

DATE: June 27, 2003

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-04786

**APPEAL BOARD DECISION AND REVERSAL ORDER**

**APPEARANCES**

**FOR GOVERNMENT**

Jonathan A. Beyer, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

Department Counsel has appealed the January 17, 2003 decision of Administrative Judge John G. Metz, Jr., in which the Judge concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Department Counsel's appeal presents the following issue: 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.

**Procedural History**

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated April 16, 2002. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence). A hearing was held on December 11, 2002. The Administrative Judge issued a written decision, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Department Counsel's appeal.

**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 Issue<sup>(1)</sup>

The Administrative Judge made findings and reached conclusions favorable to Applicant with respect to the SOR subparagraphs alleged under Guideline C (Foreign Preference). Those findings and conclusions have not been challenged by Department Counsel. Accordingly, the Board need not address them to resolve this appeal.

The Administrative Judge concluded that Department Counsel had presented a case under Guideline B (Foreign Influence), but further concluded that the security concerns had been mitigated for several reasons:

(A) the employment of Applicant's mother with the Iranian defense ministry more than 20 years ago would not subject Applicant to any current risk of foreign influence because her mother: (i) emigrated to the United States more than 20 years ago; (ii) became a naturalized U.S. citizen in 1997; (iii) has not traveled to Iran since 1981; and (iv) is not likely to travel to Iran again since she converted to Christianity and would take significant risks if she traveled to Iran;

(B) although Applicant's father still lives in Iran, the security concerns raised by his presence there are mitigated because: (i) the Iranian government has lost whatever leverage it might have had to influence Applicant by pressuring her father; (ii) Applicant's ties of affection with her father were much stronger in the past than they are now; (iii) Applicant has seen her father only a few times in the intervening years, has little current contact with him, and has never returned to Iran to see him despite his cancer in the early 1990s; and (iv) Applicant seems unlikely to be influenced to act against United States interests on her father's behalf.

Department Counsel's brief sets forth two claims of error: (1) the Administrative Judge failed to articulate a rational basis for applying Foreign Influence Mitigating Condition 1<sup>(2)</sup>; and (2) the Administrative Judge erred by applying Foreign Influence Mitigating Condition 1 because Applicant failed to satisfy her burden of presenting sufficient evidence to warrant its application. In support of the first claim of error, Department Counsel argues: (a) Iran's long history of hostility toward the United States is undisputed; (b) Applicant's father in Iran is in a position to be exploited by the Iranian government; (c) the Judge failed to articulate a rational basis for his conclusion that "the Iranian government has lost whatever leverage it might have had with the Applicant's father in terms of influencing his behavior"; (d) the Judge erred by placing too much significance on the age of Applicant's father; and (e) the Judge gave undue weight to the "distant relationship" Applicant has with her father. In support of the second claim of error, Department Counsel argues: (f) Applicant did not make a very strong showing that her ties with her father in Iran do not pose a security risk"; (g) even though Applicant's father was not persecuted in the past, he is in a precarious position living in Iran; and (h) it is Applicant's burden to show that her father is not in a position to be exploited by the Iranian government.<sup>(3)</sup>

Department Counsel's two assignments of error, as well as its appeal arguments overlap somewhat. Taken in their totality, Department Counsel's claims of error and appeal arguments raise the issue of whether the Administrative Judge's favorable conclusions under Guideline B (Foreign Influence) are arbitrary, capricious, or contrary to law.

Department Counsel has the burden of presenting evidence to establish controverted SOR allegations. Directive, Additional Procedural Guidance, Item E3.1.14. "The 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." Directive, Additional Procedural Guidance, Item E3.1.15. The applicant's burden of persuasion includes the burden of presenting evidence sufficient to warrant application of Adjudicative Guidelines mitigating conditions. *See, e.g.*, ISCR Case No. 01-17496 (October 28, 2002) at p. 5. Because of the "clearly consistent with the national interest" standard, an applicant's burden of persuasion under Item E3.1.15 is a heavy one. *See, e.g.*, ISCR Case No. 00-0484 (February 1, 2002) at p. 3 n.2. Finally, even if a

case is a "close" one, it must be resolved in favor of the national security, not in favor of an applicant. *See, e.g.*, ISCR Case No. 01-26893 (October 16, 2002) at p. 10.

