KEYWORD: Guideline B

DIGEST: The government is not required to prove that a country specifically targets U.S. citizens in order raise Guideline B security concerns. The Judge's favorable decision is not sustainable in light of the Judge's findings and/or record evidence including findings or evidence that: Applicant's wife is not a U.S. citizen, Applicant in-laws have had employment with the Taiwanese military and still live in Taiwan, Applicant used a Chinese name when conducting business in China and Taiwan. Favorable decision reversed.

CASENO: 08-09211.a1

DATE: 01/21/2010

DATE: January 21, 2010

In Re:	)	
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	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel
Caroline H. Jeffreys, Esq., Department Counsel

FOR APPLICANT
Gary Rigney, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 23, 2009, 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 September 25, 2009, after the hearing, Administrative Judge Arthur E. Marshall, Jr. granted Applicant's request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raises the following issues on appeal: whether the Judge erred by concluding that the government failed to establish a heightened risk under Guideline B and whether the Judge's application of the Foreign Influence Mitigating Conditions and his whole-person analysis are unsupported by the record evidence and are therefore arbitrary and capricious. Finding error, we reverse the Judge's favorable security clearance decision.

A. Facts

The Judge made the following relevant findings of fact:

While still in college, Applicant obtained part-time work with a new computer technology company. Upon graduation, Applicant became a full-time employee of the company. In order to increase the company's sales, Applicant moved to Taiwan. Applicant also made business trips to mainland China. While living in Taiwan, Applicant met his future wife. While working and living in Taiwan, Applicant adopted a Chinese name. Applicant decided to sever his ties to his employer. He returned to the United States and changed jobs. His future wife accompanied him, and they married soon thereafter. Applicant and his wife now have one child. They own a home and have developed ties in their community. Applicant's wife has received a permanent green card and is preparing to apply for American citizenship. Applicant's wife has relatives in Taiwan and maintains contact with her parents, brother, and paternal grandfather. Applicant's father-in-law served in the Taiwanese military as an air traffic controller, but is now retired and receives no government retirement benefits. Applicant's mother-in-law has worked as a switchboard operator at a Taiwanese military base for almost 30 years, but does little work now and will retire soon. Applicant's father-in-law has visited Applicant and his wife twice, and Applicant and his wife have made three trips to Taiwan to visit her family. Applicant is well regarded at work.

B. Discussion

Department Counsel's appeal involves the Judge's 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 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 general standard 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). 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.

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. "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, e.g.,* ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, 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. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Department Counsel contends that the Judge erred by concluding that the government failed to establish a heightened risk under Guideline B. Department Counsel's argument has merit. In his decision, the Judge cited official notice documents that Taiwan is a country that actively collects industrial information and engages in industrial espionage. Decision at 2-3. Although Applicant has an extensive personal history with Taiwan and Applicant's wife is not yet an American citizen and she has regular communication with immediate family members in Taiwan and Applicant and his wife have made three trips to visit her family there, the Judge did not apply Foreign Influence Disqualifying Condition 7(a).[1] Using the Directive's language regarding the "Concern" under

[1]"Conditions that could raise a security concern and may be disqualifying include: (a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion[.]" Directive ¶ E2.7(a).

Guideline B,[2] the Judge stated that Department Counsel had not presented evidence to prove that Taiwan targeted U.S. citizens to obtain information or was associated with terrorism. Decision at 3. As Department Counsel points out, the government's concern under Guideline B includes, but *is not limited to*, indications that the country involved targets U.S. citizens or is associated with terrorism. The Judge's conclusions in this case have the practical effect of requiring Department Counsel to prove affirmatively that Taiwan specifically targets U.S. citizens in the course of attempts to gather protected information. The Directive does not require the Government to prove affirmatively that a country specifically targets U.S. citizens in order to raise Guideline B security concerns that shift the burden of persuasion to Applicant. Moreover, the "heightened risk" language in ¶ E2.7(a) addresses an applicant's contacts, not necessarily the country involved in the contact. *See, e.g.,* ISCR Case No. 08-04488 at 4 (App. Bd. Apr. 23, 2009). The Judge's conclusion in this regard is not sustainable.

