

KEYWORD: Guideline C; Guideline B

DIGEST: To the extent the Judge erred in his treatment of Guideline C disqualifying conditions, such error is harmless in light of the Judge's sustainable application of Guideline C mitigating conditions. The Judge's consideration of Guideline B was not confined to the possibility of coercive means of influence. Favorable decision affirmed.

CASENO: 07-13232.a1

DATE: 07/08/2008

DATE: July 8, 2008

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| In Re: |) | |
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| ----- |) | ISCR Case No. 07-13232 |
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| Applicant for Security Clearance |) | |

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Emilio Jaksetic, Esq., Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security

clearance. On November 26, 2007, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline C (Foreign Preference) and B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 31, 2008, after the hearing, Administrative Judge Edward W. Loughran granted Applicant’s request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge erred in concluding that Applicant’s status did not raise Guideline C security concerns; and whether the Judge’s favorable decision under Guideline B is arbitrary, capricious, or contrary to law. Finding no error, we affirm.

The Judge made the following pertinent findings of fact: Applicant is an engineer working for a defense contractor. Born in India, he came to the U.S. to attend graduate school. He has held an Indian passport, though he never used it.

His parents are residents and citizens of India, as are his mother-in-law and father-in-law. He has three siblings, one of whom is a citizen and resident of India, the remaining two being citizens and residents of the U.S. Applicant and his wife traveled to India four times in the recent past to visit their parents. He holds no foreign assets and has no intention of returning to India to live.

Applicant has held a status called “Overseas Citizen of India” (OCI). He did so in order to facilitate foreign travel. According to a Department of State Consular Information Sheet,¹ OCI is a status which permits a holder to travel to and from India, to work and study there, and to obtain property there. It is not a “dual nationality” program, being more in the nature of a green card. This document states that OCI status does not confer Indian citizenship upon a holder. Applicant has renounced his OCI status out of concern that it would affect his clearance eligibility. He had previously surrendered his Indian passport when applying for OCI status.

Department Counsel argued on appeal that the Judge’s favorable decision under Guideline C did not take into account significant contrary record evidence. OCI status, he contended, raises a serious question as to whether Applicant has shown a preference for India over the U.S. and that it was error for the Judge to conclude that Applicant’s OCI status did not raise security concerns under Guideline C. He stated that “it was arbitrary, capricious, and contrary to law for the . . . Judge to conclude that only full foreign citizenship is covered under Adjudicative Guidelines ¶ 10.” Department Counsel Brief at 7. The Board has considered these arguments in light of the Judge’s decision and the record as a whole, paying particular attention to the previously- referenced Consular Information Sheet, an official U.S. document whose contents are binding upon the Judge. *See* ISCR Case No. 05-11292 at 4, n.1 (App. Bd. Apr. 12, 2007) (“ . . . Official pronouncements by the President, State Department, Department of Defense, or other appropriate federal agency on matters

¹Identified in the record as Hearing Exhibit II.

of national security are equivalent to legislative facts for purposes of DOHA adjudications in that they bind the Judge and are not subject to refutation . . .”)

Without elaboration, the Consular information Sheet states that the OCI program does not grant Indian citizenship. The gravamen of Department Counsel’s argument is that the OCI program establishes some form of citizenship, at least in the eyes of the Indian government. The Judge had to consider all the evidence but was bound by the Consular Information Sheet. The record provides no basis to hold that the Judge’s analysis of Applicant’s OCI status was error. Moreover, there is ambiguity in the Judge’s decision in that, after declaring that no Foreign Preference disqualifying condition was raised by the OCI status, the Judge goes on to rely on Applicant’s renunciation of his OCI status and surrender of his OCI card in his overall analysis of Guideline B.² This suggests that the Judge may, in fact, have attributed some security significance to the OCI status, notwithstanding his one unequivocal statement to the contrary. In any event, the Judge, in effect, concluded in the alternative that Applicant had satisfied two Guideline C mitigating conditions³ and this conclusion is sustainable on this record. Therefore, to the extent the Judge erred in his treatment of the disqualifying conditions, such error is harmless.

Department Counsel also argues that it was arbitrary, capricious, and contrary to law for the Judge to conclude that only full citizenship is covered under the Guidelines, ¶ 10. The Board does not interpret the Judge’s decision as asserting or implying such a position.

Concerning Guideline B, Department Counsel is correct that the Government’s security concerns are broader than the limited possibility of the use of coercive means of influence. However, a review of the Judge’s decision leads the Board to conclude that the Judge did not confine his analysis under Guideline B to only coercive means of influence. Department Counsel’s brief cites several passages where the Judge spoke solely in terms of “coercion.” Yet, in other portions of his Decision, the Judge uses terms like “inducement,” “persuasion,” and “conflicts of interest” when discussing the potential security concerns raised by the presence of Applicant’s family members in India. Judges’ decisions are not measured by a standard of perfection. The fact that the Judge did not engage in a detailed discussion of bribery and illegal gratuities as forms of foreign influence, and did not engage in the type of conflict of interest analysis proffered by Department Counsel, does not establish error. The terms used by the Judge, though general, are broad in scope and fairly embrace the concept of non-coercive means of influence. The Judge’s use of them indicates that he considered an appropriate spectrum of types of foreign influence, and “a satisfactory explanation for [his] conclusions, including a rational connection between the facts found” and his ultimate decision, both as to the application of the mitigating conditions and the whole-person analysis. *See* ISCR Case No. 03-22861 at 2-3 9App. Bd. Jun. 2, 2006).

²It is not necessarily contradictory to find conduct or circumstances mitigated for the purposes of one guideline but still disqualifying in the context of relevant matters in another guideline.

³Directive ¶ E2.11(b): “[T]he individual has expressed a willingness to renounce dual citizenship” and Directive ¶ E2.11(e): “[T]he passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated[.]”

The record supports the Judge's conclusion that Applicant has met his burden of persuasion that it is "clearly consistent with the interests of the national security" for him to have a clearance. *See Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). "The Board need not agree with a Judge's decision in order to find it sustainable." ISCR Case No. 06-23881 at 2 (App. Bd. November 2, 2007). Accordingly, the Board concludes that the Judge's decision, as to both Guidelines B and C, is sustainable.

Order

The Judge's favorable security clearance decision is AFFIRMED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairman, 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