

DATE: June 7, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-04172

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Terry L. Elling, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated March 11, 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 Michael H. Leonard issued an unfavorable security clearance decision, dated November 8, 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's conclusions with respect to Guideline B (Foreign Influence) violated Section 2-203 of the National Industrial Security Program Operating Manual ("NISPOM"); (2) whether the Administrative Judge erred in finding that none of the mitigating conditions under Guideline B applied; and (3) whether the Administrative Judge erred in failing to properly apply the "whole person" concept. 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 conclusions with respect to Guideline B (Foreign Influence) violated Section 2-203 of the National Industrial Security Program Operating Manual ("NISPOM"). On appeal, Applicant argues that the Administrative Judge ruled against him on the basis of information relating to foreign influence that was available to the Government in the course of prior security clearance adjudications that were determined in his favor. He further argues that no new significant derogatory information has been developed since those prior adjudications. Applicant contends that the Administrative Judge erred by not making a favorable security clearance decision in this case based on application of Section 2-203 of the National Industrial Security Program Operating Manual (NISPOM), ⁽¹⁾ which reads: "**Reciprocity**. Federal agencies that grant security clearances (TOP SECRET, SECRET, CONFIDENTIAL, Q or L) to their employees or their contractor employees are responsible for determining whether such employees have been previously cleared or investigated by the Federal Government. Any previously granted PCL ⁽²⁾ that is based upon a current investigation of a scope that meets or exceeds that necessary for the clearance required, shall provide the basis for issuance of a new clearance without further investigation or adjudication unless significant derogatory information that was not previously adjudicated becomes known to the granting agency." Department Counsel contends that Section 2-203 of the NISPOM is not applicable in this case.

Under Section 2-203, reciprocity is predicated on: (a) a person having an existing security clearance, (b) based on a current investigation, (c) of a scope that meets or exceeds that necessary for the security clearance at issue, and (d) the absence of significant derogatory information that was not previously adjudicated. If any of the elements is missing, then Section 2-203 does not apply.

Applicant's reliance on his Q clearance, issued by the Department of Energy, is misplaced. Applicant testified that his Q

clearance was issued in 1992 and ended in 1997 or 1998 (Hearing Transcript at p. 80). A security clearance that was ended or terminated approximately 7 years ago does not constitute an existing security clearance "that is based upon a *current* investigation." (3)

Applicant's reliance on the issuance of a DoD security clearance to him in 1990 also is misplaced. Nothing in Section 2-203 indicates or suggests that it bars any federal department or agency from conducting periodic reinvestigation of persons holding a security clearance. Furthermore, nothing in the language of Section 2-203 or the concept of reciprocity, (4) indicates or suggests that a federal department or agency is precluded from periodically reevaluating whether a person should continue to retain a security clearance that was previously granted by that federal department or agency. Section 2-203 does not transform a favorable security clearance decision into a vested right or entitlement to a security clearance in perpetuity. Finally, the 1990 decision to grant Applicant a DoD security clearance was based on an investigation that is not "current" under NISPOM Section 2-201. (5)

2. Whether the Administrative Judge erred in finding that none of the mitigating conditions under Guideline B (Foreign Influence) applied. The Administrative Judge concluded that the strengths of Applicant's ties to his sister and brother who are citizens and residents of Iran were such that security concerns exist under Guideline B. The Judge also concluded that the fact of Applicant's travel to Iran in 1998 and 2001 on an Iranian passport that identified him as a U.S. resident, nature of the Iranian regime and his sister's employment with an oil company that is part of the Iranian Ministry of Petroleum created potential risks that precluded mitigation of the security concerns. The Judge did not apply any of the Guideline B Mitigating Factors and he specifically declined to apply Guideline B Mitigating Condition 1. (6) On appeal, Applicant argues: (a) the evidence establishes that his contacts and correspondence with his siblings are casual and infrequent, thus establishing a basis for the application of Guideline B Mitigating Condition 3 (7); (b) regarding Guideline B Mitigating Condition 4, (8) Applicant complied with the requirements to report his trips to Iran to the appropriate authorities, and there is every indication that he would report any requests or threats to disclose classified information; and (c) the Judge erroneously discounted Guideline B Mitigating Condition 1. For the reasons that follow, the Board concludes Applicant's arguments lack merit, with one exception that demonstrates harmless error.

Regarding the fact that the Administrative Judge did not apply Guideline B Mitigating Condition 3 in Applicant's favor, the Board concludes that the record evidence was not such that the Judge was required, as a matter of law, to apply the mitigating condition. There is a rebuttable presumption that contacts with immediate family members are not casual. *See, e.g.*, ISCR Case No. 00-0484 (February 1, 2002) at p. 5. The evidence cited by Applicant -- that he extends no financial support to his siblings, has no financial ties to Iran, and has seen his sister only four times in twenty-five years and has not spoken with her in the last year -- is relevant evidence, but it did not compel the Judge to conclude that Guideline B Mitigating Condition 3 should be applied. As Department Counsel notes, there is other relevant record evidence that shows Applicant's ties with his immediate family members in Iran -- when viewed in their entirety -- are more than merely "casual and infrequent." Applicant has failed to establish error on the part of the Judge.

