

KEYWORD: Guideline B; Guideline C

DIGEST: The Judge erred in not applying Foreign Influence Disqualifying Condition 7(e). The Judge erred in analyzing Applicant's ties to Iran rather than his ties to his father who visits Iran and has other ties to that country. Favorable decision reversed.

CASENO: 08-02864.a1

DATE: 12/29/2009

DATE: December 29, 2009

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In Re:)	
)	
-----)	ISCR Case No. 08-02864
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Alison O'Connell, Esq., Department Counsel

FOR APPLICANT

Samuel Bluck, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 8, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline C (Foreign Preference) and Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 16, 2009, after the hearing, Administrative Judge Mark Harvey 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 erred in his analysis of the Guideline B disqualifying conditions; whether the Judge erred in his application of the pertinent mitigating conditions; and whether the Judge’s favorable security clearance decision is arbitrary, capricious, or contrary to law. Finding error, we reverse.

Facts

The Judge made the following pertinent findings of fact: Applicant is a senior research scientist who requires a security clearance “to enhance his employment.” Decision at 3. He earned degrees in mathematics and computer science from U.S. universities.

Applicant was born in the U. S. His mother was a citizen of Germany and, as a consequence, Applicant acquired German citizenship by virtue of birth. When he was about six months old, Applicant’s family moved to Germany, where he completed high school. He subsequently returned to the U.S. Applicant is not married and has no children.

Applicant has held a German passport, the most recent one issued in 2003. He has traveled to Germany and other countries of the European Union on that passport. He surrendered his passport to his security facility officer in 2008. Since attaining his majority, Applicant has received medical treatment in Germany at the partial expense of the German government and holds a German driver’s license.

Applicant told an OPM investigator that he was not willing to renounce his German citizenship and that he intends to remain a citizen of Germany. In a later response to interrogatories propounded by DOHA, Applicant stated that he had a duty and obligation to follow Germany’s law and fulfill the responsibilities of a German citizen.

He subsequently stated that he intended to be bound by the laws both of the U.S. and of Germany. He stated, “I will not violate the U.S. laws or Constitution.” *Id.* at 4. Although he does not intend to move to Germany, he could do so if necessitated by employment concerns.

Applicant’s father is a dual citizen of Germany and Iran. A retired physician, Applicant’s father visits Iran approximately once a year. Applicant’s mother is deceased. Applicant traveled to Germany on his U.S. passport to attend her funeral.

Applicant has three uncles who are citizens of Iran. One lives in the U.S. and is “probably still an Iranian citizen.” *Id.* at 5. Another of Applicant’s Iranian uncles lives in a European country.

Applicant has a half-interest in a piece of German real estate, valued at approximately 700,000 Euros. The rental income derived from this property has varied from 300 Euros a month to 3,000. Applicant and his co-owner are attempting to sell the property. After the hearing, Applicant submitted a letter from a German attorney attesting to a “contract of mandate regarding the sale of [the] real estate . . . After consultation with the tax consultant, [his attorney] will submit a proposal for further proceedings. *Id.* Applicant has a German bank account with approximately 6,000 Euros in it. “At the hearing, Applicant said he intended to close the account.” *Id.*

He owns a house in the U.S. valued at about \$87,000. He has about \$30,000 in U.S. bank accounts and \$35,000 in retirement accounts. He enjoys an excellent reputation for job performance, honesty, generosity, and patriotism.

Iran is a country that engages in a clandestine effort to obtain weapons of mass destruction, sponsors terrorism, intervenes in the internal affairs of Iraq, undermines the Middle East peace process, and violates human rights. It has sought illegally to obtain U.S. military and sensitive technology.

Germany is an ally of the U.S. and its second largest trading partner. Nearly a quarter of U.S. citizens have some German ancestry.

Discussion

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).

In the Analysis portion of the decision, the Judge concluded that the evidence raised two Foreign Preference disqualifying conditions (FPDC)–10(a)(1),¹ possession of a foreign passport, and 10(a)(3),² accepting medical or other benefits from a foreign country. As the Judge's findings demonstrate, Applicant's receipt of medical treatment in Germany, and his German passport and driver's license establish these disqualifying conditions. The Judge also concluded that the case raised two Foreign Influence disqualifying conditions (FIDC)–7(a),³ contact with, *inter alia*, a foreign family member, etc, which creates a risk of exploitation, and 7(b),⁴ connections to, *inter alia*, a foreign person that creates a potential conflict of interest. Applicant's foreign relatives, both in Germany and in Iran, establish these conditions.

