

KEYWORD: Guideline C; Guideline B

DIGEST: The Judge’s favorable decision did not address significant contrary record evidence regarding among other thing applicant’s close relationship with his in-laws who still reside in Iran. Testimony regarding hypothetical situations, standing alone, is of limited value, unless there is record evidence that applicant has acted in a similar manner in the past in comparable situations or that applicant has a previous track record of complying with security regulations and procedures in the context of dangerous, high-risk circumstances in which he made a significant contribution to the national security. Favorable decision reversed.

CASENO: 07-06030.a1

DATE: 06/19/2008

DATE: June 19, 2008

In Re:)	
)	
-----)	ISCR Case No. 07-06030
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Candace Le’i, Esq., Department Counsel

FOR APPLICANT

Michelle L. Perry, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 31, 2007, DOHA issued a statement of reasons 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 February 7, 2008, after the hearing, Administrative Judge Martin H. Mogul granted Applicant’s request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raises the following issues on appeal: whether the Judge’s application of Foreign Influence Mitigating Condition 8(b) is unsupported by the record evidence and is therefore arbitrary, capricious, and contrary to law; and whether the Judge’s whole-person analysis is unsupported by the record evidence and it therefore arbitrary, capricious, and contrary to law. Finding error, we reverse.

Whether the Record Supports the Judge’s Factual Findings

A. Facts

The Judge made the following relevant findings of fact: Applicant was born in Iran and moved to the United States with his father when Applicant was five years of age and has lived in the United States ever since. Applicant became a naturalized United States citizen in 1996. Applicant’s wife was also born in Iran. She came to the United States in 2000 and became a naturalized United States citizen in 2004. They have no children.

The Judge took administrative notice of the hostile nature of the relationship between the United States and Iran, including the fact that Iran “is considered one of the most dangerous adversaries to the interests of the United States.” Decision at 4. The Judge’s decision includes the following statement: “The United States Government’s concerns with Iran’s policies include, but are not limited to the following: (1) its clandestine efforts to acquire nuclear weapons of mass destruction, (2) its sponsorship of international terrorism, (3) its intervention into the internal affairs of Iraq, (4) its aggressive efforts to undermine the Middle East peace process, and (5) its human rights violation against its own people.” *Id.*

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 same 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. Therefore, they are not at issue in this appeal. In arguing the issues on appeal, Department Counsel contends that the Judge's decision does not take into account significant contrary record evidence. The Board will address this contention 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 choice 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)).

"[N]o one has a right to a security clearance. . . 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. 581, 528 (1988). The Appeal Board may reverse a 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.

The Judge discussed the security concerns raised in this case under Guideline B. Directive ¶¶ E2.6 and 2.7. However, the Judge found these concerns mitigated under ¶ 8(b). In applying ¶ 8(b), the Judge overlooked significant record evidence. The Judge noted the fact that Applicant has been in the United States since he was five years old and has strong ties to this country. In his application of Guideline B, the Judge overlooked record evidence regarding the close relationship of Applicant and his wife with Applicant's mother- and father-in-law, who live in Iran. Applicant's wife speaks to her parents every day or every other day. Applicant's in-laws are adherents of the Baha'i faith. Applicant testified that members of that religion are denied rights and are often mistreated in Iran. Applicant and his wife have applied for permission for her parents to enter the United States, but they are still in Iran. Applicant's wife testified that her parents have some knowledge that Applicant's job is in some way connected with the United States, although it is not clear how much they know about its exact nature. The Judge's failure to discuss explicitly these and other facts¹ raises the question of whether the Judge failed to take them into account, failed to understand their significance, or engaged in an arbitrary and capricious analysis. *See, e.g.*, ISCR Case No. 02-00318 at 6 (App. Bd. Feb. 25, 2004).

The Judge gave significant weight to Applicant's testimony that he would do nothing to assist his in-laws if the Iranian government threatened or pressured them. The Board has stated that such testimony, standing alone, is of limited value, unless there is record evidence that the applicant has

¹Applicant testified: 1) to his continuing possession of an Iranian ID card, which he is willing to surrender; 2) to his family's attempts to secure return of confiscated property in Iran; and 3) to his apprehensiveness about traveling to Iran at the time of the other matters to which he testified.

acted in a similar manner in the past in comparable circumstances, or that the applicant has a previous track record of complying with security regulations and procedures in the context of dangerous, high-risk circumstances in which he made a significant contribution to the national security. *See, e.g.*, ISCR Case No. 06-25202 at 6 (App. Bd. Feb. 22, 2008).

While the Judge took administrative notice of the nature of the Iranian government, he gave little consideration to the nature of that government in reaching his conclusions, particularly in light of the heightened risk to Applicant's in-laws in this case. *Cf.* ISCR Case No. 05-00939 at 5 (Oct. 3, 2007).

The Judge's whole-person analysis is based on Applicant's close ties to the United States, as discussed in his application of mitigation above. Again, the Judge does not take into account contrary evidence such as the heightened risk to Applicant's in-laws set out above, and his analysis is therefore, not sustainable.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairman, 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