

KEYWORD: Guideline B

DIGEST: The revised adjudicative guideline B specifically cites the country involved as a factor to be considered. The Judge's decision failed to take into consideration in a meaningful way record evidence regarding the nature of the PRC. The Judge's conclusion regarding Applicant's citizenship and its impact on his vulnerability is unsupported by the record. Applicant's testimony regarding his relationship with his parents, had to be considered in light of other record evidence. The Judge's conclusion did not do that. Favorable decision reversed.

CASENO: 07-00029.a1

DATE: 12/07/2007

DATE: December 7, 2007

In Re:)	
)	
-----)	ISCR Case No. 07-00029
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 25, 2007, DOHA issued a statement of reasons 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 June 30, 2007, after the hearing, Administrative Judge Jacqueline T. Williams 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 the following issues on appeal: whether the Judge’s application of the Foreign Influence Mitigating Conditions is unsupported by the record evidence and is arbitrary, capricious, or contrary to law; and whether the Judge’s whole-person analysis is arbitrary, capricious, or contrary to law because the whole-person considerations relied upon are unsupported by the record evidence.

Whether the Record Evidence Supports the Judge’s Factual Findings

A. The Judge made the following relevant findings of fact.:

Applicant was born in the People’s Republic of China (PRC) and came to the United States for further graduate-level education in 1986. He became an American citizen in 2002. He is single and has never married. His parents and two brothers are citizens and residents of the PRC. His parents are retired textile engineers. Between 2002 and 2005, Applicant sent his parents \$17,500. Applicant speaks to his mother five to six times a year. One brother is a high school principal and teacher, and the other is an electrical engineer at a broadcasting company. Applicant speaks to one brother four or five times a year, and the other about twice a year. Applicant traveled to the PRC in 1995, 2003, and 2006. The 2006 trip was for his mother’s 70th birthday. Applicant has had casual contact with Chinese Embassy employees and professors visiting the United States from the PRC.

“The PRC is a repressive, totalitarian government with foreign policy goals antithetical to the U.S. . . . It has an active, effective intelligence service that targets U.S. intelligence and economic information, and operates against its citizens in the U.S. However, under PRC law, citizens who become naturalized citizens of other countries lose their PRC citizenship.” Decision at 5.

B. Discussion

The appeal involves the Judge’s conclusions.

Whether the Record Supports the 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 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. Our scope of review under this standard is narrow, and we may not substitute our judgment for that of the Judge. We review matters of law *de novo*.

Department Counsel contends that the Judge's application of the Foreign Influence Mitigating Conditions is unsupported by the record evidence and is arbitrary, capricious, or contrary to law. Department Counsel's argument has merit.

It is undisputed that Applicant's father, mother, and two brothers are citizens and residents of the PRC. Thus, a *prima facie* case under Guideline B had been established, and the burden had shifted to Applicant to mitigate the security concerns raised.

The validity of Appeal Board precedent issued under earlier editions of the Adjudicative Guidelines is an issue in this case. The Board has previously held “. . . a Judge cannot rely on language from an earlier version of the Directive to justify the Judge's decision and that an applicant's security eligibility must be adjudicated under current DoD policies and standards, not past ones. Similarly, the precedential value of Board decisions is affected to the extent those decisions involve the interpretation of a provision of the Directive that is later revised or changed. Statements made by the Board in earlier decisions that are predicated on then-existing language in the Directive cannot be simply assumed—by a Judge or a party—to be applicable in later cases after the pertinent provision(s) of the Directive have been revised or changed.” See ISCR Case No. 02-17369 at 3-4 (App. Bd. May 23, 2006); and ISCR Case No. 02-24254 at 7-8 (App. Bd. Jun. 29, 2004) (footnotes omitted). Of course, some precedent remains completely valid in the face of changes to the guidelines, because it is not dependent on the language of any specific guideline. Other precedent remains valid where the applicable language of the guideline is unchanged or the changes are not of sufficient magnitude to vitiate or overrule the substance of the precedent. However, Board decisions cannot be relied on or followed to the extent they involve precedent predicated on law or DoD policy that changed after the issuance of those decisions. Quasi-judicial adjudications must be made within the bounds of applicable law and agency policy, not without regard to them. See, e.g., *Croplife America v. Environmental Protection Agency*, 329 F.3d 876, 882 (D.C. Cir. 2003) (administrative law judges cannot ignore agency policy in making rulings); *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989)(administrative law judge is subordinate to head of agency or department in matters of policy); *Mullen v. Bowen*, 800 F.2d 535, 540 n. 5 (6th Cir. 1986) (decisional independence does not relieve administrative law judge of the obligation to apply agency policy). See ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003)(security clearance decisions must be based on current DoD policy and standards). Accordingly, no Board decision should be construed or interpreted without regard to the law and DoD policy applicable at the time the Board decision was issued.

