

KEYWORD: Guideline B

DIGEST: Applicant testified that he received the pre-hearing guidance which advised him of his right to have an attorney or persona representative at the hearing. Applicant has a masters degree from an American university.. Applicant has not demonstrated that he was denied due process. Adverse decision affirmed.

CASENO: 11-06925.a1

DATE: 12/13/2013

DATE: December 13, 2013

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In Re:)	
)	
-----)	ISCR Case No. 11-06925
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Wilfredo A. Ruiz, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 13, 2012, DoD 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). On October 1, 2013, after conducting a hearing,¹ Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert J. Tuider denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether Applicant was denied due process; whether the Department Counsel failed to meet her burden of production; whether the Judge failed to consider all of the evidence; whether the Judge failed properly to weigh the evidence; and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge’s Findings of Fact

Applicant is from Pakistan. He came to the U.S. in the mid-1990s and became a citizen of this country in the late 1990s. He has a master’s degree in computer science from a U.S. university. He married a U.S. citizen, divorcing her in 2011. Applicant owns some land in Pakistan worth about \$15,000. He owns no property in the U.S. He has \$7,000 to \$10,000 in a 401k plan and about \$4,000 in a U.S. bank account. Since becoming a citizen, he has voted in all U.S. elections in which he was eligible.

Applicant’s father and four of his siblings are citizens and residents of Pakistan. He communicates with his father and with two of his siblings on a weekly or bi-weekly basis. He has two siblings who are citizens and residents of other western countries. Applicant sends this family about \$400 a month.

Applicant has a friend who works for the government of Pakistan. He contacts this friend about every other month. Applicant enjoys an excellent reputation for his character.

Pakistan has supported the U.S. in its efforts to remove the Taliban from power. However, the Taliban, al Qaida, and other terrorist organizations operate within Pakistan, and the U.S. has identified several areas of that country that it considers to be safe havens for terrorists. In addition, some elements of the Pakistani government may be providing covert aid to terrorists in Pakistan. Credible reports suggest that Pakistani authorities use wiretaps and monitor mail, telephone, and electronic communications without the requisite court approval.

The Judge’s Analysis

¹The record does not reflect which party requested the hearing.

The Judge concluded that three of the Guideline B disqualifying conditions were raised by Applicant's circumstances: 7(a),² (b),³ and (e).⁴ In so concluding, he cited to evidence of Applicant's close family members who are citizens and residents of Pakistan, his frequent contact with them, his financial support to them, and his property interests in Pakistan. The Judge also considered the nature of the Pakistani government and its human rights record. Although noting that there was no evidence that the government had targeted Applicant's family, the Judge concluded that it was not possible to rule out that terrorist groups might do so.

In considering Applicant's case for mitigation, the Judge noted that Applicant has significant ties within the U.S. However, weighing these ties with those Applicant maintains within Pakistan, the Judge opined that there exists a threat to Applicant's family not so much from the government as from terrorist organizations there. He concluded that evidence concerning Applicant's ties within Pakistan must be awarded greater weight than evidence of his connections within the U.S.

Discussion

Applicant contends that he was denied due process. Specifically, he states that he was not made aware of his right to employ counsel to represent him at the hearing and that he was denied his right to call witnesses in his behalf. Applicant's appeal brief, and Department Counsel's reply brief, assert matters from outside the record. Although we cannot consider new evidence on appeal, we have considered such evidence insofar as it bears upon questions such as due process, jurisdiction, etc. *See, e.g.*, ISCR Case No. 12-01038 at 1-2 (App. Bd. Mar. 22, 2013).

The reply brief asserts that Applicant's SOR was accompanied by a DOHA cover letter that included information about Applicant's right to representation. It also asserts that, prior to the hearing, Department Counsel sent Applicant a letter advising him of the evidence to be submitted as part of the Government's case-in-chief. Included in this letter was advice about Applicant's right to counsel.⁵ In addition, DOHA sent Applicant pre-hearing guidance that advised Applicant of his right to be represented at the hearing by an attorney or some other personal representative. This guidance also provided information to Applicant of his right to present both testimonial and documentary evidence, although with the caveat that witness production is the sole responsibility

²Directive, Enclosure 2 ¶ 7(a): "contact with a foreign family member . . . or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or concern[.]"

³Directive, Enclosure 2 ¶ 7(b): "connections to a foreign person . . . that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information[.]"

⁴Directive, Enclosure 2 ¶ 7(e): "a substantial . . . property interest in a foreign country . . . which could subject the individual to heightened risk of foreign influence or exploitation[.]"

⁵Department Counsel attached copies of these letters to his brief. Neither letter was included in the record, though SOR cover letters have appeared in other case records. The inclusion in the record of the kind of letters Department Counsel attached to the reply brief can facilitate the resolution of issues such as the one before us.

of the person intending to offer the evidence. Applicant testified that he had received this letter. Tr. at 7. In each of these documents the advice about representation and evidence was consistent with the pertinent provisions of the Directive.⁶ We note that Applicant has lived in the U.S. for nearly 20 years and that he earned a master's degree from a university in this country. This evidence, along with the general quality of his oral presentation and of written documents composed by him and included in the record, demonstrates to the satisfaction of the Board that Applicant has sufficient fluency in the English language and general sophistication to have enabled him to comprehend the guidance provided him, both about his right to counsel and his right to present evidence, including testimonial evidence.

Applicant cites to the Constitutional right to counsel. The doctrine that Applicant has cited is applicable to criminal law. DOHA proceedings are civil in nature, and DOHA applicants are not afforded the procedural protections received by criminal defendants. *See, e.g.*, ISCR Case No. 03-21262 at 2 (App. Bd. Jul. 10, 2007).

Applicant did not bring evidence or witnesses to the hearing. However, upon recommendation of Department Counsel, the Judge held the record open after the hearing to enable Applicant to provide documentary evidence (Tr. at 10-11), and Applicant took advantage of that opportunity, submitting several post-hearing documents that were included as Applicant Exhibits. Applicant accompanied his exhibits by a letter. Nowhere in this letter, or in his presentation during the hearing, did Applicant express a desire to call live witnesses or claim to have been unaware of his right to do so. Indeed, his appeal brief does not list any actual witness whom he would have called, nor does it contain any proffer of expected testimony that he wished to present. Rather, Applicant's generalized, non-specific assertion that he was denied a right to call witnesses is raised for the first time on appeal and is not supported by the record. Based upon our examination of the record as a whole, we conclude that Applicant was not denied the due process afforded by the Directive. *See, e.g.*, ISCR Case No. 11-12204 (App. Bd. Jul. 11, 2013).

Applicant contends that the Government failed to meet its burden of production. When an applicant controverts an allegation in the SOR, the Government bears the burden of producing substantial evidence of the facts supporting the allegation. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." Directive ¶¶ E3.1.14; E3.1.32.1. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant's security-worthiness. *See, e.g.*, ISCR Case No. 11-08063 at 3-4 (App. Bd. Jul. 19, 2013). The presence of close relatives in a country in which terrorists operate and/or which has a poor human rights record is significant in Guideline B cases. *See, e.g.*, ISCR Case No. 10-09986 at 3 (App. Bd. Dec. 15, 2011). Moreover, the Government is not required to prove affirmatively that a country specifically targets U.S. citizens in order to gather protected information. *See, e.g.*, ISCR Case No. 08-02864 at 4 (App. Bd. Dec. 29, 2009). Factors such as the obscurity of foreign relatives or the failure of foreign persons to contact those relatives do not provide a meaningful measure of whether an applicant's circumstances pose a security risk. *See, e.g.*, ISCR Case No. 07-13696 at 5 (App. Bd. Feb. 9, 2009).

⁶The SOR states that the Directive was sent to Applicant.

In the case before us, Applicant admitted each of the SOR allegations. Therefore, the allegations were not controverted, thereby relieving the Government of its burden of production. Nevertheless, the Government presented evidence such as Applicant's security clearance application and his answers to DOHA interrogatories, in both of which he discussed his connections in Pakistan. It also presented numerous official notice documents regarding the geopolitical situation in that country. These documents, along with Applicant's SOR admissions and his testimony at the hearing, provide substantial evidence that Applicant has close relatives living in a country in which terrorist activity occurs and in which the government monitors telephonic and electronic communications, and that he has a significant property interest there as well. Such evidence is sufficient to establish a heightened risk that Applicant's relatives or property could become a means through which he could come to the attention of persons interested in acquiring U.S. classified information and be subjected to pressure or coercion. We find no error in the Judge's treatment of the disqualifying conditions. Moreover, given the frequency of Applicant's communications with his Pakistani relatives and his numerous travels to that country, we find no reason to disturb the Judge's application of the mitigating conditions. Applicant's brief on appeal is not sufficient to rebut the presumption that the Judge considered all of the evidence in the record, nor has he shown that the Judge mis-weighed the evidence. *See, e.g.,* ISCR Case No. 11-12875 at 2 (App. Bd. Sep. 17, 2013).

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The decision 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."

Order

The 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

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