

KEYWORD: Guideline B

DIGEST: Applicant's brother-in-law was a retired high level officer in the Peruvian military and now has a high level executive position in that country's government. Adverse decision affirmed.

CASENO: 13-00397.a1

DATE: 05/22/2014

DATE: May 22, 2014

In Re:)
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-----) ISCR Case No. 13-00397
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)
Applicant for Security Clearance)
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)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

John Bayard Glendon, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On August 28, 2013, 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). Applicant requested a hearing. On February 20, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Rita C. O’Brien 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’s findings of fact contained errors; whether the evidence was sufficient to raise security concerns; whether the Judge erred by considering evidence not alleged in the SOR; and whether the Judge’s decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge’s Findings of Fact

Born and educated in the U.S., Applicant is married to a Peruvian citizen. They have a young son and were expecting a daughter at the time of the hearing. Applicant has worked for his current employer since late 2011. He was granted a top secret clearance in 2006. In 2010, he underwent a periodic reinvestigation, as a consequence of which he was issued an SOR. The SOR contained several allegations under Guideline B. Applicant failed to submit a timely answer to the SOR, resulting in the revocation of his clearance.

Applicant’s wife is a dual citizen of the U.S. and Peru. She became a naturalized U.S. citizen in the mid-2000s. The sole allegation under the current SOR pertains to Applicant’s brother-in-law, whom the Judge identified as “Officer A.” This person is a citizen and resident of Peru. He was a high-ranking officer in the Peruvian military and, since his retirement, has served in a “high-level executive position” with the government of that country. Decision at 3.

Applicant has had personal interactions with Officer A about 15 times since the late-2000s. He usually sees him when visiting Peru. Applicant gave him assistance in securing a hotel room during an official visit to the U.S. On another occasion, he gave Officer A help with his computer. He also helped purchase clothing for him. In a 2010 security clearance application (SCA), he stated that he had telephone contact with Officer A three to seven times a year. In a later SCA, he stated that he and Officer A had quarterly contact, and, in his reapplication letter following the revocation of his clearance, he stated that he had contact with his official five times a year.

Additionally, Applicant stated that his wife was in touch with her sister, Officer A’s wife, anywhere from daily to “a few times a week.” *Id.* Applicant’s relationship with his sister-in-law was not alleged in the SOR. Applicant has traveled to Peru seven times between late 2007 and late 2011. He did so to attend family events. He informed his employer about his travels, in accordance with the security training he had received. He submitted into evidence a “partial copy of a foreign contact notification form,” that he had completed when Officer A’s wife and three friends had visited Applicant and his wife in the U.S.

Peru has a history of military coups. One such event in 1968 led to a period of inflation and social chaos, during which terrorist groups like Shining Path emerged. Shining Path is financed in

part by narcotics trafficking, and the U.S. State Department has designed it a foreign terrorist organization. Although it has been weakened, it still is a threat to Peruvian security. It has attacked at least 87 persons in 2012 and has kidnaped both Peruvian citizens and foreign workers. It has expressed an intent to target U.S. interests.

The U.S. and Peru have a strong cooperative relationship, and this country is Peru's largest foreign investor and trading partner. Human rights violations have occurred in Peru, and public officials have engaged in corrupt practices. Shining Path has engaged in human rights abuses, including killings, recruiting child soldiers, extortion, and hostage taking.

The Judge's Analysis

The Judge cited to administrative notice documents concerning Shining Path's activities in Peru. She stated that Applicant is related to Officer A, who has past and current ties to the Peruvian government. She stated that this person's status creates a heightened risk of foreign exploitation and a potential conflict of interest.

She also cited to evidence of Applicant's own contacts with his brother-in-law, noting that they have talked several times over the past five years and that they shared a residence during one of Officer A's visits to the U.S. She also noted that Applicant has assisted Officer A with hotel reservations, clothing purchases, and computer support. She concluded that Applicant's contacts with Officer A are not so casual as to mitigate a concern that this officer is a means through which Applicant could be subjected to foreign influence or coercion.

In the whole-person analysis, the Judge acknowledged evidence favorable to Applicant, such as his ties within the U.S., his U.S. birth, and his service to the U.S. However, she stated that, through his wife, Applicant will continue to have family ties to a government official of a country in which terrorist activity occurs.

