

DATE: September 15, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-05645

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

Shouming Li, Personal Representative

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated September 17, 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 Roger E. Willmeth issued an unfavorable security clearance decision, dated April 6, 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 failed to take into consideration record evidence favorable to Applicant; (2) whether the Administrative Judge erred by concluding Applicant's ties with immediate family members were not extenuated or mitigated; and (3) whether the Administrative Judge's adverse conclusions under Guideline B 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**

On appeal, Applicant does not challenge the Administrative Judge's findings of fact about her father and four brothers who are citizens and residents of the People's Republic of China, or her contacts with them. However, Applicant does challenge the conclusions the Judge reached about her ties to, and contacts with, her father and four brothers, as well as the Judge's conclusions under Guideline B (Foreign Influence).

1. Whether the Administrative Judge failed to take into consideration record evidence favorable to Applicant. Applicant contends the Administrative Judge overlooked or failed to take into account record evidence that she argues is crucial and favorable to her case. This contention is not persuasive.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Applicant's ability to cite record evidence that is not specifically cited or discussed in the Judge's decision is not sufficient to rebut that presumption. This is because there is no legal requirement that a Judge discuss each and every piece of record evidence in a decision. *See, e.g.*, ISCR Case No. 02-00305 (February 12, 2003) at p. 2. Furthermore, Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to rebut the presumption that the Judge considered all the record evidence. *See, e.g.*, ISCR Case No. 02-19479 (June 22, 2004) at p. 3. Finally, the presumption that the Judge considered all the record evidence is not overcome merely because an appealing party believes that the Judge should have weighed the evidence differently. *See, e.g.*, ISCR Case No. 02-07757 (March 29, 2004) at p. 4 ("Merely because the Judge did not give as much weight to the evidence presented by Applicant as he would have liked, it does not follow that the Judge simply ignored that evidence."). Although Applicant's appeal arguments show her disagreement with the Judge's weighing of the record evidence, they are not sufficient to rebut or overcome the presumption that the Judge considered all the record evidence.

2. Whether the Administrative Judge erred by concluding Applicant's ties with immediate family members were not extenuated or mitigated. The Administrative Judge concluded that Applicant had not extenuated or mitigated the security concerns raised by her ties to, and contacts with, her father and four brothers, all of whom are citizens and residents of the People's Republic of China. Applicant contends the Judge erred, arguing that the Judge should have concluded her ties and contacts were extenuated and mitigated.

Applicant had the burden of presenting evidence to extenuate or mitigate the security concerns raised by the facts and circumstances of her ties and contacts with her father and four brothers, all of whom are citizens and residents of the People's Republic of China. *See* Directive, Additional Procedural Guidance, Item E3.1.15.

The Administrative Judge explained why he concluded Applicant's family ties raised security concerns that were not mitigated by the evidence presented by Applicant (Decision at pp. 3, 5-6). Given the record evidence in this case, the Judge had a sufficient basis for concluding that Applicant had not presented sufficient evidence to warrant application of Foreign Influence Mitigating Condition 1. <sup>(1)</sup>

Applicant's appeal arguments set forth an alternate interpretation of the record evidence, but they do not show that the Judge's conclusions on this point are arbitrary, capricious, or contrary to law.

The Administrative Judge explained why he concluded Applicant's contacts with her father and four brothers in the People's Republic of China were limited in frequency but were not casual (Decision at p. 5). Given the record evidence in this case, the Judge had a sufficient basis for concluding that the facts and circumstances of the totality of Applicant's contacts with her father and four brothers in the People's Republic of China did not warrant application of Foreign Influence Mitigating Condition 3. <sup>(2)</sup>

Applicant's appeal arguments, which seek to explain the significance of her contacts in a piecemeal manner, do not show the Judge's conclusions on this point are arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 02-11570 (May 19, 2004) at p. 7 (an Administrative Judge must consider the totality of an applicant's foreign contacts, not just each foreign contact separately). *See also* ISCR Case No. 02-09907 (March 17, 2004) at p. 9 (discussing the need to avoid blurring the difference between the nature of an applicant's contacts and the frequency of those contacts).

3. Whether the Administrative Judge's adverse conclusions under Guideline B are arbitrary, capricious, or contrary to law. Applicant challenges the Administrative Judge's unfavorable conclusions under Guideline B, arguing: (a) the Judge failed to apply the whole person concept to her case, as required by the Directive; (b) the Judge did not view the evidence in context; (c) the Judge did not articulate a satisfactory explanation for his unfavorable conclusions; (d) the Judge's decision shows a clear error of judgment; (e) the Judge made an unwarranted assumption that a security clearance precludes any foreign travel; and (f) the Judge ignored an important aspect of the case. For the reasons that follow, the Board concludes Applicant's arguments do not demonstrate the Judge erred.

