

DATE: November 29, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-08870

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

Robert E. Coacher, Department Counsel

#### FOR APPLICANT

#### *Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 6, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline B (Foreign Influence), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested that the case be decided on the written record. On March 24, 2006, after considering the File of Relevant Material (FORM), Administrative Judge Claude R. Heiny granted Applicant's request for a security clearance. Department Counsel submitted a timely appeal pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Administrative Judge failed to articulate a rational basis for concluding that Applicant's contacts with his siblings and nieces and nephews are casual and infrequent. We reverse the Administrative Judge's decision to grant the clearance.

### **II. Whether the Record Supports the Administrative Judge's Factual Findings**

#### **A. Facts**

The Administrative Judge found that Applicant has worked as an engineer for a defense contractor since 1983. Applicant was born in Iran and became a naturalized United States citizen in 1982. He has two daughters, both born in the United States.

In addition, Applicant has a brother and two sisters who are citizens and residents of Iran. The Administrative Judge found that the most recent evidence shows that the brother owns an appliance store, and the sisters are housewives. He contacts his siblings twice a year, at Thanksgiving and at Christmas. Applicant gave \$800 total to his nieces and nephews in 2002 and \$1500 in 2003.

The Administrative Judge also found that Iran is a nation hostile to the United States. It is attempting to acquire weapons of mass destruction and has a poor human rights record. The

issue raised by Department Counsel pertains to the Administrative Judge's conclusions, which will be addressed below.

### **III. Whether the Record Supports the Administrative Judge's Ultimate Conclusions.**

An Administrative Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Appeal Board may reverse the Administrative Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Administrative Judge. We may not set aside an Administrative Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency ..." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. We review matters of law *de novo*.

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. ISCR Case No. 03-01009 at 2 (App. Bd. March 29, 2005) (citations omitted).

Given the Administrative Judge's findings, he properly determined that Applicant's family ties raised security concerns under Guideline B, Disqualifying Condition 1 (*an immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country*). As a result, Applicant bore the burden of persuasion as to whether he should receive a security clearance. Applicant was responsible for presenting evidence to rebut, explain, extenuate, or mitigate facts admitted by Applicant or proven by Department Counsel, and had the ultimate burden of persuasion as to obtaining a favorable clearance decision. Directive, ¶ E3.1.15. *See also* ISCR Case No. 02-28838 at 2 (App. Bd. June 12, 2006); ISCR Case No. 02-20115 at 3 (App. Bd. July 29, 2005).

The Administrative Judge evaluated Applicant's case in light of Mitigating Condition 3 (*contact and correspondence with foreign citizens are casual and infrequent*). Directive ¶ E2A2.1.3.3. There is a rebuttable presumption that an applicant's contacts with immediate family members in a foreign country are not casual. ISCR Case No. 00-0484 at 4-5 (App. Bd. February 1, 2002). The Administrative Judge concluded that this presumption had been rebutted regarding the siblings and that the evidence in the file established that Applicant's contact with his nieces and nephews was also casual and infrequent. <sup>(1)</sup>

However, the lack of evidence from Applicant makes it difficult to evaluate his relationship with his family members in Iran. By electing (1) to have the case decided on the written record and (2) to provide nothing in extenuation, mitigation, or refutation of the Department Counsel's FORM, Applicant has forgone the opportunity to supply information in support of his burden of persuasion (including persuading the Judge that his holiday communications and gifts are casual in nature). This left the Administrative Judge with the task of evaluating his answers to the SF 86, his statements during the subject interview, and his prior written statement from a security clearance investigation of twenty years ago to determine if he has met his burden.

These matters, taken together, raise questions about Applicant's relationship with his relatives that the record provides no basis to resolve. For example, there is nothing in the record to explain why phone conversations with siblings conducted at Thanksgiving and Christmas are casual within the ordinary meaning of the term, since they occur regularly (albeit at wide intervals) and are apparently preplanned. For another, the record does not explain the significance of the monetary gifts. Whether such gifts are *de minimus* or a substantial bequest depends on matters not documented, such as the financial condition of Applicant. The gifts provide serious reason to doubt Applicant's January 2004 statement <sup>(2)</sup> to the effect that his relationship with his family abroad is tenuous. <sup>(3)</sup> Again, Applicant's choices precluded the Administrative Judge from probing these issues in detail, leaving the record silent on questions that are significant in evaluating his fitness for a clearance.

We conclude that Department Counsel has met its burden on appeal. We conclude that the Administrative Judge committed error by granting the clearance.

#### IV. Order

The judgment of the Administrative Judge granting Applicant a clearance is REVERSED.

Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman, Appeal Board

Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board

1. To a large extent, evaluating this particular Mitigating Condition depends upon the meaning of the word "casual." The Merriam Webster Dictionary includes the following as its principal definition: "resulting from, or occurring by chance." Black's Law Dictionary provides a similar cluster of meanings: "occurring without regularity, occasional; impermanent . . . [h]appening or coming to pass without design and without being foreseen or expected . . . unpremeditated." The essential meaning of the word, therefore, suggests events which are more fortuitous in nature than planned or designed.

2. Item 5, Subject Interview dated January 14, 2004, at 4

3. We also note an apparent discrepancy in Applicant's subject interview. He states that he sends his nieces and nephews money at Christmas and yet also states that he does not know the addresses in Iran of his siblings. While it is possible that his nieces and nephews are adults with separate addresses, it is a question to which a reasonable person might desire an answer in evaluating Mitigating Condition 3.