DATE: March 8, 2006

In Re:

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

Applicant for Security Clearance

ISCR Case No. 03-10954

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

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FOR APPLICANT

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APPEAL BOARD DECISION

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 6, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision-security concerns raised under Guideline B (Foreign Influence), of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended (Directive). Applicant requested a hearing. On June 9, 2005, after the hearing, Administrative Judge James A. Young denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: (a) whether the Administrative Judge correctly concluded that Applicant's father-in-law is a "relative" or "associate" of Applicant "connected with any foreign government;"(b) whether the Administrative Judge correctly concluded that Applicant was bound by affection or obligation to his father-in-law who is a resident citizen of Iran; (c) whether the Administrative Judge correctly concluded that Applicant failed to establish that his father-in-law is not an "agent" of a foreign power for purposes of Foreign Influence Mitigation Condition 1; (d) whether the Administrative Judge correctly concluded that Applicant failed to establish that his father-in-law was not in a position to be exploited by Iran in a way that could force Applicant to choose between loyalty to his father-in-law and the United States; (e) whether the Administrative Judge properly applied a whole person analysis prior to concluding that Applicant failed to mitigate security concerns; and (f) whether the Administrative Judge's overall adverse security clearance determination is arbitrary, capricious, or contrary to law.

The Administrative Judge made the following dispositive findings of fact:

Applicant is a naturalized U.S. citizen who works for a defense contractor. He was born in an Eastern European nation in 1956, and his parents fled that nation later that year. Applicant became a naturalized U.S. citizen in 1967, and obtained a security clearance in 1985 while working on a government sponsored research project, and held security

clearances at various times thereafter. His last interim clearance was revoked when the SOR was issued. His supervisors, co-workers, and government officials uniformly praise Applicant as an honest, dependable, and dedicated employee whose work has had a significant effect on the national defense. Applicant is married to a naturalized U.S. citizen (spouse) who was born in Iran of Iranian parents. The spouse's father is a lawyer who specializes in international oil contracts for the National Iranian Oil Company. The spouse left Iran in 1973, and met Applicant in 1978. They married in December 1986, and she was naturalized as a U.S. citizen in 1999. They have one son who is 15 years old. The spouse has seven siblings. One sister lives in Sweden and another in Canada. The other five are in the U.S. Three are U.S. citizens.

After the 1979 revolution in Iran, the spouse's father was forced to resign from his position. In the early 1980s, leaders of the National Iranian Oil Company realized they had no one with his expertise, so they rehired him to work on international oil contracts. He is now retired, but still works as a consultant to the National Iranian Oil Company. The National Iranian Oil Company is a sub-company of Iran's Ministry of Petroleum. The spouse's mother died in 1995. Her father has since remarried. He is still a citizen resident of Iran. The U.S. broke relations with Iran in 1980. Iran is the most active state-sponsor of terrorism, is trying to acquire nuclear weapons and other weapons of mass destruction, and has a dismal human rights record.

Applicant has very little contact with his spouse's father. Her father attended Applicant's wedding to his spouse in the U.S. in 1986. He also visited them every three years until the estrangement between the spouse and her father about ten years ago. After that, there was little if any contact between them until the spouse and her father reconciled and visited her in the U.S. for three days in 2003. Since then they have been in contact about every three months by telephone and a couple of times by e-mail. The spouse admits she still loves her father and their reunion a couple of years ago was quite emotional.

For the reasons that follow, the Board finds that the Administrative Judge's decision is supportable. We will briefly address what we perceive to be Applicant's chief claims of error.

