

DATE: February 25, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-00318

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT

Sheldon I. Cohen, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated September 26, 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 June 2, 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 favorable conclusions under Guideline C (Foreign Preference) are arbitrary, capricious, or contrary to law; and (2) whether the Administrative Judge's favorable conclusions under Guideline B (Foreign Influence) are 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 favorable conclusions under Guideline C (Foreign Preference) are arbitrary, capricious, or contrary to law. In challenging the Administrative Judge's favorable conclusions under Guideline C, Department Counsel argues: (a) the Judge misapplied Foreign Preference Mitigating Condition 1 and Foreign Preference Mitigating Condition 2; and (b) the Judge erred by evaluating Applicant's possession and use of an Iranian passport in a piecemeal manner that failed to consider that conduct in light of Applicant's ties to immediate family members in Iran. For the reasons that follow, the Board concludes Department Counsel's arguments fail to demonstrate the Judge erred.

(a) Department Counsel argues the Administrative Judge erred by applying Foreign Preference Mitigating Condition 1 ⁽¹⁾ because Applicant's dual citizenship is not based solely on his birth in Iran. In the alternative, Department Counsel argues that even if Foreign Preference Mitigating Condition 1 were held to be applicable, it would not be dispositive of Guideline C. These arguments fail to demonstrate error below.

Applicant correctly notes that Department Counsel's first argument is based on the premise that Applicant's use of an Iranian passport forms the basis of his Iranian citizenship. Although possession and use of an Iranian passport shows a person is exercising the rights and privileges of Iranian citizenship, the exercise of such rights and privileges is separate and distinct from the basis of the person's Iranian citizenship. In this case, although Applicant's past possession and use of an Iranian passport shows he exercised the rights and privileges of Iranian citizenship, his possession and use of an Iranian passport is not a basis or source of Iranian citizenship. Given the record evidence in this case, Applicant's Iranian citizenship is based on his birth in Iran and, therefore, the Administrative Judge did not err by finding Foreign Preference Mitigating Condition 1 applicable. ⁽²⁾

Department Counsel's alternative argument does not demonstrate the Administrative Judge erred. Nothing in the Judge's decision indicates or suggests the Judge was concluding that the application of Foreign Preference Mitigating Condition 1 was dispositive of the Guideline B issues in this case. It was not arbitrary, capricious, or contrary to law for the Judge to apply Foreign Preference Mitigating Condition 1 and take it into consideration when reaching his conclusions under Guideline C.

Department Counsel essentially concedes that the Administrative Judge did not err by applying Foreign Preference Mitigating Condition 2⁽³⁾ to Applicant's Iranian military service, which occurred before he became a naturalized U.S. citizen. However, Department Counsel argues the Administrative Judge erred by applying Foreign Preference Mitigating Condition 2 to Applicant's possession and use of an Iranian passport because that possession and use of an Iranian passport indicated he has a foreign preference. This argument is not persuasive.

First, the Board does not read the Administrative Judge's decision as applying Foreign Preference Mitigating Condition 2 to Applicant's possession and use of an Iranian passport before he became a naturalized U.S. citizen. Before an applicant becomes a naturalized U.S. citizen, an applicant cannot reasonably be faulted for using a passport of the country of which he or she is a citizen. Until an applicant becomes a naturalized U.S. citizen, the applicant cannot be expected to obtain a U.S. passport. Furthermore, until an applicant becomes a naturalized U.S. citizen, the applicant's possession and use of a passport of the country of his or her citizenship does not constitute the exercise of dual citizenship within the meaning of Guideline C.⁽⁴⁾

Second, the Administrative Judge noted Applicant's possession and use of an Iranian passport after he became a naturalized U.S. citizen raised security concerns under Guideline C, but further concluded that those security concerns were mitigated by Applicant's surrender of the Iranian passport after he learned about the DoD policy concerning the possession and use of foreign passports.⁽⁵⁾ If an applicant surrenders a foreign passport, the Judge must consider not only the bare fact of surrender, but also the overall facts and circumstances surrounding the applicant's possession, use, and surrender of the foreign passport.⁽⁶⁾ Under the particular facts and circumstances of this case, it was not arbitrary, capricious, or contrary to law for the Judge to conclude that application of Foreign Preference Mitigating Condition 2 to Applicant's Iranian military service and Applicant's surrender of his Iranian passport (consistent with the requirements of the ASDC3I memorandum) was sufficient to mitigate the security concerns under Guideline C.⁽⁷⁾

