

DATE: March 1, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-27515

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 the Applicant a Statement of Reasons (SOR), dated July 14, 2004, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based on Guideline B (Foreign Influence) and Guideline E (Personal Conduct). Administrative Judge Michael H. Leonard issued an unfavorable security clearance decision, dated October 19, 2004.

Applicant appealed the Administrative Judge's unfavorable 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 supported by the record evidence, (2) whether the Administrative Judge failed to consider all the record evidence, and (3) whether the Administrative Judge erred in his conclusion that Applicant had failed to demonstrate that he had mitigated the government's security concern regarding foreign influence. For the reasons set forth below, 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 [\(1\)](#)

(1) Whether the Administrative Judge's findings of fact are supported by the record evidence. Applicant argues on appeal that the Judge made findings of fact which are not supported by the record evidence. Included in those challenged findings are: (a) Applicant's immediate family in China are known to the Communist Party and that puts them at risk, and (b) Applicant has close and continuing ties to his family in China. Both findings are sustainable.

The Administrative Judge found, and the record supports, that Applicant's family were persecuted for many years starting in 1957. The Judge found, and the record supports, that a correction was issued in 1979 by the Chinese Communist authorities and Applicant's family ceased to be persecuted and were rehabilitated. Applicant argues that as a result of the 1979 correction and the Judge's lack of understanding of the situation in China, the Judge's finding that the family members are known to the Communist Party and are therefore at risk is erroneous. The Board disagrees. The Judge's challenged finding is plausible in light of the record evidence.

Applicant's argument about the Judge's knowledge of China is without merit. The Board has previously noted that neither DOHA Administrative Judges nor the Board have the authority to adjudicate foreign policy or foreign relations issues. *See, e.g.*, ISCR Case No. 02-09907 (March 17, 2004) at p. 3, and ISCR Case No. 02-00318 (February 25, 2004) at pp. 6-7. It is untenable for a party to demand that an Administrative Judge be an expert in the culture, history and politics of every foreign country. Indeed, it is untenable for a party to rely on a Judge's knowledge (other than "common knowledge") of any information which is not record evidence. It is a party's burden to offer any evidence for the record that they wish a judge to consider.

The Judge found that Applicant's parents, two siblings and his parents-in-law all live in China. Applicant challenges the Judge's characterization of his family ties as close. The Judge's characterization is sustainable. The plain language of the

Directive makes clear that there is a presumption that one has close ties and a high level of obligation to one's immediate family. Applicant's claim that he only speaks to his immediate family a few times a year and only occasionally travels to China to visit them is insufficient to rebut the presumption. Applicant's in-laws, although not immediate family, are part of the mosaic of Applicant's ties to China and should be considered in that context.

(2) Whether the Administrative Judge failed to consider all the record evidence. Applicant points to several aspects of the record which he believes the Administrative Judge disregarded. There is a rebuttable presumption that the Administrative Judge considered all the record evidence. However, the Judge is not obliged to discuss each and every piece of evidence. *See, e.g.*, ISCR Case No. 02-15074 (September 9, 2003) at p. 3. The fact that the Administrative Judge interpreted the record differently than a party, in this case, Applicant, would have liked is not proof that the Judge failed to consider the evidence. Similarly the Judge may have given some evidence less weight than Applicant hoped for, but that also does not mean that the Judge failed to consider the evidence. *See, e.g.*, ISCR Case No. 02-01494 (May 28, 2003) at p. 3. Applicant's argument regarding the evidence he cites are inadequate to overcome the presumption that the Judge considered all the record evidence.

Applicant's focus on his employment record and references does not demonstrate that the Administrative Judge erred. The Judge was not obliged to conclude that Applicant's employment record and references necessarily mitigated or extenuated the government's security concerns about Applicant's family in China. Therefore, the Judge was not obliged to discuss Applicant's employment record and references in his decision.

(3) Whether the Administrative Judge erred in his conclusion that Applicant had failed to demonstrate that he had mitigated the government's security concern regarding foreign influence. Applicant argues that the Administrative Judge erred by concluding that Applicant had failed to mitigate the government's security concerns regarding Applicant's family ties to China. Applicant's argument is not persuasive.

Applicant claims that he demonstrated that it is impossible for his relatives in China to be exploited in a way that would force him to choose between his loyalty to them and his loyalty to the United States, in accordance with the standard set forth in Guideline B Mitigating Condition 1. ⁽²⁾ The record does not support Applicant's claim. The Judge found that Applicant has four immediate family members and his parents-in-law living in a country which has a poor human rights record and engages in espionage against the United States. The Judge's findings are supported by the record. Applicant's claim on appeal that because his family is not employed by the Chinese government they are not susceptible to exploitation is not persuasive. *See, e.g.*, ISCR Case No. 02-29279 (February 9, 2005) at pp. 3-4.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error in the Administrative Judge's October 19, 2004 decision. Therefore, that decision is affirmed.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge's favorable findings under Guideline E (Personal Conduct) are not at issue on appeal.
2. 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.