

DATE: August 24, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-11269

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 August 7, 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) and Guideline C (Foreign Preference). Administrative Judge Darlene Lokey Anderson issued an unfavorable security clearance decision dated April 29, 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 concluding Applicant has a foreign preference under Guideline C; and (2) whether the Administrative Judge erred by concluding Applicant could be subject to foreign influence under Guideline B. 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 concluding Applicant has a foreign preference under Guideline C. The Administrative Judge concluded Applicant (who became a naturalized U.S. citizen in 1993) demonstrated a foreign preference under Guideline C because: (a) he wanted to maintain his Turkish citizenship to protect his financial interests in Turkey (which include real estate worth approximately \$100,000 that he expects to inherit from his parents in Turkey, and possible survivor benefits from his father's Turkish military pension); and (b) he stated he is not willing to renounce his Turkish citizenship because renunciation of his Turkish citizenship could jeopardize his inheritance rights and the inheritance rights of his children. ⁽¹⁾

On appeal, Applicant does not challenge the Administrative Judge's findings of fact, but contends that the Judge erred by concluding the evidence shows he has a foreign preference under Guideline C. In support of this contention, Applicant argues: (i) his father passed away earlier this year; (ii) he pledged allegiance to the United States when he became a naturalized U.S. citizen in 1993; (iii) his preference is for the United States, where he has chosen to live and raise his children; and (iv) his interest in retaining his Turkish citizenship is solely for financial reasons rather than emotional ones.

Applicant's assertion about his father passing away constitutes new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. And, even if Applicant's assertion about his father passing away were not new evidence, it would not demonstrate the Administrative Judge erred in this case. The Judge did not base her conclusions under Guideline C (Foreign Preference) on Applicant's father being alive and living in Turkey.

The Administrative Judge specifically noted Applicant became a naturalized U.S. citizen in 1993. However, that fact did not preclude the Judge from taking into account the record evidence concerning Applicant's desire to maintain his

Turkish citizenship to protect his financial interests in Turkey, and his stated unwillingness to renounce his Turkish citizenship because he did not want to jeopardize his inheritance rights or the inheritance rights of his children.⁽²⁾ Even if Applicant's motivation to maintain Turkish citizenship is based purely on financial reasons, such reasons do not preclude a finding of foreign preference under Guideline C.⁽³⁾

The Administrative Judge had to consider the record evidence concerning Applicant's statements about his preference for the United States. However, that evidence was not binding or conclusive on the Judge, who had to consider and weigh it in light of the record evidence as a whole, including evidence of Applicant's conduct and circumstances that is indicative of a foreign preference.⁽⁴⁾ Applicant's statements about his preference for the United States did not preclude the Judge from considering the security significance of the record evidence showing Applicant wants to protect his ability to exercise the rights and privileges of Turkish citizenship for personal, financial reasons.⁽⁵⁾

Given the record evidence in this case, Applicant's appeal arguments -- considered individually or cumulatively -- do not demonstrate it was arbitrary, capricious, or contrary to law for the Administrative Judge to conclude Department Counsel had presented evidence showing Applicant has a foreign preference under Guideline C, and that Applicant had not presented evidence that extenuated or mitigated the security concerns raised under Guideline C.

2. Whether the Administrative Judge erred by concluding Applicant could be subject to foreign influence under Guideline B. The Administrative Judge concluded Applicant could be subject to foreign influence under Guideline B because: (a) his parents and a brother are citizens and residents of Turkey; (b) his ties with his parents are very close; (c) he has financial interests in Turkey that he wishes to protect; and (d) he did not present evidence that extenuated or mitigated the facts and circumstances that make him vulnerable to foreign influence.

On appeal, Applicant does not challenge the Administrative Judge's findings of fact, but contends the Judge erred by concluding the evidence shows he is vulnerable to foreign influence under Guideline B. In support of this contention, Applicant argues: (i) his father passed away earlier this year; (ii) in the last 15 years, his trips outside the United States have been infrequent; (iii) his interest in retaining his Turkish citizenship is solely for financial reasons rather than emotional ones; and (iv) his parents' estate is only a modest one that he wishes to protect as a "future source of financial support for my two young children."

