

DATE: November 1, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-26083

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

William F. Savarino, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 4, 2005, 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 March 8, 2006, after the hearing, Administrative Judge Joan Caton Anthony denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Administrative Judge's adverse security clearance decision under Guideline B is arbitrary, capricious and contrary to law.

Applicant argues that the evidence he provided in the proceeding below was sufficient to require the Administrative Judge to conclude, as a matter of law, that he had rebutted, mitigated or extenuated the security concerns raised by the Guideline B (Foreign Influence) allegations. Specifically, Applicant contends that the Judge's adverse decision should be reversed because the Judge erred in not applying Guideline B Mitigating Conditions 1 ⁽¹⁾ and 3, ⁽²⁾ and made an unfavorable decision that is unsupported by the record as a whole.

The Administrative Judge made sustainable findings that: (1) Applicant's mother and sister are citizens of India, residing in India, (2) Applicant's mother lives on her teacher's pension and an inheritance from her late husband, (3) Applicant's wife is a citizen of Russia currently residing in the U.S. with Applicant, (4) Applicant met his wife over the internet, (5) Applicant's parents-in-law are citizens and residents of Russia, (6) Applicant's step-son is a citizen and resident of Russia, (7) Applicant and his wife have provided this step-son with approximately \$3,000 a year for his education since 2002, (8) Applicant's wife is close to her son and owns an apartment in Russia with him, (9) Applicant's wife visits her parents in Russia once a year, has e-mail contact with her son in Russia once a week, and speaks by telephone with her parents and son once a month, (10) Applicant traveled to Russia in 1998, 2001, and 2004, (11) India is active in pursuing aggressive information collection and industrial espionage against the U.S., (12) political and economic instability in Russia raise security concerns for U.S. citizens residing there, and by extension, for those U.S. citizens who have family members residing there, (13) the Russian government knows about Applicant's work because he has worked with Russian scientists on joint projects. Given those findings, the Administrative Judge concluded that Applicant's ties with his and his wife's immediate family members raised security concerns under Guideline B, and that

Disqualifying Conditions 1 and 2 applied. That conclusion shifted the burden of persuasion to Applicant. If there are admitted or proven facts and circumstances that raise security concerns, "[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15.

Applicant argues that the Administrative Judge gave insufficient weight to evidence that: (a) the Applicant himself has no relationship or communication with his wife's family in Russia, (b) the Applicant and his wife had experienced marital difficulties, and his wife had at one time attempted to obtain a divorce, (3) (c) because of profound religious differences Applicant has been estranged from his family in India for more than 30 years, and (d) India is a democracy with interests not inimical to the U.S. Applicant also argues that there are many Hearing Office decisions in which applicants with ostensibly similar circumstances were granted clearances. The Board does not find Applicant's arguments persuasive.

The application of Adjudicative Guidelines disqualifying and mitigating conditions does not turn simply on a finding that one or more of them applies to the particular facts of a case. Rather, the application of a disqualifying or mitigating condition requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan. 15, 2003). The absence of a particular disqualifying condition does not compel a favorable security clearance decision. *See, e.g.*, ISCR Case No. 02-08052 at 3 (App. Bd. June 23, 2003). As the trier of fact, the Administrative Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. Lastly, the decision in another DOHA Hearing Office case does not demonstrate error by the Judge in this case. A decision by a Hearing Office Judge is not legally binding precedent on that Judge's colleagues in other cases, and such cases are not legally binding precedent on the Board. *See* ISCR Case No. 01-22606 at 3-5 (App. Bd. Jun. 30, 2003).

Foreign connections not based on birth can raise security concerns under Guideline B. Therefore, the Administrative Judge's decision is not rendered arbitrary, capricious, or contrary to law because Applicant's relationships with Russian citizens are based on his marriage. *See, e.g.*, ISCR Case No. 02-00305 (February 12, 2003) at p. 4. Given the record in this case, it was not arbitrary and capricious for the Administrative Judge to conclude that Applicant had not met his burden of demonstrating that his contacts with his wife and her family were casual and infrequent, and that his wife's family was not in a position to be exploited by a foreign power in a way that could force the Applicant to choose between loyalty to them and the U.S. In that regard, the Judge was not required to engage in a piecemeal analysis of the Applicant's Russian family ties separate from Applicant's other ties to Russia and the other security concerns presented in the case. A review of the Judge's decision indicates that the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying circumstances, and considered the possible application of relevant mitigating conditions and factors. The Judge articulated a rational basis for not favorably applying any mitigating conditions or factors and reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns. The Judge was not required, as a matter of law, to favorably apply Guideline B Mitigating Conditions 1 and 3 with respect to Applicant's Russian family ties, and the Judge's overall adverse security clearance decision insofar as it relates to that aspect of the case is sustainable.

Applicant's argument with respect to his Indian family ties is somewhat stronger. The Administrative Judge found that Applicant had been raised, in part, by his maternal grandfather and that because of serious religious differences, Applicant's relationship with his mother and sister was strained. Applicant's last contact with his sister occurred in 1986, when he last visited India. Applicant last spoke with his mother by telephone in 2001, when she asked him to come visit her in India. Applicant did not go. Applicant's mother and sister have never visited him in the U.S., and Applicant only communicates with them through an uncle who lives in the U.S. Given those facts, the Administrative Judge concluded that neither Mitigating Condition 1 nor Mitigating Condition 3 under Guideline B were shown to apply with respect to Applicant's mother and sister in India. She found that Applicant failed to demonstrate that his mother and sister "could not be exploited by a foreign power in a way that could force him to choose between loyalty to them and to the U.S." (Decision at 6-7) She further found that the long-standing strains and pattern of intensely-felt differences of belief and opinion had diminished communication and contact but nevertheless reflected an ongoing "intensely familial relationship that cannot be considered casual." (*Id.*) While the facts bearing on these potentially Mitigating Conditions

could be interpreted otherwise, the Judge has articulated a rational interpretation of the record evidence in reaching her conclusions. The Board does not review a case *de novo*. In this instance, the Judge made sustainable findings that Applicant continues to harbor strong feelings concerning his mother and sister that influence his communication with and behavior toward them. Therefore, she could not conclude that the evidence established a relationship that was so casual and unimportant as to mitigate the security concerns raised by their foreign citizenship and residence. Moreover, even were the Board to find her conclusions with respect to application of Mitigating Conditions 1 and 3 to be arbitrary and capricious, that would at most be harmless error, because the Judge's ultimate adverse clearance decision is sustainable on other grounds. *See, e.g.*, ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006).

Order

The decision of the Administrative Judge denying Applicant a clearance is AFFIRMED.

Signed Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Signed: David M. White

David M. White

Administrative Judge

Member, Appeal Board

1. Directive ¶ E2.A2.1.3.1. ("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.")
2. Directive ¶ E2.A2.1.3.3. ("Contact and correspondence with foreign citizens are casual and infrequent.")
3. In his brief, Applicant states that he and his wife have been unable to resolve their differences and have decided to proceed with the divorce. The Board cannot consider this new evidence on appeal. *See* Directive ¶ E3.1.29.