

DATE: August 26, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-15068

## **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 July 8, 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). Administrative Judge Elizabeth M. atchinski issued an unfavorable security clearance decision dated April 20, 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's unfavorable decision is arbitrary, capricious, or contrary to law because Applicant's situation has not changed since 1983, when he was first granted a security clearance; (2) whether the Administrative Judge improperly held Applicant's place of birth against him; (3) whether the Administrative Judge failed to give due weight to the fact that Applicant is a naturalized U.S. citizen; (4) whether the Administrative Judge erred by holding against Applicant the fact that he is reluctant to contact Syrian officials to formally renounce his Syrian citizenship; (5) whether the Administrative Judge erred by concluding Applicant's ties with immediate family members living in Syria raised security concerns under Guideline B; and (6) whether the Administrative Judge's unfavorable decision is not supported by the record evidence as a whole. 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 <sup>(1)</sup>

1. Whether the Administrative Judge's unfavorable decision is arbitrary, capricious, or contrary to law because Applicant's situation has not changed since 1983, when he was first granted a security clearance. Applicant asserts that his situation has not changed since he was granted a security clearance in 1983, and therefore, an unfavorable security clearance should not have been issued. This argument does not demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

Applicant's current security eligibility does not turn on a favorable security clearance decision made in 1983. A past favorable security clearance decision does not preclude the federal government from taking into account later events that have a bearing on an applicant's security eligibility. <sup>(2)</sup> The record evidence shows various events have occurred since 1983 that are material and relevant to an assessment of Applicant's current security eligibility. The Administrative Judge was not precluded from considering the record evidence concerning Applicant's conduct and circumstances since 1983 --including the facts and circumstances of Applicant's ties with his sisters and in-laws who are citizens and residents of Syria, and one sister who is a citizen and resident of Lebanon -- in making a determination as to his current security eligibility.

2. Whether the Administrative Judge improperly held Applicant's place of birth against him. Applicant states that he has the right, as a U.S. citizen, "to be treated fairly" and "to be protected from arbitrary measures that could threaten [his]

livelihood." Applicant goes on to claim that "[h]olding my birthplace against me, something over which I have no control, is unjustified" and that his birth in Syria "is a fact and should not be held against me." The Board construes Applicant's statements as raising the issue of whether the Administrative Judge improperly held Applicant's place of birth against him.

The SOR issued to Applicant does not allege Applicant's birth in Syria as a basis for denying or revoking his access to classified information. Furthermore, the Administrative Judge's decision does not rely on Applicant's birth in Syria as a basis for denying or revoking his access to classified information. Rather, the Judge based her decision on consideration of the facts and circumstances of Applicant's ties with his sisters and in-laws who are citizens and residents of Syria, and one sister who is a citizen and resident of Lebanon. Neither the record below nor the Judge's decision provides support for this claim of error.

3. Whether the Administrative Judge failed to give due weight to the fact that Applicant is a naturalized U.S. citizen. Applicant notes that when he became a naturalized U.S. citizen "I took an oath to renounce all foreign allegiances and to support the United States and its constitution unconditionally."<sup>(3)</sup> Applicant also asserts that since his naturalization, he considers himself a citizen of the United States and not a citizen of any other country. The Board construes Applicant's statements as raising the issue of whether the Administrative Judge failed to give due weight to the fact that Applicant is a naturalized U.S. citizen.

As a preliminary matter, the Board notes that this case does not involve any issue of foreign preference under Guideline C. The SOR issued to Applicant did not make any allegation that Applicant's conduct or circumstances raised any security concerns under Guideline C. Furthermore, the Administrative Judge did not make any finding that Applicant has a foreign preference under Guideline C.

Regardless of whether an applicant is a U.S. citizen by birth or by naturalization, the federal government is entitled to consider whether an applicant is in a position of possible vulnerability to foreign influence because of the applicant's conduct or circumstances. Neither an applicant who is a U.S. citizen by birth nor an applicant who is a U.S. citizen by naturalization is exempt from review under Guideline B if there are facts and circumstances that give rise to security concerns based on the possibility of foreign influence. Applicant's status as a naturalized U.S. citizen did not preclude the Administrative Judge from considering whether Applicant is in a position of possible vulnerability to foreign influence because of the overall facts and circumstances of Applicant's ties with his four sisters who are citizens and current residents of Syria, his sister who is a citizen and current resident of Lebanon, and his current wife's parents and siblings who are citizens and residents of Syria.

Finally, Applicant does not articulate any discernible, persuasive argument for how or why the fact of his naturalization as a U.S. citizen renders the Administrative Judge's findings and conclusions under Guideline B arbitrary, capricious, or contrary to law.

4. Whether the Administrative Judge erred by holding against Applicant the fact that he is reluctant to contact Syrian officials to formally renounce his Syrian citizenship. Applicant takes exception with the Administrative Judge's statement that he is reluctant to contact Syrian officials to formally renounce his Syrian citizenship, arguing (a) he renounced his Syrian citizenship when he took the oath to become a naturalized U.S. citizen; and (b) to formally apply for renunciation of Syrian citizenship could place his family members in jeopardy and serve no useful purpose since he has already renounced it when becoming a naturalized U.S. citizen.<sup>(4)</sup>

Since this case does not involve Guideline C (Foreign Preference), it is understandable for Applicant to question why the Administrative Judge should be concerned about Applicant's reluctance to contact the Syrian government to renounce his Syrian citizenship. A close reading of the Judge's decision persuades the Board that the Judge was not drawing an adverse inference under Guideline B based on Applicant's reluctance to contact the Syrian government to renounce his Syrian citizenship. Rather, the Judge was relying on Applicant's reluctance as evidence of his continued feelings of affection for his family members living in Syria. The Judge's reasoning relies on a subtle, but legally permissible distinction.<sup>(5)</sup> Accordingly, the Board concludes Applicant's claim of error is not a frivolous one, but it fails to demonstrate the Judge erred in this case.

