

KEYWORD: Guideline B

DIGEST: The Directive presumes a nexus between admitted or proven conduct under any of the Guidelines and an applicant’s worthiness for a clearance. A Judge is not obligated to hold a record open for the presentation of additional evidence, especially when neither party requests it. Adverse decision affirmed.

CASE NO: 14-02950.a1

DATE: 05/14/2015

DATE: May 14, 2015

In Re:)	
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-----)	ISCR Case No. 14-02950
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Amanda M. Wilwert, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On July 28, 2014, 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 4, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert E. Coacher 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 erred in concluding that his case raised security concerns; whether Applicant was denied due process; 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 was born in India, coming to the U.S. in the early 2000s. He became a U.S. citizen the following decade. Married with two children, his family members became naturalized U.S. citizens as well. Applicant has several relatives who are citizens and residents of India, as is his mother-in-law. Applicant's father-in-law is a citizen of India who resides in a European country. One of Applicant's siblings is an officer in the Indian Army, whose duties are not involved with the Indian intelligence service. Applicant contacts this sibling about every four to six weeks. Another sibling is a retired college president, whom Applicant contacts about every five to six weeks. Applicant's wife contacts her mother weekly.

Applicant owns a home in the U.S., the equity in which is about \$600,000, and he has nearly \$500,000 in retirement accounts. Applicant is active in various civic organizations in the U.S. He owns investment property in India, valued at around \$580,000. He receives rental income of about \$8,000 annually from this property. He has contacted an Indian realtor to sell this property, although he submitted no evidence to show that an offer of sale had been made.

India is a democratic republic, a strategic ally of the U.S. The U.S. is India's largest trading and investment partner, and the new prime minister seeks to further the security relationship between his country and the U.S. Nevertheless, there are tensions between India and the U.S. India cooperates with Iran and its military forces. It is also one of the most active collectors of sensitive U.S. economic, industrial, and proprietary information. The U.S. has sanctioned Indian scientists and companies for transferring technology related to weapons of mass destruction to Iran. There are also cases in which persons have illegally exported or attempted to export U.S. restricted technology.

The Judge's Analysis

The Judge concluded that Applicant's circumstances raised Disqualifying Conditions (DC) 7(a),¹ (b),² (d),³ and (e).⁴ He cited to evidence that Applicant has frequent contact with his sibling in the Indian Army, his contacts with other siblings being less frequent. He also noted evidence of Applicant's wife's weekly contact with her mother. He concluded that Applicant's relationships with these relatives posed a "heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion." Decision at 7.

The Judge concluded that Applicant had mitigated the concerns arising from his Indian relatives other than the Army officer. He also concluded that Applicant had not mitigated concerns regarding his financial holdings in India. He stated that "Applicant was unable to fully meet his burden of showing that he can be expected to resolve any conflict of interest in favor of the U.S. interest." *Id.* at 8. In the whole-person analysis, the Judge concluded that "Applicant's [sibling's] military connection and his substantial property interests in India create a potential conflict that he failed to provide sufficient mitigating evidence to overcome." *Id.* at 9.

Discussion

Applicant contends that the Judge erred in concluding that his connections within India raised concerns under Guideline B. He stated that the Judge made errors that created "an unfounded concern about potential foreign influence[.]" Appeal Brief at 6. He also argues that the evidence does not support a conclusion that his financial interests in India pose a heightened risk of exploitation, insofar as he is not dependent on them *Id.* at 7.

The Directive presumes a nexus, or a rational connection, between admitted or proven circumstances under any of the Guidelines and an applicant's worthiness for a security clearance. The Government is not required to provide direct evidence of such a nexus. *See, e.g.*, ISCR Case No. 09-05812 at 3 (App. Bd. Dec. 1, 2011). In the case before us, a reasonable person could conclude that Applicant's sibling in the Indian army is a person through whom Applicant could come to the attention of those interested in acquiring U.S. information. *See, e.g.*, ISCR Case No. 11-12623 at 5 (App. Bd. Feb. 2, 2015). Moreover, the Directive does not require actual dependence on foreign financial or property interests for them to raise concerns under DC 7(e). What constitutes

¹Directive, Enclosure 2 ¶ 7(a): "contact with a foreign family member, business or professional associate, friend, 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 coercion[.]"