Department Counsel also argues that the Judge's application of the Foreign Influence Mitigating Conditions[3] is unsupported by the record evidence and is therefore arbitrary and capricious. Department Counsel's argument has merit. Noting Applicant's close ties to the United States and his limited relationship with his in-laws, without regard for Applicant's relationship with his wife, a Taiwanese citizen, or their relationships with her family in Taiwan, the Judge initially applied Mitigating Conditions 8(a), 8(b), 8(c), and 8(f). Decision at 10-11. However, the Judge then correctly stated that "the relationship between a spouse and the spouse's family is attributed to an applicant."[4] Decision at 10. While attempting to minimize the relationship between Applicant's spouse and her mother and brother, the Judge recognized the close relationship between Applicant's

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[2]"Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is associated with terrorism." Directive ¶ E2.6.

[3]The Judge's decision cited Mitigating Conditions 8(a), (b), (c), and (f):
" (a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;"
"(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, of country is so minimal, or the individual has such deep 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;"
" (c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence of exploitation;" . . .
"(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual." Directive ¶ E2.8.

[4]*See, e.g.,*ISCR Case No. 07-17673 at 3 (App. Bd. Apr. 2, 2009).

spouse and her father.[5] The Judge therefore stated that application of Mitigating Conditions 8(b) and 8(c) was obviated, and he applied only Mitigating Condition 8(a). Construing the Judge's reasoning, it appears that in the end only Mitigating Conditions 8(a) and 8(f) were applicable. Applicant's relationships with his Taiwanese wife and her Taiwanese family are a factor to be considered in Mitigating Condition 8(a), as to whether he could be placed in a position of having to choose between the interests of her and her family and the United States. The Judge stated that he recognized that "Taiwan may be a collector or [sic] economic information" and that "the [Peoples Republic of China] may use operatives stationed within Taiwan[.]" Decision at 11. However, he based his application of Mitigating Condition 8(a) on the lack of evidence that Applicant's father-in-law "is an enemy of the United States or that his daughter's marriage has triggered any form of inquiry by governmental or other agents." *Id.* The Directive does not require evidence of either of those matters. The Judge also stated that there is "no indication that Taiwan uses coercive measures against private citizens." *Id.* The Judge's conclusion that none of Applicant's in-laws are involved in activities that would make it likely that Applicant would have to choose between their interests and those of the United States is not supported by the record evidence. Because the Judge attempted to minimize Applicant's wife's relationship with her mother, he did not discuss the fact that her mother has been employed for almost thirty years as a switch-board operator at a Taiwanese Air Force base and is nearing retirement. The Judge's application of Mitigating Condition 8(a) is not sustainable.

Department Counsel also challenges the sufficiency of the Judge's whole-person analysis. She plausibly contends that the analysis does little but restate the factors underlying his treatment of the mitigating conditions. This argument is persuasive. The Board notes the Judge's findings and record evidence (1) that Applicant conducted business in Taiwan and China; (2) that while conducting business in China he used a Chinese name written in Chinese script; (3) that he is married to a citizen of Taiwan; (4) that his wife's parents and brother are citizens of Taiwan; and (5) that his wife maintains frequent contact with her father and brother. The Judge does not adequately explain how the evidence submitted by Applicant mitigates the security concerns arising from these foreign contacts, viewed in their totality. *See* ISCR Case No. 02-00305 at 4 (App. Bd. Feb. 12, 2003) (Propriety of considering a spouse's foreign citizenship in light of the record as a whole). Accordingly, the Judge's whole-person analysis is not sustainable.

Order

The Judge's decision granting Applicant a security clearance is REVERSED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge

[5]While Applicant has a closer relationship with her father than with her mother and brother, the record evidence does not support the Judge's characterization of her relationship with her mother and brother as "indifferent."

Chairperson, Appeal Board

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

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board