

DATE: April 9, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-02195

## **APPEAL BOARD DECISION AND REVERSAL ORDER**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Eric Borgstrom, Esq., Department Counsel

#### **FOR APPLICANT**

V. Rock Grundman, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated January 16, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline B (Foreign Influence). Administrative Judge Claude R. Heiny issued a favorable security clearance decision dated September 12, 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 issue is raised on appeal: whether the Administrative Judge articulated a rational basis for his favorable conclusions under Guideline B (Foreign Influence). 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 Issue**

On appeal, there is no dispute that: (1) Applicant has a mother and two sisters who live in Iran; and (2) the Iranian government has been deemed to be hostile to the United States. [\(1\)](#)

The sole issue on appeal is whether the Administrative Judge articulated a rational, sustainable basis for his favorable conclusions under Guideline B (Foreign Influence), which form the basis for his favorable security clearance decision.

Department Counsel argues the Administrative Judge's favorable conclusions under Guideline B are arbitrary, capricious, or contrary to law because: (a) the Judge failed to address or take into account the hostility of the Iranian government towards the United States; (b) the Judge failed to articulate a rational basis for his conclusion that Applicant's immediate family members in Iran are not vulnerable to influence or pressure from the Iranian government; and (c) the Judge misapplied Foreign Influence Mitigating Condition 3.

Applicant argues the Administrative Judge's favorable conclusions under Guideline B should be upheld on appeal because: (i) the Judge did not fail to take into account the hostility of the Iranian government towards the United States; (ii) the Judge had a rational basis for applying Foreign Influence Mitigating Condition 1; and (iii) the Judge had a rational basis for applying Foreign Influence Mitigating Condition 3. Applicant argues, in the alternative, that if the Board concludes that the Judge failed to adequately address the issue of Iran's hostility towards the United States, then the Board should remand the case to the Judge for "further exposition of the Administrative Judge's factoring in of Iran's hostility to the United States."

For the reasons that follow, the Board concludes the Administrative Judge failed to articulate a sustainable basis for his favorable conclusions under Guideline B (Foreign Influence).

The Administrative Judge failed to articulate a sustainable explanation for applying Foreign Influence Mitigating

Condition 1<sup>(2)</sup> that takes into account the scope of Guideline B (Foreign Influence), the language of Foreign Influence Mitigating Condition 1, and the totality of the record evidence, both favorable and unfavorable.<sup>(3)</sup>

Department Counsel correctly notes that the Administrative Judge does not discuss or mention in his decision Iran's hostility toward the United States.<sup>(4)</sup> The Judge's silence on that aspect of the case is problematic. In general, a Judge is not required to specifically discuss each and every piece of record evidence. However, a Judge's findings of fact must be based on the record evidence as a whole, including any evidence that runs contrary to the Judge's findings.<sup>(5)</sup> Furthermore, if a Judge does not discuss or even mention a significant aspect of the case that reasonably could be expected to be explicitly taken into account in the Judge's decision, then a serious question arises as to whether the Judge forgot that aspect, ignored it, failed to take it into account, dismissed that aspect of the case for no apparent reason, failed to understand the significance of that aspect of the case, or engaged in an arbitrary and capricious analysis.<sup>(6)</sup> In this case, the Judge's failure to discuss or even mention the Iranian government's hostility toward the United States (while he discussed various other aspects of the case that were not as significant)<sup>(7)</sup> leaves his analysis under Guideline B (Foreign Influence) strained, incomplete, and indicative of arbitrary and capricious action.<sup>(8)</sup>

Department Counsel correctly notes that the record evidence concerning Applicant's mother and two sisters living in Iran raises security concerns under Guideline B (Foreign Influence) and that the burden of persuasion shifted to Applicant to present evidence sufficient to address those security concerns such that "it is clearly consistent with the national interest" to grant or continue access to classified information for Applicant.<sup>(9)</sup> The Judge had to consider the totality of Applicant's conduct and circumstances and evaluate whether Applicant had presented sufficient evidence to extenuate or mitigate the security concerns raised by his mother and two sisters living in Iran. Given the clearly consistent with the national interest standard, Applicant had a very heavy burden of persuasion to overcome the security concerns raised by the fact that his mother and two sisters live in Iran.

