

KEYWORD: Guideline B

DIGEST: Applicant's parent-in law are citizens and residents of Belarus. Applicant's sister-in-law is married to a retired high level official of the Russian army. Favorable decision reversed.

CASENO: 11-04980.a1

DATE: 09/21/2012

DATE: September 21, 2012

In Re:)
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 -----) ISCR Case No. 11-04980
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)
 Applicant for Security Clearance)
)
)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Alison O'Connell, Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 6, 2012, 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 6, 2012,¹ after the hearing, Administrative Judge John Grattan Metz, Jr., granted Applicant's request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raises the following issues on appeal: whether the Judge's conclusion that the record did not raise security concerns regarding Applicant's Belarusian relatives was erroneous; whether the Judge improperly shifted the burden of persuasion to the Government; whether the Judge failed properly to apply the mitigating conditions; and whether the Judge's whole-person analysis was erroneous. Consistent with the following, we reverse the Judge's decision.

The Judge's Findings

The Judge made the following pertinent findings of fact: Applicant is employed by a Defense contractor. He seeks an industrial security clearance for the first time, although he held a clearance during his service in the military from 1983 to 1989. He has held non-DoD clearances since leaving the military. Applicant was born and raised in the U.S. His first marriage ended in divorce. He married again in the late 2000s, to a woman born in Belarus. She is a legal resident of the U.S. and has applied for U.S. citizenship. Applicant and his wife have no children.

Applicant's parents-in-law are citizens and residents of Belarus. They speak no English, and Applicant speaks no Belarusian. He has no contact with them except once or twice a year, through his wife. She speaks to her mother by telephone on a weekly basis.

Applicant's wife has a sister who is married to a retired high-ranking official of the Russian army. The couple lives in Russia. Applicant has contact with them once or twice a year through his wife. He visited with them for about ten days in the late 2000s. Applicant's sister-in-law and child visited Applicant and his wife in 2010. Applicant speaks no Russian and his in-laws speak no English. Applicant's wife speaks with her sister approximately twice a month.

Belarus is an autocratic regime. A former Soviet republic, it maintains close historical and cultural ties with Russia. The U.S. recognized Belarusian independence in 1991. There have been human rights violations during elections in that country, and Belarus exports military significant materials, weapons, and technology to countries that sponsor terrorism. Belarus is attempting to "expand relations" to "countries of concern," including Iran, Sudan, and Syria. Decision at 3.

Russia has a mixed human rights record. In opposing terrorism, the government engages in torture, summary executions, and arbitrary detentions. Russia has an "active, significant, recent, and ongoing collection program focusing on the U.S." *Id.* As of 2005, Russia was one of the two most aggressive collectors of U.S. information. The record does not reflect whether Russia targets U.S. citizens. The U.S. and Russia cooperate on many foreign policy issues.

¹The file copy of the Decision is undated. The date cited above comes from Department Counsel's appeal brief.

Applicant does not discuss the specifics of his job with his wife, nor has he told any of his relatives about his work or that he is applying for a clearance. The Judge noted that the official conducting Applicant's security clearance interview stated that questioning "did not disclose any indications of foreign influence or preference." *Id.* at 4. Applicant enjoys an excellent reputation for honesty and trustworthiness. He had unaccompanied access at a previous job without incident or concern. Applicant and his wife own their home in the U.S., and they own three other houses as well. Applicant's net worth is over \$1,000,000. Their combined annual income is about \$175,000. Applicant and his wife have no financial interests in Belarus or Russia.

In the Analysis, the Judge noted that Guideline B security concerns can arise when an applicant's circumstances create a heightened risk of foreign exploitation or possible conflict of interest. He also noted that such concerns can be raised by business dealings or other financial interests in foreign countries. He concluded that Applicant's Russian in-laws raise security concerns under Guideline B but that his parents-in-law in Belarus do not.