The Judge reasonably concluded that Applicant's family situation raised a security concern and was potentially disqualifying under Foreign Influence Disqualifying Conditions 1[(1)] and 3.[(2)] The Judge notes that there is a rebuttable presumption that an applicant has ties of affection, or at least obligation, to members of his spouse's family. *See*, *e.g.*, ISCR Case No. 01-03120 at 8 (App. Bd. Feb. 20, 2002). But, considering the record, it is clear that the Judge did not simply rely on this presumption. The record indicates that the spouse reconciled her differences with her father and is emotionally attached to him. In such circumstances, the Judge reasonably could conclude that Applicant had not rebutted this presumption. Similarly, given the father-in-law's position as an attorney/consultant to an entity controlled by an Iranian ministry, it was reasonable for the Judge to conclude that Applicant had a relative who was connected with a foreign government.

Applicant asserts that the Administrative Judge's application of Foreign Influence Mitigating Condition 3[(3)] and his conclusion that Applicant's contacts with his father-in-law were infrequent and casual necessarily rebutted the presumption that Applicant had close ties of affection and obligation to his father-in-law. Applicant's contention lacks merit. Foreign Influence Mitigating Condition 3 relates to the frequency and nature of Applicant's *contacts* with a foreign relative and not to the overall qualitative nature of the relationship between Applicant and that relative, which includes such attributes as affection and obligation. While application of Mitigating Condition 3 may mitigate, at least partially, security concerns that arise because of the relationship, it does not necessarily rebut the presumption of close ties and affection.

An applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by the Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Directive ¶ E3.1.15. The Administrative Judge reasonably concluded that Applicant had failed to satisfy his burden on Foreign Influence Mitigating Condition 1[(4)] because (a) Applicant failed to demonstrate that his father-in-law was not an agent of a foreign power; and (b) Applicant failed to demonstrate that his father-in-law was not in a position to be exploited by a foreign power in a way that could force the Applicant to choose between loyalty to him and the United States.

Applicant contends that the characterization of his father-in-law as "agents of a foreign power" for purposes of Foreign Influence Mitigating Condition 1, is arbitrary, capricious, or contrary to law because, in Applicant's opinion, Congress provided a precise legal definition for that term in the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §1801 (b), and it simply is not intended to apply to a retired oil and gas attorney doing consulting work for a foreign government. Applicant argues that an "agent" as defined in 50 U.S. C. §1801 (b) is someone acting against U.S. interests precisely because that is their job.[(5)] However, such a narrow definition of "agent" is inappropriate where the concern is foreign influence and preference, not just the narrower scope of proscribed activities under FISA. The United States Code offers other examples of foreign agents, such as, "agent of a foreign principal" in the Foreign Agents Registration Act of 1938, as amended, where an "agent" could include a person whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in part by a foreign principal. *See* 22 U.S.C. § 611 (c)(1). An employee of a foreign government need not be employed at a high level or in a position involving intelligence, military, or other national security duties to be an agent of a foreign power for purposes of Foreign Influence itigation Condition 1. *See* ISCR Case No. 02-24254 at 4-5 (App. Bd. June 29, 2004) where an applicant unsuccessfully suggested that his brother worked for a city government in Syria, not the Syrian government. Citing this decision, and considering the father-in-law's past employment and current position as consultant to an entity which is controlled by an Iranian ministry, the Administrative Judge reasonably concluded that the father-in-law met the definition of "agents of a foreign power" for purposes of the first part of Foreign Influence Mitigating Condition 1.

The Administrative Judge's conclusion that the second part of Foreign Influence Mitigating Condition 1 ultimately did not apply to Applicant's situation, is not arbitrary, capricious or contrary to law. The Judge weighed a number of variables, including the nature of the father-in-law's link to Iran and the likelihood that there is a significantly greater risk of coercion, persuasion or duress where the foreign power is authoritarian, hostile to the United States, and has a dismal human rights record. Even if we assume, solely for purposes of this appeal, that the Judge had agreed with Applicant regarding the first part of Foreign Influence Mitigating Condition 1, the Judge was not required to apply the entire mitigating condition in Applicant's favor where the Judge reaches an unfavorable conclusion with regard to the second part of the mitigating condition. Applicant's argument that he is entitled to a favorable application of the entire mitigating condition if one part is favorable to him, is not a reasonable interpretation of the Directive. *See*, *e.g.*, ISCR Case No. 02-24254 at 5 (App. Bd. Jun. 29, 2004).

