

DATE: December 20, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-03635

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 29, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence), Guideline F (Financial Considerations) and Guideline E (Personal Conduct), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 30, 2006, after the hearing, Administrative Judge Charles D. Ablard granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raises two issues on appeal: whether the Judge erred in concluding that Applicant sufficiently mitigated the Foreign Influence security concerns; and whether the Judge erred in his application of one Financial Considerations Mitigating Condition and in his ultimate conclusion that Applicant sufficiently mitigated the Financial Considerations security concerns. [\(1\)](#)

Whether the Record Supports the Administrative Judge's Factual Findings

Department Counsel adopted the Judge's Findings of Fact for purposes of the appeal, so no issue concerning the sufficiency of the record support for those findings is before the Board. The Judge found the following facts concerning Guidelines B and F.

Applicant was born in Nigeria, where he lived with his mother until he was 17 years old. He then lived with an uncle for three years before coming to the United States in 1989, at age 20. He received a GED then joined the U.S. Navy for a four year enlistment. In 1995, after leaving the Navy, he became a naturalized U.S. citizen. He also served a six year enlistment in the National Guard from 1997 to 2003. His mother is a citizen of and resides in Nigeria. His father and two brothers, who all came to the U.S. together in 1976, are U.S. citizens. He has never returned to Nigeria, communicates with his mother infrequently by email no more than four times a year, and has not spoken to her by phone since 2003 when they communicated concerning a problem of his brother. He has affection for his mother, but has limited current contact and had little contact with her for 20 years. The Judge specifically found, "While Nigeria is a country with many problems despite its great wealth (Exh. IV), Applicant's limited contact with it and lack of contact even with his one remaining relative living there, indicates little likelihood of security concern." Decision at 2. Nowhere else in the decision does the Judge address the security situation in Nigeria.

Applicant admitted and provided documentation concerning two child support payments for his teenage children which his credit reports indicated were some \$20,000 and \$11,000 in arrears. Applicant provided proof that these totals did not reflect \$6,426 in IRS intercepts of his tax refunds and were thus overstated in that amount. The debts arose while he was enrolled in engineering school from 1997 to 2002 and not fully employed. He pays \$360 per month in garnished wages to settle these debts, and is current on these payments. He worked miscellaneous jobs while in engineering school, and has worked for his present employer full time since earning his degree in 2002. He earns approximately \$3,000 per month, of which he has \$500 remaining after monthly bills and child support withholdings. Payments on his deferred education loans will start this year.

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 or remand 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, E3.1.33. 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 [Judge]..." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. We review matters of law *de novo*.

The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application 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). Thus, the presence of some potentially disqualifying evidence does not alone compel the Judge to make an unfavorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. A Department Counsel's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law.

Department Counsel incorrectly describes the Judge's sustainable findings in asserting that he erred in finding for Applicant under Guideline F. The Judge found that, "[t]he government has conceded the allegation of one debt and Applicant established that all the others except for the child support are erroneous. The child support debts are still outstanding, but are being paid regularly by the garnishment withholding." Decision at 5. He further found that the outstanding balance on these child support debts was significantly reduced from that alleged in the SOR. He thus determined that Applicant was meeting his financial obligations and any possible security concern remaining after Applicant disproved the SOR financial allegations was sufficiently overcome by other "whole person" factors establishing his trustworthiness.

Department Counsel asserts that the Judge's favorable finding under Guideline B was arbitrary and capricious on three grounds: (1) that it fails to provide a rationale as to how the favorable facts cited operate to reduce or eliminate the security risks; (2) that it utilizes whole person factors which are improper and irrelevant under Guideline B; and (3) that it fails to address significant record evidence which clearly detracts from the favorable conclusions. These assertions are without merit except that the Judge's whole person analysis, including his consideration of the nature of Applicant's relationship with his mother, does not consider the situation in Nigeria where she lives. Such consideration is necessary to provide the context for the whole person evidence that the Judge did consider. The Judge may properly conclude that security concerns and potentially disqualifying conditions are mitigated under a whole person analysis even in the absence of any particular Guideline-specific mitigating conditions.⁽²⁾ However, the Board has held that in Foreign Influence cases, the nature of the foreign government involved, the intelligence gathering history of that government, and the presence of terrorist activity in the country, "is important evidence that provides context for the other evidence of record, and must be brought to bear on the Judge's ultimate conclusions in the case." *See* ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) and decisions cited therein. In the absence of anything specifically addressing the security

situation in Nigeria, the Judge's decision fails to consider important factors that are relevant to deciding whether Applicant has mitigated the security concerns raised by his mother's citizenship and residence there.

This renders the decision arbitrary and capricious under Board precedent, and the error is not harmless. The Board cannot determine from this record whether proper consideration of the security situation in Nigeria would necessarily lead either to the same conclusion, or to a different conclusion, on the ultimate question of whether it is clearly in the interest of national security to grant Applicant a clearance. Therefore, remand is the appropriate remedy to address the error. *See* ISCR Case No. 04-07187 at 5 (App. Bd. Nov. 17, 2006); Directive ¶ E3.1.33.

Order

The Judge's favorable findings for Applicant under Guidelines F and E are affirmed. Pursuant to Directive ¶ E3.1.33.2, the Board remands the case to the Administrative Judge to consider the record evidence on the security situation in Nigeria as the context for his whole person analysis of security concerns raised under Guideline B. The Judge should then issue a new decision, consistent with the requirements of Directive ¶¶ E3.1.35 and E3.1.25.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: David M. White

David M. White

Administrative Judge

Member, Appeal Board

1. Department Counsel did not appeal the Judge's findings for Applicant under Guideline E. Although not specifically addressed, the appeal also alleges no errors with respect to the Judge's findings for Applicant concerning the seven out of nine debts which Applicant proved were improperly listed on his credit report. (SOR ¶¶ 2.a. through 2.g.).

2. ISCR Case No. 02-09389 at 4 (App. Bd. Dec. 29, 2004). *See* ISCR Case No. 02-32006 at 5 (App. Bd. Oct. 28, 2004); ISCR Case No. 02-30864 at 4 (App. Bd. Oct. 26, 2005); ISCR Case No. 03-11448 at 3-4 (App. Bd. Aug. 10, 2004).