

KEYWORD: Guideline C; Guideline B

DIGEST: Applicant has multiple immediate family members who live in or are citizens of Iran. Applicant applied for, received and used an Iranian passport in order to adopt a child from Iran. Favorable decision reversed.

CASENO: 11-01888.a1

DATE: 06/01/2012

DATE: June 1, 2012

In Re:)
)
)
 -----) ISCR Case No. 11-01888
)
)
 Applicant for Security Clearance)
)
)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Christopher Graham, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 14, 2011, 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 February 29, 2012, after the hearing, Administrative Judge Arthur E. Marshall, Jr. granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raises the following issues on appeal: whether the Judge's Guideline C and Guideline B mitigation conclusions are arbitrary, capricious and contrary to law because they fail to consider important aspects of the case, and whether the Judge engaged in a piecemeal analysis of the case by not considering Applicant's use of an Iranian passport in conjunction with his family ties to Iran. For the following reasons, the Board reverses the Judge's favorable security clearance determination.

The Judge made the following pertinent findings of fact: Applicant is a 54-year-old naturalized U.S. citizen. Applicant arrived in the United States from Iran in 1977. He received a green card and was briefly married in the 1980's. He remarried in 1991, the same year he became a U.S. citizen. Never having had children of their own, Applicant and his wife decided to adopt two young Iranian children in 2009. Applicant approached his security officer at work about obtaining an Iranian passport he had previously surrendered in 2008 when he first received a security clearance. He was told the passport had been destroyed. With the knowledge and consent of his employer, Applicant applied for and received a new Iranian passport in January 2010 to facilitate his transit in and out of that country to adopt the children. He kept his employer fully informed about the adoption and he had approval from the U.S. Department of Homeland Security and the U.S. Citizenship and Immigration Services. After returning from the adoption, Applicant tendered his Iranian passport. The passport was destroyed in May 2010.

When Applicant immigrated to the United States, he left behind his mother, a brother, and three sisters, all of whom are citizens and residents of Iran. Applicant has another brother who is a citizen of Iran but a resident of the United States, and two other brothers who are U.S. citizens residing in the United States. Applicant's mother is 90 years old, in poor health, and is incapable of travel. None of Applicant's relatives in Iran have any involvement with the Iranian government or military. Applicant's brother who lives in the U.S. but remains an Iranian citizen has thus far declined to become a U.S. citizen because he is "too busy" with his company.

Applicant has monthly contact with his aged mother. She is the only foreign family member with whom Applicant maintains regular contact. He has annual telephonic contact with his two siblings in Iran. Applicant has some form of contact with his brothers in the United States about once a month. Applicant appears to be particularly close to only one brother, who is a U.S. citizen.

Since coming to the United States in the 1970's, Applicant has never been approached by any representative of the government of Iran or other foreign entity. Applicant considers himself to be a U.S. citizen, is happy here, and plans to remain.

The Judge took administrative notice of the following facts concerning the nature of the Iranian regime: Iran is a constitutional, theocratic Islamic republic. Islamic law is the basis for Iranian state authority. The United States has not had diplomatic or consular relations with Iran since 1979. In 2006, the President declared the continuation of a 1979 declaration of a national emergency because Iran poses an extraordinary threat to the national security, foreign policy, and economy of the United States. Iran engages in clandestine efforts to illegally obtain U.S. military equipment and other sensitive technology, and to acquire nuclear weapons and other weapons of mass destruction. Iran is one of the most active state sponsors of terrorism. Iranian authorities do not recognize dual citizenship, and consider Iranian-born, naturalized U.S. citizens and their children to be solely Iranian citizens. U.S.-Iranian dual citizens may be subject to harassment or arrest in Iran, may have their U.S. passports confiscated, and may be denied permission to exit Iran.

The Judge reached the following conclusions: Applicant admitted that he applied for and received a new Iranian passport to his security officer in 2008. He subsequently traveled to Iran on the new passport. This raises foreign preference disqualifying conditions. With foreign preference disqualifying conditions raised, the burden shifts to Applicant to mitigate security concerns. In obtaining his Iranian passport, Applicant worked openly with his employer and security officer and explained his reasons for wanting to visit Iran. The facts regarding his adoption were disclosed to government agencies. After the adoption, Applicant reported to his company and tendered his passport to the security officer. The passport was then destroyed. These facts are sufficient to raise AG ¶ 11(e).¹

Applicant has a mother and two siblings who live in and are citizens of Iran. He also has a sibling in the United States who remains an Iranian citizen. These facts raise foreign influence disqualifying conditions. With disqualifying conditions thus raised, the burden shifts to Applicant to mitigate security concerns. Applicant maintains monthly telephonic contact with his aged mother in Iran. His contact with his siblings in Iran is negligible, consisting of an annual phone call to relations who are as busy with their own immediate affairs as Applicant is. Applicant is in monthly contact with his brothers living in the U.S. None of these brothers seem to maintain connections with Iran, but are rather entrenched in the lives they have built here in the United States. None of Applicant's relations are involved with the government, military, or other entity representing a foreign nation. All are at or over retirement age and have no demonstrable ties to Iran. In contrast, Applicant has been in this country for many years, and he and his wife have built their lives here.

¹“[T]he passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.”

Like his siblings, Applicant is too busy with his own life, work, and family to concentrate on any foreign ties. Foreign Influence Mitigating Conditions AG ¶ 8(a)², AG ¶ 8(b)³, and AG ¶ 8(c)⁴ apply.

