

DATE: July 15, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-09892

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Aria Shariati, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated July 30, 2003 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 James A. Young issued an unfavorable security clearance decision dated January 27, 2004.

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 erred by reaching adverse conclusions under Guideline C (Foreign Preference); (2) whether the Administrative Judge erred by reaching adverse conclusions under Guideline B (Foreign Influence); and (3) whether the Board should remand the case to the Administrative Judge for further proceedings. 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 erred by reaching adverse conclusions under Guideline C (Foreign Preference). The Administrative Judge entered formal findings against Applicant under Guideline C based on her possession of a current Iranian passport, which she renewed at the insistence of Iranian authorities so that her children could travel to Iran with their father to visit their paternal grandmother. The Judge concluded that Applicant's possession of the Iranian passport falls under the terms of the memorandum on foreign passports issued by the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASDC3I) on August 16, 2000, and that Applicant's reason for renewing her Iranian passport was not extenuating or mitigating under Guideline C. Applicant challenges the Judge's adverse conclusions under Guideline C. In support of that challenge, Applicant argues: (a) her situation is similar to other cases in which DOHA Judges have made favorable security clearance decisions; (b) the Judge failed to take into account the facts and circumstances of her trips to Iran before she became a naturalized U.S. citizen; (c) she has not used her Iranian passport since she became a naturalized U.S. citizen; (d) she does not have a preference for Iran over the United States; (e) she does not intend to travel to Iran; (f) she tried to surrender her Iranian passport but was not allowed to do so by Iranian officials; and (g) she did not voluntarily renew her Iranian passport, but rather had it renewed under duress. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge erred.

The decisions by Hearing Office Administrative Judges in other cases cited by Applicant do not demonstrate the Administrative Judge erred in this case. A decision by a Hearing Office Judge is not legally binding precedent on another Hearing Office Judge or the Board. *See, e.g.*, ISCR Case No. 01-22606 (June 30, 2003) AT PP. 3-5. The Judge in this case was not required to follow the decisions of his colleagues in other cases, distinguish this case from the decisions of his colleagues in other cases, or reconcile his decision in this case with decisions by his colleagues in other cases.

Applicant correctly notes that the record evidence shows she used an Iranian passport to travel to Iran before she became a naturalized U.S. citizen. The Board has specifically noted that an applicant cannot be faulted for using a passport of the country of which he or she is a citizen, and that an applicant cannot be expected to obtain and use a U.S. passport before the applicant becomes a naturalized U.S. citizen.⁽¹⁾ However, the Board does not read the decision below as indicating or suggesting that the Administrative Judge was drawing adverse conclusions under Guideline C based on Applicant's use of an Iranian passport before she became a naturalized U.S. citizen.

Given the record evidence in this case, the Administrative Judge reasonably found that Applicant possesses a current Iranian passport. Indeed, Applicant does not challenge that finding on appeal. Under the terms of the ASDC3I memorandum on foreign passports, Applicant's possession of a current Iranian passport is disqualifying conduct that provides a rational basis for the Judge's adverse conclusions under Guideline C.⁽²⁾ Applicant's arguments raise a form of "legal necessity" defense. However, such a defense is precluded by the terms of the ASDC3I memorandum.⁽³⁾ Furthermore, to the extent that Applicant's arguments could be construed as questioning the wisdom or desirability of the ASDC3I memorandum, they cannot be addressed in these proceedings.⁽⁴⁾ Applicant's possession of an Iranian passport is sufficient to support the Judge's adverse conclusions under Guideline C.

2. Whether the Administrative Judge erred by reaching adverse conclusions under Guideline B (Foreign Influence). The Administrative Judge concluded that Applicant's mother, a dual United States-Iranian citizen who lives in the United States, does not pose any security concerns under Guideline B. However, the Judge entered formal findings against Applicant under Guideline B based on the facts and circumstances of her ties to her father, maternal aunt, and mother-in-law, who are citizens and residents of Iran. Applicant challenges the Judge's adverse conclusions under Guideline B. In support of that challenge, Applicant argues: (a) the Judge erred by overruling counsel's objection to a hypothetical question Department Counsel asked her sisters at the hearing; (b) the record evidence shows that she does not have strong ties with her father in Iran; (c) the Judge gave undue weight to the evidence that her father had given her and her sisters financial assistance; (d) the record evidence shows that she has ties or a relationship with her stepmother and her stepsisters living in Iran; and (e) the record evidence does not support a finding that she has connections or a relationship with her mother-in-law, who lives in Iran.

