

DATE: March 3, 2005

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 03-04090

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

#### **FOR APPLICANT**

Evan R. Berlack, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated November 20, 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), Guideline B (Foreign Influence), and Guideline E (Personal Conduct). Administrative Judge Michael H. Leonard issued an unfavorable security clearance decision, dated July 29, 2004.

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 erred by not applying Foreign Preference Mitigating Condition 3 and Foreign Influence Mitigating Condition 1; (2) whether the Administrative Judge failed to consider the evidence showing Applicant possesses rare and valuable skills important for national security that outweigh any security concerns raised about Applicant's security eligibility; and (3) whether the Administrative Judge erred by relying on the ASDC3I memorandum on foreign passports. 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 [\(1\)](#)

The Administrative Judge made the following material findings of fact, which are not challenged on appeal:

Applicant is a native-born U.S. citizen. In 1983, Applicant decided to emigrate to Israel for religious reasons. In September 1983, Applicant found employment with an Israeli communications company and worked there until January 1985. Applicant lived in Israel as a legal resident until 1987, when he obtained Israeli citizenship.

Applicant served in the Israeli military on active duty in 1988, performed reserve duty with the Israeli military until 2001, and no longer has any Israeli military obligation to perform.

Applicant was granted a security clearance by the DoD in 1992 and has held that clearance since then without incident. Applicant takes his security clearance responsibilities seriously.

Applicant lives in Israel and owns his residence there. Applicant does not own any real estate in the United States or in any other country. Applicant has about \$25,000-\$35,000 in financial accounts in the United States, and stock options with the U.S. company that is the parent company of the technology company subsidiary he works for in Israel. Applicant's salary is deposited in a bank in Israel.

Applicant has voted in Israeli elections since living in Israel, and has voted in U.S. Presidential elections during that time. Applicant's physical presence in the United States is limited to four or five business trips a year. Applicant is not a resident of any particular U.S. state. Applicant has filed annual U.S. federal income tax returns since he moved to Israel

in 1983.

Applicant is married to a native-born Israeli citizen who works as a teacher in a local school. Applicant and his wife have four minor children. Their children are dual citizens of the United States and Israel. Applicant's father and three brothers are dual citizens of the United States and Israel, and they all live in Israel. Applicant's father is retired and living on a U.S. government retirement. One of Applicant's brothers is employed by the Israeli government. Applicant three other brothers work in private industry in Israel.

Applicant possesses and uses both U.S. and Israeli passports. Applicant uses his Israeli passport to exit and enter Israel, and used his U.S. passport for his foreign travel outside Israel, and when entering and exiting the United States. Applicant is not willing to surrender his Israeli citizenship or his Israeli passport, and intends to continue to live and work in Israel and raise his children there.

1. Whether the Administrative Judge erred by not applying Foreign Preference Mitigating Condition 3 and Foreign Influence Mitigating Condition 1. Applicant contends the Administrative Judge erred by not applying Foreign Preference Mitigating Condition 3 and Foreign Influence Mitigating Condition 1 in his favor. In support of this contention, Applicant argues: (a) the Judge ignored record evidence supporting the application of those two mitigating conditions; and (b) in the alternative, the Judge failed to articulate a rational connection between the undisputed facts regarding those two mitigating conditions and the Judge's unfavorable security clearance decision. For the reasons that follow, the Board concludes this claim of error lacks merit.

1(a). There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise.<sup>(2)</sup> That presumption is not rebutted or overcome merely because a party argues that the Judge should have weighed the record evidence differently and given more weight to certain record evidence.<sup>(3)</sup> Applicant's disagreement with the Judge's weighing of the evidence in this case is not sufficient to rebut the presumption that the Judge considered all the record evidence.

1(b). Applicant asserts the Administrative Judge should have applied Foreign Preference Mitigating Condition 3<sup>(4)</sup> because the record evidence shows: (i) his case is similar to that in ISCR Case No. 99-0511 (December 30, 1999), in which a Hearing Office Judge issued a favorable security clearance decision; (ii) his defense contractor employer requests continuation of his security clearance; and (iii) he has worked on numerous defense projects for the U.S. military. Applicant's claim concerning Foreign Preference Mitigating Condition 3 is not persuasive.

