DATE: June 28, 2004

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 02-02892

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief 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 February 24, 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 Martin H. Mogul issued an unfavorable security clearance decision dated November 25, 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.

The following issues have been raised on appeal: (1) whether the Administrative Judge failed to consider the totality of the record evidence, ignored evidence favorable to Applicant, and failed to discuss evidence favorable to Applicant in his decision; and (2) whether the Administrative Judge's unfavorable security clearance 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 failed to consider the totality of the record evidence, ignored evidence favorable to Applicant, and failed to discuss evidence favorable to Applicant in his decision. Applicant contends the Administrative Judge erred by: (a) failing to consider the totality of the record evidence; (b) ignoring evidence favorable to Applicant; (c) not discussing evidence favorable to Applicant. These overlapping contentions fail to demonstrate the Judge erred.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise.[(1)] To rebut or overcome that presumption, an appealing party must do more than simply disagree with the Judge's weighing of the record evidence, or cite record evidence that is not specifically discussed or mentioned in the Judge's decision.[(2)] Applicant strongly disagrees with the Judge's weighing of the record evidence and cites record evidence that is not discussed or mentioned in the decision below. However, Applicant's arguments, viewed individually or collectively, do not rebut or overcome the presumption that the Judge considered all the record evidence in this case.

Applicant also contends the Administrative Judge erred by failing to properly consider Applicant's statements that he would not succumb to threats. Applicant cites Board decisions in support of his argument that statements such as those made by Applicant are entitled to be given some weight, but that the Judge acted in an arbitrary and capricious manner by giving Applicant's statements no weight at all. For the reasons that follow, Applicant's argument does not persuade the Board that the Judge acted in an arbitrary and capricious manner.

Although the rules of evidence are relaxed in these proceedings to allow for the development of a full and complete record, the goal of developing a full and complete record does not translate into a situation where evidence must be accepted or considered uncritically without regard to what evidentiary value reasonably can be given to it.[(3)] An

Administrative Judge's weighing of the record evidence is not reducible to a simple formula. While a Judge must consider the record evidence as a whole when weighing evidence, there is nothing in the Directive or general principles of law that dictate what weight, if any, a Judge must give to any particular piece of evidence. Even if there is no challenge to the admissibility of a given piece of evidence, the admissibility of that evidence is separate and distinct from what weight a Judge reasonably can give to it.[(4)] Moreover, even if a Judge concludes a witness's testimony is credible, such a favorable credibility determination is separate and distinct from what weight a Judge reasonably can give to such testimony.[(5)] Finally, in deciding whether a Judge has acted reasonably in weighing the record evidence, the Board does not look at pieces of evidence in isolation, but rather considers whether the Judge exercised common sense and sound judgment in weighing the evidence and made findings of fact and reached conclusions that reflect a reasonable, plausible interpretation of the record evidence as a whole, taking into account whether there is record evidence that runs contrary to the Judge's findings and conclusions.[(6)]

Applicant's statements about what he would do if his family were threatened (Hearing Transcript at pp. 117-118) are record evidence that the Administrative Judge had to consider. The Judge had to decide whether that testimony was credible,[(7)] and if so, what weight (if any) to give that testimony in light of the record evidence as a whole.[(8)] Even if the Judge concluded that Applicant's testimony was credible, the Judge's obligation to consider that testimony did not compel the Judge give it any particular weight, or any weight at all. The Board has declined to hold that an applicant's statements about what he or she would do if family members were threatened are not admissible or not entitled to be taken into account by a Judge. However, the Board has noted the limited value of such statements because they involve a prediction by an applicant about what he or she might do in the future under some hypothetical set of circumstances, usually without any record evidence that the applicant has faced an identical or similar situation in the past and acted on it.[(9)] Applicant's statements in this case suffer from the same kind of limitations. Applicant identifies no rule of law, and offers no cogent argument for why the Judge in this case should have given more weight to Applicant's statements about what he would do if his family members were threatened. Applicant clearly wanted the Judge to give more weight to his statements than the Judge gave to them. Applicant's strong disagreement with the Judge's decision to not give his statements more weight is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.[(10)]

