

KEYWORD: Guideline C; Guideline B

DIGEST: The Judge did not abuse his discretion in ruling on Official Notice documents. Applicant failed to rebut the presumption that the Judge considered all of the evidence. The Board cannot consider new evidence on appeal. The Judge erred in concluding that Foreign Preference Mitigating Condition 11(a) logically mitigated the concerns arising from Applicant's significant connections to Israel. Adverse decision affirmed.

CASE NO: 10-04641.a1

DATE: 09/24/2013

DATE: September 24, 2013

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In Re:))
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-----) ISCR Case No. 10-04641
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Applicant for Security Clearance))
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Gregg A. Cervi, Esq., Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 26, 2012, DoD 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 decision on the written record. On June 27, 2013, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Marc E. Curry denied Applicant’s request for a security clearance. Applicant appealed, and Department Counsel cross-appealed, pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge’s decision to take official notice of certain documents was erroneous; whether the Judge considered all of the evidence; and whether the Judge’s adverse decision under Guideline B was arbitrary, capricious, or contrary to

law. Department Counsel raised the following issue on cross-appeal: whether the Judge's favorable decision under Guideline C was arbitrary, capricious, or contrary to law. For reasons set forth below, we affirm the Judge's adverse findings under Guideline B and reverse his favorable findings under Guideline C.

The Judge's Findings of Fact

Applicant is an employee of a Defense contractor and has been so since 2009. He holds undergraduate and advanced degrees in his field.

Applicant was born in Israel. His mother was a U.S. citizen who moved to Israel in the early 1970s. Because of his mother's dual citizenship, Applicant also holds dual citizenship with Israel and the U.S. He moved to the U.S. in the late 2000s. Applicant's wife and children are also dual citizens of Israel and the U.S.

While living in Israel, Applicant completed mandatory military service. He worked for an arms company owned by the Israeli government, holding a top secret clearance. He also held a top secret clearance while working on a classified project with his private employer in the early 2000s.

Applicant voted in several Israeli elections. He also held an Israeli passport, which he used for travel to Israel after moving to the U.S. This passport expired in early 2012. Applicant owns a house in Israel, and his parents live in the house. He maintains an Israeli driver's license for travel in Israel when visiting his parents.

Applicant's sibling is a dual citizen of Israel and the U.S., living in Israel. He has two half-siblings who are citizens and residents of Israel, as are his parent-in-law. Applicant contacts his stepfather-in-law about 15 times a year. He has a sibling-in-law who is an Israeli citizen living in another country. He also has several former neighbors and colleagues living in Israel with whom he corresponds 10 to 15 times a year.

Applicant's net worth is about \$1.5 million, of which about \$1.2 million are in the U.S. The remainder is comprised of his home, a pension fund, and savings account, located in Israel. He is in the process of liquidating his pension fund and savings account.

Israel is a parliamentary democracy with close ties to the U.S. There are several groups operating in Israel, the West Bank, and Gaza that the U.S. has designated as foreign terrorist organizations. Israel aggressively targets U.S. sensitive and protected technologies. Over the past years, Israeli intelligence officers have been implicated in intelligence collecting against the U.S.

The Judge's Analysis

The Judge cleared Applicant under Guideline C. Although he concluded that Applicant's circumstances raised concerns under that Guideline, he found that Applicant's dual citizenship was

a function of his mother's having decided to relocate to Israel. He stated that Applicant's "pursuit of higher education in Israel and his decision to stay in Israel after college to settle down and raise a family did not represent exercises of preference for Israel over the U.S. Rather, these actions were reflective of a young man who had spent his entire life in his home country. In sum, Applicant technically was a dual U.S. citizen, but Israel was his home." Decision at 5. The Judge extended favorable application to mitigating condition 11(a): "dual citizenship is based solely on parents' citizenship or birth in a foreign country."

The Judge also concluded that Applicant's circumstances raised concerns under Guideline B. He further concluded that Applicant had failed to mitigate these concerns. He noted Applicant's extensive family connections within Israel, Applicant's financial ties within that country, and evidence that in the past persons have committed espionage against the U.S. on behalf of Israel. In the whole-person analysis, the Judge cited to evidence that paints Applicant to be highly talented and successful. However, he concluded that the favorable evidence in the record was not sufficient to mitigate the concerns arising from his connections in Israel.

Discussion

Applicant's Appeal

Applicant challenges the Judge's decision to take official notice of certain information. Specifically, he stated that some of the information referenced in Item 7, Official Notice Documents, referred to events that occurred several years ago and contends that these documents do not necessarily portray the current geopolitical situation in Israel.

