

DATE: January 24, 2007

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 05-04648

## **PPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Candace Le'i, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 25, 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), of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On May 18, 2006, after the hearing, Administrative Judge Martin H. Mogul 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 issues on appeal: whether the Administrative Judge committed reversible error by applying Foreign Influence Mitigating Condition (FIMC) 1 and concluding that Applicant's family in Iran and Bolivia are not in a position to be exploited by a foreign power; and whether the Judge's whole person analysis is unsustainable where the Judge relied on whole-person considerations unsupported by the record evidence and applied them in a manner that is arbitrary, capricious, and contrary to law. [\(1\)](#)

### **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 moved to the United States at the age of 18 in 1978. Applicant became an American citizen in 1990 and received a Masters degree in electrical engineering in 1993. Applicant has a brother who is an Iranian citizen, but has lived in the United States since 1994 and plans to remain in the U.S. Applicant has a sister who is a citizen and resident of Iran. She is a housewife. Applicant speaks to his sister two to three times a year.

Applicant's wife was born in Bolivia and came to the United States in 2000. She is a permanent resident of the U.S. and plans to become a U.S. citizen as soon as she is able to do so. Applicant married her in 2003, and they have a child who was born in the U.S. Applicant's wife's parents are citizens and residents of Bolivia. They speak only Spanish, and Applicant has only limited communication with them since his knowledge of Spanish is limited.

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<sup>(2)</sup> and concluding that Applicant's sister in Iran is 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. 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. July 17, 2006). *See also*, ISCR Case No. 03-15205 at 3-4 (App. Bd. Jan. 21, 2005). Here, the Judge stated that Applicant's sister is a housewife and has no ties to the Iranian government. The Judge noted that Iran is "undisputedly hostile" to the United States and that Applicant has a very heavy burden of showing that his sister does not pose a security risk. Without any support in the record, the Judge then concluded that the sister is not in position to be exploited by the Iranian government. The record does not support the Judge's application of FIMC 1.

The Administrative Judge performed a whole-person analysis. Department Counsel argues that the Judge based his whole-person analysis in part on conclusions which are unsupported by record evidence. One example of lack of support in the record is the Judge's application of FIMC 1, as discussed above. Another is the Judge's statement that Applicant does not have a close relationship with his sister in Iran, which we construe as an implicit application of FIMC 3.<sup>(3)</sup> While Applicant testified that he does not have a close relationship with his sister, portions of Applicant's testimony indicate regular contact (phone conversations two to three times a year) with his sister and familial regard for her.<sup>(4)</sup> There is a rebuttable presumption that an applicant's contacts with family members are not casual. *See, e.g.*, ISCR Case No. 02-24267 at 7 (App. Bd. May 24, 2005). Applicant had the burden of proving that his ties to his sister casual in nature. Applicant has not met that burden. The Judge's conclusion on the matter is unsupported by the record.

The Board does not agree with Department Counsel that the factors listed in E2.2.2.1 of the Directive are the only ones that may be considered in performing a whole person analysis in a Guideline B case. Other matters such as evidence of an applicant's personal loyalties; the nature and extent of an applicant's family ties to the U.S. relative to his ties to a foreign country; his or her social ties within the U.S.; and many others raised by the facts of a given case can properly be factored into judge's evaluation of an applicant's worthiness of a security clearance. *See, e.g.*, ISCR Case No. 04-00631 at 4-5 (App. Bd. Sept. 6, 2006); ISCR Case No. 03-02878 at 3 (App. Bd. June 7, 2006). The consideration for the Board is whether in a given case a judge's whole-person analysis supports his or her final decision. *See, e.g.*, ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007).

In this case, however, the Judge's whole-person analysis is not sustainable because it relies in significant part on his misplaced application of FIMC 1 and FIMC 3. What is left is a conclusory statement without reference to record evidence as to what Applicant would do in a hypothetical situation. On appeal, Applicant cites to record evidence to support the Judge's conclusion, but the Board cannot determine with confidence what the Judge was thinking about the matters imputed to him by Applicant. That uncertainty is merely another reason the Board cannot affirm the Judge's decision.

