influence Disqualifying Condition 1,⁽²⁾ the citizenship of those two in-laws is not fatal to the Judge's reasoning or analysis.

(b)(ii) For the reasons that follow, the Board does not find persuasive Applicant's argument that the Administrative Judge simply ignored Foreign Influence Mitigating Condition 1, Foreign Influence Mitigating Condition 3, and Foreign Influence Mitigating Condition 5.

As to Foreign Influence Mitigating Condition 1,⁽³⁾ the Administrative Judge specifically indicated that she concluded that Applicant has not met his burden of showing his family ties with close relatives in Israel did not raise security concerns. An applicant has the burden of presenting evidence to support the application of specific mitigating conditions. *See, e.g.*, ISCR Case No. 01-17496 (October 28, 2002) at p. 5. A Judge's conclusion that an applicant has failed to meet or satisfy that burden of persuasion indicates the Judge considered the applicant's evidence but found it insufficient or unpersuasive; it is not an indication that the Judge simply ignored a particular mitigating condition.

To the extent that Applicant argues that Foreign Influence Mitigating Condition 1 must be applied unless there is an affirmative finding that an applicant's relatives in a foreign country are agents of a foreign power, his argument is unpersuasive. *See* ISCR Case No. 01-03120 (February 20, 2002) at p. 4 (noting bifurcated nature of Foreign Influence Mitigating Condition 1).

To the extent that Applicant argues that, under Foreign Influence Mitigating Condition 1, the Administrative Judge had to consider the security significance of each relative living in Israel on an individual basis, his argument urges an artificial, piecemeal analysis that is not legally required. It is important to consider under Guideline B the totality of an applicant's family ties in a foreign country, not just each family tie considered in isolation. *See, e.g.*, ISCR Case No. 00-0628 (February 24, 2003) at p. 5 (noting the totality of an applicant's contacts with various foreign citizens can be more significant than the contacts the applicant has with each foreign citizen). *See also* ISCR Case No. 01-08390 (February 12, 2002) at p. 4 (Administrative Judge must consider record evidence as a whole, rather than viewing evidence in an isolated or piecemeal manner, because the totality of record evidence can have significance that is not apparent from viewing individual pieces of evidence in isolation).

Finally, Applicant's reliance on making a distinction between the State of Israel and Israel as the Holy Land is unpersuasive. Under Guideline B, foreign influence is not limited to consideration of influence that might be brought to bear on an applicant by the actions of foreign governments. Indeed, some of the Foreign Influence Disqualifying Conditions refer to situations that do not involve a foreign government. *See also* ISCR Case No. 99-0601 (January 30, 2001) at p. 6 ("The distinction between an applicant's feelings toward the government of a foreign [country] and the applicant's feelings toward the people and culture of a foreign country does not have much practical meaning or significance under Guideline B. The mere fact that Applicant has expressed antipathy toward the [foreign country] government is not dispositive under Guideline B. A person can be vulnerable to foreign influence without having any positive or favorable feelings toward the government of a particular foreign country.").

As to Foreign Influence Mitigating Condition 3,⁽⁴⁾ there is sufficient record evidence about the nature and frequency of Applicant's contacts with family members in Israel to sustain the Administrative Judge's decision to not apply this mitigating condition. Given the totality of Applicant's contacts with his family members in Israel, the Judge was not required, as a matter of law, to conclude that Mitigating Condition 3 applies.

With respect to Foreign Influence Mitigating Condition 5,⁽⁵⁾ Applicant's argument does not show the Administrative Judge erred. On its face, Mitigating Condition 5 is pertinent to situations where there is evidence that an applicant has financial interests in a foreign country and the question arises whether those financial interests are disqualifying or not. A Judge need not apply Mitigating Condition 5 where, as in this case, there has been no showing that an applicant has any financial interests in a foreign country. *See, e.g.*, ISCR Case No. 99-0519 (February 23, 2001) at p. 13 ("On its face, Foreign Influence Mitigating Condition 5 would be irrelevant to any foreign influence case where there is no evidence that the applicant had or has any financial interests in a foreign country.").

(c) Applicant argues the Administrative Judge's conclusions under Guideline C are arbitrary, capricious, or contrary to law because: (i) the Judge failed to evaluate Foreign Preference Disqualifying Condition 2 in context; and (ii) the Judge failed to consider Foreign Preference Mitigating Conditions 1 and 4. The Board will address these arguments in turn.

