

DATE: February 6, 2007

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-11577

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Jr., Esq, Department Counsel

FOR APPLICANT

Michael P. Heiskell, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 10, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision-security concerns raised under Guideline B (Foreign Influence) and Guideline C (Foreign Preference), pursuant to Department of Defense Directive 5220.6 (Jan 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 12, 2006, after the hearing, Administrative Judge Shari Dam granted Applicant's request for a security clearance. Department Counsel appealed pursuant to the Directive ¶ E3.1.28 and E3.1.30.

Whether the Record Supports the Administrative Judge's Factual Findings

A. Facts

The Administrative Judge made the following findings of fact: Applicant was born in Iran, but came to the United States to attend college. He received a M.S. in structural engineering and a Ph.D. in mechanical engineering.

Applicant became a U.S. citizen in 1986 and has held a security clearance "the last 20 years." Applicant divorced his first wife in 1998 and married his current wife, an Iranian citizen, in 1999. She has applied for U.S. citizenship, but was still waiting to take the oath of citizenship at the time of the hearing. Applicant's two children were born in the U.S. and reside here with Applicant and his wife.

Applicant's parents, Iranian citizens, emigrated to the U.S. in 1983. Applicant's father died in 2006. His mother is a naturalized citizen. Applicant's grandmother, a citizen of Iran, died in 2004. Applicant has two sisters, who are citizens and residents of the U.S. The Judge found that neither Applicant nor his immediate family members own property in Iran, and Applicant "has no financial ties to Iran."

Applicant's mother-in-law and father-in-law are citizens and residents of Iran. The Judge found that neither are employed by the Iranian government, and that they "have not been monitored by" that government. Applicant's wife telephones her parents weekly and "sometimes [Applicant] speaks to them if he is at home."

In 1997 Applicant applied for an Iranian passport to visit his grandmother, who was ill. The Judge found that Applicant spoke to his security officer prior to travel, as was advised that there were no problems with Applicant taking the trip.

Applicant made four subsequent trips to Iran on the Iranian passport. The Judge found "[d]uring his initial visit in 1997, he used his Iranian passport to obtain a visa for Germany, in order to leave Iran because he was concerned that the Iranian government could confiscate his American passport and detain him." Applicant has since renounced his Iranian citizenship by means of a letter submitted to the Iranian Embassy in Washington. He also returned his Iranian passport.

The Judge found that five witnesses called by Applicant, consisting of friends and fellow employees, described him as an excellent worker and someone who could be trusted to protect classified information.

The Judge also found that Iran is a nation with interests adverse to those of the United States. Iran is attempting to acquire weapons of mass destruction and is involved in international terrorism. The Judge found that Iran has a "dismal human rights record" and supports violent opposition to the Mideast peace process.

B. Discussion

The Appeal Board's review of the Administrative Judge's finding of facts is limited to determining if they are supported by substantial evidence--such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966)). In evaluating the Administrative Judge's finding, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1

In his appeal brief, Department Counsel does not explicitly challenge the Administrative Judge's findings of fact. However, the Department Counsel notes Applicant's testimony that, as of the date of the hearing, his wife's application for U.S. citizenship had not been finalized "pending FBI background investigation."

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 asserts three assignments of error. First, that the Administrative Judge committed reversible error by failing to consider Foreign Influence Disqualifying Condition (FIDC) 2; second, that the Administrative Judge's conclusion that mitigated the security concerns raised by the evidence was arbitrary, capricious, and contrary to law; and third, that the Administrative Judge improperly shifted the burden of persuasion to the government. We will treat each issue *seriatim*.

A. Failure to consider FIDC 2

This disqualifying condition addresses security concerns which arise then an applicant "[shares] living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists." Directive ¶ E2.A2.1.2.2. In the instant case, Applicant's wife is still a citizen of Iran, and her parents are Iranian citizens who reside there. Record evidence establishes, and the Administrative Judge found, that she speaks with her parents weekly and that Applicant also speaks with them whenever he is at home during one of her calls.

We conclude that this evidence is sufficient to raise a security concern under FIDC 2. It is reasonably foreseeable that the regular and frequent conversations with Applicant's Iranian wife has with her parents could bring those parents to the attention of the Iranian government and provide a means through which Applicant could be subjected to duress. We

conclude that the Administrative Judge erred by not giving formal consideration to this disqualifying condition.

B. Mitigation of FIDC 1

This disqualifying condition addresses concerns arising when "[a]n immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country." Directive ¶ E2.A2.1.2.1. "[I]n-laws represent a class of persons who are contemplated by the Directive as presenting a potential security risk. As a matter of common sense and human experience, there is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the persons' spouse." ISCR Case No. 03-26176 (App. Bd. Oct. 14, 2005). Given the citizenship and residence of Applicant's in-laws, the Administrative Judge did not err when she concluded that the record contains "substantial evidence" of this disqualifying condition. Decision at 7.

Once a disqualifying condition is raised by record evidence, "[t]he applicant is responsible for presenting . . . 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. The Directive lists five potential mitigating conditions which might enable an applicant to sustain his or her burden of persuasion. In cases involving FIDC 1, the most pertinent is Foreign Influence Mitigating Condition (FIMC) 1, which states that security concerns can be mitigated through a showing that the immediate family members "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. *See also* ISCR Case No. 04-06564 (App. Bd. ay 30, 2006).