(b) Department Counsel contends the Administrative Judge erred by evaluating Applicant's possession and use of an Iranian passport in a piecemeal manner that failed to consider that conduct in light of Applicant's ties to immediate family members in Iran. Although Department Counsel argues for a plausible, alternate interpretation of the record evidence, Department Counsel's argument fails to demonstrate the Judge acted in a manner that is arbitrary, capricious, or contrary to law when analyzing Applicant's possession and use of an Iranian passport in light of the particular facts and circumstances of this case. Applicant's counterargument is more persuasive on this issue.

2. Whether the Administrative Judge's favorable conclusions under Guideline B (Foreign Influence) are arbitrary, capricious, or contrary to law. In challenging the Administrative Judge's favorable conclusions under Guideline B, Department Counsel argues: (a) the record evidence does not support the Judge's application of Foreign Influence Mitigating Condition 1; (b) because Iran is a country that is hostile to the United States, Applicant has a very heavy burden of persuasion under Guideline B that was not satisfied in this case; (c) the Judge failed to address the hostile nature of the Iranian government; (d) the Judge failed to articulate a rational basis for his conclusion that Applicant's family members in Iran do not pose a security risk under Guideline B; (e) the Judge erred by applying Foreign Influence Mitigating Condition 3 to Applicant's family members in Iran; and (f) the Judge's favorable conclusions under Guideline B do not reflect application of the whole person concept.

In reply, Applicant argues: (i) Department Counsel's appeal argument raises an issue that was not raised before the Administrative Judge and, therefore, the Board should not take cognizance of it on appeal; (ii) Department Counsel seeks to discriminate against Applicant based on national origin in violation of Executive Order 12968, Section 3.1(c); (iii) decisions by Hearing Office Judges in other DOHA cases provide support for the Judge's decision in this case; (iv) the decision below reflects the Administrative Judge gave consideration to the hostile nature of the Iranian government; (v) Department Counsel asks the Board to impose an impossible burden on Applicant; (vi) the record evidence supports

the Judge's favorable conclusions under Guideline B; (vii) there is no evidence that the Iranian government has sought to harass, influence, imprison, or detain Applicant's immediate family members in Iran; (viii) Department Counsel's argument concerning Foreign Influence Mitigating Condition 3 is flawed and the Judge did not err by applying that mitigating condition to a relative who is not an immediate family member; (ix) Department Counsel's argument about the whole person concept lacks specificity and does not demonstrate any error by the Judge; and (x) even if the Board concludes that Department Counsel's claims of error are persuasive, the Board should sustain the Judge's decision based on the record evidence as a whole.

The Board does not find persuasive Applicant's contention that Department Counsel is raising an issue that should not be taken cognizance of on appeal. Nothing in the record below persuades the Board that Department Counsel, through action or inaction, waived its right to challenge the Administrative Judge's rulings and conclusions under Guideline B.

The Board also does not find persuasive Applicant's contention that Department Counsel is seeking to have an adverse security clearance decision made based solely on Applicant's national origin. The SOR issued to Applicant was not based solely on Applicant's national origin. Furthermore, Department Counsel's case during the proceedings below and its arguments on appeal do not reflect an attempt to obtain an adverse security clearance decision in this case based solely on Applicant's national origin.

Applicant places too much reliance on Administrative Judge decisions in other DOHA cases. Although a decision by a Hearing Office Judge may be cited as persuasive authority, it is not legally binding precedent on other Hearing Office Judges or the Board.⁽⁸⁾ Accordingly, the decisions cited by Applicant do not constitute legally binding precedent that the Board must follow, distinguish, or reconcile in this or any other appeal. Furthermore, a party citing decisions by Hearing Office Judges as persuasive authority must do more than simply cite the decisions because they reached an outcome similar to the one the party wants to achieve in its case on appeal.⁽⁹⁾ In this case, Applicant's extensive reliance on Hearing Office decisions is not persuasive because it does not articulate cogent reasons why the Board should follow the cited decisions, but rather relies on the implicit premise that if Hearing Office Judges rule a certain way then the Board should follow suit unless it can affirmatively articulate reasons why it should not. The Board declines to assume a burden that is not legally or logically required by Executive Order 10865, the Directive, or generally accepted principles of appellate practice.

