DATE: February 28, 2005

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In Re:

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SSN: ----------

Applicant for Security Clearance

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ISCR Case No. 03-06174

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

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

**FOR APPLICANT**

Thomas M. Abbott, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated February 24, 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 Joseph Testan issued an unfavorable security clearance decision, dated August 24, 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 concluding Applicant had not mitigated the security concerns raised by his obtaining an Iranian passport in 1999; and (2) whether the Administrative Judge erred by concluding Applicant has not mitigated the security concerns raised by the presence of immediate family members in Iran. 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)]

Before addressing the main appeal issues, the Board will discuss a threshold procedural issue raised by a portion of Applicant's appeal brief, which sets forth "findings of fact [that] were not made by the Administrative Judge, but are supported by the record evidence." Although the parties are free -- within the bounds of zealous advocacy -- to argue about what the record evidence shows, it is the Administrative Judge, not either party, that makes the findings of fact in a case. Moreover, the Directive authorizes the Board to review a Judge's findings of fact, not engage in *de novo* fact-finding. Accordingly, the Board will consider Applicant's proffered "findings of fact" only to the extent they constitute argument about the record evidence in support of any of the specific appeal issues raised by Applicant.

1. Whether the Administrative Judge erred by concluding Applicant had not mitigated the security concerns raised by his obtaining an Iranian passport in 1999. The Administrative Judge found the following: (i) Applicant became a naturalized U.S. citizen in 1987; (ii) Applicant obtained an Iranian passport in 1999 to enable him to travel to Iran if necessary to honor his father's wish to be buried in Iran; (iii) Applicant's Iranian passport expired in January 2004 without him ever using it; (iv) Applicant gave the expired Iranian passport to his company's security officer in July 2004; and (v) the company security officer shredded Applicant's Iranian passport in July 2004. The Judge held that prior Board decisions concerning the application of an August 2000 memorandum concerning foreign passports[(2)] (hereinafter "ASDC3I memorandum") precluded him from concluding that Applicant had mitigated the security concerns raised under Guideline C (Foreign Preference) by his obtaining an Iranian passport in 1999.

On appeal, Applicant does not challenge the Administrative Judge's findings of fact about his Iranian passport. However, Applicant contends the Judge erred by concluding he did not mitigate the security concerns raised by his possession of an Iranian passport. In support of this contention, Applicant asserts: (a) the Board's decisions interpreting the ASDC3I memorandum were wrongly decided or need to be modified to reflect situations such as those Applicant's

case; and (b) he was denied due process because he was not told by DoD that he had to relinquish his Iranian passport to the issuing authority.

(a) Whether the Board's decisions interpreting the ASDC3I memorandum were wrongly decided or need to be modified to reflect situations such as those Applicant's case.[(3)] The ASDC3I memorandum states, in relevant part, "Therefore, consistent application of the guideline requires that 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" (italics added). Applicant is correct in noting that the Board has interpreted the term "surrender" in the ASDC3I memorandum as meaning surrender of the foreign passport to the issuing authority.[(4)] Applicant makes several arguments in support of his contention those Board decisions interpreting the ASDC3I memorandum were wrongly decided or need to be modified. Specifically, Applicant argues the Board's decisions: (i) impose a requirement that is not required by the Directive or the ASDC3I memorandum concerning foreign passports; (ii) fail to take into account situations where the issuing authority does not permit a person to surrender a foreign passport; and (iii) do not permit an Administrative Judge to exercise reasonable discretion to consider record evidence that a foreign country does not permit an applicant to surrender a foreign passport.

