

DATE: January 24, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-06267

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 May 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 B (Foreign Influence) and Guideline C (Foreign Preference). Administrative Judge Thomas M. Crean issued an unfavorable security clearance decision, dated June 29, 2005.

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 making certain factual findings, and (2) whether the Administrative Judge erred in concluding that the security concerns raised under Guideline B (Foreign Influence) had not been mitigated. 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⁾

1. Whether the Administrative Judge erred in making certain factual findings. Applicant contends that the Administrative Judge's adverse security clearance decision should be reversed because it is predicated on several minor faulty findings of fact.⁽²⁾ The Board does not find Applicant's contention persuasive.

The factual errors which Applicant alleges⁽³⁾ would not be reasonably likely to change the outcome of the case. Applicant has not met his burden of demonstrating that the Administrative Judge's material findings with respect Applicant's foreign family members do not reflect a reasonable or plausible interpretation of the record evidence. As noted above, the Board does not review a case *de novo*. Considering the record evidence as a whole, the Judge's material findings of security concern are sustainable.

2. Whether the Administrative Judge erred in concluding that the security concerns raised under Guideline B (Foreign Influence) had not been mitigated. Applicant argues that the evidence he provided in the proceeding below was sufficient to require the Administrative Judge to conclude that he had rebutted, mitigated or extenuated the security concerns raised under Guideline B (Foreign Influence). Specifically, Applicant contends that the Judge's adverse decision should be reversed because the Judge: (1) misapplied Foreign Influence Mitigating Condition 1,⁽⁴⁾ (2) failed to consider mitigating evidence, and (3) made an unfavorable decision that is unsupported by the record as a whole. For the reasons that follow, the Board concludes Applicant's arguments do not demonstrate the Judge erred.

The Administrative Judge made sustainable findings that: (1) Applicant's father and mother are citizens of Bosnia-Herzegovina residing in that country, (2) Applicant maintains contact with his father and mother through video teleconferencing several times a month, (3) Applicant had traveled to Bosnia-Herzegovina between 1999 and 2001 to visit his parents, and (4) Applicant's father had been a high-level official in the Bosnian government and a major

government-held corporation. Given those findings, the Judge concluded that Applicant's ties with his immediate family members raised security concerns under Guideline B and that Foreign Influence Disqualifying Condition 1 ⁽⁵⁾ applied. That conclusion shifted the burden of persuasion to Applicant. Directive, Additional Procedural Guidance, Item E3.1.15.

Applicant also contends that the Administrative Judge gave insufficient weight to evidence that: (1) Applicant's parents in Bosnia-Herzegovina were now retired and were not agents of the Bosnian government, and (2) Bosnia-Herzegovina was not hostile to the United States.

The Administrative Judge concluded that, even assuming none of Applicant's family members were agents of the Bosnian government, Applicant still had the burden of demonstrating that his family members in Bosnia-Herzegovina were not in positions where they are likely to be exploited by a foreign power. Applicant's arguments do not demonstrate that it was arbitrary, capricious, or contrary to law for the Administrative Judge to conclude that Applicant had not met his burden of persuasion under Guideline B. As noted above, the Board does not review a case *de novo*. There is a rebuttable presumption that a Judge considered all the record evidence unless he or she specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. The mere disagreement with the Judge's weighing of the evidence is not sufficient to demonstrate error without a showing that the Judge's weighing of the evidence was arbitrary, capricious, or contrary to law.

The absence of evidence that Applicant's family members in Bosnia-Herzegovina are currently employees or agents of the Bosnian government is not dispositive. Having relatives, cohabitants, or associates who are connected with a foreign government is a disqualifying condition under Guideline B. ⁽⁶⁾ However, the absence of such a connection with a foreign government does not mean that there is no security concern under Guideline B. *See, e.g.*, ISCR Case No. 02-29665 (November 10, 2004) at p.5. A reading of Guideline B in its entirety shows that security concerns can be raised by a variety of foreign connections, not just having family members with foreign government connections. Moreover, the Board has previously rejected the premise that security concerns under Guideline B are mitigated merely because an applicant's foreign 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). Finally, nothing in Guideline B indicates or suggests that it is limited to countries that are hostile to the United States. *See, e.g.*, ISCR Case No. 02-31154 (September 22, 2005) at p. 6. The Board has warned "against reliance on overly simplistic distinctions between 'friendly' nations and 'hostile' nations when adjudicating cases under Guideline B." *See* ISCR Case No. 00-0317 (March 29, 2002) at p. 6. In his decision, the Judge articulated a rational basis for his conclusion that Applicant's circumstances increased Applicant's vulnerability to foreign influence. Considering the record as a whole, it was not arbitrary, capricious or contrary to law for the Judge to conclude that Applicant had not met his burden of producing sufficient evidence to warrant the application of itigating Conditions 1 or to conclude that Applicant had not mitigated the security concerns raised under Guideline B.

Conclusion

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

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. The Administrative Judge found in favor of Applicant with respect to SOR paragraphs 1.a, 1.b, 2.d, and 2.e. Those favorable formal findings are not at issue on appeal.
2. Applicant's Brief at p. 1.
3. For example: (1) Applicant no longer works for a defense contractor, but is now a civilian employee of a DoD component; (2) Applicant left Bosnia-Herzegovina in May 1993, not October 1993; and (3) Applicant came to the United States to find a new home, not to improve his education.
4. Directive, Adjudicative Guidelines, Item E2.A2.1.3.1 ("A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brother, 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").
5. Directive, Adjudicative Guidelines, Item E2.A2.1.2.1 ("An immediate family member, or person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country").
6. Directive, Adjudicative Guidelines, Item E2.A2.1.2.3.