

DATE: September 26, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-09541

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Candace Le'i, Esq., Department Counsel

FOR APPLICANT

John P. Murphy, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 25, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision--security concerns raised under Guideline C (Foreign Preference) and Guideline B (Foreign Influence) pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 27, 2006, after the hearing, Administrative Judge Darlene Lokey Anderson granted Applicant's request for a security clearance.⁽¹⁾ 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 by applying Foreign Influence Mitigating Condition (FIMC) 1 and concluding that Applicant's family members are not in a position to be exploited by the Iranian government, and by applying FIMC 3 and concluding that Applicant's contacts with his family in Iran are casual and infrequent. We reverse the Administrative Judge's favorable security clearance decision.⁽²⁾

Whether the Record Supports the Administrative Judge's Factual Findings

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

Applicant has a sister, three brothers, a step-sister, and a step-brother who are citizens of and reside in Iran. One of his brothers does consulting work. That brother has had permanent residency status in the United States since 2000 and travels back and forth between Iran and the United States. Another brother owns a clothing store, and the third owns a car rental business. Applicant's sister and step-sister are housewives, and his step-brother is a car dealer. Applicant contacts his siblings in Iran once every four or five months.

Applicant's mother applied for visas for all of her children and is sponsoring all of them to come to the United States. The necessary paperwork has been completed. None of Applicant's siblings in Iran are affiliated with the Iranian government in any way, and all are awaiting the opportunity to come to the United States permanently.

Applicant testified that he could not be pressured by one of his relatives in Iran or the Iranian government to release classified or sensitive information that could damage the United States.

Applicant's wife testified that Applicant is very involved in helping raise their four children. He has been coach of their soccer team and involved in their school activities. He is responsible and trustworthy.

Two coworkers testified about Applicant's good character and patriotism toward the United States. Applicant's manager sent a letter attesting to Applicant's superior knowledge and abilities at work. Applicant provided documentary evidence regarding job-related achievements and a patent he received.

B. Discussion:

The Judge's findings 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*.

Department Counsel argues that the Administrative Judge erred by applying FIMC 1⁽³⁾ and concluding that Applicant's family members in Iran are not in a position to be exploited by the Iranian government. Department Counsel contends that the Judge's conclusion regarding the possibility of exploitation is arbitrary, capricious, and unsupported by the record evidence. Department Counsel's argument has merit. Applicant has siblings and step-siblings in Iran. Application of FIMC 1 requires that an applicant's relatives in a foreign country not be agents of a foreign government and that they not be in a position to be exploited by a foreign government in a way that could influence the applicant to act in a way that would be detrimental to the United States. *See, e.g.*, ISCR Case No. 02-24566 at 3 (App. Bd. Jul. 17, 2006). *See also*, ISCR Case No. 03-15205 at 3-4 (App. Bd. Jan. 21, 2005). The Judge noted the occupations of Applicant's relatives and found that they were not agents of the Iranian government. The Judge then concluded that they were not in a position to be exploited by that government, but failed to articulate a reasonable basis for her conclusion. The record supports the Judge's statement that Applicant's relatives in Iran are not agents of the Iranian government, but there is no support in the record for the conclusion that the relatives are not in a position to be exploited by the Iranian government.

Department Counsel contends that the Administrative Judge erred by applying FIMC 3⁽⁴⁾ and concluding that Applicant's contacts with his family in Iran are casual and infrequent. There is a rebuttable presumption that an applicant's contacts with immediate family members are not casual. *See, e.g.*, ISCR Case No. 02-24267 at 7 (App. Bd. May 24, 2005). There is nothing in the record of this case that rebuts that presumption. Applicant traveled to Iran to help his relatives initiate paperwork to facilitate their move to the United States, and he testified how important it is to him for all of his family members to come to the United States permanently. The frequency with which Applicant speaks to his family members in Iran does not diminish the strength of his family ties. Moreover, application of FIMC 3 requires that contacts be casual *and* infrequent. *See, e.g.*, ISCR Case No.01-24358 at 6 (App. Bd. Apr. 13, 2004). The record does not support the Administrative Judge's application of FIMC 3.

Although Department Counsel has established the errors discussed above, the Board notes that the applicability or non-applicability of particular mitigating conditions, standing alone, does not require reversal of a Judge's security clearance if the Judge's whole-person analysis is sufficient to support her favorable decision. However, in this case, the Judge did only a limited whole-person analysis and relied on the same unsupported conclusions as to exploitation and family contacts in performing that analysis. Therefore, the errors are harmful, and the case must be reversed.

ORDER

The Administrative Judge's favorable security clearance decision is REVERSED.

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Signed: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board

1. The case was erroneously dated January 27, 2005. However, the SOR was issued on July 25, 2005, and the hearing was held on November 28, 2005.

2. Department Counsel does not appeal the Judge's favorable findings and conclusions with regard to Guideline C (Foreign Preference). The Judge's findings and conclusions as to Guideline C are not at issue in this decision.

3. "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.

4. "Contact and correspondence with foreign citizens are casual and infrequent" Directive ¶ E2.A2.1.3.3.