

DATE: October 26, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-12500

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

Dwight A. Johnson, Esq.

Diana M. Kleefeld, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 4, 2005, DOHA issued a statement of reasons 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 6, 2006, after the hearing, Administrative Judge Mary E. Henry 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 raises the following issue on appeal: whether the Administrative Judge's favorable security clearance decision under Guideline B is arbitrary, capricious, contrary to law, and unsupported by the record evidence. [\(1\)](#) Department Counsel raises that issue with particular reference to the Judge's application of Foreign Influence Mitigating Condition (FIMC) 1 and FIMC 3 and the Judge's whole-person analysis. We reverse the Judge's decision.

Whether the Record Supports the Administrative Judge's Factual Findings

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

Applicant was born and raised in Iran. He immigrated to the United States in 1977. He graduated from an American university with a degree in electrical engineering in 1980. In the same year, he married an American-born U.S. citizen. They have four children, all born in the U.S. Applicant's wife and children reside in the U.S.

Applicant's parents live in Iran, although they have visited Applicant in the U.S. Applicant talks to them once or twice a month. His father is retired from an oil company owned by the Iranian government and receives a pension based on that job. His mother never worked outside her home. Applicant's two brothers are naturalized U.S. citizens residing in the U.S. and married to American citizens. Applicant's three sisters are Iranian citizens residing in Iran. Two are married, and one is a widow. All three have children living in Iran. One brother-in-law works for the Iranian government-owned oil company. Applicant speaks to his sisters two or three times a year. No one in Applicant's family in Iran has held public office or been involved in politics or journalism. The Iranian government has not approached Applicant's family

with regard to Applicant.

Applicant renounced his Iranian citizenship when he became an American citizen in 1988. Applicant's family in Iran asked him to travel to Iran in 1995. He had acquired an American passport; but because the Iranian government still considered him an Iranian citizen, Applicant acquired an Iranian passport for that trip. That passport expired in 1998. Applicant has since returned his expired Iranian passport to Iranian officials and renounced his Iranian citizenship in writing to those officials. He does not plan to return to Iran, and he has not taken his wife and children there. Applicant is security-conscious and does not speak to others, including his family, about his job. He is highly respected by his employer and by co-workers and friends.

Applicant considers himself an American citizen. He owns no property in Iran and has no business or financial ties there. He has no contact with anyone in Iran except his parents and sisters.

Iran is an authoritarian, constitutional, theocratic republic, dominated by the Shi'a Muslim clergy. Human rights violation continue, particularly against journalists who speak out against Iran's current government, minority religions, such as the Baha'i faith, and political activists, who oppose the current ruling regime. Serious mistreatment of prisoners occurs. Although human rights violations are prohibited by law, the Iran government does not enforce the law. The current Iranian government supports and actively sponsors terrorism, especially against the U.S.

B. Discussion

The Administrative 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*.

Department Counsel argues that the Administrative Judge erred by applying FIMC 1⁽²⁾ 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 parents and sisters in Iran. Application of FIMC 1 requires that an applicant's relatives in a foreign country are not agents of a foreign government and that they are not 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 discussed the situation of Applicant's relatives and found that they were not agents of the Iranian government, in spite of the fact that Applicant's father receives a pension from the Iranian government-owned oil company and his brother-in-law currently works for that company. The Judge then concluded that they were not in a position to be exploited by that government. That conclusion is unsupported by the record evidence. Although the Judge notes the family members' low-key and noncontroversial lifestyle, and the fact that the Iranian government has not contacted them about Applicant in the past, such factors are insufficient to support the application of FIMC 1, given the Judge's findings as to the nature of the Iranian government and its security/intelligence posture *vis a vis* the United States.

Department Counsel contends that the Administrative Judge erred by applying FIMC 3⁽³⁾ in this case. The Judge stated in her decision that she applied FIMC 3 as to Applicant's sisters. 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. 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). In this case, Applicant speaks to his sisters at least two to three times a year. The record indicates that he speaks to his parents once or twice a month and may speak to his sisters if they are with his parents when he calls. In testimony, Applicant referred to his "wonderful family" in Iran.⁽⁴⁾ The record does not support the Administrative Judge's application of FIMC 3.

Department Counsel argues that to the extent that the Administrative Judge performed a whole-person analysis, that analysis is arbitrary, capricious, contrary to law, and unsupported by the record evidence. Department Counsel's contention has merit. Prior Board decisions indicate that the applicability or non-applicability of particular mitigating conditions, standing alone, does not require reversal of a Judge's security clearance, since the Judge's whole-person analysis could overcome errors in the application of mitigating conditions. However, in this case, the Judge relied on the same unsupported conclusions as to exploitation and family contacts in performing a whole-person analysis. The errors therefore require reversal.

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. Department Counsel does not appeal the Judge's decision as to Guideline C. The Judge's findings and conclusions as to Guideline C are therefore not at issue. In his Appeal, Department Counsel notes that at the end of her

decision, the Judge stated, "[i]n light of all the circumstances. . . , it is not [sic] clearly consistent with the national interest to grant a security clearance for the Applicant. Clearance is granted." *See* Decision at 11-12. Department Counsel regards the inclusion of the word "not" as a typographical error and does not raise it as a substantive issue.

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 ¶ E2.A2.1.3.1.

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

4. *See* Transcript at p. 34.