

DATE: January 21, 2005

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-15205

**APPEAL BOARD DECISION AND REVERSAL ORDER**

**APPEARANCES**

**FOR GOVERNMENT**

Erin C. Hogan, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated December 31, 2003, 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 Michael H. Leonard issued a favorable security clearance decision, dated August 26, 2004.

Department Counsel appealed the Administrative Judge's favorable decision. The Appeal 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 committed reversible error when he applied Mitigating Condition 1 of Guideline B and concluded that Applicant's immediate family members in Iran were not in a position to be exploited by a foreign power in a way that could force Applicant to choose between his loyalty to those family members and the United States. For the reasons that follow, the Board reverses 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 committed reversible error when he applied Mitigating Condition 1<sup>(1)</sup> of Guideline B and concluded that Applicant's immediate family members in Iran were not in a position to be exploited by a foreign power in a way that could force Applicant to choose between his loyalty to those family members and the United States. The Administrative Judge found that Applicant's mother and three of his siblings are citizens of and reside in Iran. The Judge acknowledged Iran's dismal human rights record and its hostility to the United States. Nonetheless, the Judge concluded that Applicant's relatives were not in a position to be exploited by a foreign power in a way that could force Applicant to choose between his loyalty to the relatives and his loyalty to the United States. The Judge based this conclusion in large part on his finding that Applicant's relatives have not previously been exploited by the Iranian government. In support of his conclusion the Judge also articulated other factors such as the frequency of contact with the relatives, the relatives' lack of dependency on Applicant for support, the Applicant's refusal to travel to Iran, and the Applicant's meticulous work habits and practice of strictly following the rules relating to his work.

Department Counsel is not required to present evidence that Applicant would compromise classified information if the Iranian government made threats against his family members living in Iran. Indeed, the Government need not wait until an applicant is put in a position of having to choose between his relatives and the United States to determine that a security risk is present. *See, e.g.*, ISCR Case No. 01-26893 (October 16, 2002) at p. 10. Department Counsel correctly points out that Foreign Influence Mitigating Condition 1 hinges not on what choice Applicant might make if he is forced to choose between his loyalty to his family and the United States, but rather hinges on the concept that Applicant should not be placed in a position where he is forced to make such a choice.

Department Counsel argues that the fact that Applicant's relatives have no history of being exploited by the Iranian

government does not mean that they are in any less of a position to be exploited in the future. Department Counsel's argument has merit. Applicant's vulnerability to possible foreign influence through his relatives in Iran is the same, whether or not the Iranian 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. The Administrative Judge's conclusion that the Iranian government is not likely to target Applicant in the future has no basis in the record evidence in this case.

Department Counsel argues that Applicant's testimony regarding other factors in the case, such as frequency of contact between Applicant and his relatives, the lack of the relatives' dependency upon Applicant for support, and Applicant's refusal to travel to Iran fails to make an adequate showing that his family ties to Iran do not pose a security risk. The Board agrees.

In this case, given the record evidence of Iran's hostility to the United States as well as Iran's demonstrated inclination to do whatever it feels is necessary to advance its interests without regard to the rights of any individual, the Administrative Judge could not reasonably conclude from the evidence presented that Applicant's family members in Iran were not in a position to be exploited in such a way that Applicant may have to choose between loyalty to them or to the United States. [\(2\)](#)

An applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Directive, Additional Procedural Guidance, Item E3.1.15. Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of national security. Directive, Adjudicative Guidelines, Item E2.2.2. In cases such as this, where the issue involves the potential of a hostile foreign power exploiting the family ties between an applicant and his family members, an applicant has a very heavy burden to show that his family ties with relatives in the foreign power do not pose a security risk. *See, e.g.*, ISCR Case No. 01-26893 (October 16, 2002) at p. 8.

Given the totality of the facts and circumstances in this case, as cited by Department Counsel on appeal, the Administrative Judge's conclusion that Applicant met his burden of showing that his relatives in Iran do not place Applicant in a position where he might have to choose between his loyalty to them and the United States is not supported by the record.

### **Conclusion**

Department Counsel has met its burden of demonstrating reversible error. Therefore the Administrative Judge's August 26, 2004 decision is reversed.

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

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. "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."

2. Department Counsel argues that the undisputed evidence demonstrates that Applicant's family members are in a position to be exploited by the Iranian government. The Board need not address that argument in order to conclude that the Judge failed to articulate a rational basis for concluding that Applicant successfully extenuated or mitigated the security concerns raised by the presence of Applicant's mother and siblings living in Iran.