

KEYWORD: Guideline B; Guideline C

DIGEST: The language of Guideline B does not require the level of proof the Judge asserted from Department Counsel. The 'heightened risk language addresses an applicant's contacts, not necessarily the country that the foreign contact is from. The Judge's discussion about the normal and routine nature Applicant's immediate family contacts does not vitiate the government's security concerns. The Board is not able to conclude that the evidence of record is sufficient to overcome the government's security concerns. Favorable decision reversed..

CASENO: 08-04488.a1

DATE: 04/23/2009

DATE: April 23, 2009

In Re:)	
)	
----)	ISCR Case No. 08-04488
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Alison O'Connell, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 5, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence); and Guideline C (Foreign Preference) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 30, 2009, after the hearing, Administrative Judge John Grattan Metz Jr. granted Applicant’s request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.¹

Department Counsel raises the following issues on appeal: (a) whether the Judge erred by concluding that the government failed to establish a case of heightened risk under Guideline B; and (b) whether the Judge’s application of Foreign Influence Mitigating Condition 8(a) is unsupported by the record evidence and is arbitrary, capricious, and contrary to law. erred by concluding that the government’s security concerns were not mitigated. For the following reasons, the Board reverses the Judge’s favorable security clearance determination.

Whether the Record Supports the Judge’s Factual Findings

A. The Judge made the following pertinent findings of fact:

Applicant was born in Taiwan in 1970. She immigrated to the United States in 1990, where she lived with her aunt and uncle, who were both U.S. citizens. She obtained a bachelor’s degree in 2001 and a master’s degree in 2007. Applicant became a naturalized U.S. citizen in 1997. Applicant has a Taiwanese passport which remains valid until 2012, but she has surrendered it to her corporate security officers.

Applicant’s mother is a resident citizen of Taiwan, and for the last 10 years has been retired from her job as an insurance agent for a private insurer. Applicant’s step-father is also a resident citizen of Taiwan. He has been retired for 11 years from his job as a ticket seller in a bus station. The record does not reflect whether this was a position with the Taiwanese government or a local government. Applicant’s brother is a resident citizen of Taiwan, employed as a junior high teacher in a private school. Applicant talks to her brother and mother two or three times a month by telephone. Applicant also has some high school friends in Taiwan, whom she speaks to by telephone three or four times a year. One is a housewife, while two others work in a commercial electronics company. Applicant visits these friends when she travels to Taiwan.

Since 1999, Applicant has traveled to Taiwan once per year on average. In 2000, she opened some bank accounts in Taiwan so she would have quick access to cash. She deposited traveler’s checks in her accounts and withdrew cash as necessary during her visits. Typically, she would leave about \$200 in the accounts when she left Taiwan, but the accounts now have about \$3,000 in them. Applicant derives no income from these accounts.

¹Department Counsel does not challenge the Judge’s favorable findings and conclusions under Guideline C.

Taiwan is a multiparty democracy whose authorities generally respect the human rights of its citizens. While Taiwan is an active collector of industrial information and engages in industrial espionage, the record does not demonstrate that the government of Taiwan targets U.S. intelligence information. Further, the record does not demonstrate that Taiwan seeks to exert pressure on U.S. citizens to collect information from family members residing in that country or abroad.

Applicant's current supervisor, who is aware of her family background, testified that she had proven herself to be open, honest, trustworthy, and reliable in the six years he has known her.

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 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 does not challenge the Judge's findings of fact. Rather, Department Counsel asserts error in the Judge's analysis of the case and his application of the Adjudicative Guidelines. Therefore, Department Counsel's appeal arguments are most appropriately addressed in the context of the Judge's conclusions as described in the section that follows.

Whether the Record Supports the Judge's Ultimate Conclusions

A. Conclusions

The Judge reached the following conclusions:

Foreign influence adjudications can and should consider the identity of the foreign country in which the foreign contact or financial interest is located—including, but not limited to, whether the country is known to target U.S. citizens to obtain protected information and/or is associated with a risk of terrorism. Evaluation of an individual's qualifications for access to protected information requires careful assessment of both the foreign entity's willingness and ability to target protected information, and to target ex-patriots who are U.S. citizens to obtain that information, and the individual's susceptibility to influence, whether negative or positive. More specifically, an individual's contacts with foreign family members (or other foreign entities or persons) raise security concerns only if those contacts create a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion.

In this case, the government did not establish that Applicant's contacts with her family and friends in Taiwan created a heightened risk of exploitation, inducement, manipulation, pressure, or coercion. The government also did not establish that Applicant's bank accounts in Taiwan were sufficient to create a heightened risk of influence or exploitation.

