

KEYWORD: Guideline B; Guideline C

DIGEST: The Judge’s decision relied on Applicant’s good character, Applicant’s naturalization ceremony, and Applicant’s having declined a job in Ukraine. Her character is less at issue in this case, in which the focus is her circumstances. Her naturalization ceremony is not telling in a security context. Her decision to decline a job in Ukraine is consistent with a desire to live in the U.S. but adds little under Guideline B. The Decision fails to consider important aspects of the case and runs contrary to the weight of the evidence. Favorable decision reversed.

CASENO: 14-02563.a1

DATE: 08/28/2015

DATE: August 28, 2015

In Re:)	
)	
-----)	ISCR Case No. 14-02563
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

David F. Hayes, Esq., Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On July 28, 2014, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) and Guideline C (Foreign Preference) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 27, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Francisco Mendez granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge’s favorable decision was arbitrary, capricious, or contrary to law. The sole allegation under Guideline C was withdrawn and, consequently, is not at issue in this appeal. Consistent with the following, we reverse.

The Judge’s Findings of Fact

Born in Ukraine, Applicant attended college in that country, obtaining undergraduate and graduate degrees in English language and literature. She worked as a translator, in support of a U.S. sponsored program. She worked for a U.S. citizen, who was a contractor of the U.S. Government. With his assistance, she obtained a fellowship and moved to the U.S., where she earned another advanced degree, after which she went to work for a Federal contractor. Her duties require her to handle proprietary and sensitive information. She enjoys an outstanding reputation for her job performance, as well as her trustworthiness and reliability.

Applicant married her husband in the early 2000s. He worked for the same Ukrainian agency that had employed Applicant. Since coming to the U.S., he has worked under the auspices of an agency of the U.S. Government. Applicant and her husband are both naturalized U.S. citizens. Applicant’s naturalization ceremony was conducted in a particularly prestigious manner. At some point, Applicant was offered a job in Ukraine, which she turned down. She and her husband have lived continuously in the U.S. since coming here in the early 2000s. They have no property or assets in Ukraine. Their closest friends are all U.S. citizens. Although she used to travel for her job, properly reporting any suspicious activity, she no longer travels. Applicant’s connections within Ukraine are her parents, sibling, and in-laws, who are citizens and residents there. Applicant’s sibling works at the agency where Applicant, her father, and husband once worked. None of her relatives have any connection with separatists operating in Ukraine. They do not live or work in areas that are flashpoints between Ukraine and Russian-backed forces.

U.S. has diplomatic ties with Ukraine. Its policy is centered on strengthening democracy in that country. Ukraine is facing significant challenges, none greater than that posed by Russia’s annexation of the Crimea and its support for separatist forces. The situation is precarious, with clashes between Ukrainian and Russian-backed forces causing death and injury. The Russian-backed forces have taken on an increasingly strident anti-American tone.

The Judge’s Analysis

The Judge concluded that Applicant's circumstances raised three Disqualifying Conditions: 7(a),¹ 7(b),² and 7(d).³ In addressing Applicant's case for mitigation, the Judge stated that, while the relationship between Ukraine and the U.S. is good, "foreign-backed forces with interests inimical to the United States operate freely in parts of Ukraine and pose a significant threat not only to Ukraine's sovereignty, but also to U.S. national security interests." Decision at 8. He concluded that, under the circumstances, the concerns in Applicant's case are similar to those in which family members reside in a hostile country.⁴ Given the heightened scrutiny that is required in such cases, the Judge concluded that only mitigating condition 8(b)⁵ was entitled to discussion. He cited to evidence concerning Applicant's naturalization ceremony, which, he said, "speaks volumes as to the deep connections she has established in the U.S. in a relatively short time[.]" Decision at 9. He also cited to evidence that she had turned down a job in Ukraine "as proof that she and her husband have fully embraced the United States as their home." *Id.*

The Judge cited to evidence that Applicant and her husband have worked hard over the decade that they have lived in the U.S., and that their children having been born here. He also noted evidence that Applicant had properly handled sensitive information in the course of her job and that she had voluntarily reported a possible "spillage" of confidential information. *Id.*

In the whole-person analysis, the Judge stated that Applicant had been candid during the course of the adjudication of her application for a clearance. He also stated that her demeanor at the hearing led him to conclude that she would be "forthcoming and resolute" in her ability to resolve any conflict of interest in favor of the U.S.