Applicant is correct in noting that the Directive is silent on the matter of surrendering a foreign passport. However, the matter of surrendering a foreign passport is explicitly covered by the ASDC3I memorandum. Therefore, there is no basis for Applicant's assertion that the Board has imposed its own requirement that a foreign passport be surrendered. Furthermore, to the extent that Applicant's argument implicitly challenges the surrender requirement in the ASDC3I memorandum because it does not appear in the Directive, that argument fails to take into account the provision of the Directive that authorizes the issuance of policy guidance such as the ASDC3I memorandum.[(5)] The Board will not presume to question the authority of the ASDC3I to issue the memorandum concerning foreign passports.[(6)]

The Board will not recapitulate its reasoning for concluding that the term "surrender" in the ASDC3I memorandum means surrender of a foreign passport to the issuing authority because that reasoning has been set forth in earlier decisions.[(7)] Applicant relies to some extent on facts not in evidence and not found as facts by the Administrative Judge regarding the practices of Iran. In this case, there is no evidence Applicant made any effort to surrender his passport to Iran. Many of Applicant's arguments on appeal are hypothetical at best, since they rely on supposition of what might have happened if Applicant had attempted surrender of the Iranian passport. Applicant's arguments raise policy questions about the pros and cons of the ASDC3I memorandum that the Board does not have the authority to address and resolve within the limits of its authority under the Directive.[(8)] Other than disagreeing with the Board's decisions on the meaning of "surrender" in the ASDC3I memorandum and making policy arguments that have the practical effect of asking the Board to make a ruling that goes beyond its limited jurisdiction and authority under the Directive, Applicant sets forth no persuasive reason for why the Board should change or modify its earlier decisions.[(9)]

One argument Applicant make warrants further discussion. Specifically, Applicant argues that since the word "surrender" is not defined in the ASDC3I memorandum, then the Board's interpretation of that term violates Applicant's due process rights unless it has been reviewed by the ASDC3I (or successor) or published. This argument lacks merit for several reasons.

First, Applicant cites no legal authority for the proposition that an agency or department must define every term of a regulation, directive, or policy memorandum or face the prospect that its regulation, directive, or policy memorandum will be legally unenforceable. Moreover, acceptance of such a proposition would result to the absurd result that federal regulations, directives, and policies would be nullified unless each and every one included a definitions section. Not every term in the U.S. Code has a definition provided by Congress. That does not mean that the U.S. Code is unenforceable until Congress enacts such definitions. Not every term in the Directive is defined. That does not mean that the Directive is unenforceable until definitions for the Directive are issued by the Secretary of Defense, Deputy Secretary of Defense, or DoD personnel authorized to act under Directive, Section 5.1. Indeed, acceptance of Applicant's argument would leave the Board without authority to rule on his appeal until the Secretary of Defense, Deputy Secretary of Defense or other authorized DoD personnel issue definitions pertinent to the Board's authority under Directive, Additional Procedural Guidance, Items E3.1.28 through E3.1.35.

Second, Applicant cites no legal authority for the proposition that an agency or department cannot enforce a regulation, directive, or policy memorandum unless any interpretation or implementation of the regulation, directive, or policy memorandum is reviewed by higher-level officials or published before becoming effective.[(10)] Indeed, acceptance of Applicant's argument would result in the untenable result that *no* provision of the Directive could be interpreted or applied until the interpretation or implementation of each provision was reviewed by higher-level DoD officials or published.

Third, although Applicant concedes that Board decisions interpreting the ASDC3I memorandum are publicly available, Applicant makes no cogent argument for how the public availability of Board decisions is not sufficient to place him on reasonable notice of the Board's interpretation of the ASDC3I memorandum.[(11)]

(b) Whether Applicant was denied due process because he was not told by DoD that he had to relinquish his Iranian passport to the issuing authority. Applicant contends he was denied due process because he was not told by DoD that he had to surrender his Iranian passport to the issuing authority, asserting that he was denied a fair opportunity to present a defense. This contention is not persuasive.

