

DATE: December 11, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-31602

## 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 February 21, 2003 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 an unfavorable security clearance decision dated August 11, 2003.

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.

The following issues have been raised on appeal: (1) whether the Administrative Judge's decision in this case is unfair and inconsistent with decisions made in other cases involving applicants with similar family ties abroad; and (2) whether the Board should reconsider and reevaluate Applicant's security clearance eligibility. 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. Whether the Administrative Judge's decision in this case is unfair and inconsistent with decisions made in other cases involving applicants with similar family ties abroad. Applicant contends the Administrative Judge's adverse decision is "unfair and inconsistent with decisions made in similar cases" involving applicants with family members in Vietnam and other (unspecified) countries. He does not cite to any DOHA cases in support of his contentions.

Applicant's argument relies on assertions about the security clearance status of other persons of Vietnamese origin with family members in Vietnam and other foreign countries. The facts and circumstances of such other persons are not part of the record evidence in this case. Furthermore, the manner in which the security clearance status of other persons of Vietnamese origin has been adjudicated by the Department of Defense is not part of the record evidence in this case. Accordingly, Applicant's assertions constitute new evidence, which the Board cannot consider on appeal. Directive, Additional Procedural Guidance, Item E3.1.29.

2. Whether the Board should reconsider and reevaluate Applicant's security clearance eligibility. Applicant also asks the Board "to reconsider and reevaluate my request for security clearance" because of the hardship that an adverse security clearance decision has on him and his family.

The adverse effect that an unfavorable security clearance decision may have on Applicant does not demonstrate that the Administrative Judge committed any factual or legal error. The Administrative Judge's findings of fact and conclusions about the security significance of Applicant's situation do not turn or depend on what effect a security clearance decision will have on Applicant's employment situation.

As noted earlier in this decision, there is no presumption of error below and the appealing party has the burden of raising claims of error and demonstrating that those claims of error have merit. None of Applicant's appeal arguments

demonstrate any factual or legal error by the Judge. Accordingly, the Board does not have any basis for disturbing the Judge's findings and conclusions, or the Judge's adverse security clearance decision.

### **Conclusion**

Applicant has not met his burden of demonstrating error below. Therefore, 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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board