



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
) ISCR Case No. 18-01780
)
Applicant for Security Clearance)

Appearances

For Government: Liam Apostol, Esq., Department Counsel
Kelly Folks, Esq., Department Counsel
For Applicant: *Pro se*

03/08/2019

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for access to classified information. He presented sufficient evidence to explain, extenuate, or mitigate the security concerns stemming from his ties to the country of India during the security clearance process. Accordingly, this case is decided for Applicant.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on February 20, 2016. This document is commonly known as a security clearance application. On August 22, 2018, after reviewing the application and the information gathered during a background investigation, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) sent Applicant a Statement of Reasons (SOR), explaining it was unable to find that it was clearly consistent with the national

interest to grant him eligibility for access to classified information.¹ The SOR is similar to a complaint in a civil court action. It detailed the factual reasons for the action under the security guideline known as Guideline B, Foreign Influence. Applicant answered the SOR on September 10, 2018, and requested a hearing before an administrative judge. The case was assigned to me January 16, 2019. A notice of hearing was issued on January 28, 2019, scheduling the hearing for February 22, 2019. Government Exhibits (GX) 1-2 were admitted into evidence without objection. Applicant testified but presented no documentation. The transcript was received on March 4, 2019. Based on a review of the pleadings, testimony and exhibits, eligibility for access to classified information is granted.

Procedural Matters

Department Counsel requested that I take administrative notice of certain facts regarding the Republic of India. Applicant did not object and the memorandum of administrative notice and source documents were entered into the record as Government Hearing Exhibit 1.

Findings of Fact

In his Answer to the SOR, Applicant admitted SOR ¶¶ 2.a-g. These admissions are incorporated in my findings of fact. Applicant provided explanations for the SOR allegations.

Applicant is 50 years old and has an undergraduate degree in engineering from a university in India. He was born in India, came to the United States in 1995, and was naturalized in 2008. His spouse is a citizen of India, and is a permanent resident of the United States. (GX 1) She is applying for U.S. citizenship next month. (Tr. 13) Applicant and his wife have two children who were born in the United States. (Tr. 24) He has renounced his Indian citizenship. He does possess an Overseas Citizen of India Card (OIC) card from India, which is used as a visa. He carries a U.S. passport. (Tr. 19) Since 2012, he has been employed by a defense contractor. However, Applicant has been working as a consultant in the field for many years. (GX 1)

Applicant's mother is a citizen and resident of India. She is a 70-year-old widow who elects to remain in India. Applicant calls his mother every Sunday. He visits his mother and stays in her house when he travels to India. (Tr. 31) (SOR 1.a) Applicant has two sisters who are citizens and residents of India. He calls them occasionally. (SOR 1.b) Applicant's mother-in-law is also a 70-year-old widow who is a citizen and resident of India. (SOR 1.c) Applicant has three cousins who are residents and citizens of India. (SOR 1.d) He also has an uncle who is a resident and citizen of India who is a retired

¹ This action was taken under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive). *I decided the case using new AGs effective June 8, 2017, as well as the former guidelines, and my conclusions would be the same under either guideline.*

clerk. (SOR 1 .e) None of his relatives work for the Indian government or know the nature of Applicant's work. Applicant's only contact with the extended family members occurs when he visits his mother in India. (GX 2) He has called his one cousin a year ago to speak about a loan. (Tr. 45)

Applicant visited India about eight times from 2009 to 2016. His two children needed speech therapy as they are not verbal and have special needs. In India they were able to attend speech therapy six days a week. Applicant, his wife and children stayed for seven months. Applicant has otherwise visited his family about every other year. (Tr. 20) He has never had any contacts with the Indian government or military. He has not voted in any Indian elections.

In 1998, Applicant and his wife purchased property in India, with an estimated total value of approximately \$360,000. (Tr. 30) He and his wife own three houses and an apartment. Applicant fully disclosed all possible financial interests in India on his security clearance. He believes the property has devalued about 15 to 20 percent. (Tr. 26) Applicant is in the process of liquidating the properties except for one home for his mother to live in. Applicant stated that one house is in the process of being sold and that there is an agreement in place with a deposit. (Tr.26) Applicant decided to sell the properties because he does not intend to return to India. (GX 2)

Applicant provided loans for his family over the years estimated to be about \$125,000. He stated that most of the loans have been repaid. His cousin used the money to send his son to university. (Answer) One cousin started a business with \$30,000 that Applicant loaned him in 2009. (Tr.15)

Applicant and his wife currently own a house in the United States that is worth about \$615,000. (Tr. 49) His current salary is about \$225,000. He approximates assets in a value of about a million dollars. (Tr.50) He and his wife want to settle in his current state as they want their two children to receive a fine education. He was emphatic that the United States is home now and forever.

Applicant's wife speaks to her mother, who has always been a homemaker, every other day. (Tr. 33) Applicant's mother-in-law visited the United States in 2007 when Applicant's child was born. He communicates randomly with his wife's sisters, and his two brothers-in-law. They work in private business and have no connections to the Indian government. None of his wife's family know about his work. (GX 2)

Applicant stated that his wife knows about the security clearance process. He repeatedly stated that his oath of allegiance to the United States is one that he does not take lightly. He votes in U.S. elections. Nothing could compel him to do something against the United States.