The fact that an applicant has immediate family members living in a foreign country raises security concerns under Foreign Influence Disqualifying Condition 1.<sup>(4)</sup> However, the applicability of Foreign Influence Disqualifying Condition 1 is not solely dispositive of a case. *See, e.g.*, ISCR Case No. 98-0476 (December 14, 1999) at p. 4 (rejecting Department Counsel's contention that application of Foreign Influence Disqualifying Condition 1 was dispositive of a case). Furthermore, an applicant may present evidence sufficient to warrant application of Foreign Influence Mitigating Condition 1.<sup>(5)</sup> *See* ISCR Case No. 98-0419 (April 30, 1999) at p. 5 (upholding Administrative Judge's application of earlier version of Foreign Influence Mitigating Condition 1). *Cf.* ISCR Case No. 99-0519 (February 23, 2001) at p. 12 (noting the applicant had presented a plausible argument for why the Administrative Judge could have applied Foreign Influence Mitigating Condition 1, but concluding that it was not error for the Judge to decline to apply that mitigating condition).

Department Counsel correctly notes that an applicant with immediate family members living in a country hostile to the United States has a heavy burden to show that those family ties do not pose a security risk. *See* ISCR Case No. 01-26893 (October 16, 2002) at p. 10. In this case, there is no dispute that Applicant's father lives in Iran, a country with a history of hostility toward the United States since 1979. Furthermore, the U.S. State Department has indicated the Iranian government is involved in international terrorism, supports violent opposition to the Middle East peace process, engages in threats and subversive activities against its neighbors, and has a dismal human rights record.<sup>(6)</sup> Accordingly, the hostility of the Iranian government to the United States goes beyond mere diplomatic disagreement and gives rise to significant security concerns. Accordingly, Applicant bears a heavy burden of showing that the presence of her father living in Iran does not pose a security risk. Correspondingly, the Judge could not render a favorable security clearance decision without articulating a rational basis for concluding that Applicant had successfully extenuated or mitigated the security concerns raised by the presence of her father living in Iran.

The Administrative Judge failed to articulate a rational basis for his conclusion that "the Iranian government has lost whatever leverage it might have had with the Applicant's father in terms of influencing his behavior." Such leverage does not turn on whether Applicant's father was a judge under the regime of the Shah so much as whether the Iranian government currently has the power to pressure Applicant's father through threats *vis-a-vis* his pension, his possession and use of an Iranian passport (and, therefore, his ability to travel), any property he currently owns in Iran, and other forms of harassment or worse by police, security forces, or the Revolutionary Guard in Iran. By focusing on the former position of Applicant's father as a judge, the Judge failed to take into account the simple reality of the father's present situation. Although Applicant's father's past role as a judge under the regime of the Shah might serve as a pretext or excuse for the Iranian government to exert pressure on him, the Iranian government could easily pressure him without even bothering to use that pretext or excuse.<sup>(7)</sup> A government that is involved in international terrorism, engages in threats and subversive activities against its neighbors, and has a dismal human rights record is not likely to have scruples about pressuring one of its citizens. In short, the Judge's conclusion that the Iranian government has lost any leverage over Applicant's father is not sustainable.

Similarly, the Administrative Judge failed to articulate a rational basis for his conclusion that the age of Applicant's father reduces the security risk. To the extent Applicant's father is vulnerable to the power of the Iranian government to exert pressure on him, the age of Applicant's father would seem to be irrelevant. Absent record evidence to the contrary, why should the Judge conclude that a foreign government that is involved in international terrorism, engages in threats and subversive activities against its neighbors, and has a dismal human rights record would have reservations or scruples about exerting pressure on one of its citizens merely because of his age? *See also* ISCR Case No. 02-00305 (February 12, 2003) at p. 7 (age of applicant's parents living in a foreign country does not diminish or reduce security concerns under Guideline B).

To the extent that Department Counsel argues that Applicant's "distant relationship" with her father could not be considered by the Administrative Judge, the Board is not persuaded by its argument. As part of the "whole person" concept, the nature and character of an applicant's relationship with a family member living in a foreign country is relevant. However, to the extent that Applicant argues the relative absence of affection she has for her father<sup>(8)</sup> is

