

DATE: July 28, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-24933

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

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

FOR APPLICANT

Leslie McAdoo, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated August 9, 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 C (Foreign Preference). Administrative Judge Robert Robinson Gales issued a favorable security clearance decision, dated December 28, 2004.

Department Counsel appealed the Administrative Judge's favorable 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's favorable conclusions under Guideline B (Foreign Influence) are arbitrary, capricious, or contrary to law. For the reasons that follow, the Board reverses 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⁽¹⁾

Whether the Administrative Judge's favorable conclusions under Guideline B (Foreign Influence) are arbitrary, capricious, or contrary to law. The Administrative Judge concluded that Applicant had mitigated the security concerns raised under Guideline B by Applicant's ties and contacts with: (i) his father, mother, and two sisters (who are citizens and residents of Syria); (ii) the two sisters' husbands (who are Syrian-born civil engineers working for companies in Saudi Arabia); and (iii) his wife's two brothers, both of whom are Syrian citizens (one working as a dentist in Saudi Arabia, the other who is a businessman in Saudi Arabia).

On appeal, Department Counsel challenges the Administrative Judge's favorable conclusions under Guideline B as arbitrary, capricious, and contrary to law. In support of that contention, Department Counsel argues: (a) the record evidence does not support the Judge's conclusion that Applicant's ties and contacts with his parents in Syria have "no security significance"; (b) the Board decision cited by the Judge is distinguishable from Applicant's case; and (c) the Judge erred by applying Foreign Influence Mitigating Condition 1. In reply, Applicant argues: (i) the record evidence supports the Judge's finding that Applicant's parents are not agents of the Syrian government, and the Judge's finding that Applicant's parents are not vulnerable to being exploited; (ii) there is ample record evidence to support the Judge's application of Foreign Influence Mitigating Condition 1; (iii) the Judge did not err by considering evidence of Applicant's character and ties to the United States, and that evidence supports the Judge's favorable conclusions under the whole person concept; (iv) Department Counsel did not offer evidence to rebut the proposition that Applicant's relatives in Syria are not in a position to make him vulnerable to coercion, or affirmatively prove that Applicant's parents in Syria are vulnerable to exploitation by a foreign power; (v) acceptance of Department Counsel's position would result in no applicant with family members that are foreign citizens or residents of a foreign country being eligible for a security clearance; (vi) acceptance of Department Counsel's position would result in Foreign Influence

Mitigating Condition 1 being nullified; (vii) the Judge's reliance on a prior DOHA decision was not misplaced; (viii) the Judge took into account the record evidence about the nature of the Syrian government; and (ix) Applicant's case is similar to another DOHA case that resulted in a favorable security clearance decision by a Hearing Office Judge.⁽²⁾ For the reasons that follow, the Board concludes Department Counsel has demonstrated error below.

Before addressing the merits of Department Counsel's appeal arguments, the Board will dispose of some of Applicant's counterarguments that lack merit.

First, contrary to Applicant's assertion, Department Counsel's appeal is not based on the contention that any applicant with immediate family members in a foreign country is ineligible for a security clearance. Rather, Department Counsel's appeal position is that Applicant has not presented sufficient evidence to rebut or overcome the security concerns raised by his ties and contacts with his parents in Syria, which the record evidence shows has an authoritarian government and is a country identified by the U.S. State Department as being involved with state-sponsored terrorism.

Second, to the extent Applicant argues Department Counsel had the burden of presenting evidence to prove a direct nexus between Applicant's ties and contacts with his immediate family members in Syria and a potential for exploitation by a foreign power, Applicant's argument runs afoul of well-established federal case law.⁽³⁾ Department Counsel is not required to present evidence that proves an applicant presents a clear and present danger or imminent threat to national security.⁽⁴⁾ All that is required is proof of conduct or circumstances that raise security concerns under one or more Guidelines.