There is no question that Applicant was entitled to receive reasonable notice of the reasons why DOHA proposed to deny or revoke access to classified information, as well as a reasonable opportunity to respond.[(12)] In this case, Applicant received an SOR about five months prior to the hearing. He also received a copy of the ASDC3I memorandum prior to the hearing, although the date is unclear from the record. The concept of due process does not obligate DoD to provide an applicant with a road map on how an applicant can develop or present evidence that might extenuate or mitigate conduct or circumstances that raise security concerns.[(13)]

To use an analogy: Due process requires a criminal defendant to receive adequate notice of the charges being made against the defendant, and a reasonable opportunity to respond to those charges and present a defense. However, due process does not obligate the government to issue with the criminal indictment a roadmap of defenses that the criminal defendant might raise in response to the criminal charges alleged in the criminal indictment. Although a criminal statute must be clear enough to allow a reasonable person to understand what conduct is prohibited, there is no due process requirement that such a statute specify potential defenses to any criminal charge brought under the statute.[(14)] Acceptance of Applicant's argument would have the practical effect that *no* SOR could be issued by DOHA without including a detailed explanation to each applicant as to what specific defense(s) could be raised under each Guideline alleged in the SOR, including which general factors (Directive, Section 6.3; Directive, Adjudicative Guidelines, Item E2.2.1) or provisions of the Adjudicative Guidelines the applicant might be entitled to invoke in extenuation or mitigation.

2. Whether the Administrative Judge erred by concluding Applicant has not mitigated the security concerns raised by the presence of immediate family members in Iran. The Administrative Judge concluded that Applicant had not mitigated the security concerns raised under Guideline B (Foreign Influence) by the presence of his two sisters living in Iran. Applicant contends: (a) DoD is treating U.S. citizens of Iranian origin in a discriminatory manner; (b) the Judge's decision shows there is selective application or enforcement of the Directive; (c) the Judge failed to consider all the record evidence and apply the whole person concept in this case; and (d) the Judge should have applied Foreign Influence Mitigating Conditions 1, 3, and 4 and concluded he had successfully mitigated the security concerns under Guideline B.

(a) Applicant's claim that his case is being handled in a discriminatory manner seeks to have the Board exercise jurisdiction and authority that it does not have under the Directive. Applicant's claim is predicated on factual assertions that go beyond the record in his case, and the Board cannot consider new evidence on appeal.[(15)] Moreover, Applicant's claim seeks to have the Board review the action of DoD personnel that are not subject to review by the Board. The Board does not have supervisory jurisdiction over: (i) DoD personnel who refer cases to DOHA; (ii) DOHA personnel who issue SORs; (iii) Department Counsel who appear at hearings and present evidence in support of SOR allegations; or (iv) Hearing Office Administrative Judge's who conduct hearings and issue security clearance decisions.[(16)] Furthermore, DOHA proceedings are intended to adjudicate the security eligibility of individual applicants, not entertain or adjudicate claims that would cover whole classes of applicants.[(17)] In view of the foregoing reasons, the Board

concludes it does not have the jurisdiction or authority to address the merits of Applicant's claim that he is the victim of discriminatory treatment.

(b) Applicant's claim that there is selective application or enforcement of the Directive also seeks to have the Board exercise jurisdiction and authority that it does not have under the Directive. This claim assumes that the Board has the authority to review and pass judgment on decisions such as: (i) whether a security clearance case should be referred to DOHA; (ii) whether an SOR should be issued in a particular case; and (iii) what allegations should or should not be included in an SOR. Under the Directive, the Board does not have authority or jurisdiction to review and pass judgment on such decisions. Furthermore, DOHA proceedings are not a proper forum to adjudicate civil rights claims.[(18)]

(c) There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise.[(19)] That presumption is not rebutted by Applicant's ability to argue for an alternate interpretation of the record evidence. After all, DOHA proceedings are adversarial in nature,[(20)] and one of the hallmarks of adversarial proceedings is the right of each party to make good faith arguments in support of: (i) what weight the party believes the Judge should give to particular record evidence; (ii) what the party thinks the evidence proves; (iii) the inferences the party thinks are warranted in light of the record evidence; and (iv) the conclusions the party believes the Judge should reach based on the record evidence in the case. Accordingly, the presumption that the Judge considered the record evidence is not rebutted merely because Applicant can argue that the Judge should have weighed the evidence differently, drawn different inferences, or reached other conclusions than he did.[(21)]

