

DATE: December 19, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-12372

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

Eric R. Stanco, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated November 7, 2002 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), Guideline C (Foreign Preference), and Guideline F (Financial Considerations). Administrative Judge Matthew E. Malone issued an unfavorable security clearance decision dated July 18, 2003.

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 brief raises the issues of (1) whether the Administrative Judge reached conclusions in his decision that are not supported by the record evidence; and (2) whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

#### **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. Whether the Administrative Judge reached conclusions in his decision that are not supported by the record evidence.

Applicant asserts that the following conclusions reached by the Administrative Judge are not supported by the record evidence: (a) with regard to Guideline B (Foreign Influence), Applicant's ties of affection are strongest with his family members in Italy as opposed to his children, who live in the United States; (b) with regard to Guideline B, Foreign Influence Mitigating Condition 1 <sup>(1)</sup>

did not apply to one of Applicant's brothers living in Italy; (c) with regard to Guideline C (Foreign Preference), Applicant's lack of sufficient relationships with U.S. citizens was a motivator in Applicant's obtaining of dual citizenship (with Italy) for himself and his family and Applicant's obtaining of Italian citizenship in 1997 and his subsequent temporary residence in Italy indicated a preference for that country; and (d) with regard to Guideline F (Financial Considerations), Applicant's debts remain unresolved and are unmitigated. Applicant's contentions have mixed merit.

(a) In his decision, the Administrative Judge concluded that Applicant's ties of affection are strongest with his family members in Italy, who are the people with whom he has the most contact. <sup>(2)</sup>

The Judge also concluded that his ties to his children have been attenuated through marital separation and divorce, by the fact that his children have lived continuously in the United States, and by the fact that Applicant has not lived in the United States since October 2000. <sup>(3)</sup>

Applicant asserts on appeal that there is no evidence in the record to suggest that Applicant's affections are stronger for his family members in Italy than for his own children in the United States. Applicant is correct in stating that there is no

direct evidence that touches on the strength of Applicant's relationship to his family in Italy relative to his relationship to his children in the United States. The record contains only objective evidence of the frequency of contact with Applicant's Italian relatives (weekly to monthly telephonic contact and occasional trips to Italy prior to 2000), the fact that Applicant lived in Italy from 2000 to 2003 (initially due to his employment, but Applicant remained in Italy for a time after he became unemployed), and Applicant's contacts with his children, principally his daughter. Although Applicant and his wife divorced in 1999 and his son lives with his ex-wife while his daughter goes to college, there is no evidence that Applicant is estranged from his children.

Since there is no direct evidence that Applicant has stronger ties of affection to his Italian relatives as compared to his children, the issue is whether the Administrative Judge's conclusion that Applicant has stronger ties to the former can be reasonably inferred from the record. The Board holds that it cannot. Applicant has established error on the part of the Administrative Judge.

(b) The Administrative Judge concluded that, while Foreign Influence Mitigating Condition 1 "might apply to Applicant's parents and one of his brothers," Applicant had provided insufficient information to enable the application of the mitigating condition to his other brother. The Administrative Judge stated "Applicant's somewhat cryptic reference to his other brother's employment by a defense contractor does nothing to clarify any possible involvement by his brother with foreign interests." On appeal, Applicant asserts that there was nothing "cryptic" in Applicant's testimony regarding his brother's employment. Applicant correctly points out that he testified simply that his brother was employed by a European subsidiary of an American defense contractor and that there was no other evidence presented on the issue of his brother's employment. Applicant also asserts on appeal that there is nothing in the record that would suggest his brother's involvement with foreign interests and thus nothing to undermine the applicability of Foreign Influence Mitigating Condition 1 to his brother.

The Administrative Judge's discussion of the applicability of Foreign Influence Mitigating Condition 1 to Applicant's Italian relatives is not a model of clarity. His use of the word "cryptic" in describing the evidence about the one brother's employment with an American defense contractor seems misplaced. The evidence about the brother's employment is straightforward as far as it goes. Nevertheless, the Judge does correctly state that the burden is on Applicant to establish the applicability of the mitigating condition, and he also states that Applicant has provided insufficient evidence about the brother to meet that burden. Given the fact that Foreign Influence Mitigating Condition 1 requires that Applicant establish not only that his Italian relatives are not agents of a foreign government, but are also not in a position to be exploited by a foreign government, the Judge's conclusion that the mitigating condition did not apply to Applicant's one brother was not error.

(c) On appeal, Applicant takes issue with the Administrative Judge's conclusions regarding Applicant's motivations for applying for and obtaining Italian citizenship in 1997 for himself and his family after having previously obtained United States citizenship in 1990. The Administrative Judge concluded that Applicant acted to preserve the rights of Italian citizenship for his children in part because he never developed sufficient contacts in the United States to care for them should anything happen to him and his wife. Applicant argues that there is no record evidence to support this conclusion. Applicant correctly points out that there is no record evidence regarding Applicant's relationship with friends in the United States. He asserts that it was unreasonable for the Judge to conclude that Applicant did not have such relationships simply because he desired that his immediate family in Italy care for his children in the event something happened to him and his wife. Applicant's claim of error on this point has merit. The Judge's conclusion is not supported by the record evidence.

