DATE: May 23, 2006

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 02-17369

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 7, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline B (Foreign Influence) pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 27, 2005, after the hearing, Chief Administrative Judge Robert Robinson Gales granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Administrative Judge erred in his application of Guideline B Mitigating Condition 1 (MC1)[(1)]; whether the Administrative Judge erred in his application of Guideline B Mitigating Condition 5 (MC5)[(2)]; and whether the remainder of the Judge's decision is sufficient to sustain his conclusion on appeal. We remand the case to the Administrative Judge.

Whether the Record Supports the Administrative Judge's Factual Findings

The Administrative Judge made the following pertinent findings of fact:

Applicant is a 52-year-old seeking to retain a SECRET security clearance initially granted to him in 1991. Applicant was born to a Christian family in Jordan. In 1982, Applicant married an American citizen and moved to the United States. In 1986, Applicant became a U.S. citizen. Since then he has had no contact with the government of Jordan.

Both of Applicant's parents are deceased. Applicant is entitled to a share of his father's estate estimated at $10,000. Applicant has no other financial interests in Jordan. He has one sister who is a naturalized Swedish citizen, living in Sweden, married to a Swedish man. She has one child. Applicant speaks to her bimonthly and last visited with her in 1989. He has a second sister who is married to an American citizen, but she lives in Jordan again after six years of living in the U.S. as a resident alien. Her husband lives in the U.S. as does at least one of her two children. Applicant gave her about $100 a month for an unspecified period of time. Applicant has monthly contact with her. Applicant's third sister is a Jordanian citizen married to a Jordanian citizen, residing in Jordan with two children. Applicant has quarterly to monthly contact with her. Applicant's fourth sister is also a Jordanian citizen married to a Jordanian citizen residing in Jordan. Applicant has bimonthly contact with her and she has visited him in U.S. three times. Applicant's fifth sister is a Jordanian citizen married to a Jordanian citizen residing in Jordan. However, she has a U.S. resident alien card and intends to come to the U.S. with her husband under Applicant's sponsorship, once the husband completes his advanced degree. Applicant's sixth sister is a Jordanian citizen, married to a Jordanian citizen residing in Jordan with their one child. Applicant has quarterly telephonic contact with her and she has visited him in the U.S. once. Applicant's brother is a Jordanian citizen residing in Jordan. He is a civil

engineer employed by a city government agency serving as a contractor for the Ministry of Agriculture working on irrigation matters. (This is the only one of Applicant's family members that the Judge found to have a government job). Applicant's parent-in-law are naturalized U.S. citizens. Applicant's mother-in-law resides in the U.S. Applicant's father-in-law resides in Jordan (in retirement).

Applicant has applied for all his siblings residing in Jordan to immigrate to the U.S. as resident aliens. One motivation for Applicant's family to immigrate is that they are members of a Christian minority in a country where Palestinians and Islamic fundamentalists constitute the majority.

Applicant has been employed by the same government contractor since 1991.

Jordan is pro-Western and has close relations with the U.S. Hamas operates in Jordan, but there is no evidence the government assists the group or concurs in its actions. Department Counsel acknowledges that there is no evidence Jordan is active in espionage against the U.S.

B. Discussion

The Judge's findings of fact are not challenged on appeal.

Whether the Record Supports the Administrative Judge's Ultimate Conclusions.

An Administrative Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Appeal Board may reverse the Administrative Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Administrative Judge. We may not set aside an Administrative Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency ..." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. We review matters of law *de novo*.

The Administrative Judge commences his analysis of MC1 by quoting from an Appeal Board decision which was issued in the context of resolving a case that was adjudicated under an earlier set of Adjudicative Guidelines. Decision at 11. In the case that the Judge cited, for example, Guideline B Mitigating Condition 1 *as it was then drafted* is quoted: "[A] determination that the immediate family member(s), cohabitant, or associate(s) in question would not constitute an unacceptable security risk." ISCR Case No 98-0507 at p. 7 (App. Bd May 17, 1999). Although he did not quote the outdated language at that point in his decision, the Judge's reference to the dated Appeal Board decision set a mistaken framework for his entire analysis of the case. Later, in the conclusions section of his decision, while the Judge does cite the current version of MC1 at one point in his conclusions section, no part of the analysis that follows discusses the evidence with reference to the current language of MC1. Instead, the Judge explicitly cites the "unacceptable security risk" language from the previous version of MC1 when discussing the evidence and offering his analysis of the mitigating aspects of the case.

The Board has previously held ". . . a Judge cannot rely on language from an earlier version of the Directive to justify the Judge's decision and that an applicant's security eligibility must be adjudicated under current DoD policies and standards, not past ones. Similarly, the precedential value of Board decisions is affected to the extent those decisions involve the interpretation of a provision of the Directive that is later revised or changed. Statements made by the Board in earlier decisions that are predicated on then-existing language in the Directive cannot be simply assumed --by a Judge or a party-- to be applicable in later cases after the pertinent provision(s) of the Directive have been revised or changed." *See* ISCR Case No. 02-24254 (App. Bd. Jun 29, 2004) (footnotes omitted). The Board's holding is made all the more pertinent in that it was explaining why another Board decision (ISCR Case No. 98-0419) was no longer good law for analyzing foreign influence cases. The quotation that the Judge used in his decision from ISCR Case No. 98-0507 included within it a cite to the very same part of ISCR Case No. 98-0419 which the Board ruled no longer apt in ISCR Case No. 02-24254.

Taken together, the case quotation and the language of the conclusions section of the Judge's decision raise significant doubts as to whether the Judge applied the current version of MC1 to the case. Accordingly, the case is remanded to the Judge for reconsideration and the issuing of a new decision that clearly applies the current version of MC1.

On appeal, Department Counsel asserts that the Administrative Judge failed to articulate a satisfactory conclusion as to the application of Guideline B MC5. Department Counsel argues that the Judge's statement as to the application of the mitigating factor is conclusory. Although Department Counsel is correct in pointing out that the Judge offers little in terms of analysis of this aspect of the case, given the state of the record evidence regarding Applicant's financial interests in Jordan, the Judge's application of MC5 in this instance is sustainable.

Department Counsel's appeal brief also contends that the Administrative Judge's decision is not sustainable under the "whole person" concept. Given the record evidence in this case, the Board concludes that the Judge's error concerning the application of Guideline B MC1 influenced his "whole person" analysis of Applicant's security eligibility, but that the Judge's error did not significantly undercut his "whole person" analysis. On remand, the Judge should consider the applicability of the general factors contained in Directive ¶¶ E2.2.1.1 through E2.2.1.9.

Order

The judgment of the Chief Administrative Judge denying Applicant a clearance is REMANDED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman (Acting), Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D Billett

Administrative Judge

Member, Appeal Board

Separate Opinion of Member William S. Fields

I agree with the Board's conclusion that the Administrative Judge erred in his application of Guideline B Mitigating Condition 1. I also agree with their conclusion that the error substantially influenced the Judge's "whole person" analysis, but did not significantly undercut it. However, I think the Judge made sufficiently detailed and thoughtful findings of fact to support his overall favorable clearance decision, and remand is unlikely to produce a different result. Accordingly, I would affirm the Judge's decision.

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. Directive ¶E2.A2.1.3.1. "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. Directive ¶E2.A2.1.3.5. "Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities."