

KEYWORD: Guideline B

DIGEST: A Hearing Office Judge is not authorized to review and pass judgment on Appeal Board decisions. Quasi-judicial adjudications must be made within the bounds of applicable law and agency policy not without regard to them. There is a rebuttable presumption that an applicant's relationship with immediate family members is not casual. Department Counsel is not required to prove a threat of espionage. Favorable decision reversed.

CASENO: 07-13696.a1

DATE: 02/09/2009

DATE: February 9, 2009

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| In Re:                           | ) |                        |
|                                  | ) |                        |
| -----                            | ) | ISCR Case No. 07-13696 |
|                                  | ) |                        |
| Applicant for Security Clearance | ) |                        |

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Emilio Jaksetic, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 3, 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 October 16, 2008, after the hearing, Administrative Judge Claude R. Heiny 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 raised the following issues on appeal: whether the Judge’s favorable security clearance decision is arbitrary, capricious, and contrary to law.

Specifically, Department Counsel argues that the Judge improperly used the decision to pass judgment on prior Appeal Board precedent and that the Judge’s application of mitigating conditions found in ¶ E2.8(a) through (c) of the Directive is arbitrary and capricious and is not supported by the record evidence. Department Counsel also contends that the Judge, in effect, improperly shifted the burden to Department Counsel to present evidence of a clear and present danger or imminent threat of espionage. Finally, Department Counsel maintains that the Judge’s favorable conclusions concerning Applicant’s security eligibility are not supported by the record evidence. Finding error, we reverse the Judge’s favorable security clearance decision.

### **Whether the Record Evidence Supports the Judge’s Factual Findings**

#### **A. Facts**

The Judge made the following relevant findings of fact:

Applicant was born in the Peoples Republic of China (PRC). She came to the United States at the age of 24 and completed her education here. Applicant became a U.S. citizen in 2006. In 1998, Applicant married a citizen of a Western European country. Applicant’s husband has permanent residency status in the U.S., but works as a civil servant in his country of birth. They have two children who were born in the U.S. and are U.S. citizens. Applicant’s mother-in-law, father-in-law, and sister-in-law are citizens and residents of her husband’s country of birth. Applicant exchanges e-mails with her mother-in-law and sister-in-law on birthdays. Applicant’s parents are PRC citizens, but have permanent residency status in the U.S., and live with Applicant. Applicant has an emotional bond with her brother, who is a citizen of and resides in the PRC. Decision at 10. Applicant’s brother is the editor of a state-owned publication, and his wife is a university librarian. Applicant contacts her brother twice a year. Applicant also speaks to her mother’s sister a couple of times a year. When Applicant traveled to the PRC in 2006 to visit her gravely-ill grandmother, she stayed with her brother and got together with former classmates. Applicant’s supervisor and her former neighbor testified to her professionalism and character.

The PRC is a repressive, totalitarian government with a poor record on human rights. The PRC’s foreign policy goals are antithetical to the United States. The PRC has an active and effective program of industrial espionage to obtain U.S. technology. Decision at 5.

## B. Discussion

Department Counsel's appeal involves the Judge's conclusions.

### **Whether the Record Supports the Judge's Ultimate Conclusions**

An Administrative 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 the Administrative 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.

Department Counsel notes that the Administrative Judge's decision included a lengthy exposition on prior Appeal Board rulings which ended with the statement "Notwithstanding the Appeal Board's position, I conclude that many of these attributes are pertinent to the analysis in this case under the whole person concept." Footnote 10 of Decision, at page 11. Department Counsel persuasively argues that the Judge acted in a manner that is arbitrary, capricious and contrary to law to the extent that he deliberately rejected binding agency authority. For purposes of this discussion, we set aside the fact that many of the cases cited were explicitly interpreting the plain language of a specific Guideline which is no longer in effect and the fact that the Judge's statement of some of the cited precedent is inaccurate. Department Counsel is correct that a Hearing Office Administrative Judge is not authorized to review and pass judgment on Appeal Board decisions. The Directive clearly places the responsibility for review at the Appeal Board level. More broadly, quasi-judicial adjudications must be made within the bounds of applicable law and agency policy, not without regard to them. *See, e.g., Croplife America v. Environmental Protection Agency*, 329 F.3d 876, 882 (D.C. Cir. 2003) (administrative law judges cannot ignore agency policy in making rulings); *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989) (administrative law judge is subordinate to head of agency or department in matters of policy); *Mullen v. Bowen*, 800 F.2d 535, 540 n. 5 (6th Cir. 1986) (decisional independence does not relieve administrative law judge of the obligation to apply agency policy). *See* ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003) (security clearance decisions must be based on current DoD policy and standards).

The Judge found that Applicant's contacts and ties with relatives and friends in the PRC raised security concerns under Guideline B. However the Judge concluded that the security concerns were mitigated under ¶ E2.8(a) through (c) of the Directive. Department Counsel argues that the Judge's application of those mitigating conditions is arbitrary and capricious and is not supported by the record evidence. Department Counsel's argument has merit.

Paragraph E2.8(a) of the Directive<sup>1</sup> involves an applicant's relationships with persons in other countries. Of particular concern in this case are Applicant's relationships with her brother and sister-in-law. Both are public employees of the PRC, and Applicant's brother, the editor of a government publication, is in a position of responsibility in the area of the PRC where he lives. As noted above, the Judge concluded that Applicant has an emotional bond with her brother. Decision at 10. Moreover, Applicant's parents, while they live with Applicant in the U.S., maintain ties to the PRC. Applicant's mother last traveled to the PRC in April 2008. It is also significant that Applicant's parents suffered at the hands of the Chinese government during the Cultural Revolution. Transcript at 143.<sup>2</sup> Decision at 3. Given Applicant's brother's government position and her parents continuing ties to the PRC, the Judge's application of ¶ E2.8(a) is arbitrary and capricious and is not supported by the record evidence, particularly in light of the PRC's poor record on human rights, which the Judge recognized in his decision.

For mitigation under ¶ E2.8(c) of the Directive,<sup>3</sup> contact must be casual and infrequent. The Judge applied mitigation with regard to Applicant's brother, who is a citizen of and resident in the PRC. There is a rebuttable presumption that an applicant's relationship with immediate family members is not casual. *See, e.g.*, ISCR Case No. 02-24267 at 7 (App. Bd. May 24, 2005) There is nothing in the record of this case that rebuts that presumption. In fact, the Judge stated that Applicant has an emotional bond with her brother. Decision at 10. Applicant contacts her brother by phone or e-mail twice a year and speaks to her aunt with about the same frequency. However, the totality of Applicant's contacts with her relatives cannot be said to be casual. *See, e.g.*, ISCR Case No. 05-03279 at 3 (App. Bd. Sep. 20, 2007). Furthermore, the frequency with which an applicant speaks to family members does not diminish the strength of her family ties. *See, e.g.*, ISCR Case No. 04-12500 at 4 (App. Bd. Oct. 26, 2006). *Compare, also*, ISCR Case No. 06-18337 (App. Bd. Feb. 8, 2008). In this case, Applicant is involved in the process of her brother's immigration to the U.S., which is expected to take ten years. Transcript at 134. The record does not support the Judge's application of ¶ E2.8(c) of the Directive.

In applying ¶ E2.8(b) of the Directive,<sup>4</sup> the Judge minimized Applicant's foreign ties and emphasized her strong connections to the United States. Department Counsel correctly points out

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<sup>1</sup>“[T]he nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, or government and the interests of the U.S.[.]” Directive ¶ E2.8(a).

<sup>2</sup>*See* ISCR Case No. 06-24575 at 3 (App. Bd. Nov. 9, 2007).

<sup>3</sup>“[C]ontact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation[.]” Directive ¶ E2.8(c).

<sup>4</sup>“[T]here is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest[.]” Directive ¶ E2.8(b).

that Applicant's foreign ties are more significant than the Judge concluded. Applicant has been a U.S. citizen only since May 2006. Apart from her children, Applicant's family ties are to her brother, her parents, and her husband. Her brother, with whom Applicant has an emotional bond, is a citizen and resident of the PRC. Applicant's parents reside in the United States, but are citizens of the PRC. They have ties to the PRC and are not eligible to become U.S. citizens until 2011. While Applicant's husband has legal residency status in the U.S., he is a German citizen and a civil servant of a German state. Applicant has been a permanent employee of her current employer only since November 2007. Given her ties, the Judge's application of ¶ E2.8(b) is arbitrary and is not supported by the record evidence.

Department Counsel also contends that the Judge, in effect, improperly shifted the burden to Department Counsel to present evidence of a clear and present danger or imminent threat of espionage. Department Counsel's contention has merit. Under the Directive, once the Judge finds that security concerns have been raised, the burden shifts to an applicant to extenuate or mitigate those concerns. Department Counsel is not required to prove a threat of espionage. *See, e.g.*, ISCR Case No. 02-09907 at 7 (App. Bd. Mar. 17, 2004). The Judge concluded that there was little likelihood that the PRC would use the presence of Applicant's brother and his wife to pressure or coerce Applicant because her brother and his wife lead low-profile, non-political lives and have not been approached or threatened due to their relationship with Applicant and because there is no indication that the PRC is aware of Applicant's career in the United States. The Board has consistently held that factors such as an applicant's relatives' obscurity or the failure of foreign authorities to contact those relatives in the past do not provide a meaningful measure of whether an applicant's circumstances pose a security risk. *See, e.g.*, ISCR Case No. 04-06386 at 4 (App. Bd. Aug. 25, 2006). The Judge's conclusions in this regard are arbitrary, capricious, and contrary to law.

Finally, Department Counsel maintains that the Judge's favorable conclusions regarding Applicant's security eligibility are not supported by the record evidence. In evaluating Applicant's eligibility under the whole-person concept, the Judge used similar analysis and reached conclusions similar to those discussed above. The Judge relied in part on the same erroneous conclusions discussed above, *e.g.*, conclusions regarding the application of ¶ E2.8(a) through (c). The Judge also relied in part on his determination regarding Applicant's credibility. While a Judge's credibility determination is entitled to deference, it is not a substitute for record evidence. *See, e.g.*, ISCR Case No. 02-14995 at 6 (App. Bd. Jul. 26, 2004). In light of the record as a whole, the Judge did not articulate a satisfactory explanation for his favorable conclusions, and his decision is not sustainable.

### **Order**

The Judge's decision granting Applicant a security clearance is REVERSED.

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