Department Counsel's argument concerning the Administrative Judge's application of Foreign Influence Mitigating Condition 3⁽¹⁰⁾ does not demonstrate the Judge erred. The Board reads the decision below as applying Foreign Influence Mitigating Condition 3 to Applicant's relatives in Germany, not Applicant's relatives in Iran. Accordingly, Department Counsel's argument that the Judge erred by applying Foreign Influence Mitigating Condition 3 to Applicant's immediate family members in Iran lacks merit.

It is untenable for Department Counsel to argue that "[t]he Appeal Board has determined that Iran is a country hostile to the interests of the United States." The Board does not have the authority to make its own pronouncements about the nature of relations between the United States and foreign countries. Pronouncements about the relationship between the United States and any given foreign country are committed to the President of the United States and other duly authorized Executive Branch officials.⁽¹¹⁾ In ISCR Case No. 02-04786 (June 27, 2003), cited by Department Counsel in its appeal brief, the Board noted that the parties did not dispute that the Iranian government was hostile to the United States,⁽¹²⁾ and specifically noted that the U.S. Department of State had made official pronouncements about the nature of the Iranian government. Relying on official pronouncements by the President, the U.S. Department of State, or other authorized federal officials concerning foreign policy and foreign relations matters is *not* the equivalent of the Board making its own determination as to foreign policy and foreign relations matters. In the other decision cited by Department Counsel (ISCR Case No. 01-26893, October 16, 2002), the Board simply noted that there was no dispute, during the proceedings below or on appeal, that the Iranian government has been hostile to the United States. Neither Board decision cited by Department Counsel establishes, as a matter of fact or law, the nature of the Iranian government or the nature of its relationship with the United States.⁽¹³⁾ At the hearing, Department Counsel presented evidence that the Iranian government is considered to be hostile to the United States and Applicant did not dispute that evidence or seek to prove otherwise; nor does Applicant seek on appeal to assert that the Iranian government is not hostile to the United States.

Department Counsel persuasively argues the Administrative Judge's decision does not reflect consideration of the record evidence that the Iranian government is hostile to the United States. Although the Administrative Judge found that "Applicant decided to leave Iran in order to pursue a life free of the dictatorship imposed by the ruling fundamentalist regime in the [Government of Iran]" (Decision at p. 3), the Administrative Judge did not discuss, mention, or acknowledge the record evidence indicating that the Iranian government is hostile to the United States. Applicant correctly notes that there is a rebuttable presumption that the Judge considered the record evidence and there is no requirement that the Judge cite to Board decisions in issuing his own decision in Applicant's case. However, given the record evidence that the Iranian government is hostile to the United States, the absence of any discussion or acknowledgment of that evidence by the Judge is very significant. Although there is no requirement that a Judge specifically cite and address every piece of record evidence,⁽¹⁴⁾ a Judge must make findings and reach conclusions that take into consideration relevant record evidence (whether that evidence is favorable, unfavorable, or mixed in nature).⁽¹⁵⁾ When there is significant record evidence that runs contrary to a Judge's findings and conclusions and the Judge does not discuss or even acknowledge the existence of that evidence, the rebuttable presumption that the Judge considered all the record evidence is seriously undercut and a serious question arises whether the Judge engaged in an arbitrary and capricious analysis. In this case, the Judge's failure to discuss or even acknowledge the hostility of the Iranian government toward the United States in connection with his assessment of the security implications of Applicant's ties with immediate family members in Iran indicates the Judge overlooked or ignored significant record evidence that runs contrary to his findings and conclusions and demonstrates arbitrary and capricious action.⁽¹⁶⁾

Applicant also argues Department Counsel is seeking to have an impossible burden placed on him. This argument is unpersuasive. There is no right to a security clearance,⁽¹⁷⁾ and there is no presumption in favor of granting or continuing a security clearance.⁽¹⁸⁾ Indeed, a favorable security clearance decision should not be made unless there is an affirmative finding that it would be clearly consistent with the national interest to grant or continue a security clearance.⁽¹⁹⁾ Moreover, Department Counsel is not required to prove that an applicant poses a clear and present danger to national security,⁽²⁰⁾ or that an applicant has committed a security violation.⁽²¹⁾ Furthermore, "[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."⁽²²⁾ Applicant's right to due process does not change the substantive law governing security clearance adjudications, and does not relieve Applicant of the heavy burden of persuasion imposed on all applicants by Executive Order 10865 and the Directive.

