

DATE: December 30, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-21927

## **APPEAL BOARD DECISION AND REMAND ORDER**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Eric Borgstrom, Esq., Department Counsel

#### **FOR APPLICANT**

Matthew A. Rossi, Esq.

Nicolas Jafarieh, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated August 25, 2003, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline C (Foreign Preference), Guideline B (Foreign Influence), and Guideline E (Personal Conduct). Administrative Judge Michael J. Breslin issued a favorable security clearance decision, dated January 18, 2005.

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 application of Foreign Influence Mitigating Condition 1 was erroneous; and (2) whether the Administrative Judge's conclusion that Applicant successfully mitigated the case against him under Guideline B (Foreign Influence) was unsupported by the record evidence. For the reasons that follow, the Board remands the case to the Administrative Judge for further processing.

### **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).

### **Administrative Judge's Findings and Conclusions**

In his decision, the Administrative Judge found the following: (a) Applicant became a naturalized citizen of the United States in December 1997; (b) Applicant has a mother, two sisters, and three brothers who are citizens of and residents of Saudi Arabia; (c) One of Applicant's sisters is a principal of a school in the national school system and two of her brothers are commercial airline pilots who were educated in the United States employed by the national airline; (d) Applicant has no property, bank accounts or assets in Saudi Arabia; (e) Applicant has a well-paying job and substantial assets in the United States; (f) the United States and Saudi Arabia enjoy good relations and share mutual concerns that have resulted in close economic and security ties; and (g) The United States remains concerned about human rights conditions in Saudi Arabia and terrorists in Saudi Arabia who target American travelers. As a result of these facts, the Judge concluded that (i) Applicant maintains regular contact with his mother and siblings and these circumstances could create the potential for foreign influence; (ii) Foreign Influence Disqualifying Conditions 1-[\(1\)](#) and 3-[\(2\)](#) are applicable to the case; (iii) None of Applicant's brothers or sisters are members of the ruling family or the government and there is no evidence indicating any one of them is an agent of a foreign power; (iv) many aspects of Saudi legal traditions are inconsistent with the human rights embraced by the United States, including its treatment of women, prisoners, and minorities, and its protection of speech, press, assembly and association; (v) Saudi interests have made it an ally of the United States in security, trade, and other political interests; (vi) under the circumstances, the possibility that the Saudi government would attempt to exploit or pressure its residents to act adversely to the interests of the United States is limited; (vii) under the circumstances presented by the presence of Applicant's relatives in Saudi Arabia, there is some opportunity for adverse influence against Applicant's relatives in Saudi Arabia; (viii) while Applicant is bound by close ties of obligation and affection to his relatives in Saudi Arabia, at the same time he has extensive ties to the United

States; (ix) considering the extent of his ties to the United States, Applicant is not vulnerable to pressure or duress; and (x) Foreign Influence Mitigating Condition 1<sup>(3)</sup> applies to the case.

### Appeal Issues<sup>(4)</sup>

1. Whether the Administrative Judge's application of Foreign Influence Mitigating Condition 1 was erroneous. On appeal, Department Counsel asserts that the Administrative Judge's application of Foreign Influence Mitigating Condition 1 was in error. In support of this contention, Department Counsel argues: (a) when analyzing the applicability of Foreign Influence Mitigating Condition 1, the Judge erroneously weighed Applicant's ties to his Saudi immediate family members against his ties to the United States; (b) when considering the possibility of influence under Foreign Influence Mitigating Condition 1, the Judge's analysis was impermissibly narrow; (c) the Judge's conclusion that Applicant's Saudi relatives are not subject to influence or exploitation because Saudi Arabia and the United States enjoy good relations is erroneous.

In support of the Judge's application of Foreign Influence Mitigating Condition 1, Applicant asserts the following on appeal: (i) The Administrative Judge properly took into account Applicant's ties to the United States; and (ii) the Judge properly considered Saudi Arabia's close relationship with the United States in concluding there was limited potential for Applicant's relatives to be exploited by the Saudi government.

In its brief, Department Counsel does not challenge the Administrative Judge's conclusion that one of Applicant's sisters and two of his brothers in Saudi Arabia were not agents of a foreign power. Accordingly, that conclusion is not at issue on appeal. However, the Board has previously noted that Foreign Influence Mitigating Condition 1 is bifurcated in nature and places the burden on applicants to establish that their immediate family members or other persons to whom they have close ties of affection or obligation and who reside in a foreign country are not in a position to be exploited in a way that could force the applicant to choose between loyalty to the persons involved and the United States. *See, e.g.*, ISCR Case No. 02-15339 (April 29, 2004) at p. 4. Department Counsel persuasively argues that the Judge's application of this second prong of Foreign Influence Mitigating Condition was arbitrary and capricious.

