

KEYWORD: Guideline C; Guideline B

DIGEST: Given the sparse record in this case, it is difficult to justify the Judge ‘s conclusion that Applicant has a “a history of service to this country.” The Judge did not discuss in his whole person analysis the significance of Applicant’s possession of a current valid Iranian passport. Nor did he discuss the security significance of the persecution Applicant’s family has already suffered in Iran. Favorable decision reversed.

CASENO: 04-12435.a1

DATE: 04/09/2007

DATE: April 9, 2007

In Re:)	
)	
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SSN: -----)	ISCR Case No. 04-12435
)	
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 4, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline C (Foreign Preference) and

Guideline B (Foreign Influence), of 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 timely appealed 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.¹ Applicant submitted a response which primarily restates the information he submitted in response to the SOR. To the extent that the reply brief contains information not contained in the record below, however, that information is new evidence, which the Board cannot consider. Directive ¶ 3.1.29. We reverse the Administrative Judge's decision to grant the security clearance.

Whether the Record Supports the Administrative Judge's Factual Findings

A. Facts

The Administrative Judge made the following relevant findings of fact:

In 1984, Applicant moved to the United States. Applicant married an American citizen in 1987. They divorced in 1991. Applicant became a naturalized American citizen in 1993. To assist in the settlement of his father's estate, Applicant applied for an Iranian passport and paid a fee to the Iranian government for it in lieu of military service. Applicant never used the passport for travel, and it expired in 2006. Applicant has no property in or attachments to Iran.

When Applicant's father died intestate, ownership of the family home passed to Applicant's mother and all the children. When Applicant's mother decided to sell the home and move to the U.S., Applicant and his seven siblings had to provide quitclaim deeds before the house could be sold. Applicant had to have an Iranian passport for his quitclaim deed to be acceptable to the Iranian government.

Applicant's mother and most of his siblings are now registered aliens in the U.S. One sibling lives in Australia. One sister and an uncle remain citizens and residents of Iran. They belong to a minority religion in Iran and are subject to systemic persecution. The uncle is blind and in his eighties, and moving to another country would be very difficult for him. Applicant has not seen these two relatives in eighteen years, but speaks to them regularly. Applicant acknowledges he is bound to his sister by ties of affection and, to a lesser extent, to his uncle

Iran has been hostile to the U.S. since the Islamic Revolution began in 1979. Iran supports terrorist groups and is making efforts to obtain weapons of mass destruction. Iran has a poor record of human rights, and there is evidence of summary executions, arbitrary arrest and detention, torture and other degrading treatment of prisoners, and violence against women. There is no indication that Iran has ever attempted to exploit any resident of Iran for the purpose of compromising a security clearance holder in the U.S.

¹Department Counsel does not appeal the Judge's findings and conclusions as to Guideline C.

On August 16, 2000, the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASDC3I) issued guidance clarifying the application of the Foreign Preference adjudicative guideline. The ASDC3I memo states any clearance must be denied or revoked unless the applicant surrenders the foreign passport or obtains approval for its use from the appropriate agency of the U.S. government. A copy of the ASDC3I's memo was sent to Applicant as part of the FORM. The record contains no evidence of surrender of the Iranian passport by Applicant.

B. Discussion

Department Counsel's appeal involves the Administrative Judge's conclusions.

Whether 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. and ¶ E3.1.33.3.

Given his findings, the Judge properly concluded that Foreign Influence Disqualifying Condition (FIDC) 1² 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 Administrative Judge found that Foreign Influence Mitigating Condition (FIMC) 1³ was properly raised by the facts. In evaluating FIMC 1, 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 that 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." Decision at 6. The Judge concluded that the evidence

²"An immediate family member...is a citizen of, or resident or present in, a foreign country." Directive ¶ D2.A2.1.2.1.

³"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.

supplied by Applicant was insufficient to meet his burden of persuasion as to the second clause of FIMC 1. Having properly declined to apply the mitigating condition, 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 22 years which Applicant has lived in the U.S., his U.S. citizenship, 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 security concerns raised by the presence of his sister and uncle in Iran. 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. June 28, 2004). In light of this, we conclude that the Judge abused his discretion in concluding that Applicant had satisfied his burden of persuasion.

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 7. 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.

The Board notes that as of the close of the record in this case (December 2005), Applicant held a current and valid Iranian passport, which he had made no effort to surrender. The Judge found for Applicant under Guideline C, which is not an issue on appeal. The Judge did not discuss what significance Applicant's holding of a valid passport should have on his analysis of Applicant as a whole person. Such a failure is error. Similarly, the Judge did not explain in his whole person analysis how he resolved issues such as the systematic persecution Applicant's family is already subject to and Applicant's acknowledgment of his ties to the family members in Iran. Cumulatively, these errors warrant reversal.

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: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board