

KEYWORD: Guideline C; Guideline B; Guideline E

DIGEST: The Judge's challenged conclusions regarding Applicant's falsifications are sustainable. Applicant has not met her burden in challenging the Judge's credibility determination. Adverse decision affirmed.

CASENO: 05-14488.a1

DATE: 08/10/2007

DATE: August 10, 2007

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| In Re: |) | |
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| ----- |) | ISCR Case No. 05-14488 |
| |) | |
| Applicant for Security Clearance |) | |

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jennifer I. Goldstein, Department Counsel

FOR APPLICANT

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The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security

clearance. On May 18, 2006, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline C (Foreign Preference), Guideline B (Foreign Influence), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 26, 2007, after the hearing, Administrative Judge Joseph Testan denied Applicant’s request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.¹

Applicant has raised the following assignments of error: whether the Judge erred in concluding that Applicant deliberately falsified her security clearance application; whether the Judge’s adverse credibility determination is arbitrary and capricious; whether the Judge erred in failing to apply Guideline E mitigating conditions; whether the Judge erred in failing to apply Guideline J mitigating conditions; and whether the Judge’s whole person analysis was the result of an arbitrary and capricious weighing of the evidence. Finding no error, we affirm.

Whether the Record Supports the Judge’s Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant was born and raised in Iran. In 1979 she moved to the U.S. and decided to remain here after the Iranian Revolution occurred, given the fact that her fiancé was Jewish. Applicant became a U.S. citizen, married, and raised two children in this country.

Applicant has traveled to Iran three times since moving to the U.S., in 1994, 1996, and 2002. The first two trips were to visit her elderly parents and/or grandmother, the third to visit the graves of her recently deceased parents. In 1996 and in 2002, she traveled with a document supplied by the government of Iran, which was marked “passport.” When Applicant first submitted her security clearance application (SCA), in October 2002, she answered “no” to the question as to whether she had ever held a foreign passport. In response to the question about her foreign travel, Applicant listed visits to European countries but did not mention her trips to Iran. Applicant submitted a second SCA in March 2003, answering these questions in the same way. In June 2003, Applicant provided a signed, sworn statement to the Defense Security Service (DSS), which contained the following: “I had a three year Iranian passport when I first came to the U.S., which has since expired and my current U.S. passport has expired. I obtained my 1978 expired Iranian passport prior to becoming a U.S. citizen in 1985. My U.S. passport (which just expired on 14 Apr 03) is the only document I have used and intend to use for all travel outside the U.S. I plan on renewing my U.S. passport in the future.”

B. Discussion

The Appeal Board’s review of the Judge’s findings 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

¹The Judge’s favorable findings under Guidelines C and B are not at issue in this appeal.

of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21 (1966). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1. Applicant does not challenge the Judge's findings. To the extent that such a challenge is implicit in Applicant's first assignment of error, we will address it below.

Whether the Record Supports the Judge's Ultimate Conclusions

A 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 choices 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 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. 518, 528 (1988). The Appeal Board may reverse the 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.

"[T]here is a strong presumption against granting a security clearance." *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish any appropriate mitigating conditions. See Directive ¶ E3.1.15. "The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole." See ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

As stated above, Applicant contends that the Judge erred in concluding that she deliberately provided false statements as part of her clearance investigation through her denial of having possessed a foreign passport and her omission of her trips to Iran in 1996 and 2002. Concerning the first, Applicant contended at the hearing that she held only an Iranian visa, not a passport. However, the Judge noted that the documents in question, admitted as exhibits, were clearly marked "passport;" that in a written response to interrogatories Applicant stated that she traveled to Iran with Iranian passports; and that in her response to the SOR Applicant described the documents in that way as well. Decision at 3. The Judge concluded, therefore, that Applicant could not reasonably have believed that the documents in question were merely entry visas and that Applicant's denials of having held Iranian passports constituted deliberate falsifications.

We have examined the decision in light of the record evidence. In addition to those matters discussed above, we note that Government Exhibit 9 contains a memorandum, apparently in Applicant's own hand, certifying that a reproduced document is an accurate copy of an Iranian passport, of which Applicant is the custodian. Furthermore, Applicant's own Exhibit Z is a photocopy of a document that is clearly marked "passport," issued to Applicant by the government of Iran, and which no reasonable person could mistake for a mere entry visa. Applicant includes a translation of part of this document from Farsi into English, the translation describing it as a

passport. Given the evidence, the Judge's conclusion that Applicant did not honestly believe she held only entry visas, and therefore deliberately falsified her responses concerning her foreign passports, is sustainable.

For similar reasons the Judge's conclusion that Applicant deliberately omitted listing her trips to Iran is sustainable. Applicant submitted two SCAs, in October 2002 and again in March 2003. She visited Iran in August 2002, to visit her parent's graves, an event so recent and of a nature so memorable that the Judge concluded the omission could not have been due to mere forgetfulness. Considered in light of the record, there is "a rational connection" between the Judge's findings of fact and his conclusion that Applicant deliberately provided false information on this matter. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006). The Judge's conclusion regarding the deliberate quality of Applicant's falsifications is, therefore, neither arbitrary, capricious, nor contrary to law.

Regarding the second assigned issue, Applicant bears a "heavy burden" in challenging a Judge's credibility determination (*See* ISCR Case No. 97-0356 at 2-3 (App. Bd. Apr. 21, 1998)), which determination is entitled to deference on appeal. Directive ¶ E3.1.32.1; ISCR Case No. 02-26331 at 3, n. 2 (App. Bd. Oct. 19, 2005). We conclude that Applicant has not met her burden of persuasion in this matter. Although Applicant asserts that the Judge ignored record evidence that supported her side of the story, a Judge is presumed to have considered all the evidence, and there is nothing to indicate that he did otherwise in this particular case. *See, e.g.*, ISCR Case No. 01-03357 at 4 (App. Bd. Dec. 13, 2005). Applicant points to certain of the Judge's statements, contained in his findings of fact, which she argues undermine his negative assessment of Applicant's credibility.² However, when read in context, these statements are the Judge's attempts to summarize Applicant's testimony at the hearing, rather than exculpatory findings of his own. *See* ISCR Case No. 01-07018 at 9 (App. Bd. Dec. 6, 2005) ("The Board does not review individual sentences of a Judge's decision in isolation.") We find no error in the Judge's credibility determination.

We have considered the remaining assignments of error in light of the Judge's decision and the record as a whole. The Judge could reasonably conclude that Applicant's multiple falsifications were recent and not isolated.³ Given the evidence, the Judge's conclusion that Applicant had failed in her burden of persuasion as to the applicability of any possible mitigating condition is sustainable. Furthermore, the Judge's whole person analysis complies with the requirements of Directive ¶ E2.2.1, in that the Judge considered the totality of Applicant's conduct in reaching his decision.⁴

² *See, e.g.*, the following: "She . . . testified that after she mailed her expired Iranian passport back to the Iranian authorities, she received back from them the Iranian passport she had sent to them (with a hole punched into it to invalidate it) . . . and an Iranian document . . . She further testified that because the document was marked "Passport," she became confused and called the Iranian officials who assured her that the document she received was a visa, not a passport . . . [A]pplicant accepted their explanation that it was a visa and not a passport." Decision at 2-3.

³ *See* Directive ¶¶ E2.A5.1.3.3, E2.A10.1.3.1, E2.A10.1.3.2.

⁴ Applicant's "falsifications of material facts are extremely troubling. The Government relies heavily on the honesty and integrity of individuals seeking access to our nation's secrets. When such an individual intentionally falsifies material facts on a security clearance application, or in a signed, sworn statement, it is extremely difficult to conclude that he or she nevertheless possesses the good judgement, reliability, and trustworthiness required of clearance holders . . . In reaching a decision under Guidelines E and J, I have considered the formal adjudication guidelines as well as the Directive's general factors. In the end, a decision under Guidelines E and J in this case boils down to this: Applicant's

See ISCR Case No. 04-09959 at 6 (App. Bd. May 19, 2006). The Judge’s adverse clearance decision is neither arbitrary, capricious, nor contrary to law.

Order

The Judge’s adverse security clearance decision is AFFIRMED.

Signed: Jean E. Smallin _____

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields _____

William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody _____

James E. Moody
Administrative Judge
Member, Appeal Board

inability or unwillingness to admit that she attempted to conceal her possession of an active Iranian passport and her travel to Iran from the Government precludes a finding that she can now be relied upon to be truthful with the Government.” Decision at 6.