

KEYWORD: Guideline B

DIGEST: Considering the Judge's findings, the Board concludes that none of the circumstances cited by the Judge would present a serious obstacle to Syria exercising control over Applicant's resident family members in order to coerce, exploit or pressure Applicant. Applicant has not met his heavy burden of persuasion given that he has immediate family members living in a country hostile to U.S. Favorable decision reversed.

CASENO: 06-18337.a1

DATE: 02/08/2008

DATE: February 8, 2008

In Re:)	
)	
-----)	ISCR Case No. 06-18337
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Andrew W. Dyer, Jr., Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 31, 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 August 23, 2007, after the hearing, Administrative Judge Charles D. Ablard granted Applicant's request for a security clearance. Department Counsel filed 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 was arbitrary, capricious, or contrary to law. Finding error, we reverse.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following findings of fact: Applicant became a U.S. citizen in 1996. He has held a security clearance since 1999 when he was first employed by a defense contractor. Applicant's parents live in Syria in a suburb of Damascus where his father operates a small electronics repair shop. His mother is a homemaker who has not been in good health. Both parents are in their mid-70s and have no connection with the government. He telephones his parents once a month, especially because of the health of his mother.

Applicant has one brother and two sisters who live in Syria. His brother is a truck driver, who also served a required tour in the military as a young man. Applicant was sponsoring the sisters for citizenship in the U.S. but one recently married and is no longer interested in coming to the U.S. He continues to sponsor the second sister who is a manager for a small business importing building materials from Germany. Applicant contacts his siblings by phone 3-4 times a year. The young children of his siblings in Syria attend private schools of an internationally renowned private system. None of the family in Syria have any contacts or work with the Syrian government. Applicant has a brother who lives in the U.S. and is also employed as an engineer with another major defense contractor. Applicant maintains close contact with him. He is the only relative who knows what Applicant does and for whom he works. They do not discuss their own or the other's work with other family members.

Applicant has traveled to Syria five times since 1997, when he first took his wife to meet his family. His other trips were in 2000 so that his older child could meet his parents and in 2001 for a family wedding. This trip was encouraged by his colleagues since he had recently begun work for his present employer, was working hard, and they thought he needed a vacation. The trips in 2004 and 2005 were related to the illness of his mother. The last two trips were taken alone for cost reasons. Applicant has always used his U.S. passport for travel to Syria. He has notified his security office of all of his trips since his employment in the defense industry even though company policy did not fully require it. He was not required to give a report on his return and did not do so. He knows to report suspicious contacts to the relevant security office.

Because of current security implications, Applicant does not intend to return to Syria even though he has continuing concerns for his mother. Applicant has never voted in Syria and has consistently voted in the U.S. since becoming a citizen. His parents own some property in Syria in the form of a house and store. Applicant and his brother in the U.S. have disavowed any interest in inheriting the property, having designated their shares to go to their siblings in Syria. He provides

no financial support to his family in Syria, only giving them small gifts on special occasions. His annual salary is \$138,000. His wife does not work. The equity in his home is \$350,000, and he has a 401k investment plan valued at \$100,000. Applicant has set aside funds for his children's education since their birth. All his financial assets are in the U.S. Applicant is active in civic affairs in his community, works with the cub scouts, and also works with an organization providing support for children with autism. He also has a small organization promoting interest in science among students. Applicant is close to his wife's family in the U.S. They visit together at least four times a year. The family vacations are to visit his wife's parents and his brother's family.

Applicant is highly regarded for his skills, diligence, integrity, and knowledge of security requirements, by his three supervisors and colleagues who testified for him at the hearing and in two submitted reference letters (Ex. A and B). All references come from persons who have held security clearances for many years and have worked with him on secure projects. During his almost ten years in the defense industry, Applicant has never had a security violation.

The Judge stated the following in his Conclusions section: The Syrian government has cooperated with the U.S. in attempting to limit movement of individuals linked with radical groups from crossing into Iraq and has increased border security, which is a continuing problem for U.S. troops stationed there. The U.S. has expressed disappointment that more is not being done and is working to improve the level of cooperation. The U.S. maintains diplomatic relations with Syria and views it as a strategic link to controlling militant radicals in the Middle East, particularly the transit via Syria into other neighboring countries. While Congress has placed sanctions on trade with Syria through the Syria Accountability Act, there have been recent visits by U.S. congressional delegations from both political parties in an attempt to open up a dialogue with its government to improve relations and obtain greater cooperation.