2. Whether the Administrative Judge's unfavorable security clearance decision is arbitrary, capricious, or contrary to law. Applicant makes several arguments that the Board construes as raising the issue of whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Specifically, Applicant argues: (a) the Judge erred by imposing on Applicant an incorrect burden of proof; (b) the Judge did not apply the whole person concept in evaluating Applicant's security eligibility; and (c) the Judge did not properly consider Foreign Influence Mitigating Conditions 1 and 3. The Board will address these arguments in turn.

(a) Applicant makes several arguments in support of his contention that the Administrative Judge erred by imposing on Applicant an incorrect burden of proof. Specifically, Applicant argues: (i) the Judge failed to articulate a clear burden of proof that Applicant was supposed to meet; (ii) the Judge imposed on Applicant a burden of proof that is impossible to meet, thereby nullifying the Adjudicative Guidelines; (iii) the Judge erred by imposing on Applicant a burden of proof that constitutes impermissible discrimination based on national origin, in violation of Executive Order 12986, Section 3.1(c); and (iv) the Judge imposed on Applicant an improper burden of proof because Saudi Arabia and Yemen are friendly countries, not hostile ones. For the reasons that follow, the Board finds Applicant's arguments unpersuasive.

(a)(i) Security clearance adjudications are conducted pursuant to the parameters of Executive Order 10865 and the Directive. Accordingly, the burden of proof that an applicant must satisfy is not set by DOHA Hearing Office Judges or the Board, but rather it is set forth by Executive Order 10865, as implemented by the Directive. Reading the Judge's decision in its entirety, the Board concludes the Judge adjudicated Applicant's case under the legal standard set by Executive Order 10865 and the Directive.

Department Counsel has the burden of "presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted."[(11)] An applicant has the burden of "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

[(12)]

burden of persuasion as to obtaining a favorable clearance decision." As to factual matters, either party has to present sufficient credible evidence to permit the Judge to make findings of fact that satisfy the substantial evidence test.[(13)] However, a favorable security clearance decision should not be made unless there is an affirmative determination that it would be clearly consistent with the national interest to grant or continue a security clearance for a given applicant.[(14)] Applicant's appeal arguments do not persuade the Board that the Judge imposed on him an incorrect burden of proof.

(a)(ii) Applicant also asserts the Administrative Judge imposed an impossible burden of proof on him that has the practical effect of nullifying the Adjudicative Guidelines. However, Applicant's arguments in support of this claim of error have the practical effect of asserting that the Judge must apply Foreign Influence Mitigating Condition 1 in his favor unless: (1) Department Counsel affirmatively proves that mitigating condition is not applicable; (2) there is a showing that the governments of Saudi Arabia or Yemen have specifically targeted or threatened Applicant's relatives -- or any other relative of any U.S. citizen -- living in those countries, or (3) the Judge satisfactorily explains why that mitigating condition is not applicable to Applicant despite the fact that it has been applied to applicants in other cases involving a broad range of foreign countries.

Implicit in Applicant's arguments is the premise that he is entitled to a favorable security clearance decision unless the federal government affirmatively establishes he is not entitled to receive such a favorable decision. That premise runs afoul of the following legal principles: there is no right to a security clearance,[(15)] there is no presumption in favor of granting or continuing one,[(16)] and the federal government can resolve doubts in favor of the national security rather than in favor of an applicant.[(17)] As discussed earlier in this decision, Applicant has the burden of persuasion as to obtaining a favorable security clearance decision. That burden of persuasion includes the burden of presenting evidence to warrant application of Adjudicative Guidelines mitigating conditions. Although Department Counsel has the burden of presenting evidence to prove controverted facts, Department Counsel does not have the burden of affirmatively disproving the applicability of an Adjudicative Guidelines mitigating condition.[(18)]

