

DATE: September 21, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-26978

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Jason R. Perry, Esq., Department Counsel

#### **FOR APPLICANT**

Sheldon I. Cohen, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated March 3, 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 Joan Caton Anthony issued an unfavorable security clearance decision dated February 28, 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 issues have been raised on appeal: (1) whether the Administrative Judge imposed on Applicant a burden of proof that is impossible to meet; (2) whether the Administrative Judge failed to properly consider Applicant's statement that he would not succumb to threats to his family; and (3) whether the Administrative Judge's decision is 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 Issues

1. Whether the Administrative Judge imposed on Applicant a burden of proof that is impossible to meet. Applicant asserts the Administrative Judge imposed an impossible burden of proof on him that has the practical effect of nullifying the Adjudicative Guidelines. This claim of error involves the Judge's consideration of Foreign Influence Mitigating Condition 1 [\(1\)](#)

and her conclusion that it did not apply in this case to Applicant's relatives living in Jordan and Syria. Applicant argues that the Judge's disposition of Mitigating Condition 1 had the effect of requiring Applicant to show that the foreign countries in question would never in the future attempt to coerce its residents in order to influence Applicant to disclose classified information, and that such a burden was impossible to meet.

Department Counsel is not required to present direct evidence of a nexus between an applicant's conduct and circumstances and an unfavorable security clearance decision. *Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973). Nor is Department Counsel required to prove that an applicant poses an imminent or clear and present danger to national security before an unfavorable security clearance decision can be made. *See, e.g.*, ISCR Case No. 02-09907 (March 17, 2004) at p. 7; ISCR Case No. 00-0596 (October 4, 2001) at p. 4; ISCR Case No. 99-0068 (November 30, 1999) at p. 6. Moreover, the federal government is not required to grant security clearances to applicants unless it is affirmatively shown that a particular applicant has been specifically targeted by a foreign country for intelligence gathering purposes. *See, e.g.*, ISCR Case No. 01-18860 (March 17, 2003) at p. 7; ISCR Case No. 02-09907 (March 17, 2004) at pp. 7-8. Apart from the practical consideration that both parties have limited access to information about covert intelligence gathering activities by foreign countries and organizations, the federal government is not precluded from denying or revoking access to classified information based on facts and circumstances that raise security concerns but have not yet resulted in an actual breach. *See Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969, *cert. denied*, 397

U.S. 1039 (1970). Applicant's right to due process does not change the substantive law governing security clearance adjudications, and does not relieve Applicant of the heavy burden of persuasion imposed on all applicants by Executive Order 10865 and the Directive. *See, e.g.,* ISCR Case No. 02-00318 (February 25, 2004) at p. 9.

Applicant acknowledges that in earlier cases the Board has taken the positions set forth in the preceding paragraph and that the Board has earlier rejected arguments postulating an impossible burden of proof. He now urges the Board to reconsider its prior reasoning in light of new argument and case law set forth in his appeal brief. Applicant argues (a) an administrative decision requiring an unerring prediction of the future is an impossible burden of proof rendering decisions under these circumstances arbitrary and capricious and (b) where the facts are uniquely within the peculiar knowledge of one party, the burden of proving those facts shifts to that party, otherwise there is a presumption in favor of the other party. Applicant argues that the Administrative Judge's decision and the prior rulings of the Board violate both of these propositions by requiring Applicant to prove that any country would never attempt to influence its citizens at any time. Applicant's argument is not persuasive.

Security clearance decisions are not an exact science, but rather involve predictive judgments about whether a person may be at risk to fail to properly handle classified information. *Department of the Navy v. Egan*, 484 U.S. 518, 528-29 (1988). To the extent that DOHA administrative judges are required to assess current risk by making predictive judgments about the likelihood of future conduct or circumstances, their actions parallel determinations made in other areas of the law. (2) By suggesting that the reasoning of the Judge and the Board puts Applicant to the impossible task of predicting the future, Applicant's argument goes too far. As in any other area of DOHA jurisprudence, application of Foreign Influence Mitigating Condition 1 is not predicated on precise predictions of the future. Rather, an administrative judge is required to make predictive judgments about the likelihood of a current and future risks based on present circumstances. The circumstances presented by the location of Applicant's relatives in Jordan and Syria is certainly a matter that is susceptible to proof. Moreover, the cases cited by Applicant stating that a party bears the burden of producing evidence uniquely within its powers to obtain are readily distinguishable from this case. As stated in a prior paragraph, both parties are handicapped when it comes to gathering evidence about the covert intelligence practices of a foreign country. When it comes to the specific circumstances of Applicant and his relatives in a foreign country, however, it can hardly be said that Applicant is in a position of disadvantage relative to the position of Department Counsel concerning the ability to produce evidence about those circumstances. Applicant's arguments on these points do not persuade the Board to reconsider its past responses to "impossible burden of proof" arguments nor do they persuade the Board that the Judge's application of Foreign Influence Mitigating Condition 1 was error.

