

KEYWORD: Guideline B

DIGEST: Department Counsel persuasively argues that the Judge erred in concluding that the government had failed to present substantial evidence of a security concern under Guideline B. In the meantime Russia has attacked Georgia. The Judge's remand decision must have a current and accurate geopolitical assessment and security/intelligence profile of Russia. Favorable decision remanded.

CASENO: 07-04496.a1

DATE: 10/22/2008

DATE: October 22, 2008

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| In Re: |) | |
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| ----- |) | ISCR Case No. 07-04496 |
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| Applicant for Security Clearance |) | |

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Emilio Jaksetic, Esq., Department Counsel

FOR APPLICANT

Kathleen E. Voelker, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 14, 2007, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline C (Foreign Preference), Guideline B (Foreign Influence), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 30, 2008, after the hearing, Administrative Judge John Grattan Metz, Jr. 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 issues on appeal: whether the Judge improperly shifted the burden of persuasion to the Government; whether the Judge erred by concluding that the government had presented no evidence of heightened risk; and whether the Judge erred in concluding that Applicant’s case did not raise Guideline B security concerns.¹ Finding error, we remand the case to the Judge.

Whether the Record Supports the Judge’s Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant was born in Russia, then part of the U.S.S.R. She received a Master’s degree in computer science there. She married, and she and her husband had a son together. Her husband subsequently died.

In the 1990s she came to the U.S. with her son and married a U.S. citizen, whom she later divorced. She married a third husband, who adopted her son. Her son became a U.S. citizen by virtue of the adoption. Applicant herself became a U.S. citizen in the 2000s. Her parents came to the U.S. in the late 1990s and live near Applicant and her husband. Applicant’s father is a naturalized U.S. citizen, and her mother is a permanent resident of the U.S. who has applied for citizenship. Applicant has an aunt who lives in Ukraine, which used to be a member of the U.S.S.R. Applicant traveled to Russia in the early 2000s to attend her brother’s wedding. She also traveled to Ukraine to visit her aunt. Applicant holds a Russian passport, because that is a requirement for renouncing Russian citizenship.

Russia is a “nominal democracy with a mixed human rights record.” Decision at 4. It has been a target of terrorist activity in recent years, and Russian forces pursuing terrorists have engaged in torture, summary executions, and arbitrary detentions. “Russia has an active, significant, recent, and ongoing collecting program focusing on the U.S. As of 2005, Russia was one of the two most aggressive collectors of sensitive and protected U.S. technology and accounted for much of such targeting. However, Russia is not known to target U.S. citizens to obtain protected information.” *Id.* at 4.

¹The Judge’s favorable decision under Guidelines C and E is not at issue in this appeal.

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 same 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). 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's assignment of error includes mixed questions of law and fact. Consideration of the assigned errors requires the Board to address the sufficiency of the Judge's findings about the geopolitical situation in Russia and Russia's targeting of Americans and American information.

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 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). 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).

The Judge concluded that Applicant's case did not raise security concerns under Guideline B. "In this case, the government failed to establish a case under Guideline B. Considering first the country involved, Russian and the U.S. enjoy competitive foreign relations, although they cooperate on a wide variety of issues. While Russia is actively engaged in the collection of U.S. information . . . there is no evidence suggesting that it targets its expatriate citizens such that would make Applicant or her family members likely targets for coercion, duress, or influence." Decision at 7. Department Counsel argues that the Judge erred. He states that, viewed in light of the whole record,

Applicant's foreign relatives, her foreign travel, Russia's problematic human rights record, and its status as a collector of U.S. technological information are sufficient to raise Guideline B security concerns.² The Board finds Department Counsel's argument persuasive.

The Board notes certain events which have occurred since the close of the record and which have a bearing on this case. In August 2008 Russia attacked Georgia. *See* President's "Remarks on the Situation in Georgia," August 18, 2008: "It now appears that an effort may be underway to depose Georgia's duly elected Government. Russia has invaded a sovereign neighboring state and threatens a democratic government elected by its people." *See also* Joint Statement on Georgia by Foreign Ministers of Canada, France, Germany, Italy, Japan, the United States and the United Kingdom, Department of State Media Note, August 27, 2008: "Russia's recognition of the independence of South Ossetia and Abkhazai violates the territorial integrity and sovereignty of Georgia and is contrary to U.N. Security Council Resolutions supported by Russia. Russia's decision has called into question its commitment to peace and security in the Caucasus."³ The Board also notes that the Judge made no findings about Ukraine, which is an error. *See* ISCR Case No. 06-18400 at 3 (App. Bd. Aug. 2, 2007).

A current and accurate assessment of the "geopolitical situation" and the "security/intelligence profile of the country vis-a-vis the United States" is crucial in Guideline B cases. *See* ADP Case No. 06-14978 at 3 (App. Bd. Oct. 11, 2007); ISCR Case No. 04-02630 at 2-3 (App. Bd. May 23, 2007). In this case, Applicant has close relatives who are citizens of a country that has engaged in armed conflict with a democracy friendly with the U.S. *See* U.S. Department of State Background Note: Georgia, February 2008. This is a matter bearing directly on the Guideline B security concern, which requires consideration of the nature of the foreign country.⁴ The Board concludes that the best course of action is to remand the case to the Judge with instructions that he reopen the record, allow the parties an opportunity to proffer appropriate documents for official notice pertinent to the geopolitical situation in Russia, or other relevant and material evidence, and allow the parties to reargue the case. The other issues in the case are not ripe for consideration at this time.

²*See* Directive ¶ E2.7(a): "contact with a foreign family member . . . or other person 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[.]" Directive ¶ E2.7(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[.]"

³ For a discussion of official notice in DOHA proceedings, *see* ISCR Case No. 05-11292 at 2-4 (App. Bd. Apr. 12, 2007).

⁴Directive ¶ E2.6: "The Concern. Foreign contacts and interests may be a security concern if the individual has divided loyalties . . . may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in the U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact . . . is located."

Order

The Judge's favorable security clearance decision is REMANDED.

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

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board