Third, the Board does not find persuasive Applicant's assertion that Department Counsel's appeal brief seeks to nullify Foreign Influence Mitigating Condition 1.⁽⁵⁾ Department Counsel's brief merely argues that Applicant did not present evidence sufficient to satisfy his burden of persuasion concerning the applicability of Foreign Influence Mitigating Condition 1. Department Counsel is not required to present evidence that disapproves the applicability of an Adjudicative Guidelines mitigating condition; rather, an applicant has the burden of presenting evidence sufficient to warrant application of pertinent Adjudicative Guidelines mitigating conditions.⁽⁶⁾ Accordingly, Department Counsel was not required to present evidence to affirmatively preclude the application of Foreign Influence Mitigating Condition 1. Rather, Applicant had the burden of presenting evidence sufficient to warrant application of that mitigating condition.⁽⁷⁾

Fourth, Applicant's reliance on some decision by Hearing Office Administrative Judges is misplaced. The decisions of Hearing Office Judges are not legally binding precedent that must be followed by the Board.⁽⁸⁾ Apart from that legal principle, a favorable Hearing Office decision that Applicant asserts presents a situation like his⁽⁹⁾ is not persuasive because it is readily distinguishable from Applicant's case. In the case cited by Applicant, the foreign country was India, not Syria. As will be discussed later in this decision, a significant factor in this case is the record evidence about Syria having an authoritarian government and being a country identified by the U.S. State Department as involved with state-sponsored terrorism. Another Hearing Office decision relied on by Applicant is not persuasive because it was reversed by the Board on appeal.⁽¹⁰⁾

Turning to Department Counsel's appeal arguments, the Board concludes they are persuasive for the reasons that follow.

Department Counsel persuasively challenges the Administrative Judge's conclusion that Applicant's ties and contacts with his parents in Syria have "no security significance" (Decision at p. 9). The Administrative Judge's statement that Applicant's continuing relationship with his parents in Syria "[has] no security significance" is inconsistent with the Judge's conclusion that Department Counsel had established its case under Guideline B (Decision at p. 8), and the Judge's conclusion that the residence and citizenship of Applicant's immediate family members "are clearly of security concern under Foreign Influence Disqualifying Condition 1" (Decision at p. 9), and runs contrary to the Judge's recognition of the record evidence showing Syria has an authoritarian government and is a country identified by the U.S. State Department as being involved with state-sponsored terrorism (Decision at pp. 6 and 9). Moreover, the Judge noted the evidence concerning the Syria Accountability Act and an Executive Order issued in May 2004 to implement that statute (Decision at p. 6). That Executive Order contains the following language: "I, GEORGE W. BUSH, President of the United States of America, hereby determine that the actions of the Government of Syria in supporting terrorism,

continuing its occupation of Lebanon, pursuing weapons of mass destruction and missile programs, and undermining United States and international efforts with respect to the stabilization and reconstruction of Iraq, constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States and hereby declare a national emergency to deal with that threat."⁽¹¹⁾ Because the President of the United States declared in Executive Order 13338 that the actions of the Syrian government "constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States," the Judge could not simply conclude -- without an explanation supported by the record evidence -- that, "[n]otwithstanding the nature of the government in Syria," Applicant's ties and contacts with his parents in Syria "[have] no security significance." Given the record evidence of Applicant's ties and contacts with his parents in Syria -- a country whose government's actions "constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States" -- the Judge failed to articulate a satisfactory explanation for his favorable conclusion that is consistent with the record evidence.⁽¹²⁾

