

DATE: June 14, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-14036

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

William F. Savarino, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated March 29, 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 Philip S. Howe issued an unfavorable security clearance decision, dated December 13, 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 rushed the decision in this case and overlooked important considerations and mitigating facts; (2) whether the Administrative Judge's conclusion that the presence of Applicant's parents and in-laws in the PRC raised unmitigated security concerns under Guideline B is supported by the record evidence; (3) whether the Administrative Judge failed to articulate a sustainable basis for his formal finding against Applicant because of his wife's PRC citizenship; and (4) whether the Administrative Judge failed to utilize the whole person concept in reaching his decision. 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 rushed the decision in this case and overlooked important considerations and mitigating facts. Applicant states that five months after the hearing the Administrative Judge had not issued a decision in his case. Applicant further represents that after his lawyer contacted the DOHA Hearing Office to inquire about the status of the decision, the Judge then issued the decision in less than two weeks. Applicant now complains on appeal that the Judge rushed his decision in response to the inquiry and the result was a decision that overlooked important aspects of the case and overlooked compelling mitigating evidence.

Applicant's claims lack merit. There is a rebuttable presumption that government officials carry out their duties in good faith, and a party seeking to rebut or overcome that presumption has a heavy burden of presenting clear evidence to the contrary. *See, e.g., National Archives and Records Administration v. Favish*, 541 U.S. 157, 174 (2004). Moreover, there is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Applicant's strong disagreement with the Judge's findings and conclusions do not demonstrate the Judge made his findings of fact or reached his conclusions in a hasty or careless manner or rebut the presumption that the Judge carried out his duties in good faith. Applicant fails to identify anything specific in the Judge's decision or in the record below that indicates or suggests a basis for a reasonable person to question the good faith of the Judge in this case.<sup>(1)</sup>

2. Whether the Administrative Judge's conclusion that the presence of Applicant's parents and in-laws in the PRC raised unmitigated security concerns under Guideline B is supported by the record evidence. The Administrative Judge concluded that Department Counsel established by substantial evidence that Applicant's parents and his wife's parents

are citizens of the People's Republic of China (PRC). He then concluded that Guideline B Disqualifying Condition 1 <sup>(2)</sup> applied because these people are his immediate family members and they are in a foreign country. The Judge went on to conclude that Guideline B Mitigating Condition 1 <sup>(3)</sup> was not applicable because of the potential for exploitation of his parents and parents-in-law by the PRC government. The Judge cited the fact that Applicant's parents were the victims of PRC policies during the Cultural Revolution as a basis for his conclusion. The Judge also concluded that Applicant's contacts with his PRC relatives were not casual and were frequent enough to make Guideline B Mitigating Condition 3 <sup>(4)</sup> inapplicable to the case. On appeal, Applicant asserts: (a) there is no basis in the record for the Judge to conclude that Applicant's relatives in the PRC are actually in a position to be exploited in a way that could force him to choose between loyalty to them and the United States; and (b) Applicant's contacts with his PRC relatives are casual and infrequent. Applicant's arguments fail to establish error on the part of the Administrative Judge.

The Administrative Judge concluded that the government had established a prima facie case under Guideline B, Disqualifying Condition 1, and that conclusion is not challenged by Applicant on appeal. Once facts raising security concerns under Guideline B were admitted by Applicant or proven by Department Counsel, the burden shifted to Applicant to present evidence of refutation, extenuation, mitigation, or changed circumstances sufficient to warrant a favorable security clearance decision. <sup>(5)</sup> There is no right to a security clearance, <sup>(6)</sup> there is no presumption in favor of granting a security clearance, <sup>(7)</sup> a security clearance should not be granted unless there is an affirmative determination that it is clearly consistent with the national interest to grant or continue a security clearance for a particular applicant, <sup>(8)</sup> and doubts must be resolved in favor of the national security. <sup>(9)</sup> The Judge's conclusion that Applicant's PRC relatives were in a position to be exploited, thus precluding application of Guideline B Mitigating Condition 1, is sustainable based on the record evidence. Moreover, it was Applicant's burden to demonstrate that his relatives were not in a position to force him to choose between his loyalties to them and the United States. <sup>(10)</sup>

Concerning Guideline B Mitigating Condition 3, the Judge's conclusion that the record evidence precluded its application is sustainable. The record evidence cited by Applicant did not compel the Administrative Judge, as a matter of law or logic, to conclude Applicant's contacts warranted application of Guideline B Mitigating Condition 3.

3. Whether the Administrative Judge failed to articulate a sustainable basis for his formal finding against Applicant because of his wife's PRC citizenship. Subparagraph 1.a of the SOR alleged under Guideline B that Applicant's wife was a citizen of the PRC and currently resided with Applicant in his home. The Administrative Judge made found that Applicant's wife was a citizen of the PRC who had applied for U.S. citizenship and expected to be granted such citizenship sometime in 2004. He then made a formal finding under subparagraph 1.a of the SOR without any mention or discussion in the "Conclusions" section of his decision about Applicant's wife's PRC citizenship or the status of her pending application for U.S. citizenship. On appeal, Applicant argues that it is difficult to assess the impact, if any, that the nationality of the applicant's wife had on the Judge's decision, and the fact that Applicant's wife was close to receiving her citizenship at the time of the hearing and, in fact, has now been granted her U.S. citizenship are mitigating factors that were overlooked by the Judge. Applicant asserts that these factors should be considered by the Board in determining whether the Judge's decision was arbitrary or capricious. <sup>(11)</sup>

Applicant's argument that his wife's pending U.S. citizenship constituted a matter in mitigation is not persuasive. There is nothing in the record evidence that required, as a matter of law, a conclusion that Applicant's wife's citizenship status was mitigating. The security concerns raised by the presence of Applicant's wife's parents in the PRC are not extenuated or mitigated by her citizenship status. Furthermore, the citizenship status of Applicant's wife does not extenuate or mitigate the security concerns raised by the presence of Applicant's parents in the PRC.

