KEYWORD: Guideline B

DIGEST: In Foreign Influence cases, the nature of the foreign government involved, the presence of terrorist activity, and the intelligence gathering history of that government are important considerations that provide context for the other record evidence and must be brought to bear on the Judge's ultimate conclusions in the case. The country's human rights record is also an important consideration. There is a rational connection between an applicant's family ties in a hostile country and the risk that the applicant might fail to protect and safeguard classified information. Whether or not actively hostile actions, such as military conflict, have broken out or are imminent, any country whose policies consistently threaten U.S. national security may be viewed as hostile for purpose of DOHA adjudications. The Supreme Court has explicitly cited family members in a hostile country as a reason to deny an applicant a security clearance. Accordingly, we have long held that such applicants have a "very heavy burden" of persuasion to show that connections in a hostile country do not pose a threat to U.S. security. The Decision is Reversed.

CASE NO: 19-00831.a1

DATE: 07/29/2020

DATE: July 29, 2020

In Re:	)	
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	)	
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Kelly M. Folks, Esq., Department Counsel

FOR APPLICANT
Leon J. Schachter, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 17, 2019, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 29, 2020, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Marc Curry granted Applicant's request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge erred in his application of the mitigating conditions and whether he properly applied the whole-person concept, resulting in a decision that was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse.

The Judge's Findings of Fact

Applicant was born and raised in the Soviet Union, where he received his college and graduate school education. He came to the U.S. about twenty years ago and was naturalized a U.S. citizen about six years later. Applicant's wife was born in the Soviet Union but came to the U.S. in the mid-1990s to live with her father, also a Soviet emigre. Applicant's wife attended college in this country. She and Applicant married about twenty years ago.

Applicant and his wife have two minor children. Though both were born in the U.S., the older child has dual citizenship acquired to facilitate travel to Russia along with Applicant and his spouse.

Applicant's mother is a citizen and resident of Russia. Retired, she receives a pension of about $1,000 a month. Though she has held resident alien status with the U.S., she stopped traveling to this country in about 2015 due to health concerns. Applicant communicates with his mother about once a week.

Applicant has a half-sibling who is a citizen and resident of Russia. The sibling owns a company in Russia. In the late 2000s, Applicant's sibling moved to the U.S. on an investment visa. Applicant and the sibling purchased two gas stations in hopes of generating income. The sibling decided not to remain in the U.S., however, due to a delay in securing approval of a "green card." The sibling wired Applicant "hundreds of thousands of dollars" during their business relationship. Applicant's contact with the sibling has been deteriorating over time. He last saw the sibling on 2019 while attending his father's funeral. Applicant communicates with the sibling generally through text messages, though they talk on the phone two or three times a year.

Applicant's father-in-law was granted political asylum in the U.S. due to Soviet religious

persecution. Applicant's mother-in-law came to the U.S. a few years after her husband and was naturalized a few years ago. Applicant has several acquaintances in Russia with whom he communicates in frequently. All of Applicant's close friends live in the U.S.

Applicant's home in the U.S. is valued at about $430,000 and he has cash savings of about $40,000. He is active in his community, coaching soccer and serving on the board of directors of his homeowner's association. Applicant enjoys an outstanding reputation for the quality of his work performance. One witness stated that Applicant "puts our nation above everything else." Decision at 4.

Russia poses a significant cyber-espionage threat against the U.S. It's interference with the U.S. presidential election in 2016 is the most recent incident of its longstanding desire to undermine the U.S.-led liberal order. This was a "significant escalation of past attempts to influence U.S. elections." Russia has an "abysmal human rights record," which includes extrajudicial killings, arbitrary arrest, torture, and suppression of the media. Decision at 4-5.

The Judge's Analysis

The Judge concluded that Applicant's relationship with his mother and sibling satisfy the criteria of disqualifying condition 7(a):

> [C]ontact, regardless of method, with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion. Directive, Encl. 2, App. A ¶ 7(a).

In drawing this conclusion, the Judge cited to Official Notice documents to the effect that Russia seeks to expand its influence worldwide through any means necessary, including espionage, cyberattacks, and interference in foreign elections. He stated that as "a repressive, autocratic country that conducts more espionage against the United States than nearly every country in the world, it is axiomatic that Applicant's relationship with his Russian family members poses a heightened risk of foreign exploitation, [etc]." Decision at 6.

The Judge also concluded, however, that Applicant had established the criteria of mitigating condition 8(b):

> [T]here is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, or allegiance to the group, government or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest. Directive, Encl. 2, App. A ¶ 8(b).

He stated that the heightened risk inherent in Applicant's foreign relatives is mitigated by the "deep, longstanding ties Applicant has cultivated in the United States since immigrating 20 years ago, his

cultural integration into his community, as exemplified by his soccer coaching and service on the homeowner's association, and his many friends, financial ties, and the professional goodwill that he has earned during his career. Decision at 6.

Discussion

There is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied,* 499 U.S. 905 (1991). The applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate admitted or proven facts. The applicant has the burden of persuasion as to obtaining a favorable decision. Directive ¶ E3.1.15. The standard applicable in security clearance decisions "is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

In deciding whether the Judge's rulings or conclusions are erroneous, we will review the 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. 14-02563 at 3-4 (App. Bd. Aug. 28, 2015).