Applicant is correct that the Administrative Judge had to evaluate his security eligibility in light of the whole person concept.[(22)] However, Applicant does not make a persuasive argument showing how the Judge failed to evaluate his case in light of the whole person concept. At most, Applicant sets forth an alternate interpretation of the record evidence, and cites favorable evidence that he asserts the Judge should have given more weight to. As noted in the preceding paragraph, one of the hallmarks of an adversarial proceeding is the right of each party to make good faith arguments in support of its interpretation of the record evidence. If the Board were to hold that a party's ability to make a good faith argument in support of its interpretation of the record evidence were sufficient to demonstrate the Judge failed to apply the whole person concept, then there would be few Hearing Office decisions that would not be vulnerable to such challenges. The issue is not whether the parties or the Board agree with the Judge's particular analysis of a case, whether the parties or the Board would weigh the record evidence the same way the Judge did, or whether the parties or the Board would draw the same inferences or reach the same conclusions as the Judge did. Rather, the question is whether the Judge's decision reflects a reasonable evaluation of the applicant's security eligibility in light of the record evidence as a whole and pertinent provisions of the Directive (including the whole person concept). Applicant has not shown that the Judge's decision fails to apply the whole person concept.

(d) Applicant also contends the Administrative Judge erred by not applying Foreign Influence Mitigating Conditions 1, 3, and 4. The Board will address each of these claims of error in turn.[(23)]

Foreign Influence Mitigating Condition 1.[(24)] Applicant contends the record evidence shows that he met his burden of showing that his ties to two sisters in Iran are mitigated under Foreign Influence Mitigating Condition 1 and that the Administrative Judge failed to offer a satisfactory explanation for his conclusion that Foreign Influence Mitigating Condition 1 does not apply. This claim is not persuasive.

Applicant argues the Administrative Judge should have applied Foreign Influence Mitigating Condition 1 because: (a) the decision fails to show the Judge considered the record evidence in this case; (b) the application of Foreign Influence Mitigating Condition 1 by Hearing Office Judges "has been irregular and inconsistent"; (c) Hearing Office Judges have issued favorable decisions in other cases involving applicants with family ties in Iran "similar to or greater than Applicant's"; (d) Applicant's sisters in Iran are not agents of a foreign power; (e) since Applicant cannot trust the Iranian government to honor any coercive or non-coercive agreement involving his family members, Applicant cannot be placed in a position to choose between his family members in Iran or his obligations to protect classified U.S. information; (f) if the Iran government were to approach Applicant in a coercive or non-coercive manner, then the only choice Applicant has would be to report the contact to U.S. authorities; (g) the record evidence shows Applicant has a history of reporting foreign contacts to appropriate persons; (h) the record evidence shows "Applicant is in the unique

position of being able to present evidence of how he would react [if the Iran government were to contact him directly or indirectly]"; (i) there is no evidence that the Iranian government has ever attempted to exploit any resident of Iran for the purpose of trying to compromise a person holding a U.S. security clearance; and (j) there is no evidence that the Iranian government has ever sought to exploit his relationship with his sisters in Iran. These arguments fail to demonstrate the Judge erred in this case.

As noted earlier in this decision, there is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. Applicant's disagreement with the Judge's decision to not apply Foreign Influence Mitigating Condition 1 is not sufficient to rebut the presumption that the Judge considered the record evidence.

As discussed earlier in this decision, the decisions by Hearing Office Administrative Judges are not legally binding precedent. The decision of a Hearing Office Judge to apply Foreign Influence Mitigating Condition 1 in a given case does legally bind a fellow Hearing Office Judge to apply Foreign Influence Mitigating Condition 1 in another case. It is untenable for Applicant to argue "the Board has created an arbitrary and capricious system" where Hearing Office Judges apply the Adjudicative Guidelines inconsistently. The Board does not have the jurisdiction, authority, or capability to review Hearing Office decisions that are not appealed. Even when Hearing Office decisions are appealed, the Board cannot review rulings in those decisions that are not challenged by the parties.[(25)] If Applicant believes that decisions issued by Hearing Office Judges are inconsistent, then his remedy lies elsewhere. The Board cannot ignore the limits of its jurisdiction and authority under the Directive, however much an appealing party would like it to do so.