Implicit in Applicant's arguments is the premise that he is entitled to a favorable security clearance decision unless the federal government affirmatively establishes he is not entitled to receive such a favorable decision. That premise runs afoul of the following legal principles: there is no right to a security clearance, there is no presumption in favor of granting or continuing one, and the federal government can resolve doubts in favor of the national security rather than in favor of an applicant. Directive, Adjudicative Guidelines, Item E2.2.2; *Egan*, 484 U.S. 518, 528-529. Although Department Counsel has the burden of presenting evidence to prove controverted facts, Department Counsel does not have the burden of affirmatively disproving the applicability of an Adjudicative Guidelines mitigating condition. *See, e.g.,* ISCR Case No. 02-09907 (March 17, 2004) at p. 7; ISCR Case No. 01-20908 (November 26, 2003) at p. 3; ISCR Case No. 01-24306 (September 30, 2003) at p. 6.

2. Whether the Administrative Judge failed to properly consider Applicant's statement that he would not succumb to threats to his family. Applicant argues that the Administrative Judge did not mention his statement that he would not betray the United States if his family were threatened and that he would report any such threats to the proper authorities. He submits that this failure to mention his statement is an indication that the Judge gave Applicant's statement no weight whatsoever. For the reasons that follow, Applicant's argument does not persuade the Board that the Judge acted in an arbitrary and capricious manner.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.,* ISCR Case No. 99-9020 (June 4, 2001) at p. 2. To rebut or overcome that presumption, an appealing party must do more than simply disagree with the Judge's weighing of the record evidence, or cite record evidence that is not specifically discussed or mentioned in the Judge's decision. Applicant's statements about what he would do if his family were threatened are record evidence that the Judge had to consider. The Judge had to

decide whether the testimony was plausible, and if so, what weight (if any) to give that testimony in light of the record evidence as a whole. Even if the Judge concluded that Applicant's testimony was plausible, the Judge's obligation to consider that testimony did not compel the Judge to give it any particular weight, or any weight at all. The Board has declined to hold that an applicant's statements about what he or she would do if family members were threatened are not admissible or not entitled to be taken into account by a Judge. However, the Board has noted the limited value of such statements because they involve only a prediction by an applicant about what he or she might do in the future under some hypothetical set of circumstances. The Board has also noted that in considering the applicability of Foreign Influence Mitigating Condition 1, the key issue is whether the status and circumstances of an applicant's relatives in other countries might put the applicant in a position where he is forced to choose between his loyalty to his family and his loyalty to the United States. Thus, Applicant's statement as to what he might do when presented with such a choice is of limited relevance.

3. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. The Administrative Judge noted that Jordan was a country beset by civil unrest and had been on the front lines in the war against international and regional terrorism. The Judge noted that Syria is included on the State Department list of state sponsors of terrorism. The Judge concluded that Applicant's close familial and friendship ties with and obligations to relatives in Jordan and Syria created the potential for foreign influence that could result in the compromise of classified information and that this concern has not been mitigated. On appeal, Applicant maintains that the Judge failed to offer a rationale to support her conclusions. Applicant argues variously: (a) Jordan is a friendly country with a consistently pro-Western foreign policy and traditionally has had close relations with the United States; (b) Applicant's father's ties to Jordan, which include only his receipt of a modest military pension and ownership of property in Jordan worth \$140,000, are not of security significance; (c) Applicant's brother's position as a professor at a Jordanian University, and Applicant's casual relationship with his brother negate any possible security concerns arising out of their relationship; (d) Applicant's sister, a dual citizen of the United States and Jordan living in Jordan, is not an employee of the Jordanian government or any other government and is not in a position to be exploited; (e) Applicant has only a casual relationship with his sister-in-law and she is not in a position to be exploited; (f) The record evidence does not support the Administrative Judge's finding that Applicant has ties of familial obligation to his first cousins in Jordan and his second cousin in Syria; (g) the Administrative Judge failed to provide a rationalization for her formal finding that Applicant's travel to Jordan, Syria, and Israel was security clearance disqualifying; and (h) the Administrative Judge ignored mitigating evidence and failed to employ the "whole person" concept. The Board interprets these various arguments as raising the issue of whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. While Applicant's arguments have mixed merit, the Board concludes that the Judge's overall adverse security clearance decision is sustainable.

