

DATE: October 6, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-31083

## **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 June 8, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence). Administrative Judge Claude R. Heiny issued an unfavorable security clearance decision, dated March 10, 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.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge properly considered Applicant's foreign family ties under Guideline B; and (2) whether the Administrative Judge properly considered case under a whole person analysis. 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<sup>(1)</sup>

1. Whether the Administrative Judge properly considered Applicant's foreign family ties under Guideline B. Applicant challenges the Administrative Judge's adverse conclusions regarding the security significance of Applicant's immediate family in Iran consisting of his parents and seven siblings. The Administrative Judge concluded that Applicant's family situation does not fall entirely within the parameters of Foreign Influence Mitigating Condition 1.<sup>(2)</sup>

On appeal Applicant argues that his relatives are not employed by Iran's government and have not supported its policies and that they are not in a position to be exploited in a way that might force Applicant to choose between them and the United States. Applicant's arguments do not establish error on the part of the Administrative Judge.

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.

In this case the Judge found that Applicant had proven one requisite element under Foreign Influence Mitigating Condition 1 (that Applicant's relatives were not agents of a foreign power) but that the other requisite element was not proven. Indeed, the Judge explicitly found that Applicant's relatives *are* in a position to be exploited in such a way that might force Applicant to choose between his loyalty to them and his loyalty to the United States. Although Applicant claims on appeal that he demonstrated that they are not in a position to be exploited, he cites no specific evidence beyond their not being employed by or supporters of the Iranian government. On its face, Applicant's claim is not persuasive. Furthermore, the Judge's sustainable citations to official United States documents regarding Iran's hostility to the United States and its poor human rights record detract from Applicant's claim.

2. Whether the Administrative Judge properly considered case under a whole person analysis. Applicant discusses many aspects of his situation beyond the presence of his family in Iran. Applicant's arguments raise the issue of whether the Administrative Judge properly analyzed Applicant's case under a whole person analysis.

There is a presumption of good faith and regularity by Administrative Judges in DOHA proceedings. *See, e.g.*, ISCR Case No. 99-0019 (November 22, 1999) at p. 5. Furthermore, the Administrative Judge acknowledged the whole person concept and stated specifically that he had considered the whole person factors. A review of the Judge's decision convinces the Board that the Judge did consider factors under the whole person analysis. Here the Judge concluded that the presence of Applicant's immediate family in Iran presented a circumstance which makes Applicant vulnerable for security purposes, and this vulnerability had not been mitigated.

### **Conclusion**

Applicant has failed to meet his burden on appeal of demonstrating error in the Administrative Judge's decision. The Board affirms the Judge's March 10, 2005 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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. The Administrative Judge made favorable formal findings with respect to SOR paragraph 1 (Foreign Preference). Those findings are not at issue on appeal.

2. "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" (Directive, Adjudicative Guidelines, Item E2.A2.1.3.1).