

KEYWORD: Guideline B

DIGEST: Department Counsel demonstrated that the Judge erred in finding that Applicant's Lebanese bank account was worth approximately \$25,000 based on a dated and illegible bank book rather than the \$100,000 acknowledged by Applicant in his response to the SOR. Applicant did rely to the File of Relevant Material. The evidence in mitigation for Applicant's ties to Lebanon is limited. The Judge's favorable decision is reversed.

CASENO: 07-16064.a1

DATE: 01/12/2009

DATE: January 12, 2009

In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Kathryn D. MacKinnon, Esq., Deputy Chief Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 14, 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 decision on the written record. On September 23, 2008, after considering the record, 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 raised the following issues on appeal: whether the Judge’s favorable decision did not take into account significant contrary record evidence and whether the Judge improperly shifted the burden of persuasion to the Government. Finding error, we reverse.

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

#### **A. Facts**

The Judge made the following pertinent findings of fact: Applicant was born in Lebanon in the late 1960s. Due to his ancestry, however, he did not acquire Lebanese citizenship by virtue of his birth there. He immigrated to the U.S. in the mid-1990s and became a U.S. citizen in 2005. His wife and sister are both naturalized U.S. citizens. His mother, brother, and father-in-law are residents of Lebanon. Applicant has a savings account in Lebanon worth about \$25,000.

Lebanon is a “nominal democracy” with a poor human rights record. It has long been subject to Syrian influence and it is a “permissive environment” for terrorist organizations hostile to Israel.<sup>1</sup>

#### **B. Discussion**

The Appeal Board’s review of the Judge’s findings of fact 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*

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<sup>1</sup>See Item II, U.S. Department of State Background Note: Lebanon, Nov. 2007, at 9: “Lebanon’s foreign policy has been heavily influenced by neighboring Syria, which has also long influenced Lebanon’s internal policies as well.” See also Item III, Travel Warning, Oct. 17, 2007, at 1, to the effect that Hizballah operates in southern Lebanon, in which there is little or no government control; Item IX, CRS Report for Congress, Oct. 20, 2007, at 13-15, describing Syria’s history of influencing the internal affairs of Lebanon; Item VI, U.S. Department of State Country Reports on Terrorism, Chapter 6, April 30, 2007, which lists foreign terrorist organizations. This document, at p. 9, identifies Hizballah as “the most technically capable terrorist group in the world.” This document states that Hizballah has strong ties with Iran and helps Syrian advance its interests in the region.

*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.

Department Counsel argues that the Judge erred in concluding that Applicant's bank account contained \$25,000 in U.S. currency. The SOR alleged that Applicant's savings account had a balance of approximately \$100,000. Applicant admitted this allegation in his response to the SOR as he had earlier in his reply to interrogatories propounded by DOHA. However, in this same reply to interrogatories, Applicant stated that he had a bank statement showing 46,375,800 Lebanese pounds, which he averred is equivalent to 25,000 U.S. dollars. This appears to be the basis for the Judge's finding. The Board has examined the record and notes the document in question. It demonstrates bank account activity, although Applicant's name is nowhere on it. The dates of this activity appear to have been the late 1990s. The final entry, however, is poorly reproduced and impossible to read with accuracy. It appears to show a final balance somewhat in excess of 46 million pounds. The date of this final balance is totally illegible. The Board concludes that the bank statement is old, and does not contradict the greater amount listed in the SOR and in Applicant's responses. Department Counsel has demonstrated error on this point.

### **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).

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 Applicant's case, the Judge stated that the Government had not established "that there was a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion because of Applicant's limited family contacts in Lebanon." Decision at 4. He appears to have concluded, therefore, that the Government had not presented substantial evidence of Guideline B security concerns. Department Counsel argues persuasively that the Judge's conclusion in this regard is error. The Board notes the Judge's findings that Applicant's mother, brother, and father-in-law reside in Lebanon, a country in which terrorists operate, in which Syria exerts considerable influence, and which has a problematic human rights record.<sup>2</sup> Applicant's circumstances as a whole are sufficient to raise security concerns under Guideline B, in that they pose a foreseeable risk that Applicant could experience a conflict of interest between his obligations to the U.S. and his obligations to his relatives in Lebanon.<sup>3</sup> *See* ISCR Case No. 05-11292 at 4 (App. Bd. Apr. 12, 2007) ("The presence of immediate family members in a country which a hostile power like Syria is attempting to destabilize, and in which terrorist groups operate with a substantial degree of autonomy, poses a real concern in the adjudication of applicant's request for a security clearance.") Therefore, the Judge should have evaluated the case in light of Applicant's burden of persuasion as to mitigation. The Board notes that Applicant chose to have the case decided upon the written record, with the result that his credibility could not be evaluated in the context of a hearing. *See* ISCR Case No. 08-00899 at 3 (App. Bd. Jul. 29, 2008). Applicant did not reply to the Government's File of Relevant Material; nor did he submit a reply brief on appeal. Therefore, his case for mitigation is limited and consists only of his responses to the SOR and to the DOHA interrogatories, in which he lists his family members in Lebanon, his bank account there, and his reasons for leaving Lebanon to live in the U.S. Examining the record as a whole, the Board is not able to conclude that content of these documents is sufficient to mitigate the security concerns in his case, in light of the standard set forth in *Egan*. Considering the security concerns, and the paucity of record evidence as to mitigation, the Judge's favorable security clearance decision is not sustainable.

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<sup>2</sup>*See* Executive Order 13338, May 11, 2004, declaring a national emergency to address geopolitical challenges posed by Syria, including its interference in Lebanon. *See also* Item IV, U.S. Department of State Country Reports on Terrorism, Chapter 2, April 30, 2007, at 9, concerning, *inter alia*, assassinations in Lebanon aimed at intimidating those who oppose Syrian interference; Item V, U.S. Department of State Country Reports on Terrorism, Chapter 3, April 30, 2007, at 3, concerning, *inter alia*, Syrian support for Hizballah and for Palestinian terrorist groups; Item VII, U.S. Department of State Country Reports on Human Rights Practices, March 11, 2008, at 5, to the effect that Palestinian refugees in Lebanon were "subject to arrest, detention, and harassment by state security forces and rival Palestinian factions."

<sup>3</sup>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 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: James E. Moody  
James E. Moody  
Administrative Judge  
Member, Appeal Board