

DATE: May 11, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-06262

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 Applicant a Statement of Reasons (SOR), dated April 6, 2004, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline C (Foreign Preference), Guideline B (Foreign Influence), and Guideline E (Personal Conduct). Administrative Judge LeRoy F. Foreman issued an unfavorable security clearance decision, dated December 17, 2004.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge erred in concluding that Applicant had a substantial financial interest in a foreign country, and (2) whether the Administrative Judge's decision with respect to the personal conduct allegations is 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 erred in concluding that Applicant had a substantial financial interest in a foreign country. The Administrative Judge found that: (a) Applicant paid for a plot of land and a double-wide mobile home in Mexico, (b) title to that property is currently in his wife's name because Applicant is not a Mexican citizen, (c) Applicant and his family live on this property, from which he commutes to his job in the United States, and (d) because of his debts Applicant could not qualify for a loan to purchase a home in the United States. Based upon those findings the Judge concluded Applicant had a substantial financial interest in a foreign country as contemplated under Foreign Influence Disqualifying Condition 8. On appeal, Applicant contends that the Judge erred in not applying Foreign Influence Mitigating Condition 5 because Applicant's foreign financial interest is minimal. In support of this contention, Applicant argues that the property in question is technically titled in his wife's name and even if she were to lose the property, he could easily afford another one.

Whether an applicant's financial interest in a foreign country is "substantial" for purposes of applying Foreign Influence Disqualifying Condition 8, or "minimal" for purposes of applying Foreign Influence Mitigating Condition 5, does not turn simply on consideration of the dollar amount of that financial interest. In assessing the significance of the foreign financial interest involved, an Administrative Judge must not only consider the dollar amount, but also its value in comparison to the applicant's financial interests in the United States, as well as any other record evidence concerning the facts and circumstances of the applicant's foreign financial interest and foreign ties. *See, e.g.*, ISCR Case No. 01-18860 (March 17, 2003) at p. 4. Considering the record as a whole, it was not arbitrary, capricious or contrary to law for the Judge to conclude that Applicant had a substantial, as opposed to a minimal, financial interest in the property which served as his family home in Mexico and that Applicant had not met his burden of presenting evidence sufficient to mitigate the security concerns raised by such a circumstance.

2. Whether the Administrative Judge's decision with respect to the personal conduct allegations is arbitrary, capricious or contrary to law. The Administrative Judge found: (a) Applicant and his wife reside in Mexico and his wife is a Mexican citizen, (b) Applicant registered his motor vehicle in California and obtained a driver's license in that state by falsely representing that he resided in California (at his aunt's address), and (c) Applicant obtained a U.S. Alien Registration Card for his wife by falsely representing she resided in California (at Applicant's aunt's address). Based upon those findings, the Judge concluded Applicant had engaged in a pattern of dishonesty or rule violations as contemplated under Personal Conduct Disqualifying Condition 5. On appeal, Applicant contends the Judge's conclusion is unsustainable because: (1) Applicant was unaware of the fact that it was illegal to use his aunt's address to obtain a California driver's license and vehicle registration, (2) although his wife did not intend to live at his aunt's address, his immigration lawyer told him it would be acceptable to use it as he did, and (3) the use of his aunt's address on all of the forms in question is a common practice. The explanations and justifications offered by Applicant do not render erroneous the Judge's conclusion that Applicant engaged in fraudulent conduct. Considering the record as a whole, it was not arbitrary, capricious or contrary to law for the Judge to conclude that Applicant had engaged in conduct which constituted a pattern of dishonestly or rule violations and that he had not met his burden of presenting evidence sufficient to mitigate the security concerns raised by such conduct.

Conclusion

Applicant has failed to demonstrate harmful error below. Accordingly, the Board affirms the Administrative Judge's adverse security clearance decision.

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

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board