Applicant's ties to the United States constituted evidence that the Administrative Judge was entitled to consider. However, Applicant's ties to the United States, in and of themselves, do not necessarily eliminate the security concerns raised by Applicant's family ties in Saudi Arabia. Regarding Foreign Influence Mitigating Condition 1, the burden is on Applicant to establish that his family ties to Saudi Arabia do not place him in a position of vulnerability. Applicant has presented no evidence to show that his sense of family obligation to his relatives in Saudi Arabia, and hence his vulnerability, are diminished by his ties to the United States. Moreover, the Judge's discussion of this aspect of the case consists only of a brief recitation of the facts establishing the ties to the United States. The Judge did not explain how those facts refute, extenuate, or mitigate the security concerns raised under Guideline B by the record evidence of Applicant's ties and contacts with immediate family members in Saudi Arabia. Failure to do so was error, especially in light of the Judge's own conclusion that there was some opportunity for adverse influence against Applicant's relatives in Saudi Arabia.

Department Counsel asserts that the Administrative Judge erred in the scope of inquiry he used to determine who in the case is subject to influence. Department Counsel's argument on this point is not a model of clarity. Department Counsel appears to be saying that when making his security clearance decision, the Judge considered only whether Applicant would be vulnerable to pressure or duress and did not consider whether Applicant was indirectly vulnerable to pressure or duress, either through pressure exerted on him by his relatives in Saudi Arabia, or by pressure being exerted on his Saudi relatives by the Saudi government. After a review of the Administrative Judge's decision, the Board concludes that the Judge did consider the issue of the potential for vulnerability of Applicant through the possibility of pressure being exerted on him by or through his relatives in Saudi Arabia. Department Counsel fails to demonstrate error on this point.

The Administrative Judge concluded that Saudi Arabia's interests in oil exports and the regional stability essential to that end have made it an ally of the United States in security, trade, and other political interests. The Judge further concluded that, under the circumstances, the possibility that the Saudi government would attempt to exploit or pressure its residents to act adversely to the interests of the United States is limited. Department Counsel persuasively argues that the

Administrative Judge's heavy reliance on the fact that Saudi Arabia is an ally of the United States with some similar interests is misplaced. Nothing in Guideline B indicates or suggests that it is limited to countries that are hostile to the United States. *See, e.g.*, ISCR Case No. 00-0317 (March 29, 2002) at p. 6; ISCR Case No. 00-0489 (January 10, 2002) at p. 12. The Board has warned "against reliance on overly simplistic distinctions between 'friendly' nations and 'hostile' nations when adjudicating cases under Guideline B." *Id.* Department Counsel cites to portions of the record evidence that establish Saudi Arabia's poor human rights record, evidence of financial contributions to terrorists from sources inside Saudi Arabia, and a credible terrorist threat to U.S. and Western interests inside Saudi Arabia. The Judge himself acknowledged the human rights and terrorist issues that exist with Saudi Arabia. Also, as mentioned earlier in this decision, the Judge concluded that, based on the circumstances of Applicant's relatives in Saudi Arabia, there was some opportunity for adverse influence against those relatives. Given this record, the Judge failed to articulate a rational basis for his conclusion that the nature of the relationship between Saudi Arabia and the United States lessens the potential threat of exploitation or coercion in this case such that application of Foreign Influence Mitigating Condition 1 would be warranted.

2. Whether the Administrative Judge's conclusion that Applicant successfully mitigated the case against him under Guideline B (Foreign Influence) was unsupported by the record evidence. Department Counsel asserts that independent of the Administrative Judge's errors in the application of Foreign Influence Mitigating Condition 1, the Guideline B security concerns are not otherwise mitigated in this case. In support of this assertion, Department Counsel argues: (a) none of the remaining Foreign Influence Mitigating Conditions apply in this case; and (b) the case is not sufficiently mitigated under the "whole person" concept, including a consideration of Applicant's mitigated conduct under Guideline C (Foreign Preference). In response, Applicant argues that the Judge properly considered the totality of Applicant's past conduct and present circumstances in concluding that the case had been mitigated.

The Board need not consider the validity of Department Counsel's assertions that other Foreign Influence Mitigating Conditions (other than Mitigating Condition 1) do not apply in this case regarding a resolution of the government's security concerns under Guideline B. A review of the Administrative Judge's decision convinces the Board that the Administrative Judge did not apply or rely upon the other mitigating conditions cited by Department Counsel in his resolution of Guideline B. Therefore, Department Counsel's argument is moot.

Department Counsel argues that aspects of Applicant's mitigated Guideline C conduct militate against the conclusion that he has mitigated the Guideline B security concerns. Department Counsel specifically mentions: (a) the fact that Applicant used his Saudi Arabian passport in lieu of his United States passport on two trips to Saudi Arabia in 1999 and 2000; (b) Applicant visited his relatives on both occasions; and (c) Applicant did not surrender his Saudi passport or his Saudi citizenship until after the issuance of the SOR.

