

KEYWORD: Guideline C; Guideline B

DIGEST: The Board concludes that the Judge did not adequately discuss significant mitigating evidence in light of prior precedents. Adverse decision remanded.

CASENO: 06-25928.a1

DATE: 04/09/2008

DATE: April 9, 2008

In Re:	)	
	)	
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	)	ISCR Case No. 06-25928
	)	
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 June 4, 2007, DOHA issued a statement of reasons (SOR) 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 November 20, 2007, after the hearing, Administrative Judge Juan J. Rivera denied Applicant's request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.<sup>1</sup>

Applicant raised the following issues on appeal: whether certain of the Judge's findings were supported by substantial evidence; and whether the Judge's adverse security clearance decision is sustainable. We remand the case to the Judge for the issuance of a new decision.

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

#### **A. Facts**

The Judge made the following sustainable findings of fact: Applicant works for a defense contractor abroad. He was born and raised in Ecuador and became a U.S. citizen in the early 2000s. His wife is a citizen of Ecuador and currently resides with him in another country. He has children who are Ecuadorian citizens or U.S. citizens or dual citizens of those countries. Those children reside with their parents.

Applicant has immediate family members and in-laws who are citizens and residents of Ecuador. He has an in-law who is a member of the Ecuadorian military. He also has a friend who is a member of the Ecuadorian military. They contact each other by e-mail approximately once every three months. He has a number of uncles and aunts who are citizens and residents of Ecuador.

Applicant and/or his wife own real estate in the country he works and have bank accounts in that country and in Ecuador. Applicant's financial ties in the country he works are due only to the fact that he works there. He has substantial financial ties or property in the U.S.

Ecuador is a constitutional republic that respects human rights and maintains close ties with the United States.<sup>2</sup>

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 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 finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S.

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<sup>1</sup>The Judge's favorable decision under Guideline C and under SOR paragraphs 2(d), 2 (r) and 2(s) is not at issue in this appeal.

<sup>2</sup>The Board construes the Judge's decision as concluding that Applicant's ties to the country he works in are not of security concern.

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.

As stated above, Applicant contends that certain of the Judge's findings of fact are not based upon substantial record evidence. Having reviewed the record as a whole, the Board resolves this issue adversely to Applicant. To the extent that the Judge's findings of fact contain error, it is harmless. *See* ISCR Case No. 01-23362 at (App. Bd. Jun. 5, 2006).

### **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 the 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.

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After 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).

In analyzing Applicant's case, the Judge took into account his ties to the United States and other matters Applicant submitted in his own behalf but concluded that, given Applicant's extensive family ties to Ecuador, his connection to members of the Ecuadorian military, and the dangers inherent in the region, Applicant had not met his burden of persuasion as to mitigation. After

reviewing the record, the Board concludes that the Judge's analysis in that regard did not adequately discuss significant mitigating evidence, in light of prior precedents and Applicant's burden of persuasion in the case.

As a general rule, an applicant's prior history of complying with security procedures and regulations is considered to be of relatively low probative value for the purposes of refuting, mitigating, or extenuating the security concerns raised by that applicant's more immediate disqualifying conduct or circumstances. *See, e.g.*, ISCR Case No. 01-03357 at 4 (App. Bd. Dec. 13, 2005); ISCR Case No. 02-10113 at 5 (App. Bd. Mar. 25, 2005); ISCR Case No. 03-10955 at 2-3 (App. Bd. May 30, 2006). However, the Board has recognized an exception to that general rule in Guideline B cases, where the applicant has established by credible, independent evidence that his compliance with security procedures and regulations occurred in the context of dangerous, high-risk circumstances in which the applicant had made a significant contribution to the national security. *See, e.g.*, ISCR Case No. 04-12363 at 2 (App. Bd. July 14, 2006); ISCR Case No. 05-03846 at 6 (App. Bd. Nov. 14, 2006); ISCR Case No. 07-00034 at 3 (App. Bd. Feb. 5, 2008). The presence of such circumstances can give credibility to an applicant's assertion that he can be relied upon to recognize, resist, and report attempts at coercion or exploitation. *Id.*

Here, the record contained statements from several officials of another government agency referencing the significant and dangerous work done on behalf of the U.S. by Applicant. One statement commended Applicant for his work "in a position of trust while performing critical counter . . . operations in . . ." <sup>3</sup> Another, stated that Applicant "has demonstrated unswerving dedication to . . . the mission of [the other government agency] and the United States . . . in the war on . . . [Applicant] literally make[s] life and death decisions [during every mission]." <sup>4</sup> Yet another commends Applicant for serving the U.S. at the risk of his own personal safety. <sup>5</sup> Those statements are consistent with the Judge's findings about the danger posed to American citizens abroad. They demonstrate that Applicant has repeatedly been willing to assume a high level of risk on behalf of the U.S., and they constitute important evidence that Applicant's ties and sense of obligation to the U.S. could be sufficiently strong that he "[could] be expected to resolve any conflict of interest in favor of the U.S. . . ." Directive ¶ E2.8(b). *See* ISCR Case No. 05-03846 at 6 (App. Bd. Nov. 14, 2006.) (Applicant's work as an interpreter in Afghanistan occurred "in the context of dangerous, high-risk circumstances in which [he] made a significant contribution to the national security.") *See also* ISCR Case No. 04-12363 (App. Bd. Jul. 14, 2006); ISCR Case No. 07-00034 (App. Bd. Feb. 5, 2008).

Accordingly, the case is remanded to the Judge for the issuance of a new decision which discusses whether or not Applicant's circumstances fall within the above precedents, and if so, to what extent. On remand, the Judge is permitted to reopen the record on the motion of either party.

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<sup>3</sup>Applicant Exhibit (AE) 1 at 3. (Letter from Program Manager, dated Oct. 12, 2007.)

<sup>4</sup>AE 1 at 5.

<sup>5</sup>AE 1 at 7.

**Order**

The Judge's adverse security clearance decision is REMANDED.

Signed: Michael Y. Ra'anan  
Michael Y. Ra'anan  
Administrative Judge  
Chairman, 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