

DATE: February 12, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-00305

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 August 8, 2002, in which she concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed.

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 following issues: (1) whether the federal government is estopped from denying or revoking a security clearance in Applicant's case; (2) whether the Administrative Judge failed to consider certain evidence; (3) whether the Administrative Judge failed to give sufficient weight to certain evidence; (4) whether the Administrative Judge improperly placed the burden of proof on Applicant; (5) whether the Administrative Judge failed to give due consideration to Applicant's surrender of an Israeli passport; and (6) whether the Administrative Judge erred in her application of the Adjudicative Guidelines. For the reasons that follow, the Board affirms the Administrative Judge's decision.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated February 4, 2002. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence). A hearing was held on July 18, 2002.

The Administrative Judge issued a written decision, dated August 8, 2002, 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 th Board on Applicant's appeal from the Judge's adverse 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 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⁾

The Administrative Judge made findings of fact about Applicant's dual United States-Israeli citizenship, Applicant's birth in the United States and his growing up in Israel, Applicant's return to the United States as an adult, Applicant's ties with immediate family and in-laws in Israel, Applicant's financial assets in the United States and Israel, the efforts of Applicant's wife to become a naturalized U.S. citizen, Applicant's possession and use of an Israeli passport, Applicant's surrender of his Israeli passport shortly before the hearing, and Applicant's family ties in the United States. The Judge concluded the facts and circumstances of Applicant's conduct and circumstances raise security concerns under Guideline B and Guideline C that were not resolved by the evidence presented by Applicant. On appeal, Applicant does not specifically challenge the Judge's findings of fact. However, Applicant does make various arguments that challenge the Judge's analysis of the case, the Judge's application of the Adjudicative Guidelines, and the Judge's conclusions under Guideline B and Guideline C.

1. Whether the federal government is estopped from denying or revoking a security clearance in Applicant's case. Applicant asserts that before joining his defense contractor employer he "repeatedly verified . . . that my dual citizenship should not prevent me from getting a security clearance and have been assured by the security personnel that it would not be an issue." The Board construes these assertions as raising the issue of whether the federal government is estopped from denying or revoking a security clearance in Applicant's case.

The federal government cannot be equitably estopped from protecting classified information. *See, e.g.*, ISCR Case No. 99-0519 (February 23, 2001) at p. 15. Furthermore, security clearance decisions involve the exercise of Executive Branch authority under Article II of the U.S. Constitution. *Department of Navy v. Egan*, 484 U.S. 518, 527-528 (1988). In exercising that authority, the federal government is not bound or constrained by the statements or promises of defense contractor personnel. Furthermore, even if statements were made to Applicant in the past that accurately reflected then-current DoD policy, that would not preclude the Administrative Judge from making an adverse decision in this case. Security clearance decisions must be based on current, not past, DoD policy and standards. *See, e.g.*, ISCR Case No. 00-0489 (January 10, 2002) at p. 8. Accordingly, even if the Board were to assume, solely for purposes of deciding this appeal, that the facts and circumstances of Applicant's case would not raise security concerns under past DoD policy and standards, such a conclusion would not preclude the Judge from reaching an adverse security clearance decision by applying current DoD security policy. For all these reasons, Applicant's claim of error fails to show the Judge erred.

2. Whether the Administrative Judge failed to consider certain evidence. Applicant contends the Administrative Judge failed to consider certain evidence that he believes favors him. In support of this contention, Applicant cites to various pieces of evidence that he believes the Judge failed to consider, including the written and testimonial statements made by other people on his behalf. This claim of error is not persuasive.

There is a rebuttable presumption that a Judge considers all the record evidence unless the Judge specifically states otherwise. An applicant's disagreement with the Judge's findings and conclusions, standing alone, is not sufficient to overcome the rebuttable presumption that the Judge considered all the record evidence. *See, e.g.*, ISCR Case No. 01-10301 (December 30, 2002) at pp. 3-4. Furthermore, there is no requirement that a Judge specifically cite and discuss each and every piece of evidence. *See, e.g.*, ISCR Case No. 00-0621 (January 30, 2002) at p. 3. Accordingly, Applicant's

disappointment that the Judge did not discuss more extensively the written and testimonial statements made by other people on his behalf does not demonstrate the Judge erred. Moreover, in weighing the evidence, the Judge must consider whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. Merely because the Judge concluded that the favorable evidence presented by Applicant was not persuasive or sufficient to outweigh or overcome the unfavorable evidence, it does not follow that the Judge failed to consider the record evidence favorable to Applicant.

