

DATE: November 14, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-03846

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Farris E. Ain, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 31, 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 April 26, 2006, after the hearing, Administrative Judge Darlene Lokey Anderson 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 issues on appeal: whether the Administrative Judge applied the correct Adjudicative Guidelines; whether the Administrative Judge erred in her synopsis; whether the Administrative Judge erred by not favorably applying Guideline B Mitigating Condition 3; and

whether the Administrative Judge articulated a sustainable rationale for her unfavorable clearance decision, given her findings of fact. We remand the case to the Administrative Judge.

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

A. Facts

The Administrative Judge found the following: Applicant was born in Afghanistan. After an invasion by a Russian Communist regime, in 1979, he left Afghanistan as a refugee and walked through the desert to Iran. After four months in Iran, Applicant purchased a fake passport, traveled to Turkey, and then to Germany. He stayed in Germany for about nine months and then came to the United States in 1980. Applicant worked for a restaurant for eighteen years. In October 1993, he became a United States citizen. He is grateful to the United States for the freedom and opportunities it has given him.

Applicant has a brother who is citizen and resident of Afghanistan, and is a high-level official in the Afghan government.

In 2002, Applicant was hired by a defense contractor to work as an interpreter to assist the United States Army in their mission in Afghanistan. He worked in Afghanistan from December 2002 to April 2004. Applicant went to lunch and

dinner with his brother on two occasions while he was working in Afghanistan. Since Applicant returned to the United States, Applicant's brother has visited him in the United States once every six or seven months. Applicant's brother lived in the United States from 1979 until 2002, when he returned to assist in the formation of the new government in Afghanistan. His wife and daughter reside in the United States.

Applicant explained that sometimes while he is in Afghanistan he feels safe, other times he does not. He stated that he feels that he is a stranger there because the country has changed so much.

Six witnesses testified on behalf of Applicant including several long time family friends and family members. All the witnesses had a very high respect for the Applicant. Applicant is considered to be a most considerate, kind, honest, reliable, and sound individual.

Letters of recommendation from his employer, professional colleagues, and military personnel who have worked with Applicant in Afghanistan attest to his sound judgment, discretion, reliability and team efforts. Applicant has achieved a high level of respect as an interpreter. His references consider him a great American and they highly recommend him for a security clearance.

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 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, 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 this case, the Administrative Judge's material findings of fact are not challenged.

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*.

(1) On appeal, Applicant offers new evidence that his brother is no longer working in Afghanistan for that country's government. The Board may not consider new evidence on appeal. *See* Directive ¶ E3.1.29. Accordingly, we may not consider the change in status of Applicant's foreign family member, and the impact that it might have on the security concerns presented in his case.

(2) Applicant argues that the Administrative Judge committed harmful error by basing her decision on the Directive's Enclosure 2 Adjudicative Guidelines rather than the Revised Adjudicative Guidelines. The revised Adjudicative Guidelines were circulated to agencies involved in security clearance determinations after December 29, 2005. They were implemented by the Department of Defense in a memo dated August 30, 2006, for SORs issued on or after September 1, 2006. The SOR in Applicant's case was issued on October 31, 2005. The Judge correctly based her decision on the Adjudicative Guidelines in effect at that time.

Applicant is essentially challenging the implementation of the Revised Adjudicative Guidelines by the Under Secretary of Defense. The Board's jurisdiction and authority are limited to reviewing security clearance decisions by Hearing

Office Administrative Judges. *See* Directive ¶¶ E3.1.28-E3.1.35. Nothing in the Directive gives the Board the jurisdiction or authority to pass judgment on the wisdom or desirability of guidance provided by the Under Secretary of Defense. *See, e.g.*, ISCR Case No. 99-0457 at 5 (App. Bd. Jan. 3, 2001).

(3) Applicant contends the synopsis of the Administrative Judge's decision contains a legal error. In support of that contention, Applicant argues that a statement of the Judge confuses a Guideline B Disqualifying Condition with a Mitigating Condition. This argument lacks merit.

The Board reviews an Administrative Judge's decision in its entirety, not just isolated sentences in the Judge's decision, to discern what the Judge found and concluded. *See, e.g.*, ISCR Case No. 02-30587 at 3 (App. Bd. June 15, 2005). Absent unusual circumstances, any flaws or errors in the synopsis of a Judge's decision are not likely to be harmful. *See, e.g.*, ISCR Case No. 02-23336 at 3-4 (App. Bd. May 10, 2004). Even if the Board were to assume, solely for the purposes of deciding this appeal issue, that Applicant interpretation of the language in the Judge's synopsis is correct, it still would not constitute harmful error.

(4) 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 Condition 3. ⁽¹⁾ This argument lacks merit.

In this case, the Administrative Judge made sustainable findings that: Applicant's brother was a high-level official in the Afghanistan government; Applicant went to lunch and dinner with his brother on two occasions while he was working in Afghanistan; and since Applicant returned to the United States, Applicant's brother has visited him in the United States once every six or seven months. Given those findings, the Judge concluded that Applicant's ties with his brother raised security concerns under Guideline B and that Disqualifying Conditions 1 and 3 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.