Discussion

Applicant has challenged some of the Judge's findings of fact. We examine a Judge's findings to see if they are supported by substantial evidence, which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all of the contrary evidence in the same record." Directive ¶ E3.1.32.1. *See also* ISCR Case No. 12-12172 at 3 (App. Bd. Jan. 9, 2014). Applicant cites to his testimony that the laptop for which he provided assistance was owned by the daughter of his wife's brother rather than Officer A. While Applicant is correct in his description of his hearing testimony, the context of the Judge's finding was that Applicant had a family connection with Officer A, both through his wife and directly himself. In that sense, irrespective of whether the laptop belonged to Officer A or the daughter of his wife's brother, Applicant's having provided advice on a matter in which Officer A had expressed an interest—computer operating systems that might be useful to the Peruvian military—bears upon the closeness of Applicant's family connections and supports the Judge's overall analysis. It is not

likely that the Judge's analysis would have changed if she had identified the owner of the computer as the wife's brother's daughter. Therefore, to the extent that this is an error, it is harmless. The Judge's material findings of security concern are supported by substantial record evidence or constitute reasonable inferences or conclusions from the evidence.

Applicant argues that the Judge considered conduct not alleged in the SOR, for example the personal assistance he provided Officer A on several occasions. However, a Judge is required to make pertinent findings regarding the allegations in the SOR. Directive ¶ E3.1.25. These findings should be sufficiently detailed so as to provide an appropriate context for his or her analysis of an applicant's case. In doing so, a Judge can be expected to make findings on things that are not explicitly stated in the SOR but without which a reasoned decision may be difficult or even impossible to achieve. To that end, a Judge may consider conduct and matters not alleged in the SOR as part of his or her evaluation of the applicant's case for mitigation and in performing a whole-person analysis, among other things. *See, e.g.*, ISCR Case No. 09-08108 at 6 (App. Bd. Feb. 15, 2011). In this case, we find no reason to believe that the Judge considered the cited evidence improperly, for example as evidence of security concerns beyond the scope of the SOR. The SOR alleged that Applicant's family connection with his brother-in-law presented a risk that Applicant could be subjected to foreign influence or coercion. The Judge's findings were reasonably directed toward evaluating the nature and extent of Applicant's relationship with his brother-in-law and were relevant to her whole-person analysis. We find no error in the Judge's treatment of matters not explicitly addressed in the SOR.

Applicant denies that his brother-in-law raises a concern under Guideline B. However, the Directive presumes a nexus between admitted or proven conduct under any of the Guidelines and an applicant's security worthiness. *See, e.g.*, ISCR Case No. 11-06925 at 4 (App. Bd. Dec. 13, 2103). In this case, Applicant admitted the facts contained in the SOR allegation, and the Government presented substantial evidence concerning those facts as well. Record evidence of Applicant's connections to his brother-in-law, both direct and through Applicant's wife; his brother-in-law's status as a government official; and the geopolitical situation in Peru are sufficient to raise concerns under Guideline B, even without resort to the Directive's presumption of nexus. We find no basis to disturb the Judge's conclusion that Applicant's family connection in Peru raises a Foreign Influence concern.

Applicant's brief cites to other DOHA cases that, he contends, support his effort to obtain a clearance. We have given these cases due consideration as persuasive authority. However, other Hearing Office cases are binding neither on other Hearing Office Judges or on the Appeal Board. *See, e.g.*, ISCR Case No. 13-00464 at 3(App. Bd. Feb. 20, 2014). He also cites an Appeal Board case in which we reversed a grant of a clearance to an applicant whose father had been a high ranking military officer in a foreign country. He distinguishes his case from that one on the ground that he is not a direct blood relative of Officer A. However, the cited case does not stand for the proposition that family connections more attenuated than direct blood relationship are necessarily of minimal security significance. Each case has to be decided on its own merits. The DOHA cases that Applicant has cited are not sufficient to demonstrate that the Judge's decision was erroneous.

Applicant notes the rebuttable presumption that a person has ties of obligation to the immediate relatives of his or her spouse. *See, e.g.*, ISCR Case No. 11-04980 at 4 (App. Bd. Sep. 21, 2012). He argues, however, that Officer A is not an immediate relative of Applicant's wife, citing to state and federal cases and other legal sources regarding in-laws, relationships by affinity, etc., contending that the presumption does not arise under his circumstances. Again, each case must be decided on its own merits. National security decisions do not turn on legal distinctions that might have more purchase in other types of litigation. *See, e.g.*, ISCR Case No. 01-07629 at 3 (App. Bd. Apr. 5, 2002). A foreign citizen with whom Applicant has communicated four to five times a year and with whose spouse Applicant's wife communicates several times a week if not daily is someone with whom Applicant can reasonably be said to have familial ties relevant to a security clearance analysis.

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'an
Michael Y. Ra'an
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