First, Applicant's reliance on the Hearing Office decision in ISCR Case No. 99-0511 (December 30, 1999) is misplaced. It is well-settled that a Hearing Office Judge's decision is not legally binding on other Hearing Office Judges or the Board. At most, a Hearing Office decision can be cited as persuasive authority, and the party relying on such a decision has the burden of showing why such a decision should be followed.<sup>(5)</sup> The Judge's decision in ISCR Case No. 99-0511 (December 30, 1999) is not persuasive because it was reversed by the Board on appeal. Furthermore, the Board decision specifically rejected the Hearing Office Judge's interpretation and application of Foreign Preference Mitigating Condition 3.<sup>(6)</sup> Second, the statements by Applicant's defense contractor company concerning him are not a substitute for evidence that the federal government has affirmatively sanctioned, approved, authorized, consented to, or otherwise sanctioned a particular act or type of conduct by Applicant, either as part of an official policy or with respect to Applicant. Nothing in the statements by Applicant's defense contractor company indicate that the federal government affirmatively sanctioned or approved of those aspects of Applicant's conduct and circumstances that form the basis of the SOR in this case. Third, the record evidence that Applicant has worked on numerous defense projects for the U.S. military is irrelevant to whether the federal government has affirmatively sanctioned or approved of his conduct within the meaning of Foreign Preference Mitigating Condition 3.

Applicant asserts the Administrative Judge should have applied Foreign Influence Mitigating Condition 1<sup>(7)</sup> because the record evidence shows his immediate family members are not agents of a foreign power and cannot be exploited by a foreign power. This claim is not persuasive. First, the Judge found and the record evidence shows that Applicant has a brother who is employed by the Israeli government. That brother is an agent of the Israeli government for purposes of Foreign Influence Mitigating Condition 1. Second, there is no dispute that Applicant's father and three brothers live in

Israel, that Applicant lives in Israel with his wife (an Israeli citizen by birth) and four minor children, and that most of Applicant's financial assets are in Israel. Given the Judge's unchallenged findings of fact concerning Applicant's extensive, continuing ties with Israel, the Judge properly concluded that the security concerns under Guideline B (Foreign Influence) are sufficient to preclude the application of Foreign Influence Mitigating Condition 1. Applicant's disagreement with the Judge's conclusion is not sufficient to demonstrate the Judge acted in a manner that is arbitrary, capricious, or contrary to law.

2. Whether the Administrative Judge failed to consider the evidence showing Applicant possesses rare and valuable skills important for national security that outweigh any security concerns raised about Applicant's security eligibility.

Applicant also contends the Administrative Judge erred by not taking into consideration record evidence that shows he possesses rare and valuable skills important to U.S. national security that outweigh any security concerns that might be raised about his security eligibility. In support of this contention, Applicant relies on the Adjudicative Desk Reference.

[\(8\)](#)

Applicant's reliance on portions of the Adjudicative Desk Reference is misplaced. That publication contains the following crucial language:

*"Supplemental Information is not U.S. Government policy and may not be cited as authority for denial or suspension of access. The Personnel Security Committee of the Security Policy Board approved this program and encouraged its use as a job aid to assist security personnel in making informed judgments to implement policy.*

*"While the Supplemental Information can provide useful background or reference information for evaluating a case or explaining a decision, denials and suspensions must be based on the specific policy guidance provided by the Adjudicative Guidelines. From a legal perspective, Supplemental Information is comparable to background information that might be obtained through library research. Indeed, most of it is based on library research. However, it is not all-inclusive nor necessarily the only legitimate point of view on the topics discussed."* (italics added)

Given that language, Applicant cannot reasonably contend the Supplemental Information portions of the Adjudicative Desk Reference constitute official U.S. government policy that the Administrative Judge was required to follow. Moreover, Applicant makes no cogent argument for how or why the Supplemental Information in the Adjudicative Desk Reference that he cites on appeal demonstrates the Judge's decision is arbitrary, capricious, or contrary to law.