Considering the Administrative Judge's written decision in light of the record evidence as a whole, the Board concludes that Applicant's appeal arguments do not demonstrate the Judge failed to consider record evidence favorable to him.

3. Whether the Administrative Judge failed to give sufficient weight to certain evidence. Applicant contends the Administrative Judge failed to give sufficient weight to the following evidence: (a) when Applicant resided in Japan while employed there, he was a U.S. citizen at the time, voted in the 1996 elections, and filled out U.S. tax forms; (b) "[a]ll the foreign preferences and activities . . . took place more than ten (10) years ago"; (c) his elder brother serves as an officer in the U.S. military and holds a security clearance; (d) the delay in his wife becoming a naturalized U.S. citizen has been due to bureaucratic delays by the Immigration and Naturalization Service and the need for his wife to restart the naturalization process; and (e) Applicant's statements that it is not possible for him to be vulnerable to foreign influence.

Applicant's arguments fail to demonstrate the Administrative Judge erred. First, Applicant's reliance on his being a U.S. citizen while he was employed in Japan does not demonstrate the Judge erred. It was not arbitrary or capricious for the Judge to take into consideration the fact that Applicant has lived in the United States for less than ten years of his life. The Judge's observation on this point is consistent with the whole person concept that must be applied in security clearance adjudications. Second, Applicant's claim that his conduct indicative of a foreign preference took place more than ten years ago is undercut by the record evidence that he used an Israeli passport as recently as 2000 and possessed it until July 2002. It is not arbitrary or capricious for a Judge to conclude that possession and use of a foreign passport constitutes evidence indicative of a foreign preference. Third, Applicant's security eligibility must be determined in light of the particular facts and circumstances of Applicant's conduct and situation, not the particular facts and circumstances of his elder brother's conduct and situation. Fourth, as of the close of the record in this case, Applicant's wife had not yet become a naturalized U.S. citizen.⁽²⁾ Even if Applicant and his wife are totally blameless because of delays in the naturalization of his wife, that would not preclude the Judge from considering the security significance of his wife's status as an Israeli citizen in light of the record evidence as a whole (including evidence of family ties with Israeli citizens living in Israel). Fifth, Applicant's statements about his lack of vulnerability to foreign influence are record evidence that the Judge had to consider. However, Applicant's statements were not binding on the Judge and did not preclude the Judge from considering the overall facts and circumstances of Applicant's conduct and situation to decide whether Applicant might be vulnerable to foreign influence. *See, e.g.,* ISCR Case No. 99-0519 (February 23, 2001) at p. 12 ("[A]n applicant's opinion as to the security significance of the applicant's conduct or circumstances is not dispositive and does not relieve a Judge of his or her responsibility to evaluate an applicant's security eligibility.").

As the trier of fact, an Administrative Judge has broad discretion in weighing the record evidence. Absent a showing that the Judge acted in an arbitrary or capricious manner, the Board will not disturb the Judge's weighing of the record evidence. Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in an arbitrary or capricious manner. *See, e.g.,* ISCR Case No. 99-0435 (September 22, 2000) at p. 4. Considering the record as a whole, the specific matters cited by Applicant in support of this claim of error do not, individually or collectively, demonstrate the Judge weighed the record evidence in an arbitrary or capricious manner.

4. Whether the Administrative Judge improperly placed the burden of proof on Applicant. Applicant also contends that his statements about why he is not vulnerable to foreign influence "[were not] challenged during the hearing so placing the burden of proof on me is in essence disregarding all my statements and mitigation arguments." As discussed earlier in this decision, Applicant has failed to persuade the Board that the Judge ignored the record evidence or acted in a manner that is arbitrary or capricious when weighing the record evidence. What remains of this claim of error can be construed as raising the issue of whether the Judge improperly placed the burden of proof on Applicant.

