

KEYWORD: Guideline B

DIGEST: The record evidence and statements in the Decision itself illustrate the security concerns arising th Applicant's father's circumstances. Favorable decision reversed.

CASENO: 09-06457.a1

DATE: 05/16/2011

DATE: May 16, 2011

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In Re:)	
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Applicant for Security Clearance)	
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Fahryn Hoffman, Esq., Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 31, 2010, DOHA 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 January 31, 2011, after the hearing, Administrative Judge Mark Harvey 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 pertinent mitigating conditions and whether the Judge’s whole-person analysis was erroneous. Consistent with the following discussion, we reverse the decision of the Judge.

Facts

The Judge made the following pertinent findings of fact: Applicant is an employee of a Government contractor. Born in Afghanistan, he moved to the U.S. as an adolescent. He attended high school and college in the U.S., obtaining a degree in general science. He works as a language instructor.

His wife was born in Afghanistan, becoming a U.S. citizen in the late 1990s. She and Applicant have three children, all born in the U.S. and who live in this country. All of Applicant’s siblings live in the U.S. While in Afghanistan, Applicant’s father held a position with the government. He had previously worked as an academic. He and his family left the country in the early 1980s due to worry about being arrested by the Soviets. Applicant’s father became a U.S. citizen in the late 1980s and Applicant did so in the early 1990s.

Applicant’s father returned in Afghanistan in the early 2000s and served as a high-level government advisor. He was appointed to a high-level position in the Afghan government. He is still serving in that capacity as of the close of the record. Applicant’s father also has business interests in Afghanistan. Applicant visited his father a few years ago, staying with him in his quarters. The quarters are guarded. “Applicant conceded his father’s position increases the risk to Applicant while Applicant is in Afghanistan.” Decision at 4. Applicant’s mother travels to Afghanistan a few months each year to visit Applicant’s father. Applicant frequently communicates with her. He communicates with his father three or four times a year.

Applicant has numerous brothers- and sisters-in-law, most of whom reside in Afghanistan. One lives in a European country and another in an Asian country. Applicant’s spouse communicates with her siblings or her in-laws approximately every month. Applicant has an in-law who is a linguist for the U.S. Government. He also has a sibling who works for a U.S. contractor in Afghanistan. He has an uncle and a cousin who live in that country, and he communicates with them twice a year.

Afghanistan is an Islamic Republic with a democratically elected president. Terrorist forces operate in Afghanistan, including al-Qaida. These organizations target U.S. and Afghan interests

through suicide operations, bombings, assassinations, and hostage taking. As of the close of the record, the risk of terrorist activity is extremely high. The U.S. has committed to assisting Afghanistan in rebuilding. Along with other countries, the U.S. provides resources and expertise to Afghanistan, including humanitarian relief, capacity building, security needs, counter-narcotic programs, and infrastructure projects.

Discussion

Once a concern arises regarding an Applicant's security clearance eligibility, 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). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. In rendering a final decision, an "agency must 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 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 access to classified information 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, 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* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

The Judge concluded that the evidence in Applicant's case raised security concerns under Guideline B. The Judge went on to conclude that Applicant had met his burden of persuasion as to mitigation. He noted Applicant's significant ties to the U.S. and his stated willingness to risk his life for the U.S.

Department Counsel argues that the Judge's decision runs contrary to the weight of the record evidence. She cites to the Judge's findings and to other evidence that undercuts his favorable decision. She pays particular note to:

the past and present foreign governmental positions of Applicant's father, the father's decision to return to Afghanistan and work there indefinitely for the Afghan government in a very senior position, his high-level and long-term contacts in Afghanistan . . . and his . . . [business interests] in Afghanistan. Appeal Brief at 11.

Department Counsel's contention that the evidence does not support the Judge's favorable holding is persuasive. The record evidence and statements in the Decision itself illustrate the security concerns arising from the circumstances surrounding Applicant's father. He is prominent and has been so for many years, even back to the time of the Soviet invasion. He exercises political responsibilities that render him highly visible and has significant business operations in Afghanistan as well. As the Judge himself noted in the Analysis portion of the decision, he "is a probable high-value target of terrorists and the Taliban." Decision at 8. Applicant's case is similar to that of the applicant in an earlier decision, in which the applicant's brother was a prominent official of the Nigerian government. In concluding that the applicant's relationship with his brother posed security concerns, we noted that the brother:

has a high-level position and enjoys a reputation beyond the Nigerian borders. Applicant has testified that he speaks to his brother frequently and serves as a surrogate uncle for [the brother's] children who live in the U.S. Given those facts, it is foreseeable that he could become a means through which parties within or outside of Nigeria could attempt to exert pressure on Applicant. ISCR Case No. 08-10025 at 4 (App. Bd. Nov. 3, 2009).

Of course, no circumstances are identical, but the gravamen of our decision in this earlier case was the real possibility that the brother's prominence would bring him to the attention of those who might exploit the applicant's close relationship with him as a means of coercing the applicant into providing protected U.S. information. In the case before us now, those who might be tempted to use Applicant's father as a means of coercion include terrorist organizations that are hostile to the U.S. and that are engaged in operations designed to defeat our geopolitical goals. As we have previously stated, terrorist activity in a foreign country is an important consideration in Guideline B cases. *See, e.g.*, ISCR Case No. 05-03250 at 4 (App. Bd. Apr. 6, 2007). Moreover, evidence that Applicant's mother spends a significant portion of the year in Afghanistan with her husband, and that Applicant communicates with them frequently, is another reason to conclude that Applicant could be subjected to coercion.

These concerns are compounded by record evidence of Applicant's other relatives in Afghanistan, including numerous in-laws.

[I]n-laws represent a class of persons who are contemplated by the Directive as presenting a potential security risk. As a matter of common sense and human experience, there is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse. ISCR Case No. 03-26176 at 5 (App. Bd. Oct. 14, 2005).

In the case before us now, Applicant's evidence does not rebut the presumption that he has ties of affection for his in-laws or for his other relatives, such as the uncle and cousin with whom he communicates twice a year. This evidence raises the real possibility that Applicant could be faced with a conflict of interest between his ties to his Afghani family members. and the interests of the

U.S.¹ The record, viewed as a whole, does not support the Judge's conclusion that Applicant has demonstrated that he would resolve any such conflict of interest in a manner favorable to the U.S.

We note the Judge's statement, in the analysis portion of the decision, that Applicant and his family members "are potential targets of terrorists and the Taliban." The Judge goes on to say that "Applicant's potential access to classified information is unlikely to add significantly to the risk they already face from lawless elements in Afghanistan." Decision at 11. Even if this is true, however, it fails to address the security concern in this case. That concern is that the existing danger to Applicant's family posed by forces hostile to the U.S. could foreseeably become a basis for coercing Applicant into divulging classified information.

In light of the foregoing, the Judge's decision does not consider an important aspect of the case and runs contrary to the weight of the record evidence. The record as a whole does not support the Judge's favorable decision, either through the mitigating conditions or the whole-person factors. Viewed in light of the *Egan* standard, the Judge's decision is not sustainable.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge

¹Directive, Enclosure 2 ¶ 8(b): "there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person . . . is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest[.]"

Member, Appeal Board