Department Counsel also persuasively argues the Administrative Judge erred by placing undue reliance on a brief passage from a Board decision in another case.⁽¹³⁾ That case is readily distinguishable from Applicant's case. That case did not involve Syria, or a foreign country that has an authoritarian government and has been identified by the U.S. State Department as being involved with state-sponsored terrorism. As a matter of common sense, security concerns are raised by ties and contacts with immediate family members in a foreign country that has an authoritarian government and is identified by the U.S. State Department as being involved with state-sponsored terrorism. Indeed, as Department Counsel correctly notes, in the Board decision cited by the Judge, the Board used language that recognized an applicant could be vulnerable to coercion or undue influence brought to bear on immediate family members by a police state or terrorists.⁽¹⁴⁾ Accordingly, it was arbitrary and capricious for the Judge to rely on two sentences from the Board decision in ISCR Case No. 99-0507, taken out of context.⁽¹⁵⁾

The Administrative Judge's finding that Applicant's parents are not agents of the Syrian government is not dispositive of whether Foreign Influence Mitigating Condition 1 is applicable to the facts and circumstances of Applicant's case. Because Foreign Influence Mitigating Condition 1 is bifurcated in nature, the Judge's unchallenged finding that Applicant's parents are not agents of the Syrian government -- standing alone -- is not sufficient to warrant application of that mitigating condition.⁽¹⁶⁾ Applicant's reply brief is not persuasive to the extent it seems to argue the Judge's finding that his parents are not agents of the Syrian government is sufficient to warrant application of Foreign Influence Mitigating Condition 1. Moreover, to the extent the Judge places significance on his finding that Applicant's immediate family members are not associated with the Syrian government or any foreign intelligence service or organization (Decision at p. 9), the Judge used reasoning that is inconsistent with the language and scope of Guideline B.⁽¹⁷⁾ The Board does not find persuasive Applicant's argument that the Judge reasonably could conclude that absence of ties with the Syrian government was sufficient to mitigate the security concerns raised under Guideline B. Given the record evidence in this case, the Judge failed to articulate a rational basis for his conclusion that Applicant was entitled to the "protection" of Foreign Influence Mitigating Condition 1 (Decision at p. 9).

Applicant is correct that it was proper for the Administrative Judge to take into consideration the record evidence about Applicant's character and ties to the United States. However, Applicant does not articulate a persuasive argument as to how such evidence supports the Judge's favorable conclusions under Guideline B. To the extent Applicant's reply brief argues that the record evidence of his character and ties to the United States shows he would make the right choice if Syrian government tried to exploit his ties with his parents in Syria, it is not persuasive. Department Counsel correctly points out that the applicability of Foreign Influence Mitigating Condition 1 does not hinge on what choice Applicant might make if he is forced to choose between his loyalty to his family and the United States, but rather hinges on whether Applicant presented evidence sufficient to demonstrate that he would not be placed in a position where he would be forced to make such a choice.⁽¹⁸⁾

Applicant's argument about the modest, ordinary lives of his parents in Syria also is not persuasive. The lack of prominence of Applicant's parents does not nullify the security concerns raised under Guideline B. The issue under Guideline B is not whether an applicant's immediate family members in a foreign country are of interest to a foreign power based on their prominence or personal situation. Rather, the issue is whether an applicant's ties and contacts with immediate family members in a foreign country raise security concerns because those ties and contacts create a potential

vulnerability that a foreign power could seek to exploit in an effort to get unauthorized access to U.S. classified information that an applicant -- not the applicant's immediate family members -- has by virtue of a security clearance. A person may be vulnerable to influence or pressure exerted on, or through, the person's immediate family members -- regardless of whether the person's family members are prominent or not.⁽¹⁹⁾ There is no good reason to assume that a foreign country with an authoritarian government that has been identified as being involved with state-sponsored terrorism would have compunctions about exerting influence or pressure on its citizens just because they lack prominence or live modest, ordinary lives.

For all these reasons, taken cumulatively, the Board concludes Department Counsel has demonstrated harmful error below and that Applicant's arguments in support of the Administrative Judge's favorable decision are not persuasive.

Conclusion

Department Counsel has demonstrated error below that warrants reversal. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.3, the Board reverses the Administrative Judge's favorable security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

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

1. The Administrative Judge entered favorable formal findings under Guideline C (Foreign Preference). Those favorable formal findings are not at issue on appeal. The Judge's favorable formal findings under Guideline B (Foreign Influence) with respect to SOR paragraphs 2.a, 2.d, 2.f, 2.g, and 2.h are not at issue on appeal.

