

KEYWORD: Guideline B

DIGEST: Department Counsel argues that the conditions in Afghanistan are hostile to U.S. national security interests and, therefore, Applicant should have a “very heavy burden” placed on him to mitigate the resulting foreign influence security concerns. The record evidence does not describe Afghanistan as a hostile country. Department Counsel cites no prior Appeal Board decision in which we concluded Afghanistan was a hostile country. Her arguments for application of the “very heavy burden” mitigation standard are based on conditions in that country – such as terrorism, unrest, and instability – as opposed to any actions taken by the Afghan Government. Department Counsel has failed show that the Afghan Government’s interests are adverse to U.S. interests or that it has established policies or taken actions that threaten U.S. national security. She has not cited any evidence showing that Afghanistan is involved in any form of espionage against the United States. To the contrary, Department Counsel notes in her appeal brief that Afghanistan has had a democratic government since 2004. Favorable decision is affirmed.

CASE NO: 19-01689.a1

DATE: 06/08/2020

DATE: June 8, 2020

In Re: _____

Applicant for Security Clearance

ISCR Case No. 19-01689

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Andrea M. Corrales, Esq., Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On August 29, 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 decision on the written record. On February 26, 2020, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge John Bayard Glendon 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 a mitigating condition and in his whole-person analysis. Consistent with the following discussion, we affirm the Judge’s decision.

The Judge’s Findings of Fact

Applicant, who is in his late 30s, was born in Afghanistan. He graduated from high school in Pakistan after his family relocated there as refugees. About 11 years ago, he met a woman online who was born in Afghanistan and held U.S. citizenship. They married a year later in Pakistan. His wife had three adult children who held dual U.S. and Afghan citizenship. One child lived in Afghanistan and the other two in the United States. After his marriage, Applicant returned to Afghanistan and applied for a U.S. visa as the spouse of a citizen. He entered the U.S. in late 2013. In 2014, his attempt to enlist in the U.S. military was unsuccessful due to his failure of the vocational aptitude test. He and his wife separated in early 2017. He became a U.S. citizen in early 2018. He and his wife divorced later that year. He began his current employment in 2018.

Applicant’s mother and three of his siblings are citizens and residents of Afghanistan. Those siblings are married and have children. His father is deceased. He has weekly telephone contact with his mother and one sibling and monthly or quarterly telephone contact with the other two siblings. He has provided his mother about \$200 per month as support. In 2016 and 2018, he visited his family in Afghanistan. He possesses U.S. and Afghan passports. In a counterintelligence screening interview, he indicated that he did not intend to renounce his Afghan citizenship so that he could travel there without the need for applying for a visa. Applicant also has a friend who is in the Afghan military. He has monthly contact with this friend and does not discuss work with him.

“In his June 2018 Interview, Applicant reportedly said that if he worked for the U.S. Government in Afghanistan, he would be concerned about the safety of his mother and one of his three sisters in Afghanistan. He planned to deal with this concern by keeping work there a secret.

He also stated, however, that if his family was ever threatened, he would not betray his country. He further stated that he would never betray the U.S. or Afghanistan.” Decision at 3. In his SOR Response, Applicant stated his answer to a question during a security screening about his allegiance to Afghanistan was misunderstood. He indicated that the security and national interest of the United States are his priority and his allegiance to Afghanistan is just due to it being his country of birth, noting his future belongs in the United States.

A U.S. Air Force captain indicated that Applicant has “the highest level of moral character[,]” is a “very trustworthy American[,]” and put himself at personal risk in physically escorting the remains of deceased coalition forces to a safe area after an attack. Decision at 4. Other U.S. and foreign military personnel commend Applicant for his loyalty, character, and performance of duties. Two U.S. military members co-wrote a memorandum stating, “I trust [Applicant] with my life on every mission; his action in supporting the United States is a testament to his loyalty to our nation.” *Id.*

The Taliban and other extremist groups are active throughout Afghanistan and present a serious challenge to the government. Due to terrorism, crime, civil unrest, and armed conflict, the U.S. State Department advises the security situation in Afghanistan is extremely unstable and the threat to U.S. citizens is critical. This country also experiences widespread disregard for the law and human rights abuses without effective government action to curtail them.

