

KEYWORD: Guideline B

DIGEST: The Judge committed a significant number of errors in his findings of fact. Given the number of errors, Applicant has a reasonable basis for questioning whether the Judge accurately evaluated the record evidence when deciding the case. The Board concludes that the totality of fact-related error in the Judge's decision was harmful. Adverse decision remanded.

CASENO: 12-04780.a1

DATE: 08/21/2013

DATE: August 21, 2013

In Re:	)	
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	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

*Pro se*

The Department of Defense (DoD) declined to grant Applicant a security clearance. On January 23, 2013, DoD 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 June 17, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Marc E. Curry denied Applicant's request for a security clearance. Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: (1) whether the Judge committed harmful error when making numerous findings of fact that are not supported by the record evidence; and (2) whether the Judge applied Guideline B mitigating conditions properly. For the following reasons, the Board remands the Judge's unfavorable security clearance decision.

The Judge found: Applicant is 47 years old. He was born and raised in the PRC. He received a bachelor's degree in physics and fiber optics and a master's degree in fiber optics before immigrating to the United States to pursue a doctorate. He received his doctorate in the field of fiber optics. He became a naturalized U.S. citizen in 2009. His wife immigrated to the U.S. in 1999.

Applicant's wife immigrated to the United States in 1999 and his daughter immigrated here one year later. Both are lawful U.S. permanent residents and have applied for citizenship. Applicant's parents are citizens and residents of the PRC. They are retired farmers. Applicant talks to them approximately twice per week. Applicant purchased a house in the PRC for his parents, which is currently worth approximately \$30,000. He transferred ownership of the house to his father in 2013. Applicant provided between \$1,000 and \$2,500 of annual financial support to his parents. Now that he is aware of the potential security implications of providing financial support to his parents, Applicant has no intention to support them financially in the future.

Applicant has three brothers who are citizens and residents of the PRC. Applicant talks to his brothers approximately once every three months, and e-mails them approximately once or twice a week.

Applicant has four paternal aunts who are citizens and residents of the PRC. He talks to them approximately twice per year on holidays. He never knew them that well when he lived in the PRC, and does not know their first names. Applicant's parents-in-law and brother-in-law are citizens and residents of the PRC. Applicant talks to his parents-in-law approximately once per month and communicates with his brother-in-law through e-mails once or twice per year.

Applicant stays in touch with four of his colleagues from the company where he worked from 1990 to 1996. All of them have either retired or left the company. Two are living in the United States and are permanent residents. Applicant has not seen three of them since 1998 and has not seen the remaining co-worker in six years. He communicates with them approximately once or twice a year via phone or e-mail.

Applicant has visited the PRC three times since immigrating to the United States. Most recently, he traveled in November 2009.

The PRC is a totalitarian state that routinely violates human rights. It is the most aggressive conductor of espionage against the United States in the world, and its intelligence collection efforts are growing in scale, intensity, and sophistication.

The Judge concluded: Applicant's relatives who are PRC citizens and residents, and his wife and daughter, who are PRC residents living with him, raise security concerns under Guideline B. However, Applicant no longer owns property in the PRC and no longer provides financial support to his parents. Applicant's past employment while living in the PRC does not generate a security concern. Applicant's contacts with his former friends and coworkers and his contacts with his aunts in the PRC are sufficiently infrequent so as to be mitigated.

Since immigrating to the United States in 2009, Applicant's wife has been a pillar of her community. Applicant's wife and daughter live in the U.S., are integrated into their community, and are involved with charitable activities. These factors mitigate security concerns under Guideline B.

Given the aggressive and multifaceted nature of the PRC's espionage activities against the United States, it cannot be concluded that any of the mitigating conditions are applicable to any of the remaining relatives of Applicant in the PRC. These include Applicant's parents and brothers as well as his mother-in-law and father-in-law.

Applicant takes issue with six of the Judge's findings of fact in the findings of fact section of the Judge's decision, and one finding of fact found in the analysis section. These will be discussed in turn.

Applicant challenges the Judge's finding that he e-mails his brothers in the PRC once or twice per week. He states, and the record supports, his assertion that he contacts his brothers via e-mail once or twice per year.<sup>1</sup> Applicant has established error with regard to this finding of fact.

Applicant challenges the Judge's finding that he last visited the PRC in November 2009. He states, and the record supports, his claim that he last traveled to the PRC in June 2008.<sup>2</sup> Applicant has established error with regard to this finding of fact.

Applicant challenges the Judge's finding that he stays in touch with four of his colleagues from the company where he worked from 1990 to 1996. He states, and the record supports, his contention that he stays in touch with four of his colleagues from the company where he worked from 1996-1998.<sup>3</sup> Applicant has established error with regard to this finding of fact.

Applicant challenges the Judge's finding that he earned a bachelor's degree in physics and fiber optics. He states, and the record supports, his assertion that he earned a bachelor's degree in physics and optics.<sup>4</sup> Applicant has established error with regard to this finding of fact.

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<sup>1</sup>See Applicant's answer to the SOR, dated March 12, 2013.

<sup>2</sup>See Tr. at p. 53.

<sup>3</sup>See Tr. at p. 29-30, 53-54; App. Ex. F;

<sup>4</sup>See Tr. at p. 35.

Applicant challenges the Judge's finding that he earned a master's degree in fiber optics. He states, and the record supports, his claim that he earned a master's degree in physics laser.<sup>5</sup> Applicant has established error with regard to this finding of fact.

Applicant challenges the Judge's finding that he earned his doctorate in the field of fiber optics. He states, and the record supports, his contention that he received his doctorate in the field of physics and optics.<sup>6</sup> Applicant has established error with regard to this finding of fact.

Applicant challenges the Judge's factual assertion in the analysis section of his decision that Applicant's wife immigrated to the United States in 2009. This is at variance with the Judge's earlier finding of fact that Applicant's wife immigrated in about 1999. The record supports the earlier finding that the wife came to this country in 1999.<sup>7</sup> Applicant has established error with regard to the Judge's statement of fact in the analysis section.

Even if some of the errors do not bear directly upon the security significant issues in the case, they are part of a larger pattern where the Judge committed a significant number of errors in his findings of fact. The Board does not review isolated sentences of a Judge's decision. *See, e.g.*, ISCR Case No. 03-05645 at 5 (App. Bd. Sep. 15, 2004). Applicant rightly argues that the several errors pertaining to dates had the potential to affect the Judge's analysis of the case. Given the number of errors, Applicant has a reasonable basis for questioning whether the Judge accurately evaluated the record evidence as a whole when deciding the case. *Compare*, ISCR Case No. 02-071919 at 4 (App. Bd. Mar. 25, 2004). The Board concludes that the totality of fact-related error in the Judge's decision was harmful.

Given the cumulative nature of the errors identified by Applicant, the appropriate remedy is to remand the case to the Judge with instructions to issue a new decision (consistent with the requirements of Directive, Additional Procedural Guidance, ¶¶ E3.1.25 and E3.1.35) after correction of identified errors and a reconsideration of the record as a whole. It is premature to address the remaining issue raised by Applicant.

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<sup>5</sup>See Tr. at p. 34.

<sup>6</sup>See Tr. at p. 33.

<sup>7</sup>See Tr. at p. 66.

**Order**

The decision of the Judge is REMANDED.

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

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

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