The record evidence that Applicant's sisters in Iran are not agents of a foreign power did not compel the Administrative Judge to apply Foreign Influence Mitigating Condition 1. Because that mitigating condition is bifurcated in nature, Applicant is not entitled to its application merely because he can show his sisters in Iran family members are not agents of a foreign power.[(26)]

The absence of record evidence that the Iranian government has ever attempted to exploit any resident of Iran for the purpose of trying to compromise a person holding a U.S. security clearance, and the absence of record evidence that the Iranian government has ever sought to exploit Applicant's sisters in Iran does not have the significance that Applicant places on it. The federal government is not required to wait until there is proof that an applicant has been specifically targeted by a foreign government before it can decide whether an applicant's conduct and circumstances pose a security risk.[(27)]

Applicant's remaining arguments are predicated on an alternate interpretation of the record evidence. Applicant's ability to argue for an interpretation of the record evidence that favors him

is not sufficient to show that the Administrative Judge's choice to not apply Foreign Influence Mitigating Condition 1 in this case is arbitrary, capricious, or contrary to law. Applicant may believe that the record evidence should have been viewed more favorably by the Judge. However, that belief is not sufficient to demonstrate the Judge acted in a manner that is arbitrary, capricious, or contrary to law.

Foreign Influence Mitigating Condition 3.[(28)] Applicant contends the record evidence does not support the Administrative Judge's finding that his relationship with family members in Iran is close, and further contends the Judge should have applied Foreign Influence Mitigating Condition 3 in his favor. There is a rebuttable presumption that a person's contacts with immediate family members are not casual in nature.[(29)] Applicant cites to record evidence that could provide support for an argument that his contacts with family members in Iran are casual and infrequent. However, Applicant also does not challenge the Judge's finding that he has regular telephone contact with his sisters in Iran. Considering the record as a whole, there is sufficient record evidence to permit the Judge to conclude Applicant's contacts with his sisters in Iran are not casual or infrequent enough to warrant application of Foreign Influence Mitigating Condition 3.

Foreign Influence Mitigating Condition 4.[(30)] Applicant contends that the Administrative Judge erred by not applying Foreign Influence itigating Condition 4 because: (a) there is record evidence that he has reported his foreign contacts in

the past; and (b) there is record evidence that shows he would report to his supervisors and company security office any attempt by the Iranian government to contact him directly or indirectly. The Board will discuss Applicant's arguments in reverse order.

Applicant's second argument lacks merit. The opinions by third parties about what Applicant would do if Iranian government officials contacted him under unspecified circumstances in the future (Exhibits B and C) are not stronger or more weighty than Applicant's opinion about how he would act if Iranian government officials contacted him under unspecified circumstances in the future.[(31)] As the Board has held, an applicant's opinion about such future situations generally are not entitled to much weight.[(32)] Applicant fails to articulate a cogent argument for why the opinions by third parties about how he would act if Iranian government officials contacted him under unspecified circumstances in the future are entitled to greater weight than Applicant's opinion.

Given the record evidence that Applicant has reported foreign contacts in the past, the Administrative Judge failed to explain why he concluded Foreign Influence Mitigating Condition 4 did not apply in this case. However, considering the record as a whole, the Board concludes that this error does not warrant remand or reversal.

**Conclusion**

The Board affirms the Administrative Judge's security clearance decision because Applicant has not demonstrated error below that warrants remand or reversal.

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. Applicant's reliance on decisions by Hearing Office Administrative Judges is somewhat misplaced. Decisions by Hearing Office Judges are not legally binding precedent that the Board must follow. The Board is not required to: (a) follow decisions issued by Hearing Office Judges; (b) justify why it chooses not to follow decisions issued by Hearing Office Judges; or (c) reconcile its decisions with those issued by Hearing Office Judges. Rather, it is the burden of a party to persuade the Board as to why it should follow any Hearing Office Judge decision cited by that party. *See, e.g.*, ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5.

2. August 16, 2000 memorandum by Assistant Secretary of Defense for Command, Control, Communications, and Intelligence, entitled "Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guideline."