Provisions of the Directive should not be construed in a narrow or artificial manner that does not adequately take into account the compelling interest of the United States in protecting and safeguarding classified information and the basic objectives of the industrial security program.<sup>(10)</sup> Consistent with that principle, the thirteen Guidelines<sup>(11)</sup> should not be construed or applied in a narrow or artificial manner that does not adequately address the security concerns implicated by them.<sup>(12)</sup>

Nothing under Guideline B (Foreign Influence) limits its scope to cases involving the risk of influence or pressure exerted by an applicant's relatives.<sup>(13)</sup> Therefore, the Administrative Judge's conclusion that Applicant's mother and two sisters do not pose a security risk does not address the security threat that could be posed if the Iranian government were to seek to bring coercive or noncoercive influence or pressure<sup>(14)</sup> to bear against Applicant's mother and two sisters in Iran in an effort to influence him.<sup>(15)</sup> The Judge's failure to address that aspect of the case reflects an arbitrary and capricious analysis.

A showing that an applicant's relatives are not agents of a foreign power satisfies only one part of Foreign Influence Mitigating Condition 1.<sup>(16)</sup>

Therefore, the Administrative Judge's conclusion that Applicant's mother and two sisters living in Iran are not agents of the Iranian government is not sufficient to warrant application of Foreign Influence Mitigating Condition 1.

Applicant correctly notes the Administrative Judge found Applicant's testimony to be credible. However, although a favorable credibility determination permits an Administrative Judge to find an applicant's testimony believable, it does not relieve the Judge from the obligation to decide what weight reasonably can be given to that testimony in light of the record evidence as a whole.<sup>(17)</sup> Therefore, the Judge's favorable conclusion about Applicant's credibility is not a substitute for record evidence<sup>(18)</sup> showing that Applicant's ties to his mother and two sisters in Iran do not leave him vulnerable to coercion, pressure or influence by the Iranian government.

The record evidence supports the Administrative Judge's findings and conclusions that Applicant has ties with the

United States and does not have a preference for Iran, but the absence of a foreign preference does not negate the security concerns raised under Guideline B (Foreign Influence).<sup>(19)</sup>

Finally, the Administrative Judge's application of Foreign Influence Mitigating Condition 1 is undercut by his finding that Applicant's mother and two sisters would like to come to the United States and the record evidence that Applicant unsuccessfully tried to bring his father (since deceased), his mother, and two sisters to the United States, and is still interested in bringing his mother and two sisters to the United States.<sup>(20)</sup> Given the record evidence in this case, the Judge failed to address or take into account the potential leverage over Applicant that the Iranian government could have based on that situation.

The totality of these errors renders the Administrative Judge's reasoning and application of Foreign Influence Mitigating Condition 1 unsustainable.

The Administrative Judge's application of Foreign Influence Mitigating Condition 3<sup>(21)</sup> also is problematic because it blurs or conflates the difference between (a) the frequency of Applicant's contacts with his family members in Iran, and (b) the nature of those contacts.<sup>(22)</sup> Given the record evidence in this case, the Judge reasonably could find that Applicant's contacts with his family members in Iran have been infrequent. However, given the record evidence in this case, the Judge's characterization of those contacts as casual are not sustainable. There is a rebuttable presumption that contacts between immediate family members are not casual.<sup>(23)</sup> The totality of the record evidence concerning Applicant's contacts with his immediate family members is not sufficient to rebut or overcome that presumption.<sup>(24)</sup>

As noted earlier in this decision, Applicant argues, in the alternative, that if the Board concludes that the Administrative Judge failed to adequately address the issue of Iran's hostility towards the United States, then the Board should remand the case to the Judge for "further exposition of the Administrative Judge's factoring in of Iran's hostility to the United States." Remand of this case to rectify that error is not warranted because it is not the only error involved.