Apart from Applicant's argument concerning the Adjudicative Desk Reference, the record evidence cited by Applicant on appeal does not demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. The federal government has a compelling interest in protecting classified information and, pursuant to that interest, it has to decide whether persons to be entrusted with access to classified information are at risk of deliberately or inadvertently mishandling such information.<sup>(9)</sup> In making such decisions, the federal government must determine whether a given person possesses and exhibits the high degree of judgment, reliability, and trustworthiness required of persons granted access to classified information.<sup>(10)</sup> Security clearance decisions are not limited to consideration of an applicant's job performance or conduct during duty hours, and off-duty conduct can be relevant in assessing an applicant's security eligibility.<sup>(11)</sup> An applicant's technical expertise (or lack thereof) is not a measure of whether the applicant is at risk of deliberately or inadvertently mishandling classified information, nor is it a measure of whether the applicant demonstrates the high degree of judgment, reliability, or trustworthiness required of persons granted access to classified information. An applicant with technical expertise may -- through conduct or circumstances -- demonstrate that he or she poses a security risk; an applicant without any technical expertise may -- through conduct and circumstances -- demonstrate that he or she is a good candidate for a security clearance.<sup>(12)</sup> The security significance of Applicant's conduct and circumstances does not turn on whether Applicant possesses a technical ability that could be useful to a DoD contact or project. Moreover, the security concerns raised by Applicant's conduct and circumstances under Guideline B (Foreign Influence) and Guideline C (Foreign Preference) are not extenuated or mitigated by whether Applicant possesses a technical ability that could be useful to a DoD contract or project.

3. Whether the Administrative Judge erred by relying on the ASDC3I memorandum on foreign passports. Applicant contends the Administrative Judge erred by basing his unfavorable security clearance decision on application of the

[\(13\)](#)

ASDC3I memorandum on foreign passports to Applicant's possession and use of an Israeli passport. Applicant argues the Judge erred because the ASDC3I memorandum on foreign passports is "ultra vires" and "contrary to law" because it is contrary to the Adjudicative Guidelines.

The Board has noted that the Directive authorizes the ASDC3I to oversee application of adjudicative standards, and issue clarifying guidance and instructions concerning the adjudication of security clearance cases.<sup>(14)</sup> The Board also has held that: (a) it does not have jurisdiction and authority to review decisions by the ASDC3I<sup>(15)</sup>; and (b) both Hearing Office Judges and the Board are bound to apply and follow the ASDC3I memorandum on foreign passports.<sup>(16)</sup> Accordingly, the Board will not entertain Applicant's challenge to the legality of the ASDC3I memorandum on foreign passports. If Applicant wishes to challenge the lawfulness of the ASDC3I memorandum, then he must seek relief outside DOHA proceedings.

Given the record evidence that Applicant possesses and uses an Israeli passport, and that Applicant does not intend to surrender it, the Administrative Judge properly concluded that application of the ASDC3I memorandum precluded a favorable security clearance decision.

### **Conclusion**

The Board affirms the Administrative Judge's decision because Applicant has failed to demonstrate error below, and because Applicant seeks relief that the Board is not authorized to provide under the Directive.

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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to Guideline E (Personal Conduct). The Judge's findings and conclusions under Guideline E are not at issue on appeal.

2. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2.

3. *See, e.g.*, ISCR Case No. 02-01494 (May 28, 2003) at p. 3.

4. "Activity is sanctioned by the United States" (Directive, Adjudicative Guidelines, Item E2.A3.1.3.3).

5. *See generally* ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5.

6. *See* ISCR Case No. 99-0511 (December 19, 2000) at pp. 6-8.
7. "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).
8. The Adjudicative Desk Reference is accessible at <http://www.dss.mil/nf/adr>
9. *Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988).
10. *See, e.g.*, ISCR Case No. 02-22325 (July 30, 2004) at p. 3.
11. *See, e.g.*, ISCR Case No. 01-20445 (April 29, 2003) at p. 4.
12. *See, e.g.*, ISCR Case No. 02-11570 (May 19, 2004) at p. 8; ISCR Case No. 02-04237 (August 12, 2003) at p. 3; ISCR Case No. 01-13894 (February 20, 2003) at p. 4; ISCR Case No. 01-26893 (October 16, 2002) at p. 4.
13. The Assistant Secretary of Defense for Command, Control, Communications, and Intelligence issued a memorandum entitled "Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guidelines," dated August 16, 2000. According to that memorandum, possession and use of a foreign passport raises security concerns that require "any clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government."
14. *See, e.g.*, ISCR Case No. 00-0489 (January 10, 2002) at p. 7.
15. *See, e.g.*, ISCR Case No. 99-0519 (February 23, 2001) at p. 5 n.1.
16. *See, e.g.*, ISCR Case No. 02-04237 (August 12, 2003) at p. 4.