In Foreign Influence cases, the nature of the foreign government involved, the presence of terrorist activity, and the intelligence gathering history of that government are important considerations that provide context for the other record evidence and must be brought to bear on the Judge's ultimate conclusions in the case. The country's human rights record is also an important consideration. *See*, *e.g.*, ISCR Case No. 17-04208 at 4 (App. Bd. Aug. 7, 2019); ISCR Case No. 15-00528 at 3 (App. Bd. Mar. 13, 2017). There is a rational connection between an applicant's family ties in a hostile country and the risk that the applicant might fail to protect and safeguard classified information. Whether or not actively hostile actions, such as military conflict, have broken out or are imminent, any country whose policies consistently threaten U.S. national security may be viewed as hostile for purpose of DOHA adjudications. *See, e.g.*, ISCR Case No. 17-04208 at 5. The Supreme Court has explicitly cited family members in a hostile country as a reason to deny an applicant a security clearance. *Egan*, supra, at 529 . Accordingly, we have long held that such applicants have a "very heavy burden" of persuasion to show that connections in a hostile country do not pose a threat to U.S. security. *See, e.g.,* ISCR Case No. 17-04208 at 5; ISCR Case No. 09-08099 at 2 (App. Bd. Sep. 14, 2012); and ISCR Case No. 10-09986 at 3 (App. Bd. Dec. 15, 2011).

Department Counsel argues that the Judge's favorable conclusions run contrary to the greater weight of the record evidence. We find Department Counsel's arguments to be persuasive. We note the following, drawn from the Judge's findings and/or from the record evidence.

1. Russia is a major practitioner of cyber-espionage against the U.S. It seeks to exert

influence on U.S. elections, for example, in an effort to undermine U.S. strategic goals. Decision at 4.

2. Terrorist groups plot attacks within Russia and may bring such plots to fruition at any moment. U.S. Department of State Travel Advisory, Included in Hearing Exhibit (HE) I.

3. Telephone and electronic communications are subject to surveillance at any time without notice. The Russian System for Operational-Investigative Activities permits authorities to monitor and record all data that traverses Russia's networks. Crime and Safety Report, Included in HE I.

4. Applicant's mother and sibling are citizens and residents of Russia. Decision at 2-3.

5. Applicant's relationship with these two relatives is not casual. He speaks with his mother weekly. Moreover, he testified that, though he speaks with his sibling only once or twice a year, he communicates with this relative more frequently by text messaging. Applicant and his sibling planned to go into business together in the U.S. Though this project fell through, the sibling gave Applicant several thousand dollars in furtherance of their business plans. Decision at 3-4; Tr. at 49.

6. Applicant's mother receives a pension through the Russian government. Tr. at 66-67.

Although the Judge properly concluded that Applicant's circumstances pose a heightened risk of coercion, his mitigation analysis failed to explain how things such as Applicant's excellent job performance, his coaching activities, and his service on his HOA meet his very heavy burden of persuasion. Tellingly, and as Department Counsel notes, the Judge did not explicitly mention the this burden, which significantly impairs his overall favorable decision.

A Guideline B adjudication is not a judgment on an applicant's character or loyalty to the U.S. Rather, it is a determination as to whether an applicant's circumstances foreseeably pose a risk of compromise. Of course, no one's future conduct can be predicted with certitude. Even a person of the highest character can experience circumstances under which he or she could be tempted to place the well-being of foreign relatives over the interests of the U.S. *See, e.g.*, ISCR Case No. 17-04208 at 5. The Judge applied mitigating conditions 8(b), which was erroneously cited as 20(b), and 8(c) ("contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation;") which was erroneously cited as 8(d). The Judge's application of 8(c) is simply not consonant with the fact that Applicant's Russian contacts are family, including three members of his immediate family. Simply put they are not casual contacts. The Judge's conclusions under 8(b) are not sustainable given the circumstances in Russia, that country's approach to the U.S. and American interests, and the nature of his family contacts with Russians , including persons residing in Russia. DOHA can only draw conclusions from the available evidence, mindful of the Supreme Court's observation that security clearance

adjudications are "an inexact science at best." *Egan, supra*, at 529.

Accordingly, in light of record evidence of Russia's history of espionage against the U.S., its deliberate and significant intrusions into U.S. elections, and its monitoring of electronic and telephonic communications, it is foreseeable that Applicant's ongoing relationship with his relatives could be means through which he comes to the attention of Russian authorities charged with uncovering U.S. classified or protected information and subjected to the kind of pressure or coercion that a clearance adjudication seeks to avoid. Moreover, it is not reasonable to conclude that Applicant's character evidence and community involvement provide a clear insight into how he might react under such a circumstance.

We note the argument in Applicant's reply brief to the effect that the "heightened risk" standard is vague to the point of unconstitutionality. He made that same argument in the hearing, where he urged a similar argument about the *Egan* standard. Tr. at 6 *et seq*. It is axiomatic that DOHA has no jurisdiction to rule on constitutional issues or on the wisdom of the provisions of the Directive. *See, e.g.,* ISCR Case No. 08-05344 at 3 (App. Bd. Feb. 3, 2010). We have held that "heightened risk" is not a high standard for the Government to meet, defining it as a risk "greater than the normal risk inherent in having a family member living in a foreign country." ISCR Case No. 17-03026 at 5 (App. Bd. Jan. 16, 2019). Insofar as Applicant has not cross appealed, however, the question of whether he received the due process afforded by the Directive is not before us.

We conclude that, given the risks inherent in Applicant's foreign connections, his evidence in mitigation is not sufficient to meet the very heavy burden of persuasion, viewed in light of the mitigating conditions and the whole-person concept. The Judge's decision fails to consider important aspects of the case and runs contrary to the weight of the record evidence.

Order

The Decision is **REVERSED**.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board