Finally, our review of the Administrative Judge's decision indicates that the Judge conducted a "whole person" analysis. The Judge specifically states that he considered all evidence in the case and evaluated Applicant's situation in light of the adjudicative process factors in Directive ¶ E2.2.1. *See* Decision at 5. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. The Judge's Conclusions reflect an evaluative process that considered both favorable and unfavorable evidence, and the Judge made a favorable formal finding for Applicant with respect to SOR paragraph 1.c (brother-in-law is an Iranian citizen residing in the United States). While the end result of that process was not what Applicant had hoped for, nothing supports Applicant's claim that it was arbitrary and capricious because it could have only resulted in a favorable determination. After conducting the whole person analysis, the Judge's statement that Applicant failed to mitigate foreign influence concerns caused by the father-in-law, is consistent with a weighing of whole person factors that included Directive ¶ E2.2.1.8 ("the potential for pressure, coercion, exploitation, or duress"), and is not an abdication of his duties. In light of all of the evidence in the record, the Judge was not required as a matter of law to conclude here that it was clearly consistent with the national interest to grant or continue a security clearance for Applicant, and did not err in denying Applicant a clearance.

Order

The decision of the Administrative Judge denying Applicant a clearance is AFFIRMED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Concurring opinion of Chairman Emilio Jaksetic:

For the reasons that follow, I agree with my colleagues that the Administrative Judge's decision should be affirmed.

Applicant's claim that the Administrative Judge failed to consider all the record evidence is not persuasive. There is a rebuttable presumption that a Judge considers all the record evidence unless the Judge specifically states otherwise. *See Western Pacific Fisheries, Inc. v. SS President Grant*, 730 F.2d 1280, 1285 (9th Cir. 1984). Apart from that presumption, a reading of the decision below persuades me that the Judge was aware of, and took into account, the evidence submitted by Applicant. That presumption is not rebutted or overcome because a party can argue for a different weighing of the record evidence or an alternate interpretation of the record evidence. If the Board were to conclude that the presumption could be rebutted or overcome in such a manner, then there would be very few cases where a party could not prevail on appeal. This is because it is a rare case where a party cannot make a nonfrivolous argument for weighing the evidence differently than the Judge did, or where a party cannot argue for a plausible alternate interpretation of the record evidence.

I agree with my colleagues' conclusion that the decision below reflects an analysis with the requirements of Directive, Adjudicative Guidelines, Item E2.2.1. I do not reach that conclusion because the Judge stated that he evaluated the case in light of the general factors set forth under Item E2.2.1.[(6)] Rather, I reach that conclusion because the decision below reflects an analysis that is consistent with the provisions of Item E2.2.1.

Applicant contends the Administrative Judge erred by concluding the facts and circumstances of his ties and contacts with his father-in-law warranted application of Foreign Influence Disqualifying Condition 3 ("Relatives, cohabitants, or associates who are connected with any foreign government"). Applicant contends the Judge erred by applying Foreign Influence Disqualifying Condition 3, based on a finding that his father-in-law is an associate, because his father-in-law is not an "associate." Applicant urges the Board to adopt a narrow, technical meaning of "associate" that is not persuasive because it would foreclose application of Foreign Influence Disqualifying Condition 3 in cases where an applicant has significant personal or social associations -- but not business or professional associations -- with a person connected with a foreign government. I do not find such a narrow interpretation of "associates" to be persuasive.[(7)] As Department Counsel correctly notes, there is language in the Concern portion of Guideline B (Foreign Influence) that militates against construing the word "associate" as narrowly as Applicant asks the Board to do. And, in any event, even if I were to accept -- solely for the sake of argument -- Applicant's narrow interpretation of the word "associate," Applicant was not prejudiced in any meaningful way by the Judge's application of Foreign Influence Disqualifying Condition 3 because Applicant's father-in-law is a relative, and Foreign Influence Disqualifying Condition 3 covers an applicant's relatives.

