KEYWORD: Guideline B

DIGEST: There is a rebuttable presumption that a person has ties of affection for or obligation to the immediate family members of the person's spouse. An applicant's stated intention about future hypothetical conduct is not entitled to much weight unless there is record evidence of similar conduct under similar circumstances. Department Counsel is not required to present evidence that Applicant would compromise classified information if threatened. Favorable decision reversed.

CASENO: 05-00939.a1

DATE: 10/03/2007

DATE: October 3, 2007

In Re:	)	
	)	
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	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT
Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 30, 2005, 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), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 31, 2006, after the hearing, Administrative Judge Martin H. Mogul. granted Applicant's request for a security clearance. Department Counsel appealed. After considering the merits of Department Counsel's appeal, the Appeal Board issued a Decision dated March 14, 2007 in which it remanded the case to the Judge with instructions. The Judge issued a Remand Decision on March 22, 2007. Department Counsel timely appealed this second decision pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge's application of Foreign Influence Mitigating Condition (FIMC) 1[1] is arbitrary, capricious, and contrary to law.[2] For the following reasons, the Board reverses the Judge's favorable security clearance decision.

Whether the Record Supports the Judge's Factual Findings

The Judge made the following pertinent findings of fact:

Applicant was born in the U.S. to U.S. born parents. She received her education, which includes a Ph.D., from U.S. universities. Her husband, who is not of Persian descent, was born in Iran. He became a naturalized citizen of the United States in the early 1980s. They have two children, both born in the U.S. Applicant's mother and brothers are natural born U.S. citizens, residing in the U.S. Applicant's father is deceased.

Applicant's daughter married an Iranian citizen, but they are divorced. Neither Applicant nor her daughter has contact with him. Applicant has a niece who is a citizen of Iran, but who resides in the U.S. and who is in the process of becoming a U.S. citizen. Applicant's father-in-law is a citizen and resident of Iran, although he holds permanent resident alien status in the U.S. The father-in-law visited the U.S. in this decade, but Applicant neither saw nor spoke with him while he was here. Applicant maintains no contact with her father-in-law.

Applicant's husband has four siblings, one of whom is a U.S. citizen residing in the U.S., one of whom resides in the U.S. and is in the process of becoming a U.S. citizen, and the remaining two of whom reside in both Iran and Europe. Applicant has no regular contact with her in-laws in Iran.

Applicant traveled to Iran twice in the 1990s, and once earlier in this decade. One visit was to honor her mother-in-law, who had recently died. The other two were for her daughter's wedding ceremony and to visit her grandchild, who had been born in Iran. Applicant lived in Iran in the 1970s for three years, while her husband fulfilled a non-military service obligation to that country Neither Applicant nor her husband own any property in Iran nor do they stand to inherit Iranian assets. They own a home in the U.S. valued at $2 million and have other assets in this country.

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[1]Directive ¶ E2.A2.1.3.1: "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;"

[2]Department Counsel does not appeal the Judge's favorable ruling under Guideline C.

Applicant testified that Iran may consider her a citizen of Iran but she does not consider herself a citizen of that country. She denied that she had ever taken an affirmative step to be considered an Iranian citizen. When she traveled to Iran her name and her daughters' names were added to her husband's Iranian passport. Applicant indicated that she would be willing to renounce her Iranian citizenship.

B. Discussion

The Appeal Board's review of the Administrative Judge's findings of fact is limited to determining if they are supported by substantial record 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 (1966). In evaluating the Administrative Judge's findings, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1.

Department Counsel has not expressly challenged the Administrative Judge's factual findings, although she provides a detailed description of facts from the record, upon which her appeal brief relies. Some of this evidence was not included in the Judge's factual findings. Inasmuch as Department Counsel's appeal arguments are couched essentially in terms of objections to the Judge's conclusions, the Board will address the arguments raised on appeal by Department Counsel in the context of determining whether the record supports the Judge's ultimate conclusions. In so doing, the Board will discuss evidence highlighted by Department Counsel in her argument, some of which was not included in the Judge's factual findings.

Whether the Record Supports the 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)). 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. We review matters of law *de novo*.

Department Counsel asserts that the Judge's application of Foreign Influence Mitigating Condition 1 is unsupported by the evidence and is arbitrary, capricious, and contrary to law. Specifically, Department Counsel argues: (a) in view of the record evidence, the Judge's conclusion that Applicant's family members are not in a position to be exploited by the government of Iran is arbitrary and capricious; (b) the Judge failed to consider Applicant's husband's ties to his family members in Iran when evaluating the potential threat of coercion toward Applicant by the presence of those family members in Iran; and (c) the Judge did not consider the nature of the Iranian regime

when evaluating Applicant's vulnerability to exploitation. Department Counsel's arguments have merit.

