

DATE: September 29, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-02634

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 October 19, 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 Arthur E. Marshall, Jr. issued an unfavorable security clearance decision, dated June 10, 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's decision should be reversed based on Applicant's proffer of changed circumstances concerning his family members. 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

Whether the Administrative Judge's decision should be reversed based on Applicant's proffer of changed circumstances concerning his family members. The Administrative Judge found the following: (a) Applicant was born in Vietnam, emigrated to the United States, and in 1992 became a naturalized U.S. citizen; (b) Applicant has two sisters, one brother, and one brother-in-law who are citizens and residents of Vietnam; (c) Applicant maintains weekly email contact with his immediate family members in Vietnam; (d) Applicant is sponsoring one of his sisters in Vietnam to come to the United States; and (e) Applicant wants to bring his other family members to the United States from Vietnam. The Judge concluded that the facts and circumstances of Applicant's ties and contacts with family members in Vietnam raised security concerns under Guideline B (Foreign Influence) and that Applicant had not presented evidence that was sufficient to extenuate or mitigate those security concerns. The Judge entered formal findings against Applicant under Guideline B and concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

On appeal, Applicant asserts that his family members have moved from Vietnam and are living in the United States as permanent residents. Applicant's assertion about his family members constitutes a proffer of new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. The Administrative Judge's findings of fact about Applicant's family members are supported by the record evidence that was available to him. Applicant cannot fairly challenge the Judge's findings of fact based on a proffer of new evidence on appeal.

Moreover, Applicant's proffer of new evidence on appeal does not render the Administrative Judge's decision arbitrary, capricious, or contrary to law. Applicant had the opportunity to respond to the File of Relevant Material submitted by Department Counsel and to present evidence on his behalf for the Judge to consider in his case. There is no right under Executive Order 10865, the Directive, or federal administrative law for the record to be kept open indefinitely so a party can supplement the record evidence. As a matter of practical necessity, the opportunity to offer record evidence for a Judge to consider must come to a close and a security clearance decision rendered in a case. *See, e.g.*, ISCR Case No.

00-0250 (February 13, 2001) at pp. 3-4 (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-555 (1978)).

Conclusion

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

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