Citing a Board decision, the Administrative Judge stated that there is a rebuttable presumption that Applicant has ties of affection or obligation to members of his wife's family. The Judge went on to hold that Applicant had failed to rebut that presumption. Applicant challenges the Judge's holding, arguing that the Judge erred in relying on the presumption because Applicant presented evidence that made the presumption disappear. Applicant's argument concerning evidentiary presumptions is not persuasive. I reach that conclusion for a series of interrelated reasons, taken collectively. First, an Administrative Judge is not required to strictly follow technical rules of evidence. *See* Directive, Additional Procedural Guidance, Item E3.1.19. Accordingly, although it is entirely proper for Applicant to cite to federal case law concerning evidentiary issues,[(8)] such case law is not mandatory authority in these proceedings, but rather it is persuasive authority. Second, even if Applicant were entitled to application of Federal Rule of Evidence 301 in these proceedings, his argument does not demonstrate the Judge erred. Under Federal Rule 301, a presumption does not shift the burden of nonpersuasion, which remains with the party "on whom it was originally cast." Under the Directive, the

applicant has the burden of presenting evidence to refute, rebut, explain, or mitigate facts and circumstances raising a security concern. *See* Directive, Additional Procedural Guidance, Item E3.1.15. Presenting evidence for the Judge's consideration does not automatically compel a Judge to conclude that such evidence is sufficient to satisfy the applicant's burden of persuasion under Item E3.1.15. Third, I agree with my colleagues that there is record evidence that supports the Judge's conclusion that Applicant failed to rebut the presumption.

Applicant challenges the Administrative Judge's finding that his father-in-law is an agent of a foreign power. In support of this challenge, Applicant argues: (a) 50 U.S.C. 1801(b) sets forth the proper definition of "agent of a foreign power"; and (b) the Board should overrule or modify an earlier decision concerning the meaning of "agent of a foreign power." For the following reasons, I conclude that Applicant's position lacks merit.

The definition of "agent of a foreign power" set forth in 50 U.S.C. 1801(b) cannot be considered separate from the statutory context in which it appears. This is important for several reasons. First, Section 1801(b) appears in a definition section of a statute that begins with the following words: "As used in this subchapter:" Those words signal that the definitions that follow -- including Section 1801(b) -- are intended to be used for that particular statute, *not* the U.S. Code in general, and *not* matters outside the purview of that statute. Second, Section 1801(b) appears in a statutory provision that deals with electronic surveillance in the context of foreign intelligence surveillance, not security clearance adjudications. Because security clearance adjudications are not criminal proceedings,[(9)] there is no good reason to interpret provisions of the Directive (including the Adjudicative Guidelines) in terms of statutory provisions that deal with law enforcement matters such electronic surveillance. As noted earlier in this concurring opinion, provisions of the Directive (including the Adjudicative Guidelines) should be interpreted and construed in a manner that effectuates the national security purposes of the industrial security program. Those national security purposes are not served by construing the provisions of the Directive in terms of statutory definitions that deal with law enforcement matters. A statute that regulates electronic surveillance matters is not appropriate to emulate in security clearance adjudications. The standards for law enforcement officials to conduct electronic surveillance cannot be equated with the standards for deciding whether a person should be granted access to classified information. Third, adoption of the definition set forth in 50 U.S.C. 1801(b) could lead to unwarranted results in Guideline B (Foreign Influence) cases. If 50 U.S.C. 1801(b) were followed in Guideline B cases, then the following kinds of people would be deemed to be *not* "agents of a foreign power" unless they also were shown to be involved in sabotage, terrorism or clandestine intelligence activities in or against the United States:

(i) a foreign head of state; (ii) the members of a foreign cabinet or equivalent governmental body; (iii) the ranking officials of a foreign affairs ministry; (iv) foreign ambassadors and diplomats; (v) the officers of foreign military; and (vi) the head of a foreign government entity tasked with research, development, and production of weapons systems for that foreign country.