5. Whether the Administrative Judge erred by concluding Applicant's ties with immediate family members living in Syria raised security concerns under Guideline B. Applicant challenges the Administrative Judge's conclusion that his ties with immediate family members living in Syria raise security concerns under Guideline B. This claim of error lacks merit.

The Administrative Judge specifically articulated the reasons why she concluded that Applicant's ties with immediate family members living in Syria raises security concerns under Guideline B (Decision at pp. 7-9). The Judge's conclusions follow rationally from her findings of fact and do not reflect any reasoning that is arbitrary, capricious, or contrary to law. Applicant's strong disagreement with the Judge's conclusions does not demonstrate the Judge erred. <sup>(6)</sup>

6. Whether the Administrative Judge's unfavorable decision is not supported by the record evidence as a whole. Applicant also asserts: (a) an unfavorable security clearance would be unjustified and would threaten his livelihood; (b) the Judge's unfavorable decision is a threat to his "right to live in dignity as a respectable American citizen"; (c) he has been a loyal employee of his company for many years; (d) his contacts with his sisters and in-laws in Syria and his sister in Lebanon are ones that any normal family can be expected to have; (e) his sisters are elderly housewives without any political affiliations; (f) his second marriage is beneficial and allows him to be a more productive person and citizen of the United States; (g) he has shown by his conduct over the years that the United States, not Syria, is his home and country; and (h) he has been a law-abiding U.S. citizen who values the principles of American democracy. The Board construes Applicant's assertions as raising the issue of whether the Judge's decision is not supported by the record evidence as a whole.

There is no right to a security clearance. <sup>(7)</sup> Furthermore, the adverse consequences that an unfavorable security clearance decision could have on Applicant are not relevant to an evaluation of his security eligibility under Guideline B. The security significance of Applicant's ties with his sisters and in-laws in Syria and his sister in Lebanon do not turn on whether an unfavorable security clearance decision would adversely affect Applicant's job or career. <sup>(8)</sup>

An Administrative Judge must consider the record evidence as a whole, decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*, and make a reasoned decision as to whether an applicant has met his or her burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15. <sup>(9)</sup> In this case, the Judge's decision reflects a fair and reasonable consideration of the record evidence as a whole, both favorable and unfavorable, as required by the Directive. <sup>(10)</sup> Furthermore, the Judge's decision articulates a rational basis for the Judge's adverse conclusions under Guideline B. Applicant's ability to cite favorable record evidence does not demonstrate the Judge erred. Moreover, Applicant's argument for an alternate interpretation of the record evidence does not demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. Applicant's assertions, taken individually or collectively, do not demonstrate the Judge erred or that her decision is not supported by the record evidence as a whole.

### Conclusion

Applicant has failed to demonstrate error below. Accordingly, 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. The Administrative Judge entered a formal finding in favor of Applicant with respect to SOR paragraph 1.c. That favorable formal finding is not at issue on appeal.
2. *See, e.g.*, ISCR Case No. 01-19823 (December 3, 2003) at p. 5 (a prior favorable security clearance decision does not give rise to a vested right or interest in continued retention of a security clearance).
3. 8 U.S.C §1448 provides: "A person who has applied for naturalization shall, in order to be and before being admitted to citizenship, take in a public ceremony before the Attorney General or a court with jurisdiction under section 1421(b) of this title an oath (1) to support the Constitution of the United States; (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the applicant was before a subject or citizen; (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; (4) to bear true faith and allegiance to the same; and (5)(A) to bear arms on behalf of the United States when required by the law, or (B) to perform noncombatant service in the Armed Forces of the United States when required by the law, or (C) to perform work of national importance under civilian direction when required by the law."
4. Experience in the industrial security program shows that not all foreign countries recognize or accept the renunciation of foreign allegiance that is a part of the oath taken by one of their citizens to become a naturalized U.S. citizen. Indeed, the Board has noted the practical reality that some foreign countries do not recognize or accept the renunciation of foreign allegiance that occurs as part of the U.S. naturalization process. *See* ISCR Case No. 98-0592 (May 4, 1999) at pp. 6-7 (citing federal court case).
5. Applicant's freedom to make personal choices about matters affecting him and his family does not preclude the federal government from taking into account whether security concerns are raised by the choices Applicant makes. *See, e.g.*, ISCR Case No. 02-06928 (September 17, 2003) at p. 4; ISCR Case No. 02-06806 (February 25, 2003) at p. 3; ISCR Case No. 00-0516 (December 7, 2001) at p. 5.
6. *See, e.g.*, ISCR Case No. 02-09907 (March 17, 2004) at pp. 5-6 (an applicant's opinion about the security significance of the applicant's conduct and circumstances is not binding on an Administrative Judge).
7. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988). *See also Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990)(no right to a security clearance or a job requiring a security clearance), *cert. denied*, 499 U.S. 905 (1991).
8. *See, e.g.*, ISCR Case No. 01-24504 (February 11, 2003) at p. 4.
9. "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."
10. *See* Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1.