

DATE: September 23, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-01169

## **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 August 10, 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) and Guideline C (Foreign Preference). Administrative Judge Charles D. Ablard issued an unfavorable security clearance decision, dated March 23, 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.

The following issues have been raised on appeal: (1) whether the Administrative Judge's adverse conclusions under Guideline B (Foreign Influence) are arbitrary, capricious, or contrary to law; and (2) whether the Administrative Judge's adverse conclusions under Guideline C (Foreign Preference) 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 Issues**

1. Whether the Administrative Judge's adverse conclusions under Guideline B (Foreign Influence) are arbitrary, capricious, or contrary to law. The Administrative Judge entered formal findings in favor of Applicant with respect to SOR paragraphs 1.a, 1.b, and 1.c. <sup>(1)</sup> However, the Judge concluded that, given the record evidence of Applicant's overall history of trips to Taiwan and her intention to continue to travel to Taiwan to visit relatives living there, Applicant had not sufficiently mitigated the security concerns under Guideline B (Foreign Influence). The Judge noted favorable characteristics of Applicant but concluded that in light of his remaining concerns under Guideline B (Foreign Influence) and Guideline C (Foreign Preference) it is premature to grant Applicant a security clearance at this time.

Applicant challenges the Administrative Judge's adverse conclusions under Guideline B, arguing: (a) the Judge failed to give due consideration to the evidence that much of her travel to Taiwan occurred before she was employed by a defense contractor; and (b) the Judge should have applied Foreign Influence mitigating Conditions 3, 4, and 5. For the reasons that follow, the Board concludes Applicant's arguments have mixed merit, but that the error identified by Applicant does not warrant remand or reversal.

Applicant is correct that the record evidence shows much of her travel to Taiwan occurred before she was employed by a defense contractor. However, that observation does not demonstrate the Administrative Judge erred. An applicant's past conduct can be considered in assessing the applicant's security eligibility. <sup>(2)</sup> Furthermore, it was not arbitrary or capricious for the Judge in this case to consider the record evidence of Applicant's past trips to Taiwan in evaluating the security significance of her more recent trips to Taiwan and her stated intention to travel to Taiwan in the future.

Consistent with the whole person concept, <sup>(3)</sup> it was not arbitrary or capricious for the Judge to consider the totality of Applicant's travel to Taiwan, not just her travel there after she became employed by a defense contractor.

Considering the record evidence as a whole (including the evidence that Applicant intends to continued traveling to Taiwan to visit her relatives there in the future), the Administrative Judge was not required to conclude that Applicant's contacts with relatives in Taiwan were casual and infrequent enough to warrant application of Foreign Influence Mitigating Condition 3. <sup>(4)</sup>

Applicant persuasively argues that the record evidence in this case warrants application of Foreign Influence Mitigating Condition 4. <sup>(5)</sup> An Administrative Judge must apply pertinent provisions of the Adjudicative Guidelines. <sup>(6)</sup> When there is record evidence that, on its face, appears to support the application of an Adjudicative Guidelines disqualifying or mitigating condition, a Judge must apply the pertinent provision of the Adjudicative Guidelines or articulate a rational basis for why the Judge concludes that application of that provision is not warranted under the particular facts and circumstances of the case. <sup>(7)</sup> Here, the Judge erred because the record evidence, on its face, appears to support application of Foreign Influence Mitigating Condition 4 and the Judge failed to articulate any discernible basis for not applying it in this case.

Applicant's argument concerning Foreign Influence Mitigating Condition 5 <sup>(8)</sup> does not demonstrate the Administrative Judge erred. The SOR did not allege, and the Judge did not find that Applicant had any financial interests in Taiwan. Furthermore, there is no record evidence that Applicant has any financial interests in Taiwan. Since there was no SOR allegation or record evidence concerning financial interests in Taiwan, it was not arbitrary or capricious for the Judge to not address Foreign Influence Mitigating Condition 5 when evaluating Applicant's security eligibility.

