

DATE: November 22, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-22974

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

John T. Riely, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated July 12, 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 Thomas M. Crean issued an unfavorable security clearance decision, dated March 21, 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 issues have been raised on appeal: (1) whether Applicant's conduct and circumstances obligated the Administrative Judge to conclude that Applicant had mitigated the security concerns caused by the fact that Applicant has immediate family that resides in Iran; (2) whether the Administrative Judge's conclusions contradict his own findings of fact; (3) whether the Administrative Judge improperly considered the circumstances of Applicant's in-laws in his decision. For the reasons set forth below the Board affirms the 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 Applicant's conduct and circumstances obligated the Administrative Judge to conclude that Applicant had mitigated the security concerns caused by the fact that Applicant has immediate family that resides in Iran. Applicant cites various aspects of his conduct and circumstances in support of the contention that the Judge's unfavorable decision was erroneous. Among the factors cited by Applicant are: his emigration from Iran in 1974, his presence in the United States for almost three decades, his naturalization by the United States in 1982, his use of a United States passport, his non-use of an Iranian passport for more than three decades, his absence from Iran for more than 25 years, his unblemished security clearance record, the fact that his relatives are not agents of Iran, the fact that his relatives have not been exploited during 27 years Applicant has worked in his field, his brief and casual contacts with his parents and sister, his forthrightness regarding his family ties in Iran and his lack of financial interests in Iran. Most of the factors cited by Applicant are found in the Judge's decision. Applicant's assertion regarding his security record is not found in the Judge's decision but that does not mean that the Judge did not consider it. The Judge concluded that Applicant's ties to his parents and sister in Iran were more than just casual. There is sufficient record evidence to support the Judge's conclusion.

Applicant is correct that the Administrative Judge was required to consider the record evidence, both favorable and unfavorable, in reaching his decision. However, there is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. An appealing party's strong disagreement with a Judge's weighing of the record evidence is not sufficient to rebut or overcome that presumption. Applicant's ability to cite favorable record evidence that he believes the Judge should have given more weight to is not sufficient to rebut or overcome the presumption that the Judge considered all the record evidence. Furthermore, the Board will not disturb an Administrative Judge's weighing of the evidence unless there is a showing that the Judge did so in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 02-10215 (January 30, 2004) at

p. 6. Applicant's arguments here do not demonstrate that the Administrative Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law.

(2) Whether the Administrative Judge's conclusions contradict his own findings of fact. Applicant cites several of the Administrative Judge's findings of fact which he argues run contrary to the Judge's unfavorable conclusions. The favorable findings include: Applicant's relatives are not employed by or agents of the Iranian government, there is no evidence that Iran has ever attempted to exploit any of its residents or citizens in order to compromise a security clearance holder in the United States, Applicant has not been to Iran since 1979, Applicant has not had an Iranian passport since 1982, Applicant became a United States citizen as soon as he could in 1982, Applicant has substantial family and financial ties in the United States, Applicant has no financial interests in Iran, and there is no evidence that Applicant has ever met his in-laws who reside in Iran (the Judge specifically noted in this context that Applicant met his wife long after his last trip to Iran).

Applicant is correct that the Administrative Judge made many favorable findings of fact. Nonetheless the Judge had to weigh those favorable findings against the other facts and circumstances of the case and reach a conclusion. As noted earlier in this decision the Board will not disturb such a weighing absent a showing that the weighing was arbitrary, capricious or contrary to law. Furthermore, the federal government is not required to wait until an applicant commits a security violation before it can deny or revoke access to classified information. *Adams v. Laird*, 420 F. 2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Even in the absence of any security violations, the federal government can deny or revoke access to classified information if an applicant's conduct and circumstances raise security concerns. The Judge concluded that the favorable evidence did not mitigate the government's concerns regarding Applicant relatives in Iran. His conclusion is reasonable in light of the record evidence.

(3) Whether the Administrative Judge improperly considered the circumstances of Applicant's in-laws in his decision. Applicant argues that the Administrative Judge improperly considered the circumstance of Applicant's in-laws presence in Iran even though they were not cited in the SOR. While it certainly would have been preferable for the Judge or Department Counsel to have moved to amend the SOR in accordance with Directive, Additional Procedural Guidance, Item E3.1.17, the failure to amend is not fatal in a case such as this where Applicant was on adequate notice that the facts and circumstances at issue involved his ties to family in Iran. ISCR Case No. 02-15383 (July 29, 2003) at pp. 2-3 ("An SOR is an administrative pleading that is not measured against the strict requirements of a criminal indictment. As long as an SOR places an applicant on reasonable notice of the allegations against him or her and there has been no showing that the wording of an SOR has prejudiced an applicant's ability to respond to the allegations and present evidence on his or her behalf, a security clearance case should be adjudicated on the merits of the relevant issues and not be concerned with pleading niceties."). Moreover, the Judge's adverse conclusions in this case are supported by record evidence independent of any consideration of the circumstances of Applicant's in-laws in Iran.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error. The Administrative Judge's March 21, 2005 decision is affirmed.

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