

DATE: February 15, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-02382

## **APPEAL BOARD DECISION AND REVERSAL ORDER**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Jennifer I. Campbell, Esq., Department Counsel

#### **FOR APPLICANT**

Ellen Mendelson, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated October 15, 2003 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 Kathryn Moen Braeman issued a favorable security clearance decision dated August 31, 2004.

Department Counsel appealed the Administrative Judge's favorable 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 issue has been raised on appeal: whether the Administrative Judge's application of Foreign Influence Mitigating Condition 1 is unsupported by the facts and is arbitrary, capricious or contrary to law. For the reasons that follow, the Board reverses 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<sup>(1)</sup>

#### Whether the Administrative Judge's application of Foreign Influence Mitigating Condition 1<sup>(2)</sup>

is unsupported by the facts and is arbitrary, capricious or contrary to law. The Administrative Judge found that Applicant's mother is a citizen of and is living in Iran where she is waiting for an interview date in connection with emigrating to the United States. The Judge found that Applicant's several siblings are citizens of Iran who live in other countries and do not own property in Iran. The Judge acknowledged Iran's hostility to the United States. The Judge then concluded that Applicant's relatives, including his mother, were not in a position to be exploited by Iran in a way that could force Applicant to choose between his loyalty to his relatives and his loyalty to the United States. The Judge reached this conclusion in part because she concluded that the relationship between the United States and Iran "has the potential to shift," in part because there is no evidence of any substantial likelihood that Applicant's relatives would exercise foreign influence over Applicant, and in part because Applicant is not vulnerable to duress merely because of these family ties when only his elderly mother remains in Iran.

In asserting that the Administrative Judge erred in this case by applying Foreign Influence Mitigating Condition 1, Department Counsel specifically argues: (1) the Judge improperly shifted the burden to the government to show a substantial likelihood that Applicant's foreign relatives would influence him; (2) the Judge ignores record evidence which indicates Applicant's mother is in a position to be exploited by the Iranian government due to the nature of the Iranian government's repressive regime; (3) there is a lack of record evidence to allow the Judge to conclude that Applicant, through his Iranian mother, is not in a position to be exploited by the Iranian government; and (4) the Judge fails to articulate a satisfactory explanation for the application of Foreign Influence Mitigating Condition 1. These specific assertions have merit.

Department Counsel argues that the Administrative Judge's conclusion that there is no evidence of any substantial

likelihood that Applicant's relatives would exercise foreign influence over him amounted to an unfair shifting of the burden of proof on Foreign Influence Mitigating Condition 1. There are only two plausible ways to read the Administrative Judge's decision in this respect: either (a) the Judge shifted the burden of proof on Foreign Influence Mitigating Condition 1 from the Applicant (to demonstrate its applicability) to the government (to demonstrate its inapplicability), or (b) the Judge concluded that Applicant had met his burden of showing the applicability of that mitigating condition. In either case, the Judge erred. If the Judge shifted the burden to Department Counsel to disprove the applicability of Foreign Influence Mitigating Condition 1, she erred as a matter of law and ruled in a manner inconsistent with the precepts of the Directive. *See*, Directive, Additional Procedural Guidance, Item E3.1.15.; *see, e.g.*, ISCR Case No. 01-17496 (October 28, 2002) at p. 5 (applicant has burden of presenting evidence to support application of Adjudicative Guidelines mitigating condition; Department Counsel does not have the burden of proving the inapplicability of such a mitigating condition). If the Judge concluded that Applicant had met his burden of showing the applicability of that mitigating condition, she erred given the record evidence in this case, at least as that evidence applies to Applicant's mother living in Iran.

Department Counsel asserts that there is a lack of record evidence to allow the Judge to conclude that presence of Applicant's mother in Iran, where she is a citizen, does not place Applicant in a position where he could be exploited or influenced by the Iranian government. Department Counsel further asserts that the Administrative Judge fails to articulate a satisfactory explanation for her application of Foreign Influence Mitigating Condition 1. These arguments are related and can be discussed together. Both have merit.

The Administrative Judge found that none of Applicant's siblings live in Iran and therefore nothing would make them vulnerable to coercion, pressure or influence. The Judge also found that nothing would make Applicant's mother-in-law (who became a naturalized U.S. citizen in 2004) or his two children (who were born in the U.S. and are dual citizens of the U.S. and Iran) vulnerable to coercion, pressure or influence. These facts, which are not challenged on appeal, are not relevant to the issue of the potential of pressure or exploitation that could be placed upon Applicant because of his mother. Regarding Applicant's mother, the Judge's findings, aside from noting that she is a widowed housewife, has visited the United States twice, and is waiting for an interview date in the hopes of eventually moving to the U.S., contain only the cursory and conclusive statement, "[n]othing in her background would make her vulnerable to coercion, pressure or influence." Department Counsel persuasively argues that this finding is not supported by the record evidence of the nature of Iran's repressive regime, which places Applicant's mother in a position to be exploited by the Iranian government. Department Counsel also persuasively argues that there is no basis in the record for the Judge's conclusion that "there are indications that the [United States-Iranian] relationship has the potential to shift" and that the Judge's decision fails to articulate a rational basis for her conclusion that Applicant is not vulnerable to coercion through his mother in light of record evidence establishing the hostility of the government of Iran to the United States and Iran's systematic human rights abuses and involvement with international terrorist activities.

The Administrative Judge concluded Applicant is not vulnerable to duress merely because of his family ties when only his elderly mother remains in Iran. The Judge's language suggests that she discounts the possibility of a potential threat because Applicant has only one immediately family member residing in Iran. Any such discounting is error. The number of immediate family members of an applicant that are citizens of, or reside in, a foreign country is not dispositive of the nature or extent of the threat of pressure or coercion. For purposes of meeting its burden of establishing a security concern under Foreign Influence Disqualifying Condition 1-<sup>(3)</sup>

, Department Counsel need not establish that an Applicant has multiple immediate family members living in a foreign country. Similarly, the applicability or non-applicability of Foreign Influence Mitigating Condition 1 does not turn on the number of immediate family members related to an applicant in a given country. Rather, the applicability of Foreign Influence Mitigating Condition 1 turns on whether an applicant has satisfied his burden of establishing that the presence of one immediate family member or several family members in a foreign country does not subject him to the possibility of pressure or coercion.

An Administrative Judge's responsibility to weigh the record evidence does not mean that the Judge is at liberty to draw whatever inferences or conclusions the Judge wants to draw; rather, the Judge must draw reasonable inferences and reach reasonable conclusions that fairly take into account the totality of the record evidence and evaluate the security significance of the facts and circumstances of an applicant's case in a manner that is consistent with the "clearly

consistent with the national interest" standard. In this case, the Judge failed to articulate a basis for her favorable conclusions under the Foreign Influence Guideline that is supported by the record evidence and reasonable inferences drawn from it.

Given the totality of the errors established by Department Counsel in the preceding paragraphs, Department Counsel has persuasively argued that the Administrative Judge's application of Foreign Influence Mitigating Condition 1 to the facts of this case is arbitrary, capricious or contrary to law.

### **Conclusion**

Department Counsel has met its burden of demonstrating harmful error below that warrants reversal. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.3, the Board reverses the Administrative Judge's favorable security clearance decision.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. The Administrative Judge made formal findings favorable to Applicant under the Foreign Preference Guideline (Guideline C), more specifically, SOR subparagraphs 1.a., 1.b, and 1.c. These favorable findings have not been appealed.

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

3. "An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country."