

DATE: April 12, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-10390

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez Jr., Esq., Department Counsel

FOR APPLICANT

Lawrence M. Monat, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated March 9, 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), Guideline B (Foreign Influence), and Guideline E (Personal Conduct). Administrative Judge James A. Young issued an unfavorable security clearance decision dated November 5, 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 obtaining and possessing an Israeli passport; (2) whether the Administrative Judge erred by concluding Applicant had not mitigated the security concerns raised by the presence of his wife's immediate family members and his own cousins in Israel; and (3) whether the Administrative Judge erred by concluding Applicant deliberately concealed his possession of an Israeli passport when completing a security clearance application. 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 by concluding Applicant had not mitigated the concerns raised by his obtaining, using, and possessing an Israeli passport. The Administrative Judge found the following: (i) Applicant immigrated to the United States from Israel when he was 16 years old and became a U.S. citizen in 1971; (ii) Applicant possesses an Israeli passport that was issued on July 10, 1996; (iii) Applicant used his Israeli passport on his most recent trip to Israel in 1996; (iv) the Israeli passport expired in 1998, but in 1999 it was extended until September 14, 2004; (v) in March 2003 Applicant expressed a willingness to renounce his Israeli citizenship and relinquish his Israeli passport by the end of April 2003; and (vi) Applicant still possessed the Israeli passport at the time of the hearing. The Judge held that the application of an August 2000 memorandum concerning foreign passports⁽¹⁾

(hereinafter "ASDC3I memorandum") required him to find against Applicant on the security concerns raised under Guideline C (Foreign Preference) because he possesses an Israeli passport.

On appeal, Applicant does not challenge the Administrative Judge's findings of fact about his Israeli passport. However, Applicant contends the Judge erred by concluding he did not mitigate the security concerns raised by his possession of an Israeli passport. In support of this contention, Applicant asserts: (a) he was denied due process at the hearing because the SOR said nothing about the failure to surrender his passport, and he relied on the government's position at the hearing that, once his passport expired, the ASDC3I memorandum did not apply; (b) he can no longer use his expired Israeli passport and its status is tantamount to its having been surrendered; (c) the Israeli government does not permit a simple surrender of a passport, and instead requires the additional step of renunciation of one's Israeli citizenship; (d) given the requirements of the Israeli authorities, Applicant did all he could to surrender his passport; (e) as a matter of

policy, the ASDC3I memorandum should not be interpreted to permit a foreign government to control an American citizen's ability to surrender his passport; and (f) an overall consideration of Applicant's case under a "whole person" analysis should mitigate the application of the ASDC3I memorandum.

Regarding Applicant's due process argument, there is no question that Applicant was entitled to receive reasonable notice of the reasons why DOHA proposed to deny or revoke his access to classified information, as well as a reasonable opportunity to respond.⁽²⁾

In this case, Applicant received the SOR about six months prior to the hearing. The allegations in the SOR under Guideline C placed Applicant on reasonable notice that his possession and use of an Israeli passport had potential negative impact upon his eligibility for a security clearance. The concept of due process does not obligate DoD to provide 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. *See, e.g.*, ISCR Case No. 03-06174 (February 28, 2005) at p. 7. Moreover, the record indicates that Applicant discussed with a government investigator the possibility of relinquishing his Israeli passport in March 2003, at which time he indicated he would do so by April 2003.⁽³⁾

The record also indicates that Applicant made an attempt to surrender his Israeli passport on September 10, 2004, less than two weeks before the hearing. Given this factual setting, Applicant fails to articulate how any perceived deficiencies in the SOR affected his rights during the hearing. Applicant also argues that Department Counsel adopted a position during the hearing that since his Israeli passport had expired, the provisions of the ASDC3I memorandum did not apply. Applicant claimed that the actions of Department Counsel affected the way he presented his case because he tried the matter on the assumption that, once his passport expired, the ASDC3I memorandum did not apply. On this point, Applicant's argument fails for two reasons. First, other than arguing that he was forced to try his case a certain way, Applicant fails to articulate with specificity precisely how he was prejudiced thereby. Second, there is nothing in the record to establish that Department Counsel made any representations to Applicant prior to or during the evidentiary portion of the hearing concerning their position on the applicability of the ASDC3I memorandum.⁽⁴⁾ The position of Department Counsel that, once the passport expired, the ASDC3I memorandum did not apply, was not announced until closing arguments in the case.⁽⁵⁾

Given this sequence of events, there is nothing in the record to indicate that Applicant was misled by Department Counsel concerning the effect of the ASDC3I memorandum.

Applicant's second argument is essentially that the Israeli passport has been "constructively" surrendered because it has expired and he can no longer use it. 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.⁽⁶⁾

Applicant's argument is without merit.

