

DATE: November 29, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-17114

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Edward O. Lear, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated March 17, 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) and Guideline B (Foreign Influence). Administrative Judge Joseph Testan issued an unfavorable security clearance decision dated August 6, 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 Applicant can augment the record evidence on appeal; (2) whether the Administrative Judge erred in his application of the Adjudicative Guidelines; and (3) whether the Administrative Judge gave undue weight to the evidence that Applicant possessed and used an Iranian passport. 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

Applicant does not challenge the Administrative Judge's findings of fact about Applicant's possession and use of an Iranian passport, or Applicant's mother and three siblings who are Iranian citizens living in that country. Because there is no presumption of error below, the Board need not review the Judge's unchallenged findings of fact to determine whether those findings of fact are supported by substantial record evidence.

1. Whether Applicant can augment the record evidence on appeal. Applicant has sought to augment the record on appeal to present evidence of actions that he has taken since the hearing. Applicant's proffer of new evidence on appeal is rejected. No new evidence can be considered on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. As a practical matter, there must be finality to any judicial or administrative proceeding and there is no general legal right to continuously supplement the record evidence. *See, e.g.*, ISCR Case No. 01-21274 (January 8, 2004) at p. 3 (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-555 (1978)). Applicant had a fair opportunity during the proceedings below to present evidence for the Judge to consider in his case. Applicant cannot fairly challenge the Judge's decision based on a proffer of new evidence.

2. Whether the Administrative Judge erred in his application of the Adjudicative Guidelines. Applicant contends the Administrative Judge erred by not applying in Applicant's favor Foreign Influence Mitigating Condition 1⁽¹⁾ and Foreign Influence Mitigating Condition 3.⁽²⁾ In support of this contention, Applicant relies -- in part -- on his proffer of new evidence on appeal. As discussed earlier in this decision, the Board cannot consider new evidence on appeal. The Board will only consider that portion of Applicant's appeal argument concerning Foreign Influence Mitigating Condition 1 and Foreign Influence Mitigating Condition 3 that does not rely on his proffer of new evidence.

In light of the record evidence in this case, the Administrative Judge properly concluded that the burden had shifted to

Applicant to present evidence to extenuate or mitigate the security concerns raised under Guideline B (Foreign Influence) and Guideline C (Foreign Preference).⁽³⁾ Applicant's burden included presenting sufficient record evidence to warrant the application of Adjudicative Guidelines mitigating conditions.⁽⁴⁾ In analyzing a case, a Judge does not have unfettered discretion in applying the Adjudicative Guidelines. However, the Judge must apply them in a reasonable manner that is supported by the record evidence as a whole and that is consistent with other applicable provisions of the Directive.⁽⁵⁾

To the extent Applicant relies on decisions by Hearing Office Administrative Judges in other DOHA cases,⁽⁶⁾ his claim of error is not persuasive. The decision of one Hearing Office Judge is not legally binding on another Hearing Office Judge in a different case. Furthermore, the decision of any Hearing Office Judge is not legally binding precedent that the Board has to distinguish, follow, or explain why it does not choose to follow. To the contrary, a party citing a Hearing Office decision as persuasive authority has the burden of persuading the Board that such a decision should be followed.⁽⁷⁾ The Hearing Office decisions cited by Applicant do not establish the Judge erred in this case. Nor do those decisions persuade the Board that the Judge's analysis or conclusions concerning Foreign Influence Mitigating Condition 1 or Foreign Influence Mitigating Condition 3 are arbitrary, capricious, or contrary to law.⁽⁸⁾

To the extent Applicant argues the Administrative Judge erred by not giving more weight to his testimony, Applicant does not demonstrate the Judge erred. The Board will not disturb a Judge's weighing of the evidence unless there is a showing that the Judge acted in a manner that is arbitrary, capricious, or contrary to law when weighing the evidence. A party's strong disagreement with the weight a Judge gave to certain evidence is not sufficient to demonstrate the Judge weighed the evidence improperly. Rather, a party must demonstrate how or why the Judge's weighing of the record evidence reflects action that is arbitrary, capricious, or contrary to law.⁽⁹⁾ Applicant's emphasis on the sincerity of his testimony does not demonstrate the Judge erred. A favorable credibility determination is not a substitute for record evidence, nor does it relieve a Judge from the obligation to consider and evaluate credible testimony in light of the record evidence as a whole. Accordingly, even if a Judge concludes that a witness (including an applicant) has testified truthfully and sincerely, the Judge is not compelled to accept that testimony uncritically. Rather, a Judge must consider and weigh such testimony in light of the record evidence as a whole.⁽¹⁰⁾ Therefore, the Judge's conclusion that Applicant's testimony was sincere (Decision at p. 2) did not compel the Judge to give more weight to Applicant's testimony.

