

KEYWORD: Guideline B

DIGEST: The Judge’s controverted findings of fact are based on substantial evidence or reasonable inferences from the record evidence or harmless error that would not change the outcome of the case. Applicant’s alternative interpretation of the evidence is insufficient to demonstrate error. Adverse decision affirmed.

CASENO: 06-19923.a1

DATE: 02/28/2008

DATE: February 28, 2008

In Re:	)	
	)	
-----	)	ISCR Case No. 06-19923
	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James F. Duffy, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 14, 2006, DOHA issued a statement of reasons (SOR) 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 September 27, 2007, after the hearing, Administrative Judge Robert J. Tuidier denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's adverse security clearance decision under Guideline B is arbitrary, capricious, or contrary to law.

Applicant argues that the Judge's adverse clearance decision should be reversed because the Judge erred in his findings as to the date Applicant immigrated to the U.S., the date he became a U.S. citizen, and the extent of his telephone contact with his mother, father, and sister in Taiwan. He also argues the Judge erred in his weighing of the evidence. The Board does not find Applicant's arguments persuasive.

The Board's review of a Judge's findings 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 finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620, (1966).

The Judge's findings as to the date Applicant immigrated to the U.S., the date he became a U.S. citizen, and the extent of his telephone contact with his mother, are based on substantial evidence.<sup>1</sup> The Judge's findings as to the extent of Applicant's telephone contact with his sister and father constitute either reasonable inferences that could be drawn from the record evidence or harmless error in that they would not change the outcome of the case.<sup>2</sup> Applicant has not met his burden of demonstrating that the Judge's material findings with respect to his circumstances of security concern do not reflect a reasonable or plausible interpretation of the record evidence. Considering the record evidence as a whole, the Judge's material findings of security concern are sustainable. *See, e.g.*, ISCR Case No. 06-21025 at 2 (App. Bd. Oct. 9, 2007).

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. 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. 01-14740 at 7 (App. Bd. Jan.15, 2003). Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence,

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<sup>1</sup>See Decision at 2; Transcript at 36; Government Exhibit 1 at 1; Applicant's Exhibit B at 1.

<sup>2</sup>The Judge stated that Applicant had telephone contact with his sister “when he calls his parents” and had “telephone contact once a week” with his father. *See* Decision at 3. The evidence indicates that Applicant had telephone contact with his sister “various amounts of time, exact amounts unknown” and “telephone contact once a week” with his father when his mother is in Taiwan. *See* Applicant's Exhibit B at 1. *See also* Transcript at 72 and 74.

or *vice versa*. An applicant's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law.

A review of the Judge's decision indicates that the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying circumstances, and considered the possible application of relevant mitigating conditions and factors.<sup>3</sup> The Judge gave Applicant partial credit under the relevant mitigating conditions, but reasonably explained why the evidence which Applicant had presented was insufficient to overcome the government's security concerns. The Judge's decision exhibits a discerning weighing of a number of variables to reach a commonsense determination. Directive ¶ E2.2. In so doing, the Judge articulated a reasonable concern that Applicant's circumstances created a conflict of interest that could potentially make him vulnerable to coercion, exploitation or pressure. That security concern is based on close family ties in Taiwan, considered in the context of the overall political/security profile of that country *vis-a-vis* the United States. Applicant offers an alternative interpretation of the record evidence. However, that alternative interpretation of the record evidence is insufficient to render the Judge's interpretation arbitrary, capricious or contrary to law. *See, e.g.*, ISCR Case No. 03-19101 at 2 (App. Bd. Oct. 13, 2006). The Judge has articulated a rational explanation for his unfavorable determination under the disqualifying and mitigating factors and the whole-person concept, and there is sufficient record evidence to support that determination—given the standard that required the Judge to err on the side of national security. *See, e.g.*, ISCR Case No. 06-04371 at 3 (App. Bd. Oct. 18, 2007).

### Order

The decision of the Judge denying Applicant a security clearance is AFFIRMED.

Signed: Michael D. Hipple

Michael D. Hipple  
Administrative Judge  
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin  
Administrative Judge  
Member, Appeal Board

Signed: William S. Fields

William S. Fields

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<sup>3</sup>Decision at 5-8.

Administrative Judge  
Member, Appeal Board