

KEYWORD: Guideline C; Guideline B; Guideline F; Guideline E

DIGEST: An applicant with family members living in a country hostile to the U.S. bears a heavy burden in demonstrating that those family members circumstances do not pose a security risk. In this case the record is sparse. Favorable decision reversed.

CASENO: 06-18918.a1

DATE: 03/28/2008

DATE: March 28, 2008

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In Re:	)	
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	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Richard A. Stevens, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 11, 2007, DOHA issued a statement of reasons advising Applicant of the basis

for that decision—security concerns raised under Guideline C (Foreign Preference), Guideline B (Foreign Influence), Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 24, 2007, after the hearing, Administrative Judge Marc E. Curry 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 raises the following issues on appeal: whether the Judge’s favorable application of Foreign Influence Mitigating Condition (FIMC) 8(b) was arbitrary, capricious, and contrary to law; and whether the Judge’s whole-person analysis was arbitrary, capricious, and contrary to law.<sup>1</sup> Finding error, we reverse.

### **Whether the Record Supports the Judge’s Factual Findings**

#### **A. Facts**

The Judge made the following pertinent findings: Applicant is a 41-year-old divorced man with no children. He was born in Iran and emigrated to the U.S. in 1993 after living in a European country for several years. He has been a naturalized U.S. citizen since 1998. He is a personal protection officer. He earned an associate’s degree in economics from an Iranian university in the 1980s.

Applicant’s father was a high-ranking official under the Shah’s regime. He retired in the 1970s. After the 1979 revolution, his family was harassed by extremists, who made death threats. The harassment grew so severe that they had to separate for their safety and seek “secure and secret place[s] to survive.”<sup>2</sup> Approximately a year later, the revolutionary fervor subsided, allowing them to reunite.

In the mid-1980s, Applicant served in the Iranian army. At the time, the country was at war with Iraq, and military service was mandatory. After his discharge from the military, the government jailed him under false charges. Applicant testified that this was due to his “not agreeing with their politics.”<sup>3</sup> A relative managed to get him released from jail, and Applicant fled the country, crossing the border into Turkey at great personal risk. Once Applicant reached Turkey, he caught a plane bound for a European country, where a distant relative lived. Shortly after arriving, he was granted political asylum. Applicant feared that his life would have been in jeopardy if he had returned to Iran.

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<sup>1</sup>The Judge’s favorable decision under Guidelines C and E is not at issue on appeal. The Guideline F security concerns were withdrawn at the hearing. Tr. at 50.

<sup>2</sup>Tr. at 109.

<sup>3</sup>Tr at 33.

Throughout the process, Applicant was assisted by a person whom he paid \$3,000. His family helped him accumulate the money by selling much of their personal valuables. While living in Europe, Applicant started working various jobs in security at several night clubs, and eventually became a professional bodyguard.

Applicant emigrated to the United States in 1993. In 1994, after four months of specialized training, he obtained a professional bodyguard's license. Since that time, he has worked several stints as a professional bodyguard, in addition to other related occupations such as private investigations and hotel security. Over the years, he has taken extensive continuing education courses in order to retain his bodyguard's license. He is also licensed to carry firearms in 35 states. Applicant has worked for the same company since 2003. He was recently promoted to director of personal protection. Also, he works as a firearms instructor for a subsidiary company.

Applicant is highly respected on the job and in his community. A character witness who is a police officer testified at the hearing. Having observed Applicant in his professional capacity when they worked together on a part-time security enforcement job, and in his personal capacity as a longtime friend, he described him as a "man of honor . . . whose greatest mission is to serve the U.S."<sup>4</sup> Among the former employers who praised his professionalism include a retired special agent with the U.S. Department of Justice Office of Internal Affairs, and a former personnel security specialist.

Applicant's parents and two of his sisters live in Iran. He has not seen them since he fled Iran in the 1980s. Applicant's relationship with his father is strained. They do not correspond and have only talked with one another once in the past five years. Applicant is close to his mother. He considers her a friend and talks with her once a week. His parents have been separated for approximately 10 to 15 years.

Applicant's sisters living in Iran are both homemakers. He talks to them every two to four months. He has another sister, a citizen and resident of a European country. He visited her approximately two years ago. Currently, he talks to her a few times per week. There is no record evidence of when she emigrated from Iran.

Applicant has one brother, also a citizen and resident of the same European country as the sister. He emigrated there from Iran in 2001. In the ten years before he left Iran, he worked in law enforcement, focusing exclusively on drug interdiction. Fearing retribution against him by drug lords or other corrupt officials, he sought asylum in Europe. Applicant traveled there to visit his brother in approximately 2001. Although he has not seen him since then, he talks to him "a couple of times a week."

Applicant has no financial interests in Iran. He does not receive a pension from Iran for his service in the Iranian military. Approximately two years after emigrating to the United States,

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<sup>4</sup>Tr. 63.

Applicant legally changed his name. He legally adopted an Americanized name in order to be more consistent with U.S. society.