The Board interprets Department Counsel's contention as a failure of the Administrative Judge to consider Applicant's conduct under Guideline C when evaluating Applicant's circumstances relating to Guideline B under the "whole person" concept. There is no presumption of error below. Department Counsel bears the burden of establishing that the Judge improperly ignored pertinent evidence when evaluating the case under the "whole person" concept. Department Counsel's appeal argument does not satisfy this burden nor does it offer a sufficient explanation for why Applicant's conduct under Guideline C undercuts any mitigating aspects of the case.

In addition to the points raised relating to Guideline C, the Board interprets Department Counsel's appeal brief as raising the issue of the Administrative Judge's broader treatment of the case under the "whole person" concept. Moreover, Applicant's reply brief asks the Board to affirm the Judge's decision as being consistent with the "whole person" concept.

Because the Administrative Judge erred in his application of pertinent provisions of the Adjudicative Guidelines (Foreign Influence Mitigating Condition 1), the continued viability of the Judge's favorable conclusions about the Applicant's security eligibility under Guideline B turns on whether the Judge articulated a rational basis for those favorable conclusions that is consistent with a "whole person" analysis in light of the record evidence as a whole. For the reasons that follow, the Board concludes Department Counsel has failed to demonstrate the Administrative Judge's analysis of Applicant's security eligibility under the "whole person" concept warrants reversal.

An Administrative Judge must apply pertinent Adjudicative Guidelines disqualifying and mitigating conditions. However, a Judge's obligation to apply pertinent provisions of the Adjudicative Guidelines does not override the Judge's obligation to evaluate an applicant's security eligibility in light of the "whole person" concept.<sup>(6)</sup> Accordingly, the mere presence or absence of an Adjudicative Guidelines disqualifying or mitigating condition is not solely dispositive of a case.<sup>(7)</sup> Even if there is an Adjudicative Guidelines disqualifying or mitigating condition that is applicable, a Judge must consider the applicable disqualifying or mitigating condition in light of the record evidence as a whole and any pertinent general factors,<sup>(8)</sup> and decide what weight can reasonably be given to the applicable disqualifying or mitigating condition.<sup>(9)</sup> And, if a Judge reasonably concludes that particular Adjudicative Guidelines disqualifying or mitigating conditions do not apply to the specific facts of a case, the Judge still must evaluate the applicant's security eligibility under the general factors of Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1 (which refers to the "whole person" concept).<sup>(10)</sup>

In view of the foregoing, the Board's conclusion that Department Counsel has demonstrated error in the Administrative Judge's application of the Adjudicative Guidelines does not foreclose Applicant from arguing that the Judge's decision is sustainable under the "whole person" concept, which Applicant does in his reply brief. The Board concludes that the Judge's error concerning the Adjudicative Guidelines influenced his "whole person" analysis of Applicant's security eligibility, but that the Judge's error did not sufficiently undercut his "whole person" analysis to warrant reversal. Accordingly, the Board remands the case to the Judge with instructions to issue a new decision after correction of the error identified in this Decision and Remand Order.

### **Conclusion**

Department Counsel has demonstrated error below that warrants remand. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.32.3, the Board remands the case to the Administrative Judge for issuance of a new decision, consistent with the requirements of Directive, Additional Procedural Guidance, Items E3.1.35 and E3.1.35.

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. "An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country" (Directive, Adjudicative Guidelines, Item E2.A2.1.2.1).

2. "Relatives, cohabitants, or associates who are connected with any foreign government" (Directive, Adjudicative

Guidelines, Item E2.A2.1.2.3).

3. "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" (Directive, Adjudicative Guidelines, Item E2.A2.1.3.1).

4. At the outset of the hearing, Department Counsel moved to withdraw the allegations under Guideline E (Personal Conduct), and said motion was granted. Department Counsel did not appeal the Administrative Judge's favorable findings and conclusions under Guideline C (Foreign Preference), other than to argue that certain facts and circumstances established in the case under Guideline C should have been considered by the Administrative Judge in his evaluation of the case under Guideline B.

5. *See* Directive, Section 6.3 and Additional Procedural Guidance, Item E3.1.25.

6. The Adjudicative Guidelines contains language that explicitly states the evaluation of an applicant's security eligibility must include consideration of all available information in light of the "whole person" concept. *See* Directive, Adjudicative Guidelines, Item E2.2.1. The Administrative Judge's obligation to apply pertinent provisions of the Adjudicative Guidelines does not diminish the Judge's obligation to evaluate an applicant's security eligibility in light of the "whole person" concept. Those two obligations are complementary, not exclusive, in nature.

7. *See, e.g.*, ISCR Case No. 02-09389 (December 29, 2004) at p. 4; ISCR Case No. 02-32006 (October 28, 2004) at p. 5.

8. Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1.

9. *See, e.g.*, ISCR Case No. 02-05110 (March 22, 2004) at pp. 4-6; ISCR Case No. 01-08565 (March 7, 2003) at p. 5.

10. *See, e.g.*, ISCR Case No. 03-11448 (August 10, 2004) at pp. 3-4.