

KEYWORD: Guideline J; Guideline E

DIGEST: Applicant maintains that there is not substantial evidence of Guideline J security concerns on the specific issue of whether the government proved the fourth element of the crime of “harboring” under 8 U.S.C. § 1324(a)(1)(A)(iii). Applicant argues that the fourth element requires proof that Applicant’s conduct tended to substantially facilitate the alien (his wife and stepdaughter) remaining in the United States illegally. He argues that the record does not satisfy the element since: Applicant consulted an attorney (about his wife’s and stepdaughter’s situation); who then filed pertinent forms on behalf of them with the Immigration and Customs Enforcement Agency and Applicant openly attempted to obtain legal status for his wife, and in so doing he discussed it with the INS and his security officer. These actions exposed his wife’s location and status to the INS, the DOD and the OPM. He argues that the phrase “substantially facilitate” means to make an alien’s presence in the United States substantially easier or less difficult and is tied to actions aimed at preventing the detection and apprehension of aliens. Applicant’s arguments have merit as to Guideline J, however, the Judge’s Guideline E analysis is affirmed. Adverse decision affirmed

CASENO: 07-07645.a1

DATE: 03/25/2009

DATE: March 25, 2009

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In Re:)	
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-----)	ISCR Case No. 07-07645
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Applicant for Security Clearance)	
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

David L. Hagan, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 4, 2008, 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 September 10, 2008, at the hearing, the SOR was amended to include allegations under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). On January 7, 2009 after the hearing, Administrative Judge Richard A. Cefola denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: (a) whether the Judge incorrectly concluded that the government established a case against Applicant for harboring his illegal alien wife and his illegal alien stepdaughter in violation of 8 USC § 1324¹, and (b) whether the Judge erred in concluding that Applicant's relationships with his wife and stepdaughter were disqualifying under Guideline E. For the following reasons, the Board affirms the Judge's unfavorable decision.²

The Judge made the following findings: Applicant met his spouse, a citizen of Mexico illegally in the United States, at her place of employment in the United States. Initially, Applicant knew her heritage was Mexican, but he thought she was a legal resident of the United States. After their relationship became more serious, he discovered that she was in the U.S. illegally. Once they were married, Applicant thought she could get legal residency status, but Applicant has experienced difficulties in getting his wife that status. Applicant's wife remains a citizen of Mexico living in the U.S. illegally. She is subject to deportation, and, if deported, may not be eligible to return to the U.S. for ten years. Applicant's minor stepdaughter, his spouse's daughter by a previous marriage, is also

¹The SOR in this case was amended at the hearing on the government's motion, although no written document purporting to be the amendments is contained in the record. Regarding the contents of the amendments, the hearing transcript and the Judge's decision contain similar language with only minor discrepancies. At the hearing, Department Counsel alleged two violations of 8 U.S.C. § 1324, without specifying which specific portion of 8 U.S.C. § 1324 he was alleging. A review of the statute reveals that 8 U.S.C. § 1324(a)(1)(A)(iii) is the specific section of the law that is pertinent to the case. The Judge correctly referenced this specific subparagraph of 8 U.S.C. § 1324 in his findings of fact.

²The Judge ruled in Applicant's favor regarding the SOR allegations under Guideline B. Those favorable rulings are not at issue on appeal.

in the U.S. illegally.

Applicant maintains that the government failed to present substantial evidence of Guideline J security concerns. Even if Applicant is persuasive on this point, however, the Judge's ultimate decision is sustainable under Guideline E.

Regarding Guideline J, Applicant asserts that the crime of "harboring" is comprised of four elements. He concedes that the government has established two of the elements enumerated, but he contests the fourth element, which requires proof that Applicant's conduct tended to substantially facilitate the alien (his wife and stepdaughter) remaining in the United States illegally.³ Applicant argues that the record evidence does not establish that the fourth element is satisfied, inasmuch as it indicates: (a) immediately after getting married, Applicant consulted an attorney about his wife's and stepdaughter's situation; (b) while working through his attorney (who filed pertinent forms on behalf of Applicant's wife and stepdaughter with the U.S. Immigration and Customs Enforcement Agency) Applicant openly and honestly attempted to obtain legal status for his wife, and in so doing he discussed the matter with the INS and his security officer, among others; (c) these actions essentially exposed his wife's location and her status to the INS, the Department of Defense and the U.S. Office of Personnel Management; and (d) the only slim security Applicant's wife has at this point is a statement from an employee at the INS that the agency has no current interest in apprehending her. Applicant argues that, regarding the fourth element of the crime of harboring, the phrase "substantially facilitate" means to make an alien's presence in the United States substantially easier or less difficult. Applicant also maintains that the "easier or less difficult" standard is tied to the defendant's actions aimed at preventing the detection and apprehension of aliens and not just making an Applicant's day-to-day life easier or less difficult. Applicant argues that his actions in attempting to resolve openly his wife's immigration status have not tended to substantially facilitate his wife remaining in the United States illegally, but, in fact, have had precisely the opposite effect. On the specific issue of whether the government proved the fourth element of the crime of "harboring" under 8 U.S.C. § 1324(a)(1)(A)(iii), Applicant's arguments have merit.⁴

Applicant has correctly identified the four elements that need to be established to make out a case under 8 U.S.C. § 1324(a)(1)(A)(iii). The focus of Applicant's appeal is correctly on the meaning of the phrase, "substantially facilitate the alien remaining in the United States illegally." "[T]o 'substantially facilitate,' means to make an alien's illegal presence in the United States substantially easier or less difficult." *United States v. Shum*, 496 F.3d 390, 392 (5th Cir.