The Judge concluded that Foreign Influence Disqualifying Condition 1[3] applied to the case. The Judge is bound by the Directive. Under the Directive, once it has been demonstrated that Applicant has immediate family members in one or more foreign countries, the burden shifts to Applicant to show that the government's concerns about Applicant's overseas family are mitigated. For FIMC 1 to apply, Applicant was charged with satisfying the burden of presenting evidence sufficient to establish that her family members in Iran are not in a position to be exploited so as to force her to choose between loyalty to those persons and the United States. The Judge gave four reasons for applying FIMC 1: (i) the connection between Applicant's family in Iran, who have no government involvement, and Applicant is minimal and Applicant is not close to them; (ii) Applicant's stated intention not to cooperate with any potential threat to her in-laws in Iran; (iii) Applicant was born in the United States and all of her close family members are citizens and residents of the United States; and (iv) her long and successful employment history and her significant financial interests in the United States.

As matter of common sense and human experience, there is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse. *See*, *e.g.*, ISCR Case No. 01-03120 at 4 (App. Bd. Feb. 20, 2002). Department Counsel persuasively argues that the record evidence in this case does not establish that Applicant has overcome this presumption. As Department Counsel points out, the Judge's analysis of this aspect of the case is flawed in that, when he evaluates the strength of family ties, he focuses only on Applicant's ties to her Iranian in-laws and fails to consider the ties of Applicant's husband to his immediate family members in Iran. These latter ties have a direct bearing on the strength of the ties of affection and obligation between Applicant and her father-in-law and her siblings-in-law. The record evidence establishes that there is genuine affection between Applicant's husband and his father and his siblings in that they communicate monthly, Applicant's husband sends his relatives gifts, and Applicant's parents-in-law have visited Applicant's husband and their other sons in the past on a yearly basis. The record indicates that Applicant herself has communicated with her in-laws on numerous occasions, either directly or through her husband. Applicant has also traveled to Iran three times in the past to visit her Iranian in-laws. Given the state of the evidence, the presumption in favor of close ties of affection or obligation between Applicant and her Iranian in-laws has not been overcome. There is no evidence of hostility, estrangement, or indifference in the relationship between Applicant and her Iranian in-laws or in the relationship between Applicant's spouse and those same relatives. Therefore, the Judge's conclusion that a weakness of ties between Applicant and her Iranian in-laws minimizes the likelihood of vulnerability to coercion has no support in the record.

The Judge mentioned Applicant's stated intention not cooperate with any potential threat to her in-laws in Iran as a matter in mitigation. An applicant's stated intention about what he or she might do in the future under some hypothetical set of circumstances is merely a statement of intention that is not entitled to much weight, unless there is record evidence that the applicant has acted in an identical or similar manner in the past under identical or similar circumstances. *See*, *e.g.*,

[3]Directive ¶ E2.A2.1.2.1.: "An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country."

ISCR case No. 02-26826 at 5 (App. Bd. Nov. 12, 2003). Moreover, application of FIMC 1, by its own terms, does not hinge on the choice Applicant might make in such a situation. Rather, the concern is that Applicant not be placed in a situation that could force her to choose between her loyalty to foreign in-laws and the United States. *See* ISCR Case No. 03-15205 (App. Bd. Jan. 21, 2005).

Department Counsel is not required to present evidence that Applicant *would* compromise classified information if the Iranian government made threats against her family members living in Iran. The federal government is not required to wait until a hostile foreign country makes threats against an applicant or the applicant's immediate family members and then see how the applicant reacts or responds to such threats. *Cf. Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969)(government need not wait until a person mishandles or fails to safeguard classified information before it can make an adverse security clearance decision), *cert. denied*, 397 U.S. 1039 (1970). All that is required is evidence that Applicant is in a situation that poses a security risk. To require a stronger showing would result in the untenable situation that the federal government would have to grant access to classified information until or unless there is evidence that an applicant has actually failed to protect and safeguard classified information, or until or unless persons in hostile countries are actively engaging in attempts to gain access to classified information from an applicant through the use of threats and intimidation toward that applicant's relatives.

The Judge lists Applicant's status as a natural-born United States citizen, the status of her close family members as United States citizens, her long and successful employment history in the United States and her significant financial interests in the United States as factors in his determination that her family in Iran does not constitute an unacceptable security risk. While these factors were relevant evidence that the Judge was entitled to consider, given the record evidence in this case, which includes the potential actions of the government of Iran, a regime that is openly hostile to the United States and its interests, Applicant's ties and history in the United States do not eliminate the security concerns raised by her family ties in Iran. Given the nature of the Iranian government, Applicant has presented no evidence, and the Judge has articulated no rationale, establishing that her sense of family obligation to relatives living in Iran are diminished by her ties to the United States.

Department Counsel asserts that the Judge did not adequately consider the nature of the Iranian regime when reaching his conclusions in this case. Notwithstanding the expanded treatment given the description of the government of Iran in the Judge's remand decision, Department Counsel's argument has merit. With this decision the Judge has described the characteristics and history of the current Iranian regime in more detail. However, there is little in the way of analysis that relates these factors to Applicant's situation.

