

DATE: May 4, 2005

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-30535

**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 Applicant a Statement of Reasons (SOR), dated November 5, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline B (Foreign Influence). Administrative Judge Henry Lazzaro issued an unfavorable security clearance decision, dated November 24, 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 issue: whether the Administrative Judge erred in concluding that Applicant had not successfully rebutted, mitigated or extenuated the security concerns raised under Guideline B (Foreign Influence). 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 in concluding that Applicant had not successfully rebutted, mitigated or extenuated the security concerns raised under Guideline B (Foreign Influence). Applicant argues that the evidence he provided in the proceeding below was sufficient to require the Administrative Judge to conclude that he had rebutted, mitigated or extenuated the security concerns raised under Guideline B (Foreign Influence), under the "whole person" concept. Specifically, Applicant contends that the Judge's adverse decision should be reversed because: (1) Applicant's wife and stepson have applied for United States citizenship, so they pose no threat of coercion to Applicant, and Applicant's foreign in-laws are retired and not agents of a foreign government, (2) Applicant's contacts with his foreign in-laws are casual and infrequent, (3) Applicant's wife has no foreign financial interests, (4) Applicant and his wife intend to promptly report any efforts at exploitation by a foreign government to the proper authorities, and (5) the facts of Applicant's case are similar to other Hearing Office decisions in which applicants were granted a clearance. For the reasons that follow, the Board concludes Applicant's arguments do not 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. Therefore, 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). Whether Applicant's wife and stepson are eligible or not eligible to apply for U.S. citizenship now or

in the future does not change the fact that they are now Russian citizens and not U.S. citizens, and does not change the security significance of those facts for purposes of adjudicating Applicant's current security eligibility. Even if Applicant's wife and stepson were to become naturalized U.S. citizens in the future, such a circumstance does not render the 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. 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). Moreover, the Board has previously rejected the premise that security concerns under Guideline B are mitigated merely because an applicant's foreign family members are elderly or retired. *See, e.g.*, ISCR Case No. 02-04786 (June 27, 2003) at pp. 5-6 (Administrative Judge failed to articulate a rational basis for his conclusion that the age of the applicant's father reduces security concerns under Guideline B; also noting that foreign government could bring pressure to bear on the applicant's father through threats concerning father's pension).

Applicant's argument for the applicability of Guideline B (Foreign Influence) Mitigating Condition (MC) 4<sup>(1)</sup>

is not persuasive. Applicant's assertions as to how he and his wife would act when faced with a hypothetical situation of attempted exploitation did not require the Judge to apply MC4. Applicant's argument for the applicability of Guideline B Mitigating Condition 1, <sup>(2)</sup>

Mitigating Condition 3, <sup>(3)</sup>

and Mitigating Condition 5<sup>(4)</sup>

are likewise not persuasive. There is no evidence which would have required the Judge to apply the second prong of MC1. Given the nature of the relationships involved, the Judge could reasonably conclude that MC1 was more pertinent than MC3 to mitigate the government's concerns. Finally, application of MC5, although technically permissible, would not have added much to the Judge's analysis, which focused on familial relationships, not finances. *See, e.g.*, ISCR Case No. 03-09445 (April 25, 2005) at p. 4.

Considering the record evidence as a whole, the 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 asserts that the Administrative Judge failed to do the proper "whole person" analysis of Applicant and his situation. Applicant's general point is well taken. A Judge's analysis is not limited to a mechanical application of pertinent Adjudicative Guidelines. It is proper for a Judge to evaluate a case using the general factors from the Directive, Section 6.3 and Adjudicative Guidelines E2.2.1. *See*, ISCR Case No. 03-09445 (April 25, 2005) at pp. 3-4; ISCR Case No. 03-11448 (August 10, 2004) at pp. 3-4. In this case, however, Applicant has not demonstrated that the Judge failed to do a "whole person" analysis of Applicant. The Judge discussed both record evidence favorable to Applicant and the ultimate basis for his adverse conclusions.

Finally, Applicant cites to other decisions by DOHA Administrative Judges for the proposition that many cases exist where security clearances have been granted to applicants who have foreign family connections similar to Applicant's. <sup>(5)</sup>

The decision in another DOHA case cited by Applicant on appeal does not demonstrate error by the Judge in this case.

A decision by a Hearing Office Judge is not legally binding precedent on that Judge's colleagues in other cases even if Applicant establishes close factual similarities between the cited cases and the instant case. The cited cases are not legally binding precedent on the Board in any case. *See* ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing in detail the precedential value of decision by Hearing Office Judges); ISCR Case No. 01-26347 (January 8, 2004) at pp. 4-5.

### Conclusion

Applicant failed to meet his burden of demonstrating 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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. "The individual has promptly reported to proper authorities all contacts, requests, or threats from persons or organizations from a foreign country, as required."
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."
3. "Contact and correspondence with foreign citizens are casual and infrequent."
4. "Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities."
5. One of the cases cited in Applicant's Brief, ISCR Case No. 02-15339 (September 26, 2003), was reversed on appeal. *See*, ISCR Case No. 02-15339 (April 29, 2004).