Security clearance decisions are not an exact science and involve predictive judgments about whether an applicant's conduct and circumstances pose of risk of deliberate or inadvertent mishandling of classified information.[(19)] Department Counsel is not required to present direct evidence of a nexus between an applicant's conduct and circumstances and an unfavorable security clearance decision.[(20)] Nor is Department Counsel required to prove that an applicant poses an imminent or clear and present danger to national security before an unfavorable security clearance decision can be made.[(21)] Moreover, the federal government is not required to grant security clearances to applicants unless it is affirmatively shown that a particular applicant has been specifically targeted by a foreign country for intelligence gathering purposes.[(22)] Apart from the practical consideration that generally neither party is in a position to have access to information about covert intelligence gathering activities by foreign countries, the federal government is not precluded from denying or revoking access to classified information based on facts and circumstances that raise security concerns but have not yet resulted in an actual security breach.[(23)]

To the extent Applicant's appeal argument relies on decisions by Hearing Office Administrative Judges in other Guideline B cases, it is not persuasive. The decisions by Hearing Offices in other cases are not legally binding precedent that the Judge had to follow in this case, and such decisions are never legally binding precedent on the Board.[(24)] The Judge was not required to distinguish his conclusions in this case from the conclusions Hearing Office Judges reached in other Guideline B cases, or reconcile his conclusions in this case with their conclusions in other such cases.

(a)(iii) There is no basis for Applicant's claim that the Administrative Judge erred by imposing on him a burden of proof that constitutes impermissible discrimination based on national origin, in violation of Executive Order 12986, Section 3.1(c).[(25)] The Judge did not base his unfavorable decision on Applicant's national origin. Rather, the Judge based his decision on the security concerns raised by the facts and circumstances of Applicant's family ties with close relatives who are citizens of Yemen and who reside in Saudi Arabia.

(a)(iv) The Board does not find persuasive Applicant's argument that the Administrative Judge failed to consider or give

proper weight to the evidence that the governments of Saudi Arabia and Yemen are not hostile to the United States. As discussed earlier in this decision, Applicant has not met his burden of rebutting or overcoming the presumption that the Judge considered all the record evidence. Furthermore, Applicant's argument does not demonstrate the Judge weighed the record evidence in a manner that is arbitrary, capricious, or contrary to law.

Applicant refers to Board decisions involving Guideline B in the context of countries hostile to the United States and argues those cases support his assertion that the Board has held applicants face a different burden of persuasion that turns on whether the foreign country involved is hostile or not hostile to the United States. If the Board had never addressed Guideline B issues in cases involving a country not hostile to the United States, Applicant's approach would be understandable. However, the Board has addressed Guideline B issues in cases involving countries not hostile to the United States. Applicant's argument is unpersuasive because it does not distinguish those Board decisions from this case, or explain how his argument is consistent with the reasoning of those Board decisions. Moreover, the Board has not limited its use of the phrase "heavy burden of persuasion" to Guideline B cases involving countries that are hostile to the United States. It has used that phrase in other kinds of cases, including a Guideline B case where the applicant's immediate family members were living in Turkey,[(26)] a Guideline E case,[(27)] a Guideline J case,[(28)] a Guideline K case,[(29)] and a Guideline O (predecessor to Guideline E) case.[(30)]

The burden of persuasion that all applicants must satisfy under Directive, Additional Procedural Guidance, Item E3.1.15 -- regardless of what Guidelines are involved -- is the "clearly consistent with the national interest" standard, which was discussed earlier in this decision. That burden of persuasion is no different under Guideline B. As a practical matter, the nature of the record evidence in a particular case may make it easier or more difficult for an applicant to satisfy his or her burden of persuasion under Item E3.1.15, but the "clearly consistent with the national interest" standard is not changed by the nature of the record evidence in a case.[(31)]

Nothing in Guideline B (Foreign Influence) indicates or suggests that it is limited to countries that are hostile to the United States.[(32)] The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it,[(33)] regardless of whether that person, organization, or country has interests inimical to those of the United States.[(34)] The United States is entitled to ensure that persons entrusted with classified information are not at risk of failing to properly handle and safeguard such information because of potential conflicts of interest due to foreign family ties.[(35)]

The Board has warned "against reliance on overly simplistic distinctions between 'friendly' nations and 'hostile' nations when adjudicating cases under Guideline B."[(36)] The nature of foreign relations between the United States and other countries is too complex to be reducible to a simple dichotomy between countries "friendly to the United States" and countries "hostile to the United States." Moreover, even countries that are not considered to be hostile to the United States can take actions opposing the foreign policy and national security objectives of the United States.[(37)] History also shows that foreign countries not considered to be hostile to the United States have obtained unauthorized access to United States classified information.[(38)] Furthermore, the security concerns under Guideline B are not limited to situations involving vulnerability to coercion or blackmail.[(39)] The national security of the United States can be at risk whether a person with foreign family ties is vulnerable to coercion or blackmail, or is vulnerable to noncoercive influence. Indeed, the history of espionage against the United States shows many cases without any indication of coercion or blackmail being brought to bear on the individuals involved in spying.

(b) Applicant also contends the Administrative Judge did not apply the whole person concept in evaluating Applicant's security eligibility. In support of this contention, Applicant argues the Judge ignored or failed to consider various portions of the record evidence that are favorable to him. This argument is a variation of the arguments discussed under the first appeal issue. As discussed earlier, the Board does not find those arguments persuasive.

(c) The Administrative Judge concluded the record evidence of Applicant's family ties with immediate family members who are citizens of Yemen living in Saudi Arabia raised security concerns under Guideline B, and that Applicant failed to present evidence of extenuation or mitigation sufficient to warrant a conclusion that it is clearly consistent with the national interest to grant or continue a security clearance for him. Applicant contends the Judge erred by not concluding

Applicant's family ties were mitigated under Foreign Influence Mitigating Conditions 1[(40)] and 3.[(41)] In support of this contention, Applicant argues: (i) his family members are not members of a foreign power; (ii) his family members are not in a position to be exploited by a foreign power; and (iii) his contacts with his family members are casual and infrequent.

On it face, Foreign Influence Mitigating Condition 1 is bifurcated in nature: it can be applied if the record evidence supports a determination that an applicant's immediate family members in a foreign country are neither (1) agents of a foreign power, nor (2) in a position to be exploited by a foreign power.[(42)] Accordingly, the Administrative Judge was not required to apply that mitigating condition just because there is no record evidence that Applicant's family members living in Saudi Arabia are agents of Saudi Arabia, Yemen, or any other foreign power. Moreover, the Board is not persuaded that the record evidence presented by Applicant concerning his family ties with immediate family members living in Saudi Arabia was of a kind and degree that compelled the Judge -- legally or logically -- to conclude Applicant presented sufficient evidence to warrant application of Foreign Influence Mitigating Condition 1. Applicant's arguments do not persuade the Board that the Judge acted in an arbitrary or capricious manner by concluding that Applicant did not present sufficient evidence to warrant application of Foreign Influence Mitigating Condition 1.

During the proceedings below, Applicant presented evidence about his contacts with immediate family members to show they are not frequent and to rebut the presumption that they are not casual. Apart from referring to Applicant's contacts with his parents as "sporadic" (Decision at p. 3), the Administrative Judge made no specific findings about the nature or frequency of Applicant's contacts with his immediate family members who live in Saudi Arabia, and did not articulate any reason for why he did not apply Foreign Influence Mitigating Condition 3. However, considering the record as a whole, the Board concludes the Judge's failure constitutes harmless error because there is not a significant chance that the Judge would reach a different result if the Board were to remand the case with instructions that the Judge explicitly discuss Foreign Influence Mitigating Condition 3.[(43)]

Conclusion

Applicant has not demonstrated error below that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's unfavorable 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. *See, e.g.*, ISCR Case 99-9020 (June 4, 2001) at p. 2.