There is no right to a security clearance. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988). There is no

presumption in favoring of granting or continuing a security clearance. *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Indeed, a security clearance is not to be granted or continued unless there has been an affirmative determination that it would be clearly consistent with the national interest to do so. *See* Executive Order 10865, Section 2. Furthermore, an applicant "has the ultimate burden of persuasion as to obtaining a favorable security clearance decision." Directive, Additional Procedural Guidance, Item E3.1.15. Accordingly, it would not be improper for the Judge to place the burden of proof on Applicant.

Furthermore, as discussed earlier in this decision, Applicant's statements about why he believes he is not vulnerable to foreign influence are not binding on the Administrative Judge.

5. Whether the Administrative Judge failed to give due consideration to Applicant's surrender of an Israeli passport. The Administrative Judge found that Applicant possessed and used an Israeli passport for many years, last using it in 2000 and surrendering it in July 2002. Those findings are not at issue on appeal. However, Applicant argues: (a) he was unaware of the August 16, 2000 memorandum by the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASDC3I) concerning adjudication of security clearance cases involving the possession or use of a foreign passport until after he had been interviewed in connection with his security clearance application; (b) the Judge erred by drawing an adverse inference or conclusion from the timing of his surrender of his Israeli passport; and (c) the Judge's adverse decision is "not completely in line with the [ASDC3I] memorandum." The Board construes Applicant's arguments as raising the issue of whether the Judge failed to give due consideration to his surrender of an Israeli passport. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge erred.

(a) Applicant's lack of knowledge about the ASDC3I memorandum until he was interviewed does not have the significance he attributes to it. Security clearance adjudications are intended to evaluate an applicant's past and present conduct and circumstances to determine whether or not it is clearly consistent with the national interest to grant or continue a security clearance. In general, the security significance of an applicant's past and present conduct and circumstances does not turn on whether an applicant is aware of DoD security policy or standards.⁽³⁾ Indeed, as a practical matter, many applicants probably do not know about DoD security policy or standards until after their defense contractor employer starts the process to apply for a security clearance. Security clearance adjudicators are not precluded from applying pertinent DoD security policy or standards merely because an applicant may not have known about them before. The ability of DoD to promulgate and apply policy or standards in security clearance adjudications does not depend on whether applicants are knowledgeable about them.

(b/c) The Administrative Judge concluded that Applicant's surrender of his Israeli passport constituted compliance with the terms of the ASDC3I memorandum concerning the possession and use of foreign passports. Accordingly, it is reasonable for Applicant to question why the Judge did not enter a formal finding for him with respect to his possession and use of an Israeli passport. A review of the decision below shows the Judge explained why she did not place greater weight or significance on Applicant's surrender of his Israeli passport (Decision at p. 7). The Board need not agree with the Judge's reasoning to conclude that she acted within the bounds of her discretion when weighing the facts and circumstances surrounding Applicant's surrender of his Israeli passport in light of the overall record evidence of Applicant's personal and family ties with Israel. *See, e.g.*, ISCR Case No. 01-02452 (November 21, 2002) at p. 9. In short, an applicant's compliance with the ASDC3I memorandum does not preclude a Judge from considering the record evidence as a whole to determine whether there still are unresolved security concerns.

(6) Whether the Administrative Judge erred in her application of the Adjudicative Guidelines. The Administrative Judge applied Foreign Preference Mitigating Condition 2,⁽⁴⁾ and Foreign Preference Mitigating Condition 4⁽⁵⁾ (Decision at pp. 4-5). Applicant contends the Administrative Judge erred by not also applying Foreign Preference Mitigating Condition 1, Foreign Influence Mitigating Condition 1, and Foreign Influence Mitigating Condition 5. The Board address each of the mitigating conditions that Applicant claims the Judge should have applied in his case.

