

KEYWORD: Guideline B

DIGEST: Department Counsel persuasively argues that the Judge erred in concluding that the government had failed to present substantial evidence of a security concern under Guideline B. In the meantime Russia has attacked Georgia. The Judge's remand decision must have a current and accurate geopolitical assessment and security/intelligence profile of Russia. Favorable decision remanded.

CASENO: 07-14508.a1

DATE: 10/22/2008

DATE: October 22, 2008

In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Candace L. Le'i, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 10, 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 June 30, 2008, after the hearing, Administrative Judge John Grattan Metz, Jr. 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 raises the following issues on appeal: whether the Judge improperly shifted the burden of persuasion to the government; whether the Judge erred by concluding that the government had presented no evidence of heightened risk under Guideline B; whether the Judge erred in concluding that the government had failed to meet its burden of production under Guideline B; and whether the Judge’s application of the pertinent mitigating conditions was error. For the reasons set forth below, we remand the case to the Judge.

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

#### **A. Facts**

The Judge made the following pertinent findings of fact: Applicant was raised and educated in the U.S.S.R., receiving a degree in computer science. She married a U.S.S.R. citizen, with whom she had a daughter, and divorced him four years later. While living in the U.S.S.R. she worked for government-controlled companies. She immigrated to the U.S. in the early 1990s, along with her daughter. She renounced her U.S.S.R. citizenship, surrendered her property interests to the government, and paid the government six months salary. In the mid-1990s she became a U.S. citizen.

Applicant married a retired officer of the U.S. Army. Her new husband adopted her daughter. She subsequently divorced this second husband. Applicant has obtained a Master’s Degree from a U.S. university and works for a federal contractor. Her job requires her to travel extensively.

Applicant’s brother is a citizen and resident of Russia. He is retired from the military. She contacts him once a year. Both of Applicant’s parents are dead. Her first ex-husband is a citizen and resident of Russia. She contacts him as often as six times a year to keep him apprised of his daughter, with whom he has no contact. Applicant contacts her former mother-in-law, a citizen and resident of Russia, about four times a year, and she contacts two friends, both of whom are citizens and residents of Russia, about four times a year. She has traveled several times to Russia, most recently to pay respects to her father’s grave.

Russia has been a target of terrorist activity in recent years. Russian federal forces, in pursuing terrorists, engage in torture, summary executions, disappearances, and arbitrary detentions. Russia has an active, significant, recent, and ongoing intelligence collection program. As of 2005 Russia was one of the two most aggressive collectors of sensitive and protected U.S. technology and

accounted for much of such targeting. Russia is not known to target U.S. citizens to obtain protected information.

## 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 (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 Judges findings. However, consideration of the assigned errors requires the Board to address the sufficiency of the Judge's findings about the geopolitical situation in Russia.

### **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)). "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 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).

The Judge concluded that the government had failed to present substantial evidence of a security concern under Guideline B. "Applicant's foreign travel to Russia has no independent security significance. Her contacts with her ex-husband, former mother-in-law, and two friends—none of whom is connected to the Russian government—are minimal. Her contacts with her brother—now still tenuously connected to the government through his retirement—is virtually non-

existent. Department Counsel has articulated no sensible reason I should consider either as a potential source of influence on Applicant.” Decision at 5. Department Counsel argues that the Judge erred in his analysis, in that he examined the government’s evidence in a piecemeal fashion rather than as a whole. Department Counsel contends that the presence in Russia of a close relative such as a brother; regular and frequent contact with her former in-laws and her friends; her regular visits to Russia; and Russia’s status a nation with a problematic human rights record that actively seeks U.S. intelligence, viewed as a whole, are sufficient to raise a Foreign Influence security concern.<sup>1</sup> The Board finds Department Counsel’s argument persuasive.

The Board also notes certain events which have occurred since the close of the record and which have a bearing on this case. In August 2008 Russia attacked Georgia. *See* President’s “Remarks on the Situation in Georgia,” August 18, 2008: “It now appears that an effort may be underway to depose Georgia’s duly elected Government. Russia has invaded a sovereign neighboring state and threatens a democratic government elected by its people.” *See also* Joint Statement on Georgia by Foreign Ministers of Canada, France, Germany, Italy, Japan, the United States and the United Kingdom, Department of State Media Note, August 27, 2008: “Russia’s recognition of the independence of South Ossetia and Abkhazai violates the territorial integrity and sovereignty of Georgia and is contrary to U.N. Security Council Resolutions supported by Russia. Russia’s decision has called into question its commitment to peace and security in the Caucasus.” For a discussion of official notice in DOHA proceedings, *see* ISCR Case No. 05-11292 at 2-4 (App. Bd. Apr. 12, 2007).

A current and accurate assessment of the “geopolitical situation” and the “security/intelligence profile of the country vis-a-vis the United states” is crucial in Guideline B cases. *See* ADP Case No. 06-14978 at 3 (App. Bd. Oct. 11, 2007); ISCR Case No. 04-02630 at 2-3 (App. Bd. May 23, 2007). In this case, Applicant has regular contact with citizens of a country that has engaged in armed conflict with a democracy friendly with the U.S. *See* U.S. Department of State Background Note: Georgia, February 2008. This is a matter bearing on the Guideline B security concern, which requires consideration of the nature of the foreign country. The Board concludes that the best course of action is to remand the case to the Judge with instruction that he reopen the record, allow the parties an opportunity to proffer appropriate documents for official notice pertinent to the current geopolitical situation in Russia, or other relevant and material evidence, and allow the parties to reargue the case. The other issues in the case are not ripe for consideration at this time.

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<sup>1</sup>*See* Directive ¶ E2.7(a): “contact with a foreign family member . . . or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion[.]” Directive ¶ E2.7(b): “connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual’s obligation to protect sensitive information or technology and the individual’s desire to help a foreign person, group, or country by providing that information[.]”

**Order**

The Judge's favorable 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