As a matter of common sense and sound risk management under the "clearly consistent with the national interest" standard, an applicant with in-laws to whom they may feel a sense of obligation living in a country hostile to the United States and with a poor human rights record regarding its own citizens should not be granted a security clearance without a very strong showing that those family ties do not pose a security risk. Given the undisputed hostility of the Iranian government to the United States, the fact that Applicant has a father-in-law and two sibling-in-laws living in Iran places a heavy burden on her to demonstrate she should be granted access to classified information. In this

case, the record evidence does not provide the Judge with a rational basis for his conclusion that Applicant has met that heavy burden.

Conclusion

Considering the record evidence as a whole, Department Counsel has identified a number of errors by the Judge which, taken in their entirety, warrant reversal of the Judge's favorable security clearance decision.

Order

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

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

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

See Dissenting Opinion
James E. Moody
Administrative Judge
Member, Appeal Board

CONCURRING OPINION OF ADMINISTRATIVE JUDGE MICHAEL Y. RA'ANAN

I concur with the decision to reverse the Judge's favorable decision. I write separately to clarify an issue arising from my dissent in the first Appeal Board decision in this case.

In my dissent, I discussed Applicant's dual citizenship and the lack of record evidence that she had pursued renunciation of her Iranian citizenship. As it turned out, my discussion of this matter alerted Applicant to the fact that evidence she had submitted to the Administrative Judge had

never been admitted into the record. My earlier discussion of this aspect of the case is no longer pertinent in light of the correction to the record.

In addition to the facts discussed in the majority opinion in the context of the issue of Applicant's Iranian relatives and in-laws I also note one other problem with the Judge's favorable decision. Department Counsel cites case law discussing the fact that family relationships are complex and involve matters of obligation. She specifically notes that Applicant' granddaughter is an Iranian citizen. Applicant's testimony is plain that the granddaughter's father is an Iranian, possibly living in Iran. (Applicant's daughter met him in Iran, they married in Iran, and the grandchild was born in Iran). It seems to me that the parent of one's grandchild is potentially a person of obligation no less than the in-laws.

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

DISSENTING OPINION OF ADMINISTRATIVE JUDGE JAMES E. MOODY

I respectfully disagree with my colleagues' decision in this case. Given the Judge's unchallenged findings, I conclude that a favorable whole person analysis is sustainable on this record.

I would note first of all that Applicant is a U.S. citizen, born in this country of parents who themselves are U.S. citizens. She has two brothers, both of whom are U.S. born citizens as well. Therefore, Applicant is in a position different from many others under Guideline B in that she has not become a U.S. citizen only recently, nor has she faced a shifting of national loyalties that might be expected to accompany the naturalization process. Additionally, her children are U.S. born citizens, and her husband has been a citizen of this country since 1983. She and her husband hold substantial assets in the U.S. and none in Iran. All in all her family history, her immediate family, and her financial holdings suggest greater psychological ties to the U.S. than might be found in many other cases under this Guideline.

I do not believe that Applicant's security concerns can be mitigated as a matter of law merely through the application of relevant mitigating conditions. The presence of in-laws in a hostile country like Iran would make that a difficult task. However, a Judge is not limited to Adjudicative Guideline mitigating conditions when deciding on whether an applicant has demonstrated extenuation or mitigation. It is obviously permissible for a Judge to conclude that no mitigating condition will *per se* justify the granting of a clearance yet nevertheless decide in an Applicant's favor in view of the whole person analysis. *See, e.g.*, ISCR Case No. 02-05110 at n 7 (App. Bd. Mar. 22, 2004); ISCR Case No. 99-0542 at 7 (App. Bd. Mar. 21, 2003). In this case the Judge's findings and the record as a whole demonstrate (1) that Applicant has been a U.S. citizen since birth; (2) that her parents and brothers are themselves U.S. citizens by birth; (3) that her husband has been a U.S.

citizen for 24 years; (4) that Applicant's children are U.S. citizens by birth; (5) that Applicant's financial assets, valued at over $2 million, are located in the U.S.; (6) that neither Applicant nor her husband own property in Iran; (7) that Applicant has held a Department of Defense security clearance since 1991 without incident or concern; and (8) that Applicant's *direct* contact with her Iranian in-laws is either non-existent or infrequent. After examining these facts in light of the record, a reasonable person could conclude that the real probability of Applicant becoming a danger to national security is sufficiently low as to warrant a favorable decision. I express no opinion as to whether I would have decided in Applicant's favor had I been the Judge in this case. However, given the constraints which the Directive imposes upon the Board's exercise of appellate review, I cannot say that the Judge's favorable decision under the facts of this case is arbitrary, capricious, or contrary to law. *See* Directive ¶ E3.1.32.3. *See also* ISCR Case No. 03-23483 at 4 (App. Bd. Jan. 29, 2007.) For that reason I would affirm the decision of the Judge.

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board