The Judge concluded that any concerns in Applicant's case had been mitigated. Although he noted that in-laws are within the scope of persons who can raise security concerns under Guideline B, he stated that, as a matter of common sense, imputed ties through marriage are not as strong as those of consanguinity. He stated that there is no evidence tying Applicant's parents-in-law to the Belarusian government or his sister-in-law to the government of Russia. He also stated that there is no evidence that Applicant's brother-in-law was connected in any way to Russia's intelligence gathering apparatus. He concluded that Applicant's ties in the U.S. are sufficiently longstanding that there is "no conflict of interest that can be exploited." *Id.* at 7. He stated that Applicant's wife's ties to her Belarusian parents and Russian sister are neither casual nor infrequent, "but neither are they so strong that Applicant would [choose] his imputed or derivative interests in Russia over U.S. interests." *Id.* In performing his whole-person analysis, the Judge noted Applicant's having held a clearance in the past without incident or concern, his absence of significant immediate contact with his foreign in-laws, the U.S. citizenship of his children, and his financial holdings in the U.S., among other things. He concluded that Applicant had demonstrated mitigation.

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)). "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). "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b). 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 (9th 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).

Department Counsel contends that the Judge erred in concluding that the circumstances of Applicant's parents-in-laws' citizenship and residence in Belarus did not raise concerns under Guideline B. We find this argument persuasive.

There is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of his or her spouse. The human rights record of the country in which an applicant's relatives or in-laws live is a pertinent consideration in Guideline B cases. *See, e.g.*, ISCR Case No. 10-09986 at 3 (App. Bd. Dec. 15, 2011). The record evidence demonstrates that (1) Applicant's in-laws live in Belarus, which has a poor human rights record; (2) Belarus has close ties to Russia; (3) Belarus is seeking closer ties with countries hostile to the U.S. such as Iran; (4) Belarus sells military-significant technology to countries engaged in terrorist activity; and (5) Applicant's wife communicates with her parents frequently and appears to have close relationship with them. The Government is not required to present a direct nexus between an applicant's foreign contacts and the concern addressed by Guideline B, nor is the Government required to prove that an applicant poses a clear and present danger to national security. The Directive addresses primarily the nature and extent of an applicant's foreign contacts. *See, e.g.*, ISCR Case No. 09-05812 at 3 (App. Bd. Dec. 1, 2011) It also addresses the foreign country's association with a risk of terrorism. Directive, Enclosure 1 ¶ 6. The Judge's findings about Applicant's Belarusian in-laws, and the evidence upon which those findings are based, are sufficient to raise a concern under Guideline B.²

²*See* Directive, Enclosure 2 ¶ 7(a): "contact with a foreign family member . . . who is a citizen or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion[.]" Directive, Enclosure 2 ¶ 7(b): "connections to a foreign person . . . that create a potential conflict of

Department Counsel argues that the Judge's analysis had the effect of shifting the burden of persuasion as to mitigation from Applicant to the Government. We find this argument persuasive.

The Judge concluded that Applicant's Russian in-laws raised security concerns. Therefore, he addressed Applicant's case for mitigation regarding these in-laws. Despite his having concluded that Applicant's parents in-laws did not pose security concerns, he discussed mitigation regarding them as well, in the alternative. Department Counsel notes that the Judge relied on large measure on an absence of evidence regarding Applicant's in-laws. *See, e.g.*, the findings summarized above in which the Judge stated that there is no record evidence concerning any connections between Applicant's parents-in-law and the Belarusian government or concerning any connection between Applicant's Russian brother-in-law and Russian intelligence-gathering. We also note the Judge's finding, described above, to the effect that the record does not reflect whether or not Russia targets U.S. citizens in its intelligence-gathering activities.

As Department Counsel argues, and the Directive requires, it is an applicant who bears the burden of persuasion as to mitigation, insofar as the Government has demonstrated security concerns. However, in the case before us, Applicant reported possessing little information regarding his in-laws. For example, he testified that he did not know what his parents-in-law did during their working lives, whether they worked for the government or had affiliations with the military, etc. Tr. at 36-37. Neither did he have information as to where his sister-in-law works in Russia, when his brother-in-law retired from his position with the army, what he does in retirement, whether he still works for the Russian government, or how long he was associated with the Russian army. Tr. at 38, 42-43.