3. Applicant correctly notes that an appealing party has the right to make good faith arguments for why the Board should overrule or modify its earlier decisions.

4. *See, e.g.*, ISCR Case No. 01-01295 (December 13, 2001) at p. 4; ISCR Case No. 99-0480 (November 28, 2000) at p. 8.

5. *See, e.g.*, ISCR Case No. 00-0489 (January 10, 2002) at p. 7 (noting ASDC3I has authority under the Directive to establish adjudicative standards, oversee the application of such standards, and to issue clarifying guidance and instructions); ISCR Case No. 01-00783 (December 19, 2001) at p. 4 (same).

6. *See* ISCR Case No. 99-0519 (February 23, 2001) at p. 5 n.1 (Board does not have jurisdiction to review decision of ASDC3I to suspend a security clearance pursuant to Directive, Section 6.4). *Cf. Association of Administrative Law Judges v. Heckler*, 594 F. Supp. 1132, 1141 (D.D.C. 1984)(when an agency delegates review authority to an agency appellate, the agency appellate body has the authority to review administrative law judge decisions to ensure they comply with agency policy).

7. *See* cases cited in footnote 4 of this decision.

8. To the extent that Applicant's arguments ask the Board to revert to policies that preceded the ASDC3I memorandum, Board decisions cannot be relied on or followed to the extent they involve rulings predicated on law or DoD policy that changed after the issuance of those decisions. *See, e.g.*, ISCR Case No. 02-24254 (June 29, 2004) at p. 7. Quasi-judicial adjudications must be made within the bounds of applicable law and agency policy, not without regard to them. *See, e.g., Croplife America v. Environmental Protection Agency*, 329 F.3d 876, 882 (D.C. Cir. 2003) (administrative law judges cannot ignore agency policy in making rulings); *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989)(administrative law judge is subordinate to head of agency or department in matters of policy); *Mullen v. Bowen*, 800 F.2d 535, 540 n. 5 (6th Cir. 1986) (decisional independence does not relieve administrative law judge of the obligation to apply agency policy). *See also* Directive, Section 5.2.13 (Hearing Office and Board must "have the requisite independence to render fair and impartial decisions *consistent with DoD policy*")(italics added); ISCR Case No. 02-00305 (February 12, 2003) at p. 3 (security clearance decisions must be based on current DoD policy and standards). Accordingly, no Board decision should be construed or interpreted without regard to the law and DoD policy applicable at the time the Board decision was issued.

9. If appropriate officials in the DoD decide that the Board's interpretation of the ASDC3I memorandum is erroneous, then they are free to amend or clarify the ASDC3I memorandum as authorized by law. *See, e.g.*, Directive, Section 5.1. Moreover, the Directive authorizes the adjudication of an applicant's security eligibility, not the adjudication of the pros and cons of DoD policy, in these proceedings. *See, e.g.*, ISCR Case No. 02-04237 (August 12, 2003) at p. 4 (neither a Hearing Office Judge nor the Board can review or pass judgment on the wisdom or desirability of the ASDC3I memorandum). *See also Iran Air v. Kugelman*, 996 F.2d 1253, 1260 (D.C. Cir. 1993)(administrative law judges are bound to follow agency policy and cannot reargue or dispute agency policy in their rulings or decisions). Any party who wants to obtain a change or modification of DoD policy must seek relief outside DOHA proceedings.

10. It is legally permissible for agencies or departments to enforce statute, regulations, directives, or policies through quasi-adjudicative proceedings. *See, e.g., Immigration and Naturalization Service v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)(recognizing federal agency can give ambiguous statutory terms concrete meaning through process of case-by-case adjudication). Otherwise, entities such as the National Labor Relations Board would be crippled or severely restricted in their ability to carry out their functions.

11. It is frivolous for Applicant to argue that the lawful effect and precedential value of Board decisions on the ASDC3I memorandum can be placed in doubt by the rulings of Hearing Office Administrative Judges. The lawful effect and precedential value of appellate tribunal decisions are not contingent on the actions or inactions of lower level tribunals, nor are they dependent on the consent or agreement of lower level tribunals. *See also* footnote 1 of this decision. No party can reasonably rely on the decisions of Hearing Office Judges to escape the precedential value of Board decisions that are on point.