### Order

The Administrative Judge's favorable security clearance decision 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

### **Separate Opinion of Member David M. White**

I respectfully dissent. I do not agree that the Administrative Judge erred. Furthermore, this is not a case in which correction of any error identified by the majority either mandates or is cured by reversal. Department Counsel raises two issues on appeal: (1) whether the Judge erred by applying Foreign Influence Mitigating Condition (FIMC) 1 and concluding that relatives in Iran and Bolivia are not in a position to be exploited by a foreign power;<sup>(S)</sup> and (2) whether the Judge's whole person analysis is arbitrary, capricious and contrary to law.

Applicant is a 46 year old software engineer with bachelor's and master's degrees in electrical engineering from a U.S. university. He was born in Iran. His parents were a teacher and a school principal. In 1978, at age 18, he moved to the U.S. and has lived here ever since, becoming a naturalized citizen in 1990. He has visited Iran only twice since 1978, to visit his mother during an illness and later to attend her funeral. Both of his parents are now deceased and he has formally renounced his Iranian citizenship. His brother left Iran at age 17, has never returned, and lives permanently in the United States. Applicant has a close relationship with his brother. His sister, a home-maker married to an anesthesiologist, still lives in Iran. In 2003 he married a Bolivian citizen who is now a permanent resident alien of the U.S. and intends to apply for citizenship as soon as she becomes eligible. Her family, comprising two parents and a sister, are citizens and residents of Bolivia. Applicant's son was born in the U.S. in 2005. He owns two houses worth approximately \$900,000.00 and has substantial other financial assets, all in the U.S.

Department Counsel took issue with one of the Judge's Findings of Fact in connection with the first allegation of error. Department Counsel cites an ambiguous portion of Applicant's brother's written statement to contend that Applicant has a close relationship with his sister. The Judge found that they only speak by telephone two or three times a year and that they do not have a close relationship. The Board's scope of review for contested Findings of Fact is to determine whether they are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. The Judge based his finding on extensive testimony from Applicant and corroborating evidence to the effect that he has only seen his sister three or four times since 1978, and there is no ongoing relationship or affection. The Judge's decision reflects a rational interpretation of all the relevant evidence, and his finding is a sustainable characterization on this issue. This finding was not an implicit application of FIMC 3, but rather supported the conclusions under FIMC 1 and the whole person analysis that Applicant did not feel or owe any loyalty to his sister that could be exploited to conflict with his loyalty to the United States.

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 or remand 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,

E3.1.33. 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 [Judge]..." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. We review matters of law *de novo*.

The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole. *See* ISCR Case No. 01-14740 at 7 (App. Bd. Jan.15, 2003). Thus, the presence of some potentially disqualifying evidence does not alone compel the Judge to make an unfavorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. A Department Counsel's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law.

Department Counsel relies heavily on Board precedent interpreting FIMC 3 (*Contact and correspondence with foreign citizens are casual and infrequent*) when, in fact, the Judge neither applied nor cited FIMC 3.<sup>(6)</sup> The Judge analyzed the nature of Applicant's relationships with both his sister in Iran and his wife's family in Bolivia to conclude that FIMC 1 applied because none of them were either agents of a foreign power or in a position to be exploited in a way that could force Applicant to choose between loyalty to them and loyalty to the United States. Contrary to Department Counsel's assertion on appeal, the Judge correctly cited and applied the "very heavy burden" standard of proof to Applicant's mitigation case because of the hostile nature of one of the countries involved. Applicant came to the United States from Iran when it was a strong U.S. ally, as it had been for the entire 18 years of his life to that point. The fact that he fully agrees with the adverse characterization of the current regime there does not contradict the Judge's finding that "the mitigating evidence substantially outweighs the evidence supporting the SOR," as Department Counsel asserts. The Judge's conclusion that FIMC 1 applies in this case is based on his examination of the relevant evidence, is rational and is within the scope of authority delegated to him to adjudicate this clearance determination. He found that Applicant's strong U.S. attachments and absence of any loyalty to his or his wife's foreign family members showed that none of them were in a position to be exploited in a way that could force Applicant to choose between conflicting loyalties. Department Counsel's argument for a virtual *per se* rule, denying clearance to any U.S. citizen who has a family member living in another country because presence there subjects them to possible foreign exploitation, is contrary to the Directive's express language, its adjudicative guidelines, and its intent that all evidence, pro and con, be individually evaluated in reaching these determinations in the best interest of national security. *See* Directive ¶ E2.2.2. The Judge's conclusion that FIMC 1 applies is neither arbitrary and capricious nor contrary to law.