4. Whether the Administrative Judge failed to utilize the whole person concept in reaching his decision. Applicant makes various arguments in support of his general proposition that the Administrative Judge did not properly consider the whole person concept in reaching his decision. These arguments are: (a) the Judge erroneously applied a per se "bright-line" test which resulted in the automatic determination of Applicant because he has relatives in the PRC; and (b) the Judge's decision is inconsistent with the decisions of other DOHA Hearing Office Administrative Judges in similar cases and is inconsistent with his own prior decision in a case that is factually analogous to the instant case.

Applicant's argument that the Administrative Judge's adverse decision is based solely on the fact that Applicant's relatives are PRC citizens is not persuasive. The Judge's adverse conclusions under Guideline B were not based merely upon the fact that Applicant's parents and in-laws are citizens of the PRC. Rather, they were based on the record evidence that Applicant's ties with his foreign family members pose a security risk under the particular facts of this case. The Board notes that this program has adjudicated Guideline B (Foreign Influence) cases involving applicants with ties to a wide variety of countries, not just the PRC. Furthermore, whether an applicant with family ties to citizens of the PRC can mitigate the security concerns raised by such ties depends on the particular facts and circumstances of each applicant's case. *See, e.g.*, ISCR Case No. 02-09907 (March 17, 2004) at p. 10 n.9 (result of applicant's case does not decide, favorably or unfavorably, the outcome of all security clearance adjudications involving applicants with ties to family members in the PRC). Furthermore, a review of the Judge's decision reveals that he considered evidence both favorable and unfavorable to Applicant. Applicant's strong disagreement on appeal with the manner in which the Judge weighed the evidence does not demonstrate that the Judge employed a *per se*, "bright-line" test that ignored important aspects of the case, failed to employ the whole person concept, or that his decision was otherwise arbitrary, capricious or contrary to law.

Applicant cites to other decisions of DOHA Hearing Office Judges involving applicants with relatives in the PRC, including a case previously decided by the Judge in the instant case, for the proposition that the Judge did not employ the whole person concept in this case and that the case was wrongly decided. Decisions of individual Hearing Office Judges are not binding on other Hearing Office Judges, nor are they binding on the Appeal Board. A party citing such a decision has the burden of demonstrating that the cited decision addressed similar or identical issues and facts, articulated a rational basis for its conclusions, relied on reasoning or analysis that can be applied to the facts and conclusions of the current case, relied on reasoning or analysis that is consistent with governing legal authorities, or that there are sound reasons the Board should follow the reasoning of the cited case. *See, e.g.*, ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5. Accordingly, even if the Board were to conclude that the Judge's decision in this case was not consistent with the decisions by his colleagues in other DOHA cases that are cited by Applicant, such a conclusion would not require the Board to hold that the Judge's decision in this case was arbitrary, capricious or contrary to law or that the Judge failed to properly utilize the whole person concept. Because the decisions of Hearing Office Judges are not legally binding precedent in other cases, neither a Hearing Office Judge nor the Board is required to distinguish them or justify why they are not persuasive authority. *See, e.g.*, ISCR Case No. 02-30941 (April 19, 2004) at p. 3.

Applicant also cites an earlier case decided by the Administrative Judge in this case where the Judge reached the opposite conclusion regarding an applicant's security clearance eligibility based on a record that Applicant argues is closely analogous to the record in this case. As a practical matter, the Board cannot review the record evidence in the other case and decide whether the Judge's decision in that case was supported by the record evidence as a whole or not, or is distinguishable from this case in some important aspect. Moreover, the Judge's decision in the other case uses language that suggests the Judge engaged in an analysis that the Board has found to be arbitrary, capricious, or contrary to law in other Guideline B cases. If the Board were forced to decide how to reconcile the Judge's decision in the other case with the Judge's decision in this case, it would be more likely to conclude the decision in the other case was wrongly decided than to conclude the decision in this case was erroneous.

### **Conclusion**

Applicant has not demonstrated 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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. It is legally permissible for a judge conducting a nonjury trial in a criminal case to pronounce verdict after completion of the trial without recessing to deliberate. *United States v. System Architects, Inc.*, 757 F.2d 373, 376 (1st Cir. 1985). If pronouncement of a verdict in a criminal case upon completion of the trial is not sufficient grounds to question the trial judge's verdict, what legal or logical basis is there for Applicant to challenge the Administrative Judge's decision in this case based on the timing of its issuance?

2. "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."

3. "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."

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

5. *See* Directive, Additional Procedural Guidance, Item E3.1.15.

6. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988).

7. *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991).

8. Executive Order 10865, Section 2: Directive, Sections 3.2 and 4.2, Adjudicative Guidelines, Item E2.2.1, and Additional Procedural Guidance, Item E3.1.25.

9. Directive, Adjudicative Guidelines, Item E2.2.2. *See also Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

10. *See, e.g.*, ISCR Case No. 02-09907 (March 17, 2004) at p. 7 (applicant has the burden of persuasion as to the applicability of Adjudicative Guidelines mitigating conditions).

11. Applicant attached a copy of his wife's U.S. naturalization certificate to his appeal brief and states that this evidence should not be disregarded as new evidence on appeal. He asserts that the actual naturalization certificate is an "integral part" of evidence introduced at the hearing that the granting of her U.S. citizenship was imminent. The Board rejects this argument, and will confine its review to the actual evidence of record. *See* Directive, Additional Procedural Guidance, Item E3.1.29.