

KEYWORD: Guideline B

DIGEST: The Judge failed to take into account significant record evidence. The Judge erred in not applying FIDC 7(d) in light of the fact Applicant's spouse is a citizen of the PRC. Judges must be guided by common sense with a view toward making a determination consistent with the interests of national security. Favorable decision reversed.

CASENO: 07-02485.a1

DATE: 05/09/2008

DATE: May 9, 2008

In Re:)
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 -----) ISCR Case No. 07-02485
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)
 Applicant for Security Clearance)
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Alison O'Connell, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 29, 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 December 10, 2007, after the hearing, Administrative Judge Barry M. Sax 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’s determination that the Government had not made a *prima facie* case under Guideline B is erroneous; whether the Judge’s application of the Guideline B mitigating conditions is erroneous; and whether the Judge’s whole-person analysis was arbitrary, capricious, or contrary to law. Finding error, we reverse.

Whether the Record Supports the Judge’s Factual Findings

A. Facts

Applicant was born in the People’s Republic of China (PRC) in 1958. She came to the U.S. in the late 1980s, completing her education. She became a U.S. citizen in 2001. Her husband is a citizen of the PRC. He has postponed becoming a naturalized citizen because of his elderly father, who lives in China. “It is easier and faster for her husband to go to China, if his father suddenly became ill, if he was still able to use a Chinese passport.” Decision at 2.

Applicant’s parents are citizens of the PRC but permanent residents of the U.S. They moved to the U.S. prior to the hearing in Applicant’s case. Applicant’s in-laws are citizens and residents of the PRC. Applicant’s brother is a citizen and resident of the PRC. Applicant speaks with him on the telephone “several times a year.” Decision at 3. Applicant traveled to the PRC in 1998, 2000, 2002, 2003, 2004, and August 2006 to visit her parents. Because they now live in the U.S., “she no longer has any need to travel” to the PRC. *Id.* Applicant has substantial assets in the U.S. “Applicant and her husband left any assets they had in [the PRC] when they left more than two decades ago.” *Id.*

The PRC has an “authoritarian Communist government.” Its human rights record is poor. “The United States is a primary intelligence target of [the PRC] because of the U.S. role as a global superpower, its substantial military, political, and economic power . . . [The PRC] uses legal and illegal means, including espionage” to obtain military-related technology. Decision at 5.

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 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. 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 challenged the Judge’s findings. Her argument that the Judge’s application of the Guideline B mitigating conditions does not take into account significant record evidence will be addressed 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 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 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *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 deciding the case in Applicant’s favor, the Judge considered the application of Foreign Influence Disqualifying Condition (FIDC) 7(a).¹ This provision of Directive describes security

¹Directive ¶ E2.7(a).

concerns raised when an applicant's contact with, *inter alia*, a foreign relative "creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion . . ." The Judge stated that Applicant's ties to the U.S. are such that "no 'heightened risk' has been shown that she would ever act improperly in a national security context. (Guideline B: Foreign Influence at 7.(a).)" Decision at 6. In so doing, he apparently concluded that this disqualifying condition was not raised on the facts of Applicant's case. Department Counsel contends that the Judge's decision on this matter fails to take into account significant record evidence. That argument is persuasive. Department Counsel notes, for example, that the PRC is active in the collection of intelligence and sensitive proprietary information from U.S. defense contractors and that the PRC considers U.S. citizens of Chinese ancestry to be "prime intelligence targets."² The Board also notes other record evidence that the PRC monitors its citizens' telephone, fax, and e-mail communications and routinely enters residences to obtain such data.³ These matters, read in conjunction with Applicant having family members who live in the PRC, are sufficient to constitute substantial evidence of the security risk outlined in the Directive. Given the PRC's interest in U.S. intelligence, Applicant's foreign relatives pose a real, rather than merely theoretical, risk that Applicant could be targeted for manipulation or induced into compromising classified information.⁴

Department Counsel also argues that the Judge erred in not considering FIDC 7(d),⁵ which identifies security concerns arising when an applicant shares "living quarters with a person or persons . . . if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion . . ." Again, Department Counsel's argument is persuasive. Applicant lives with her husband, a citizen of the PRC, who in turn maintains contact with his father, a citizen and resident of the PRC. Read in light of the above-referenced record evidence concerning the PRC's intelligence gathering activity, and the Judge's findings on the same issue, the record contains substantial evidence of the sort of foreign influence security concern described in FIDC 7(d). Even if one interprets FIDC 7(a) and (d) narrowly, one must acknowledge that the Directive does not provide an exhaustive and exclusive list of disqualifying circumstances; rather, the matters listed in the disqualifying conditions are illustrative in nature and do not provide a Judge with a basis to conclude that factors or categories not explicitly described fall outside the general security concern of the guideline. In analyzing cases before them, Judges must be guided by common sense and with

²Government Brief at 8. *See also* Administrative Notice Document (AN) IV, Intelligence threat Handbook, June 2004, at 17.

³ON II, Country Report on Human Rights Practices, March 2007, at 9.

⁴*See* Directive ¶ 6, describing the Foreign Influence security concern. "Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism."

⁵Directive ¶ E2.7(d).

a view toward making a reasoned determination consistent with the interests of national security. The Judge's conclusion that the Government has not presented substantial evidence of Guideline B security concerns is erroneous.

The Judge did reference Foreign Influence Mitigating Condition (FIMC) 8(b)⁶ and the whole-person, raising the implication that, despite his having found no security concerns in Applicant's case, he evaluated Applicant's mitigation evidence in the alternative. The Board has examined the Judge's relatively brief mention of these matters in light of the record as a whole. The Board concludes that the record does not support the view that Applicant has met her burden of persuasion that it is "clearly consistent with the interests of the national security" for her to have a clearance. *Egan*, 484 U.S. at 528. The fact that Applicant lives with a PRC citizen, her husband; that her husband maintains contact with his own father who is a citizen and resident of the PRC; that Applicant's brother is a citizen and resident of the PRC; that Applicant speaks with her brother over the telephone "several times a year;" that the PRC targets U.S. citizens of PRC ancestry for intelligence gathering purposes; and that the PRC monitors telephone and other communications of its citizens constitute significant record evidence of security significant foreign contacts and interest. As such, Applicant's evidence as to her good job performance and her ties to the U.S. are not sufficient to mitigate those concerns. It is not to question Applicant's patriotism to acknowledge that the record in her case raises the reasonable concern that she could be placed in a position of having to choose between her ties to the U.S. and her obligations to her foreign family members. The evidence which Applicant has provided is not sufficient to mitigate the Government's security concerns. The Board holds that the Judge's favorable decision is not sustainable on this record.

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

⁶Directive ¶ E2.8(b).

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board