Taiwan and the U.S. enjoy excellent foreign relations. Although Taiwan is an active collector of commercial information, it has not been demonstrated to target protected U.S. information, nor has it been demonstrated to target U.S. citizens to obtain protected information. Given that Taiwan generally respects the human rights of its citizens, the risk that it might seek protected information from Applicant is low, if not non-existent.

The government produced no evidence that there was a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion because of Applicant's contacts with family and friends in Taiwan. Applicant has resided in the U.S. nearly half her life. Her contacts with her parents, sibling, and friends are normal. There is nothing in the circumstances of their being in Taiwan, or in Applicant's contacts with them, to heighten the risk that she could be impelled or compelled to provide protected information to Taiwan.

Even if the government had established security concerns based on her contacts with Taiwanese nationals and her bank accounts, those concerns would be mitigated. Applicant's contacts in Taiwan are routine. Taiwan generally respects the rights of its citizens, and none of her contacts in Taiwan are, or have been involved in activities that would make it likely that Applicant would have to choose between their interests or those of the U.S. The value and nature of Applicant's bank accounts are such that they are unlikely to be used effectively to influence her.

B. Discussion

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.

Department Counsel contends that the Judge erred by concluding that the government failed to establish a "heightened" risk in this case under Guideline B. Department Counsel's arguments have merit. The Board notes the Judge's findings and record evidence that Applicant has close family members in Taiwan with whom she regularly communicates and visits, and that Taiwan is a country that actively collects industrial information and engages in industrial espionage. As

pointed out by Department Counsel, the Judge's conclusions in this case have the practical effect of requiring Department Counsel to prove affirmatively that a country specifically targets U.S. intelligence information and specifically targets U.S. citizens in the course of attempts to gather protected information. The language of the Directive, Guideline B, does not require this level of proof from Department Counsel in order to raise security concerns that shift the burden of persuasion to Applicant. *See, e.g.*, ISCR Case No. 07-05686 at 4 (App. Bd. Nov. 12, 2008). Indeed, the "heightened risk" language in the Guideline addresses an applicant's contacts, not necessarily the country that the foreign contact is from. The Judge's conclusion on this issue is not sustainable.

Department Counsel further contends that the Judge's application of Foreign Influence Mitigating Condition 8(a)² is unsupported by the record evidence and is arbitrary, capricious, and contrary to law. Department Counsel's arguments have merit.

The Judge based his mitigation rationale in part on his conclusion that Applicant's relationships with her foreign family members and friends in Taiwan were "normal" and "routine." The Judge does not define or elaborate on his use of the words "normal" and "routine." In any event, the ability to characterize an applicant's relationships with foreign resident citizens who are immediate family relatives or close friends as "routine" does not vitiate the government's security concerns. Indeed, the rebuttable presumption that an applicant has ties of affection for immediate family members is based on the set of circumstances one normally expects to exist among close relatives. These circumstances include strong emotional attachments, feelings of obligation, and the maintenance of regular contact with such relatives. These are the very factors that give rise to the potential of exploitation and use of those relationships to place applicants in the position of having to choose between the interests of those individuals and the interests of the United States. The Judge's findings of fact in this case do not rebut the presumption. Thus, the Judge erroneously employed his conclusion that these contacts were "normal" and "routine" as a partial basis for his ultimate ruling that Applicant satisfied her burden of overcoming the government's security concerns.

The Judge also based part of his mitigation rationale on his statement that Taiwan generally respects the human rights of its citizens. As Department Counsel points out, when evaluating the strength of Applicant's case in mitigation, the Judge omits any consideration of Taiwan as an active collector of industrial information and a user of industrial espionage techniques. Taiwan's posture in this regard is of such significance that the failure of the Judge to factor it into his analysis of the strength of Applicant's case in mitigation was error.

Department Counsel argues that the Judge's conclusion that none of Applicant's contacts in Taiwan are, or have been, involved in activities that would make it likely that Applicant would have to choose between their interests and those of the U.S. is not supported by the record evidence.

²[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, organization, or government and the interests of the U.S."

Department Counsel characterizes the record as “sparse” regarding the activities of Applicant’s Taiwanese relatives and friends. The Board notes that there is some record evidence of the employment history and other life circumstances of Applicant’s relatives and friends. However, given Applicant’s burden of production regarding mitigation, the Board is not able to conclude that the evidence of record is sufficient to overcome the government’s security concerns.

The record as a whole does not support a conclusion that Applicant has met her burden of persuasion in light of the *Egan* standard. Therefore, the Judge’s ultimate decision is not sustainable.

Order

The decision of the Administrative Judge granting Applicant a security clearance is REVERSED.

Signed: Michael Y. Ra’anan
Michael Y. Ra’anan
Administrative Judge
Chairman, Appeal Board

Signed: Jeffery D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

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