### **Conclusion**

Department Counsel has met its burden of demonstrating harmful error below. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.3, the Board reverses the Administrative Judge's security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. At the hearing, the parties agreed that there was no dispute as to the hostility of the Iranian government towards the United States.
2. "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" (Directive, Enclosure 2, Item E2.A2.1.3.1).
3. The application of Adjudicative Guidelines disqualifying and mitigating conditions is not reducible to simple, formula adjudication and requires the exercise of sound judgment after careful consideration of the record evidence as a whole and application of Adjudicative Guidelines provisions in a manner compatible with their plain meaning and other pertinent provisions of the Directive. *See, e.g.*, ISCR Case No. 01-27371 (February 19, 2003) at pp. 3-4.
4. Department Counsel's appeal brief asserts that "[t]he Appeal Board has determined that Iran is hostile to the interests of the United States." That assertion is incorrect. *See* ISCR Case No. 02-00318 (February 25, 2004) at pp. 6-7 (explaining why the same assertion by Department Counsel in another appeal was incorrect). The Board notes Department Counsel's appeal brief in this case was submitted before the Board issued its decision in ISCR Case No. 02-00318.
5. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.
6. *See, e.g.*, ISCR Case No. 02-00318 (February 25, 2004) at p. 8; ISCR Case No. 99-0424 (February 8, 2001) at p. 10. As noted earlier in this decision, in deciding whether the Administrative Judge acted in an arbitrary or capricious manner, 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.
7. Applicant asks the Board to conclude that the Administrative Judge did not wish to be "belaboring issues not in contention." It is one thing to belabor an uncontroverted matter. It is another thing to ignore or fail to acknowledge an uncontroverted matter that is significant to the issues in the case.
8. On appeal, Applicant cites to a passage in the hearing transcript to support his argument that the Administrative Judge did, in fact, take into account the hostility of the Iranian government toward the United States. The single passage cited by Applicant is not a substitute for the Judge's obligation to address that aspect of the case in his decision.
9. *See* Directive, Additional Procedural Guidance, Item E3.1.15.
10. *See, e.g.*, ISCR Case No. 01-24356 (February 26, 2003) at pp. 4-5; ISCR Case No. 00-0317 (March 29, 2002) at p. 7 n.14.
11. *See* Directive, Enclosure 2, Item E2.2.3.
12. *See, e.g.*, ISCR Case No. 01-24356 (February 26, 2003) at pp. 4-5 (rejecting narrow interpretation of Guideline F that would render other parts of the Directive meaningless, or that would undermine effectiveness of industrial security program).
13. *See, e.g.*, ISCR Case No. 99-0424 (February 8, 2001) at p. 11 ("Furthermore, by considering only how Applicant's relatives in [a foreign country] might exercise influence on him, the Judge failed to give any consideration to whether *other* persons or entities might be able to seek to exercise pressure, influence or coercion over Applicant through his immediate family members in [a foreign country]. The Judge's failure to do so reflects an arbitrary and capricious approach to this case.")(italics in original).
14. Security concerns are not limited to the possibility of coercive pressure or influence being exerted against an

applicant or an applicant's immediate family members. Security concerns include the possibility of noncoercive pressure or influence being exerted against an applicant directly or through an applicant's immediate family members. *See, e.g.*, ISCR Case No. 99-0295 (October 20, 2000) at pp. 7-8.

15. Applicant's argument that his mother and two sisters in Iran are non-political and keep a low profile is not persuasive. That argument focuses on the low probability that the Iranian government would have any independent interest in Applicant's mother and two sisters, which is not really an issue in this case. Rather, the security concern implicated in this case is the possibility that the Iranian government might take an interest in Applicant's mother and two sisters based on their ties to Applicant. *See, e.g.*, ISCR Case No. 02-04786 (June 27, 2003) at p. 5.

16. *See, e.g.*, ISCR Case No. 99-0511 (December 19, 2000) at p. 10 (discussing bifurcated nature of Foreign Influence Mitigating Condition 1); ISCR Case No. 98-0507 (May 17, 1999) at p. 10 ("The security significance of an applicant's family ties in a foreign country does not turn on the simple question of whether the applicant's relatives have official ties with a foreign government.").

17. *See, e.g.*, ISCR Case No. 01-26893 (October 16, 2002) at p. 7 ("Beyond helping a Judge in deciding whether to believe an applicant's testimony, a credibility determination does not have independent evidentiary weight as to the facts of a case. Although the Judge could conclude Applicant was a credible witness who was testifying honestly and sincerely, that conclusion is not a substitute for an analysis of the security significance of the record evidence about Applicant's family ties with relatives in [a foreign country].").

18. *See, e.g.*, ISCR Case No. 00-0291 (August 13, 2001) at p. 3.

19. *See, e.g.*, ISCR Case No. 01-17496 (October 28, 2002) at p. 5 (even in the absence of a foreign preference, family ties in a foreign country can raise security concerns); ISCR Case No. 99-0601 (January 30, 2001) at p. 6 ("A person can be vulnerable to foreign influence without having any positive or favorable feelings toward the government of a particular foreign country.").

20. *See, e.g.*, ISCR Case No. 02-04786 (June 27, 2003) at p. 6 (noting Foreign Influence Mitigating Condition 1 is not limited to ties of affection, but also covers ties of influence or obligation).

21. "Contacts and correspondence with foreign citizens are casual and infrequent" (Directive, Enclosure 2, Item E2.A2.1.3.3).

22. *See* ISCR Case No. 02-09907 (March 17, 2004) at p. 9 (discussing the difference between frequency and nature of contacts under Foreign Influence Mitigating Condition 3).

23. *See, e.g.*, ISCR Case No. 00-0484 (February 1, 2002) at p. 5.

24. Whether there is sufficient record evidence to support an Administrative Judge's findings is a question of law, not a question of fact. *See, e.g.*, ISCR Case No. 98-0370 (January 28, 1999) at p. 2.