2. Applicant's appeal brief contains a factual assertion about the efforts of Applicant's wife to become a United States citizen. That assertion constitutes new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

3. *See Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973)(government is not required to present direct or objective evidence of a nexus between an applicant's conduct and circumstances and an unfavorable security clearance decision).

4. *See, e.g.*, ISCR Case No. 02-06478 (October 25, 2004) at p. 6. *See also* ISCR Case No. 03-16516 (November 26, 2004) at p. 7 ("Under Guideline B (Foreign Influence), Department Counsel is not required to prove that a foreign country has specifically targeted a particular applicant with immediate family members living in that foreign country.") (footnote omitted)

5. "A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in questions 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).
6. *See, e.g.*, ISCR Case No. 03-06174 (February 28, 2005) at p. 10 n.23.
7. *See, e.g.*, ISCR Case No. 02-02892 (June 28, 2004) at p. 6.
8. *See, e.g.*, ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5.
9. ISCR Case No. 02-13593 (August 10, 2004).
10. The Hearing Office decision in ISCR Case No. 02-26826 (May 14, 2003) was reversed by the Board on November 12, 2003.
11. Executive Order 13338 (May 11, 2004) *reprinted in* 69 *Federal Register* 26751-26754 (May 13, 2004). When a federal statute or Executive Order is referred to in testimony or documents during a proceeding below, the text of such a federal statute or Executive Order is deemed to be part of the record. For example, although copies of Executive Order 10865 and the Directive are not normally offered as evidence or formally placed into the record of DOHA proceedings, the text of Executive Order 10865 and the Directive are properly deemed to be part of the record before the Administrative Judge.
12. As discussed earlier in this decision, when deciding whether an Administrative 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.
13. ISCR Case No. 98-0507 (May 17, 1999).
14. *See* ISCR Case No. 02-29403 (December 14, 2004) at pp. 4-5 (discussing ways in which terrorists or terrorist organizations could pose a threat to U.S. classified information). There is no good reason to assume that countries involved in state-sponsored terrorism could not pose similar threats to U.S. classified information.
15. *See, e.g.*, ISCR Case No. 03-09483 (November 17, 2004) at pp. 3-4 (Board holding that Administrative Judge erred by making a ruling based on a portion a sentence in an earlier Board decision, taken out of context).
16. *See, e.g.*, ISCR Case No. 03-06174 (February 28, 2005) at p. 11; ISCR Case No. 02-24254 (June 29, 2004) at p. 5.
17. Nothing in the language of Guideline B indicates or suggests that foreign influence is of security concern only if an applicant has ties and contacts with foreign citizens or entities involved with a foreign government or a foreign intelligence service. *See, e.g.*, ISCR Case No. 02-29665 (November 10, 2004) at p. 5.
18. *See, e.g.*, ISCR Case No. 02-24267 (May 24, 2005) at pp. 5-6; ISCR Case No. 03-15205 (January 21, 2005) at pp. 3-4; ISCR Case No. 01-26893 (October 16, 2002) at pp. 9-10.
19. *See, e.g.*, ISCR Case No. 02-13595 (May 10, 2005) at p. 5 ("There is no reason to assume that a foreign government interested in gaining unauthorized access to classified U.S. information would focus on applicants with access to such information only if the applicants have prominent family members living abroad. A foreign government can seek to exert influence or pressure on applicants with immediate family members living in the foreign country regardless of whether the applicant's family members are prominent persons or ordinary persons without any prominence.")(footnote omitted); ISCR Case No. 03-02382 (February 15, 2005) at p. 5 (Administrative Judge failed to articulate a rational basis

for concluding that an applicant's mother in Iran, a widowed housewife, was not in a position of vulnerability).