Applicant's third and fourth arguments (c and d) may be discussed together. Here, Applicant is arguing that the Israeli authorities have made it extremely difficult for him to comply with the ASDC3I memorandum, inasmuch as the relinquishing of an Israeli passport is an onerous and time-consuming process that also involves renunciation of Israeli citizenship. Applicant also argues that, despite these difficulties, he did all he could to comply with the dictates of the ASDC3I memorandum. Nothing in the ASDC3I memorandum indicates that possession of a foreign passport is extenuated or mitigated by any personal hardship that might ensue if an applicant tries to surrender a foreign passport. *See, e.g.*, ISCR Case No. 02-07625 (May 24, 2004) at p. 3. Also, the suggestion in Applicant's argument that he proceeded diligently to effect a surrender of his passport but, because of the nature of the process, simply ran out of time, is not supported by the record evidence.⁽⁷⁾

Applicant argues that, as a matter of policy, the ASDC3I memorandum should not be interpreted in a manner that effectively permits a foreign government to control an American citizen's ability to surrender his foreign passport. Applicant's argument raises 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. The Board's

jurisdiction and authority are limited to reviewing security clearance decisions by Hearing Office Administrative Judges. *See*, Directive, Additional Procedural Guidance, Items E3.1.28 - E3.1.35. Nothing in the Directive gives the Board the jurisdiction or authority to pass judgment on the wisdom or desirability of guidance provided by the ASDC3I memorandum. *See, e.g.*, ISCR Case No. 99-0480 (November 28, 2000) at p. 8. Accordingly, the Board will not address Applicant's policy argument.

Lastly, Applicant argues that he must be judged as a "whole person" and that his 39 years as a productive and loyal American citizen who has made significant contributions to the national defense demonstrates that his possession of an expired passport is no basis on which to deny him a security clearance. Nothing in the ASDC3I memorandum indicates that the nature of an applicant's background or achievements creates an exception to the requirements of the memorandum.

2. Whether the Administrative Judge erred by concluding Applicant had not mitigated the security concerns raised by the presence of his wife's immediate family members and his own cousins in Israel. The Administrative Judge concluded that Applicant's ties and contacts with his father-in-law, brother-in-law, and cousins, all of whom are citizens and residents of Israel, raised security concerns under Guideline B (Foreign Influence), and that Applicant had not met his burden of presenting evidence sufficient to extenuate or mitigate those security concerns. On appeal, Applicant does not challenge the Administrative Judge's findings of fact about his family ties and contacts. However, Applicant does make the following arguments: (a) the Administrative Judge found in mitigation that Applicant's family contacts in Israel were minimal, casual and infrequent, except for his father-in-law; (b) Applicant's father-in-law is 84 years old, suffers from dementia, Applicant has difficulty communicating with him, and he is not the type of individual that might be subject to exploitation by a foreign government; (c) Applicant's 30-year history of holding a security clearance without incident and with the same set of relatives vitiates any inference that his father-in-law or other family members present a security concern; and (d) Applicant has no financial stake or interest in Israel. For the reasons that follow, the Board concludes Applicant's arguments do not demonstrate the Judge erred.

Applicant's first argument, in essence, is that the Administrative Judge found mitigated all of Applicant's contacts with his other Israeli relatives, and that the remaining concern is only with his father-in-law. The Board disagrees. When the totality of the Judge's conclusions regarding Guideline B are considered, there is no indication that the Judge categorically excluded Applicant's brother-in-law from his evaluation when ultimately deciding against Applicant under Guideline B. The Judge concluded Applicant had not rebutted the presumption that Applicant has ties of affection for, or obligation to, his father-in-law and his brother-in-law. Moreover, when considering the applicability of Guideline B Mitigating Condition 3, [\(8\)](#)

the Judge stated, "While his contacts are infrequent, they do not appear to be casual, at least with his father-in-law." The Judge's equivocal language suggests that, although the term "casual" applied to Applicant's other relatives to a greater degree than his father-in-law, the Judge was not excluding the other relatives from further consideration because their contacts with Applicant were wholly "casual." Earlier in his decision, the Judge observed the evidence Applicant stays in touch with other relatives in Israel establishes that he is bound by affection or obligation to them. Ultimately, the Judge found against Applicant under Guideline B after a consideration of "all the circumstances." A fair reading of the totality of the Judge's decision indicates that his adverse decision under Guideline B was not based solely on the circumstances of his father-in-law.

On appeal, Applicant emphasizes the age and health of his father-in-law and cites these factors as reasons that should eliminate any security concerns. Even if Applicant's family members are not likely to try to influence him, it does not follow that the Administrative Judge could not conclude Applicant's family ties placed him in a position of vulnerability to coercive or noncoercive influence or pressure exerted by Israel based on Applicant's family ties with several people who are citizens and residents of that country. *See, e.g.*, ISCR Case No. 02-02195 (April 9, 2004) at p. 6 (security concerns under Guideline B are not limited to consideration of whether there is a possibility of pressure or influence being exerted against an applicant by his or her immediate family members; but rather, includes consideration of whether there is the possibility of pressure or influence being exerted against an applicant by other persons or entities through his or her immediate family members in a foreign country).

Applicant argues that the presence of Applicant's relatives in Israel has never presented a problem in the past. Under

Guideline B, Department Counsel is not required to prove that a foreign country has specifically targeted a particular applicant with immediate family members and other family members living in that foreign country.⁽⁹⁾

Facts and circumstances that raise security concerns about an applicant's security eligibility can warrant an adverse security clearance decision without any proof that a foreign intelligence or security service has specifically targeted the applicant or sought to exploit those facts and circumstances. Applicant's vulnerability to possible foreign influence through his relatives in Israel is the same whether or not the Israeli government has sought to exert such influence or pressure in the past. *See, e.g.*, ISCR Case No. 03-16516 (November 26, 2004) at p. 7.

Finally, the Administrative Judge's failure to cite evidence that Applicant has no financial stake or interest whatsoever in Israel does not constitute error. Applicant argues that the Judge should have considered Guideline B Mitigating Condition 5.⁽¹⁰⁾

While it was certainly permissible for the Judge to consider Applicant's lack of financial interests in Israel under the "whole person" concept, the Judge was not required to do so in this case. Given the fact that financial interests in Israel were not listed as a basis for denial of a security clearance in the SOR, the fact that Applicant has no such interests is of less relevance than might otherwise be the case.

3. Whether the Administrative Judge erred by concluding Applicant deliberately concealed his possession of an Israeli passport when completing a security clearance application. The Administrative Judge found that Applicant falsified a security clearance application in February 2003 by failing to disclose that he held an active Israeli passport during the seven-year period prior to the completion of the application. On appeal, Applicant challenges that finding of falsification.

Applicant argues that his assertions at the hearing as to why the omission was not the product of deliberate falsification were uncontested, and nothing in the record demonstrated a motive to lie. Applicant's testimony about his state of mind at the time he completed the security clearance application was relevant evidence the Judge was bound to consider, but the Judge was not required to accept Applicant's un rebutted testimony at face value. The Judge was entitled to evaluate the inherent plausibility or implausibility of Applicant's explanations along with all other relevant evidence in deciding whether to accept those explanations. Moreover, Applicant's introduction into evidence of his explanation as to his state of mind did not, as Applicant asserts, shift the burden to Department Counsel to present evidence that Applicant had a motive to lie on his application. Regarding this argument, as well as Applicant's more general appeal argument about the absence of record evidence of a motivation to lie, the lack of such evidence is not dispositive of the issue of intent.

"Motive" and "intent" are separate and distinct. *See, e.g., Black's Law Dictionary, 6th Edition* (West Publishing, 1990) at p. 810. Although evidence that an applicant has a particular motive to falsify may be probative of an intent to falsify for purposes of Guideline E, there is no legal requirement that a particular motive to falsify be established in order to prove an applicant had the intent to falsify. *See, e.g., ISCR Case No. 02-15935* (October 15, 2003) at p. 7.

Applicant asserts on appeal that the Administrative Judge's analysis of the falsification issue rests on an irrational reliance on the fact that he brought his Israeli passport to an interview with a Defense Security Service agent held subsequent to his completion of the security clearance application. The Board need not decide whether this assertion has merit because Applicant has demonstrated the Judge's finding of falsification is not sustainable.

In challenging the Administrative Judge's finding of falsification, Applicant correctly notes Department Counsel has the burden of proving controverted facts. The Judge's decision contains a legally erroneous statement about Applicant's burden of proof. Specifically, the Judge stated that the Board decision in ISCR Case No. 02-23133 (June 9, 2004) held that proof of an omission is sufficient to shift the burden of proof to an applicant to prove the omission was not a falsification. The Judge appears to rely on a portion of one sentence from the Board's decision in ISCR Case No. 02-23133 out of context. In ISCR Case No. 02-23133, the Board specifically held that: (a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. In that decision, the Board went on to state that *given the record evidence in that case*, it was legally permissible for the Judge to conclude Department Counsel had established a

prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission. The Board cannot reach a similar conclusion in light of the record evidence in this case. However, this error does not warrant a remand because the Board is affirming the Judge's decision on other grounds.

Conclusion

Applicant fails to demonstrate harmful error below. Accordingly, the Board affirms the Administrative Judge's decision.

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. 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."

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

3. Government Exhibit 2.

4. Department Counsel's position, whether at the hearing or on appeal, as to the applicability of the ASDC3I memorandum in a given circumstance does not undercut the viability and continued legal effect of the policy as expressed in the memorandum.

5. Hearing Transcript, p. 109.

6. *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.

7. Applicant cites a decision by a Hearing Office Administrative Judge in support of his argument. His reliance on a decision of a Hearing Office Judge is somewhat misplaced. Decisions of 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. Here, the case cited by Applicant is so factually dissimilar from the instant case that it has no persuasive value

whatever.

8. "Contact and correspondence with foreign citizens are casual and infrequent."

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

10. "Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities."