

DATE: March 3, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-24942

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 May 13, 2004, 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) and Guideline B (Foreign Influence). Administrative Judge James A. Young issued a decision, dated October 21, 2004, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed.

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 issue: whether the Administrative Judge's findings and adverse conclusions under the Foreign Influence Guideline (Guideline B) are arbitrary, capricious, or contrary to law. 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 Issue ⁽¹⁾

Whether the Administrative Judge's findings and adverse conclusions under the Foreign Influence Guideline (Guideline B) are arbitrary, capricious, or contrary to law. Regarding foreign influence, the Administrative Judge found the following: (a) Applicant's parents are citizen residents of Israel; (b) both of Applicant's parents are retired and did not previously work for the Israeli government; (c) Applicant maintains contact with his parents by telephone on a weekly basis; (d) between 1986 and the late 1990's, Applicant's parents visited him annually in the United States but the trips have since ceased; (e) Applicant's sister is a citizen resident of Israel and does not work for the government; (f) Applicant speaks with his sister by telephone approximately once a month; (g) Applicant has several aunts and uncles to whom he speaks by telephone two or three times a year; and (h) Applicant has three close friends in Israel with whom he maintains telephonic contact two to four times a year. The Administrative Judge concluded: (i) Applicant is a loyal U.S. citizen; (ii) at the same time, the evidence clearly established Applicant has strong ties of affection or obligation to his family members and friends who are citizen residents of Israel; and (iii) although these foreign associates are not agents of a foreign power, Applicant failed to demonstrate that his foreign associates are not in a position of vulnerability such that he could be forced to choose between loyalty to the U.S. and loyalty to them.

On appeal, Applicant argues:

(a) his relationship with his parents is that of one who has been separated from them from a long period of time;

(b) he devotes all his energies, time, love and allegiance to his present family in the U.S.;

(c) he has only casual telephone contact with his parents and the contact has been waning as the period of separation increases;

(d) it has been approximately nineteen years since he immigrated to the U.S.; and

(e) his renunciation of his Israeli citizenship shows that he is a person dedicated to the U.S. government, his job, and his family in the U.S.

Although his argument is not couched in such terms, Applicant essentially takes issue with the Administrative Judge's conclusion that Applicant did not satisfy his burden of establishing mitigation under Foreign Influence Mitigating Condition 1. ⁽²⁾

Applicant fails to demonstrate the Administrative Judge erred by not making a favorable security clearance decision based on applying Foreign Influence Mitigating Condition 1. Given the record evidence in this case, it was reasonable for the Administrative Judge to conclude that Applicant's ties with immediate family members, extended family members, and friends in Israel raised security concerns under Guideline B. Those concerns shifted the burden to Applicant to demonstrate that the facts and circumstances of those ties do not place him in a position of vulnerability through possible foreign influence. *See, e.g.*, ISCR Case No. 00-0484 (February 1, 2002) at p. 3; ISCR Case No. 00-0489 (January 10, 2002) at p. 11. The Judge's conclusion that Applicant had not met that burden is sustainable on this record. Applicant's ability to proffer an alternate interpretation of the record evidence is insufficient to establish error on the part of the Judge. Because the Judge concluded that Applicant had not met his burden of mitigation regarding his family ties and friendships in Israel, the Judge properly declined to apply Foreign Influence Mitigating Condition 1.

Conclusion

Applicant has failed to meet his burden of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's adverse security clearance decision. ⁽³⁾

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, 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. Applicant devotes a significant portion of his appeal brief to a justification for why he used an Israeli passport after obtaining U.S. citizenship and a U.S. passport. At one point he indicates his belief that the Administrative

Judge's adverse decision resulted, in part, from his use of an Israeli passport after acquiring his U.S. passport. The SOR raised the issue of Applicant's passport under the Foreign Preference Guideline (Guideline C) but not the Foreign Influence Guideline (Guideline B). The Administrative Judge made formal findings in favor of Applicant under Guideline C. Nothing in the Administrative Judge's decision suggests that Applicant's use of an Israeli passport was a factor that the Judge considered when making his adverse formal findings under Guideline B. Applicant's arguments concerning his use of his Israeli passport are therefore moot.

2. Foreign Influence Mitigating Condition 1 provides: "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.).

3. In the conclusion section of his brief, Applicant states that he understands the concerns that the Department of Defense has raised and he states that he is willing to accept conditional terms "set up by the court" that will mitigate any further concerns. The Board has neither the ability to impose such terms nor any continuing jurisdiction over Applicant's case.