

KEYWORD: Guideline C; Guideline B

DIGEST: Once the facts alleged in the SOR had been established, in this case by Applicant's admissions, the burden shifted to Applicant to rebut, explain, extenuate or mitigate those facts, and Applicant has the ultimate burden of persuasion. The implementation of the current Adjudicative Guidelines superceded the August 16, 2000 Memorandum of the Assistant Secretary of Defense for Command Control Communications and Intelligence. Any error in this regard is harmless however, in light of the remainder of the Judge's analysis. Adverse decision affirmed.

CASENO: 07-06364.a1

DATE: 05/23/2008

DATE: May 23, 2008

In Re:

Applicant for Security Clearance

ISCR Case No. 07-06364

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 9, 2007, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline C (Foreign Preference), Guideline B (Foreign Influence), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On January 31, 2008, after the hearing, Administrative Judge Martin H. Mogul denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: whether the Government met its burden of proof; and whether the Judge’s decision is arbitrary, capricious, or contrary to law.

The Judge made the following relevant findings of fact: Applicant was born in Egypt and moved to the United States in 1984 to pursue higher education. He is married to a Canadian citizen, and he became a naturalized United States citizen in 1999. Applicant admitted certain SOR factual allegations (which the Judge incorporated in his decision as findings of fact). These include the fact that Applicant exercises dual citizenship with Egypt and the United States and was issued an Egyptian passport in June 1999 (which was renewed in 2005) after he received a United States passport in May 1999. Applicant used the Egyptian passport to travel to Egypt in June 1999 and November 2005. Applicant maintains his Egyptian citizenship and passport because he owns a condominium in Egypt worth \$170,000 and maintains a bank account there with a balance of approximately \$100,000. Applicant’s mother and sister are citizens and residents of Egypt.

In his Conclusions section, regarding Guideline C, the Judge stated that while Applicant did cut a small piece off of his Egyptian passport, he could not be considered to have ultimately revoked, destroyed, or invalidated his foreign passport. Since Applicant was unwilling to renounce his Egyptian citizenship, and he never notified the Egyptian authorities to revoke his passport, there is nothing to prevent him from immediately reapplying and getting a new Egyptian passport. The Judge further concluded that no mitigating condition under Guideline C applied to the case and the disqualifying evidence substantially outweighs the mitigating evidence. Regarding Guideline B, the Judge concluded that Applicant was particularly close to his mother, who lives in Egypt, and also concluded that when compared to his limited resources in the United States, Applicant’s Egyptian holdings, which include a condominium valued at \$170,000 and a bank account worth \$100,000, must be considered substantial and could subject Applicant to heightened risk of foreign influence or exploitation, resulting in a formal finding against Applicant under Guideline B.

In his appeal brief, Applicant repeats some of his testimony from the hearing.¹ He also presents new facts which are not part of the record below. The Board cannot consider new evidence. Directive ¶ E3.1.29.

¹The Judge found in Applicant’s favor as to Guideline E. That finding is not at issue here.

Applicant maintains that the government did not meet its burden of proof in his case. Although Applicant admitted factual allegations against him in the SOR,² he argues that the government was required to prove the disqualifying conditions related to those factual allegations and that its failure to do so constitutes error. Applicant's argument is without merit. Under the Directive, once the facts alleged in the SOR had been established, in this case by Applicant's admissions, the burden shifted to Applicant to rebut, explain, extenuate, or mitigate those facts; and Applicant had the ultimate burden of persuasion as to obtaining a favorable security clearance decision. Directive ¶ E3.1.15.

Applicant disagrees with the Judge's conclusions with regard to the Guideline C and Guideline B allegations against him. Among the conclusions that Applicant points to under Guideline C are those concerning the security significance of Applicant's possession and use of an Egyptian passport and under Guideline B those concerning the presence of his mother and sister in Egypt.

With regard to Guideline C, Applicant argues that he should be able to hold and use an Egyptian passport purely for travel convenience as long as he does not otherwise demonstrate a preference for Egypt over the United States.³ Moreover, Applicant argues that he defaced the passport and sent copies of it to Department Counsel shortly after the hearing (during the time that the Judge left the record open for further submissions).

In deciding that Applicant's continued possession of his Egyptian passport was of security significance and was unmitigated, the Judge noted that Applicant never notified the Egyptian authorities to revoke his passport. To the extent the Judge concluded that Applicant was *required* to notify Egyptian authorities and get them to revoke his passport in order to mitigate the government's concerns, such a conclusion was error. The implementation of the current Adjudicative Guidelines on September 1, 2006 superseded the August 16, 2000 Memorandum of the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence and its requirement that Applicants formally surrender a foreign passport to the issuing authority. However, after a review of the totality of the Judge's analysis under Guideline C, the Board concludes that any error regarding the requirement of passport surrender is rendered harmless by the fact that other portions of the Judge's analysis, which emphasize Applicant's unwillingness to renounce his Egyptian citizenship and his failure to ultimately revoke, destroy, or invalidate his Egyptian passport, are sufficient to sustain the Judge's ultimate adverse clearance decision under Guideline C.

²Applicant admitted all but one of the SOR allegations under Guideline C and all of the allegations under Guideline B.

³Applicant cites two ICSR decisions which he contends support his position. One, ISCR Case No. 99-0062 (Sep. 15, 1999), is a Hearing Office decision and therefore would not be binding precedent for the Board. The other, 98-0476 (Dec. 14, 1999), is a Board decision which discusses Foreign Preference, but it denies the applicant a clearance.

Applicant also argues that his dual citizenship and the presence of his mother and sister in Egypt should not be considered to be of security concern. He notes the cooperative relationship between Egypt and the United States and maintains that Egypt has no need to gather information due to the nature of that relationship. However, he states that renunciation of his Egyptian citizenship would require him to file a court action in Egypt which would eventually reach the office of the President of Egypt. Applicant states that action would be “risky” for him because “[i]t exposes the applicant to the Egyptian government and identifies him as someone with foreign allegiance and possibly information.” He also states that it would also put his family in Egypt in jeopardy. The record supports the Judge’s conclusions on those matters, particularly in light of Applicant’s comments. *Cf.* ISCR Case No. 04-02511 at 3-4 (App. Bd. Mar. 20, 2007).

After reviewing the record as a whole, the Board concludes that the Judge examined the evidence and articulated a satisfactory explanation for his 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, 158 (1962)). Therefore the Judge’s ultimate unfavorable security clearance decision under Guideline C and Guideline B is sustainable.

Order

The Judge’s decision denying Applicant a security clearance decision is AFFIRMED

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, 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