

KEYWORD: Guideline B

DIGEST: The Judge found that Applicant has four siblings and one half sibling living in Iran. Applicant has traveled to Iran on several occasions over the last two decades. Applicant used an Iranian passport for those trips to Iran (now expired and relinquished to his security officer). Department Counsel persuasively argues that the Judge’s favorable decision was made without sufficient attention to contrary record evidence. The obscurity of foreign relatives or the failure of foreign authorities to contact those relatives do not reliably measure the security risk attendant to their presence when they are subject to a hostile regime with a dismal human rights record. Favorable decision reversed.

CASENO: 07-18283.a1

DATE: 04/24/2009

DATE: April 24, 2009

In Re:)	
)	
----)	ISCR Case No. 07-18283
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Emilio Jaksetic, Esq., Department Counsel

FOR APPLICANT

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 9, 2008, 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 February 6, 2009, after the hearing, Administrative Judge Claude R. Heiny 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 issues on appeal: whether the Judge improperly ignored Appeal Board precedent in reaching his decision; whether the Judge’s application of the Foreign Influence Mitigating Conditions (FIMC) was not supported by record evidence; whether the Judge improperly shifted the burden of persuasion to the Government; and whether the Judge’s favorable security clearance decision is unsustainable. Finding error, we reverse the decision of the Judge.

Whether the Record Supports the Judge’s Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant is a software engineer for a defense contractor, who had held a security clearance since the early 1990s. Born in Iran, he came to the U.S. in the mid-1970s and attended college. He earned several Bachelor degrees from U.S. universities, as well a Masters. In the early 1980s he married and had three children. He divorced, and, in the early 1990s, he subsequently remarried, to a U.S. citizen. In the early 1990s Applicant became a U.S. citizen.

Applicant’s parents, Iranian citizens, are deceased. He has four siblings and one half-sibling, who are citizens and residents of Iran. He has never discussed his work with them, and they do not know what he does for a living. Applicant has traveled to Iran on several occasions between the mid-1990s and the early 2000s. He traveled on an Iranian passport, because he had been informed by Iranian officials that he could not obtain a visa on a U.S. passport. His Iranian passport has expired, and he has since relinquished it to his company’s facility security officer.

The U.S. has designated Iran as “the most active state sponsor of terrorism.” Decision at 5. It supports violent opposition to the middle-east peace process and commits serious human rights abuses. The Iranian government considers U.S. citizens born in Iran to be Iranian citizens. Such persons have been harassed by the Iranian government when traveling in Iran.

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 defer to the Judge’s credibility determinations. Directive ¶ E3.1.32.1.

Department Counsel’s argument that the Judge’s decision does not sufficiently take into account contrary 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 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).

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).

The Guideline B security concern is as follows: “Foreign contacts and interests may be a security concern in the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in 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.” Directive ¶ E2.6. The Judge properly concluded that Applicant’s family connections to Iran raise security concerns under Guideline B. *See, e.g.*, ISCR Case No. 01-26893 (App. Bd. Oct. 16, 2002) (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.) However, Department Counsel persuasively argues that the Judge erred in concluding that Applicant had met his burden of persuasion as to mitigation. Specifically, Department Counsel contends that the Judge’s decision was made without sufficient attention to contrary record evidence.

In concluding that Applicant had mitigated the security concerns in his case, the Judge appears to have relied on record evidence that Applicant has little sense of loyalty to Iran, that he is opposed to that regime, and that he is a devoted U.S. citizen. While that is evidence which the Judge was bound to consider, it does not end the analysis. The Guideline B security concern is not limited to consideration of an applicant’s loyalty to a foreign country itself. It also requires consideration of an applicant’s attachment or obligation to persons or other interests in the foreign country. The Board notes the Judge’s findings that Applicant has four siblings who live in Iran, that Applicant has feelings of affection for them,¹ and that the Iranian regime considers persons such as Applicant and his wife to be Iranian citizens. The Board also notes record evidence that, until his mother’s death in 2007, Applicant communicated with his siblings frequently and, since her death, maintains at least biannual contact with them. The Board notes the Judge’s findings as to the nature of the Iranian government, its sponsorship of terrorism and its human rights violations. It also notes matters contained in the Official Notice documents submitted by the Government, to the effect that the Iranian regime monitors the social activities of its citizens, monitors telephone conversations and internet communications, and opens mail without court authorization. U.S. Department of State, *Country Report on Human Rights Practices - 2007* at 9 (March 11, 2008). The Board also notes that Iran’s president has called for the elimination of Israel and has questioned the historical validity of the holocaust. *Id.* at 15. It has provided support for groups in Iraq and Afghanistan which are directly responsible for hundreds of U.S. casualties. Testimony of William J Burns, Undersecretary of State for Political Affairs, to the U.S. Senate Committee on Foreign Relations (July 9, 2008).

The Judge’s findings, the record evidence, and the Official Notice material, taken together, demonstrate that Applicant’s close relatives reside in a country whose interests are contrary to those of the U.S. In light of the record as a whole, it is foreseeable that these relatives could be a means through which Applicant could come to the attention of the regime. His family could be a vehicle through which Iran might attempt to coerce Applicant. Despite Applicant’s testimony and other

¹Applicant notes on appeal that there is no record evidence of his use of the word “love” for his siblings. Applicant’s argument does not demonstrate that his affection for them is minimal.

evidence that he has no loyalty to Iran, there is not sufficient evidence to demonstrate that his ties to the U.S. outweigh his sense of obligation to his Iranian relatives. Department Counsel points out the Judge's statement to the effect that there is no evidence that Applicant or his family have ever been targeted by the Iranian regime. The Board has consistently held that factors such as an applicant's relatives' obscurity or the failure of foreign authorities to contact those relatives in the past do not provide a meaningful measure of whether an applicant's circumstances pose a security risk, when, for example, the relatives are subject to the authority of a regime that is hostile to the United States and has a dismal human rights record.² ISCR Case No. 07-13696 at 5 (App. Bd. Feb. 9, 2009). The Judge's statement suggests that he has impermissibly shifted the burden of persuasion to the Government. *See, e.g.*, ISCR Case No. 02-09907 at 7 (App. Bd. Mar. 17, 2004) (Under the Directive, once the Judge finds that security concerns have been raised, the burden shifts to an applicant to extenuate or mitigate those concerns. Department Counsel is not required to prove a threat of espionage.) Department Counsel also correctly notes that the Judge appears to have ignored Appeal Board precedent in formulating his decision, which is error. For a fuller discussion, *see* ISCR Case No. 07-13696 at 3. In light of the foregoing, the Board concludes that the Judge's favorable security clearance decision is not sustainable on this record.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Michael Y. Ra'anan

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

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody

²Applicant accurately cites the Adjudicative Guidelines in this regard. However, the totality of the personal circumstances being considered includes the nature of the country. In this case, the relatives' obscurity is not a meaningful basis for concluding that they are beyond the reach of the regime.

Administrative Judge
Member, Appeal Board