Regarding the applicability of Guideline B Mitigating Condition 4, the fact that Applicant dutifully reported his trips to Iran to the proper authorities is favorable evidence that the Administrative Judge was bound to consider. A Judge must apply pertinent provisions of the Adjudicative Guidelines. *See* Directive, Section 6.3 and Additional Procedural Guidance, Item E3.1.25. Given the record evidence presented by Applicant regarding his reporting his trips to Iran, the Judge should have explained why he decided application of Guideline B Mitigating Condition 4 was not warranted. The Judge's failure to give such an explanation was error. However, the error is harmless in light of the Judge's other sustainable findings and conclusions under Guideline B.

Applicant begins his argument regarding the application of Guideline B Mitigating Condition 1 by stating that the presence of Applicant's siblings in Iran is an issue that is precluded from the Administrative Judge's consideration by the operation of Section 2-203 of the NISPOM. For the reasons stated earlier in this decision, this is not a tenable argument. Applicant goes on to argue that the Judge's conclusion that his sister's presence in Iran as an employee of an oil company that is part of the Iranian Ministry of Petroleum constitutes a potential risk was an unsupported assertion. Applicant also argues that the evidence of his long-term financial and personal ties to the U.S. and his proven record of handling classified information for 14 years without any security violations is overwhelming and negates any arguable tie to his sister and brother that could prompt him to compromise classified information to Iran. Applicant has failed to

demonstrate that the Judge erred by not applying Guideline B Mitigating Condition 1.

Under the Directive, once it has been demonstrated that Applicant has immediate family members in a foreign country, the burden shifts to Applicant to show the government's concerns about Applicant's overseas family are mitigated.⁽⁹⁾ An applicant with immediate family members living in a country hostile to the United States has a heavy burden to show that those family ties do not pose a security risk. *See* ISCR Case No. 01-26893 (October 16, 2002) at p. 10. In this case, there is no dispute that Applicant's brother and sister live in Iran, a country with a history of hostility toward the United States since 1979. Record evidence introduced by Department Counsel in this case indicates that the Iranian government is involved in international terrorism, supports violent opposition to the Middle East peace process, and has a dismal human rights record. The hostility of the Iranian government to the United States goes beyond mere diplomatic disagreement and gives rise to significant security concerns. *See, e.g.*, ISCR Case No. 02-04786 (June 27, 2003) at pp. 4-5. Accordingly, Applicant bears a heavy burden of showing that the presence of his siblings in Iran does not pose a security risk. Moreover, when determining the applicability of Guideline B Mitigating Condition 1, the key issue is not what choice Applicant would likely make when confronted by a foreign government in search of classified information. The determination to be made under Mitigating Condition 1 is whether or not the presence of Applicant's relatives in Iran creates the risk that Applicant will be placed in a position where he has to make the choice between his affections and/or obligations to his family in Iran and the United States. Finally, Applicant's sister works for an oil company that is part of the Iranian Ministry of Petroleum and, as such, is an agent of a foreign government within the meaning of Guideline B Mitigating Condition 1. The Board concludes that the record in this case is sufficient to support the Judge's conclusion that the security concerns raised by the presence of Applicant's immediate family in Iran have not been mitigated. Applicant has not demonstrated on appeal that the Judge should have applied Guideline B Mitigating Condition 1 to his brother and sister in Iran.

3. Whether the Administrative Judge erred in failing to properly apply the "whole person" concept. Applicant also contends the Administrative Judge's decision contains no consideration of the whole person concept. Applicant cites favorable record evidence and argues that the only conclusion supported by the evidence is that it is clearly consistent with the national interest to renew his security clearance.

To the extent Applicant's argument asserts the Judge ignored evidence favorable to Applicant, it runs afoul of the rebuttable presumption that a Judge considers all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. That presumption is not rebutted or overcome merely because Applicant is able to point to favorable evidence that he claims the Judge should have given more weight to. *See, e.g.*, ISCR Case No. 02-15935 (October 15, 2003) at p. 6. Moreover, Applicant's ability to proffer an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge's decision fails to reflect a common sense determination that applies the whole person concept. A reading of the decision below persuades the Board that the Judge reached reasonable conclusions that take into account the record evidence as a whole -- including the favorable evidence presented by Applicant. Given the record evidence in this case, the Judge's analysis of Applicant's security eligibility is consistent with the whole person analysis required by the Directive. *See, e.g.*, ISCR Case No. 00-0628 (February 24, 2003) at pp. 5-6 (discussing application of the whole person concept).

Conclusion

Applicant has not demonstrated harmful error below. Accordingly, the Board affirms the Administrative Judge's unfavorable 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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. The NISPOM was promulgated in January 1995. Change 1 to the NISPOM was issued July 31, 1997, and Change 2 was issued May 1, 2000. The NISPOM (including Change 1 and Change 2) can be found at <http://www.dtic.mil/whs/directives/corres/html/522022m.htm>
2. According to Section 1-300 of the NISPOM, a PCL is an employees's personnel clearance.
3. NISPOM Section 2-201 ("Investigative Requirements") refers to "investigations [that] are current within 5 years."
4. *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at pp. 3-4 (discussing concept of reciprocity in case involving claim raised under Section 2-203).
5. *See* footnote 3 of this decision.
6. "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).
7. "Contact and correspondence with foreign citizens are casual and infrequent" (Directive, Adjudicative Guidelines, Item E2.A2.1.3.3).
8. "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).
9. *See* Guideline B Disqualifying Condition 1 (Directive, Adjudicative Guidelines, Item E2.A2.1.2.1).