

KEYWORD: Guideline B; Guideline C

DIGEST: The burden to produce evidence for mitigation is on Applicant. Th Judge impermissibly shifted the burden. The Judge erred by not discussing the security threat in Iran for which there was record evidence. Favorable decision reversed.

CASENO: 05-03250.a1

DATE: 04/06/2007

DATE: April 6, 2007

In Re:)	
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SSN: -----)	ISCR Case No. 05-03250
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 14, 2005, DOHA issued a statement of reasons 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 July 18, 2006, after the hearing,

Administrative Judge Barry M. Sax 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 raised the following issues on appeal: whether the Administrative Judge's application of Foreign Influence Mitigating Condition 1 is arbitrary, capricious, or contrary to law; whether the Administrative Judge's application of Foreign Influence Mitigating Condition 5 is arbitrary, capricious, or contrary to law; and whether the Administrative Judge's "whole person" analysis is unsustainable in that it relied on whole person considerations unsupported by the record evidence and applied them in a manner that is arbitrary, capricious, or contrary to law.

Whether the Record Supports the Administrative Judge's Factual Findings

A. Facts

The following findings of fact are relevant to the issues in this appeal:

Applicant is a 53-year-old systems engineer for a defense contractor. Her elderly parents are citizens and residents of Iran and are her only ties to that country. Her parents received "Green Cards" in the 1980s, and have visited the U.S., but they never moved here due to health and language concerns. Applicant's parents owned a home supplies store, but are now retired. Applicant has four sisters and a brother, all of whom emigrated to the U.S. and became U.S. citizens. On approximately four occasions over 33 years (coinciding with the Persian New Year, Mother's Day or Father's Day) Applicant sent approximately \$200.00 to her parents in Iran. Applicant calls her parents about "every week." The Administrative Judge concluded that Iran is clearly recognized as hostile to the United States, which places a heavy burden on Applicant to overcome her parents' presence in that country.

Applicant traveled to Iran in September or October 1999 and from December 2000 to January 2001, during periods when her security clearance was not active. She entered and exited Iran using an Iranian passport because she wanted to visit her parents. She had heard that Iranian authorities would still consider her to be an Iranian citizen, and might take away her U.S. passport, leaving her stranded in Iran. Her Iranian passport expired in 2001. She has renounced her Iranian citizenship, returned the passport and she does not intend to renew it. She is not a part of any "Iranian community" in the U.S. and recognizes her obligation to this country and would report any improper contact. Her parents visited her three times in the U.S., in about 1996, 1998, and 2002 or 2003.

Her U.S.-born husband is a partner in a pharmaceutical firm. To her knowledge, he has no contact with any foreign government officials. She is aware of her responsibility to report any improper contacts. She received a merit award from her company in March 2006. She first obtained a security clearance in 1990. She and her husband purchased a home in the U.S. about five years ago for \$800,000-\$850,000. She does not own any other property outside the U.S.

B. Discussion

¹Department Counsel's does not dispute the Administrative Judge's favorable findings for the Applicant under Guideline C, and they are not in issue on this appeal.

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 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, 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.

The Administrative Judge’s findings of fact outlined above are not challenged on appeal. To the extent necessary to resolve the issues raised on appeal, the Administrative Judge’s findings of fact will be discussed below in conjunction with the analysis of his conclusions. The Hearing Transcript (HT) will be cited when appropriate.

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)). 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. Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Administrative Judge. We may not set aside an Administrative Judge’s decision “that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency . . .” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 42. We review matters of law *de novo*.

We are not persuaded by the Department Counsel’s argument that the Administrative Judge applied Foreign Influence Mitigating Condition 5² in a manner that was arbitrary, capricious or contrary to law. The concern here is an undetermined amount that Applicant may possibly receive as an inheritance from her parents in Iran, and the Administrative Judge concluded that the possibility is minimal that she would receive any sum sufficient to offset her significant US assets. The Judge may have misstated the applicable standard. The standards are whether the foreign financial interest could make the individual vulnerable to foreign influence, and in mitigation, whether the interests are minimal and not sufficient to affect the individual’s security responsibilities.³ The standard is not necessarily whether the sum of the foreign assets are significant to offset the Applicant’s US assets. Nevertheless, the SOR does not raise the issue of Applicant’s possible inheritance from her parents as disqualifying conduct, and generally, it is inappropriate to

²“Foreign financial interests are minimal and not sufficient to affect the individual’s security responsibilities” (Directive ¶ E2.A2.1.3.5).

³See Foreign Influence Disqualifying Condition 8 (Directive ¶ E2.A2.1.2.8) and Foreign Influence Mitigating Condition 5 (Directive ¶ E2.A2.1.3.5) respectively.

base an adverse security clearance determination on conduct not raised in the SOR.⁴ Accordingly, the Judge's errors in raising the inheritance under Foreign Influence Disqualifying Condition 8, or in discussing the disqualifying and mitigating conditions associated with it, are harmless errors. It was appropriate for the Judge to consider the evidence of the mere expectancy of the inheritance as evidence of the close relationship between Applicant and her parents in Iran.

However, the Board finds that Department Counsel's argument that the Administrative Judge applied Foreign Influence Mitigating Condition 1⁵ in a manner that is arbitrary, capricious and contrary to law, is persuasive. The Judge recognized the hostile nature of the U.S. relationship with Iran and the heavy burden on Applicant to overcome the security significance of her parents presence in that country. Decision at 4. The Judge stated that "there is no evidence one way or the other as to whether [Applicant's parents] are susceptible to pressure from the Iranian government . . ." Decision at 4. But the Judge appears to have improperly shifted the evidentiary burden back to the government.⁶ The Judge concluded that there is no record "evidence supporting an inference that Applicant would feel 'forced' to choose between her loyalty to [her parents] and to the United States." Decision at 4. Even when a non-hostile country is involved, the Department Counsel should prevail when neither party presents evidence on whether Applicant's family or associates are in a position to be exploited in such a way that Applicant is forced to choose between his family and his country. As the Directive requires, the burden is on Applicant to come forward with evidence on mitigation.

The Administrative Judge later cited evidence (e.g., no history of security problems, security sensitivity training, and promises to report any improper contacts) for why he found an inference that Applicant would not be forced to choose between her parents and her country. He also explained that "[t]o the degree that there is a risk, it is a hypothetical one, based primarily on the undisputed presence of [Applicant's] parents in Iran and her warm relations with them."

An Administrative Judge is not required to discuss each and every piece of record evidence in making a decision, but the Judge cannot ignore, disregard, or fail to discuss significant record evidence that a reasonable person could expect to be taken into account in reaching a fair and reasoned decision. *See, e.g.*, ISCR Case No. 02-19479 at 6 (App. Bd. Jun. 22, 2004). Even if there is some record evidence that Applicant herself would resist exploitation, that does not directly address the issue of whether the parents are in a position to be exploited by Iran in a way that could force Applicant to choose between loyalty to them and her country. The Administrative Judge erred in focusing primarily on Applicant's relationship with her parents without including a detailed

⁴Conduct not alleged in the SOR may be considered for some purposes (e.g., to assess an applicant's credibility; to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; or to demonstrate rehabilitation). Since the SOR did not raise the possible inheritance as disqualifying, mitigation is not relevant. There is no indication of an amendment to the SOR to include the possible inheritance.

⁵"A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(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).

⁶"The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by the Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision" (Directive ¶ E3.1.15).

analysis of the security threat in Iran. That analysis is important to the outcome here. In Foreign Influence cases, the nature of the foreign government involved, the intelligence gathering history of that government, and the presence of terrorist activity are important considerations that provide context for the other record evidence and must be brought to bear on the Judge's ultimate conclusions in the case. *See, e.g.*, ISCR Case No. 04-08560 at 4 (App. Bd. Oct. 10, 2006). The country's human rights record is also an important consideration. *See, e.g.*, ISCR Case No. 04-11463 at 4 (App. Bd. Aug. 4, 2006). The record evidence describes Iranian's efforts to acquire nuclear weapons and other weapons of mass destruction; Iranian support and involvement in international terrorism; Iran's violent opposition to the Middle East peace process; and not insignificantly, Iran's dismal human rights record. As pointed out by Department Counsel, Applicant's testimony underscores the official view that Iran is a hostile state that is repressive to its own citizens and others. Based on her experience over a 10-day period on one visit, Applicant described Iran as a "lawless" country. HT at 37. Moreover, in order to visit her parents Applicant felt constrained to obtain an Iranian passport rather than enter and exit Iran with her American passport out of concern that Iran could confiscate her American passport and leave her stranded there. Given the security concerns posed by the Iranian government and the situation in Iran, and given Applicant's very heavy burden of persuasion, it was not plausible for the Judge to conclude that Applicant's parents were not in a position to be exploited by a foreign power in a way that could force the Applicant to choose between loyalty to them and the United States.

Even if particular Adjudicative Guidelines disqualifying and mitigating conditions do not apply to the specific facts of a case, the Judge must still evaluate an applicant's security eligibility under the general factors of Directive § 6.3 and Adjudicative Process ¶ E2.2.1 (which refers to the "whole person concept"). Any doubt as to whether access to classified information is clearly consistent with national security must be resolved in favor of national security. Directive ¶ E2.2.2. *See* ISCR Case No. 04-00631 at 4 (App. Bd. Sept. 6, 2006). However, given the record here, the Board concludes that such an analysis could not result in a favorable determination for Applicant. A whole person analysis should include reasonable consideration of the situation in and nature of the country involved. *See e.g.*, ISCR Case No. 02-24566 at 3 (App. Bd. July 17, 2006). As explained in the preceding paragraph, the Administrative Judge failed to specifically analyze the security situation in Iran so that he could compare it with the Adjudicative Process factors, particularly the potential for pressure, coercion, exploitation, or duress (Directive ¶ E2.2.1.8), in the context of the relationship of Applicant and her parents. The Board does not have to agree with the totality of Department Counsel's comments to conclude that the Judge could not have conducted a reasonable whole person analysis here without analyzing the security situation in Iran and how it affects Applicant and her parents. *See, e.g.*, ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006).

Order

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

Signed: Michael D. Hipple
Michael D. Hipple
Administrative Judge
Member, 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