

DATE: September 29, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-09027

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 May 4, 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). Administrative Judge John Grattan Metz, Jr. issued an unfavorable security clearance decision, dated July 13, 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 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

Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. The Administrative Judge made findings of fact about the following: (a) Applicant's ties and contacts with his mother and sister, who are citizens and residents of the People's Republic of China; (b) Applicant's trips to the People's Republic of China in 1998, 2000, and 2001; (c) the likelihood that Applicant would travel to the People's Republic of China to visit his mother if she became ill; and (d) the nature of the government of the People's Republic of China. The Judge concluded that the facts and circumstances of Applicant's situation raised security concerns under Guideline B (Foreign Influence) and that Applicant did not present evidence that extenuated or mitigated those security concerns.

On appeal, Applicant does not challenge the Administrative Judge's findings of fact about his mother and sister. Instead, Applicant contends the Judge's decision is wrong because: (a) the Judge "clearly did not understand the basics of current China" and "[t]ime will prove his rationale is wrong"; and (b) any security concerns the government has will be eliminated once he arranges to have his mother and sister immigrate to the United States. The Board construes Applicant's arguments as raising the issue of whether the Judge's unfavorable decision is arbitrary, capricious, or contrary to law.

As noted earlier in this decision, there is no presumption of error below. Because Applicant does not challenge the Administrative Judge's findings of fact about his mother and sister, those findings stand on appeal and need not be reviewed to decide this appeal.

Given the record evidence in this case, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to conclude that the facts and circumstances of Applicant's situation raised security concerns under Guideline B (Foreign Influence) and that the burden shifted to Applicant to present evidence sufficient to refute, rebut, extenuate or mitigate those security concerns. *See* Directive, Additional Procedural Guidance, Item E3.1.15. Applicant's disagreement with the Judge's conclusions about the security significance of his situation is not sufficient to demonstrate the Judge's conclusions are arbitrary, capricious, or contrary to law. Moreover, considering the record as a whole, the Board

concludes it was not arbitrary, capricious, or contrary to law for the Judge to decide that Applicant had not presented evidence that was sufficient to extenuate or mitigate the security concerns raised under Guideline B.

Applicant's assertion about his plans to have his mother and sister immigrate to the United States constitutes new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Applicant's proffer of new evidence on appeal does not demonstrate the Judge erred.

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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board