

DATE: July 7, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-19194

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

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

#### FOR APPLICANT

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated May 13, 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) and Guideline E (Personal Conduct). Administrative Judge Joan Caton Anthony issued an unfavorable security clearance decision, dated March 30, 2005.

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 issue has been raised on appeal: whether the Administrative Judge erred by concluding Applicant failed to mitigate the security concerns raised by his ties and contacts with family members who are citizens and residents of Thailand. 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 Issue <sup>(1)</sup>

Whether the Administrative Judge erred by concluding Applicant failed to mitigate the security concerns raised by his ties and contacts with family members who are citizens and residents of Thailand. The Administrative Judge concluded that security concerns were raised under Guideline B (Foreign Influence) because of the totality of Applicant's contacts and ties with family members who are citizens and residents of Thailand. In reaching that conclusion, the Judge noted the record evidence concerning the following: (a) one of Applicant's brothers in Thailand is a judge; (b) Applicant received a \$100,000 loan from his mother and a brother in Thailand; (c) Applicant and his wife traveled to Thailand in 1997, 1999, 2000, and 2002; (d) Applicant owns a townhouse in Thailand that he uses for vacations and as an investment property; (e) State Department warnings to U.S. citizens concerning the dangers of travel to Thailand; and (f) a State Department report on human rights practices in Thailand.

On appeal, Applicant: (a) makes various assertions about his personal situation and the facts and circumstances of his ties and contacts with his relatives in Thailand; (b) states he does not discuss his work with relatives; (c) claims his contacts with his siblings in Thailand are not close; (d) asserts Thailand has a good relationship with the United States; and (e) states he supports the United States. <sup>(2)</sup> The Board does not re-try a case on appeal. Rather, the Board reviews the Administrative Judge's decision in light of the case record to determine whether the appealing party has identified any factual or legal error in the proceedings below. *See* Directive, Additional Procedural Guidance, Item E3.1.32. Making allowances for Applicant's *pro se* status, the Board construes Applicant's arguments as raising the issue of whether the Administrative Judge erred by concluding Applicant failed to mitigate the security concerns raised by his ties and contacts with family members who are citizens and residents of Thailand.

Given the record evidence in this case, the Administrative Judge properly concluded that the totality of the facts and circumstances of Applicant's ties and contacts with relatives in Thailand raised security concerns under Guideline B, and that the burden shifted to Applicant to present evidence to refute, explain, extenuate, or mitigate those security concerns

sufficiently to warrant a favorable security clearance decision. *See* Directive, Additional Procedural Guidance, Item E3.1.15.

Applicant's disagreement with the Judge about the security significance of his contacts and ties with relatives in Thailand is not sufficient to demonstrate the Judge's conclusions are erroneous. *See, e.g.*, ISCR Case No. 02-29403 (December 14, 2004) at p. 8. Furthermore, Applicant's appeal arguments -- viewed individually or cumulatively -- do not demonstrate the Judge committed any factual or legal error in her decision.

### **Conclusion**

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated any error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, 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. The Administrative Judge entered a formal finding in favor of Applicant with respect to Guideline E (Personal Conduct). That favorable formal finding is not at issue on appeal.
2. Attached to Applicant's appeal brief are two documents: (a) a June 5, 2004 letter from a colleague or supervisor in support of Applicant; and (b) a copy of Applicant's answer to the SOR. The June 5, 2004 letter constitutes new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29.