

KEYWORD: Guideline B

DIGEST: The security concern in this case arose from Applicant’s brother, whose prominence in a highly technical field might draw the brother to the attention of parties interested in acquiring U.S. technology. Applicant maintains frequent contact with the brother and his family. The record will not sustain the Judge’s conclusion that Applicant mitigated these security concerns. Favorable decision reversed.

CASENO: 08-10025.a1

DATE: 11/03/2009

DATE: November 3, 2009

In Re: ----- Applicant for Security Clearance)))))))	ISCR Case No. 08-10025
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James F. Duffy, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 8, 2009, 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 July 24, 2009, after the hearing, Administrative Judge Paul J. Mason

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 certain of the Judge's factual findings were supported by substantial record evidence; whether the Judge's application of the pertinent mitigating conditions was erroneous; and whether the Judge's whole-person analysis was erroneous. Finding error, we reverse.

The Judge found as follows: Applicant is a 53 year-old engineer working for a federal contractor. He became a U.S. citizen in the early 1990s. Applicant's parents live in Nigeria, where they are retired. Applicant's brother (A) is a high-level official in the Nigerian government.¹ He has another brother and a sister who are employed by a state government in Nigeria. Applicant speaks with these siblings every two weeks by telephone.

Nigeria is a nation with a poor human rights record. It has experienced periodic armed conflicts among religious, political and ethnic factions. The current president is working to restore peace and security to Nigeria. The previous U.S. administration considered Nigeria an important partner in the war on terror.

Department Counsel has challenged the Judge's findings concerning Applicant's brother A. Specifically, he contends that the Judge's finding that A exercises no policy-making authority is without foundation in the record.

The Appeal Board reviews the Judge's findings of facts to determine 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.

In the Findings section of the decision, the Judge quoted Applicant's testimony to the effect that A works in a strictly technical position. Although the findings do not mention policy *per se*, the implication of the quoted testimony is that A is not involved in formulating policy for the Nigerian government. Department Counsel's argument that this finding does not take into account contrary record evidence is persuasive. In addition to the portion quoted by the Judge, Applicant testified elsewhere concerning his brother. He described A as being similar to a "CEO," that he travels frequently to the U.S., and is involved in "the policy of organizations" that are addressing matters

¹REDACTED.

of national importance. Although the record does not go into great detail as to the nature of A's work, it is reasonable to believe that a government official such as A would exercise responsibility at the policy-making level. Applicant did not provide anything to corroborate his statement to the Judge that A's position is a purely technical one. Applicant did not provide information about the organization with which A is affiliated, though it is likely that such information would have been readily available. The decision does not analyze Applicant's testimony or attempt to explain why the Judge found the quoted portion of Applicant's testimony to be a definitive statement of the nature A's duties. Neither does it address Applicant's own use of the word "policy" in describing A's activities. Therefore, to the extent that the Judge's use of the quoted portion of Applicant's testimony reasonably implies a finding that A is involved in purely technical matters, this finding is unsupported by the record evidence viewed as a whole.

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 Judge concluded that Applicant's contacts in Nigeria raised Guideline B security concerns. However, he further concluded that Applicant had demonstrated mitigation under Foreign

Influence Mitigating Condition (FIMC) 8(b).² This provision mitigates security concerns when an applicant's ties to the foreign contact are minimal or his ties to the U.S. are so deep and longstanding, that he can be expected to resolve any potential conflict of interest in favor of the U.S. The Judge stated that, insofar as Applicant's brother occupies a technical position in government, one that does not involve security or financial matters, he is not likely to become a means through which Applicant could be pressured to compromise classified information. Department Counsel persuasively argues that the Judge's analysis is not supported by the record evidence.

Despite our conclusion that the Judge erred in his finding about A's responsibilities, the Board is not convinced that the distinction between a technical position and a policy-making one is meaningful in a security clearance context, especially under the facts of this case. Applicant's contentions in this regard appear to have been an effort to demonstrate that A is not in a position to have sanctioned or have participated in human rights violations. However, there is nothing in the record to suggest that he has engaged in such activity and the Board is not basing its decision on such a supposition. Rather, the security concern is rooted in A's prominence in a highly-sensitive field that could draw him to the attention of parties interested in acquiring U.S. technology. This concern applies regardless of whether A actually formulates policy or simply advises those who do.

As stated above, A has a high-level position and enjoys a reputation beyond the Nigerian borders. Applicant has testified that he speaks to his brother frequently and serves as a surrogate uncle for A's children who live in the U. S. Given those facts, it is foreseeable that he could become a means through which parties within or outside of Nigeria could attempt to exert pressure on Applicant. The record evidence is not sufficient to demonstrate that, given the possibility of such a situation, Applicant's obligation to the U.S. would necessarily outweigh his ties to his brother or to his other relatives in Nigeria. Application of the guidelines is not a comment on an applicant's patriotism but merely an acknowledgment that people may act in unpredictable ways when faced with choices that could be important to a loved-one, such as a family member. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive ¶ E2.2(b).

The record does not support a reasonable conclusion that Applicant has met his burden of persuasion, either under the mitigating conditions or the whole-person factors. The Judge's decision does not consider an important aspect of the case and offers an explanation that runs contrary to the weight of the record evidence. ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006). Accordingly, in light of the record and considering the *Egan* standard, the Judge's favorable decision is not sustainable. See *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) ("The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security'").

²Directive ¶ E2.8(b).

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

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