

DATE: December 6, 2005

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-24144

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Peregrine D. Russell-Hunter, Chief Department Counsel

**FOR APPLICANT**

Robert R. Sparks, Jr., Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated August 3, 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 Paul J. Mason issued an unfavorable security clearance decision, dated May 17, 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 the case should be remanded to the Administrative Judge in order to develop the record concerning factual developments that have occurred since the hearing; (2) whether the Administrative Judge erred by concluding Foreign Influence Mitigating Condition 1 did not apply to mitigate Applicant's case; (3) whether the Administrative Judge erred in his application of Foreign Influence Disqualifying Condition 2; (4) whether the Administrative Judge's adverse security clearance decision was arbitrary and capricious in light of the fact that Applicant was granted a prior security clearance under like or arguably less favorable circumstances and nothing of a derogatory nature has happened since; and (5) whether Applicant has demonstrated to the satisfaction of the Board that Applicant is worthy of a security clearance. 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 case should be remanded to the Administrative Judge in order to develop the record concerning factual developments that have occurred since the hearing. The case concerns the circumstances of a member of Applicant's immediate family and several in-laws who have various connections with Iran through Iranian citizenship or residence in Iran. Applicant's appeal brief makes factual assertions about matters arising after the hearing and not part of the record below. Applicant presents these factual assertions as casting Applicant's case in a more favorable light<sup>(1)</sup> and asserts that the facts found by the Administrative Judge have been "overtaken by events." One of Applicant's prayers for relief is a request that the case be remanded to the Administrative Judge so that the record may be developed concerning the new, post-hearing developments.

The Board may not consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Thus, the Board will not consider new evidence cited by Applicant when evaluating Applicant's appeal arguments. Moreover, Applicant has not articulated a basis for reopening the record in this case. Absent a showing that Applicant was denied a reasonable opportunity to present evidence for the Administrative Judge to consider, Applicant is not entitled to another opportunity to present evidence on his behalf. *See, e.g.*, ISCR Case No. 02-30603 (February 25, 2004) at p. 3. A review of the record below shows that Applicant had a reasonable opportunity to present evidence for the Administrative Judge to consider in his case. Furthermore, Applicant's claim that his situation has changed since the hearing does not warrant a remand to the Judge with instructions to open the record so that Applicant can present

additional evidence. If DOHA was required to open a case merely because a party claims there has been a change in circumstances since the hearing, there would be little chance of achieving administrative finality in security clearance cases. *See, e.g.*, ISCR Case No. 03-17114 (November 29, 2004) at p. 3 (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-555 (1978)). Regarding remand, Applicant has not demonstrated he is entitled to the relief he seeks.

2. Whether the Administrative Judge erred by concluding Foreign Influence Mitigating Condition 1 (2) did not apply to mitigate Applicant's case. At the time of the hearing, Applicant's mother was a citizen and resident of Iran. The Administrative Judge concluded that Applicant's mother had close ties of affection to Applicant, and this conclusion is not challenged by Applicant on appeal. However, Applicant asserts that it was arbitrary and capricious for the Judge to conclude that the second prong of Foreign Influence Mitigating Condition 1 did not apply. Applicant argues that the Judge erroneously relied on evidence that Applicant's mother had been contacted by the Iranian regime sometime prior to 1985 in reaching his conclusion that she was in a position of vulnerability. Applicant's assertion lacks merit.

The Administrative Judge clearly included in his analysis the fact that, Department Counsel having established its case under the Foreign Influence Guideline, Applicant had the burden of showing his family members living in Iran did not pose a security concern. *See* Directive, Additional Procedural Guidance, Item E3.1.15. He also factored in evidence that at one point in the past, Applicant's mother was approached by the Iranian regime because she had been married to a United States citizen (Applicant's father) and the mother explained that she was divorced and asked to be left alone. However, the decision below indicates the Judge did not rely solely on the evidence concerning Applicant's mother being approached by the Iranian government in the past. Rather, the Judge also considered the facts and circumstances of Applicant's contacts with his mother, her Iranian citizenship, and her residence in Iran.

Applicant also asserts that the Administrative Judge should have applied Foreign Influence Mitigating Condition 1 to the circumstances of Applicant's in-laws, which include his father-in-law, mother-in-law, brother-in-law and sister-in-law. (3) Applicant does not specify what evidence required the Judge to conclude that the mitigating condition applied nor does Applicant specifically state how the Judge's failure to apply it was error. Without specifically referencing Foreign Influence Mitigating Condition 1, the Judge concluded that the potential existed for pressure to be placed on the in-laws that could then be extended to Applicant through Applicant's wife. Given the record evidence, Applicant has not shown that the Judge's conclusions in this regard are arbitrary or capricious.

In a related argument, Applicant takes exception to the Administrative Judge's conclusion that Applicant was potentially vulnerable to pressure or influence because of the circumstances of his in-laws. Applicant asserts that the Judge's concern was "too attenuated," speculative, and that his reasoning was arbitrary and capricious. Applicant's argument on this point is not persuasive. The Board has recognized that, as a matter of common sense and human experience, there is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse. *See, e.g.*, ISCR Case No. 01-03120 (February 20, 2002) at p. 4. Accordingly, the Administrative Judge did not err in considering the immediate family members of Applicant's spouse as raising security concerns similar to those raised by the presence of Applicant's mother in Iran.