Department Counsel argues that the Judge’s conclusion that AG ¶ 11(e) operates to eliminate the Government’s security concerns under Guideline C was erroneous. Department Counsel asserts that: (a) Applicant’s re-obtaining an Iranian passport—regardless of the merits of the decision or the limited period of time involved—is a continuation of the risk that is sought to be avoided under the mitigating condition; (b) the mitigating condition was not intended to authorize holders to treat their FSO’s like “safe deposit boxes,” depositing passports with them for the purpose of obtaining a clearance, but retrieving them when expedient; and (c) simply having a good reason for exercising citizenship of another country does not mitigate the associated security concerns.

If an applicant surrenders a foreign passport, the Judge must consider not only the bare fact of surrender, but also the overall facts and circumstances surrounding the applicant’s possession, use, and surrender of the foreign passport. *See, e.g.*, ISCR Case No. 02-00318 at 4 (App. Bd. Feb. 25, 2004). In this case, the Judge relies largely on the fact that Applicant obtained the passport openly and with the approval of his employer and various agencies of the U.S. government. The Judge also relied on the fact that, after he finished the Iranian adoption, Applicant reported to his company and tendered the passport, which was then destroyed. The Judge does not explain how the fact that Applicant was open about the obtaining of the passport negated his expression of a preference for Iran. Applicant had held a security clearance for several years, and had, in fact, proffered an earlier Iranian passport to his employer. Record evidence establishes that it was his understanding at the time that his employer would hold the passport. There is nothing in the record to indicate Applicant was concerned about his employer holding his Iranian passport for him. Indeed, Applicant sought the use of the passport upon the commencement of the adoption process. It was then he learned that the passport had been destroyed. Applicant then applied for and received a new Iranian passport, and traveled to Iran on it. The Judge’s brief discussion of this issue in his analysis suggests that the destruction of this second Iranian passport settled the issue of mitigation. This was error as the Judge’s analysis did not consider important aspects of the case. Notwithstanding the destruction of the most recent Iranian passport, the totality of facts and

² “[T]he 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.”

³ “[T]here 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.”

⁴ “[C]ontact 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.”

circumstances surrounding this issue raise significant doubts as to Applicant's future proclivities toward exhibiting preferences for Iran.⁵

Department Counsel asserts that the Judge's resolution of the case under Guideline B was erroneous. He states that Applicant's contact with his family in Iran is neither casual nor infrequent, and the Judge's sparse discussion in his analysis merely echos the language of the mitigating conditions and offers no explanation or nexus supporting their applicability. These arguments have merit. Given the nature of the security concerns under Guideline B and the common sense observation that family ties are generally stronger than non-family ties, evidence that an applicant has contacts with immediate family members in a foreign country raises a rebuttable presumption that those contacts are not casual in nature. *See* ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002). The record evidence in this case does not demonstrate that Applicant has rebutted the presumption. The Judge does not explain why he concludes that Applicant's ties to his Iranian family members are "casual" nor does he explain the significance of his conclusion that none of Applicant's relatives are involved with the government, military, or other entity in Iran. Also, the Judge does not explain the significance of his finding that Applicant's Iranian relatives are over retirement age. The Board has long recognized that regimes such as Iran do not necessarily have scruples about using aged or otherwise vulnerable persons under their control to advance their interests. *See, e.g.*, ISCR Case No. 03-24933 at 8 (App. Bd. Jul. 28, 2005)(There is no good reason to assume that a foreign country with an authoritarian government that has been identified as being involved with state-sponsored terrorism would have compunctions about exerting influence or pressure on its citizens just because they lack prominence or live modest, ordinary lives).

In his analysis, the Judge stresses his conclusion that Applicant and his siblings in the United States are busy building their lives here, and therefore do not concentrate on or express any interest in matters pertaining to Iran. Inasmuch as the Judge does not conclude (and indeed the evidence does not support) that Applicant and his siblings have little regard for their mother and other family members in Iran, such an analysis mischaracterizes the nature of the foreign influence threat. The level of Applicant's and Applicant's siblings' interest in Iran or in Iranian affairs has no bearing on the likelihood of persons within the Iranian government exploiting the presence of Applicant's family members in Iran, for whom there are significant ties of either affection or obligation with Applicant and his siblings in the U.S.

In support of the Judge's decision, Applicant engages in a "competing identities" analysis from the Adjudicative Desk Reference (ADR). Applicant's reliance upon portions of the ADR is misplaced. DOHA judges are required to decide cases by using the Adjudicative Guidelines, not the ADR. The ADR itself contains language indicating that it may not be cited as authority for

⁵Applicant argues that this case presents "a unique set of circumstances not anticipated by the persons drafting what many believe are outdated guidelines." Applicant does not further identify what he believes to be "unique circumstances." Moreover, to the extent he is asking us to consider the wisdom or legality of provisions of the Directive, it is well settled that the Board lacks the jurisdiction or authority to do so. *See, e.g.*, ISCR Case No. 04-01961 at 3 (App. Bd. Jul. 12, 2007); ISCR Case No. 04-10821 at 2 (App. Bd. Jul. 19, 2006).

denial or suspension of access. *See, e.g.*, ISCR Case No. 07-02253 at 3 (App. Bd. Mar. 28, 2008).

Department Counsel states that the Judge engaged in a piecemeal analysis when reviewing the case under the whole-person factors. This argument has merit. After a review of the Judge's whole-person analysis, the Board concludes that there is no indication in the language of the decision that the Judge considered the facts and circumstances surrounding Applicant's obtaining and use of an Iranian passport under Guideline C in tandem with his significant family ties in Iran under Guideline B. To fail to do so was error.

An Applicant with foreign familial ties to a country that is hostile to the United States bears a very heavy burden to show that neither he nor his family members in that country are subject to influence by that country. *See* ISCR Case No. 07-00029 at 3 (App. Bd. Dec. 7, 2007). The record evidence does not support the Judge's ultimate conclusion that Applicant has overcome that burden.

Order

The decision of the Administrative Judge granting Applicant a security clearance 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: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board