The Judge’s Analysis

Applicant’s family and personal ties establish a heightened risk of foreign exploitation, inducement, etc., and a potential conflict of interest between his obligation to protect classified information and his desire to help foreign individuals. Mitigating Condition 8(b)¹ was established. Applicant has made a significant contribution to U.S. national security in a dangerous war zone. “His actions constitute important evidence that his ties and sense of obligation to the United States are sufficiently strong that he can be expected to resolve any conflict of interest in favor of the U.S.” Decision at 8, citing various Appeal Board decisions for that proposition.

Discussion

There is no presumption of error below, and the appealing party has the burden of raising and demonstrating factual or legal error by the Administrative Judge. *See, e.g.*, ISCR Case No. 00-0339 at 3 (App. Bd. Mar. 22, 2001). In this case, Department Counsel has not challenged any of the Judge’s findings of fact. Instead, her appeal brief contends that the Judge erred in his application of Mitigating Condition 8(b) and in his whole-person assessment.

¹ Directive, Encl. 2, App. A ¶ 8(b) states, “there 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[.]”

The Judge concluded that Applicant’s contacts in Afghanistan present a heightened risk and analyzed the case accordingly. However, Department Counsel argues that the conditions in Afghanistan are hostile to U.S. national security interests and, therefore, Applicant should have a “very heavy burden” placed on him to mitigate the resulting foreign influence security concerns. *See* ISCR Case No. 17-04208 at 5 (App. Bd. Aug. 7, 2019) as an example of the application of the “very heavy burden” mitigation standard in a case involving a hostile country. The record evidence does not describe Afghanistan as a hostile country. Department Counsel cites no prior Appeal Board decision in which we concluded Afghanistan was a hostile country. Her arguments for application of the “very heavy burden” mitigation standard are based on conditions in that country – such as terrorism, unrest, and instability – as opposed to any actions taken by the Afghan Government. Department Counsel has failed show that the Afghan Government’s interests are adverse to U.S. interests or that it has established policies or taken actions that threaten U.S. national security. She has not cited any evidence showing that Afghanistan is involved in any form of espionage against the United States. To the contrary, Department Counsel notes in her appeal brief that Afghanistan has had a democratic government since 2004. Appeal Brief at 5. Additionally, the U.S. State Department Country Reports on Terrorism 2018 states that Afghan Government cooperates with the United States in bilateral counterterrorism efforts. Hearing Exhibit I. We conclude the Judge committed no error by not applying the “very heavy burden” mitigation standard in this case.

The remainder of Department Counsel’s arguments amount to a disagreement with the Judge’s weighing of the evidence. She raises concerns about some of Applicant’s purported statements reflected in a report of a military counterintelligence security screening conducted in mid-2018. During that screening, he reportedly stated that he had equal allegiance with Afghanistan and the United States, that he would never betray the U.S. or Afghanistan, that he had concerns about the safety of his family members living in Afghanistan, and that his position supporting U.S. forces in Afghanistan could endanger his family. FORM Item 4 at 2, 8, and 11. Department Counsel argues these statements are evidence of a “divided allegiance” that create foreign influence security concerns.² Quoting from Directive, Encl. 2, App. A ¶ 6. She further argues:

It was only after receiving the SOR that Applicant did an about-face and claimed that one of his expressions of dual allegiance was a misunderstanding. At no point, to

² An individual’s feeling toward a foreign country, of course, can raise Guideline B security concerns. In the past, for example, we have stated:

For purposes of Guideline B, it does not matter whether an applicant is at risk because the applicant: (1) may be influenced through favorable feelings toward the government or regime of a foreign nation; (2) may be influenced through favorable feelings toward the people (including the applicant’s relatives) and culture of a foreign nation; (3) may be influenced through a desire to avoid harm to, or to gain the benefit for, his relatives in a foreign nation; or (4) some combination or variation of such concerns. *See, e.g.* ISCR Case No. 99-0511 (December 19, 2000) at pp. 10-11 (foreign influence issues are not limited to situations involving coercive means of influence; rather, they can include situations where an applicant may be vulnerable to noncoercive means of influence).