## 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 give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

Department Counsel has not expressly challenged the Judge's findings. His argument that the Judge's decision does not take into account significant record evidence will be addressed 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 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 (9<sup>th</sup> 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).

Having properly concluded that Applicant's case raised Foreign Influence security concerns, the Judge considered the extent to which Applicant had demonstrated mitigation. The Judge extended favorable application to FIMC 8(b), which mitigates security concerns when "there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest . . ." Directive ¶ E2.8(b). In so concluding, the Judge relied upon Applicant's having lived in the U.S. for over 12 years, his having legally assumed an anglicized name, and the fact that his closest friend is a U.S. citizen. The Judge's reasoning appears to be that these matters demonstrate that Applicant's ties to the U.S. are so strong that he would not compromise U.S. interests should he be faced with that choice.

Department Counsel argues that these matters are not sufficient to establish mitigation under FIMC 8(b). The Board finds this argument persuasive. An applicant with family members living in a country hostile to the U.S. bears a "heavy burden" in demonstrating that those members do not pose a security risk. *See* ISCR Case No. 07-00029 at 3 (App. Bd. Dec. 7, 2007). A reasonable person could conclude that, given Applicant's history, he feels a greater sense of obligation to the U.S. than to Iran. However, FIMC 8(b) focuses analysis not merely upon an applicant's sympathies with his birth country as such, but also with family members residing therein. In the case under consideration, the issue is whether Applicant's attachment to his family, especially his mother, whom he describes as a friend and with whom he speaks once a week, is outweighed by his attachments within the U.S. On this point, as Department Counsel observes, the record is sparse. Applicant is divorced and has no children, therefore lacking family connections in this country. Neither is there evidence of substantial community ties within the U.S. The factors cited by the Judge, while not insignificant, do not show such deep and longstanding relationships in the U.S. so as to outweigh Applicant's admitted strong ties to his mother. Without impugning Applicant's loyalty and integrity, it must be observed that, on this record, Applicant has not met his "heavy burden" of demonstrating that the security concerns arising from his foreign relatives are sufficiently mitigated so as to warrant the grant of a security clearance.

For similar reasons, the Board concludes that the record will not sustain a favorable whole-person analysis. The Judge based his whole-person analysis upon Applicant's escape from Iran, contending that in doing so Applicant demonstrated a willingness to act against Iranian interests even at personal peril. This testimony was evidence the Judge had to consider. However, Department Counsel argues that it does not demonstrate that Applicant would act in the interests of the U.S. over those of his family, should the occasion arise. For example, Applicant testified that it was his mother's decision that he leave Iran, and his family sold their household goods to obtain money sufficient to pay for his escape. This testimony underscores Applicant's strong obligations to his family, which is the basis for the security concerns in his case. The Judge noted that Iran is hostile

to the U.S. and is a sponsor of terrorism; that it has an “abysmal” human rights record; and that its security forces have monitored private activities of citizens, entered homes, monitored phone conversations, and opened mail. The Board notes other record evidence, such as Iran’s efforts to dominate the Iraqi government;<sup>5</sup> its connection with militant factions engaged in hostilities against the U.S. and its allies;<sup>6</sup> and its public call for the annihilation of Israel.<sup>7</sup> When viewed in light of record evidence that Applicant’s family has been targeted by the regime for political reasons, it is foreseeable that they could come to the attention of Iranian authorities and become a means through which the regime could attempt to coerce Applicant to compromise U.S. secrets. As Department Counsel points out, the record does not demonstrate that Applicant would necessarily place the interests of the U.S. ahead of the interests of his own mother. A careful review of the entire record leads the Board to conclude that Applicant has not satisfied his burden of persuasion that it is “clearly consistent with the interests of the national security” for him to have a clearance. *Egan*, 484 U.S. at 528. Accordingly, the Board holds that the Judge’s decision is arbitrary, capricious, and contrary to law.

### Order

The Judge’s favorable security clearance decision is REVERSED.

Signed: Jean E. Smallin

Jean E. Smallin  
Administrative Judge  
Member, Appeal Board

Signed: William S. Fields

William S. Fields  
Administrative Judge  
Member, Appeal Board

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<sup>5</sup>Government Exhibit (GE) 4, Congressional Research Service (CRS) Report to Congress, “Iran: U.S. Concerns and Policy Responses,” at 24 June 4, 2007.

<sup>6</sup>Id. “[A]s part of its effort to build influence in Iraq, Iran is providing arms (including highly lethal ‘explosively forced projectiles,’ EFPs, that have killed about 170 U.S. soldiers in Iraq) and financing to Shiite militias.”

<sup>7</sup>GE 5, Country Reports on Human Rights Practices - 2006 at 16 March 6, 2007. This document quotes the President of Iran as stating publicly that “Israel must be wiped off the map” and that it “will one day vanish.”

Signed: James E. Moody \_\_\_\_\_

James E. Moody  
Administrative Judge  
Member, Appeal Board