

KEYWORD: Guideline C; Guideline B; Guideline E

DIGEST: Department Counsel's argument that the Judge gave insufficient attention to the repressive nature of the Iranian government and its hostility to the US. Also of importance is the fact that Applicant's family has recently been targeted by the Iranian government. Furthermore the Judge's conclusion that Applicant's contacts are casual and infrequent are not sustainable on these facts. Nothing in the Directive gives the Board jurisdiction or authority to pass judgment on the wisdom or desirability of guidance provided by the Under Secretary of Defense. Favorable decision reversed.

CASENO: 05-12088.a1

DATE: 10/24/2007

DATE: October 24, 2007

In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Fahryn Hoffman, Esq., Department Counsel

**FOR APPLICANT**

Leslie McAdoo, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 10, 2006, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline C (Foreign Preference), Guideline B (Foreign Influence), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 30, 2007, after the hearing, Administrative Judge Kathryn Moen Braeman granted Applicant’s request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.<sup>1</sup>

Department Counsel raised the following issues on appeal: whether the Judge’s application of Foreign Influence Mitigating Conditions (FIMC) 1 and 3 is arbitrary, capricious, and contrary to law; and whether the Judge’s whole person analysis is arbitrary, capricious, and contrary to law. Finding error, we reverse.

### **Whether the Record Supports the Administrative Judge’s Factual Findings**

The Judge made the following pertinent findings of fact: Applicant was born in the U.S. while her father, an Iranian native, was working here as a resident alien. When Applicant was four, her family returned to Iran. They came back to the U.S. in 1979. Applicant’s mother is a naturalized citizen of the U.S.; her father remains in Iran.

Applicant traveled to Iran in 1992 and in 2000, both times on an Iranian passport. She has relinquished this passport to a foreign embassy. Applicant’s family has experienced “political problems” from the Iranian regime, which supports terrorism and has a poor record on human rights.

The Appeal Board’s review of the Judge’s findings 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 findings from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620-21 (1966). In evaluating the Judge’s findings, we are required to give deference to the Judge’s credibility determinations. Directive ¶ E3.1.32.1. Department Counsel does not challenge the Judge’s findings, adopting them as part of her appeal brief. Therefore, those findings are not at issue in this appeal.

### **Whether the Record Supports the Administrative Judge’s Ultimate Conclusions**

A 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 choices 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 general standard is that a clearance may be granted only when ‘clearly consistent with the interests of national security.’” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Appeal

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<sup>1</sup>The Judge’s favorable decision under Guidelines C and E are not at issue in this appeal.

Board may reverse the 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 and E3.1.33.3.

“[T]here is a strong presumption against granting a security clearance.” *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish any appropriate mitigating conditions. See Directive ¶ E3.1.15. “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, e.g., ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. See ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Under FIMC 1, an applicant must show that his or her foreign relatives are neither agents of a foreign power nor in a position to be exploited by a foreign power, in this case Iran. The Judge noted that Applicant has resisted efforts by the Iranian government to force her to relinquish her U.S. citizenship, demonstrating her ability to stand up to pressure. She also noted that Applicant's father has no ties to the Iranian government, and Applicant herself has long standing ties to the U.S., having been born in this country. The Judge concluded that these matters demonstrate that Applicant is not susceptible to exploitation.

On the other hand, Department Counsel argues that the Judge's analysis did not give sufficient attention to the repressive nature<sup>2</sup> of the Iranian regime and its hostility to the U.S., which evidence both the willingness and the motive for Iran to use Applicant's father as a means of coercion. We find merit in Department Counsel's argument. Neither the Judge's findings nor the record provide a reasonable basis to conclude that Applicant's father is not someone through whom Applicant could be coerced. This is especially true in light of the findings and the record evidence that Applicant's family has been targeted by the regime in the recent past. We conclude that the record evidence does not sustain the conclusion that Applicant has met her burden of persuasion on FIMC 1.

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<sup>2</sup>See Government Exhibit 3, U.S. Department of State, Country Report on Human Rights Practices (Iran) (Mar. 8, 2006) at 12. “The [Iranian] constitution states that ‘reputation, life, property, (and) dwelling(s)’ are protected from trespass . . . however, the government infringed on these rights. Security forces monitored the social activities of citizens, entered homes and offices, monitored telephone conversations, and opened mail without court authorization.” This exhibit describes other repressive practices of the regime, including summary executions, torture, arbitrary arrest and detention, political imprisonment, and restrictions on civil liberties, such as speech, assembly, and movement.

Department Counsel has also challenged the Judge's favorable conclusion under FIMC 3, which requires a showing that contacts with foreign relatives are casual and infrequent in order to mitigate Guideline B security concerns. Again, Department Counsel's argument has merit, in light of record evidence that Applicant communicates with her father monthly and at significant times of the year, such as the New Year. Tr. at 89. *See* ISCR Case No. 04-11369 at 3 (App. Bd. Mar. 16, 2007) (Monthly communication with a foreign relative not casual or infrequent.) Given the evidence in this case, the Judge erred in her favorable application of FIMC 3.

We have considered the Judge's whole person analysis, which takes into account Applicant's U.S. ties, her relative lack of Iranian assets, and her good work performance. The Judge also considered Applicant's ability to resist pressure. On the other hand, Department Counsel argues that the Judge's whole person analysis is impaired by the same legal infirmity as her treatment of FIMC 1, that she did not properly evaluate Applicant's potential for being coerced through her Iranian father. We find Department Counsel's argument to be meritorious. As stated above, there is considerable record evidence outlining the extent to which Applicant's family has been targeted by the Iranian regime, evidence which raises serious concerns about the ease with which Applicant's Iranian family members, and through them Applicant herself, could come to the attention of a government which monitors residents' telephone conversations, opens their mail, enters their homes, and conducts other kinds of domestic surveillance. An applicant with close family members residing in a country hostile to the U.S. bears a "heavy burden" to demonstrate that it is clearly consistent with the interests of national security for him or her to have a clearance. *See* ISCR Case No. 01-26893 at 10 (App. Bd. Oct. 16, 2002). Despite the evidence submitted by Applicant we conclude that the Judge's favorable whole person analysis is not sustainable on this record. To the extent that this is a close case, it "should be resolved in the favor of national security, rather than in the favor of the Applicant." *See* ISCR Case No. 03-23190 at 2 (App. Bd. Jul.12, 2007) (internal citations omitted).

In her reply brief, Applicant contends that the Board should base its decision on the Revised Adjudicative Guidelines rather than the Directive's Enclosure 2 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 February 10, 2006. The Judge based her decision on the Adjudicative Guidelines in effect at that time. *See* ISCR Case No. 05-03846 at 3 (App. Bd. Nov. 14, 2006).

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).

**Order**

The 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