Applicant also complains that the Administrative Judge erroneously concluded that Applicant's obtaining of dual citizenship indicated a preference for Italy. On appeal, Applicant emphasizes in his hearing testimony that he did not apply for Italian citizenship status in 1997 in order to obtain any benefit for himself but to obtain that status for his children (ostensibly to make it easier for the children to enter Italy permanently in the future should their adoption by Applicant's Italian relatives be necessary). The Applicant's testimony was evidence that the Administrative Judge was bound to consider when deciding the important question of whether Applicant's re-obtaining of Italian citizenship in 1997 manifested a foreign preference. However, the Judge was not bound by that evidence. He was required to evaluate it in light of all the other evidence in the case before reaching conclusions about Applicant's true motivations and whether those motivations indicated a foreign preference. Given the totality of the record evidence, the Administrative

Judge's conclusion that Applicant's actions in 1997 indicated a foreign preference is sustainable.

Applicant also argues on appeal that it was unreasonable for the Administrative Judge to cite Applicant's residence in Italy from 2000 to 2003 along with a lack of residence, interests, and ties to the United States in support of his conclusion that Applicant had a preference for Italy. He states that the Judge's conclusion ignores the fact that Applicant had yielded all his marital assets to his wife in their 1999 divorce and that his children still live in the United States. While Applicant fails to explain how assets ceded to his wife would still constitute interests that Applicant has in the United States, he is correct in pointing out that his children's presence here constitutes a significant interest. While the Administrative Judge has overstated the matter when concluding that Applicant has virtually no reason to stay in the United States, his concerns about the fact that Applicant has no residence in the United States and he continues to seek future employment overseas are not misplaced, notwithstanding the residence of his children. It was not error for the Judge to consider these factors, along with other record evidence when concluding that Applicant has exhibited an unmitigated preference for Italy.

(d) Regarding the Administrative Judge's adverse conclusions under the Financial Considerations guideline (Guideline F), Applicant takes issue with the Judge's conclusion that Applicant failed to provide sufficient information to establish that three debts listed in the SOR had been resolved.<sup>(4)</sup>

Applicant asserts that it is clear he obtained an unqualified discharge of the debts as the result of a 2002 bankruptcy. A review of the record indicates that the evidence of debt resolution consists of Applicant's own testimony regarding the nature and scope of the bankruptcy plus a one-page document that evidences the fact of bankruptcy discharge.<sup>(5)</sup>

The Administrative Judge was required to consider this evidence when reaching his findings and conclusions regarding the status of Applicant's debts. He was not, however, required to accept Applicant's claims of debt resolution through bankruptcy discharge at face value. A reading of his decision reveals that the Judge was clearly troubled by the lack of corroborating evidence as to whether the specific debts listed in the SOR had in fact been included in the bankruptcy discharge. The document provided by Applicant provided no information regarding the resolution of specific debts. Given the state of the evidence, the Judge's conclusion that the security concerns raised by the debts had not been mitigated is sustainable.

Additionally, under Guideline F, Applicant asserts that the Judge's conclusion that Applicant's business and personal affairs have been characterized by leveraged transactions and large amounts of personal debt is contrary to another conclusion that Applicant's business failure was the result of circumstances beyond the Applicant's control. Applicant's argument lacks merit. The record evidence supports both conclusions. The Administrative Judge reasonably concluded that, while it was the breach of a lease by a third party that precipitated Applicant's financial collapse, the overall leveraged state of Applicant's business and personal finances before the breach made him vulnerable to a business setback and forestalled his financial recovery.

## 2. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

Applicant's assertion that the Administrative Judge's conclusions are arbitrary, capricious, or contrary to law is essentially subsumed by his specific arguments that are addressed in the preceding section of this decision. As indicated in that section, while Applicant has established error as to some of the Judge's conclusions, he failed to establish error as to others. Moreover, upon a reading of the Judge's decision, the Board notes that there were numerous bases for the Judge's overall adverse security clearance determination that were not challenged on appeal. There is no presumption of error below and the appealing party has the burden of raising and demonstrating factual or legal error by the Administrative Judge. See, e.g., ISCR Case No. 00-0051 (July 23, 2001) at p. 3. Accordingly, Applicant has failed to carry his burden of showing that the Administrative Judge's decision was unsustainable.

### **Conclusion**

Applicant has failed to demonstrate harmful error below. Therefore, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. "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."

2. Applicant's family members in Italy include his mother, his father, and two brothers.

3. The record evidence did establish that Applicant returned to the United States early in 2003 after a prolonged stay in Italy (slightly less than three years).

4. Applicant readily admits that a fourth debt listed in the SOR, a student loan, is delinquent and remains outstanding.

5. Applicant's Exhibit A.