

KEYWORD: Guideline B

DIGEST: The record evidence does not support the Judge’s application of Guideline B Mitigating Condition 1. The Judge’s whole person analysis is unsustainable. Favorable decision reversed.

CASENO: 05-10467.a1

DATE: 05/08/2007

DATE: May 8, 2007

In Re:	)	
	)	
	)	
-----	)	ISCR Case No. 05-10467
SSN: -----	)	
	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Goldstein, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 21, 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 August 4, 2006, after the hearing, Administrative Judge Barry M. Sax

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's application of Foreign Influence Mitigating Conditions (FIMC) 1<sup>1</sup> and 4<sup>2</sup> is arbitrary and capricious and unsupported by the record evidence; and whether the Judge's whole-person analysis is unsustainable because the whole-person considerations relied upon are unsupported by the record evidence and their application is arbitrary, capricious, and contrary to law. We reverse the Judge's decision to grant a security clearance.

### **Whether the Record Supports the Judge's Factual Findings**

Facts:

The Administrative Judge made the following relevant findings of fact: Applicant is an American citizen by birth. Applicant's wife is a citizen of the People's Republic of China (PRC), who has applied for U.S. citizenship. Applicant's parents-in-law and brother-in-law are citizens and residents of the PRC. Applicant's parents-in-law suffered under the Cultural Revolution. Applicant's father-in-law is a retired university professor and dean of a teachers' college.

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*.

---

<sup>1</sup>Directive ¶ E2.A2.1.3.1 ("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").

<sup>2</sup>Directive ¶ E2.A2.1.3.4 ("The individual has promptly reported to proper authorities all requests, contacts, or threats from persons or organizations from a foreign country as required").

Department Counsel argues that the Administrative Judge's application of FIMC 1 and 4 is arbitrary and capricious and unsupported by the record evidence. With regard to FIMC 1 in particular, Department Counsel's argument has merit. When the government has established that security concerns have been raised, as is the case here with regard to Applicant's in-laws, the burden shifts to Applicant to rebut, extenuate, or mitigate those concerns. *See, e.g.* ISCR Case No. 99-0532 at 7 (App. Bd. Dec. 13, 2000). The Judge points out that Applicant has a heavy burden to satisfy FIMC 1. The Judge states that "there is nothing in the evidence establishing whether or not Applicant's relatives in the PRC are/may be/might be/could be agents of the PRC government, or are in a position to be used, voluntarily or not, knowingly or not, to seek to persuade Applicant to act against U.S. security interests." Decision at 6. The Judge goes on to say that the security risk posed by the presence of Applicant's in-laws in the PRC is "hypothetical." Applicant has not met his burden to rebut, extenuate, or mitigate the security concerns raised in this case. Even if we accept that Applicant's in-laws in the PRC are not agents of a foreign power, their vulnerability to exploitation or coercion has not been mitigated. Indeed, they were mistreated during the Cultural Revolution. The Judge improperly shifted the burden to the government to prove that the risk exists. The record does not support the Judge's application of FIMC 1.<sup>3</sup>

Department Counsel's argument regarding the Administrative Judge's application of FIMC 4 has less merit. Applicant testified that he properly notified the appropriate officials of his marriage to a foreign national and his visits to the PRC. There is no allegation or evidence to the contrary. However, in light of the evidence as a whole and in light of the error identified with regard to FIMC 1, the Judge's application of FIMC 4 by itself would not overcome the security concerns raised by Applicant's foreign in-laws. In this case, the facts identified by the Judge in applying FIMC 4 do not readily suggest refutation, extenuation, or mitigation, and they have low probative value in light of the security concerns identified in this case. *See, e.g.*, ISCR Case No. 05-01820 at 4 (App. Bd. Dec. 14, 2006).

Department Counsel contends that the Judge's whole-person analysis is unsustainable because the whole-person considerations relied upon are unsupported by the record evidence and their application is arbitrary, capricious, and contrary to law. While we agree with Department Counsel's argument as a whole, we disagree with Department Counsel's contention 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 factors in an applicant's life are relevant in a whole-person analysis. While the Judge properly notes Applicant's maturity, integrity, and service to his country, he does not explain why these characteristics outweigh the security concerns raised by the presence of Applicant's in-laws in the PRC. While Applicant stated that he would not act contrary to the interests of the U.S., the Board has previously held that such statements are of limited weight, given their hypothetical nature. *See, e.g.*, ISCR Case No. 04-12435 at 4 (App. Bd. Apr. 9, 2007). The Judge's whole-person analysis is not sustainable.

---

<sup>3</sup>In footnote 4 of the Judge's decision, there is a discussion of an Appeal Board decision where the Board affirmed a Judge's decision in part based on testimony that the Applicant in that case had repeatedly told his wife in blunt and graphic terms he would not compromise national security even if her relatives were harmed by the PRC. There is no comparable evidence in this case. Thus, it is not clear what purpose was served by the Judge's discussion of the prior case.

**Order**

The Administrative Judge's decision granting Applicant a security 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