2. *See, e.g.*, ISCR Case No. 02-07757 (March 29, 2004) at p. 4; ISCR Case No. 00-0633 (October 24, 2003) at p. 5; ISCR Case No. 02-15074 (September 9, 2003) at p. 3.

3. *See, e.g.*, ISCR Case No. 02-09907 (March 17, 2004) at p. 6 n.6.

4. *See, e.g.*, ISCR Case No. 02-04455 (July 31, 2003) at p. 3; ISCR Case No. 97-0676 (September 29, 1998) at p. 4; ISCR Case No. 97-0202 (January 20, 1998) at pp. 4-5.

5. *See, e.g.*, ISCR Case No. 02-02195 (April 9, 2004) at pp. 6-7; ISCR Case No. 99-0601 (January 30, 2001) at pp. 5-6.

6. *See, e.g.*, ISCR Case No. 99-0435 (September 22, 2000) at p. 3.

7. The Administrative Judge's decision does not indicate whether the Judge found Applicant to be a credible witness.

8. The Board is unaware of any rule of evidence that requires a trier of fact, as a matter of law, to give some weight to every piece of evidence. Subject to review for arbitrary and capricious action, an Administrative Judge is entitled to weigh the evidence and can decide that some evidence is entitled to great weight, some weight, or no weight at all.

9. *See, e.g.*, ISCR Case No. 02-26826 (November 12, 2003) at pp. 5-6.

10. *See, e.g.*, ISCR Case No. 02-07757 (March 29, 2004) at p. 3; ISCR Case No. 02-18663 (March 23, 2004) at p. 4.

11. Directive, Additional Procedural Guidance, Item E3.1.14.

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

13. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. *See, e.g.*, ISCR Case No. 02-04455 (July 31, 2003) at p. 4; ISCR Case No. 01-10301 (December 30, 2002) at p. 5 n.3.

14. Executive Order 10865, Section 2; Directive, Sections 3.2 and 4.2 and Additional Procedural Guidance, Item E3.1.25.

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

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

17. Directive, Adjudicative Guidelines, Item E2.2.2; *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

18. *See, e.g.*, ISCR Case No. 02-09907 (March 17, 2004) at p. 7; ISCR Case No. 01-20908 (November 26, 2003) at p. 3; ISCR Case No. 01-24306 (September 30, 2003) at p. 6.

19. *Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988).

20. *Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973).

21. *See, e.g.*, ISCR Case No. 02-09907 (March 17, 2004) at p. 7; ISCR Case No. 00-0596 (October 4, 2001) at p. 4; ISCR Case No. 99-0068 (November 30, 1999) at p. 6.

22. *See, e.g.*, ISCR Case No. 01-18860 (March 17, 2003) at p. 7. Imposition of such a requirement would unduly restrict the ability of the federal government to consider a variety of potential security concerns. *See* ISCR Case No. 02-09907 (March 17, 2004) at pp. 7-8.

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

24. *See* ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing precedential value of decisions by Hearing

Office Administrative Judges).

25. "The United States Government does not discriminate on the basis of race, color, religion, sex, national origin, disability, or sexual orientation in granting access to classified information."