The Board concludes the Administrative Judge's error concerning Foreign Influence Mitigating Condition 4 is harmless because application of that mitigating condition would not compel the Judge to render a favorable security clearance decision. As a general proposition, the presence of an Adjudicative Guidelines mitigating condition does not compel a Judge to issue a favorable decision or preclude the Judge from issuing an unfavorable one. <sup>(9)</sup> Moreover, the Judge expressed doubts about whether Applicant had presented sufficient evidence to extenuate or mitigate the security concerns raised under Guideline B (Foreign Influence). The Board does not have to agree with the Judge to conclude that there is sufficient record evidence to provide a basis for the Judge's expressed doubts. Having those doubts, it was not arbitrary, capricious, or contrary to law for the Judge to resolve them in favor of the national security, not in favor of Applicant. <sup>(10)</sup>

2. Whether the Administrative Judge's adverse conclusions under Guideline C (Foreign Preference) are arbitrary, capricious, or contrary to law. The Administrative Judge concluded that Applicant's possession and use of a Taiwanese passport after she became a naturalized U.S. citizen raised security concerns under Guideline C (Foreign Preference) that were not sufficiently mitigated by her later surrender of that passport. Applicant challenges the Judge's adverse conclusions under Guideline C, contending that the Judge should have applied Foreign Preference Mitigating Conditions 1 and 4 in her favor. For the reasons that follow, the Board concludes Applicant's claims do not demonstrate the Judge committed harmful error.

Applicant's argument concerning Foreign Preference Influence Mitigating Condition 1 <sup>(11)</sup> does not demonstrate harmful error. By possessing and using a Taiwanese passport after becoming a naturalized U.S. citizen, Applicant engaged in the exercise of the rights and privileges of a Taiwan citizen that went beyond passive citizenship by birth. The exercise of the rights and privileges of foreign citizenship goes beyond the mere possession of foreign citizenship by birth and diminishes the effect of Foreign Preference Mitigating Condition 1. <sup>(12)</sup> Accordingly, the Judge was not required to conclude Applicant's possession and use of a Taiwanese passport after she became a naturalized U.S. citizen was successfully mitigated under Foreign Preference Mitigating Condition 1.

Applicant's argument concerning Foreign Influence Mitigating Condition 4 <sup>(13)</sup> does not demonstrate the Administrative Judge erred. The Judge indicated that Foreign Influence Mitigating Condition 4 was applicable in Applicant's case but gave it little weight. As discussed earlier in this decision, although a Judge must apply pertinent provisions of the Adjudicative Guidelines, the applicability of an Adjudicative Guidelines mitigating condition does not compel a Judge to issue a favorable decision or preclude the Judge from issuing an unfavorable one. The Board does not have to agree with the Judge to conclude that Applicant has not demonstrated it was arbitrary or capricious for the Judge to give

diminished weight to Foreign Influence Mitigating Condition 4.

Finally, even if the Board were to assume, solely for purposes of deciding this appeal, that Applicant has demonstrated the Administrative Judge erred by reaching adverse conclusions under Guideline C (Foreign Preference), the Judge's sustainable findings and conclusions under Guideline B (Foreign Influence) are sufficient to support his unfavorable security clearance decision.

### **Conclusion**

The Board affirms the Administrative Judge's unfavorable security clearance decision because Applicant has failed to demonstrate harmful error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. The Administrative Judge's favorable formal findings concerning SOR paragraphs 1.a, 1.b, and 1.c are not at issue on appeal.
2. *See, e.g.*, ISCR Case No. 02-00305 (February 12, 2003) at p. 6.
3. *See* Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1.
4. "Contact and correspondence with foreign citizens are casual and infrequent" (Directive, Adjudicative Guidelines, Item E2.A2.1.3.3).
5. "The individual has promptly reported to proper authorities all contacts, requests, or threats from persons or organizations from a foreign country, as required" (Directive, Adjudicative Guidelines, Item E2.A2.1.3.4).
6. *See* Directive, Section 6.3 and Additional Procedural Guidance, Item E3.1.25.
7. *See, e.g.*, ISCR Case No. 02-32254 (May 26, 2004) at p. 4.
8. "Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities" (Directive, Adjudicative Guidelines, Item E2.A2.1.3.5).

9. *See, e.g.*, ISCR Case No. 02-22163 (March 12, 2004) at pp. 6-7; ISCR Case No. 02-11810 (June 5, 2003) at p. 5.

10. *See* Directive, Adjudicative Guidelines E2.2.2. *See also* *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

11. "Dual citizenship is based solely on parent's citizenship or birth in a foreign country" (Directive, Adjudicative Guidelines, Item E2.A3.1.3.1).

12. *See, e.g.*, ISCR Case No. 02-00305 (February 12, 2003) at p. 7.

13. "Individual has expressed a willingness to renounce dual citizenship" (Directive, Adjudicative Guidelines, Item E2.A3.1.3.4).