Discussion

¹Directive, Enclosure 2 ¶ 7(a): "contact with a foreign family member . . . who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion[.]"

²Directive, Enclosure 2 ¶ 7(b): "connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information[.]"

³Directive, Enclosure 2 ¶ 7(d): "sharing living quarters with a person or person, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion[.]"

⁴*See, e.g.*, ISCR Case No. 10-07436 at 3, n. 4 (App. Bd. Oct. 19, 2011) for the proposition that there is a rational connection between an applicant's family ties in a country whose interests are adverse to the United States and the risk that the applicant might fail to protect and safeguard classified information.

⁵Directive, Enclosure 2 ¶ 8(b): "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 no 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[.]"

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 produces evidence raising security concerns, the applicant bears the burden of persuasion concerning mitigation. *See* Directive ¶ E3.1.15. The standard applicable in security clearance decisions “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). “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.” Directive, Enclosure 2 ¶ 2(b).

In deciding whether the Judge's rulings or conclusions are erroneous, we 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. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Department Counsel argues that the Judge’s decision is unsupported by the weight of the record evidence. He notes the favorable evidence that the Judge discussed. However, he argues that, given the Judge’s finding that the geopolitical situation of Ukraine presents a significant threat to U.S. national security, the presence of Applicant’s close family members there poses potential dangers that are not fully mitigated by this favorable evidence, given the “very heavy burden” required by her circumstances. *See, e.g.*, ISCR Case No. 09-08099 at 2 (App. Bd. Sep. 14, 2012).

Department Counsel characterizes Ukraine as “a country in turmoil” (Appeal Brief at 5), and he points to Administrative Notice (AN) documents that describe the intense fighting between Ukrainian forces and those backed by Russia. Department Counsel’s brief also cites to documented widespread corruption within Ukraine. AN IV, *Ukraine 2013 Human Rights Report*, at 1.⁶ The documents that Department Counsel cites underscore the Judge’s conclusion that Ukraine is equivalent to a hostile country for purposes of Guideline B analysis.

In addition to those matters discussed in Department Counsel’s brief, we also note the following, drawn from a U.S. State Department fact sheet of which the Judge took administrative notice:

⁶“The most serious human rights problem during the year was increased government interference with, and pressure on, media outlets . . . The second major human rights problem was intensified pressure on civil society, nongovernmental organizations (NGOs), and civic activists. The third major problem was the practice of politically motivated prosecutions and detentions, including the continued imprisonment of [a] former prime minister[.]” Other problems in Ukraine include torture of detainees and prisoners, “an inefficient and corrupt judicial system . . . [and] pervasive corruption in all branches of government[.]”

Russia continues to accumulate military equipment at a deployment site in southwest Russia. The equipment includes tanks, armored vehicles, rocket launchers, artillery, and air defense systems.

The State Department is “concerned much of this equipment will be transferred to separatists[.]”

Russia has recently transferred Soviet-era tanks and artillery to the separatists. Administrative Notice (AN) Document VI, U.S. State Department Fact Sheet, *Russia’s Continuing Support for Armed Separatists in Ukraine and Ukraine’s Efforts Toward Peace, Unity, and Stability*, July 14, 2014, at 1.

