

KEYWORD: Guideline B

DIGEST: After a review of the Judge’s decision and the record, the Board concludes that the Judge did not exclude relevant evidence when determining the applicability of mitigating conditions to SOR allegation 1.b. Adverse decision affirmed.

CASENO: 12-04780.a2

DATE: 11/13/2013

DATE: November 13, 2013

In Re:)	
)	
-----)	ISCR Case No. 12-04780
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On January 23, 2013, DoD 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 June 17, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Marc E. Curry denied Applicant’s request for a security clearance. Applicant appealed. On August

21, 2013, the Appeal Board issued a decision remanding the case to the Judge for correction of identified errors. On September 10, 2013, the Judge issued a remand decision. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: Whether the Judge's decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge found: Applicant is 47 years old. He was born and raised in the People's Republic of China (PRC). He received a bachelor's degree and a master's degree before immigrating to the United States to pursue a doctorate. He received his doctorate. He became a naturalized U.S. citizen in 2009.

Applicant's wife immigrated to the United States in 1999, and his daughter immigrated here one year later. Both are lawful U.S. permanent residents and have applied for citizenship. Applicant's parents are citizens and residents of the PRC. They are retired farmers. Applicant talks to them approximately once per week. Applicant purchased a house in the PRC for his parents, which is currently worth approximately \$30,000. He transferred ownership of the house to his father in 2013. Applicant provided between \$1,000 and \$2,500 of annual financial support to his parents. Now that he is aware of the potential security implications of providing financial support to his parents, Applicant has no intention to support them financially in the future.

Applicant has three brothers who are citizens and residents of the PRC. Applicant talks to his brothers approximately once every three months, and e-mails them approximately once or twice per year.

Applicant has four paternal aunts who are citizens and residents of the PRC. He talks to them approximately twice per year on holidays. He never knew them that well when he lived in the PRC, and does not know their first names. Applicant's parents-in-law and brother-in-law are citizens and residents of the PRC. Applicant talks to his parents-in-law approximately once per month and communicates with his brother-in-law through e-mails once or twice per year.

Applicant stays in touch with four of his colleagues from the company where he worked from 1996 to 1998. All of them have either retired or left the company. Two are living in the United States and are permanent residents. Applicant has not seen three of them since 1998 and has not seen the remaining co-worker in six years. He communicates with them approximately once or twice a year via phone or e-mail.

Applicant has visited the PRC three times since immigrating to the United States. Most recently, he traveled in June 2008. He has not seen any of his relatives or acquaintances since then.

The PRC is a totalitarian state that routinely violates human rights. It is the most aggressive conductor of espionage against the United States in the world, and its intelligence collection efforts are growing in scale, intensity, and sophistication.

The Judge concluded: Applicant's relatives who are PRC citizens and residents, and his wife and daughter, who are PRC citizens living with him, raise security concerns under Guideline B. However, Applicant no longer owns property in the PRC and no longer provides financial support to his parents. Applicant's past employment while living in the PRC does not generate a security concern. Applicant's contacts with his former friends and coworkers and his contacts with his aunts in the PRC are sufficiently infrequent so as to be mitigated, and his wife's and daughter's circumstances also mitigate security concerns.

Applicant's parents, brothers, and parents-in-law remain in the PRC. Therefore, its capacity to coerce, intimidate, or threaten these relatives is not limited by geography. In light of the aggressive and multifaceted nature of the PRC's espionage activities against the United States, including its exploitation of family relationships for classified or sensitive information, Applicant's stellar career and ties to the community are not enough to trigger the application of AG ¶ 8(a)¹ or AG ¶ 8(b)².

The analysis of a foreign influence case is based on more than one's cultural integration into the U.S. culture. One must consider the nature of the foreign country and its relationship with the United States. The PRC's history of conducting espionage against the United States puts a heavy burden of proof on Applicant that he was unable to meet because of his ties to his relatives who are PRC citizens and residents.