³Applicant concedes that the following elements of the crime of harboring are established by the evidence: (1) that the alien entered or remained in the United States in violation of the law, and (3) the defendant knew or recklessly disregarded that the alien entered or remained in the United States in violation of the law. Also, Applicant concedes only conditionally the second element of the crime, which he notes is circular, essentially defining harboring as harboring (the defendant concealed, harbored or sheltered the alien in the United States).

⁴8 U.S.C. § 1324(a)(1)(A)(iii) reads as follows: "Any person who knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation, shall be punished as provided in subparagraph (B)."

2007)(internal citation omitted). This definition has been further refined to mean that the defendant took steps that would shield an alien's identity from detection by the government. *Id.* In other words, to obtain a conviction, the government has to prove that the defendant harbored an alien secretly or in hiding, rather than just proving that the defendant afforded shelter to the alien. *United States v. Belevin-Ramales*, 458 F. Supp. 2d. 409 (E.D. Ky. 2006). Thus, convictions under 8 U.S.C. § 1324(a)(1)(A)(iii) generally involve defendants who provide illegal aliens with affirmative assistance involving shelter, transport, direction about how to obtain false documentation or warnings about impending investigations. *United States v. Ozcelik*, 527 F.3d 88, 99 (3d Cir. 2008). There have been successful prosecutions under this statute for providing illegal aliens with apartments and immigration papers, *United States v. Sanchez*, 963 F.2d 152 (8th Cir. 1992); for forcibly interfering with INS agents to prevent an alien's apprehension and assisting aliens in escaping from INS custody, *United States v. Varkonyi*, 645 F.2d 453 (5th Cir. 1981); and for alerting illegal aliens at a work site of the presence of INS agents in the vicinity who were looking to apprehend them, *United States v. Rubio-Gonzalez*, 674 F.2d 1067 (5th Cir. 1982). The common, key element in all these cases is affirmative action on the part of the defendant to attempt to prevent government authorities from detecting the unlawful presence of illegal aliens.

In this case, the evidence does not support a conclusion that Applicant harbored aliens as set forth in 8 U.S.C. § 1324(a)(1)(A)(iii). Since the amended SOR alleged a violation of that statute and Department Counsel has failed to demonstrate Guideline J security concerns, the Judge's adverse conclusion under Guideline J is not sustainable.

Applicant argues that the Judge's adverse conclusion under Guideline E was error. In his decision, the Judge applied Guideline E Disqualifying Condition 16 (g).⁵ Thus, the Judge's theory under Guideline E was not that Applicant violated 8 U.S.C. § 1324(a)(1)(A)(iii), but that Applicant displayed questionable judgment because of his continuing association with persons involved in criminal activity. He concluded that, so long as the status of Applicant's wife and step-daughter as illegal immigrants remains unchanged, he could find no countervailing mitigating conditions. In response to this, Applicant asserts: (i) that Applicant has stated clearly that he was willing, if necessary, to "walk away" from the relationship with his wife and stepdaughter if he could not favorably resolve their immigration status; (ii) he has been truthful, candid and cooperative throughout the security clearance process; (iii) the association with persons involved in criminal activity does not prove questionable judgment or untrustworthiness; (iv) he was cautious and used good judgment before he married his wife; (v) to suggest that he must now abandon his wife and stepchild in order to restore his good judgment is self-contradictory; and (vi) the government has not proven that he exhibited bad judgment and untrustworthiness. Applicant's arguments do not establish error on the part of the Judge.

The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*.

⁵ "[A]ssociation with persons involved in criminal activity."

See, e.g., ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

In this case, under Guideline E, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. These conclusions are reasonably supported by the record. The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). Contrary to Applicant's assertion, the Judge could reasonably find that his association with persons involved in criminal activity established questionable judgment and/or untrustworthiness. Moreover, the emphasis Applicant places on the fact that he has expressed a willingness to walk away from his wife and stepdaughter in the future if their immigration status is not favorably resolved is misplaced. Generally, the Board will not hold that a Judge's decision is arbitrary, capricious, or contrary to law because of an applicant's statement that he or she will undertake some sort of remedial action in the future. *See, e.g.*, ISCR Case No. 03-14542 at 4 (App. Bd. Apr. 26, 2005). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for his 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)). "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). Although Applicant is able to articulate facts that are arguably mitigating, the Board is not prepared, given the facts in this case, to hold that the Judge was required to find in Applicant's favor under Guideline E as a matter of law. Therefore, the Judge's ultimate unfavorable security clearance decision under Guideline E is sustainable.

Order

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

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