Other mitigating conditions under Guideline B are FIMC 2 (that "[c]ontacts with foreign citizens are the result of official United States business");⁽¹⁾ FIMC 3 (that "[c]ontact and correspondence with foreign citizens are casual and infrequent");⁽²⁾ FIMC 4 (that "[t]he individual has promptly reported to proper authorities all contacts, requests, or threats from persons or organizations from a foreign country, as required");⁽³⁾ and FIMC 5 (that applicant's "foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities").⁽⁴⁾

The Administrative Judge concluded that FIMCs 1-4 did not apply based on the facts of the case. We find no error in this. However, she went on to state that "[t]he security concerns raised by Applicant's foreign in-laws may be mitigated under [FIMC 5] . . . Neither Applicant nor any member of his immediate family has financial obligations or ties to Iran. His financial interests and property are located in the United States." Decision at 8. We find this to be confusing. In the first place, the Administrative Judge found that Applicant's in-laws own both an apartment and a farm in Iran, which contradicts her conclusion that Applicant and his immediate family have no financial interest in that country. More to the point, however, we fail to see how Applicant's lack of financial stakes in Iran mitigates concerns that his in-laws' presence in that country could be a basis for coercion. Because the record evidence raises no concerns about Applicant's financial situation, this mitigating condition is insufficient as a matter of law to meet Applicant's burden of persuasion. We do not deny that this matter has some pertinence in evaluating Applicant's whole person, only that it does not serve to mitigate the concerns raised by the record evidence. "Given the fact that financial interests in [foreign country] were not listed as a basis for denial of a security clearance in the SOR, the fact that Applicant has no such interests is of less relevance than might otherwise be the case." ISCR Case No. 03-10390 at 7 (App. Bd. April 12, 2005). We conclude that the Administrative Judge erred in applying FIMC 5.

In arguing this assignment of error, Department Counsel asserts that the Administrative Judge's whole person analysis was "unsupported by the record evidence" and, therefore, is arbitrary, capricious, and contrary to law. Specifically, Department Counsel contends that the whole person factors listed in the Directive are of limited value in a Guideline B case, because those factors are more relevant to a security concern that is based on conduct rather than relationships.⁽⁵⁾

We do not agree that a whole person analysis is limited to considering only those factors listed in the Directive. To the contrary, it can and should take into account all aspects of the record evidence which bear upon the applicant's trustworthiness and reliability. *See, e.g.*, ISCR Case No. 04-00540 at 7 (App. Bd. January 5, 2007); ISCR Case No. 04-00631 at 4-5 (Ap. Bd. September 6, 2006); ISCR Case No. 03-02878 at 3 (App. Bd. June 7, 2006). In this case, the Judge performed a relatively detailed examination of Applicant's whole person, pointing out such relevant facts as that

he has held a security clearance for many years, that the closest members of his family are citizens or residents of the U.S., that his ties to this country are stronger than his ties to Iran, that he has an excellent work record, and that he enjoys the esteem of his colleagues, who believe he should continue to hold a clearance.

On the other hand, the Judge's analysis does not explicitly address the crux of this case, that Applicant failed to meet his burden of persuasion. That is, he failed credibly to mitigate security concerns raised by his close ties of affection with persons living in a nation hostile to the U.S. and by the fact that his household is in weekly communication with those persons. It is reasonable to recognize that a nation with a "dismal human rights record" can, if alerted to the opportunity, utilize a person's loved ones as a means of exerting duress. That such pressures may not yet have been brought to bear upon Applicant is a relevant datum, but is not dispositive. Balanced against the record evidence, the nature of Applicant's burden, and the standard which applies in security clearance decisions,⁽⁶⁾ the Judge's whole person discussion is merely conclusory in nature.⁽⁷⁾

C. Improper Burden Shifting

Department Counsel objects to the following sentence in the Judge's decision: "Although the risk of undue foreign influence cannot be completely ruled out as long as Applicant's in-laws re-train their connection to Iran, Applicant's substantial ties to the United States lead me to conclude that he can be trusted to place his obligation to this government ahead of any sense of obligation to his wife's parents . . ." Department Counsel contends that the first clause in that sentence means that the Judge placed a persuasive burden on the government. We do not read the sentence that way. We view it simply as an acknowledgment by the Judge that future human behavior cannot be known with mathematical certainty. Therefore, we find no merit to this argument.

Considering the errors in this case, individually as well as cumulatively, we conclude that the case requires reversal.

Order

The judgment of the Administrative Judge granting Applicant a clearance is REVERSED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman, 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

1. Directive ¶ E2.A2.1.3.2.

2. Directive ¶ E2.A2.1.3.3.

3. Directive ¶ E2.A2.1.3.4.

4. Directive ¶ E2.A2.1.3.5.

5. *See* Directive ¶ 6.3.

6. Authorization for access to classified information . . . may be granted . . . only upon a finding that it is clearly consistent with the national interest to do so." E.O.10865, ¶ 2, February 20, 1960, as amended.

7. We note that the record contains evidence that Applicant's employer, at the behest of the Air Force Office of Special Investigations, denied him access to "special programs" of great interest to the Department of Defense. Applicant testified that this was due to his having failed to obtain written permission prior to one of his trips to Iran. The Judge made no findings on this matter. Absent appropriately detailed findings on all matters which have a substantial bearing upon the question of whether it is clearly consistent with the national interest for Applicant to hold a security clearance, a Judge's analysis, which relies on the Judge's findings, is called into question.