It would be unwarranted to interpret the Directive in a manner that would lead to a conclusion that an applicant's ties and contacts with such kinds of persons do not raise security concerns under Guideline B. And, because there is no good reason to follow 50 U.S.C. 1801(b) for purposes of adjudicating security clearance cases under Guideline B, I see no reason to overrule or modify the Board's earlier decision discussing the meaning of "agent of a foreign power."

Finally, I concur with my colleagues' conclusion that Applicant has not demonstrated the Administrative Judge erred with respect to Foreign Influence itigating Condition 1. Applicant's argument in support of his request that the Board overrule or modify its ruling in ISCR Case No. 02-24254 at 4-5 (App. Bd. Jun. 29, 2004) is unpersuasive.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. "An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country" (Directive ¶ E2.A2.1.2.1).

2. "Relatives, cohabitants, or associates who are connected with any foreign government" (Directive ¶ E2.A2.1.2.3). The Administrative Judge's reliance on the term "associate" in applying this disqualifying condition was error but the record evidence clearly supports application of the disqualifying condition given the fact that it also includes relatives.

3. "Contact and correspondence with foreign citizens are casual and infrequent" (Directive ¶ E2.A2.1.3.3).

4. "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 ¶ E.2.A2.1.3.1).

5. Applicant also relies on the Administrative Judge's statement in Decision at 5, n.3, that the phrase "agent of a foreign power" is a statutory term of art defined in 50 U.S.C. § 1801(b). That term does not include a person simply employed by a foreign government, such as Applicant's father-in-law, unless they are so employed in the United States, or they are engaged in intelligence gathering or terrorism. The Judge believes that this definition of "agent of a foreign power" should apply to all national security matters, including security clearance decisions and Foreign Influence Mitigating Condition 1. Nevertheless, the Judge also believes, correctly, that he is duty bound to apply the Board's broader definition of "agents of a foreign power."

6. An Administrative Judge is required to apply pertinent provisions of the Directive. *See, e.g.*, Directive, Section 6.3 and Additional Procedural Guidance, Item E3.1.25. If a Judge's statement that he or she applied pertinent provisions of the Directive -- standing alone -- were deemed to establish that the Judge applied pertinent provisions of the Directive, then the Judge's statement about complying with the Directive would become unreviewable. Acceptance of such reasoning would be untenable because the Directive explicitly provides for appellate review of a Judge's rulings and conclusions for compliance with applicable law. *See* Directive, Additional Procedural Guidance, Items E3.1.32.2 and E3.1.32.3. Accordingly, when an appealing party claims the Judge failed to apply pertinent provisions of the Directive, the Board is not foreclosed from reviewing that claim merely because the decision below states the Judge applied pertinent provisions of the Directive. *Cf.* ISCR Case No. 02-33714 (App. Bd. Feb. 22, 2006)(concurring opinion of Chairman Emilio Jaksetic)(making similar point in connection with appeal issue requiring the Board to decide whether there was sufficient record evidence to support the Judge's findings of fact).

7. Security clearance adjudications are not criminal proceedings -- *see, e.g., Chesna v. U.S. Department of Defense*, 850 F. Supp. 110, 119 (D. Conn. 1994) -- and there is no good reason to construe the Directive (including the Adjudicative Guidelines) with the strictness of a criminal code. To the contrary, the Directive (including the Adjudicative Guidelines) should be construed in a manner that furthers and effectuates the basic purposes of the industrial security program. *See, e.g.*, ISCR Case No. 02-02195 at 5 (App. Bd. Apr. 9, 2004).

8. Applicant's reliance on a explanation of Evidentiary Rule 301 of the North Dakota Supreme Court Rules is not persuasive.

9. *See* footnote 7.