

DATE: January 9, 2007

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-04451

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) declined to grant Applicant a security clearance. On March 24, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision--security concerns raised under Guideline C (Foreign Preference) and Guideline B (Foreign Influence) pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested the case be decided on the written record. On June 16, 2006, after considering the record, Administrative Judge John Grattan Metz, Jr. 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: whether the Administrative Judge erred with respect to a material finding of fact about Applicant's Iranian passports and by concluding that the

security concerns raised under Guideline C had not been mitigated; whether the Administrative Judge erred by concluding that the security concerns raised under Guideline B had not been mitigated.⁽¹⁾

(1) Applicant contends that the Administrative Judge erred when he did not find Applicant had surrendered his expired Iranian passports to the Iranian Interest Section of the Embassy of Pakistan, based upon Applicant's uncorroborated statement in his Answer to the SOR that he had done so. He also argues that the Judge erred in concluding that the security concerns raised under Guideline C had not been mitigated. The Board does not find these arguments persuasive.

The Appeal Board's review of an Administrative Judge's finding of fact is limited to determining if it is supported by substantial evidence--such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record. Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). In evaluating the Judge's finding, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

Applicant had requested that his case be decided on the written record and had not responded to the government's File of Relevant Material (FORM). Thus, Applicant had declined the opportunity to have his credibility evaluated by the Administrative Judge in the context of a hearing. In his decision, the Judge noted that Applicant had asserted in his

Answer that he had surrendered the expired Iranian passports in January 2004. However, the Judge also noted that Applicant had provided no corroboration of that claim, and that the claim was inconsistent with Applicant's January 20, 2004 statement to a government investigator, in which Applicant stated that he currently held two expired Iranian passports. Moreover, the Judge noted that Applicant had made no reference to surrendering his expired Iranian passports in his letter to the Iranian government relinquishing his Iranian citizenship. Given the record that was before him, the Judge's finding with respect to Applicant's expired Iranian passports is not unreasonable, and is supported by substantial evidence.

In his decision, the Administrative Judge made sustainable findings that: (a) Applicant had traveled to Iran with an Iranian passport in 1995 and that there was no record evidence that he notified the Army (then his employer) of that travel; (b) Applicant had reapplied for an Iranian passport in July 1998 and used it to travel to Iran twice in 1999 and once in 2000 to visit his family; (c) during the time Applicant made those three trips he also held a U.S. passport; and (d) there was no corroboration for Applicant's assertion that he had surrendered his Iranian passport. Given those findings, and in light of Applicant's having submitted no reply to the FORM, the Board concludes that the Judge did not err in concluding that Applicant had not sustained his burden of persuasion, and that the Judge's overall unfavorable decision under Guideline C is not arbitrary, capricious, or contrary to law.

(2) Applicant argues that the evidence he provided in the proceeding below was sufficient to require the Administrative Judge to conclude, as a matter of law, that he had rebutted, mitigated or extenuated the security concerns raised by the Guideline B allegations. In that regard, Applicant contends that the Judge's adverse decision should be reversed because the Judge erred in not applying Guideline B Mitigating Condition 1. ⁽²⁾ He also argues that the Judge gave insufficient weight to evidence that Applicant has lived in and been a citizen of the United States for many years, and has extensive ties to this country. Applicant's arguments do not demonstrate that the Judge erred.

In this case, the Administrative Judge made sustainable findings that: (1) Applicant's mother and six siblings are citizens and residents of Iran, (2) Applicant speaks by telephone once or twice a month with his brother that is caring for his mother, once a year with his other brother, and with his sisters when they are with his brother when he calls to check on his mother, (3) Applicant traveled to Iran in 1995, twice in 1999, and in 2000, to visit his family members, (4) Iran is a fundamentalist Islamic republic with a poor human rights record and has confrontational relations with the United States, and (5) the United States does not currently have diplomatic or consular relations with Iran and therefore cannot provide protection or routine consular services to American citizens in Iran. Given those findings, the Administrative Judge concluded that Applicant's ties with his family members in Iran raised security concerns under Guideline B and that Disqualifying Condition 1 applied. That conclusion shifted the burden of persuasion to Applicant. If there are admitted or proven facts and circumstances that raise security concerns, "[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15.

The application of Adjudicative Guidelines disqualifying and mitigating conditions does not turn simply on a finding that one or more of them applies to the particular facts of a case. Rather, the application of a disqualifying or mitigating condition requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan. 15, 2003). As the trier of fact, the Administrative Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.

Given the record in this case, it was not arbitrary and capricious for the Administrative Judge to conclude that Applicant had not met his burden of demonstrating that his family members in Iran were not in a position to be exploited by a foreign power in a way that could force the Applicant to choose between loyalty to them and the U.S. A review of the Judge's decision indicates that the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying circumstances, and considered the possible application of relevant mitigating conditions and factors. The Judge found in favor the Applicant with respect to several of the factual allegations. However, the Judge articulated a rational basis for not favorably applying any mitigating conditions or factors to the remainder of the allegations, and reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome

the government's security concerns. The Judge was not required, as a matter of law, to favorably apply Guideline B Mitigating Condition 1, and the Judge's overall adverse security clearance decision is sustainable.

Order

The decision of the Administrative Judge denying Applicant a clearance is AFFIRMED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Signed: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in favor of Applicant with respect to SOR paragraphs 1.c, 1.d, and 1.e. Those favorable findings are not at issue on appeal.

2. Directive ¶ E2.A2.1.3.1. ("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.")