

DATE: October 15, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-27444

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 November 27, 2002 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 Joseph Testan issued an unfavorable security clearance decision dated June 6, 2003.

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 erred by finding that Applicant's wife is eligible to become a U.S. citizen; (2) whether the Administrative Judge's adverse conclusions under Guideline B (Foreign Influence) are arbitrary, capricious, or contrary to law; and (3) whether the Administrative Judge's adverse security clearance decision should be reversed because Applicant cannot pose a security risk due to his lack of access to classified information. 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 erred by finding that Applicant's wife is eligible to become a U.S. citizen. The Administrative Judge found the following: (a) in 1995 Applicant married a Russian citizen who was the daughter of a Russian Naval officer; (b) Applicant's father lost his Russian security clearance after his daughter married Applicant and moved to the United States; (c) Applicant's wife, who has lived with Applicant in the United States since 1996, has visited her family in Russia three times, and telephones her parents in Russia a few times each week; and (d) Applicant's wife is still a Russian citizen and has not yet applied for U.S. citizenship although she is eligible to do so, but she intends to apply for U.S. citizenship and reside permanently in the United States. With one exception, Applicant does not challenge these findings on appeal. Specifically, Applicant asserts his wife is not eligible to apply for U.S. citizenship until January 2004. The Board construes that assertion as challenging the Judge's finding that Applicant's wife is eligible for U.S. citizenship.

The Administrative Judge's challenged finding is problematic. Whether Applicant's wife is eligible to apply for U.S. citizenship is a mixed question of fact and law. Even under the relaxed evidentiary standards applicable to these proceedings, ⁽¹⁾ neither Applicant nor his wife is competent to testify as to her eligibility to apply for U.S. citizenship. Whether a person is eligible to apply for U.S. citizenship turns on whether they satisfy pertinent statutory requirements under federal law, not on their personal belief or opinion about their eligibility to apply. A person's belief, however sincere, that he or she is eligible to apply for U.S. citizenship is not competent evidence that the person really is eligible to apply for U.S. citizenship. Neither party presented sufficient record evidence to establish whether Applicant's wife is eligible to apply for U.S. citizenship. Neither party asked the Judge to take administrative notice of federal statutory provisions pertaining to eligibility to apply for U.S. citizenship. And, the Judge did not state or otherwise indicate that he was taking administrative notice of federal statutory provisions pertaining to eligibility to apply for U.S. citizenship.

Under the circumstances, the Board is unable to discern a sustainable basis in the record below for the Judge's finding that Applicant's wife is eligible to apply for U.S. citizenship.

Considering the record evidence as a whole, the Board concludes the Administrative Judge's error on this point is harmless and does not warrant remand or reversal. *See* ISCR Case No.00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine). Whether Applicant's wife is eligible to apply for U.S. citizenship now, or will be eligible to apply in the future, does not change the fact that she now is a Russian citizen and not a U.S. citizen, and does not change the security significance of those facts for purposes of adjudicating Applicant's current security eligibility.⁽²⁾

2. Whether the Administrative Judge's adverse conclusions under Guideline B (Foreign Influence) are arbitrary, capricious, or contrary to law. Applicant also argues: (a) Applicant's only relationship with foreign citizens is through marriage; (b) his wife will apply for U.S. citizenship when she is eligible to do so; (c) Applicant's father retired from the Russian Navy, works for a private Russian company, and is no longer affiliated with the Russian government; ; and (d) neither Applicant's father-in-law nor any immediate family member is involved with the Russian government. The Board construes these arguments as raising the issue of whether the Administrative Judge's adverse conclusions under Guideline B are arbitrary, capricious, or contrary to law. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge erred.

Given the totality of the record evidence in this case, the Administrative Judge had a rational basis for concluding the facts and circumstances of Applicant's family ties with Russia raised security concerns under Guideline B (Foreign Influence). The Judge also correctly held that Applicant had the burden of presenting evidence to extenuate, mitigate, or otherwise overcome the security concerns raised by the facts and circumstances of his family ties with Russia. *See* Directive, Additional Procedural Guidance, Item E3.1.15. *See also* ISCR Case No. 01-17496 (October 28, 2002) at p. 5 (applicant has the burden of showing applicability of Adjudicative Guidelines mitigating condition).