Department Counsel also asserts that the Judge's whole person analysis, resulting in a favorable finding for Applicant, is arbitrary and capricious and contrary to law. After correctly discussing the "fully relevant" nature of Directive ¶ E2.2.1.8. (*The potential for pressure, coercion, exploitation or duress*) in whole person analysis under Guideline B, Department Counsel incorrectly, and without citing legal authority, asserts that whole person analysis is logically predicated on the assumption that the Judge found no specific mitigating conditions apply. Department Counsel also incorrectly asserts that whole person analysis may only be based on consideration of Applicant's actual conduct, to the exclusion of other evidence bearing on reliability, trustworthiness and potential for coercion or exploitation. Directive ¶ E2.2.1., describing the whole person concept, requires consideration of a sufficient period of a person's life, not merely his or her conduct, including available, reliable information about the person, past and present, favorable and unfavorable. Directive ¶ E2.2.3 requires that the ultimate determination be an overall common sense determination based upon careful consideration of the individual Guidelines, "each of which is to be evaluated in the context of the whole person."

The Judge not only specifically found that FIMC 1 applied to mitigate security concerns raised in the SOR, but further noted several factors, including Applicant's minimal contact with his sister, his absence of any communication with his wife's family, his powerful attachments in and commitment to the United States, to find that very little potential exists for pressure, coercion, exploitation or duress. I find this to be a permissible and sustainable conclusion as part of the Judge's articulated "whole person" analysis. The various factors cited by the Judge were not considered in isolation, but in his analysis of the totality of circumstances indicating negligible potential for exploitation based on foreign influence.

Since the Judge considered the relevant, material evidence and potential disqualifying and mitigating conditions in the context of his articulated "whole person" analysis before concluding that it is clearly consistent with the national interest to grant Applicant a security clearance, his conclusions were not arbitrary, capricious or contrary to law.

Accordingly, I would affirm the Judge's decision to grant Applicant a security clearance. But if the Judge did commit harmful error in his application of FIMC 1 or his whole person analysis, the case should be remanded with instructions to correct such error. Directive ¶ E3.1.33.3 authorizes the Board to reverse an Administrative Judge's decision, "if correction of identified error mandates such action." The majority neither articulates a rationale compelling a final decision denying Applicant a security clearance as a matter of law, nor otherwise explains how that result remedies the erroneous application of FIMC 1 or whole person analysis in his favor. Rather, Applicant's clearance is denied because the Judge erred in explaining his favorable conclusions; a basis with no logical relation to Applicant's reliability, trustworthiness, or susceptibility to coercion or duress. For reasons expressed more fully in ISCR Case No. 05-01820 at 5-7 (App. Bd. Dec. 14, 2006), remand is the authorized and proper remedy to correct errors of the type identified by the majority.

Signed: David M. White

David M. White

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in Applicant's favor with regard to Guideline C (Foreign Preference). Department Counsel does not challenge that ruling, and it is not at issue here. Furthermore, there is no appeal issue regarding the situation in Bolivia. The Judge accepted into the record official documents that address that subject.
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. Applicant testified that those calls, made in conjunction with Iranian New Year and the anniversaries of his parents deaths, are important to him. Tr. at 46, 48.
5. Department Counsel's statement of the issue on appeal incorrectly abbreviates the second prong of FIMC 1: "A determination that 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.*" (Emphasis added.) Directive ¶ E2.A2.1.3.1.
6. The majority opinion also finds error in the Judge's "implicit application" of FIMC 3 and resulting favorable conclusions under the whole person analysis.