

KEYWORD: Guideline B; Guideline C

DIGEST: The Board may not consider new evidence on appeal. The fact that Applicant's explanations and mitigating evidence did not lead the Judge to the decision desired by Applicant does not establish error. The Judge articulated a reasonable concern that Applicant's circumstances could make her vulnerable to foreign influence. Adverse decision affirmed.

CASENO: 06-24789.a1

DATE: 02/08/2008

DATE: February 8, 2008

In Re:)	
)	
-----)	ISCR Case No. 06-24789
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security

clearance. On January 30, 2007, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) and Guideline C (Foreign Preference) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 27, 2007, after the hearing, Administrative Judge Elizabeth M. Matchinski 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 issue on appeal: whether the Judge’s adverse security clearance decision under Guideline B is arbitrary, capricious, or contrary to law.¹

Applicant argues that the Judge erred, as a matter of law, in concluding that she was vulnerable to foreign influence because Applicant’s father does not hold a high-level job in the Taiwanese government. Rather, he is an ordinary public affairs officer responsible for furthering Taiwan’s cultural interests. As part of her brief, Applicant offers new evidence which indicates that her father intends to immigrate to the United States and retire here, and that she has applied for a visa on his behalf. The Board does not find Applicant’s argument persuasive.

The Board may not consider Applicant’s new evidence on appeal. *See* Directive ¶ E3.1.29. Its submission does not demonstrate error on the part of the Judge. *See, e.g.*, ISCR Case No. 06-23748 at 2 (App. Bd. Oct. 11, 2007).

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. Thus, Applicant had the burden of presenting evidence to rebut, explain, extenuate or mitigate facts that the Department Counsel proved or that Applicant admitted regarding her foreign family ties. Applicant also had the ultimate burden of persuasion as to obtaining a favorable security clearance decision. Directive ¶ E3.1.15. The Judge had to evaluate Applicant’s past and current circumstances in light of pertinent provisions of the Directive, and decide whether Applicant had met her burden of persuasion under Directive ¶ E3.1.15. The fact that Applicant’s explanations and her mitigating evidence did not lead the Judge to the decision desired by Applicant does not establish error. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision.

A review of the Judge’s decision indicates that the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying circumstances, and considered the possible application of relevant mitigating conditions and factors. The Judge found in favor of Applicant under Guideline C, and articulated a rational basis for not favorably applying any mitigating conditions or factors with respect to the Guideline B allegations. She reasonably explained why the evidence which Applicant had presented in mitigation was insufficient to overcome the government’s security concerns. The Judge’s decision exhibits a discerning weighing of a number of variables to reach a commonsense determination. Directive ¶ E2.2. In some instances, as noted earlier, this process led to favorable findings for Applicant. However, the Judge also articulated a reasonable concern that Applicant’s circumstances could potentially make her vulnerable to foreign influence. The security concern is based upon close family ties in Taiwan, considered in the context of the overall political/security profile of that country *vis-a-vis* the United States. Applicant offers an alternative interpretation of the record evidence. However, that

¹The Judge’s favorable decision under Guideline C is not at issue on appeal.

alternative interpretation of the record evidence is insufficient to render the Judge's interpretation arbitrary, capricious or contrary to law. *See, e.g.*, ISCR Case No. 03-19101 at 2 (App. Bd. Oct. 13, 2006). The Judge has articulated a rational explanation for her unfavorable determination under the disqualifying and mitigating factors and the whole-person concept, and there is sufficient record evidence to support that determination—given the standard that required the Judge to err on the side of national security. *See, e.g.*, ISCR Case No. 06-04371 at 3 (App. Bd. Oct. 18, 2007).

Order

The decision of the Judge denying Applicant a security clearance is **AFFIRMED**.

Signed: Michael D. Hipple
Michael D. Hipple
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board