Department Counsel argues that the Judge erred, however, in not concluding that the evidence also raised FIDC 7(e),⁵ a substantial business, financial, or property interest in a foreign country, which might subject the applicant to foreign coercion. Department Counsel points to Applicant's share in the German real property, valued at over 700,000 Euros, and his German bank account, valued at around 6,000 Euros. Department Counsel notes that, when viewed in comparison with Applicant's financial interests in the U.S., Applicant's German holdings constitute the substantial majority of his net worth. Under these circumstances, the record establishes a substantial property interest in Germany. Given record evidence of Applicant's ties to that country, it is foreseeable that this interest could be a means through which Applicant could be subjected to foreign influence. *See* ISCR Case No. 07-06364 at 2 (App. Bd. May 28, 2008)(“Applicant's Egyptian holdings, which include a condominium valued at \$170,000 and a bank account worth \$100,000, must be considered substantial and could subject Applicant to heightened risk of foreign influence or exploitation[.]”) *See also* ISCR Case No. 08-04488 at 4 (App. Bd. Apr. 23, 2009)(In a Guideline

¹Directive ¶ E2.10(a)(1).

²Directive ¶ E2.10(a)(3).

³Directive ¶ E2.7(a).

⁴Directive ¶ E2.7(b).

⁵Directive ¶ E2.7(e).

Because the Government is not required to prove affirmatively that a country specifically targets U.S. citizens in order to gather protected information. The “heightened risk” language in the Guideline addresses an applicant’s contacts, not necessarily the country in which the contact is located). Under the facts of this case, Applicants’ circumstances are sufficient to establish FCDC 7(e). The Judge’s failure to discuss this disqualifying condition is error.

Department Counsel argues that the Judge’s analysis of Applicant’s father’s visits to Iran is erroneous. Department Counsel’s argument has merit. The concern regarding the father’s visits to Iran grows out of Applicant’s ties to his father. The Judge’s favorable resolution of the issue relies on mis-stating the concern as to Applicant’s ties to Iran. The security vulnerability is correctly alluded to by the Judge (“Iranian authorities could use Applicant’s father to coerce Applicant.” Decision at 15-16). However, he then resolves the issue by comparing Applicant’s ties to the U.S. to his ties to Iran, which is not the correct analysis of this issue.

Concerning mitigation, the Board notes that the Judge did not attempt to clear Applicant through the mitigating conditions in and of themselves. Rather, he did so by means of his whole-person analysis. This analysis balanced Applicant’s ties to his German family members with his ties to the U.S. and with his excellent reputation in this country. Missing from the whole-person analysis, however, is any discussion in Applicant’s property interests in Germany, due to the Judge having failed to discover in those interests substantial evidence of FCDC 7(e). Department Counsel argues that the record evidence will not sustain a conclusion that Applicant has mitigated security concerns arising from this foreign property.

The Board notes Applicant’s stated intention to close out the German bank account. However, he had not closed it out as of the close of the record. Applicant also stated that he and his co-owner intended to sell the real property. Despite the Judge’s having provided Applicant with several weeks post-hearing in which to demonstrate divestiture, Applicant provided only one document, the letter from the German attorney quoted in the Judge’s findings, confirming a “contract of mandate” and advising that “a proposal for further proceedings” is forthcoming. Neither the record, nor Applicant’s reply brief, further elaborate on this issue, either by explaining what a contract of mandate is or by discussing what further proceedings are required or contemplated. As Department Counsel states, “[w]hile Applicant may have asserted that he intends to divest himself of his rental property and his foreign bank account, there is no record evidence that he actually did so or that he even made any attempts to do so.” Department Counsel Brief at 23. The evidence supports this statement, because, at the close of the record, Applicant still owned the properties under consideration. The record contains a paucity of evidence to demonstrate mitigation of the security concern arising out of Applicant’s foreign property interests. Viewing the record as a whole and in light of the *Egan* standard, and specifically taking into account record evidence of Applicant’s ties

to Germany⁶ and the problems inherent in Applicant's father's ties and visits to Iran, the Board cannot conclude that the Judge's favorable decision under Guideline B is sustainable.

Order

The Judge's favorable security clearance decision is REVERSED.

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: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board

⁶“[Applicant] views his citizenship as a contract with that country. When [Applicant] was asked if he was willing to relinquish his German citizenship, he claimed that was like asking a father to give up a child, he could not do it.” Summary of Personal Subject Interview (SPIN) conducted in December 2007. At the hearing, he reiterated his intention to retain his German citizenship. Tr. at 34. Applicant also stated that he was bound by the laws of Germany and viewed his dual “citizenships as an opportunity . . . to live, work and travel in most of North America and Europe.” SPIN, *supra*. As stated in the Judge's findings, Applicant foresees a possibility that economic circumstances may require him to move back to Germany.