

DATE: September 28, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-26209

## **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 April 26, 2004, 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 Claude R. Heiny issued an unfavorable security clearance decision, dated May 3, 2005.

Applicant appealed the Administrative Judge's unfavorable 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 issue has been raised on appeal: whether the Administrative Judge erred by concluding Applicant failed to mitigate the security concerns raised by his ties and contacts with family members who are citizens and residents of the Republic of Sudan. 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**

Whether the Administrative Judge erred by concluding Applicant failed to mitigate the security concerns raised by his ties and contacts with family members who are citizens and residents of the Republic of Sudan. The Administrative Judge concluded that security concerns were raised under Guideline B (Foreign Influence) because of the totality of Applicant's contacts and ties with family members who are citizens and residents of the Republic of Sudan (hereinafter "Sudan"). In reaching that conclusion, the Judge noted the record evidence concerning the following: (a) Applicant has three brothers and three sisters residing in Sudan; (b) only one brother has a telephone and Applicant calls him monthly; (c) on occasion, Applicant sends his siblings medicine and clothing; (c) Applicant left Sudan in 1991 to escape oppression and because he feared prosecution for his political activities against the government; (d) Applicant believes he has been blacklisted by the Sudanese government; (e) Applicant held off visiting his aging and sick mother in Sudan for ten years until he became a naturalized United States citizen because he feared he would be subject to possible interrogation, detention, and jail if he went to Sudan without U.S. citizenship status; (f) Applicant would like to visit his siblings in Sudan, but he does not have the means to do so; (g) the present government of Sudan is a military dictatorship that has an extremely poor record on human rights practices according to the U.S. State Department; (h) the U.S. has listed Sudan as a state sponsoring terrorism; and (i) relations between Sudan and the U.S. have improved only slightly within recent years.

On appeal, Applicant makes the following assertions: (a) Since the year 2000 the Sudanese government has changed its hostile attitude toward the United States and is now taking extra steps to cooperate with the U.S., especially in the area of intelligence; (b) The government of Sudan is no longer posing a threat to the U.S.; (c) Sudan is drafting a new constitution that will free its citizens from being terrorized or exploited; (d) Applicant feels he is being "singled out" because there are many U.S. citizens of Sudanese origin with family in Sudan who have been granted security clearances by the U.S. government; and (e) Applicant is a good citizen and a hard worker with an excellent record throughout his professional career. The Board does not re-try a case on appeal. Rather, the Board reviews the Administrative Judge's decision in light of the case record to determine whether the appealing party has identified any

factual or legal error in the proceedings below. *See* Directive, Additional Procedural Guidance, Item E3.1.32. Making allowances for Applicant's *pro se* status, the Board construes Applicant's arguments as raising the issue of whether the Administrative Judge erred by concluding Applicant failed to mitigate the security concerns raised by his ties and contacts with family members who are citizens and residents of the Republic of Sudan.

Applicant's arguments about the changed nature of the Sudanese government are predicated on a newspaper article that is attached to his brief. The article was not part of the record below. It constitutes new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29. After a review of the record evidence, the Board concludes that the Administrative Judge's findings and conclusions about the nature of the Sudanese government are sustainable.

Applicant's argument about other U.S. citizens with Sudanese ties being granted security clearances is based on assertions that are not supported by any record evidence in this case. Moreover, there is a rebuttal presumption that government officials carry out their duties in good faith, and a person seeking to rebut that presumption has a heavy burden of presenting clear evidence to the contrary. *See National Archives and Records Administration v. Favish*, 541 U.S. 157, 174 (2004). Applicant's assertion that he believes he is being singled out falls far short of raising a colorable claim that his case was not handled in good faith.

Applicant's status as an honest and productive United States citizen is favorable evidence that the Judge was bound to consider-and in fact did. <sup>(1)</sup> Such evidence, however, does not negate the Judge's conclusion that Applicant's overall circumstances raise a security concern under Guideline B (Foreign Influence) that has not been mitigated.

Given the record evidence in this case, the Administrative Judge properly concluded that the totality of the facts and circumstances of Applicant's ties and contacts with relatives in Sudan raised security concerns under Guideline B, and that the burden then shifted to Applicant to present evidence to refute, explain, extenuate, or mitigate those security concerns sufficiently to warrant a favorable security clearance decision. *See* Directive, Additional Procedural Guidance, Item E3.1.15. Applicant's disagreement with the Judge about the security significance of his contacts and ties with relatives in Sudan is not sufficient to demonstrate the Judge's conclusions are erroneous. *See, e.g.*, ISCR Case No. 02-29403 (December 14, 2004) at p. 8.

Applicant's appeal arguments-viewed individually or cumulatively-do not demonstrate the Judge committed any factual or legal error in his decision.

### **Conclusion**

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated any error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smalin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. *See* Decision at pp. 2, 5.