(c)(i) Applicant does not challenge the Administrative Judge's application of Foreign Preference Disqualifying Condition 2⁽⁶⁾ to his possession and use of an Israeli passport. However, Applicant argues the Judge failed to take into account the evidence that shows Applicant is willing to surrender his Israeli passport, but that he cannot do so because he cannot find it in order to surrender it. The Judge specifically noted Applicant's claim that he cannot find his Israeli passport and concluded it was not entitled to much weight under Guideline C. Given the record evidence, Applicant's appeal arguments fail to persuade the Board that the Judge acted in an arbitrary or capricious manner by not giving more weight to Applicant's claim that he cannot surrender his Israeli passport because he cannot find it.

(c)(ii) Given the facts of this case, the Administrative Judge should have applied Foreign Preference Mitigating Condition 1.⁽⁷⁾ *See, e.g.*, ISCR Case No. 99-0452 (March 21, 2000) at pp. 2-3. However, under the particular facts and circumstances of this case, the Judge's failure to apply Mitigating Condition 1 is not harmful error. The mere presence or

absence of an Adjudicative Guidelines disqualifying or mitigating condition is not solely determinative of a case. *See, e.g.*, ISCR Case No. 01-14740 (January 15, 2003) at p. 7. Furthermore, although Applicant is an Israeli citizen solely because of the citizenship of his parents,⁽⁸⁾ the Judge properly considered Applicant's exercise of the rights and privileges of Israeli citizenship when he obtained and used an Israeli passport as an adult, as well as Applicant's work for an Israel defense entity in 1981 after he had become a naturalized U.S. citizen.⁽⁹⁾ The Judge properly could consider Applicant's conduct on those occasions when assessing Applicant's security eligibility under Guideline C. *See, e.g.*, ISCR Case No. 00-0489 (January 10, 2002) at pp. 10-11 (even when Judge concludes that Foreign Preference Mitigating Condition 1 is applicable, the Judge can consider record evidence that an applicant engaged in conduct indicative of a foreign preference).

As for Foreign Preference Mitigating Condition 4,⁽¹⁰⁾ Applicant's claim of error has mixed merit. Applicant correctly notes that the record evidence shows that he expressed a willingness to renounce his Israeli citizenship. The Administrative Judge makes no finding concerning Applicant's intentions concerning his Israeli citizenship and, therefore, it is not clear whether: (1) the Judge ignored Applicant's statements; (2) the Judge found Applicant's statements not credible; (3) the Judge accepted Applicant's statements but concluded they were not entitled to be given much weight; or (4) the Judge simply failed to include any findings or conclusions on this aspect of the case. Even if the Board were to conclude, solely for purposes of deciding this appeal, that the Judge should have applied Foreign Preference Mitigating Condition 4, such a conclusion would not require the case be reversed or remanded. As noted earlier in this decision, the mere presence or absence of an Adjudicative Guidelines disqualifying or mitigating condition is not solely dispositive of a case. Furthermore, the Judge's sustainable findings and conclusions provide a sufficient basis for her adverse security clearance decision.

Conclusion

Applicant has failed to demonstrate error below that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's 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. "The Administrative Judge shall make a written clearance decision in a timely manner setting forth pertinent findings of fact, policies, and conclusions as to the allegations in the SOR, and whether it is clearly consistent with the national interest to grant or continue a security clearance for the applicant. . . ."

2. "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."
3. "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."
4. "Contact and correspondence with foreign citizens are casual and infrequent."
5. "Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities."
6. "Possession and/or use of a foreign passport."
7. "Dual citizenship is based solely on parents' citizenship or birth in a foreign country."
8. Applicant was two years old when his parents immigrated to Israel in 1948. The actions and decisions of adult parents cannot be imputed to their minor children. *See* ISCR Case No. 98-0331 (May 26, 1999) at p. 7 n.6.
9. The Board does not find persuasive Applicant's argument that the Administrative Judge gave undue weight to the record evidence that Applicant moved to Israel in 1981 and worked about 10 months for a component of the Israeli Ministry of Defense. The Judge properly considered that evidence as part of the whole person analysis required under the Directive. Applicant's action of voluntarily going to Israel and working on defense-related matters has probative value as to whether he has demonstrated a foreign preference within the meaning of Guideline C. Applicant's reliance on the evidence that he sought approval from the U.S. Department of State for his work in Israel is undercut by the evidence that shows: (a) he began working in Israel before the U.S. State Department responded to his request for approval; (b) he did not receive approval or authorization from the U.S. government for his defense-related work in Israel; and (c) the U.S. State Department warned him (while he was still working in Israel) that his work there had the potential for violating export control laws and regulations.
10. "Individual has expressed a willingness to renounce dual citizenship."