

DATE: May 10, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-13595

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Francisco Mendez, Esq., Department Counsel

FOR APPLICANT

Patricia G. Mattos, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated September 10, 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), Guideline C (Foreign Preference), and Guideline E (Personal Conduct). Administrative Judge Philip S. Howe issued a favorable security clearance decision, dated October 26, 2004.

Department Counsel appealed the Administrative Judge's favorable 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's conclusion that Applicant mitigated the security concerns raised under Guideline B (Foreign Influence) was arbitrary, capricious and unsupported by the record evidence; and (2) whether the Administrative Judge's conclusion that Applicant mitigated his exercise of dual citizenship under Guideline C (Foreign Preference) was arbitrary, capricious and unsupported by the record evidence. For the reasons that follow, the Board reverses 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⁾

1. Whether the Administrative Judge's conclusion that Applicant mitigated the security concerns raised under the Guideline B (Foreign Influence) was arbitrary, capricious and unsupported by the record evidence. The Administrative Judge found that Applicant has a mother and two sisters that are citizens of Iran and currently reside in that country. The Judge also found that Applicant's brother is an Iranian citizen living in the United States. The Administrative Judge concluded that

Foreign Influence Mitigating Condition 1⁽²⁾ applied and concluded that Applicant had successfully mitigated the government's concerns under the Foreign Influence Guideline. Department Counsel on appeal asserts that the Judge's conclusions are arbitrary, capricious and unsupported by the record evidence. Department Counsel's assertion has merit. For the reasons that follow, the Board concludes the Administrative Judge failed to articulate a sustainable basis for his favorable conclusions under Guideline B (Foreign Influence).

Department Counsel correctly notes that the record evidence concerning Applicant's mother and two sisters living in Iran raises security concerns under Guideline B (Foreign Influence) and that the burden of persuasion shifted to Applicant to present evidence sufficient to address those security concerns such that "it is clearly consistent with the national interest" to grant or continue access to classified information for Applicant.⁽³⁾ The Judge had to consider the totality of Applicant's conduct and circumstances and evaluate whether Applicant had presented sufficient evidence to extenuate or mitigate the security concerns raised by his mother and two sisters living in Iran. Given the clearly consistent with the national interest standard, Applicant had a very heavy burden of persuasion to overcome the security concerns raised by the fact that his mother and two sisters live in Iran. *See, e.g.*, ISCR Case No. 02-02195 (April 9,

2004) at pp. 3-4.

Department Counsel asserts that the Administrative Judge's decision is bare of any mention of the hostile relationship between the Iran and the United States. The Board notes that the Judge does make mention of "tension" between the U.S. and Iran when discussing Applicant's use of an Iranian passport. However, the Judge fails to analyze or discuss the significance of the presence of Applicant's immediate family members in Iran given the record evidence concerning the nature of the Iranian government and the relationship of that government to the United States. The single passage that mentions "tension" in the Judge's decision is not a substitute for the Judge's obligation to address that aspect of the case in his decision.⁽⁴⁾ The Judge failed to discuss a significant aspect of the case. That failure leaves his analysis under Guideline B (Foreign Influence) strained, incomplete, and indicative of arbitrary and capricious action. *See, e.g.*, ISCR Case No. 02-02195 (April 9, 2004) at pp. 4-5 (discussing the significance of a Judge's failure to mention or discuss significant record evidence that runs contrary to the Judge's findings and conclusions); ISCR Case No. 02-00318 (February 24, 2004) at pp. 7-8 (same).

Department Counsel asserts the Administrative Judge's application of Foreign Influence Mitigating Condition 1 is not sustainable because: (a) application of the mitigating condition runs contrary to the Judge's own findings about the facts and circumstances of Applicant's ties with immediate family members in Iran; (b) the Judge's analysis fails to give proper weight to the record evidence that Iran is hostile to the United States and had demonstrated a willingness to violate the rights of its own citizens; (c) application of the mitigating condition runs contrary to the weight of the record evidence as a whole; and (d) the Judge failed to articulate a rational basis for his application of that mitigating condition. Applicant counters by arguing the Judge properly applied Foreign Influence Mitigating Condition 1 because: (i) Applicant's immediate family members in Iran have no ties with the Iranian government; (ii) Applicant's mother is elderly and has spent her life as a homemaker; (iii) Applicant's sisters and brothers-in-law are simple people with no contacts with the Iranian government; and (iv) Applicant has been living in the United States for many years and has strong ties to the United States.

As Department Counsel correctly notes, the absence of evidence that Applicant's immediate family members living in Iran have ties with the Iranian government satisfies the first prong, but not the second prong of Foreign Influence Mitigating Condition 1. Because Foreign Influence Mitigating Condition 1 is bifurcated in nature, the absence of evidence that Applicant's immediate family members have any ties with the Iranian government does not warrant application of that mitigating condition. *See, e.g.*, ISCR Case No. 02-24254 (June 29, 2004) at pp. 4-5. Moreover, once the Administrative Judge concluded that Applicant's immediate family members in Iran were in a position to be exploited by the Iranian government in a way to force Applicant to choose between his family members and the United States (Decision at p. 7), the plain language of Foreign Influence Mitigating Condition 1 precluded the Judge from applying that mitigating condition to Applicant's case.

The fact that Applicant's mother is elderly is not supportive of applying Foreign Influence Mitigating Condition 1 because there is no record evidence that provides the Administrative Judge with a rational basis for concluding that the age of Applicant's mother confers any protection on her *vis-a-vis* the Iranian government. *See, e.g.*, ISCR Case No. 02-04786 (June 27, 2003) at pp. 5-6 (Judge failed to articulate any rational basis for his conclusion that the age of the applicant's father reduced the security risk under Guideline B).

Similarly, there is no record evidence that provides support for the Administrative Judge's (and Applicant's) implicit assumption that the Iranian government would be interested in targeting family members of applicants only when those family members are, in their own right, prominent persons. The evidence presented by Department Counsel concerning Iran's human rights record shows that the Iranian government does not target only prominent Iranian citizens. Moreover, the security concerns raised by Applicant's ties with immediate family members living in Iran arise due to the potential for the Iranian government to seek to influence or pressure Applicant because of his access to classified U.S. information, not because of the identity or status of his immediate family members living in Iran. The Iranian government's potential interest in Applicant would be based on his access to classified U.S. information, not the identity or status of his immediate family members living in Iran.⁽⁵⁾ There is no reason to assume that a foreign government interested in gaining unauthorized access to classified U.S. information would focus on applicants with access to such information only if the applicants have prominent family members living abroad.⁽⁶⁾ A foreign government can seek to exert influence or pressure on applicants with immediate family members living in the foreign country regardless of

whether the applicant's family members are prominent persons or ordinary persons without any prominence.

The record evidence as a whole supports the Administrative Judge's conclusion that Applicant's immediate family members in Iran are in a position to be exploited by the Iranian government in a way to force Applicant to choose between his family members and the United States. Neither the absence of any evidence that Applicant wishes to inherit property from his mother, nor the evidence of Applicant's ties with the United States, negates or diminishes the dilemma Applicant would be faced with if the Iranian government were to seek to exert influence or pressure on him because of his ties with immediate family members living in Iran. Because neither factor would relieve Applicant from the dilemma of being forced to choose between his family members and the United States, neither factor provides a rational basis for the Judge to apply Foreign Influence Mitigating Condition 1 in this case.

2. Whether the Administrative Judge's conclusion that Applicant mitigated his exercise of dual citizenship under Guideline C (Foreign Preference) was arbitrary, capricious and unsupported by the record evidence. Under Guideline C (Foreign Preference) the Administrative Judge found the following: (a) Applicant became a naturalized American citizen in 1984; (b) Applicant is also a citizen of Iran, but Applicant does not consider himself as such, and he tried unsuccessfully to renounce his Iranian citizenship when he obtained United States citizenship; (c) in 1995, when faced with the prospect of traveling to Iran, Applicant was concerned about making the trip with an American passport and therefore obtained and used an Iranian passport; (d) Applicant informed his company's security office in advance about the trip; (e) Applicant's Iranian passport expired after three years and he threw it away; and (f) Applicant has no plans to travel to Iran again, at least until he retires. The Administrative Judge concluded that since Applicant cannot obtain another Iranian passport and maintain his security clearance and since Applicant stated he would not travel to Iran again at least until he retired, the government's case under the Foreign Preference Guideline had been mitigated.

On appeal, Department Counsel argues that the Administrative Judge erred by concluding Applicant's expression of a foreign preference (his travel to Iran in 1995 on an Iranian passport) was mitigated merely because Applicant expressed a willingness to renounce his Iranian citizenship. Department Counsel asserts that the Judge engaged in piecemeal analysis and gave Applicant's willingness to renounce Iranian citizenship too much weight. In response, Applicant argues that after considering a totality of the circumstances in the case, the Administrative Judge properly concluded that Applicant had mitigated the government's case under Guideline C.

Department Counsel's argument is flawed to the extent it is based on the premise that the Judge based his favorable determination under Guideline C exclusively on a conclusion that Applicant is willing to renounce Iranian citizenship. After reading the Judge's decision, the Board is convinced that the Judge's favorable determination under Guideline C is not based solely on the issue of willingness to renounce citizenship, but is also based on other factors that reflect an analysis that is not piecemeal in nature. Therefore, Department Counsel's claim of error is not persuasive.

Conclusion

Department Counsel has demonstrated harmful error that warrants reversal of the Administrative Judge's ultimate determination under Guideline B. Accordingly, pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.3, the Board reverses the Administrative Judge's favorable 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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. The Board need not address the Administrative Judge's findings and conclusions about Applicant's past use of an Iranian passport because those findings and conclusions were not challenged on appeal. Applicant's reply brief asks the Board to affirm the Judge's findings and conclusions under Guideline E (Personal Conduct). Since Department Counsel has not challenged the Judge's findings and conclusions under Guideline E, the Board need not review them or decide whether they are sustainable.
2. "A determination that the immediate family member(s) 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." Directive, Adjudicative Guidelines, Item E2.A2.1.3.1.
3. *See*, Directive, Additional Procedural Guidance, Item E3.1.15.
4. It should be noted that the referenced passage appears in the Administrative Judge's discussion of the case under Guideline C (Foreign Preference), as opposed to Guideline B.
5. Even if the Board were to assume, solely for purposes of deciding this appeal, that a foreign government has no particular interest in the lives of its ordinary citizens, an applicant's close relatives who live in a foreign country and would normally be considered ordinary citizens have something significantly different from the vast majority of ordinary citizens in the foreign country: a close relative with current or future access to classified U.S. information.
6. Applicant asks the Board to distinguish between the relative prominence of the applicant's father in Iran in the case covered by the Board's decision in ISCR Case No. 02-04786 and lack of prominence of his mother and sisters in Iran. That distinction is not a material one. Indeed, the Board specifically noted that the security concerns arose from the facts and circumstances of the applicant's father living in Iran, not his former position as a Iranian judge. *See* ISCR Case No. 02-04786 (June 27, 2003) at p. 5.