

DATE: March 8, 2005

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 02-31188

## **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 April 26, 2004, 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 James A. Young issued a decision, dated November 3, 2004, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed.

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's adverse conclusions under the Foreign Influence Guideline (Guideline B) are arbitrary, capricious, or contrary to law. 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's adverse conclusions under the Foreign Influence Guideline (Guideline B) are arbitrary, capricious, or contrary to law. The Administrative Judge concluded that Applicant's ties and contacts with his mother, sister, brother, and his wife's siblings (all of whom are citizens and residents of the People's Republic of China) raised security concerns under Guideline B (Foreign Influence), and that Applicant had not met his burden of presenting evidence sufficient to extenuate or mitigate those security concerns.

On appeal, Applicant does not challenge the Administrative Judge's findings of fact about his family ties and contacts. However, Applicant does make the following arguments:

- (1) he has a right as a U.S. citizen to serve and use his expertise to benefit the U.S. national defense;
- (2) it is unfair for his family ties to be held against him because other people have spied without any foreign influence being a factor in their espionage;
- (3) because his family suffered during the Cultural Revolution, it is very unlikely that his family members in the People's Republic of China would try to influence him; and
- (4) his two trips to the People's Republic of China were to further the interests of a U.S. company and a friend who is a U.S. citizen. [\(1\)](#)

The Board construes Applicant's arguments as raising the issue of whether the Judge's adverse conclusions under Guideline B (Foreign Influence) are arbitrary, capricious, or contrary to law. For the reasons that follow, the Board concludes Applicant's arguments do not demonstrate the Judge erred.

There is no right to a security clearance. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988). Applicant has no right to, or reasonable expectation in being granted, a security clearance merely because he is a U.S. citizen. The federal government is not precluded from denying or revoking access to classified information merely because an applicant is a U.S. citizen.

Merely because foreign influence is not a factor in all espionage cases, it does not follow that an unfavorable security clearance decision cannot be based on evidence that an applicant's conduct and circumstances indicate the applicant is vulnerable to possible foreign influence. Given the record evidence in this case, the Administrative Judge had a rational basis for concluding that the totality of Applicant's conduct and circumstances raised security concerns under Guideline B (Foreign Influence) that were sufficient to warrant an unfavorable security clearance decision. *See, e.g.*, ISCR Case No. 99-0424 (February 8, 2001) at p. 12 n.11 (Directive presumes there is a nexus or rational connection between proven conduct under any of its Guidelines and an applicant's security eligibility).

Even if Applicant's family members are not likely to try to influence him, it does not follow that the Administrative Judge could not conclude Applicant's family ties placed him in a position of vulnerability to coercive or noncoercive influence or pressure exerted by the People's Republic of China based on Applicant's family ties with several people who are citizens and residents of that country. *See, e.g.*, ISCR Case No. 02-02195 (April 9, 2004) at p. 6 (security concerns under Guideline B are not limited to consideration of whether there is a possibility of pressure or influence being exerted against an applicant by his or her immediate family members; but rather, includes consideration of whether there is the possibility of pressure or influence being exerted against an applicant by other persons or entities through his or her immediate family members in a foreign country).

Finally, Applicant's motives for making the trips to the People's Republic of China did not preclude the Administrative Judge from taking them into consideration when evaluating Applicant's security eligibility. Independent of Applicant's motives, it was not arbitrary or capricious for the Judge to decide whether Applicant's presence in the People's Republic of China during such trips, when considered in light of the totality of his ties and contacts with relatives in that country, contributed to the security concerns raised under Guideline B (Foreign Influence).

### **Conclusion**

Applicant has failed to meet his burden of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, 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. Applicant also makes an argument that is based on a factual assertion about his current marital status, which involves a proffer of new evidence. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. Applicant cannot fairly challenge the Administrative Judge's decision based on a proffer of new evidence.