dispositive under Guideline B, the Board is not persuaded by her argument. First, Guideline B is not limited to consideration of ties of affection, but rather includes consideration of ties involving "affection, influence, or obligation." *See* Directive, Enclosure 2, Item E2.A2.1.1 ("Concern" section of Guideline B). Accordingly, although the presence or absence of ties of affection can be relevant under Guideline B, it is not solely dispositive. Even in the absence of ties of affection, it is still necessary to consider whether an applicant's foreign ties involve ties of influence or obligation. Second, ties with immediate family members can involve more than just whether there is affection, or lack thereof, between two family members. Family relationships also can involve matters of influence or obligation. Third, family relationships can be complex in nature, involving more than just the one-on-one relationship between two family members. *Cf.* ISCR Case No. 01-02452 (November 21, 2002) at p. 8 ("However, the Judge reasonably could consider the significance of Applicant's wife's ties to [a foreign country] and the possible effect they may have on Applicant's conduct under Guideline B (Foreign Influence)."); ISCR Case No. 01-03120 (February 20, 2002) at p. 4 ("However, as a matter of common sense and human experience, there is a rebuttable presumption that a person has ties of affection for, *or* obligation to, the immediate family members of the person's spouse.") (italics in original). Apart from the question of whether an applicant has love or affection for a given parent, there are other considerations such as: (a) the personal, family, or social notions of respect for a parent that an applicant is expected to have or exhibit; (b) the personal, family, or social notions of obligation to a parent that an applicant is expected to have or exhibit; (c) whether an applicant has love or affection for, or a sense of obligation to, another family member who has love or affection for, or a sense of obligation to, the applicant's parent; (d) whether another family member who has love or affection for, or a sense of obligation to, an applicant's parent has influence over the applicant; and (e) to what extent an applicant may be susceptible to, or concerned about, how other people might perceive the applicant's actions or relationship with a parent.

In this case, the Administrative Judge did not err by considering the record evidence concerning Applicant's relationship with her father in Iran. However, the Judge failed to articulate a rational basis for the weight he gave to it. The Judge's analysis on this aspect of the case failed to take into account relevant considerations such as the full scope of Guideline B, the complex nature of family relationships, and the relative absence of corroborating evidence concerning Applicant's statements about the nature of her father's relationships with his family members in the United States.

Applicant argues that the Administrative Judge's favorable security clearance decision should be affirmed because: (i) she was granted a security clearance in 1995 even after the government had full knowledge of her father's situation in Iran; (ii) the foreign influence guidelines "remain essentially unchanged" since 1995; and (iii) her security eligibility today is no different from when she was granted a security clearance in 1995. Applicant's argument is not persuasive. An applicant does not have a right or vested interest in retaining a security clearance. Applicant is not entitled to retain a security clearance merely because she was granted a security clearance in 1995. *See, e.g.,* ISCR Case No. 01-21528 (July 26, 2002) at p. 3.

There is merit to Department Counsel's argument that Applicant did not make a very strong showing that her ties with her father in Iran do not pose a security risk. Given the absence of corroborating evidence from Applicant's mother or brothers, Applicant's case of extenuation and mitigation rests on her own statements about her relationship with her father. What weight the Judge reasonably could be expected to place on Applicant's statements about her relationship with her father depends, in part, on her credibility. During the hearing and in the decision, the Administrative Judge expressed some concerns about Applicant's credibility, but the Judge found "she was essentially truthful in her testimony, even if some of her characterizations of events were not entirely credible" (Decision at p. 4 n.7). Having concluded some of Applicant's characterization of events "were not entirely credible," the Judge failed to articulate a rational basis for why he resolved his doubts about Applicant's credibility.<sup>(9)</sup> Furthermore, given the Judge's own expressed reservations about Applicant's credibility, the absence of corroborating evidence from Applicant's mother or brothers is more significant in assessing whether Applicant met her burden of persuasion.

On appeal, Applicant asks the Board to follow a decision by a Hearing Office Administrative Judge in another case (ISCR Case No. 99-0009, October 3, 2000). Applicant correctly notes that a decision by a Hearing Office Judge is not legally binding, but can be cited as persuasive authority. A Hearing Office Judge's decision is not persuasive authority for a current case merely because the Judge ruled a particular way or reached a particular result in another case. The Board is under no obligation to accept a Judge's decision as persuasive authority. Applicant's reliance on the Administrative Judge's decision in ISCR Case No. 99-0009 is reasonable and understandable because of factual similarities between that case and this one. However, the Board does not find the Judge's decision in that case to be

persuasive authority because its reasoning and analysis are somewhat problematic.

The Board notes that Applicant makes a variety of arguments that support the Administrative Judge's favorable conclusions under Guideline C (Foreign Preference). As noted earlier, those favorable conclusions have not been challenged by Department Counsel. Furthermore, although there can be cases where an applicant's conduct and circumstances raise security concerns under both Guideline B and Guideline C simultaneously, the absence of a foreign preference does not preclude consideration of whether an applicant's ties with a foreign country raise questions of vulnerability to foreign influence. *See, e.g.*, 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."). Accordingly, Applicant's antipathy toward Iran is not dispositive of the security concerns (under Guideline B) raised by the presence of her father in Iran.

