

DATE: September 30, 2003

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-24306

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Eric Borgstrom, Esq., Department Counsel

**FOR APPLICANT**

Richard S. Stolker, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated August 21, 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), Guideline B (Foreign Influence), and Guideline E (Personal Conduct). Administrative Judge John G. Metz, Jr. issued an unfavorable security clearance decision dated April 10, 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 adverse findings and conclusions represent a reasonable interpretation of the record evidence and (2) Whether the Administrative Judge's application of the Adjudicative Guidelines is arbitrary, capricious or contrary to law. For the reasons that follow, the Board affirms the 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)

### **Summary of the Administrative Judge's Key Findings and Conclusions**

Applicant was born in Lebanon in 1958 and moved to the United States in 1978. He became a U.S. citizen in 1987. He renewed his Lebanese passport in 1994 and traveled to Lebanon on the Lebanese passport in 1995 and 1996. At the time the U.S. government banned travel to Lebanon. He married his third wife, a Lebanese woman in 1995 in Lebanon and brought her to the U.S. in 1996. (She is now a U.S. citizen). Two of Applicant's four children have been registered with the Lebanese embassy as Lebanese citizens. Applicant has been in contact with the Lebanese embassy several times over a twenty-year period. All of Applicant's children are U.S. citizens by birth and reside in the United States. Applicant has several relatives (parents, siblings and in-laws) who reside in Lebanon. Applicant and his wife are willing to renounce their Lebanese citizenship. Applicant's Lebanese passport has expired. Applicant has been registered with a business organization of a past Lebanese Prime Minister and as a result took part in a 1999 dinner about business in Lebanon and the Persian Gulf. Applicant falsified two answers on his security clearance application.

Applicant's possession and use of a Lebanese passport after acquiring U.S. citizenship and his registering two of his children with the Lebanese embassy constitute exercise of his foreign citizenship and are disqualifying conduct under Guideline C.

Applicant's many relatives in Lebanon raise security concerns under Guideline B. Applicant's contacts with the business organization exacerbates the concern.

Applicant's falsifications are disqualifying under Guideline E.

### **Appeal Issues <sup>(1)</sup>**

(1) Whether the Administrative Judge's adverse findings and conclusions represent a reasonable interpretation of the record evidence. Applicant challenges several of the Administrative Judge's findings and conclusions on the grounds that he believes they are not supported by a fair reading of the record evidence. For the reasons that follow, the Board does not find Applicant's claims persuasive.

Applicant contends the Administrative Judge ignored certain record evidence. There is a rebuttable presumption that a 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. Applicant's arguments fail to rebut this presumption.

Applicant also cites several examples of evidence which he believes was entitled to greater weight than that assigned it by the Administrative Judge. The Administrative Judge is responsible for weighing the evidence in light of the record evidence as a whole. Applicant's disagreement with the Judge's assessment is not sufficient to persuade the Board that the Judge weighed the evidence in a manner that is arbitrary, capricious or contrary to law. The Judge's challenged findings are supported by substantial record evidence and are thus sustainable. Applicant's ability to offer an alternative reading of the record is not sufficient to demonstrate that Judge's reading is untenable. The Judge's conclusions follow rationally from his findings and are therefore also sustainable. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2.

(2) Whether the Administrative Judge's application of the Adjudicative Guidelines is arbitrary, capricious or contrary to law. Applicant challenges the Administrative Judge's application of the Adjudicative Guidelines from the Directive. In support of this contention, Applicant claims: (a) the Judge erred by saying Applicant exercised his Lebanese citizenship, (b) Applicant has expressed a willingness to renounce his Lebanese citizenship, (c) the Judge's statement that Applicant has a divided preference is untenable, (d) published State Department language on dual nationality constitutes United States Government sanctioning of the use of a foreign passport, (e) Applicant's Lebanese passport is expired, which effectively means that he has surrendered it, and (f) Applicant had no clearance at the time he engaged in the disqualifying activities which should mitigate the consequences of those activities.

Applicant's first claim fails. Applicant's renewal of his Lebanese passport after acquiring U.S. citizenship and his decision to use that passport for travel is an exercise of his Lebanese citizenship. Thus the Administrative Judge did not err by finding Applicant exercised dual citizenship and applying Foreign Preference Disqualifying Condition 1 (Directive, Enclosure 2, Item E2.A3.1.2.1. "The exercise of dual citizenship"). Applicant attempts to support his claim by saying that he had no choice about using a Lebanese passport to travel to Lebanon. Given the record evidence in this case, the Judge reasonably could find Applicant was using his Lebanese passport because the United States Government banned travel to Lebanon by U.S. citizens. Because Applicant chose to engage in the banned travel anyway, his decision to use the Lebanese passport does not mitigate the security concerns raised by his exercise of the rights and privileges of Lebanese citizenship.