Foreign Preference Mitigating Condition 1.⁽⁶⁾ Applicant argues the Administrative Judge erred by not applying Foreign Preference Mitigating Condition 1 because his Israeli citizenship was based on his parents' Israeli citizenship. Given the record evidence in this case, Applicant was entitled to application of Foreign Preference Mitigating Condition 1. *See, e.g.*, ISCR Case No. 99-0452 (March 21, 2000) at pp. 2-3. However, application of that mitigating condition would not

require the Judge to make a favorable security clearance decision or preclude the Judge from considering the record evidence as a whole to determine whether the facts and circumstances of Applicant's conduct and situation raised security concerns under Guideline B, Guideline C, or both. *See, e.g.*, ISCR Case No. 00-0489 (January 10, 2002) at pp. 10-11. *See also* ISCR Case No. 99-0452 (March 21, 2000) at p. 3 (even if Foreign Preference Mitigating Condition 1 is applicable, the Judge can consider evidence showing an applicant has exercised the rights and privileges of foreign citizenship). Accordingly, although the Judge erred by not applying Foreign Preference Mitigating Condition 1, that error was harmless in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine).

Foreign Influence Mitigating Condition 1. (7) Applicant contends the Administrative Judge erred by not applying Foreign Influence Mitigating Condition 1 because his parents are elderly, his attachment to his parents is natural and normal and raises no security concerns, it would go "well beyond the realm of the absurd" for him to sever all contact with his parents, and his wife is becoming a naturalized U.S. citizen. Applicant's arguments fail to show the Judge erred.

Applicant's attachment to his parents in Israel may be natural and normal, but that does not remove it from consideration, as part of the record evidence as a whole, in assessing Applicant's security eligibility. Furthermore, the age of Applicant's parents does not reduce or diminish the security concerns under Guideline B. And, as discussed earlier in this decision, even if Applicant and his wife are totally blameless because of delays in the naturalization of his wife, that would not preclude the Judge from considering the security significance of his wife's status as an Israeli citizen in light of the record evidence as a whole (including evidence of family ties with Israeli citizens living in Israel). Applicant's arguments fail to demonstrate the Judge erred by not applying Foreign Influence Mitigating Condition 1.

Foreign Influence Mitigating Condition 5. (8) Applicant argues the Administrative Judge erred by not applying Foreign Preference Mitigating Condition 5 because he is financially independent, he is debt-free, he is trying to purchase a home in the United States, and because he is debt-free he "should be considered a much lower risk for the potential of coercion, exploitation or pressure than most individuals." Applicant's arguments fail to show the Judge erred.

The Administrative Judge made findings of fact about Applicant's financial interests in Israel and the United States. Those findings have not been challenged by Applicant on appeal. Rather, Applicant's appeal arguments challenge the conclusions the Judge drew from those findings. Considering the record as a whole, the Board concludes the Judge did not draw unreasonable conclusions from her findings about Applicant's financial interests in Israel and the United States. Furthermore, given the Judge's sustainable conclusion on this aspect of the case, it was not arbitrary or capricious for the Judge to not apply Financial Influence Mitigating Condition 5.

Conclusion

Applicant has failed to demonstrate 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. Applicant appeal brief contains some assertions that constitute new evidence. The Board cannot consider new evidence on appeal.
2. While this case was pending on appeal, Applicant called the Board and asked the Chairman if he could supplement the record to show a change in his wife's citizenship status. By letter dated January 21, 2003, the Chairman advised Applicant that the Directive precludes the consideration of new evidence on appeal and, therefore, no useful purpose would be served by allowing him to supplement the record evidence.
3. For example, the security significance of an applicant's substance abuse, recurring financial difficulties, or criminal conduct does not turn on whether an applicant is aware of DoD security policy and standards pertaining to those matters. However, if an applicant is aware of DoD security policy and standards, such knowledge could be relevant in assessing any conduct by an applicant that was undertaken despite knowledge that such conduct is contrary to DoD security policy and standards.
4. "Indicators of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship."
5. "Individual has expressed a willingness to renounce dual citizenship."
6. "Dual citizenship is based solely on parents' citizenship or birth in a foreign country."
7. "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."
8. "Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities."