

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 a hearing. On June 21, 2006, after the hearing, Chief Administrative Judge Robert Robinson Gales 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 issues on appeal: whether the Chief Administrative Judge’s application of Foreign Influence Mitigating Condition (FIMC) 1 was arbitrary, capricious, and contrary to law and the record evidence; and whether the Chief Judge’s whole-person analysis is unsustainable because the whole-person considerations relied upon are unsupported by the record evidence and their application is arbitrary, capricious, and contrary to law.¹

Whether the Record Supports the Chief Judge’s Factual Findings

A. The Chief Administrative Judge made the following relevant findings of fact:

Applicant is an American citizen by birth, but grew up in Iran. Applicant’s grandfather died when Applicant was a small child, and Applicant’s parents (his father, an Iranian citizen, and his mother, American) moved to Iran because Applicant’s father inherited land at the death of his father. The Iranian government seized the land. Applicant’s father eventually opened his own business. Applicant’s father had a green card when he lived in the U.S. He was not allowed to return to the U.S. for many years, and the green card expired. When Applicant’s father retires, he will apply for a new green card, and he and his wife will emigrate to the U.S. Applicant’s parents live quietly, and neither has any ties to the Iranian government.

Applicant was educated primarily in Iran. He married a college classmate in Iran and both of them worked for Applicant’s father before moving to the U.S. in 2001. Applicant is separated from his wife, who is now a naturalized American citizen. They have no children. Applicant’s sister resides in the U.S.

Iran is a member of what President George W. Bush characterized as the “axis of evil.” While there was previously a lengthy period of friendship and cooperation between Iran and the U.S. when the Shah reigned, the situation changed when the fundamentalist Islamic Revolution toppled the Shah in 1979. The resulting theocratic government has repressed its people, pursued weapons of mass destruction, ignored customary principles of international law, endorsed fundamentalist Muslim political movements abroad, and supported international terrorism. Iran has remained the most active state sponsor of terrorism and has continued to exhort a variety of groups to use terrorism in pursuit of their goals. Iran continues to pursue policies that are hostile to the U.S. The U.S. does not currently have diplomatic or consular relations with Iran and cannot provide protection to U.S. citizens in that country. Iran is known to conduct intelligence operations and economic espionage against the U.S., and is a nation whose interests are inimical to those of the U.S.

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

B. Discussion

The appeal involves the Chief Administrative Judge's conclusions.

Whether the Record Supports the Chief 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*.

Department Counsel argues that the Chief Administrative Judge erred by applying FIMC 1² and concluding that Applicant's family in Iran is not in a position to be exploited by the Iranian government. Department Counsel contends that the Chief Judge's conclusion regarding the possibility of exploitation is arbitrary, capricious, and unsupported by the record evidence. Department Counsel's argument has merit. Application of FIMC 1 requires that an applicant's relatives in a foreign country are not agents of a foreign government and that they are not in a position to be exploited by a foreign government in a way that could force the applicant to choose between them and the United States. Here, the Chief Judge stated that Applicant's family members have no ties to the Iranian government. Regarding the issue of exploitation, the Chief Judge noted the inimical nature of Iran's relationship with the U.S., citing in particular Iran's support of terrorism and its intelligence operations and economic espionage against the U.S. In this case, Applicant's parents have already suffered at the hands of the Iranian government. Land owned by Applicant's grandfather were seized by the Iranian government after his death. At the time of the Islamic Revolution, Applicant's parents received death threats because of his mother's nationality. Moreover, Applicant's father, who had lived in the U.S. for ten years and held a green card, was not allowed to leave Iran for many years after his return from the U.S. We have only Applicant's testimony to indicate that the Iranian government would now allow him to emigrate to the U.S. if a new green card were issued to him.

As discussed above, the evidence indicates that Applicant's parents live under a regime hostile to the U.S. The Board has previously held that an applicant with immediate family members living in a country hostile to the U.S. has a heavy burden to show that those family ties do not pose

² "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.

a security risk. *See, e.g.* ISCR Case No. 04-06386 at 4 (App. Bd. Aug. 25, 2006); ISCR Case No. 03-09053 at 4 (App. Bd. Mar. 29, 2006). As a result, Applicant has a greater burden than would be the case for an applicant with relative living under another sort of government. *Compare* ISCR Case No. 03-02878 at 3 (App. Bd. June 7, 2006); ISCR Case No. 03-19101 at 2 (App. Bd. Oct. 13, 2006). The record evidence indicates that Applicant has close ties to his parents and speaks to his mother weekly. *Compare* ISCR Case No. 04-06564 at 4 (App. Bd. May 30, 2006); ISCR Case No. 04-00631 at 5 (App. Bd. Sept. 6, 2006).

Finally, the Chief Judge found and the record evidence indicates that Applicant's family have previously been targeted for coercion and exploitation by the Iranian regime. Despite all this record evidence, the Chief Judge provides no analysis or discussion as to how those actions against Applicant's family heighten the government's security concerns presented in this case. *See, e.g.*, ISCR Case No. 04-00109 at 5-6 (App. Bd. July 13, 2006). The Chief Judge states that "the mere possession of family ties with a person in a foreign country should not, as a matter of law, be disqualifying under Guideline B."³ He then writes: "Based on the evidence, I conclude the security concerns manifested by the government, in this instance, are largely unfounded." Decision at 12. The Chief Judge's conclusion in this regard is error, in that it ignores his own findings regarding the nature of the Iranian regime and the significance of its prior treatment of Applicant's family by that regime. Such factors are "... important evidence that provides context for all the other evidence of record and must be brought to bear on the Judge's ultimate conclusions in the case." *See, e.g.*, ISCR Case No. 04-02511 at 5 (App. Bd. March 20, 2007), *quoting* ISCR Case No. 04-07766 at 3 (App. Bd. Sept. 26, 2006).

With regard to Department Counsel's second argument, the Chief Judge's whole person analysis is unsustainable in light of the foregoing, in that it fails to consider an important aspect of the case, fails to articulate a satisfactory explanation for its conclusions, and offers an explanation for the decision that runs contrary to the record evidence. *See, e.g.*, ISCR Case No. 97-0435 at 3 (July 14, 1998) (*citing Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)).

The Chief Judge's conclusory statement that Applicant has very close ties to the U.S. is not supported by his own findings of fact. Applicant is an American citizen by birth, but returned to Iran, the country of his father, as a very young child and received most of his education there. While Applicant visited the U.S. regularly with his mother and attended summer school in the U.S., he did not move back to the U.S. until 2001, when he was already well into adulthood. The favorable facts recited by the Judge either do not readily suggest refutation, extenuation, or mitigation or have low probative value. *See, e.g.*, ISCR Case No. 04-00109 at 5 (App. Bd. July 13, 2006).

³As authority for this statement, the Chief Judge cites to the decision of a fellow Administrative Judge in ISCR Case No. 03-21434 (A.J. May 24, 2006). That case was remanded by the Appeal Board because of error on the part of the Judge. *See* ISCR Case No. 03-21434 (App. Bd. Feb. 20, 2007). The Board has previously noted that decisions by Hearing Office Judges are not legally binding precedent on that Judge's colleagues or the Board. *See* ISCR Case No. 04-04004 at 2 (App. Bd. July 31, 2006); and ISCR Case No. 02-24752 at 3 (App. Bd. July 31, 2006).

Order

The decision of the Chief Administrative Judge granting Applicant a security 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
Administrative Judge
Member Appeal Board