Here, Guideline B is at issue. Guideline B was subject to extensive revisions in the Revised Adjudicative Guidelines. However, those prior Board decisions which are consistent with the revised guidelines are still applicable. For example, the new guidelines specify in paragraphs 6 and 8(a) that the country matters. It follows that prior Board precedent which states that when the foreign country involved is hostile to the United States, an applicant bears a “very heavy burden” to show that neither he nor his family members in that country are subject to influence by that country is still valid under the new guidelines. See, e.g., ISCR Case No. 01-26893 at 8 (App. Bd. Oct. 16, 2002). Here, the Judge concluded that the case was mitigated under Foreign Influence Mitigating Conditions 8(a) and (b); without citing it, she also applied Mitigating Condition 8(c). The Judge's conclusions as to mitigation are unsupported by the record evidence.

The Revised Adjudicative Guidelines Mitigating Condition 8(a) specifically lists the country involved as a factor to be considered as it relates to mitigation. Here, the record evidence includes information on the nature of the PRC, but the Judge failed to take that information into consideration in a meaningful way in her decision. Although a Judge is not required to discuss every piece of evidence, he or she cannot ignore, disregard, or fail to discuss significant record evidence that a reasonable person could expect to be taken into account. *See, e.g.*, ISCR Case No. 02-19479 at 6 (App. Bd. Jun. 22, 2004). In the past, the Board has found harmful error when a Judge has failed to discuss the nature of the foreign government involved in a Guideline B case when that government is hostile to the United States and the hostility is a critical factor in the analysis of the case. *See, e.g.*, ISCR Case No. 02-00318 at 7 (App. Bd. Feb. 25, 2004). Such precedent is still valid under the new guidelines' specific references to the country.

As Department Counsel points out, the Judge based her decision in part on her conclusion that Applicant is no longer a target for espionage by the PRC because he has lost his Chinese citizenship and is now an American citizen. That conclusion is unsupported by the record evidence. While the Judge mentioned the PRC's use of Chinese citizens within the United States as espionage agents, record evidence indicates that its use of espionage agents in the United States is not limited to Chinese citizens. (*See Report of the Select Committee on U.S. National Committee and Military/Commercial Concerns with the People's Republic of China at 21.*) Furthermore, in light of record evidence concerning Chinese espionage, Applicant's contact with visiting Chinese scientists and professors is a significant security concern to be taken into account.

Applicant testified that he does not have a close relationship with his family members in the PRC. The Judge based her conclusion of mitigation in part on that testimony. However, the record contains testimony and other evidence of Applicant's close relationship with his family. There is evidence that: Applicant sent \$17,500 to his parents between 2002 and 2005; Applicant traveled to the PRC and visited his family on three occasions; and one of those trips was for his mother's 70th birthday celebration. There is evidence that Applicant calls his mother about six or seven times a year, and his older brother four or five times a year.¹ Given the record evidence regarding Applicant's close relationship with his family and the PRC's human rights record, the Judge's statement that "[t]he fact that his parents are citizens and residents of PRC does not constitute an unacceptable security risk" is arbitrary and capricious.

In her decision, the Judge relied on Applicant's testimony that his ties are with the United States and that he would not compromise U.S. security interests. That testimony was record evidence for the Judge to consider, but it is of limited significance. An applicant's stated intention of what he might do in the future in a hypothetical situation is merely a statement of intention that is entitled to limited weight, unless there is record evidence that the applicant has acted in a similar manner in the past in comparable circumstances. *See, e.g.*, ISCR Case No. 03-09053 at 5 (App. Bd. Mar. 29, 2006).

Department Counsel also contends that the Judge's whole-person analysis is arbitrary, capricious, or contrary to law because the whole-person considerations relied upon are unsupported by the record evidence. Department Counsel's contention has merit. The Judge's whole-person analysis is largely a restatement of her discussion under mitigation. As discussed above, the Judge's

¹Transcript at 34-35.

conclusions regarding mitigation are not supported by the record evidence. To the extent that there is some evidence indicative of mitigation, the Judge does not explain why it outweighs the significant security concerns raised in the case. *See, e.g.*, 04-12435 at 4 (App. Bd. Apr. 9, 2007). Moreover, the Judge's decision does not sufficiently address the nature of the Chinese government.

In light of the foregoing, the Judge's whole-person analysis is unsustainable in that it fails to consider an important aspect of the case, fails to articulate a satisfactory explanation for its conclusions, and offers an explanation for the decision that runs contrary to the record evidence. *See, e.g.*, ISCR Case No. 04-02511 at 6 (App. Bd. Mar. 20, 2007) (*citing Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Order

The Judge's favorable security clearance decision is REVERSED.

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

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board