

DATE: June 18, 2004

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-23118

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Peregrine D. Russell-Hunter, Chief Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated August 27, 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 Philip S. Howe issued an adverse security clearance adjudication dated December 30, 2003.

Applicant appealed the Administrative Judge's adverse decision. 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 the Administrative Judge's findings of fact are sustainable; (2) whether the Administrative Judge properly weighed the record evidence in considering Foreign Influence Mitigating Condition 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. 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. Whether the Administrative Judge's findings of fact are sustainable. Applicant challenges the Administrative Judge's findings that Applicant has two sisters living in the Democratic Republic of the Congo (DRC). Applicant correctly notes that in his answer to the SOR Applicant had updated the whereabouts of one sister, now living in France. Although the Judge's finding as to the residence of one sister is erroneous, it is harmless. In light of the presence in the DRC of one sister and three brothers, the Judge's error made no substantive difference to his analysis of the security significance of Applicant's siblings in the DRC.

2. Whether the Administrative Judge properly weighed the record evidence in considering Foreign Influence Mitigating Condition 1. The Administrative Judge concluded that the Department Counsel had proved its case with respect to Foreign Influence Disqualifying Conditions 1 through 3. <sup>(1)</sup> Applicant admitted facts that lead to the Judge's conclusions including: the presence of siblings in the DRC; his brother-in-law and sister previously worked for two DRC agencies, one of whom receives a pension from the DRC; Applicant sends money to certain siblings to help them with medical expenses; and one brother visited Applicant twice and stayed at his house. The Judge then specifically considered the application of Foreign Influence Mitigating Conditions 1 and 3, but found that neither applied in these circumstances. <sup>(2)</sup>

Applicant contends that the Judge erred in his conclusions with respect to Mitigating Condition 1. Applicant argues that the Judge overlooked that the DRC has a per capita Gross Domestic Product of only \$90 and is an economically and technologically backward country that cannot exploit US classified information. Therefore, Applicant argues, it is "highly unlikely that the DRC will have any interest in coercing me or anyone into obtaining technological classified information that is of no use for that country." Moreover, he has three brothers whose occupation is farming and do not work for any foreign company that could exploit such information. The fourth brother is a citizen of Germany who does business in the DRC, and Applicant concludes therefore that he cannot be exploited by the DRC or any other foreign power. Referring to Government Exhibit 3 (Department of State Background Notes), Applicant argues that the United

States and the DRC have friendly relations.

The Applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the Applicant or proven by the Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Directive, Additional Procedural Guidance, Item E3.1.15. Essentially the Applicant here argues that the Judge failed to properly weigh the record evidence in applying Mitigating Condition 1. There is a rebuttable presumption that the Judge considered all the record evidence unless the Judge specifically states otherwise. Neither an appealing party's strong disagreement with the Judge's weighing of the record evidence nor his ability to cite to favorable record evidence that he believes that the Judge should have given more weight to, is sufficient to rebut or overcome that presumption. *See, e.g.*, ISCR Case No. 02-10215 (January 30, 2004) at p. 6. Furthermore, the Board will not disturb an Administrative Judge's weighing of the evidence unless there is a showing that the Judge did so in a manner that is arbitrary, capricious or contrary to law.

We are not persuaded by Applicant's contention that the Judge acted arbitrarily or capriciously because the Judge did not conclude that an economically and technological backwards country would have no interest in exploiting anyone to provide it technological classified information. Applicant's assessment of the intelligence capabilities of the DRC, elements thereof, or groups competing for control of that government, is purely speculative. Also, influence less than coercion or duress may have security significance. *See, e.g.*, ISCR Case No. 02-11570 (May 19, 2004) at p. 6. Applicant's assertion about the capability of the DRC or other powers to exploit his fourth brother is likewise speculative. Moreover, even if most of Applicant's siblings or relatives did not have official ties with, or were agents of, the government of the DRC, and do not engage in technological pursuits, the Judge reasonably could conclude under the Directive that their presence in the DRC, with its history of civil strife, raises security concerns. *See, e.g.*, ISCR Case No. 01-03120 (February 20, 2002) at p. 4. <sup>(3)</sup> Finally, even if we assume for purposes of this appeal friendly ties between the United States and the DRC, such a fact does not compel an Administrative Judge to make a favorable security clearance determination. *See, e.g.*, ISCR Case No. 02-11570 (May 19, 2004) at p. 6.

Considering all of the record evidence, the Administrative Judge's conclusion was sustainable.

### **Conclusion**

Applicant has failed to meet his burden on appeal of demonstrating error which warrants remand or reversal. The Board affirms the Administrative Judge's December 30, 2003 decision.

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

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

## Member, Appeal Board

1. Disqualifying Condition 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). Disqualifying Condition 2: "Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists" (Directive, Adjudicative Guidelines, Item E2.A2.1.2.2). Disqualifying Condition 3: "Relatives, cohabitants, or associates who are connected with any foreign government" (Directive, Adjudicative Guidelines, Item E2.A2.1.2.3).

2. Mitigating Condition 1: "A determination that the immediate family member(s). . . [e.g., brothers and sisters]. . . 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). Mitigating Condition 3: "Contact and correspondence with foreign citizens are casual and infrequent" (Directive, Adjudicative Guidelines, Item E2.A2.1.3.3).

3. Applicant admits that foreign influence can be brought to bear on an applicant even if an applicant's family members have no official ties with a foreign government, and he cites a decision in support of that proposition. He distinguishes the current case from the cited case on the grounds that the government in the cited decision was able to exploit the information but the DRC was not able to do so. We do not believe that the distinction he draws is meaningful.