12. *See* Directive, Section 4.3 and Additional Procedural Guidance, Items E3.1.3, E3.1.7, and E3.1.8.

13. None of the cases cited in Applicant's appeal brief indicates or suggests that due process requires the federal government to provide such a road map.

14. For example, 18 U.S.C. §1001 makes it a criminal offense to knowingly and willfully make a false statement or representation to any department or agency of the United States. Nothing in 18 U.S.C. §1001 indicates or even suggests what defenses a defendant might be able to raise when being prosecuted under that statute. Surely, an indictment charging a violation of 18 U.S.C. §1001 is not violative of due process merely because neither the indictment nor the statute cites, lists, or otherwise informs the defendant of possible defenses to a criminal prosecution under that statute.

15. Directive, Additional Procedural Guidance, Item E3.1.29.

16. *See, e.g.*, ISCR Case No. 02-04344 (September 15, 2003) at p. 3; ISCR Case No. 02-24479 (July 14, 2003) at p. 4. *See also* ISCR Case No. 99-0481 (November 29, 2000) at p. 4 (noting adjudication of a claim that the applicant was a victim of disparate treatment would require the Board to exercise jurisdiction and authority beyond that given to it under the Directive).

17. *See, e.g.*, ISCR Case No. 02-09907 (March 17, 2004) at p. 4.

18. *See, e.g.*, ISCR Case No. 99-0519 (February 23, 2001) at p. 11.

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

20. *See, e.g.*, ISCR Case No. 02-10215 (January 30, 2004) at p. 4.

21. Moreover, Applicant's ability to identify favorable record evidence is not sufficient to demonstrate the Administrative Judge erred. It is a rare case that has evidence that points all one way or the other; the mere presence of some unfavorable record evidence does not compel an unfavorable decision, and the mere presence of some favorable record evidence does not compel a favorable decision. To hold otherwise would lead to the untenable result that the Board could not affirm any decision unless the record evidence all pointed one way. *Cf.* ISCR Case No. 02-09892 (July 15, 2004) at p. 5 (noting that it is not unusual for a Hearing Office Judge to be faced with conflicting record evidence, or a record that contains some evidence that favors one side and different evidence that favors the other side).

22. *See* Directive, Section 6.3; Adjudicative Guidelines, Item E2.2.1.

23. Under the Directive, Applicant has the burden of demonstrating extenuation or mitigation of admitted or proven facts that raise security concerns. *See* Directive, Additional Procedural Guidance, Item E3.1.15. Applicant's burden of persuasion extends to presenting evidence sufficient to warrant the application of Adjudicative Guidelines mitigating conditions. *See, e.g.*, ISCR Case No. 02-02892 (June 28, 2004) at p. 6.

24. "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).

25. *See* Directive, Additional Procedural Guidance, Item E3.1.32 (Board shall address the material issues raised by the parties).

26. *See, e.g.*, ISCR Case No. 02-02892 (June 28, 2004) at p. 11.

27. *See, e.g.*, ISCR Case No. 02-14995 (July 26, 2004) at pp. 4-5; ISCR Case No. 02-02892 (June 28, 2004) at p. 7; ISCR Case No. 00-0628 (February 24, 2003) at p. 5.

28. "Contact and correspondence with foreign citizens are casual and infrequent" (Directive, Adjudicative Guidelines,

Item E2.A2.1.3.3).

29. *See, e.g.*, ISCR Case No. 00-0484 (February 1, 2002) at p. 5.

30. "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).

31. The record evidence concerning the foreign contacts that Applicant reported in the past indicates those foreign contacts are easily distinguishable from possible contacts by Iranian government officials seeking to influence him, directly or indirectly, through his ties with his sisters in Iran.

32. *See, e.g.*, ISCR Case No. 02-02892 (June 28, 2004) at p. 4; ISCR Case No. 02-26826 (November 12, 2003) at pp. 5-6.