(a) Applicant argues that the Administrative Judge did not apply the whole person concept, but only focused on the frequency of her trips to the People's Republic of China, and ignored such things as the nature and circumstances of her trips, her motivation, the likelihood of continuance or recurrence, etc. This argument is not persuasive because it is based on a discussion of her trips to the People's Republic of China in isolation from the totality of her contacts with family members in the People's Republic of China. The whole person concept did not require the Judge to consider the security significance of Applicant's trips to the People's Republic of China separately from the record evidence of the totality of her ties to, and contacts with, her father and brothers in the People's Republic of China. Applicant's appeal argument fails to demonstrate the Judge erred.

(b) Applicant's claim that the Administrative Judge failed to view evidence in context focuses on challenging the Judge's conclusion that Applicant had not demonstrated that she is not likely to travel back to the People's Republic of China (Decision at p. 6). Applicant clearly disagrees with the Judge's conclusion. However, Applicant's appeal arguments do not demonstrate the Judge's conclusion is an unreasonable one. Given the record evidence in this case, the Judge's conclusion reflects a reasonable interpretation of the evidence and is not arbitrary, capricious, or contrary to law.

(c) Applicant's claim that the Administrative Judge failed to articulate a satisfactory explanation for his conclusions challenges two statements in the decision below: (i) the Judge's statement that Applicant's calls to her brother reflect her concern for her father; and (ii) the Judge's reference to Applicant's minor daughter in connection with his conclusion that Applicant's trips to the People's Republic of China raised security concerns. Applicant's arguments in support of this claim are predicated on an analysis of the Judge's decision which focuses on individual sentences in isolation from the rest of the decision. The Board does not review isolated sentences of a Judge's decision. Rather, when considering and evaluating appeal issues, the Board considers a Judge's decision in its entirety to ascertain what findings the Judge made and what conclusions the Judge reached. *See, e.g.*, ISCR Case No. 02-10215 (January 30, 2004) at p. 6 n. 4. Viewing the Judge's decision in its entirety, the Board concludes the Judge was *not* reaching the specific conclusions that Applicant asserts he reached. Accordingly, this claim of error lacks merit.

(d) Applicant's "clear error of judgment" argument relies on unidentified DOHA decisions which "indicate that a foreign relative who is old and retired is a factor that mitigates foreign influence." Although Applicant cites no specific DOHA decision, the Board is aware of decisions by Hearing Office Administrative Judges that use language along the lines referred to by Applicant. Applicant's argument does not demonstrate the Judge erred in this case for three reasons. First, decisions by Hearing Office Judges are not legally binding precedent on their colleagues in other cases. *See, e.g.*, ISCR Case No. 03-00543 (May 21, 2004) at p. 5. Therefore, even if there are Hearing Office decisions in other cases that support Applicant's argument, those decisions do not demonstrate the Judge erred in this case. Second, neither the language of the Directive nor experience in the industrial security program supports the notion that being elderly or retired eliminates the risk of foreign influence. Indeed, the Board has rejected the premise that security concerns under Guideline B (Foreign Influence) are mitigated merely because an applicant's immediate family members are elderly or retired. *See, e.g.*, ISCR Case No. 02-04786 (June 27, 2003) at p. 5 (Administrative Judge failed to articulate a rational basis for his conclusion that the age of the applicant's father reduces security concerns under Guideline B; also noting that foreign government could bring pressure to bear on the applicant's father through threats concerning father's pension); ISCR Case No. 02-00305 (February 12, 2003) at p. 7 (age of applicant's parents, standing alone, does not reduce or diminish security concerns under Guideline B). Third, Applicant's argument about her father's age and retired status does not apply to three of her four brothers in the People's Republic of China.

Applicant's claim the Administrative Judge "made a biased judgment" also lacks merit. There is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to rebut that presumption has a heavy burden of persuasion on appeal. *See, e.g.*, ISCR Case No. 02-08032 (May 14, 2004) at p. 4. Bias is not demonstrated merely because a Judge makes findings of fact or reaches conclusions that are adverse to a party. *See, e.g.*, ISCR Case No. 94-0954 (October 16, 1995) at p. 4. Applicant's strong disagreement with the Judge's conclusions is not sufficient to rebut or overcome the presumption. Moreover, the fact that the Judge reached a conclusion that differed from conclusions reached by Hearing Office Judges in other Guideline B cases does not prove he is biased.

(e) Applicant asserts the Administrative Judge's decision shows he based his unfavorable decision on an unwarranted assumption that she poses a security risk merely because she might travel to the People's Republic of China in the future. This assertion lacks merit.

As discussed earlier in this decision, the Board does not review individual sentences of an Administrative Judge's decision in isolation, but rather reads the decision in its entirety. Reading the decision below in its entirety, the Board concludes the Judge's decision does *not* rest solely on his conclusion that Applicant might travel to the People's Republic of China, but rather on the totality of the facts and circumstances of Applicant's conduct and situation.

(f) Applicant cites to record evidence showing the length and strength of her connections with the United States, and argues the Administrative Judge failed to take that evidence into consideration. As discussed earlier in this decision, Applicant has failed to rebut or overcome the presumption that the Judge considered the record evidence as a whole.

### **Conclusion**

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. "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).

2. "Contact and correspondence with foreign citizens are casual and infrequent" (Directive, Adjudicative Guidelines, Item E2.A2.1.3.3).