A State Department travel warning advises U.S. citizens throughout Ukraine to avoid large crowds and be prepared to remain indoors and shelter in place for extended periods of time should clashes occur in their vicinity. AN VIII, U.S. State Department, *Ukraine Travel Warning*, August 29, 2014, at 1. A Congressional Research Service report states that Russia is engaged in an effort “to destabilize eastern Ukraine,” and that, on March 6, 2014, the U.S. Administration issued an Executive Order imposing various sanctions on parties undermining Ukrainian sovereignty. Subsequent Executive Orders expanded the scope of these sanctions. AN VII, *Ukraine: Current Issues and U.S. Policy*, September 4, 2014, at 11. The cumulative effect of the evidence and material that Department Counsel has cited, along with other administrative notice matters contained in the record, underscores the instability of Ukraine at the hands of Russia and various separatist forces. It also underscores that the U.S. and Russia are undergoing a period of significant tension regarding their competing policies in Ukraine, as the Judge himself noted in his finding about the anti-American tone of the Russian-backed forces.

In addition to Administrative Notice documents, Department Counsel cites to evidence regarding Applicant’s employment history and her family circumstances, for example that, while living in Ukraine, Applicant worked for a state-owned entity, one by which her sibling is currently employed,⁷ and that Applicant communicates regularly with at least some of her Ukrainian relatives. We also note Applicant’s testimony that her family has some ties to Russia, that Russian is their first language, and that Applicant’s husband has some Russian ties. Given all of this, we agree with Department Counsel that the Judge has failed to draw a nexus between the Disqualifying Conditions that he found raised by Applicant’s circumstances and Mitigating Condition 8(b). That is, the evidence provides a strong reason to foresee that Applicant’s relatives could become a means through which she could come to the attention of persons in Ukraine or Russia interested in obtaining protected U.S. information. The Judge’s application of Disqualifying Condition 7(d) also suggests that Applicant’s husband is another possible avenue of concern. The Judge concluded that these family circumstances pose a heightened risk of coercion or pressure, and it is not beyond doubt that Applicant’s family ties within the U.S., excellent duty performance, good record concerning the

⁷Applicant testified that her sibling works in a clerical position. Tr. at 88. See ISCR Case No. 03-10954 at 4 (App. Bd. Mar. 8, 2006), for the proposition that an employee of a foreign government need not work at a high level or in a position involving intelligence to be of security significance.

handling of sensitive information, and other such evidence are sufficient to show that she would always resolve conflicts of interest in favor of the U.S., given the standard set forth in *Egan, supra*. This is especially true in regard to the concern arising through Applicant's sharing of living quarters with her husband.⁸

This is not to suggest that Applicant is disloyal or that she is other than a person of excellent character. However, common sense and a knowledge of the ways of the world suggest that even those whose character is unimpeachable could be faced with circumstances that would seriously tempt them to place the safety of parents, siblings, or parents-in-law ahead of other competing interests. Indeed, an applicant having relatives in a country hostile to the U.S. is explicitly cited by the Supreme Court as a reason to deny an applicant a security clearance. *Egan, supra*, at 529. Given the above, we are persuaded by Department Counsel's argument that the Decision does not extend appropriate weight to significant record evidence and official notice materials that cut against its favorable overall result, thereby leaving unresolved doubt as to Applicant's eligibility for a clearance. In contrast, the mitigating evidence upon which the Judge relied is not sufficient to outweigh the concerns raised by that status of Applicant's Ukrainian relatives. The Judge's decision relied on three considerations: Applicant's good character, Applicant's naturalization ceremony, and Applicant's having declined a job in Ukraine. Her good character is less at issue in this case, in which it is her circumstances that pose the problem. Her naturalization ceremony is not telling in a security clearance context. Her decision to decline a job in Ukraine is consistent with a desire to live in the U.S. but adds little to an analysis under Guideline B. The Judge's Decision fails to consider important aspects of the case and runs contrary to the weight of the record evidence.

Order

The Decision is **REVERSED**.

Signed: Michael Ra'anan

Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge

⁸The strong ties within the U.S. that the Judge found to be mitigating obviously include Applicant's husband, himself a U.S. citizen employed and living here. As stated above, the Judge also found that Applicant's sharing living quarters with him posed a heightened risk of coercion or pressure. The Judge's analysis seems to imply that this relationship is both disqualifying and mitigating

Member, Appeal Board

Signed: James E. Moody _____

James E. Moody
Administrative Judge
Member, Appeal Board