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 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 Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

Department Counsel has not expressly challenged the Judge's findings. His contention that the Judge failed to consider significant contrary record evidence will be addressed in succeeding paragraphs.

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 the 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.

Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *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, e.g.*, ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

The Judge concluded that no mitigating conditions would *per se* justify granting Applicant a clearance. Rather he cleared Applicant on the basis of his whole-person analysis. Department Counsel argues, however, that the Judge erred in that the whole-person factors which he mentioned in his decision do not squarely address the security concerns arising from an applicant’s having close relatives in a country adverse to the U.S. The Board finds Department Counsel’s argument persuasive.

The Judge took into account the high quality of Applicant’s job performance, his residence in the U.S. for 20 years, and his having held a security clearance for 8 years. The Judge also stated that Applicant “has little cultural contact with his country of origin” and that he has taken steps “to limit the amount of information” available to his Syrian family concerning the type of work he performs. Decision at 6. On the other hand, as Department Counsel noted, these factors must be considered in the context of the overall political/security profile of that country vis-a-vis the United States. This is particularly important when there is evidence which indicates that the country in question has a poor human rights record, uses torture, supports international terrorism,¹ and interferes in a neighboring country. Indeed, Congress has passed laws imposing sanctions on Syria, sanctions

¹*See* ISCR Case No 02-29403 at (App. Bd. Dec. 14, 2004) (“Terrorists can be expected to try to harm the United States, directly or indirectly. There is no reason to expect such terrorists would ignore opportunities to attack United States interests, directly or indirectly. If terrorists had an opportunity to hurt the United States by obtaining classified information, there is no good reason to expect they would simply ignore such an opportunity.”)

which the President implemented on May 11, 2004, by executive order.² The Board has previously noted 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 a security risk. *See, e.g.*, ISCR Case No. 03-09053 at 4 (App. Bd. Mar. 29, 2006). While the Judge stated that the record contains no evidence that Syria engages in “economic or military espionage,” Department Counsel draws attention to contrary record evidence of Syria’s intelligence-gathering efforts in Lebanon.³

Considering the Judge’s findings, the Board concludes that “[n]one of the circumstances cited by the Judge would present a serious obstacle to Syria . . . exercising control over Applicant’s resident family members in order to coerce, exploit, or pressure Applicant.” ISCR Case No. 04-06386 (App. Bd. Aug. 25, 2006). In his Conclusions section, the Judge stressed that Applicant’s contributions to the development of U.S. defense systems have been significant and “[t]o deny a security clearance after this extensive and successful a career record would not be in the national interest.” Applicant’s career record, while laudable, does little to assuage the Government’s security concerns brought on by his connections to Syria through his relatives. Given the close family relationship between Applicant and his foreign contacts, and the relative frequency of Applicant’s communication with them, the Board finds persuasive Department Counsel’s argument that the evidence as a whole does not support a conclusion that Applicant has met his “heavy burden” of persuasion that it is “clearly consistent with the interests of the national security” for him to have a security clearance. *Egan*, 484 U.S. at 528. *See* ISCR Case No. 02-04786 at 5 (App. Bd. Jun. 27, 2003). The Board holds that the Judge’s favorable security clearance decision is not reasonably supported by the record evidence.

Order

The Judge’s favorable security clearance decision is REVERSED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

²*See* Administrative Notice Document (AND) 5, “Syria: U.S. Relations and Bilateral Issues,” Aug. 18, 2006, at 15: “[T]he Syria Accountability and Lebanese Sovereignty Restoration Act . . . requires the President to impose penalties on Syria unless it ceases support for international terrorist groups, ends its occupation of Lebanon, ceases the development of weapons of mass destruction (WMD), and has ceased supporting or facilitating terrorist activity in Iraq.” *See also* ISCR Case No. 05-11292 (App. Bd. Apr. 12, 2007).

³*See* AND 5 at 17, to the effect that, in 2005, the U.S. Treasury Department froze the assets of a Syrian brigadier general “for playing a central part in Syria’s intelligence operations in Lebanon during the Syrian occupation.”

Signed: James E. Moody _____

James E. Moody
Administrative Judge
Member, Appeal Board