

KEYWORD: Guideline B

DIGEST: Applicant’s husband is a Chinese citizen and not a US citizen. Applicant and her husband are in regular touch with relatives in China. Favorable decision reversed.

CASENO: 05-17812.a1

DATE: 06/11/2007

DATE: June 11, 2007

In Re:)	
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-----)	ADP Case No. 05-17812
SSN: -----)	
)	
Applicant for Trustworthiness Determination)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jennifer Goldstein, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) proposed to deny or revoke Applicant’s access to unclassified automation systems in an ADP-I/ II/ III sensitivity position. On February 8, 2006, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 24, 2006, after the hearing, Administrative Judge Joseph Testan granted Applicant’s request for a

security clearance. Department Counsel submitted a timely appeal pursuant to 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. Finding error, we reverse the Judge’s decision.

Whether the Record Supports the Judge’s Factual Findings

A. Facts

Applicant is a health care analyst, born in the People’s Republic of China (China). She and her husband married in China in 1989. Applicant’s husband moved to the U.S. in 1992 to attend a university, and Applicant joined him a year later. She earned a MBA from the same university.

Applicant became a U.S. citizen in 2003. Her husband holds U.S. permanent resident status but is not willing to give up his Chinese citizenship and passport because he may need to return to China on short notice should his elderly parents, who reside there, become ill. Applicant speaks to her parents-in-law on holidays, two or three times a year. Her husband speaks with his parents about once a month. Applicant has two children, both of whom are citizens of the U.S. She has two siblings, both of whom are citizens and residents of China. She communicates with them on an average of once every two or three months. Applicant has a brother-in-law who is a citizen and resident of China. Applicant’s husband speaks with him “a few times a year.” None of Applicant’s foreign relatives work for the Chinese government.

Applicant has visited China five times since moving to the U.S. The last time was to attend to family issues arising from her mother’s death. She has no plans to return. Applicant has substantial equity in her home as well as assets in a 401K plan. She and her husband have no assets in China.

In his Conclusions section, the Judge characterized China as “a human rights abuser which actively engages in military and economic espionage. . .” Decision at 4. *See* ISCR Case No. 02-20110 at n.2 (App. Bd. June 3, 2004) (“The Board will treat a finding of fact [as such] regardless of where it appears in the Judge’s decision.”)

B. Discussion

The Appeal Board’s review of the Judge’s findings of fact 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 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. Department Counsel has not explicitly challenged the Judge’s findings of fact. To the extent that such a challenge is implicit in the issue raised on appeal the Board will deal with 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)). Once the government presents evidence establishing facts in the SOR that have been controverted, 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). 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.

Department Counsel argues that the Judge’s whole person analysis does not adequately address the nature of the Chinese government. In support of this proposition, Counsel cites the following: the Chinese government’s use of torture; its harassment, detention, and imprisonment of those perceived as threatening to the communist party or the government; its use of arbitrary arrest and detention; and its monitoring of citizen’s mail, telephone and electronic communications.¹ Counsel argues that neither the Judge’s analysis nor the record as a whole “support a rational finding that the potential for pressure, coercion, exploitation or duress resulting from Applicant’s family. . . is reduced to an acceptable level.” Given the record in this case, Department Counsel’s argument is persuasive.

We have considered the Department Counsel’s brief, Applicant’s reply brief, the Judge’s decision, and the record as a whole. We note the number of Applicant’s foreign relatives who are citizens and residents of China, the fact that Applicant and her husband communicate regularly with their Chinese relatives,² the fact that Applicant’s husband is a citizen of China and not of the U.S., holding a Chinese passport. The Judge correctly noted that China engages in military and economic espionage, and abuses human rights. Department Counsel recites record evidence about specific practices of the Chinese government, especially that of monitoring mail and electronic communications. These facts suggest a tangible and meaningful possibility that Applicant’s family members could become a means through which she could be subject to coercion. The government’s concern is not sufficiently refuted by record evidence favorable to Applicant. We conclude that neither the Judge’s whole person analysis nor the record evidence as a whole reasonably support the

¹Government Exhibit 4, U.S. State Department, Report on Human Rights Practices for 2005 (China) (March 8, 2006). “During the year authorities monitored telephone conversations, facsimile transmissions, e-mail, text messaging, and internet communications. Authorities also opened and censored domestic and international mail. The security services routinely monitored and entered residences and offices to gain access to computers, telephone, and fax machines. All major hotels had a sizable internal security presence, and hotel guestrooms were sometimes bugged and searched for sensitive or proprietary materials.” *Id.* at 10.

²Applicant’s “contacts with her siblings in the PRC cannot be considered ‘casual and infrequent. . .’” Decision at 4. See Directive ¶ E2.A2.1.3.3.

Judge's ultimate conclusion that Applicant has met her burden of persuasion. We hold that the Judge's favorable decision is arbitrary, capricious, and contrary to law.

Order

The Judge's favorable trustworthiness determination is REVERSED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairman, 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