

KEYWORD: Guideline B; Guideline C

DIGEST: Given the extent of Applicant's family and other personal contacts in Estonia, the Judge's decision does not explain, and the record does not support his conclusion that Applicant is not likely to have to choose between the interests of those persons and the interests of the United States. Favorable decision reversed.

CASENO: 08-11969.a1

DATE: 04/22/2011

DATE: April 22, 2011

In Re:)	
)	
-----)	ISCR Case No. 08-11969
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

William T. O'Neil, Esq., Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 7, 2010, 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 January 13, 2011, after the hearing, Administrative Judge Thomas M. Crean 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 application of the pertinent mitigating conditions and whether the Judge’s whole-person analysis was erroneous. Consistent with the following, we reverse the decision of the Judge.

Facts

The Judge made the following pertinent findings of fact: Applicant is the principal systems engineer for a Defense contractor. He has a bachelor’s degree in electrical engineering and a master’s in computer science. He has taken other post-graduate courses in addition to his course work for his master’s degree.

Applicant’s parents were Estonian. They fled that country, and Applicant was born in a refugee camp in another European country. When he was three years old, Applicant and his family moved to the U.S. He became a U.S. citizen in the early 1960s.

Applicant attended college on a ROTC scholarship. After graduation he received an educational delay to pursue graduate work. Thereafter he served for two years on active duty with the U.S. military, holding a secret clearance during that period of service.

After leaving the Air Force Applicant worked for Defense contractors, and his clearance was upgraded. Later he began working as a contractor for another Government agency. In the mid-2000s that agency denied him a top secret clearance based on security concerns under Guidelines B and C.

Applicant is a dual citizen of Estonia and the U.S. He registered to vote in that country in the early 2000s and has voted in Estonian elections. He worked for Estonia in the mid-2000s, having been hired by a friend who was president of a computer company.

Applicant obtained an Estonian passport in the early 2000s. He did so in order to work on a project funded by the European Union, which required Estonian citizenship.

Applicant owns a condominium in Estonia. He has paid off the mortgage, and the current value of the condo is \$160,000. His net worth in the U.S. is around \$1,000,000.

Applicant's wife is a dual citizen of Estonia and the U.S. She provides freelance translation services to both governments. Applicant and his wife frequently attend social events at the Estonian embassy.

Applicant and his wife have a daughter who works for the Estonian government in Estonia. They talk to her frequently and see her when they visit Estonia. Another daughter is a doctoral candidate at a U.S. university, and a son recently left active duty with a branch of the U.S. military. Applicant and his wife speak Estonian at home.

Applicant is friends with persons who serve in high-ranking positions with the Estonian government. Applicant reads an Estonian-American newspaper. He intends to spend time in Estonia when he retires, although he does not intend to live there because the medical care is not as good as in the U.S. His connection to Estonia is based on heritage and culture.

Estonia has been a parliamentary democracy since 1992. It is a member of NATO and of the European Union. It has a stable and constructive relationship with the U.S.

Discussion

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. In rendering a final decision, an "agency must 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 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).

The Judge concluded that Applicant's circumstances raised security concerns under both Guidelines alleged in the SOR. However, the Judge concluded that multiple mitigating conditions under the Foreign Influence and Foreign Preference Guidelines apply in Applicant's case. Similarly, the Judge's whole-person analysis concluded in Applicant's favor.

Department Counsel argues that the Judge's favorable conclusions regarding mitigation were not supported by the record. Specifically, Department Counsel cited (1) the Judge's application of Mitigating Condition (MC) 8(a) based on minimal differences between the U.S. and Estonia; (2) the Judge's mitigation of Guideline 7(e) without use of 8(f); and (3) the Judge's conclusions as to mitigation under Foreign Preference even though the plain language of the mitigating conditions does not apply to Applicant's conduct and circumstances.

Department Counsel’s arguments are persuasive, given the totality of the record evidence. The Judge stated, in the Guideline B analysis, that differences between the interests of the U.S. and Estonia are “minimal” and that there is little likelihood that Applicant will be placed in a position to have to choose between the interests of the two countries.¹ In the first place, the Judge’s conclusion about the purportedly minimal differences between U.S. and Estonian policy are speculative at best. More to the point, the “national security of the United States can be at risk whether a person with foreign family ties is vulnerable to coercion or blackmail, or is vulnerable to non-coercive influence,” as might be the case of an applicant with relatives living in a country that is a U.S. ally. ISCR Case No. 02-02892 at 10 (App. Bd. Jun. 28, 2004). Given the extent of Applicant’s family and other personal contacts in Estonia, the Judge’s decision does not explain, and the record evidence does not support, his conclusion that Applicant is not likely to have to choose between the interests of those persons and the interests of the U.S.

The Judge favorably applied two other Guideline B mitigating conditions, 8(b)² and 8(c).³ For similar reasons as those stated above, the record viewed as a whole does not support a conclusion that Applicant met his burden of persuasion that his ties to his friends and relatives in Estonia, including government officials, are such that he can be expected to resolve any conflict of interest in favor of the U.S. Especially of concern are his ties with his daughter there.

Regarding Guideline C, the Judge noted that Applicant had surrendered his passport.⁴ However, many of his conclusions are without foundation in the record. For example, it is not clear why Applicant’s evidence that he exercised Estonian citizenship rights for business and economic reasons (Decision at 10), even if true, mitigates the security concerns arising therefrom. There is a paucity of record evidence to demonstrate that he will have no further economic interests in Estonia. Also, the Judge accepted Applicant’s statement that he voted in Estonian elections simply to advance U.S. interests. He does not explain why he finds that statement to be mitigating.

¹See Directive, Enclosure 2 ¶ 8(a): “the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S[.]”

²Directive, 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 so 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[.]”

³Directive, Enclosure 2 ¶ 8(c): “contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation[.]”

⁴Directive, Enclosure 2 ¶ 11(e): “the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated[.]”

In light of the foregoing, the Judge's decision fails to consider important aspects of the case and runs counter to the weight of the record evidence. ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006). Viewed in light of the record as a whole, the Judge's decision is not sustainable, either under the mitigating conditions or the whole-person factors.

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