

DATE: December 14, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-10601

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated September 3, 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 Kathryn Moen Braeman issued an unfavorable security clearance decision, dated September 1, 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 Board can consider evidence of what Applicant has done with respect to his Iranian passport since the close of the record evidence; and (2) whether the Administrative Judge should have made a favorable security clearance decision based on an evaluation of the Adjudicative Guidelines provisions pertaining to Guideline C (Foreign Preference). 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 Issue⁽¹⁾

1. Whether the Board can consider evidence of what Applicant has done with respect to his Iranian passport since the close of the record evidence. The Administrative Judge found that Applicant had possessed and used an Iranian passport in the past, and that Applicant possesses a current Iranian passport. Applicant does not challenge those findings on appeal. However, Applicant makes assertions about what he was done with his Iranian passport since he submitted his response to the File of Relevant Material in January 2004.

Applicant's statements about what he has done since the close of the record evidence constitute a proffer of new evidence. The Board reviews an Administrative Judge's decision based on the record evidence that was before the Judge, and cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. In this case, the record evidence was closed with Applicant's response to the File of Relevant Material. Accordingly, the Board cannot consider Applicant's statements about what he has done since he submitted his response to the File of Relevant Material.

2. Whether the Administrative Judge should have made a favorable security clearance decision based on an evaluation of the Adjudicative Guidelines provisions pertaining to Guideline C (Foreign Preference). Applicant recites the disqualifying and mitigating conditions under Guideline C and argues that: (a) the disqualifying conditions do not apply to him; and (b) the mitigating conditions do apply to him. The Board construes Applicant's brief as raising the issue of whether the Administrative Judge should have made a favorable security clearance decision based on an evaluation of the Adjudicative Guidelines pertaining to Guideline C. When a Judge's application of the Adjudicative Guidelines is challenged on appeal, the Board must consider whether the appealing party has shown the Judge's application is (i) not supported by the record evidence; (ii) arbitrary or capricious; or (iii) contrary to law. *See, e.g.*, ISCR Case No. 02-15539

(April 29, 2004) at p. 4.

The Administrative Judge did not apply Foreign Preference Disqualifying Conditions 3 through 9 in making her security clearance decision. Accordingly, Applicant's arguments concerning those disqualifying conditions are moot and need not be addressed by the Board.⁽²⁾

Applicant's arguments concerning Foreign Preference Disqualifying Conditions 1⁽³⁾ and 2⁽⁴⁾ do not demonstrate the Administrative Judge erred by applying them in this case. The record evidence concerning Applicant's possession and use of an Iranian passport provided a rational basis for the Judge to conclude those two disqualifying conditions should be applied in this case.

Applicant's arguments concerning the applicability of Foreign Preference Mitigating Conditions 1,⁽⁵⁾ 2,⁽⁶⁾ and 3⁽⁷⁾ also do not demonstrate the Administrative Judge erred. Because Applicant's possession and use of an Iranian passport continued after he became a naturalized U.S. citizen in 1999, the Judge was not compelled to conclude Applicant's conduct was mitigated under Foreign Preference Mitigating Conditions 1 and 2. *See, e.g.*, ISCR Case No. 00-0489 (January 10, 2002) at pp. 10-11 (conduct by an applicant which is probative of a foreign preference can be considered under Guideline B even though it occurred after the applicant became a naturalized U.S. citizen). Applicant's reliance on a State Department advisory about the use of passports is misplaced. The State Department advisory is not binding on the Department of Defense with respect to its adjudication of security clearance cases, and it does not satisfy the requirements of the August 16, 2000 Department of Defense memorandum concerning foreign passports. *See, e.g.*, ISCR Case No. 00-0489 (January 10, 2002) at p. 8; ISCR Case No. 99-0424 (February 8, 2001) at pp. 5-6. Therefore, Applicant was not entitled to have the Judge apply Foreign Preference Mitigating Condition 3.

The Board need not decide whether the Administrative Judge should have applied Foreign Preference Mitigating Condition 4⁽⁸⁾ in this case, as argued by Applicant. Even if the Board were to assume -- solely for purposes of deciding this appeal -- that the Judge erred by not applying Foreign Preference Mitigating Condition 4, such an error would be harmless. Given the record evidence of Applicant's continued possession of an Iranian passport, the Judge correctly concluded that an unfavorable security clearance decision was warranted under the terms of the August 16, 2000 Department of Defense memorandum concerning foreign passports. The Judge could not apply Foreign Preference Mitigating Condition 4 to supersede or avoid the application of that memorandum. *See, e.g.*, ISCR Case No. 01-22693 (September 22, 2003) at p. 6.

Conclusion

Except for the possibility of one instance of harmless error, Applicant has not demonstrated that the Administrative Judge's unfavorable security clearance decision is arbitrary, capricious, or contrary to law. Accordingly, the Board affirms the Judge's unfavorable 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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to Guideline B (Foreign Influence). Those formal findings are not at issue on appeal.
2. Because Applicant's arguments concerning these disqualifying conditions are moot, the language of each disqualifying condition is not pertinent to the resolution of this appeal.
3. "The exercise of dual citizenship" (Directive, Adjudicative Guidelines, Item E2.A3.1.2.1).
4. "Possession and/or use of a foreign passport" (Directive, Adjudicative Guidelines, Item E2.A3.1.2.2).
5. "Dual citizenship is based solely on parents' citizenship or birth in a foreign country" (Directive, Adjudicative Guidelines, Item E2.A3.1.3.1).
6. "Indicators of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship" (Directive, Adjudicative Guidelines, Item E2.A3.1.3.2).
7. "Activity is sanctioned by the United States" (Directive, Adjudicative Guidelines, Item E2.A3.1.3.3).
8. "Individual has expressed a willingness to renounce dual citizenship" (Directive, Adjudicative Guidelines, Item E2.A3.1.3.4).