

KEYWORD: Guideline B

DIGEST: The Board has clearly explained why statutory language from 50 USC which is expressly self-limiting to another context does not apply to these proceedings. Given the sparse record, the Judge’s whole-person analysis fails to demonstrate that Applicant has met his burden on appeal. Favorable decision reversed.

CASENO: 04-11369.a1

DATE: 03/16/2007

DATE: March 16, 2007

In Re:)	
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SSN: -----)	ISCR Case No. 04-11369
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jennifer Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 10, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence), pursuant to

Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested that the case be decided on the written record. On June 30, 2006, after considering the record, Administrative Judge Claude R. Heiny granted Applicant's request for a security clearance. Department Counsel submitted a timely appeal pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge's whole person analysis is unsupported by record evidence and is arbitrary, capricious, and contrary to law. Applicant submitted a reply brief, which contains new matters not contained in the record. "No new evidence shall be received or considered by the Appeal Board." Directive ¶ E3.1.29. We reverse the Administrative Judge's decision to grant the clearance.

Whether the Record Supports the Administrative Judge's Factual Findings

A. Facts

The Judge made the following findings of fact: Applicant was born in Iran, immigrating to the U.S. in 1979. He got married in 1983 to a woman born in Iran but who subsequently became a U.S. citizen. Applicant and his wife have two children, both born in the U.S. Applicant's wife has no close relatives living in Iran, her parents being Iranian citizens residing in the U.S. and her siblings being both citizens and residents of the U.S. Applicant became a citizen of the U.S. in 2001.

Applicant has two brothers, both of whom are citizens and residents of Iran. The Judge found that, since the death of Applicant's mother in 2003, he "has not had a relationship with his oldest brother" and has not spoken with him telephonically since 2000. The two are not close, due to "family issues." Applicant maintains contact with his other brother, who is handling matters pertaining to their mother's estate. Applicant speaks to this brother approximately once a month.

Iran is a nation hostile to the U.S. and is one of seven countries the State Department has designated as a sponsor of terrorism. It is attempting to acquire weapons of mass destruction. Additionally, it has a poor human rights record, continuing "to commit numerous and serious abuses, including summary executions, torture, and other degrading treatment of prisoners, arbitrary arrest and detention, and violence against women."

B. Discussion

The Appeal Board's review of the Administrative Judge's finding 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 such a conclusion in light of all the contrary evidence in the 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, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966)). In evaluating the Administrative Judge's finding, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1

Department Counsel does not expressly challenge the Judge's findings, except to assert that Applicant has visited Iran on three occasions rather than upon only two, as the Judge found. We

have examined the record and agree with Department Counsel that Applicant has visited Iran upon three occasions. Beyond that, Department Counsel begins her brief with her own statement of facts drawn from the record but without alleging that the Judge's own findings are insufficient. The Board may consider whether a Judge's factual findings are based upon substantial evidence, presuming that issue is raised. Failing that, we rely on the findings as set forth in the decision. *See* ISCR Case No. 03-11765 at 3 (App. Bd. April 11, 2005). The Judge's findings, being unchallenged save for the exception noted above, are not an issue in the case.

Whether the Record Supports the Administrative 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.

Given his findings, the Judge properly concluded that Foreign Influence Disqualifying Condition (FIDC) 1¹ is applicable to this case. That conclusion shifted the burden of persuasion to Applicant. "If there are admitted or proven facts or circumstances that raise security concerns, '[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.'" ISCR Case No. 02-28838 at 2 (App. Bd. Jun. 12, 2006); Directive ¶ E3.1.15.