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). 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.

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 brother in Afghanistan were casual and infrequent. The Judge was not required, as a matter of law, to favorably apply Guideline B Mitigating Condition 3, or any of the other Guideline B Mitigating Conditions.

(5) Applicant argues that the Administrative Judge did not articulate a sustainable rationale for her unfavorable clearance decision, given her findings of fact. In that regard, Applicant notes that the Judge found that there was "strong mitigating evidence" in the case, but offered no explanation or analysis as to why that evidence was insufficient to overcome the government's security concerns. Instead, the Judge merely stated, without explanation or elaboration, that "current official policy does not allow me to grant this Applicant a security clearance." This argument has merit.

An Administrative Judge must apply pertinent Adjudicative Guidelines disqualifying and mitigating conditions. However, a Judge's obligation to apply pertinent provisions of the Adjudicative Guidelines does not override the Judge's obligation to evaluate an applicant's security eligibility in light of the "whole person" concept. Accordingly, the mere presence or absence of an Adjudicative Guideline disqualifying or mitigating condition is not solely dispositive of a case. Even if there is an Adjudicative Guideline disqualifying or mitigating condition that is applicable, a Judge must

consider the applicable disqualifying or mitigating condition in light of the record evidence as a whole and any pertinent general factors, and decide what weight can reasonably be given to the applicable disqualifying or mitigating condition. And, if a Judge reasonably concludes that particular Adjudicative Guidelines disqualifying or mitigating conditions do not apply to the specific facts of a case, the Judge still must evaluate the applicant's security eligibility under the general factors of Directive ¶ E2.2.1 (which refers to the "whole person" concept).

In her decision, the Administrative Judge found that there was "strong mitigating evidence" in this case. However, there was important specific evidence in mitigation that the Judge did not discuss. That evidence included statements from three credible U.S. government officials: (1) that Applicant had "worked under very harsh and dangerous conditions" as an interpreter during long range patrols from remote fire bases in the mountainous area of central Afghanistan; (2) that "[n]ot only were [Applicant's] linguistic skills indispensable, but his knowledge of Afghanistan's history and politics and its various ethnic groups and their customs was vital to mission success"; (3) that Applicant "routinely worked with classified materials of all sorts and levels" and "always exercised sound judgment and followed all regulations and procedures regarding classified materials"; (4) that "[m]uch of the success" of the missions was "due to [Applicant's] efforts"; and (5) "[t]he risks that [Applicant] encountered . . . was far greater than many people could ever realize."⁽²⁾ However, after finding that the government had established its case under Guideline B Disqualifying Conditions 1 and 3, and without discussing this evidence, the Judge summarily concluded:

Notwithstanding the fact that Afghanistan is a close ally of the United States, current official policy does not allow me to grant this Applicant a security clearance. I find that the Applicant is vulnerable to foreign influence under. (sic) Accordingly, I find against the Applicant under Guideline B (Foreign Influence).

Considering all the evidence, the Applicant has not met the mitigating conditions of Guideline B of the adjudicative guidelines set forth in Enclosure 2 of the Directive. Accordingly, she (sic) has not met her (sic) burden of persuasion under Guideline B.

The Administrative Judge did not explain what "current official policy" she was referring to. Nor did she explain what Applicant was vulnerable to foreign influence "under." Finally, the Judge offered no analysis of the foregoing evidence under the whole person factors. As a general rule, Judges are not required to assign an applicant's prior history of complying with security procedures and regulations significant probative value for the purposes of refuting, mitigating, or extenuating the security concerns raised by that applicant's more immediate disqualifying conduct or circumstances. *See, e.g.*, ISCR Case No. 01-03357 at 4 (App. Bd. Dec. 13, 2005); ISCR Case No. 02-10113 at 5 (App. Bd. Mar. 25, 2005); ISCR Case No. 03-10955 at 2-3 (App. Bd. May 30, 2006). However, the Board has recognized an exception to that general rule in Guideline B cases, where the applicant has established by credible, independent evidence that his compliance with security procedures and regulations occurred in the context of dangerous, high-risk circumstances in which the applicant had made a significant contribution to the national security. *See, e.g.*, ISCR Case No. 04-12363 at 2 (App. Bd. July 14, 2006). The presence of such circumstances can give credibility to an applicant's assertion that he can be relied upon to recognize, resist, and report a foreign power's attempts at coercion or exploitation.

Given the record in this case, Applicant has met his burden of demonstrating that the Administrative Judge's unfavorable clearance decision is arbitrary and capricious, in that it does not examine relevant evidence and fails to consider an important aspect of the case. *See, e.g.*, ISCR Case No. 97-0435 at 3 (July 14, 1998)(citing Supreme Court decision). Accordingly, the Board remands the case to the Judge for issuance of a new decision.

Order

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. Directive ¶ E2.A2.1.3.3. ("Contact and correspondence with foreign citizens are casual and infrequent.")
2. Applicant's Exhibits A, B, and C.