Foreign connections not based on birth can raise security concerns under Guideline B. Accordingly, the Administrative Judge's decision is not rendered arbitrary, capricious, or contrary to law because Applicant's relationships with Russian citizens are based on his marriage. *See, e.g.*, ISCR Case No. 02-00305 (February 12, 2003) at p. 4 (Administrative Judge can consider security significance of evidence that an applicant's wife is a foreign citizen with family members living in foreign country).

As discussed earlier in this decision, whether Applicant's wife is eligible or not eligible to apply for U.S. citizenship now or in the future does not change the fact that she now is a Russian citizen and not a U.S. citizen, and does not change the security significance of those facts for purposes of adjudicating Applicant's current security eligibility. Accordingly, even if Applicant's wife were to become a naturalized U.S. citizen in the future, such a future change in circumstances does not render the Administrative Judge's decision arbitrary, capricious, or contrary to law.

The absence of evidence that Applicant's family members in Russia are employees or agents of the Russian government is not dispositive. Having relatives, cohabitants or associates who are connected with a foreign government is a disqualifying condition under Guideline B.⁽³⁾ However, the absence of such a connection with a foreign government does not mean that there is no security concern under Guideline B. *See, e.g.*, ISCR Case No. 01-17496 (October 28, 2002) at p. 5; ISCR Case No. 01-03120 (February 20, 2002) at pp. 3-4. A reading of Guideline B in its entirety shows that security concerns can be raised by a variety of foreign connections, not just having family members with foreign government connections. Furthermore, the absence of a particular disqualifying condition does not compel a favorable security clearance decision. *See, e.g.*, ISCR Case No. 02-08052 (June 23, 2003) at p. 3 (the mere presence or absence of a disqualifying or mitigating condition is not solely dispositive of a case).

Considering the record evidence as a whole, the Administrative Judge had a rational basis for concluding that Applicant had failed to provide sufficient evidence of extenuation or mitigation to overcome the security concerns raised by his family ties with Russia. Applicant's disagreement with the Judge's adverse conclusions is not sufficient to demonstrate the Judge's conclusions are arbitrary, capricious, or contrary to law. Applicant's appeal arguments, viewed individually or collectively, do not demonstrate the Judge's adverse conclusions under Guideline B are arbitrary, capricious, or contrary to law.

3. Whether the Administrative Judge's adverse security clearance decision should be reversed because Applicant cannot pose a security risk due to his lack of access to classified information. Applicant also argues he cannot pose a security risk because is not "privity to information contained in secured areas and is escorted at all times by a Government representative while doing work in a classified area." The Board construes this argument as raising the issue of whether the Administrative Judge's adverse security clearance decision should be reversed because Applicant cannot pose a security risk. The Board finds this argument unpersuasive.

Applicant's security eligibility does not turn on whether he needs a security clearance for access to classified information or for access to secured areas. *See* ISCR Case No. 98-0257 (January 22, 1999) at p. 3 ("It is irrelevant whether Applicant's position requires a security clearance for access to a secure area or for access to classified information. Either type of access implicates the national security interests of the United States and requires a finding that it is clearly consistent with the national interest to grant or continue a security clearance for the applicant. Accordingly, the Administrative Judge's decision is not rendered arbitrary, capricious, or contrary to law by the fact that Applicant seeks a security clearance for access to a building and not for direct access to classified information."). *Accord* ISCR Case No. 02-04786 (June 27, 2003) at p. 2 n.1. Therefore, the Administrative Judge's adverse security clearance decision in this case is not erroneous for the reason advanced by Applicant.

Conclusion

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

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: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

1. *See* Directive, Additional Procedural Guidance, Item E3.1.19 ("... technical rules of evidence may be relaxed, except as otherwise provided herein, to permit the development of a full and complete record.").

2. The foreign citizenship of an applicant's spouse can raise security concerns under Guideline B. *See* Foreign Influence Disqualifying Condition 1, Directive, Enclosure 2, E2.A2.1.2.1 ("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.").

3. Foreign Influence Disqualifying Condition 3 (Directive, Enclosure 2, Item E2.A2.1.2.3).