As discussed earlier in this decision, Applicant's assertion about his father passing away constitutes new evidence, which the Board cannot consider on appeal. And, even if Applicant's assertion about his father passing away were not new evidence, it would not demonstrate the Administrative Judge's adverse conclusions under Guideline B are flawed. At the time the record closed, Applicant's father was alive. Furthermore, the Judge's conclusions under Guideline B were not based solely on the fact that the record evidence showed Applicant's father was alive and living in Turkey. Rather, the Judge's conclusions under Guideline B were based on the totality of Applicant's family ties with close relatives in Turkey and his financial interests in Turkey.

Applicant's statements about his trips outside the United States do not demonstrate the Administrative Judge erred. The SOR issued to Applicant did not allege his trips outside the United States gave rise to any security concerns under Guideline B or Guideline C. Furthermore, the Judge did not base her conclusions under Guideline B or Guideline C on the record evidence of Applicant's trips outside the United States. Applicant's statement about his trips outside the United States do not identify any factual or legal error in the Judge's decision.

The financial nature of Applicant's motives for wanting to protect his inheritance rights in Turkey did not preclude the Administrative Judge from considering the security significance of Applicant's conduct and circumstances under Guideline B.⁽⁶⁾ Even if Applicant is motivated solely by financial concerns, it was not arbitrary, capricious, or contrary to law for the Judge to conclude Applicant's conduct and circumstances in relation to his Turkish inheritance rights raise security concerns under Guideline B.

Given the record evidence in this case, Applicant's appeal arguments -- considered individually or cumulatively -- do not demonstrate it was arbitrary, capricious, or contrary to law for the Administrative Judge to conclude Department Counsel had presented evidence showing Applicant has a foreign preference under Guideline B, and that Applicant had

not presented evidence that extenuated or mitigated the security concerns raised under Guideline B.

Conclusion

Applicant has not demonstrated error below. Therefore, the Board affirms the Administrative Judge's security clearance decision.

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. Although the Administrative Judge found Applicant also was reluctant to renounce his Turkish citizenship because of his emotional ties to Turkey (Decision at p. 3), it is not clear from the decision below whether the Judge considered that finding as pertinent only to Guideline B (Foreign Influence) or as pertinent to that Guideline and Guideline C (Foreign Preference).

2. *See, e.g.*, ISCR Case No. 99-0424 (February 8, 2001) at p. 12 (evidence that an applicant took the oath of allegiance to become a naturalized U.S. citizen is not dispositive; the Administrative Judge must also consider record evidence of an applicant's conduct and circumstances after the applicant became a naturalized U.S. citizen).

3. *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (security significance of the exercise of rights of foreign citizenship is not negated or reduced just because it is based on purely personal reasons); ISCR Case No. 98-0476 (December 14, 1999) at p. 5 (fact that an applicant is motivated by personal financial interest does not negate or diminish security significance of the applicant's interest in retaining foreign citizenship).

4. *Cf.* ISCR Case No. 98-0507 (May 17, 1999) at p. 6 ("An applicant's stated intentions concerning retention or renunciation of foreign citizenship constitute relevant and material evidence. However, such stated intentions are not dispositive. Such statements of intent must be evaluated in light of the record evidence as a whole to determine whether they are consistent with an applicant's conduct.").

5. *See, e.g.*, ISCR Case No. 99-0424 (February 8, 2001) at p. 15 (actions taken by an applicant to exercise the rights or privileges of foreign citizenship on an ad hoc, situational basis can be indications of a foreign preference under Guideline C).

6. As discussed earlier in this decision, conduct does not lose its security significance under Guideline C (Foreign Preference) just because it is based on personal, financial motives. Similarly, an applicant's personal, financial motives

do not reduce the security significance of conduct or circumstances that give rise to security concerns under Guideline B (Foreign Influence). Even if an applicant does not intend to place himself or herself in a position of possible vulnerability to foreign influence, an Administrative Judge must consider whether the applicant's conduct and circumstances have the practical effect of placing the applicant in such a position.