3. Whether the Administrative Judge erred in his application of Foreign Influence Disqualifying Condition 2. (4) At the time of the hearing, none of Applicant's in-laws were living with him in the United States. The Administrative Judge found, however, that Applicant's father-in-law and mother-in-law alternate between residing in the United States and residing in Iran, and at the time of hearing they were in Iran visiting a sick relative. The Judge found that Applicant's brother-in-law shares Applicant's dwelling when he is in the United States, and he last lived with Applicant for about six months in 2004 before returning to Iran to finish an internship. The Judge then noted that it was Applicant's belief that the brother-in-law would return to the United States to pursue a career. Regarding Applicant's sister-in-law, the Judge made no finding that she ever lived with Applicant or his wife or that she was planning to do so in the future. Based on these findings, the Judge concluded that Foreign Influence Disqualifying Condition 2 applied to the case and that Applicant was vulnerable to influence through his parents-in-law and his siblings-in-law.

On appeal, Applicant argues that the Administrative Judge's conclusion that Foreign Influence Disqualifying Condition 2 applied was erroneous. He asserts that the Judge's application of Foreign Influence Disqualifying Condition 2 is wrong because none of Applicant's in-laws live with Applicant. Additionally, Applicant asserts that his parents-in-law are

United States citizens who live chiefly in the United States, the brother-in-law cannot be said to be "sharing living quarters" with Applicant, and his sister-in-law has never lived with Applicant.

With the exception of the sister-in-law, it was not arbitrary or capricious for the Administrative Judge to apply Foreign Influence Disqualifying Condition 2 to Applicant's in-laws. The Judge's finding that Applicant's father-in-law and mother-in-law alternate their residency between Applicant's residence in the United States and residing in Iran is supported by record evidence and provides a sufficient basis for the Judge's conclusion that Disqualifying Condition 2 applies. Likewise, the circumstance of Applicant's brother-in-law, who resided with Applicant previously and has prospects for returning to the United States, also supports the Judge's application of the Disqualifying Condition. Inasmuch as there is no evidence that Applicant's sister-in-law has ever lived with Applicant or has prospects for doing so in the future, the Judge's application of the Disqualifying Condition to her was erroneous. However, the Board regards this error as harmless in light of other findings and conclusions of the Judge that are sustainable.

4. Whether the Administrative Judge's adverse security clearance decision was arbitrary and capricious in light of the fact that Applicant was granted a prior security clearance under like or arguably less favorable circumstances, and nothing of a derogatory nature has happened since. Applicant notes that his earlier application for a security clearance was granted and he held the clearance for eleven years between 1985 and 1996 without incident, even though his mother's contact with Iranian authorities was far more recent at that time, and should not suffice to deny him a clearance now if it was insufficient to deny him a clearance then. He asserts his mother is less likely to be pressured now than she was when he last held a clearance. Regarding the circumstances of his wife and in-laws, Applicant argues that there was plenty of opportunity in the past, when he held a clearance, for the Iranian authorities to try to pressure him by way of his wife through his in-laws, but that did not happen and there is no reason to believe it might happen in the future.

There is no right to a security clearance, and a past decision to grant or continue a security clearance does not give rise to any right or vested interest in a security clearance. *See, e.g.*, ISCR Case No. 01-19823 (December 3, 2003) at p. 5. Furthermore, a favorable security clearance decision does not preclude the federal government from reassessing a person's security eligibility in light of current circumstances. Given the record evidence in this case, which includes evidence of Applicant's and his wife's continuing contacts with citizens and/or residents of Iran, the Administrative Judge was not precluded from evaluating Applicant's security eligibility and reaching an unfavorable decision. Facts and circumstances that raise security concerns about an applicant's security eligibility can warrant an adverse security clearance decision without any proof that a foreign intelligence or security service has specifically targeted the applicant or sought to exploit those facts and circumstances. *See, e.g.*, ISCR Case No. 03-16516 (November 26, 2004) at p. 7. Even in the absence of any evidence that the Iranian government has targeted Applicant in the past, the Judge was entitled to consider whether the totality of Applicant's contacts and ties with his mother and in-laws raised security concerns under the Foreign Influence Guideline that shifted the burden of persuasion for a favorable security clearance decision to Applicant. *See* Directive, Additional Procedural Guidance, Item E3.1.15. Applicant's arguments in this area fail to establish error on the part of the Administrative Judge.

5. Whether Applicant has demonstrated to the satisfaction of the Board that Applicant is worthy of a security clearance. Applicant makes the following two assertions on appeal: (a) because of his mother's present circumstances, the Board may safely discount her as a pressure point for the Applicant; and (b) his past laudatory history as a security clearance holder should permit the Board the Board to grant the requested clearance. The Board construes these statements as a request by the Applicant for it to make its own evaluation of the facts and circumstances of this case and then decide whether Applicant is eligible for a security clearance. As has been stated previously, the Board does not engage in *de novo* review when deciding appeals. The scope of the Board's authority is limited to a determination of whether the challenged findings and conclusions of the Administrative Judge are arbitrary, capricious, or contrary to law and to a determination of whether remand or reversal is required in cases where the challenging party has successfully demonstrated error. Here, for the reasons cited in previous sections of this decision, Applicant has failed to demonstrate error on the part of the Judge that warrants remand or reversal.

### Conclusion

Applicant has not met his burden of establishing error on the part of the Administrative Judge that warrants remand or reversal. Accordingly, the Board affirms the 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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. Principally, the claim that some of Applicant's foreign relatives are now in the United States and others are taking steps to establish themselves in the United States.
2. "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).
3. At the time of the hearing, all of Applicant's in-laws were citizens of Iran. Applicant's parents-in-law and brother-in-law resided in Iran, and Applicant's sister-in-law and her family were temporarily in Turkey.
4. "Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists" (Directive, Adjudicative Guidelines, Item E2.A2.1.2.2).