Our colleague's stated expression of concern about Foreign Influence Mitigating Condition 1 is not persuasive. We see no reason to change or modify our analysis of that mitigating condition because it is consistent with past Board decisions pertaining to Guideline B (Foreign Influence), and past Board decisions pertaining to the application of Adjudicative Guidelines provisions in light of the record evidence as a whole and the whole person concept. We do not believe that the resolution of this appeal involves the crossing of some "line" or "point of no return" with respect to Foreign Influence Mitigating Condition 1 that the Board has not crossed before, or which otherwise renders that mitigating condition "virtually unusable." This case does not turn on the simple question of Applicant's relationship with her father in Iran. The nature of the Iranian government, the heavy burden of persuasion that an applicant must meet in cases involving hostile countries, the relative lack of corroborating evidence to support Applicant's characterization of her relationship with her father, and the errors in the Administrative Judge's analysis identified by the Board, are pertinent as well.

### **Conclusion**

Department Counsel has met its burden of demonstrating errors that warrant reversal. Pursuant to Item E3.1.33.3 of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's favorable 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

**Separate Opinion of Administrative Judge Michael Y. Ra'anan,**

**concurring in part and dissenting in part**

I agree with my colleagues in their analysis of the Administrative Judge's discussion of Applicant's father's history in Iran.

I agree that Iran's hostility to the US, its involvement in terrorism, and suppression of human rights are all issues which must be considered in a case such as this.

I would place significant emphasis on the discrepancy between the Judge's reliance on Applicant's uncorroborated testimony to overcome disqualifying conditions and his own awareness of her credibility issues as he noted.

I differ from my colleagues in their analysis of Guideline B, mitigating condition 1. I am concerned that the Board's decisions over time are having the unintended effect of narrowing mitigating condition 1 to the point where it is virtually unusable. The majority indicates it does not understand how this decision changes the state of affairs. Put simply, with today's decision, it is hard to envision a plausible set of circumstances where the current state of Appeal Board jurisprudence would permit mitigating condition 1 to be applicable. I read the majority opinion today as saying that even where an Applicant has only one family member in a foreign country, and they are estranged from that one individual, the adjudicator must still assume that the Applicant is vulnerable via other family members to the potential exploitation of the estranged foreign family member. This comes close to rendering the mitigating condition meaningless. I take it as a given that regulatory language is intended to be meaningful and plausibly applicable to real situations. The majority cites several issues which I have noted above are not in dispute. Indeed they ought to be dispositive to the case as a whole. Those issues are also not pertinent to the problem raised here - - the majority opinion is enlarging the already heavy burden necessary to make mitigating condition 1 applicable.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. On appeal, Applicant argues that she does not have access to classified information and that she only needs a security clearance so that her employees can be assigned to work on classified projects off-site. That argument is irrelevant to this case. As long as Applicant is required to have a security clearance, her security eligibility is at issue. *Cf.* ISCR Case No. 98-0257 (January 22, 1999) at p. 3 (for purposes of adjudicating applicant's security eligibility, it does not matter whether the applicant needs a security clearance to have direct access to classified information).
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."
3. The Board construes Department Counsel's arguments as not raising any claim of error with respect to the Administrative Judge's favorable conclusions concerning the significance of the past employment of Applicant's mother with the Iranian defense ministry.
4. "An immediate member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country."
5. Quoted in footnote 2 of this decision.
6. U.S. Department of State, Bureau of Near Eastern Affairs, "Background Note: Iran," at <http://www.state.gov/r/pa/ei/bgn/5314.htm>. Official statements by the U.S. State Department concerning the foreign relations of the United States are legislative facts that can be taken into consideration by DOHA Administrative Judges or the Board in these proceedings. *See* Federal Rules of Evidence, Advisory Committee's Note to Rule 201 (discussing distinction between adjudicative facts and legislative facts). Such legislative facts are separate and distinct from adjudicative facts, which are subject to being developed through the normal adjudication process.
7. Applicant argues that the Iranian government is less likely to target her father now than it was more than 20 years ago because now "he is less likely to be a target for retaliation." The issue under Guideline B is not whether Applicant's father is likely to be a target of retaliation, but rather whether Applicant's father is in a position that could be exploited to influence or pressure Applicant.

8. The Board does not find persuasive Applicant's assertion that she "has presented overwhelming, undisputed evidence that strongly supports her assertions that her father is estranged from the rest of the family." Applicant did not present evidence from her mother or brothers to corroborate her statements about the nature of their relationship with her father. The evidence that Applicant presented to corroborate her statements about this aspect of the case (*i.e.*, the testimony of one of her employees) was limited in nature and had little probative value.

9. The Administrative Judge's apparent explanation ("Applicant might fairly be described as an intense individual who gets excited about issues that are important to her") does not provide a rational basis for concluding she is credible. Whether Applicant is "intense" or "gets excited about issues that are important to her" is irrelevant to a determination as to whether she is a credible witness.