Administrative Notice (Republic of India)

In response to the Government's request, to which Applicant did not object, I have taken administrative notice of the following relevant facts about the Republic of India:

- The 2000 and 2008 Annual Reports to Congress on Foreign Economic Collection and Industrial Espionage identified India as being involved in economic collection and industrial espionage.
- In June 2013, a member of parliament in India and a close advisor to a now-deceased chief minister was among those indicted by the U.S. Department of Justice for allegedly soliciting bribes for himself and other government officials in India in return for approving licenses to mine titanium minerals.
- As of March 2016, India continued to experience terrorist and insurgent activities. Anti-Western terrorist groups active in India, some of which are on the U.S. government's list of foreign terrorist organizations, include Islamist extremist groups Harkat-ul-Jihad, Harakat ul-Mujahidin, Indian Myjahideen, Jaish-e-Mohammed, and Lashker-e Tayyiba.
- As of 2015, the most significant human rights problems involved police and security force abuses, including extrajudicial killings, torture, and rape; corruption remained widespread and contributed to ineffective responses to crimes, including those against women, children, and members of scheduled castes or tribes, and societal violence based on gender, religious affiliation, and caste or tribe. Other human rights problems included disappearances, hazardous prison conditions, arbitrary arrest and detention, and lengthy pretrial detention. A lack of accountability for misconduct at all levels of government persisted, contributing to widespread impunity.

Law and Policies

It is well-established law that no one has a right to a security clearance.² As noted by the Supreme Court in *Department of the Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."³ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

² *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

³ 484 U.S. at 531.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.⁴ An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.⁵

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.⁶ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.⁷ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.⁸ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁹

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.¹⁰ The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹¹

Discussion

Guideline B (Foreign Influence)

The security concern under Guideline B (Foreign Influence) is set out in AG ¶ 6, as follows:

Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they result in divided allegiance. They may also be a national security concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, such considerations as whether it is

⁴ Directive, ¶ 3.2.

⁵ Directive, ¶ 3.2.

⁶ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

⁷ Directive, Enclosure 3, ¶ E3.1.14.

⁸ Directive, Enclosure 3, ¶ E3.1.15.

⁹ Directive, Enclosure 3, ¶ E3.1.15.

¹⁰ *Egan*, 484 U.S. at 531.

¹¹ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

Four disqualifying conditions under this Guideline are relevant:

AG ¶ 7(a): contact, regardless of method, 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;

AG ¶ 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 or technology;

AG ¶ 7(e) shared 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; and

AG ¶ 7(f): substantial business, financial, or property interests in a foreign country, or in any foreign-owned or foreign-operated business, that could subject the individual to a heightened risk of foreign influence or exploitation or personal conflict of interest.

Applicant's close family ties to his mother, sisters and members of his wife's family who are citizens and residents of India, and his financial interest in India establish AG ¶¶ 7(a), 7(b), 7(e), and 7(f). A "heightened risk" is associated with India, given the significant human rights and terrorism problems existent there, and its history of economic collection and industrial espionage.

Application of Guideline B is not a comment on an applicant's patriotism but merely an acknowledgment that people may act in unpredictable ways when faced with choices that could be important to a loved one, such as a family member.¹² Family relationships can involve matters of influence or obligation.¹³ Therefore, Applicant's family ties with his wife's family, property ownership, and other financial interests in India raise concerns for which he has the burden of persuasion to mitigate.¹⁴

¹² ISCR Case No. 08-10025 at 4 (App. Bd. Nov. 3, 2009).

¹³ ISCR Case No. 02-04786 (App. Bd. Jun. 27, 2003).

¹⁴ ISCR Case No. 99-0532 at 7 (App. Bd. Dec. 15, 2000) (When an applicant's ties in a foreign country raise a *prima facie* security concern, the applicant is required to present evidence of rebuttal, extenuation, or mitigation sufficient to carry his burden of persuasion that it is "clearly consistent with the national interest" to grant or continue a security clearance on his behalf).

The following mitigating conditions under this Guideline are potentially relevant:

AG ¶ 8(a): the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the United States;

AG ¶ 8(b): there is no conflict of interest, either because the individual's sense of loyalty or allegiance to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States that the individual can be expected to resolve any conflict of interest in favor of the U. S. interest;

AG ¶ 8(c): contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation; and

AG ¶ 8(f): the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

For the reasons set out in the discussion of AG ¶¶ 7(a), 7(b), 7(e) and 7(f), above, AG ¶ 8(a) is not established for the following reasons. Applicant has lived in the United States since 1999. He was naturalized in 2009. His wife is a permanent resident of the U.S. who will become a U.S. citizen. He has two special needs children who are U.S. citizens. Applicant visits his mother on a regular basis. None of his family or in-laws have connections to the Indian government.

Applicant has such deep and longstanding relationships and loyalties in the U.S. that he can be expected to resolve any conflict of interest in favor of the U.S. interest. There is little likelihood that Applicant's communications with his mother could create a risk for foreign influence or exploitation. Applicant's Indian bank accounts are dormant for the most part. He will sell the Indian property that he and his wife own as soon as he is able. His brother in India is handling the affair. His financial status in the United States far outweighs the financial interests in India. His Indian property is not worth as much as his liquid assets in the United States. Applicant has substantial retirement and savings accounts in the United States. He owns a home in the United States. Applicant's property interest in India are such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual. I find that mitigating conditions AG ¶¶ 8(b), 8(c), and 8(f) apply.

Conclusion

The record does not create doubt about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.¹⁵ Accordingly, I conclude that Applicant met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the SOR allegations:

Paragraph 1, Guideline B: For Applicant

Subparagraphs 1.a-1.g: For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant access to classified information.

Noreen A. Lynch
Administrative Judge

¹⁵ AG ¶ 2(d)(1)-(9). In that consideration, I gave positive weight to the Applicant's credibility, demeanor and maturity.