

KEYWORD: Guideline B

DIGEST: The Judge balanced the favorable evidence against the nature of the Sudanese government and its relationship with the US as well as the number of close relatives Applicant has in the Sudan. Adverse decision affirmed.

CASENO: 03-11420.a2

DATE: 06/13/2007

DATE: June 13, 2007

In Re:)	
)	
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SSN: -----)	ISCR Case No. 03-11420
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jennifer Goldstein, Esq., Department Counsel
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Phillip D. Cave, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 14, 2005, after the hearing, Administrative Judge Michael J. Breslin denied Applicant's request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30. On appeal, this Board remanded the case to the Judge to resolve an

ambiguity caused by a handwritten change to the hearing transcript. ISCR Case No. 03-11420 (App. Bd. Oct. 5, 2005). On August 31, 2006, the Judge issued a second decision, reflecting compliance with this Board's remand instructions. Applicant again submitted a timely appeal pursuant to the Directive.

Applicant raises the following issues on appeal: whether the Judge's treatment of the Guideline B mitigating conditions is erroneous; whether the Judge's unfavorable security clearance decision is arbitrary, capricious, or contrary to law; and whether Appeal Board interpretations of Guideline B adjudicative factors are erroneous and, therefore, deny Applicant due process of law. Finding no error, we affirm.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant, **REDACTED** at the time of the hearing, was born in Sudan, leaving there at to attend college . He completed his undergraduate degree . In he came to the U.S., From that date until he was a he served as an . In this position he .

Applicant became a U.S. citizen and for years taught in U.S. schools. Subsequently he became a .

Applicant married and divorced in . Applicant has children from his first marriage. His a naturalized citizen of the U.S. and native born citizen of the U.S.

Applicant married again, in . His wife was born in Sudan and lives in the U.S. in permanent resident status. She is applying for U.S. citizenship. Applicant's parents-in-law are citizens and residents of Sudan. Both are retired and neither worked for the government. Applicant's wife has siblings who are citizens and residents of Sudan, and contacts them about times a year. She has children from a previous relationship, who live in Sudan.

Applicant himself has siblings. His are citizens and residents of Sudan. He contacts three or four times a year; the other do not have phones. His are also citizens and residents of Sudan, none of whom apparently work for the government.

Sudan has been a military dictatorship since 1989. The U.S. has determined that Sudan sponsors terrorism. It has an extremely poor record on human rights.

B. Discussion

The Appeal Board's review of the Judge's findings of fact is limited to determining if they are supported by substantial evidence—such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record.” Directive ¶ E3.1.32.1. “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21 (1966). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1. Applicant does not challenge the Judge's findings of fact. Therefore, they are not at issue in this appeal.

Whether the Record Supports the Judge's Ultimate Conclusions

A 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 choices 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 general standard is that a clearance may be granted only when ‘clearly consistent with the interests of national security.’” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Appeal Board may reverse the 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 and E3.1.33.3.

There is a presumption against granting a clearance. *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied* 499 U.S. 905 (1991). Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish any appropriate mitigating conditions. See Directive ¶ E3.1.15. “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 ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

In analyzing the case, the Judge noted such favorable information as the fact that Applicant is a U.S. citizen by choice and has lived in this country for most of his adult life. All his assets are in this country and he has held an interim clearance. However, the Judge balanced those matters against the number of Applicant's close family members who reside in Sudan, the nature of the Sudanese government and its relationship with the U.S., and

, finally concluding that he is “vulnerable to pressure or duress from a foreign power.” We conclude that the Judge has articulated a rational basis for concluding that Applicant had not met his burden of persuasion as to the application of mitigating conditions. Furthermore, we conclude that his whole person analysis complies with the requirements of Directive ¶ E2.2.1, in that the Judge considered the totality of Applicant's conduct and circumstances in reaching his decision. See ISCR Case No. 04-09959 at 6 (App. Bd. May 19, 2006).

Finally, we note that Applicant argued that Board precedent denied him due process of law. In making this argument, he incorporated the Judge's own relatively lengthy survey of Board precedent, which the Judge included in his decision. Applicant also cites other cases by Hearing

Office Judges which he believes support the granting of a clearance to him. We have considered Applicant's argument in light of the record as a whole. We find no basis to conclude that he was denied the due process provided him by the Directive and by Executive Order 10865. Decisions of Hearing Office Judges do not serve as mandatory authority for Board decisions. *See* ISCR Case No. 05-03143 at 3 (App. Bd. Dec. 20, 2006).

Order

The Judge's decision denying Applicant a clearance is AFFIRMED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board