Under the Directive, DOHA proceedings are not required to be conducted in strict compliance with formal rules of evidence. Furthermore, when faced with an objection to a question posed to a witness, an Administrative Judge has broad discretion to decide whether to sustain or overrule the objection, subject to review for abuse of that discretion. Applicant's objection to the Department Counsel's question was an understandable one, but the Board does not have to agree with the Judge's ruling to conclude he did not abuse his discretion by allowing the question to be answered. Moreover, even if the Board were to assume -- solely for purposes of deciding this appeal -- that the Judge erred by overruling Applicant's objection, Applicant does not identify any particular harm or prejudice that she suffered as a result of the Judge's challenged ruling.

Applicant's disagreement with the Administrative Judge's weighing of the record evidence fails to demonstrate the Judge erred. There is no simple formula or rule of law on how a Judge must weigh record evidence. Subject to review for action that is arbitrary, capricious, or contrary to law, the Judge has discretion to weigh the record evidence. A Judge is not always faced with a case where the record evidence points all in one direction. To the contrary, it is not unusual for a Judge to be faced with conflicting record evidence, or with a record that contains some evidence that favors one side and different evidence that favors the other side. In such situations, the Judge must consider the record evidence as a whole, decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*, and reach a conclusion as to whether the applicant has met his or her burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15.⁽⁵⁾ If an appealing party challenges the Judge's weighing of the record evidence, that party must not simply disagree with the Judge's weighing of the record evidence, but rather must articulate a cogent reason or argument for how the Judge erred in weighing the record evidence. Similarly, if an appealing party challenges a Judge's conclusions, that party must not simply disagree with the Judge's conclusions, but rather must articulate a cogent reason or argument for how the Judge's conclusions are arbitrary, capricious, or contrary to law.

Moreover, some of Applicant's arguments are not persuasive because they are based on a piecemeal analysis of the record evidence. The Administrative Judge was not required to consider the facts and circumstances of Applicant's ties

with family members living in Iran, one family member at a time. To the contrary, the Judge had to consider the totality of Applicant's ties with family members living in Iran.⁽⁶⁾ Accordingly, even if a plausible argument could be made that the facts and circumstances of Applicant's ties with a particular family member living in Iran, standing alone, would not be sufficient to support adverse conclusions under Guideline B (Foreign Influence), such an argument would not demonstrate the Judge erred in this case.

Finally, given the record evidence in this case, the Administrative Judge had a rational basis for concluding that the totality of the facts and circumstances of Applicant's ties with family members living in Iran raises security concerns under Guideline B (Foreign Influence). Applicant's disagreement with that conclusion is not sufficient to demonstrate the Judge's conclusion is arbitrary, capricious, or contrary to law.

3. Whether the Board should remand the case to the Administrative Judge for further proceedings. Applicant asks the Board to reverse the Administrative Judge's decision. In the alternative, Applicant asks the Board to remand the case to the Judge "to determine the exact grounds for the Administrative Judge's decision pertaining to Guideline B allegations enumerated in [SOR paragraph] 2(c).

As discussed earlier in this decision, the Board concludes Applicant's claims of error are not persuasive. Accordingly, Applicant has failed to demonstrate any basis upon which the Board would be justified in reversing the Administrative Judge's decision. Furthermore, since Applicant has failed to demonstrate error below, she is not entitled to have her case remanded to the Judge for further explanation of his decision.

Conclusion

The Board affirms the Administrative Judge's security clearance decision because Applicant has failed to demonstrate error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. *See, e.g.*, ISCR Case No. 02-00318 (February 25, 2004) at p. 4.
2. Under the ASDC3I memorandum, clearance must be denied or revoked unless an applicant surrenders his or her foreign passport, or he or she obtains official approval for its use from the appropriate U.S. government agency.
3. *See, e.g.*, ISCR Case No. 99-0511 (December 19, 2000) at p. 12 (ASDC3I memorandum on foreign passports

overruled or superseded prior Board decisions that held an applicant's possession and use of a foreign passport could be extenuated or mitigated when it was based on legal necessity).

4. *See, e.g.*, ISCR Case No. 02-07625 (May 24, 2004) at pp. 3-4; ISCR Case No. 01-01331 (February 27, 2002) at p. 4.

5. "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."

6. *See, e.g.*, ISCR Case No. 01-22693 (September 22, 2003) at p. 7 (rejecting argument that an Administrative Judge should analyze the security significance of each of the applicant's family members living abroad on an individual, piecemeal basis). *See also* ISCR Case No. 02-01093 (December 11, 2003) at p. 4 (a Judge must not evaluate the facts and circumstances of an applicant's case in an artificial, piecemeal manner).