

DATE: July 29, 2003

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-15383

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

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

**FOR APPLICANT**

*Pro Se*

Administrative Judge Elizabeth M. Matchinski issued a decision dated February 25, 2003 in which she concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether SOR subparagraphs 1.c and 2.c are erroneous; (2) whether the Administrative Judge's decision is based on harmful errors in the findings of fact; and (3) whether the Administrative Judge's adverse conclusions are arbitrary, capricious or contrary to law.

**Procedural History**

The Defense Office of Hearings and Appeal issued to Applicant a Statement of Reasons (SOR) dated July 30, 2002. The SOR was based on Guideline C (Foreign Preference), and Guideline B (Foreign Influence). Applicant elected to have the case decided on the administrative record (without a hearing). The Administrative Judge granted Department Counsel's notion to amend the SOR. The Judge issued an adverse decision dated February 25, 2003. Applicant appealed. [\(1\)](#)

**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. *See* 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 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. *See, e.g.*, ISCR Case No. 99-0205 (October 19, 2000) at p. 2.

When a challenge to an Administrative Judge's rulings or conclusions 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).

### **Appeal Issues**

1. Whether SOR subparagraphs 1.c and 2.c are erroneous. Applicant cites to that portion of the Administrative Judge's decision which recites Department Counsel's proposed amendments to the SOR and argues that SOR subparagraphs 1.c and 2.c are wrong. Applicant's claim of error fails to demonstrate the Judge erred.

An SOR is an administrative pleading that is not measured against the strict requirements of a criminal indictment. As long as an SOR places an applicant on reasonable notice of the allegations against him or her and there has been no showing that the wording of an SOR has prejudiced an applicant's ability to respond to the allegations and present evidence on his or her behalf, a security clearance case should be adjudicated on the merits of the relevant issues and not be concerned with pleading niceties. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 2. In this case, Applicant has not shown that the wording of the SOR prejudiced her in any discernable way. Accordingly, Applicant's complaints about the SOR need not be discussed any further.

2. Whether the Administrative Judge's decision is based on harmful errors in the findings of fact. Applicant presents new evidence on appeal, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Accordingly, the Board will not consider or address arguments which rely on new evidence. Furthermore, because the Directive prohibits the consideration of new evidence on appeal, the Board cannot accept Applicant's offer to present additional evidence for it to review in connection with this appeal. The Board notes that Applicant had the opportunity to present evidence for consideration by the Administrative Judge and Applicant took advantage of that opportunity to submit such evidence in response to the File of Relevant Material. Applicant cannot fairly challenge the Judge's findings based on evidence that was not presented for the Judge's consideration.

Applicant correctly notes that the Administrative Judge erred by finding she is seeking a security clearance in connection with her educational duties. However, this error is harmless. The particular reasons why an applicant needs a security clearance usually are not relevant or material to an assessment of the applicant's security eligibility. Although factual errors about things not material to making a security clearance decision should not be treated lightly, they generally do not warrant remand or reversal. *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine).<sup>(2)</sup> Here, a reading of the Judge's decision as a whole persuades the Board that this factual error was not pivotal or otherwise crucial to the Judge's analysis of the case.

Applicant challenges the Administrative Judge's finding that she has exercised dual citizenship. The Judge's finding is sustainable. By obtaining and possessing a Spanish passport, Applicant exercised the rights and privileges of Spanish citizenship.

3. Whether the Administrative Judge's adverse conclusions are arbitrary, capricious or contrary to law. The Administrative Judge's adverse conclusions may be summed up as follows: Applicant obtained as an adult and still has a foreign passport which precludes her from eligibility for a security clearance under the August 16, 2000 memorandum of the Assistant Secretary of Defense for Command, Control, Communications and Intelligence and Guideline C. Applicant is potentially vulnerable to foreign influence under Guideline B because her brother resides outside the United States and her boyfriend is a foreign citizen residing outside the United States.

Considering the record evidence as a whole, the Administrative Judge's conclusions are sustainable. Applicant's ability to argue for an alternative interpretation of the evidence is not sufficient to demonstrate that the Administrative Judge erred. *See* ISCR Case No. 01-21340 (dated June 20, 2003) at p. 4 ("The fact that the Judge did not view the evidence . . . in the light preferred by Applicant and Applicant's ability to argue in support of a different interpretation of the evidence is not sufficient to establish error on the part of the Administrative Judge.").

Applicant also asserts the Administrative Judge failed to take into account evidence that is mitigating of her conduct and circumstances. There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. Applicant's strong disagreement with the Judge's conclusions is not sufficient to rebut that presumption.

### **Conclusions**

Applicant has failed to meet her burden on appeal of demonstrating error. The Administrative Judge's February 25, 2003 decision is affirmed.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

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

1. The Administrative Judge issued findings favorable to Applicant under SOR subparagraphs 1.d, 2.a, and 2.d. Those favorable findings are not at issue on appeal.

2. The legal sufficiency of an Administrative Judge's factual findings could be placed into question by the cumulative effect of numerous factual errors that might be deemed harmless when viewed individually.