

DATE: June 3, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-05317

## **APPEAL BOARD DECISION AND REVERSAL ORDER**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Braden M. Murphy, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

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) and Guideline C (Foreign Preference). Administrative Judge Thomas M. Crean issued a favorable security clearance decision, dated November 23, 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 issues are raised on appeal: (1) whether the Administrative Judge's application of Foreign Influence Mitigating Conditions 1 and 3 was arbitrary and capricious given the record evidence; (2) whether the Administrative Judge's conclusions under Guideline C were arbitrary and capricious given the record evidence; and (3) whether the Administrative Judge gave an adequate explanation for how he used Government Exhibits 7 and 8. For the reasons set forth below, 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 Issues

Before addressing the main appeal issues, the Board will discuss a threshold issue raised by a portion of the Department Counsel's brief, which sets forth "additions" to the Administrative Judge's Findings of Fact. Although the parties are free--within the bounds of zealous advocacy--to argue about what the record evidence shows, it is the Administrative Judge, not the parties, that makes the findings of fact in a case. Moreover, the Directive authorizes the Board to review a Judge's findings of fact, not engage in *de novo* fact-finding. Accordingly, the Board will consider Department Counsel's proffered "additions" only to the extent they constitute argument about the record evidence in support of any specific appeal issue raised by Department Counsel.

(1) Whether the Administrative Judge's application of Foreign Influence Mitigating Conditions 1 and 3 was arbitrary and capricious given the record evidence. The Administrative Judge concluded that the presence of Applicant's mother and three of his brothers<sup>(1)</sup> in Libya was mitigated by application of Guideline B itigating Conditions 1<sup>(2)</sup> and 3<sup>(3)</sup>. Department Counsel argues that the record evidence does not support the Judge's application of the cited mitigating conditions. The Board finds Department Counsel's argument persuasive.

Mitigating Condition 3 does not apply to Applicant's situation given the record evidence in this case. After he acquired U.S. Citizenship, Applicant twice traveled to Libya, in violation of a U.S. travel ban to that country, in order to visit his family. Applicant obtained a Libyan passport in order to visit his family. Applicant offered no corroboration for claims that his relationships with his brothers are distant, and contradicted himself on the point at the hearing when he said "And I do have strong family connection, but mostly it's my mom because she's been in bad health lately." (Tr. pp.20-21). There is no record evidence suggesting that Applicant's ties to his mother are casual. The record evidence does not support a conclusion that Applicant's ties to his family are casual.

The Administrative Judge's application of Mitigating Condition 1 is also not sustainable given the record evidence in this case. Applicant clearly cares about his family in Libya. Although Applicant, at times, focused on recent improvement in Libyan-U.S. relations, he expressed the fact that in the last few years he had had fears of being arrested in Libya because friends of his had been arrested there for having a U.S. passport. There is record evidence that the United States categorizes Libya's human rights record as poor. *See*, Exhibit 7. There is record evidence that, in spite of recent improvements in U.S.-Libyan relations "Certain Export controls remain in place and Libya remains on the state sponsors of terrorism list." *See*, Exhibit 5. In short, not only is there no record evidence to base a finding that Applicant is not vulnerable to exploitation of his family in Libya, there is record evidence that would support an opposite finding. (4)

(2) Whether the Administrative Judge's conclusions under Guideline C were arbitrary and capricious given the record evidence. The Administrative Judge correctly observed that Applicant's Libyan passport, renewed in 2001, required the Judge to evaluate the case in light of the memorandum of the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASDC3I), dated August 16, 2000, concerning foreign passports. In spite of recognition of the application of the ASDC3I memo, the Judge concluded that Applicant's Libyan passport, obtained, in part, to circumvent a U.S. ban on travel to Libya, was no longer of security concern because the passport expired in 2003 and Applicant, although he had possession of the passport in April 2004, cannot locate the document. The Judge concluded that the passport no longer exists. The Board does not accept the Judge's analysis.

In a similar case, involving an expired Lebanese passport obtained by an Applicant seeking to evade a U.S. ban on travel to that country, the Board concluded that an expired passport does not meet the surrender requirements of the ASDC3I memo. Furthermore, the Board observed that Applicant's use of the passport to circumvent U.S. law was a pertinent consideration, and not mitigating. *See*, ISCR Case No. 01-24306, (September 30, 2003), at pp. 4-5. While this case has the additional circumstance that the Judge found that Applicant is currently unable to locate the passport, the cited case is sufficiently on point to be controlling. Applicant's use of his Libyan passport to evade U.S. law should have been analyzed for its adverse security consequences, and the Libyan passport cannot reasonably be construed as surrendered or no longer extant.

(3) Whether the Administrative Judge gave an adequate explanation for how he used Government Exhibits 7 and 8. At the hearing, the government submitted four documents produced by the Department of State into evidence. The four documents were Exhibit 5: Background Note: Libya (October 2004); Exhibit 6: Consular Information Sheet: Libya (July 8, 2004); Exhibit 7: Libya Country Reports on Human Rights practices - 2003 (February 25, 2004); and Exhibit 8: Patterns of Global Terrorism - 2003 (April 29, 2004). At the hearing, Applicant argued that Exhibits 7 and 8 did not reflect the most current developments in Libya. The Department Counsel acknowledged the point, to an extent, saying that the documents were the most current but the developments were in Exhibit 5. The Administrative Judge essentially agreed with Applicant and indicated that he would give the two documents diminished weight. On appeal, Department Counsel challenges the weight given to the documents and the Judge's failure to articulate in the decision how the documents were used. The Board finds mixed merit in Department Counsel's challenge.

It is well settled that an Administrative Judge need not discuss every piece of evidence. It is also true that Exhibits 7 and 8 did not reflect certain improvements in U.S.-Libyan relations. However, there is no reason to believe that the material messages of Exhibit 7 (that Libya has a poor human rights record) and Exhibit 8 (that Libya remains a state sponsor of terrorism) have been obviated by the recent developments. Exhibit 5 specifically restates that Libya remains on the state sponsor of terrorism list. To the extent that the Judge's conclusions failed to take these facts into account, the Judge erred. Specifically, a country's poor human rights record and its differences with the United States on important security issues such as terrorism are factors which will have an impact on an Applicant's burden of proving that family members in those countries do not pose a security risk. *See*, ISCR Case No. 02-04786 (June 27, 2003), at pp. 4-5.

### **Conclusion**

Department Counsel has demonstrated errors which warrant reversal. Pursuant to Item E3.1.33.3 of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's favorable security clearance decision.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. Department Counsel points out that Applicant has five brothers, four of whom live in Libya.
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. Applicant cites to new evidence on appeal. The Board cannot consider new evidence. *See*, Directive, Additional Procedural Guidance, Item E3.1.29.