²Directive, Enclosure 2 ¶ 7(b): "connections to a foreign person, group, government, or country 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[.]"

³Directive, Enclosure 2 ¶ 7(d): "sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion[.]"

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

a “substantial interest” is a matter to be decided on a case by case basis. *See* ISCR Case No. 11-06925 at 2, 4 (App. Bd. Dec. 13, 2013), in which foreign property valued at \$15,000 was sufficient to raise this Disqualifying Condition. In the case before us, a reasonable person could believe that property valued at nearly \$600,000 is substantial, whether by itself or in conjunction with Applicant’s overall net worth.

When Applicant’s sibling and his property are viewed along with India’s status as a nation that actively seeks U.S. protected information and the presence within India of persons and organizations that have provided weapons technology to Iran, a reasonable person could conclude that Applicant is at a heightened risk for exploitation, pressure, or coercion. In discussing evidence regarding his military sibling, Applicant notes some apparent inconsistencies in the Judge’s analysis, in particular concerning the relative frequency of his communication with this sibling and with others. To the extent that this is an error, however, it does not appear to have been decisive in the Judge’s overall decision and, therefore, is harmless.

Applicant argues that the Judge erred by not concluding that his relationship with his military sibling was casual. There is a rebuttable presumption that an applicant’s contacts with immediate family members in a foreign country are not casual, which the record evidence in this case does not rebut. *See, e.g.*, ISCR Case No. 13-00705 at 3 (App. Bd. Jun. 25, 2013).

Applicant contends that the Judge denied him due process, in that he did not give him a reasonable opportunity to present further evidence concerning his intent to sell the property in India. Prior to the hearing, Applicant received a letter from DOHA outlining his rights, including his right to present evidence. Moreover, the SOR was sent to Applicant accompanied by a copy of the Directive, which includes provisions about an applicant’s rights and duties concerning the submission of mitigating evidence. Applicant submitted documents for the Judge’s consideration, all of which were admitted. Tr. at 17-18. At the end of the hearing, the Judge asked Applicant if he had any further evidence, to which he replied that he did not.⁵ Tr. at 52. The record supports a conclusion that Applicant was properly advised of his rights and that he did not request an opportunity to present additional evidence beyond that already submitted. *See* ISCR Case No. 12-07751 at 3 (App. Bd. Apr. 7, 2015) (A Judge is not under an obligation to hold a record open after a hearing for the submission of other evidence, especially when neither party requests it). Applicant was not denied the due process afforded by the Directive.

⁵In presenting this argument, Applicant contends that neither the Judge nor Department Counsel asked him for more evidence concerning his proposed sale of his property in India. He states that, had they done so, he could have provided further testimony. The Directive is clear, however, that “the applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15. A Judge has no authority to advise an applicant of the quantum of evidence that he or she should present or independently to investigate the allegations in an SOR. *See, e.g.*, ISCR Case No. 14-00434 at 3 (App. Bd. Jan. 20, 2015). Applicant requests that we remand the case to enable him to present more evidence. We have no authority to remand a case for this purpose. *See, e.g.*, ISCR Case No. 14-00976 at 3 (App. Bd. Feb. 5, 2015).

Applicant challenges the Judge’s mitigation analysis, citing to his connections within the U.S. in arguing that he can be expected to resolve any conflict of interest in favor of the U.S. However, Applicant is, in effect, posing an alternative interpretation of the record, which is not enough to show that the Judge weighed the evidence in a manner that was arbitrary capricious, or contrary to law. *See, e.g.*, ISCR Case No. 14-00234 at 3 (App. Bd. Apr. 6, 2015).

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
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Order

The Decision is **AFFIRMED**.

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Signed: Michael Y. Ra'anan

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Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
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Signed: James E. Moody

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