These matters constitute a significant gap in the evidentiary record, one which bears directly on the extent to which Applicant could be subject to coercion or influence. The Judge should have evaluated the paucity of evidence concerning the in-laws in the context of Applicant's burden rather than the Government's. As it stands, a reasonable person could interpret the Decision as having required the Government affirmatively to demonstrate that Applicant's foreign in-laws pose a threat to U.S. interests rather than Applicant to demonstrate the applicability of the pertinent mitigating conditions. *See, e.g.*, ISCR Case No. 04-11664 at 4 (App. Bd. Apr. 6, 2007)(A paucity of record evidence as to an applicant's contacts with his foreign in-laws must be resolved in the context of the applicant's burden of persuasion). The Judge's approach is inconsistent with the requirements of the Directive that security concerns raised by the evidence must be mitigated by an applicant, who bears the risk that his presentation may not be sufficient to resolve any and all doubt that may arise concerning his security-significant conduct or circumstances.

interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign persons, group, or country by providing that information[.]”

As Department Counsel argues, the Judge's shifting of the burden of persuasion impaired his analysis of the mitigating conditions.³ We conclude that this is especially true of the Judge's treatment of Applicant's Russian in-laws. Department Counsel notes, for example, that the Judge's statement that Applicant's "family in Russia is not so situated as to be a likely source of pressure" is not supported by anything in the record. Decision at 7; Appeal Brief at 19. As noted above, the Directive requires that *any* doubt about an applicant's fitness for a clearance be resolved in favor of national security. In the case before us, the doubt occasioned by Applicant's brother- and sister-in-laws is substantial. The record tells little to nothing about what the brother-in-law did in the Russian army, whether he still bears some connection to the army, and what he does in retirement. The absence of evidence that he is formally connected with intelligence-gathering does not permit an inference that Applicant's in-laws' circumstances are of minimal concern, given the Judge's findings and record evidence concerning the geopolitical situation in Russia, its stance toward the U.S., and its efforts to acquire U.S. information. *See* ISCR Case No. 07-14508 at 4 (App. Bd. Oct. 22, 2008)(An accurate assessment of the geopolitical situation and the security/intelligence profile of the country vis-a-vis the U.S. is crucial in Guideline B cases). Compare Applicant's circumstances with those described in ISCR Case No. 03-21190 (App. Bd. Mar. 12, 2007), in which we affirmed the grant of a clearance to an applicant whose brother was a retired officer in the Israeli military (relying in part on a similar analysis from a case involving a retired military relative in Taiwan). The nature and circumstances of the country at issue are among the pertinent factors in analyzing mitigation in the one under consideration here. Under the facts of the case before us, the geopolitical posture of Russia and the absence of evidence concerning Applicant's in-laws undermine the Judge's conclusion that Applicant has mitigated the "heightened risk" of foreign influence he found to have been raised.

Department Counsel further argues that the evidence does not support the Judge's application of the remaining mitigating conditions which he addressed. Under the facts of this case, evidence that Applicant has little immediate contact with his Russian in-laws is not sufficient to demonstrate that his ties to the U.S. so outweigh his ties to his wife's family that he would be expected to resolve any conflict of interest in favor of the U.S. As Department Counsel notes, Applicant's wife appears to be close to her relatives, and Applicant's evidence that he does not speak with these relatives himself, due among other things to a language barrier, is not sufficient to rebut the presumption that

³The Judge cited to three Guideline B mitigating conditions. Directive, Enclosure 2 ¶ 8(a) mitigates security concerns when "the 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, . . . and the interests of the U.S.[.]"

Directive, Enclosure 2 ¶ 8(b) addresses circumstances in which "there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person . . . 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.[.]"

Directive, Enclosure 2 ¶ 8(c) mitigates concerns when "contact 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[.]"

he shares a sense of obligation to them through his wife. Neither is it sufficient to mitigate the risk that Applicant's in-laws could, through their frequent contact with Applicant's wife, become a means of foreign influence or exploitation.

The Judge's whole-person analysis cites to evidence much of which bears in Applicant's favor. However, we find Department Counsel persuasive in her argument that these matters are not sufficient to resolve doubt arising from the paucity of record evidence concerning Applicant's in-laws. This is particularly true regarding Applicant's brother-in-law. Given that there is little evidence in the record from which to glean a meaningful inference as to what this person did in working for the Russian army, whether he currently holds a position with the government and, if so, what that position is, we cannot say that the whole-person analysis is sufficient to meet the stringent requirements of the standard set forth in *Department of the Navy v. Egan, supra*. We conclude that the Judge's decision does not consider relevant factors and runs contrary to the weight of the record evidence. ISCR Case No. 03-22861 at 2-3, *supra*. Accordingly, we conclude that the evidence does not support the Judge's favorable decision.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, 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