ISCR Case No. 99-0601 at 6 (App. Bd. Jan. 30, 2001).

include in his response to the FORM, did Applicant suggest that the second statement also was the result of a misunderstanding. Nevertheless, relying exclusively on Applicant's self-serving response to the SOR, the Administrative Judge perfunctorily found that Applicant's statement that his allegiance to Afghanistan is equal to the U.S. was the 'result of a misunderstanding during [a counterintelligence screening] interview.' In so finding, the Judge failed to explain how he reached this conclusion, nor did he acknowledge and analyze the significance of his lack of ties in the United States. [Appeal Brief at 12.]

These arguments are not persuasive. The Judge essentially addressed these issues. He made findings about Applicant's purported statements during the counterintelligence security screening as well as Applicant's claim in responding to the SOR that the statement alleged in SOR ¶ 1.e³ was a misunderstanding and that "the United States was his priority." Regarding Department Counsel's contention that Applicant made an "about-face" claim in his SOR Response, there no evidence that Applicant was aware of the purported statement in ¶ 1.e until he received the SOR or that he even had the opportunity to review the counterintelligence security screening report after it was prepared until he received the FORM. Further, although Department Counsel mentions a second statement in her argument, only one of Applicant's statements was alleged in the SOR, which is most likely the reason why he only addressed that statement. In the decision, the Judge concluded, "Given Applicant's clarifying explanation in his Answer, the facts surrounding this allegation [SOR ¶ 1.e] do not give rise to a security concern under Guideline B." Decision at 7. On appeal, this conclusion is reviewed to determine whether it was arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Based on our review of the record, we cannot conclude the Judge erred in reaching that conclusion. In this regard, we also note that Department Counsel does not specifically address that, after Applicant's military counterintelligence security screening, he was permitted to begin his current employment with U.S. and coalition forces in Afghanistan in the fall of 2018. FORM Item 4. It is reasonable to infer that the counterintelligence screening authorities would have precluded Applicant from assuming that employment if they concluded any force protection or related security concerns arose from his statements during that screening.

The Judge concluded that the certain SOR allegations established disqualifying conditions and relied solely on Mitigating Condition 8(b) to conclude the resulting security concerns were mitigated. Department Counsel argues that the Judge erred in applying that mitigating condition because he failed to adequately address Applicant's purported dual allegiance (discussed above) and his minimal contacts in the United States. In his analysis of Mitigation Condition 8(b), the Judge focused on Applicant's support of U.S. and coalition forces in Afghanistan, including his conduct in the face of danger. As we have previously stated, credible, independent evidence of conduct under dangerous, high-risk circumstances that significantly contributes to national security is a relevant factor to consider in Guideline B cases. *See, e.g.*, ISCR Case No. 06-25928 at 3-4 (App. Bd. Apr. 9, 2008), citing other Appeal Board decisions supporting that proposition. Such conduct lends

³ SOR ¶ 1.e stated, "During a counterintelligence screening conducted in June 2018, when asked "Is there any country that you have allegiance over the US?" you answered, "Afghanistan is equal in allegiance."

credibility to an applicant's claim that he or she can be relied upon to recognize, resist, and report any attempts at coercion or exploitation. *Id.* Likewise, such conduct could constitute important evidence that an applicant's ties and sense of obligation to the U.S. are sufficiently strong to conclude he or she could be expected to resolve any conflict of interest in favor of the U.S. *Id.* In this case, we find no reason to conclude the Judge erred in his weighing of the evidence pertaining to Mitigating Condition 8(b).

In general, Department Counsel has not rebutted the presumption that the Judge considered all the evidence in the record, nor has she shown the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to the evidence. *See, e.g.,* ISCR Case No. 17-00303 at 3 (App. Bd. Jan. 29, 2018). Department Counsel has not established that the Judge committed any harmful error. The decision is sustainable on the record.

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra'anan
Michael 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