Applicant asks the Board to affirm the Administrative Judge's decision on alternate grounds if the Board concludes the Judge erred. Applicant's request is a legally permissible one. However, considering the record as a whole, and taking into account Applicant's various arguments in support of his contention that a favorable security clearance decision is warranted on the record evidence below, the Board is not persuaded that it should affirm the decision below on alternate grounds.

Conclusion

Department Counsel has met its burden of demonstrating error below. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.3, the Board reverses the Administrative Judge's favorable 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: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

1. "Dual citizenship is based solely on parents' citizenship or birth in a foreign country."
2. *See, e.g.*, ISCR Case No. 99-0452 (March 21, 2000) at p. 3 (noting that an applicant's exercise of rights and privileges of foreign citizenship is separate and distinct from applicability of Foreign Preference Mitigating Condition 1).
3. "Indicators of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship."
4. *See, e.g.*, ISCR Case No. 97-0356 (April 21, 1998) at p.4.
5. 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" (ASDC3I memorandum).
6. *See, e.g.*, ISCR Case No. 01-22606 (June 30, 2003) at p. 8.
7. *See, e.g.*, ISCR Case No. 01-20908 (November 26, 2003) at p. 5
8. *See, e.g.*, ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing in detail the precedential value of decisions by Hearing Office Administrative Judges).
9. *See, e.g.*, ISCR Case No. 01-22606 (June 30, 2003) at pp. 4-5 (explaining why a party relying on Hearing Office Administrative Judge decisions as persuasive authority must articulate sound reasons in support of its claim that those decisions should be considered persuasive).
10. "Contact and correspondence with foreign citizens are casual and infrequent."
11. *See, e.g., Haig v. Agee*, 453 U.S. 280, 291 (1981) (quoting earlier Supreme Court decision for proposition that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations"); *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766 (1972) (same). *See also* 22 U.S.C. §2656 ("Management of foreign affairs")(Secretary of State to perform foreign affairs matters entrusted to the Secretary of State by the President). *Cf.* ISCR Case No. 01-26893 (October 16, 2002) at p. 9 n. 2 ("The official positions taken by the President of the United States and other appropriate federal officials concerning the war on terrorism are not proper subjects to be litigated in DOHA proceedings.").
12. If the parties stipulate that a certain event happened or a certain set of circumstances exists, that stipulation makes the particular event or set of circumstances uncontroverted for purposes of that proceeding and that stipulation can be binding on both parties for purposes of that proceeding (including an appeal associated with that proceeding). However, a stipulation in a given proceeding is not binding on anyone else in any other proceeding (either at the hearing level or the appeal level).
13. *See also* ISCR Case No. 00-0317 (March 29, 2002) at p. 6 (Board noting that foreign relations are complex and

dynamic in nature).

14. *See, e.g.*, ISCR Case No. 01-17496 (October 28, 2002) at p. 6.

15. *Cf.* Directive, Additional Procedural Guidance, Item E3.1.32.1 (the Board must determine whether or not "[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.") (emphasis added). As noted earlier in this decision (at p. 2), "[t]he 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."

16. *See, e.g.*, ISCR Case No. 02-26826 (November 12, 2003) at p. 5 (arbitrary and capricious for Judge to fail to address record evidence highly relevant to Guideline B issues in case); ISCR Case No. 01-16419 (March 19, 2003) at p. 4 (arbitrary and capricious for Judge to fail to discuss applicant's use of an Egyptian passport and United States passport in a manner calculated to deliberately conceal from U.S. officials his trip to Egypt).

17. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988).

18. *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991).

19. Executive Order 10865, Section 2; Directive, Section 4.2 and Additional Procedural Guidance, Item E3.1.25.

20. *See, e.g.*, ISCR Case No. 01-17496 (October 28, 2002) at p. 6.

21. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).

22. Directive, Additional Procedural Guidance, Item E3.1.15.