

DATE: February 9, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-29279

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Ty Hyderally, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued the Applicant a Statement of Reasons (SOR), dated October 27, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline C (Foreign Preference), Guideline B (Foreign Influence) and Guideline E (Personal Conduct). Administrative Judge Robert J. Tuider issued an unfavorable security clearance decision, dated November 2, 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 erred by holding against the Applicant with respect to the Guideline B allegations, and (2) whether the Administrative Judge's decision is the product of discrimination against the Applicant. 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 [\(1\)](#)

1. Whether the Administrative Judge erred by holding against the Applicant with respect to the Guideline B allegations. Applicant contends that he should not be denied a security clearance merely because he has relatives in a foreign country (including immediate family members and in-laws). This contention is without merit.

The Administrative Judge made sustainable findings that: (1) Applicant had a brother, sister, mother-in-law, and father-in-law who were citizens of the People's Republic of China (China), residing in China, (2) Applicant had traveled to China in 1995 and 2000 to visit and care for his mother, (3) Applicant maintained contact with his brother and sister, by way of annual telephone calls, and (4) Applicant's family had previously been targeted for mistreatment by the Chinese government during the Cultural Revolution. Given those findings, the Administrative Judge concluded that Applicant's ties with those immediate family members raised security concerns under Guideline B and that Foreign Influence Disqualifying Condition 1 applied. *See* ISCR Case No. 01-22606 (June 30, 2003) at p. 6. That conclusion shifted the burden of persuasion to Applicant. If there are admitted or proven facts and circumstances that raise security concerns, "[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive, Additional Procedural Guidance, Item E3.1.15.

Applicant argues that the Administrative Judge gave insufficient weight to evidence that Applicant was not close to his relatives in China, that those relatives were not agents of the Chinese government, and that Applicant is a loyal American. Applicant's argument does not demonstrate that it was arbitrary, capricious, or contrary to law for the Judge to conclude that Applicant had not met his burden of establishing that his relatives were not in a position to be exploited by a foreign power in a way that could force him to choose between loyalty to those relatives and the United States. Mere disagreement with the Judge's weighing of the evidence is not sufficient to demonstrate error without a showing

that the Judge's weighing of the evidence was arbitrary, capricious, or contrary to law.

Applicant also argues the Administrative Judge's adverse decision under Guideline B is erroneous because the Judge failed to consider significant evidence demonstrating Applicant's preference for the United States--including the fact that Applicant is now a United States citizen, he has lived permanently in the United States for many years with no intention of returning to China, he has significant property interests in the United States, he is an outstanding employee, and he has never engaged in any misconduct. There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless he or she specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Applicant's ability to cite to record evidence that he contends the Judge should have given greater weight is not sufficient to overcome that rebuttable presumption. ⁽²⁾ Merely because a Judge does not give greater weight to record evidence cited by the appealing party, it does not follow that the Judge simply ignored that evidence. Moreover, to the extent Applicant's argument can be construed as challenging the Judge's weighing of the record evidence, it fails to establish that the Judge weighed the record evidence in a manner that is arbitrary, capricious, or contrary to law.

2. Whether the Administrative Judge's decision is the product of discrimination against the Applicant. Applicant also asserts that the Administrative Judge's decision is an example of discrimination and that the sole basis for denial is that Applicant is Chinese. There is no merit to Applicant's assertion.

There is a rebuttable presumption that federal officials and employees carry out their duties in good faith. *See, e.g.*, ISCR Case No. 00-0030 (September 20, 2001) at p. 5. Furthermore, there is a rebuttable presumption that an Administrative Judge is impartial and unbiased. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 5. A party seeking to rebut either of those presumptions has a heavy burden of persuasion on appeal. The issue is not whether Applicant personally believes that he has been discriminated against. Rather, the issue is whether the record of the proceedings below contains any indication that the Judge acted in a manner that would lead a reasonable person to question the fairness and impartiality of the Judge. *See, e.g.*, ISCR Case No. 00-0248 (March 21, 2001) at p. 5. Applicant fails to identify anything in the record below that indicated or suggests a basis for a reasonable person to question the fairness or impartiality of the Judge in this case.

The Administrative Judge's adverse conclusions under Guideline B were not based merely upon Applicant's status as a former citizen of China. Rather, they were based on the record evidence that Applicant's ties with his foreign family members pose a security risk under the particular facts of this case. *See, e.g.*, ISCR Case No. 99-0457 (January 3, 2001) at p. 6. The Board notes that this program has adjudicated Guideline B (Foreign Influence) and Guideline C (Foreign Preference) cases involving applicants with ties to a wide variety of countries. To the extent that Applicant asserts that the components of Guideline B discriminate against him, the Board does not have the jurisdiction or authority to entertain challenges to the wisdom or authority of provisions of the Directive. *See, e.g.*, DISCR Case No. 90-0208 (October 24, 1991) at p. 6.

Conclusion

Applicant has failed to demonstrate harmful error below. Accordingly, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge made a favorable finding with respect to SOR paragraph 1.a and SOR paragraph 3.a had previously been withdrawn by the Government. Those favorable findings are not at issue in this appeal.
2. In this case, the Judge specifically noted that Applicant was a United States citizen, owned a home, maintained bank accounts and was registered to vote in the United States, and had "expressed great affection and loyalty for the United States . . . [and] a demonstrated history of being a trusted and valued employee." Decision at p. 3.