

KEYWORD: Guideline B

DIGEST: The Judge does not relate her own findings regarding the totalitarian nature of the People's Republic of China and its intelligence gathering efforts to the issue of whether it is likely that Applicant could be placed in a position to choose between the PRC and the United States. The Judge does not address the evidence of the PRC's hostility to Applicant's family in China and the heightened concern that his parents and in-laws could come to the attention of the government. The Judge's conclusion that neither Applicant nor his parents are likely to be vulnerable to foreign exploitation has no rational basis in the record evidence. There is record evidence that Applicant has close ties to his parents and in-laws, undermining the application of Guideline 8(b). Favorable decision reversed.

CASENO: 06-24575.a1

DATE: 11/09/2007

DATE: November 9, 2007

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In Re:)	
-----)	ISCR Case No. 06-24575
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Caroline H. Jeffreys, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 16, 2007, DOHA issued a statement of reasons (SOR) 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 May 31, 2007, after the hearing, Administrative Judge Jacqueline T. Williams granted Applicant’s request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge erred in her application of the Guideline B mitigating conditions; and whether the Judge’s whole person analysis is arbitrary, capricious, or contrary to law. Finding error we reverse.

Whether the Record Supports the Judge’s Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant was born in the People’s Republic of China (PRC), emigrated to the U.S. in 1982, and received an advanced degree from a U.S. university in 1988. He became a U.S. citizen in 1996. He is married and has two children, both of whom were born in the U.S. His bank accounts and retirement account are in the U.S.

Applicant’s parents are citizens and residents of the PRC. Both are in their 80s and retired. Both are in poor health. Applicant speaks to his parents “about once a week.” He and his brother supplement their parents’ income as needed. They purchased an apartment in the PRC for his parents. He has visited the PRC five times since 1999 to visit them. Applicant’s in-laws are citizens and residents of the PRC. They are also residents of the U.S., and divide their time between the two countries. Applicant speaks to his in-laws about once a month.

The PRC is a totalitarian regime “with foreign policy goals antithetical to the U.S.” It targets the U.S. for intelligence purposes “and operates against its own citizens in the U.S.”

B. Discussion

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 has not explicitly challenged the Judge’s findings of fact. To the extent that challenges are implicit in the allegations of error we will address them below.

Whether the Record Supports the 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 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 (9th 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).

Department Counsel has challenged the Judge’s favorable application of two Foreign Influence Mitigating Conditions (FIMC), 8(a) and (b).¹ FIMC 8(a) is as follows:

[T]he nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.

Department Counsel contends that the Judge failed to analyze Applicant’s case in light of the nature of the PRC and in light of Applicant’s family’s having been targeted in the past by the PRC government. The Board finds merit in this argument. In her Conclusions section, the Judge does not relate her own findings about the totalitarian nature of the PRC and its intelligence gathering efforts against the U.S. to the issue of whether it is likely that Applicant could be placed in a position to choose between the interests of the PRC and of the United States. More telling, the Judge does not address Applicant’s testimony concerning PRC hostility to his family. This testimony establishes

¹Directive ¶ E2.8(a), (b).

that, when Applicant was a child, PRC officials entered his family home in an attempt to find “anti revolutionary evidence.” Tr. at 27. The testimony is compelling and underscores the fact that, at least in the past, Applicant’s family had been persecuted by the government. Insofar as this mitigating condition focuses upon the “position or activities” of foreign relatives or associates, Applicant’s testimony heightens concern that his parents and in-laws could come to the attention of the PRC government and thereby become a means whereby he is forced to choose between the interests of the PRC and of the U.S. The Judge’s conclusion that neither Applicant’s parents nor his in-laws “are likely to be vulnerable to foreign exploitation” has no rational basis in the record evidence. Decision at 6. Indeed, the statement by the Judge is conclusory, without any explanation or elaboration in support. Neither is it sustainable in the face of record evidence of Applicant’s close family ties; the history of the PRC’s hostility to Applicant’s family; the PRC’s history of human rights violations; and its hostility to the interests of the U.S. The Judge’s favorable application of FIMC8(a) is error. *See, e.g.*, ISCR Case No. 05-03279 at 4-5 (App. Bd. Sep. 20, 2007).

Turning to FIMC 8(b), this mitigating condition reads as follows:

[T]here is no conflict of interest, either because the individual’s sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest.

Under the facts of this case, the crucial issue posed by this mitigating condition is whether Applicant has such deep and longstanding ties to the U.S. that he would not act against this country’s interests should the occasion arise. The Board takes note of Applicant’s testimony to the effect that he has little sympathy for the government of the PRC. Furthermore, common sense might suggest that a person who has lived voluntarily in the U.S. for a considerable period of time is dedicated to this country. However, in evaluating this mitigating condition, the Board believes that it is crucial to balance the ties at stake and to consider record evidence that detracts from the notion that Applicant’s ties to the United States are paramount. Without impugning Applicant’s patriotism, it is nevertheless necessary to consider the fact that Applicant is close to his parents, communicates with them weekly and provides for them economically as the need arises, demonstrating loyalty and responsibility for their well-being. His frequent communication with his in-laws indicates that he is close to them as well. These relatives live in a nation that views the U.S. as a primary intelligence target, that abuses human rights, and that has in the past targeted Applicant’s parents for persecution. Therefore, as noted above, the record raises a serious question as to whether Applicant’s parents could come to the attention of the PRC and thereby become a means through which he would be faced with a conflict between their interests and those of this country. The Board has repeatedly held that when the foreign power in question is hostile to the U.S. and its citizens, Applicant is faced with a “very heavy burden” to demonstrate that neither he nor his foreign family members are subject to influence by the foreign power. *See, e.g.*, ISCR Case No. 03-09053 at 5 (App. Bd. Mar. 29, 2006.) Given the record in this case, we conclude that the Judge’s analysis of the mitigating conditions is error.

We have considered the Judge’s whole person analysis. To a large extent it summarizes the discussion which came before it. The Judge states that Applicant has strong ties to the U.S. and concludes that he “can be trusted to resolve any conflict of interest . . . in favor of the U.S.” Decision

at 7. For the reasons set forth above, we conclude that this analysis fails to take into account significant aspects of the case, including the position of Applicant's parents in the PRC and his devotion to them. Admittedly, Applicant has testified that he would not act against the U.S. if faced with the choice. However, an Applicant's stated intention as to what he would do in the future is of relatively little weight, given the record in this case. *See* ISCR Case No. 03-09053 at (App. Bd. Mar. 29, 2006) ("An applicant's stated intention about what he or she might do in the future under some hypothetical set of circumstances is merely a statement of intention that is not entitled to much weight, unless there is record evidence that the applicant has acted in a similar manner in the past under similar circumstances.") After considering the Judge's decision, the briefs, and the record evidence, we conclude that the Judge has committed harmful error and that the record does not support a favorable decision.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Jeffery D. Billett

Jeffrey D. Billett
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