

DATE: July 17, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-24566

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Candace L. Le'i, Department Counsel

FOR APPLICANT

Behzad Nejad, Personal Representative

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 22, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision--security concerns raised under Guideline B (Foreign Influence), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). The SOR was subsequently amended to include security concerns under Guideline C (Foreign Preference). Applicant requested a hearing. On December 19, 2005, after the hearing, Administrative Judge Wilford H. Ross 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 raised the following issues on appeal: whether the Administrative Judge erred in applying Foreign Influence Mitigating Condition (FIMC) 1 where the Judge's decision fails to articulate a rational basis for concluding that Applicant's family in Iran are not in a position to be exploited by the Iranian government; and whether the Administrative Judge's whole-person analysis is unsustainable where the Judge relied on whole-person considerations unsupported by the record evidence and applied them in a manner that is arbitrary, capricious, and contrary to law.

Whether the Record Supports the Administrative Judge's Factual Findings

A. The Administrative Judge made the following pertinent findings of fact:

Applicant was born in Iran in 1963. She married her husband, also an Iranian by birth, in 1983. Applicant moved to the United States in 1988 and became a naturalized American citizen in September 2000. Applicant's husband became an American citizen in 1999. Applicant's daughter was born in Iran in 1986 and came to the U.S. with her mother. She is now an American citizen and has never traveled to Iran. Applicant and her husband and daughter sent statements to the appropriate officials renouncing their Iranian citizenship.

Among Applicant's siblings, only two--one sister and one brother-- remained in Iran at the time of the hearing. That sister plans to remain in Iran. Because she is 21 years older than Applicant, they were never close, and Applicant corresponds with her once or twice a year. The brother in Iran has permanent residency status in Canada and is seeking permanent residency status in the U.S. He is waiting for permission from the Iranian government to emigrate.

Applicant's mother-in-law, who lives in Iran, is 80 and in frail health. Applicant's husband owns the condominium, worth \$10,000, where she lives. Applicant's husband has executed a power of attorney granting his brother in Iran authority over the property.

Applicant traveled to Iran in 1994, 2000, and 2004. Applicant and her husband renewed their Iranian passports in order to make the 2004 trip to attend a wedding. When the security concern of the Iranian passports was explained to them, they defaced the passports and returned them to the appropriate officials at the same time they renounced their Iranian citizenship. Applicant and her husband testified concerning their problems with the current Iranian government. They have no desire to return to Iran and are very happy to live in the United States and be American citizens.

B. Discussion

The Judge's findings of fact are not challenged on appeal.

Whether the Record Supports the Administrative 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 Administrative 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 Administrative Judge. We may not set aside an Administrative Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency. . ." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. We review matters of law *de novo*.

When the government has established a security case, the burden shifts to the Applicant to rebut, explain, extenuate, or mitigate the security concerns. In this case, the Administrative Judge concluded that Applicant had mitigated all the concerns raised under Guidelines B and C. Department Counsel does not dispute the Judge's conclusions as to Guideline C, and under Guideline B only disputes conclusions as to subparagraphs 1.c and 1.e of the SOR. Those subparagraphs pertain to Applicant's two siblings and mother-in-law living in Iran. With regard to those three relatives, Department Counsel contends that the Judge erred in applying FIMC 1, ⁽¹⁾ where the Judge's decision fails to articulate a rational basis for concluding that Applicant's family in Iran are not in a position to be exploited by the Iranian government. Department Counsel points out that application of FIMC 1 requires that an applicant's family members must not be agents of a foreign power and must not be in a position to be exploited by a foreign power. The record evidence supports the Judge's statement that Applicant's family members are not agents of the Iranian government. Applicant testified that the sister in question was grown and away from Applicant's childhood home before Applicant was born. However, the same argument cannot be said of Applicant's brother and mother-in-law. Department Counsel's argument is strongest with regard to those two relatives. However, the applicability or non-applicability of a mitigating condition, by itself, does not require reversal of a Judge's security clearance decision.

Department Counsel also argues that the Administrative Judge's whole-person analysis is unsustainable because the whole-person considerations relied upon are unsupported by the record evidence and their application is arbitrary, capricious, and contrary to law. Department Counsel contends that the Directive, at ¶ E2.2.1, sets forth nine general factors for consideration under the whole-person concept, but only one of those factors can reasonably apply in a Guideline B case. ⁽²⁾ That factor refers to the extent that an Applicant is potentially subject to coercion. In this case, the Judge stated reasons for his favorable security clearance decision that amount to a whole-person analysis under that factor. But there is little corroboration for a favorable whole-person analysis. That problem is made more significant because, as Department Counsel notes, Iran, the country where Applicant's family reside, has an authoritarian government, is hostile to the United States, and has a poor human rights record. A whole-person analysis should include reasonable consideration of the situation in and nature of the country involved. Applicant's burden of demonstrating that it is clearly consistent with the national interest to be granted a security clearance is greater when Applicant's family is resident in a country with a profile such as Iran's. Here, there is little evidence to substantiate a favorable whole-person analysis.

Order

The Administrative Judge's favorable security clearance is REVERSED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman (Acting), 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

1. "A determination that the immediate family member(s) (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States" Directive ¶ E2.A2.1.3.1.

2. "The potential for pressure, coercion, exploitation, or duress" Directive ¶ E2.2.1.8.