26. ISCR Case No. 02-026826 (November 12, 2003) at p. 6.

27. ISCR Case No. 00-0291 (August 13, 2001) at p. 7.

28. ISCR Case No. 97-0727 (August 3, 1998) at p. 6.

29. ISCR Case No. 97-0435 (July 14, 1998) at p. 5.

30. DISCR Case No. 93-1184 (October 24, 1994) at p. 3.

31. To use an analogy: in a civil case involving the preponderance of the evidence standard, a party may have an easier or harder time satisfying its burden under the preponderance of the evidence standard depending on the evidence presented by that party and the evidence presented by the opposing party. If the plaintiff presents a strong case, then the defendant may have a harder time to rebut or overcome the plaintiff's case. Moreover, if the evidence presented by the plaintiff shows aggravating circumstances, then the defendant may have a more difficult time rebutting or overcoming the plaintiff's case. On the other hand, if the plaintiff presents a weak case, then the defendant may have an easier time to rebut or overcome the defendant's case. Moreover, if the evidence presented by the defendant shows extenuating or mitigating circumstances, then the defendant may have an easier time rebutting or overcoming the plaintiff's case. But, in any event, the preponderance of the evidence standard remains the same regardless of the nature and type of evidence presented by the plaintiff and the defendant.

32. *See, e.g.*, ISCR Case No. 00-0317 (March 29, 2002) at p. 6; ISCR Case No. 00-0489 (January 10, 2002) at p. 12.

33. *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988).

34. *See, e.g.*, ISCR Case No. 97-0699 (November 24, 1998) at p. 3. *See also* ISCR Case No. 02-18668 (February 10, 2004) at p. 5 n.12 (noting the federal government has prosecuted persons under the espionage statute for passing classified information to individuals or entities from countries friendly to the United States).

35. *See, e.g.*, ISCR Case No. 02-11570 (May 19, 2004) at p. 5.

36. ISCR Case No. 00-0317 (March 29, 2002) at p. 6.

37. A recent example: various countries not deemed hostile to the United States (*e.g.*, France and Germany) have actively opposed the actions and policies of the United States concerning military action against the regime of Saddam Hussein in Iraq.

38. *See, e.g., United States v. Pollard*, 959 F.2d 1011 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 915 (1988). Furthermore, countries hostile to the United States have exploited penetrations of governments friendly to the United States to gain unauthorized access to classified United States information. *See, e.g.*, Kim Philby (a high-ranking member of British intelligence who spied for the Soviet Union) and Donald Maclean (member of British Embassy in Washington, D.C. who spied for the Soviet Union). Such penetrations can allow a country hostile to the United States to take advantage of the friendly relations between the United States and the country whose government was penetrated. Moreover, a hostile country could try to use a "false flag" operation to induce cooperation from a person who might be open to cooperating with a friendly country in the belief that such cooperation would help the friendly country without harming the United States. The FBI has used "false flag" operations to identify and capture spies. *See, e.g., United States v. Squillacote*, 221 F.3d 542, 550 (4th Cir. 2000)(referring to FBI use of a "false flag" operation as part of its espionage investigation). If the FBI can use "false flag" operations to identify and catch spies, then it would be implausible to assume that a foreign country would balk at trying to use "false flag" operations as part of its intelligence gathering.

39. *See, e.g.*, ISCR Case No. 00-0317 (March 29, 2002) at p. 6; ISCR Case No. 99-0295 (October 20, 2000) at pp. 7-8. In cases involving Guidelines other than Guideline B, the Board has noted that the evidence of vulnerability to coercion or blackmail is not required before an unfavorable security clearance decision can be made. *See, e.g.*, ISCR Case No. 02-06303 (August 7, 2003) at p. 3 (case involving Guidelines E and J); ISCR Case No. 01-08410 (May 8, 2002) at p. 3 (case involving Guideline F). Nothing in the Directive requires such evidence in a Guideline B case.

40. "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, Adjudicative Guidelines, Item E2.A2.1.3.1).

41. "Contact and correspondence with foreign citizens are casual and infrequent" (Directive, Adjudicative Guidelines, Item E2.A2.1.3.3).

42. *See, e.g.*, ISCR Case No. 02-26826 (November 12, 2003) at pp. 4-5; ISCR Case No. 99-0511 (December 19, 2000) at p. 10.

43. *See* ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine).