

KEYWORD: Guideline C; Guideline B

DIGEST: The briefs and attachments raise a a reasonable question as to whether Applicant made a good-faith effort to provide evidence to the Judge. Adverse decision remanded.

CASENO: 12-07667.a1

DATE: 03/11/2013

DATE: March 11, 2013

In Re:	)	
	)	
-----	)	ISCR Case No. 12-07667
	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Paula E. Phinney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On August 6, 2012, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that

decision—security concerns raised under Guideline B (Foreign Influence) and Guideline C (Foreign Preference) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Department Counsel requested a hearing. On December 12, 2012, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Matthew E. Malone 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 the Judge considered all of the evidence and whether the Judge failed properly to apply mitigating conditions. The Judge’s favorable findings under Guideline B are not at issue in this appeal. Consistent with the following, we remand the case to the Judge.

### **The Judge’s Findings of Fact**

Applicant is a 29-year-old dual citizen of Pakistan and the U.S. Born in Pakistan, he emigrated to the U.S. in the late 1990s, becoming a citizen of this country in the mid-2000s. He obtained a U.S. passport a few months after his naturalization. He also held a Pakistani passport, which he had renewed in the early 2000s and again five years later. This current Pakistani passport will expire at the end of 2013.

Applicant advised an OPM investigator that he would relinquish his Pakistani passport, stating that he had no plans to use it in the future. He testified at the hearing that he had relinquished the passport to his security officer at the beginning of a deployment in support of U.S. military operations.

At the close of the hearing, the Judge held the record open to give Applicant an opportunity to provide information about his foreign passport. He was advised that the status of his Pakistani passport should be documented in the post-hearing submissions. However, Applicant provided no corroborating evidence concerning his claim to have surrendered his passport.

### **The Judge’s Analysis**

The Judge concluded that Applicant’s continued possession of a Pakistani passport raised security concerns under Guideline C. The Judge stated that he found Applicant to be credible and straightforward in his claim to have relinquished his passport. However, the Judge stated that Applicant’s failure to corroborate this claim, despite having been given an opportunity to do so, vitiated his case for mitigation. “Because Applicant did not document the status of his Pakistani passport, I conclude . . . that he has not mitigated the securing concern under this guideline.” Decision at 10.

### **Discussion**

In arguing his first assignment of error, Applicant has raised an issue of due process. In doing so, he has asserted facts outside the record, as has the Chief Department Counsel in his Reply Brief. We are not permitted to consider new evidence on appeal. Directive ¶ E3.1.29. However,

in appropriate cases, we have considered matters outside the record to the extent that they bear upon questions of due process or jurisdiction. *See, e.g.*, ISCR Case No. 10-01400 at 3 (App. Bd. Jan. 3, 2013).

In this case, Applicant has attached to his Appeal Brief documents purporting to corroborate his claim to have relinquished his passport. In addition, he has included an e-mail transmission, dated November 15, 2012, which was before the close of the record. This transmission has as its subject “Passport Reference” and it states that it contained an attachment. It appears originally to have been sent from Applicant’s security manager in a combat zone to Applicant, who then forwarded it to DOHA personnel. It provides no further indication of its contents, and there is nothing explicitly to demonstrate that it contained the evidence attached to the Brief. The Chief Department Counsel asserts unequivocally that no one at DOHA, to include the Department Counsel assigned to the case, received the documents at issue here. However, the briefs of the parties and the matters attached thereto raise a reasonable question as to whether Applicant made a good-faith effort to provide corroborating evidence to the Judge, a question that we are not able to resolve based on the information before us. Accordingly, we conclude that the best resolution of this case is to remand it to the Judge for further processing. The other issues raised by Applicant are not ripe for consideration.

### **Order**

The Decision is **REMANDED**.

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