

DATE: August 4, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-11463

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 12, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline B (Foreign Influence) and Guideline C (Foreign Preference), [\(U\)](#) pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested that his case be decided on the written record. On December 21, 2005, after considering the record, Administrative Judge Richard A. Cefola granted Applicant's request for a security clearance. The Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Administrative Judge's application of Foreign Influence Mitigating Condition 1 to Applicant's case was arbitrary, capricious, and contrary to the record evidence. We reverse the Administrative Judge's decision to grant the clearance.

Whether the Record Supports the Administrative Judge's Factual Findings.

A. Facts

The Administrative Judge made the following dispositive findings of fact

Applicant is 43 and came to the U.S. as a teenager in 1976, and attended both high school and college in the U.S. He became a U.S. citizen in 1987 and is married to a native born U.S. citizen. Applicant was a dual national with Iran, and until recently, maintained an Iranian passport. Applicant surrendered his Iranian passport and expressed a willingness to renounce his Iranian citizenship and believes he has done so. Applicant's father is a citizen of and resides in Iran. He is 72, retired from private enterprise as an automobile manufacturer, and suffers Alzheimer's Disease. The Applicant's mother is a dual national of the U.S. and Iran. She resides in both countries part of the year. She lives with the Applicant when in the U.S., and cares for the Applicant's father when in Iran. Applicant's two brothers are citizens of and reside in Iran. His younger brother, who has a green card and has lived in the U.S., works for the airline industry. The Applicant's older brother has a retail store and runs a private taxi service.

The Applicant's is highly regarded by his manager and a colleague.

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 (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.

On appeal, Department Counsel does not challenge these findings but notes record evidence that Applicant was born in Iran and used his Iranian passport to visit his parents in Iran in 1996. Also, Department Counsel contends that the Judge erred in failing to discuss an important additional fact not mentioned in the Judge's decision; namely, Iran's hostility toward the United States. Because this fact is related to the reasonableness of the Judge's conclusions, it will be discussed later in this decision.

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*.

In this case, the Administrative Judge concluded that the government has established a *prima facie* case to deny Applicant a security clearance because Applicant's mother is a dual national, and his father and two brothers are citizens of and reside in Iran; therefore, an "immediate family member. . . is a citizen of, or resident or present in, a foreign country" (Directive ¶ E2.A2.1.2.1). In such situations, 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. The Judge reviewed the possible mitigating factors listed under Guideline B and concluded that Foreign Influence Mitigating Condition 1 ⁽²⁾ applied because "Applicant's relatives [family members] are not connected with any government, and there is no evidence that their presence in Iran can be exploited by any government." The Judge also stated that "[i]n addition, I conclude that it would be unlikely that the Applicant would even consider any such attempt at exploitation." At that point the Judge referred to Applicant's testimony in which he stated that it is "totally intolerable" for him and his family to deal with representatives of that government and that he and his family are "resentful" of those representatives, and that nobody is aware of the type of work he does. The Judge also concluded that Applicant's situation is mitigated under Section E2.2 of the Directive but offered no specific analysis in that regard. Decision at 4.

Department Counsel challenges the Administrative Judge's conclusions, specifically arguing that: (a) it was arbitrary and capricious to conclude that Applicant met the burden of presenting evidence sufficient to establish that his family members in Iran are not in a position to be exploited by the Iranian government; (b) that the Judge's failure to discuss the Iranian government's hostility toward the U.S. made his analysis under Guideline B strained and incomplete, and indicates a result that is arbitrary and capricious; and (c) the Judge shifted the burden to Department Counsel to disprove the applicability of Foreign Influence Mitigating Condition 1.

For the reasons that follow, the Board finds Department Counsel's position to be persuasive. Department Counsel correctly noted that the Judge failed to discuss the Iranian government's hostility toward the United States. Exhibits introduced by Department Counsel clearly established this factual element as a consideration in this case. *See, e.g.*,

Government Exhibit 6 at 2. Those exhibits also document Iran's poor human rights record and its support and involvement in terrorism. *See, e.g.*, Government Exhibit 4. Iran's human rights record is worsening. *See, e.g.*, Government Exhibit 6 at 7. The Board recognizes that, in general, a Judge is not required to specifically discuss each and every piece of record evidence. However, in prior decisions involving Foreign Influence and the hostility of a foreign power to the United States, the Board found a Judge's silence on this aspect of the case to be problematic. *See, e.g.*, ISCR Case No. 02-02195 at 4-5 (App. Bd. Apr. 9, 2004) also involving Iran. If a Judge does not discuss or even mention a significant aspect of the case that reasonably could be expected to be explicitly taken into account in the Judge's decision, then a serious question arises as to whether the Judge erred.

In this case the failure to discuss the Iranian government's hostility to the U.S. and its human rights record renders the analysis under Guideline B arbitrary and capricious. The Administrative Judge reasonably could conclude that none of Applicant's family members were agents of a foreign power. However, Foreign Influence Mitigation Condition 1 requires Applicant to also demonstrate that Applicant and his family members are not in a position to be exploited by a foreign power in a way that could force Applicant to choose between loyalty to them and the U.S. Favorable evidence, such as Applicant's and his family's attitude toward the Iranian regime and the lack of knowledge of family members about the nature of Applicant's work, must be balanced against unfavorable evidence, including evidence that a regime, such as Iran's, could exploit Applicant's family members in Iran without regard to the rights of the individuals concerned. Even if the Judge had actually found that Iran is not presently aware of Applicant's work and of his family's American connection, it would be unreasonable to assume that the regime would never become aware of these facts in the future. The federal government must evaluate Applicant's security eligibility without having to prove that the Iranian government currently is aware of his work. The federal government is not required to wait until it has proof that an applicant has been specifically targeted by a foreign government before it can decide whether an applicant's conduct and circumstances pose a security risk. *See, e.g.*, ISCR Case No. 02-14995 at 4 (App. Bd. Jul. 26, 2004). Given the "clearly consistent with the national interest standard," Applicant has a very heavy burden of persuasion to overcome the security concerns raised by the fact that the Applicant has family members living in Iran. *See, e.g.*, ISCR Case No. 02-02195 at 5 (App. Bd. Apr. 9, 2004). Considering this standard and the record evidence in this case, the Judge failed to articulate a rational basis for his conclusion that "it would be unlikely that the Applicant would even consider any such attempt at exploitation."

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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. The Administrative Judge's favorable formal findings for Applicant under paragraph 2 of the SOR which involve Foreign Preference are not in dispute in this appeal.
2. "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 ¶ E.2.A2.1.3.1).