Beyond relying on Hearing Office decisions in other cases, Applicant presents arguments as to why he contends the Administrative Judge should have applied Foreign Influence Mitigating Condition 1 and Foreign Influence Mitigating Condition 3 in his favor. Applicant's arguments set forth an alternate interpretation of the record evidence, but they do not demonstrate the Judge acted in a manner that is arbitrary, capricious, or contrary to law. Considering the record evidence concerning the facts and circumstances of Applicant's ties with his mother and siblings in Iran, it was not arbitrary, capricious, or contrary to law for the Judge to conclude Applicant had not met his burden of presenting sufficient evidence to warrant the application of Foreign Influence Mitigating Condition 1 or Foreign Influence Mitigating Condition 3.

3. Whether the Administrative Judge gave undue weight to the evidence that Applicant possessed and used an Iranian passport. Applicant does not challenge the Administrative Judge's findings of fact about his possession and use of an Iranian passport. However, Applicant asks the Board to: (a) follow a Hearing Office decision that takes issue with a prior Board decision concerning the interpretation of an August 16, 2000 memorandum dealing with foreign passports; (b) consider that Applicant expressed a willingness to surrender his Iranian passport; and (c) conclude that Applicant's possession and use of an Iranian passport "did not present a clear and consistent threat to United States security."⁽¹¹⁾

As discussed earlier in this decision, a decision by a Hearing Office Administrative Judge is not legally binding precedent. Furthermore, the decision relied on Applicant was recently reversed by the Board.⁽¹²⁾

The August 16, 2000 memorandum concerning foreign passports is legally binding on Hearing Office Administrative Judges and the Board. Neither the Judge below nor the Board has the authority or discretion to not follow or apply the provisions of that memorandum. Moreover, the wisdom, desirability, or the efficacy of the August 16, 2000

memorandum are not subject to review and adjudication in these proceedings. ⁽¹³⁾ In this case, there is no dispute that Applicant possessed and used an Iranian passport in the past, and as of the hearing, he still possessed an Iranian passport. Given the record evidence in this case, the Judge properly applied the August 16, 2000 memorandum concerning foreign passports to Applicant's case. Applicant is not entitled to have the Judge adjudicate his case as if the August 16, 2000 memorandum does not exist.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has failed to demonstrate error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

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" (Directive, Adjudicative Guidelines, Item E2.A2.1.3.1).

2. "Contact and correspondence with foreign citizens are casual and infrequent" (Directive, Additional Procedural Guidance, Item E2.A2.1.3.3).

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

4. *See, e.g.*, ISCR Case No. 02-02892 (June 28, 2004) at p. 6.

5. *See, e.g.*, ISCR Case No. 02-05110 (March 22, 2004) at pp. 4-6.

6. Applicant refers to one of the Hearing Office decisions that he cites as a Board decision. The Board concludes that erroneous reference is a typographical error.

7. *See, e.g.*, ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing precedential value of Hearing Office Administrative Judge decisions, and the burden a party has when arguing that such decisions should be accepted as persuasive authority). The appeal instructions sent to all parties contain the following language: "Hearing Office Administrative Judge decisions may be cited as persuasive authority. However, a decision by a Hearing Office Administrative Judge is not legally binding precedent on an Administrative Judge in another case or on the Appeal

Board in any case. Do not cite or rely on a decision by a Hearing Office Administrative Judge to support an appeal argument if there are Appeal Board decisions on point."

8. One of the Hearing Office decisions cited by Applicant (ISCR Case No. 03-16516) was recently reversed by the Board.

9. *See, e.g.*, ISCR Case No. 01-22134 (August 19, 2004) at pp. 4-5.

10. *See, e.g.*, ISCR Case No. 02-14995 (July 26, 2004) at pp. 6-7.

11. Applicant also makes a proffer of new evidence concerning the status of his Iranian passport since the hearing. As discussed earlier in this decision, the Board cannot consider new evidence on appeal.

12. *See* footnote 8 of this decision.

13. *See, e.g.*, ISCR Case No. 02-07625 (May 24, 2004) at pp. 3-4; ISCR Case No. 00-0489 (January 10, 2002) at p. 7.