

DATE: July 26, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-08988

## **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 to Applicant a Statement of Reasons (SOR), dated September 21, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence). Administrative Judge LeRoy F. Foreman issued an unfavorable security clearance decision, dated April 29, 2005.

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 issue has been raised on appeal: whether the Administrative Judge's unfavorable security clearance decision 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 Issue<sup>(1)</sup>

Whether the Administrative Judge's unfavorable security clearance decision is arbitrary, capricious, or contrary to law. The Administrative Judge concluded that security concerns were raised under Guideline B (Foreign Influence) by Applicant's ties and contacts with: (1) her parents and her sister, who all are citizens of the People's Republic of China and are living in that country; and (2) her brother -- who was born in the People's Republic of China and later became a naturalized U.S. citizen -- who currently works for a European company doing business in the People's Republic of China. The Judge also concluded that Applicant had not presented evidence sufficient to mitigate those security concerns.

On appeal, Applicant does not challenge the Administrative Judge's findings of fact about her ties and contacts with immediate family members in the People's Republic of China. However, Applicant asserts: (a) as a U.S. citizen, she has a right to work for the U.S. government; (b) she does not believe that she should be denied a security clearance because she has immediate family members in the People's Republic of China; (c) she has stated before that if there is any conflict, she will be on the side of the United States; (d) she does not tell anyone about nature of her work; (e) she has done nothing to hurt the United States, and she would not do anything harmful to the United States in the future. The Board construes Applicant's assertions as raising the issue of whether the Judge's unfavorable decision is arbitrary, capricious, or contrary to law.

There is no right to a security clearance. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988). Being a U.S. citizen does not entitle Applicant to a security clearance.

An Administrative Judge is not bound by an applicant's opinion about the security significance of the applicant's conduct and circumstances. Error is not shown by Applicant's disagreement with the Judge about the security significance of her ties and contacts with immediate family members in the People's Republic of China. *See, e.g.*, ISCR Case No. 02-26976 (October 22, 2004) at p. 5. Given the record evidence in this case, it was not arbitrary, capricious, or

contrary to law for the Judge to conclude that Applicant's ties and contacts with immediate family members in the People's Republic of China raised security concerns under Guideline B, and that Applicant had the burden of presenting evidence sufficient to rebut or overcome those security concerns.

The Administrative Judge entered formal findings in favor of Applicant with respect to Guideline C (Foreign Preference). Therefore, Applicant's assertion about siding with the United States instead of the People's Republic of China in any conflict is moot.

Applicant's discretion about the nature of her work is not at issue in this case. The SOR did not allege, and the Administrative Judge did not find, that Applicant committed any security violations or disclosed sensitive information about her work. The federal government does not have to wait until an applicant poses an imminent threat to the national security or commits a security violation before it can deny or revoke access to classified information. *See, e.g.*, ISCR Case No. 02-06478 (October 25, 2004) at p. 6. The Judge's findings and conclusions about Applicant's ties and contacts with immediate family members in the People's Republic of China provide a rational and legally permissible basis for his adverse conclusions about Applicant's security eligibility.

### **Conclusion**

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated error below.

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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to Guideline C (Foreign Preference). Those favorable formal findings are not at issue on appeal.