We have considered Applicant's argument in light of the record as a whole. We examine a Judge's ruling on official notice to see if it was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 01-08565 at 3 (App. Bd. Mar. 7, 2003).¹

The Judge declined to take notice of one proffered document published 13 years ago. While some of the information referenced in the admitted portions of Item 7 goes back many years, we conclude that the challenged documents, viewed in context with the other Official Notice documents, could assist a reasonable person to grasp the geopolitical pressures impinging on Israel and that country's stance on collecting foreign intelligence. While the Judge explicitly considered these documents, his treatment of them in the Analysis does not indicate that he gave them undue weight. Indeed, the gravamen of his Guideline B analysis was the extent of Applicant's connections in Israel. We find no error in the Judge's having taken official notice of the documents in question.

Applicant contends that the Judge did not consider all of the evidence, citing to favorable information conveyed through his interrogatory answers and his clearance interview. A Judge is

¹For a more detailed analysis of the considerations appropriate to administrative or official notice in DOHA cases, *see* ISCR Case No. 03-21434 at 3-5 (App. Bd. Feb. 20, 2007).

presumed to have considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 10-04413 at 2 (App. Bd. Feb. 16, 2012). Applicant’s brief contains evidence not included in the record regarding disposition of his real estate holdings in Israel. We cannot consider new evidence on appeal. Directive ¶ E3.1.29.

The Judge examined the relevant data and articulated a satisfactory explanation for the decision as it pertains to Guideline B. That analysis is sustainable on this record. “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). *See also* Directive, Enclosure 2 ¶ 2(b): “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.”

Department Counsel’s Cross-Appeal

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 standard applicable in security clearance decisions is that articulated in *Egan, supra*. “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).

In deciding whether the Judge’s rulings or conclusions are erroneous, 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. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Department Counsel challenges the Judge’s favorable decision under Guideline C. He contends that Applicant’s circumstances, viewed as a whole, do not support the Judge’s favorable treatment of mitigating condition 11(a).² We find this argument persuasive.

Department Counsel contends that 11(a) contemplates U.S. citizens, born and raised in this country, who hold passive citizenship in another country by virtue of a parent’s citizenship. Although the reach of 11(a) is not limited to that particular scenario, Department Counsel’s contention that it does not logically mitigate Applicant’s circumstances has merit. In this case, Applicant was born in Israel, educated there, married and started a family there, served in its military and its defense industry, held Israeli security clearances, voted in Israeli elections, and, after moving

²Directive, Enclosure 2 ¶ 11(a): “dual citizenship is based solely on parents’ citizenship or birth in a foreign country[.]”

to the U.S. in his mid-thirties, held and utilized an Israeli passport and an Israeli driver's license. These connections with Israel are not fortuitous but, as the Judge himself noted, reflect conscious choices that Applicant made as an adult. While in no way reflecting poorly upon Applicant's character in and of itself, they raise a reasonable concern that Applicant has, over the course of his adult life, shown a preference for Israel over the U.S. and that he might be prone to provide information harmful to the interests of the U.S. were he given access to U.S. classified information.

We find persuasive Department Counsel's argument that Applicant's circumstances are at least equivalent to those of the applicant in ISCR Case No. 08-05869 (App. Bd. Jul. 24, 2009). In that case, the applicant had connections to Australia which included family members in that country, service in the Australian military, holding a top secret clearance with the Australian army, and voting in Australian elections. Given these connections, we stated that the applicant had a "heavy burden" to mitigate the Guideline C concerns alleged in the SOR, a burden that the applicant failed to meet. We noted that the applicant, by serving in a foreign military, had been willing to bear arms for another country, which we stated was strong evidence of an attachment to that country. In the case under consideration here, Applicant, when queried in an interrogatory, did not unequivocally abjure a continued willingness to bear arms for Israel.³ Considering the record as a whole, we conclude that the Judge's favorable application of 11(a) runs contrary to the weight of the record evidence. This decision is not sustainable, in light of the standard set forth in *Egan, supra*.

³Item 6, Interrogatories, at 129: "This question is hypothetical, since I have fulfilled my military duties to Israel and, at the age of 40, am no longer considered a part of the reserve forces. Furthermore, as a non-combatant I have no military skills." *See also* Item 6, Interview Summary, at 141: "When asked if he will renounce his Israel citizenship if required to obtain a clearance, he replied he probably would not renounce his Israel citizenship."

Order

The Judge's adverse decision under Guideline B is **AFFIRMED**. The Judge's favorable decision under Guideline C is **REVERSED**. The overall adverse decision is **AFFIRMED**.

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

James E. Moody
Administrative Judge
Member, Appeal Board

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Order

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