The Judge found that two mitigating conditions were possibly raised by the facts, Foreign Influence Mitigating Conditions (FIMC) 1² and 3³. In evaluating the former, the Judge observed that "[t]he hostility of Iran to the United States places a heavy burden on Applicant to demonstrate that the immediate family members in Iran do not pose a security risk and he is not in a position to be forced to choose between loyalty to the United States and his family members. With its adversarial stance and its dismal human rights record, it is conceivable that Iran would target any citizen in an attempt to gather information from the United States." The Judge concluded that the evidence supplied by Applicant was insufficient to meet his burden of persuasion as to the second clause of FIMC 1. Regarding the latter mitigating condition, the Judge concluded that Applicant had met his burden as regards the oldest brother, insofar as their contact was casual and infrequent, but not as to the other, with whom he speaks on a monthly basis. Having properly declined to apply the

¹"An immediate family member...is a citizen of, or resident or present in, a foreign country." Directive ¶ D2.A2.1.2.1.

²"A determination that the immediate family member(s)...in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States." Directive ¶ E2.A2.1.3.1.

³"Contact and correspondence with foreign citizens are casual and infrequent." Directive ¶ E2.A2.1.3.3.

mitigating conditions, therefore, the Judge based his favorable decision upon his whole person analysis. *See, e.g.*, ISCR Case No. 04-12363 at 2 (App. Bd. July 14, 2006).

Department Counsel argues that the Judge's whole person analysis does not sufficiently address the nature of the Iranian regime and the vulnerability of Applicant's Iranian relatives to coercion by that regime, relying upon Directive ¶ E2.2.1.8 ("potential for pressure, coercion, exploitation, or duress") for the proposition that it is the only adjudicative factor fully relevant to Guideline B cases. Although a sufficient whole person analysis should take into account a variety of matters in addition to the this adjudicative factor (*see* ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007)), we nevertheless find merit in Department Counsel's argument, considered as a whole. That is, while the Judge properly noted such favorable facts as the 29 years which Applicant has lived in the U.S., the U.S. citizenship and residence of his wife and children, and his sincere statement that he would not act contrary to this country despite whatever pressures Iran exerted on his relatives, the Judge does not explain why these factors outweigh the absence of record evidence concerning the brother with whom he maintains regular contact.

As Department Counsel points out, the record is silent as to the nature of his brother's employment, the extent of the brother's financial reliance upon the Iranian government, or any other factor which bears upon the question of how visible the brother might be to his country's government. In addition, the record does not develop in sufficient detail "the nature and character of [Applicant's] relationship" with the brother, which is relevant in evaluating the whole person. ISCR Case No. 02-04786 at 5-6 (App. Bd. Jun. 27, 2003). This lack of evidence is especially acute in light of the Judge's own statement that Iran might conceivably target *any* of its citizens in order to gather intelligence against the United States. Of course, as stated above, Applicant has provided his own assurance that he would not act contrary to the interests of the U.S. However, the Board has previously held that such statements are of limited weight, given their hypothetical nature. *See* ISCR Case No. 02-26978 at 5 (App. Bd. Sept. 21, 2005); ISCR Case No. 0-02892 at 4 (App. Bd. Jun. 28, 2004). In light of this, we conclude that the Judge abused his discretion in concluding that Applicant had satisfied his burden of persuasion.

The Judge cites to 50 U.S.C. § 438 and 50 U.S.C. § 1801. The Board has clearly explained why these statutes, which are self-limited to a criminal or espionage context, do not govern the interpretation of the phrase "agent of a foreign power" for purposes of FIMC1. *See* ISCR Case No. 04-00540 at 4-5 (App. Bd. Jan. 5, 2007).

Finally, the Judge concludes by saying "Applicant is a mature individual with a history of service to this country...Because of Applicant's long standing...loyalties in the U.S. he can be expected to resolve any conflict of interest in favor of the United States." Decision at 6. The Judge's reference to loyalties in the U.S. is problematic given the clear language of the Executive Order that these proceedings "shall in no sense be a loyalty determination." Given the sparse record in this case it is difficult to justify the Judge's conclusion that Applicant has a history of service to this country. Furthermore, Applicant lived here for 24 years before becoming a U.S. citizen.

Order

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board