

DATE: April 28, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-24893

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 22, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision-security concerns raised under Guideline C (Foreign Preference) and Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan.2, 1992, as amended)(Directive). Applicant requested a hearing. On September 20, 2005, after the hearing, Administrative Judge Henry Lazzaro denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: (1) whether it was arbitrary and capricious for the Administrative Judge to conclude that Applicant had not established a case in mitigation under Guideline B. <sup>(1)</sup> For the reasons that follow, the Board concludes that Applicant has failed to demonstrate error on the part of the Administrative Judge.

Applicant makes the following specific arguments in support of his position on appeal: (a) the Administrative Judge should have applied Foreign Influence mitigating Conditions 1, 3, 4, and 5; (b) two prior hearing office decisions, although not legally binding precedent, have similar fact patterns and are instructive as to the proper resolution of this case; (c) there is significant favorable evidence in the case record regarding Applicant's work ethic, professional reputation and trustworthiness, as well as evidence of the democratic nature of the Columbian government and the fact that it is becoming a force for progress and stability in its region.

The Administrative Judge found that Applicant is an American citizen by birth who has a mother, a brother, and an uncle who are citizens of and reside in Colombia. Applicant's wife is a Colombian citizen who has lived in the U.S. for eight years and has applied for U.S. citizenship. Her parents, who were Colombian, are deceased. There is the possibility that Applicant will inherit part of a piece of property in Colombia, but the value of that asset would be an insubstantial portion of his total assets. The Administrative Judge concluded that the government had established a case under Guideline B since Applicant had close ties of affection to his Colombian relatives which was demonstrated by his frequent telephonic contact, regular visits to Colombia, gifts and financial support given by him and anticipated future visits by his mother to the United States. The Judge discussed at length the serious security problems in Colombia currently presented by terrorist groups and drug traffickers. The Judge concluded that the potential for coercion, exploitation, or pressure being exerted on Applicant directly and through his foreign relatives by any of the terrorist organizations operating in Colombia is obvious. The Judge concluded that no mitigating conditions applied and decided

against Applicant under Guideline B.

Regarding Applicant's arguments about the applicability of certain Guideline B mitigating conditions, Applicant has failed to establish error on the part of the Administrative Judge. While the record evidence indicates that Applicant's Colombian relatives are not agents of a foreign power, Guideline B Mitigating Condition 1 <sup>(2)</sup> is bifurcated in nature and the second prong of the mitigating condition requires an affirmative showing by Applicant that his relatives are not in a position to be exploited. A review of the record evidence convinces the Board that the Judge's conclusion that the second prong was not satisfied and that Guideline B Mitigating Condition 1 does not apply is sustainable. Likewise, the record evidence does not support Applicant's assertion on appeal that his contacts with his foreign relatives are casual and infrequent. There is sufficient evidence to sustain the Judge's conclusion that Guideline B Mitigating Condition 3 <sup>(3)</sup> does not apply in this case.

While there is arguably some evidence to support the application of Guideline B Mitigating Conditions 4 <sup>(4)</sup> and 5, <sup>(5)</sup> the state of the record evidence is not such that the Board concludes that the Judge was required to apply these mitigating conditions as a matter of law. Moreover, even if the Judge had concluded that these two mitigating conditions had some applicability, nothing would have required the Judge to conclude that their applicability mitigated the government's overall case against Applicant. The mere applicability or inapplicability of a particular disqualifying or mitigating condition is not dispositive of a case. Rather, a Judge is required to evaluate the totality of the record evidence, taking into consideration the relative strengths and weaknesses in the applicability of various adjudicative guideline factors, when reaching his or her ultimate decision for or against Applicant. Considering the record as a whole, it was not arbitrary and capricious for the Judge to conclude the record evidence did not warrant the application of these two Guideline B mitigating conditions.

The Board has previously noted that decisions of individual Hearing Office Judges are not binding on other Hearing Office Judges, nor are they binding on the Appeal Board. Accordingly, even if the Board were to conclude that the Administrative Judge's decision in this case was not consistent with the decisions by his colleagues in other DOHA cases that are cited by Applicant, such a conclusion would not require the Board to hold that the Judge's decision in this case was arbitrary, capricious, or contrary to law. Because the decisions of Hearing Office Judges are not legally binding precedent in other cases, neither a Hearing Office Judge nor the Board is required to distinguish them or justify why they are not persuasive authority. Rather, a party citing such decisions has the burden of demonstrating that the cited decision addressed similar or identical issues and facts, articulated a rational basis for its conclusions, relied on reasoning or analysis that is consistent with governing legal authorities, or that there are sound reasons the Board should follow the reasoning of the cited case. *See*, ISCR Case No. 01-22602 at 3-5 (App. Bd. Jun. 30, 2003). On appeal, Applicant has failed to demonstrate that the cited cases articulated a rational basis for their conclusions, or that the cited cases relied on reasoning or analysis that can be applied to the facts and circumstances of this case. In light of Applicant's failure to meet his burden, the Board need not consider the cited cases as persuasive authority. Applicant has failed to demonstrate the Judge erred by not following the cited cases.

On appeal, Applicant cites to numerous exhibits containing favorable evidence relating to his work accomplishments, his character, his integrity, his loyalty and ties to the United States, and favorable aspects of Colombia and its government. Applicant's appeal argument goes essentially to the manner in which the Administrative Judge weighed this evidence. Department Counsel met its burden of presenting a *prima facie* case in support of the allegations alleged in the SOR in this case. Applicant responded by presenting evidence to refute, rebut, or explain the evidence presented against him. The Administrative Judge was charged with the duty to consider the record evidence as a whole and decide whether Applicant's evidence was sufficient to refute, rebut, or explain the evidence presented against him. Applicant clearly disagrees with the Judge's conclusion that Applicant did not meet his burden of rebutting the case against him, but Applicant has failed to demonstrate the Judge's ultimate conclusions are arbitrary, capricious, or contrary to law. Absent such a demonstration, the Board will not disturb the Judge's weighing of the record evidence.

### Order

Applicant has failed to establish error on the part of the Administrative Judge. Thus, the Administrative Judge did not err in denying Applicant a clearance. The Judge's decision is therefore AFFIRMED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman (Acting), Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. The Administrative Judge made formal findings in favor of Applicant on the allegations brought under Guideline C. Those findings are not at issue on appeal.
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."
3. "Contact and correspondence with foreign citizens are casual and infrequent."
4. "The individual has promptly reported to proper authorities all contacts, requests, or threats from persons or organizations from a foreign country, as required."
5. "Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities."