

DATE: September 7, 2005

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-11083

**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 March 5, 2004, 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 E (Personal Conduct). Administrative Judge Claude R. Heiny issued an unfavorable security clearance decision, dated March 2, 2005.

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.

Applicant's appeal presents the issue of whether the Administrative Judge's adverse conclusions were arbitrary, capricious, or contrary to law. For the reasons that follow, the Board affirms the 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 <sup>(1)</sup>

Applicant discusses his interpretation of the record evidence without specific reference to the Administrative Judge's decision or any provision of the Directive. The Board construes Applicant's brief as raising the issue of whether the Administrative Judge's adverse conclusions were arbitrary capricious, or contrary to law.

The Administrative Judge found that Applicant's mother is a U.S. permanent resident currently living in Jordan and that Applicant has six siblings who are foreign citizens and reside in Jordan, Kuwait and Saudi Arabia. The Judge concluded that Applicant's overseas immediate family were covered by Guideline B (Foreign Influence) Disqualifying Condition 1 (DC1) <sup>(2)</sup> and that the government's security concerns were not mitigated. The Judge made favorable findings under Guideline E (Personal Conduct) and under 12 subparagraphs of Guideline B which are not at issue on appeal.

The Board concludes that the Administrative Judge's unchallenged findings of fact are sufficient to support his conclusion that DC1 is applicable to Applicant's circumstances. Applicant discusses reasons why he believes that his relatives in foreign countries should not present a substantial obstacle to Applicant having a security clearance. Those reasons include: Applicant's commitment to the United States and to his children who live here; Applicant's assurances as to how he would respond to an attempt to exploit his relatives; Applicant's belief that his contact with his foreign immediate family members is casual in nature; the nature of his relatives' employment; and Applicant's discretion about his own employment.

There is a rebuttable presumption that the Administrative Judge considered all the record evidence unless he states otherwise, and Applicant's ability to cite record evidence that he believes the Judge should have given greater weight does not overcome this presumption or indicate the Judge ignored the evidence. Mere disagreement with the Judge's weighing of the evidence is not sufficient to demonstrate error without a showing that the weighing was arbitrary, capricious or contrary to law. *See, e.g.*, ISCR Case No. 03-11293 (March 24, 2005) at p. 4. Moreover, none of Applicant's assertions, taken individually or cumulatively, obligated the Judge to conclude that Applicant had overcome

the government's security concerns raised by the presence of Applicant's immediate family members in foreign countries. Given the doubts as to Applicant's security suitability raised by the circumstance of Applicant having immediate family in foreign countries, it was proper for the Judge to resolve those doubts in the government's favor. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

### **Conclusion**

Applicant has failed to demonstrate that the Administrative Judge's decision was in error. The Board affirms the Judge's March 2, 2005 decision.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. Applicant's brief includes some factual assertions that go beyond the record evidence. Such assertions constitute new evidence, which the Board cannot consider. *See Directive, Additional Procedural Guidance, Item E3.1.29.*

2. "An immediate family 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" *See Directive, Adjudicative Guidelines, Item E2.A2.1.2.1.*