The Board finds no merit in Applicant's assertions regarding the previously enumerated arguments (a) through (e) and argument (h). After a review of the record evidence and the Administrative Judge's decision, the Board concludes that in these instances the Judge's findings are reasonably supported by the record evidence and her conclusions flow logically from her findings. The Board also concludes that Applicant has failed to overcome the presumption that the Judge considered all the record evidence, both unfavorable and mitigating. Applicant correctly notes that when making a security clearance decision the Administrative Judge should evaluate an applicant's conduct and circumstances under the whole person concept. See Directive, Section 6.3; and Enclosure 2, Items E2.2.1 and E.2.2.3. However, Applicant's arguments do not demonstrate the Administrative Judge failed to apply the whole person concept. In his various arguments, Applicant essentially sets forth an alternate interpretation of the record evidence. Applicant's ability to do so is not sufficient to demonstrate the Judge failed to apply the whole person concept, or that the Judge erred when she determined that Applicant had not provided sufficient evidence in mitigation. Merely because a Judge makes adverse findings and draws adverse conclusions, it does not follow that the Judge is failing to apply the whole person concept or is weighing the evidence, both favorable and unfavorable, in a manner that is arbitrary, capricious, or contrary to law. See, e.g., ISCR Case No. 02-06194 (July 15, 2004) at p. 4.

The Administrative Judge concluded that Applicant failed to rebut the presumption that he has ties of obligation to his first cousins and his second cousin (hereinafter "cousins"). She found that his contacts with his cousins were not casual but bear "strong overtones of familial commitment."<sup>(3)</sup>

On appeal, Applicant points out that Applicant's cousins are not immediate family members and the record evidence does not support the Judge's conclusion that Applicant has ties of familial affection or obligation to these people.

Applicant's contention has merit.

The Administrative Judge erred to the extent that her findings and conclusions about Applicant's ties of affection or obligation to his cousins are based on a presumption. While the Board on numerous occasions has indicated that there is a presumption that an Applicant has close ties of affection or obligation with immediate family members, which includes Applicant's parents, siblings and children, Applicant's cousins do not fall into this category. <sup>(4)</sup>

The Board has noted the necessity of differentiating between immediate family members and other relatives. *See, e.g.*, ISCR Case No. 01-03120 (February 20, 2002) at p. 3. Absent the presumption, the relationship between Applicant and his cousins is properly characterized solely by reference to the record evidence. The record evidence in this case establishes only brief, sporadic contact between Applicant and his cousins over a time span of many years. There is no evidence that reasonably supports findings of ties of familial affection or obligation between these individuals. While the Judge could consider the significance of the fact that Applicant has cousins in Jordan and Syria in the context of her overall security clearance decision and could give this evidence appropriate weight, her mischaracterization of the relationships was error. However, the Board finds that this error is harmless in light of the findings and conclusions of the Judge that are sustainable.

The Administrative Judge made a formal finding against Applicant under subparagraph 1.1. of the SOR. <sup>(5)</sup>

The allegation cites several trips taken by Applicant to Jordan, Syria, and Israel. In her decision, the Judge mentions the fact that the travel took place but engages in no further discussion as to why the travel is significant from a security standpoint. On appeal, Applicant asserts that without a rationale as to why the travel was significant, it was error for the Judge to make a formal finding against Applicant. Applicant's contention has merit. The record evidence indicates that the Applicant's travels to Jordan and Syria were largely a function of his desire to visit relatives whose presence in those countries is the essential component of this case. There is no clear record evidence that would give independent security significance to Applicant's travels as set forth in the SOR. Given this posture, it was error for the Judge not to elaborate the specific reasons why Applicant's travel warranted a negative formal finding under subparagraph 1.1. of the SOR. However, the Board finds that this error is harmless in light of the overall record and the adverse findings and conclusions of the Judge that are reasonably supported by the record.

### **Conclusion**

Applicant has failed to meet his burden of demonstrating error below that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

### **Concurring Opinion of Administrative Judge Michael Y. Ra'anan**

I agree with the majority opinion. I am writing separately to address a point raised in Applicant's brief. Applicant refers to my separate opinion in ISCR Case No. 02-04786. That reference is misplaced. My separate opinion, on its face,

regarded a fact pattern fairly categorized as estranged relatives. Indeed, the word estranged was underlined in the separate opinion. Nothing in Applicant's case suggests that he is estranged from his immediate family members residing in Jordan. The two cases are easily distinguished.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. "A determination that the immediate family members(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. For example, injunctive relief is often based on predictions of imminent future harm.
3. Decision at p. 7.
4. *See* Foreign Influence Disqualifying Condition 1 and Foreign Influence Mitigating Condition 1. The Board has included the immediate family members of an applicant's spouse in this category. *See, e.g.*, ISCR Case No. 01-03120 (February 20, 2002) at p. 3.
5. "You traveled to Jordan from May 2002 to June 2002, Syria in May 2002, Jordan and Israel from July 2000 to August 2000, and Jordan, Israel, and Syria from June 1997 to July 1997."