Applicant argues that, although, upon remand, the Judge corrected the factual errors contained in his original decision, the Judge failed to follow the remand order to evaluate the record evidence as a whole when he decided the case. He focuses on the following phrase from the Judge's analysis: "I cannot conclude that Applicant's stellar career and ties to the community are enough to trigger the application of AG ¶ 8 (a) or AG ¶ 8 (b)." Applicant asserts that by picking up just two facts to draw a conclusion, the Judge did not consider the record as a whole. Applicant then goes on to list a number of factors he claims the Judge did not consider. Applicant's argument relies in part on evidence which was not before the Judge. The Board cannot consider new evidence on appeal. *See* Directive ¶ E3.1.29. Applicant also states that the Judge ignored record evidence when conducting his whole-person analysis. The Board concludes that Applicant has failed to establish error on the part of the Judge.

There is a rebuttable presumption that the Judge considered all the record evidence unless he specifically states otherwise. *See, e.g.,* ISCR Case No. 04-01961 at 2 (App. Bd. Jul. 12, 2007). Applicant does not overcome this presumption. The Judge's findings of fact are extensive and detailed. Many of these same facts are discussed in the analysis portion of the Judge's decision, and

¹"[T]he nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S[.]"

²"[T]here 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[.]"

form the basis for the Judge's favorable application of Guideline B mitigating conditions to all but one of the SOR allegations.

The Judge's ultimate unfavorable conclusion in the case was based on his finding against Applicant on one SOR allegation (1.b.) which referenced Applicant's parents, brothers and in-laws and their status as residents and citizens of the PRC. The gravamen of Applicant's argument appears to be that the Judge erred by failing to discuss in detail, the numerous facts of the case cited by Applicant when analyzing this single allegation and determining the applicability of the two mitigating conditions. He concludes that the failure to discuss these many details meant that the Judge did not consider the whole of the record evidence when resolving this allegation. The Board has noted the practical impossibility of discussing every piece of record evidence. *See, e.g.*, ISCR Case No. 11-05949 at 3 (App. Bd. Aug. 29, 2013).

The Board does not review particular sentences or passages of a Judge's decision in isolation. Rather, when considering and evaluating appeal issues, the Board considers a Judge's decision in its entirety to ascertain what findings the Judge made and what conclusions the Judge reached. *See, e.g.*, ISCR Case No. 03-05645 at 5 (App. Bd. Sep. 15, 2004). After a review of the Judge's decision and the record, the Board concludes that the Judge did not exclude relevant evidence when determining the applicability of mitigating conditions to SOR allegation 1.b. Indeed the phrases "stellar career" and "ties to the community" as used by the Judge are rubrics which include the more detailed facts cited by Applicant on appeal. Moreover, the Judge cited to Applicant's giving to local charity and his volunteer work at his daughter's school when mentioning the broader topic of community ties. Applicant has not demonstrated that the Judge failed to consider the entirety of the record when reaching his ultimate unfavorable conclusion.

Applicant recites to large parts of the record below in arguing that the Judge's decision should have been a favorable one. Applicant offers a rational alternative interpretation of the record evidence. However, that alternative interpretation of the record evidence is insufficient, as a matter of law, 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).

Applicant argues that the Judge did not properly consider his case under the whole-person concept and asserts again that the Judge did not consider the whole record. On this point, Applicant repeats essentially the same argument he advanced when discussing the Judge's analysis under Guideline B and the applicable mitigating conditions. He lists the same detailed facts concerning his life in the U.S. that he listed in his earlier argument. Applicant states that the Judge considered only his cultural integration into the U.S. culture when conducting this analysis, and ignored many important facts which together established his deep and longstanding relationships and loyalties in the U.S. Again, the Judge's consideration of "cultural integration" would necessarily include the many facets of Applicant's relationships and loyalties. The fact that the Judge did not identify these facets specifically in his whole-person analysis does not constitute error.³

³Applicant makes an additional argument that the Judge failed to follow the instructions in the Board's remand order by mailing the remand decision to his former attorney instead of mailing it to Applicant directly. Applicant argues that this stripped him of his right of privacy and had the potential of stripping him of his right to appeal. Applicant was able to exercise his right to appeal. The Board's jurisdiction and authority are limited to reviewing security clearance

The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found and the choice 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). Therefore, the Judge's ultimate unfavorable security clearance decision is sustainable.

Order

The remand decision of the Judge is AFFIRMED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

decisions by Hearing Office Administrative Judges. *See* Directive, Additional Procedural Guidance, ¶¶ E3.1.28-E3.1.35. The Board does not have supervisory authority over the Hearing Office. However, Applicant's concerns regarding his privacy are not frivolous. The Board will forward this decision to the appropriate officials.