The Administrative Judge considered and discussed Applicant's expressed conditional willingness to renounce his Lebanese citizenship. There is nothing to suggest that the Judge's weighing of this evidence was arbitrary or capricious. Thus there is no basis for concluding Applicant should have received additional benefit under Foreign Preference Mitigating Condition 4 (Directive, Enclosure 2, Item E2.A3.1.3.4. "Individual has expressed a willingness to renounce dual citizenship") beyond that already conferred in the Judge's decision.

The Administrative Judge's conclusion regarding Applicant's foreign preference is not arbitrary or capricious given the record evidence as a whole.

Applicant's reliance on the State Department's discussion of a dual national's use of a foreign passport (copy at Exhibit B) is misplaced. First, on its face, the language in Exhibit B recognizes that dual nationality exists, but it does not encourage it as a matter of policy because of problems it may cause. Moreover, although Exhibit B recognizes that some foreign nations require dual nationals to use that country's passport to enter or leave that country, nothing indicates that the U.S. Government affirmatively authorizes or approves the use of the foreign passport in such circumstances. *See* ISCR Case No. 00-0489 (January 10, 2002) at p. 8. Under Department of Defense policy, <sup>(2)</sup> the possession or use of foreign passports raises security concerns that may disqualify a security clearance applicant, and this policy can be more strict than the general policy enunciated by the State Department. *See* ISCR Case No. 99-0424 (February 8, 2001) at p. 6. Furthermore, given the evidence that Applicant used his Lebanese passport to circumvent the U.S. ban on travel to

that country, it is untenable for Applicant to argue his use of a Lebanese passport for that purpose was sanctioned by the U.S. Government.

We disagree with Applicant's assumption that the recent expiration of the Lebanese passport is equivalent to a surrender of it. Surrender contemplates returning it to the issuing authority, and merely keeping a foreign passport until it expires does not satisfy this requirement in the ASDC3I memo. *See* ISCR Case No. 00-0009 (September 26, 2001) at p. 4.

Likewise, we disagree with Applicant's argument that his use of his Lebanese passport prior to his application for a security clearance mitigates foreign preference concerns. Security clearance decisions are not limited to consideration of an applicant's conduct while the applicant has a security clearance. An applicant's conduct prior to obtaining a security clearance can be relevant to assessing the applicant's security eligibility.

Applicant also contends that the Administrative Judge misapplied Guideline B. Specifically he argues: (a) Applicant's family ties were mitigated under Foreign Influence Mitigating Condition 1<sup>(3)</sup>, (b) Applicant's foreign contacts are casual and infrequent,<sup>(4)</sup> and (c) Applicant's foreign financial interests are minimal.<sup>(5)</sup>

Applicant's first argument is largely based on a mistaken premise. He argues that the government failed to demonstrate that Applicant's foreign relatives were agents of a foreign government or subject to the influence of that government. Applicant has the burden of demonstrating that a mitigating condition applies. Once the government has demonstrated the applicability of a disqualifying condition (such as Foreign Influence Disqualifying Condition 1<sup>(6)</sup>), the burden shifts to the Applicant to demonstrate that there is mitigation or extenuation. There is no burden on the government to disprove the mitigating conditions. *See, e.g.*, ISCR Case No. 01-17496 (October 28, 2002) at p. 5. Beyond Applicant's mistake of law, he argues that the Judge was obliged to apply the mitigating condition based on Applicant's testimony. Given the totality of facts and circumstances in this case the Board does not agree. Although the Judge had to consider Applicant's testimony, the Judge was not compelled to accept it at face value or consider it in isolation without regard to the other record evidence in this case.

Applicant argues that the Administrative Judge should have considered Applicant's foreign contacts casual and infrequent. Given the record evidence in this case, Applicant's claim is unpersuasive.

Applicant argues that his foreign financial interests are minimal. Given the totality of Applicant's ties to Lebanon, viewing his ties to a Lebanese business separate from his overall ties with Lebanon would be a piecemeal analysis and inconsistent with the whole person concept. Applicant's claim does not demonstrate that the Administrative Judge erred.

Applicant also argues that the Administrative Judge erred in his application of Guideline E. Given the record evidence in this case, the Administrative Judge had an ample basis for finding that Applicant engaged in deliberate falsification of a security clearance application in June 1999.

### **Conclusion**

Applicant has failed to meet his burden on appeal of demonstrating error. The Administrative Judge's April 10, 2003 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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. The Administrative Judge issued formal findings for Applicant under SOR subparagraphs 2.a, 2.b, 3a, 3.b, and 3e. Those favorable findings are not at issue on appeal.
2. August 16, 2000 memorandum by Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASDC3I) entitled "Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guideline."
3. Directive, Enclosure 2, Item E2.A2.1.3.1. "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."
4. Citing Foreign Influence Mitigating Condition 3 (Directive, Enclosure 2, Item E2.A2.1.3.3).
5. Citing Foreign Influence Mitigating Condition 5 (Directive, Enclosure 2, Item E2.A2.1.3.5).
6. Directive, Enclosure 2, Item E2.A2.1.2.1. "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."