



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



In the matter of:)	
)	
)	ISCR Case No. 18-02392
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: Leon J. Schachter, Esq.

06/18/2019

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, and 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 July 24, 2017. This document is commonly known as a security clearance application. On October 19, 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

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*

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 November 15, 2018, and requested a hearing before an administrative judge. The case was assigned to me February 20, 2019. A notice of hearing was issued on March 14, 2019, scheduling the hearing for May 16, 2019. Government Exhibits (GX) 1-2 were admitted into evidence without objection. Applicant testified, presented witnesses, and submitted 22 exhibits (with several attachments) (AX A-D), which were accepted into the record without objection. The transcript was received on June 13, 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. Applicant also requested administrative notice of certain facts regarding the Republic of India. The packet was entered into the record as Applicant Hearing Exhibit II.

Findings of Fact

In his Answer to the SOR, Applicant admitted SOR ¶¶ 1.a-g. These admissions are incorporated in my findings of fact. Applicant provided explanations for the SOR allegations.

Applicant is 46 years old and has an undergraduate degree in botany from a university in India, as well as two master's degrees. He was born in India, came to the United States in 2007, and was naturalized in 2016. His spouse is a naturalized citizen of the United States. They have been married for 15 years and have two children who are U.S. citizens by birth. He has renounced his Indian citizenship and carries a U.S. passport. Since 2017, he has been employed by a government contractor. However, Applicant has been working as a scientist in the field for many years. (GX 1)

Applicant's mother and father are citizens and residents of India. (SOR 1.a and 1.b) Both parents (age 74) are retired professionals. Applicant calls his mother and father daily. He last saw them in 2018. Applicant has one brother who is a citizen and resident of India. (SOR 1.c) His brother is 38 and is self-employed. Applicant speaks with his brother about once a month. Applicant's mother-in-law is also an 83-year-old widow who is a citizen and resident of India. (SOR 1.d) He speaks to her every two to three weeks by phone. She also visits the United States frequently. (Tr. 50) None of his relatives work

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.

for the Indian government or know the nature of Applicant's work. Applicant has given his parents about \$15,000 in financial support over the years. They were gifts to his parents, as they are both retired professionals and have pensions. (SOR 1.e)

In about 2015, Applicant and his wife purchased an apartment in India, which is currently under construction, as a surprise gift for his parents. The approximate value is \$105,000. The property is financed through a bank. The estimated balance of the mortgage is \$70,000. (SOR 1.f) Applicant fully disclosed all possible financial interests in India on his security clearance and responses to questions. (GX 2). The construction is to be completed in 2019. (AX E) He is willing to sign the property over to his parents before end of construction if necessary. The value of the property constitutes a small fraction of his net worth.

Applicant and his wife co-own a bank account in India to facilitate wire transfers from his bank in the United States. The account is used to pay for the apartment under construction for his parents. (SOR 1.g) He presented documentation that the account is now closed. (AX D)

Applicant and his wife currently own a house in the United States that is worth about \$359,000. (Tr. 48) His current salary is about \$155,000. His wife earns about \$120,000. He approximates that the value of the apartment property in India is about 10 or 20 percent of his total net worth. His investments are about \$650,000 to \$ 700,000. Applicant submitted documentation from his various savings accounts, pay stub, 401(k) investment accounts, checking account and a personal financial statement. (AX C with 13 attachments). 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. Both of their professional careers have flourished in the United States. (Tr. 25)

When questioned about a possible dilemma between protecting classified information versus loyalty to his family, Applicant recognizes his deep ties to his family, but would not endanger national security. He would report any problem to his FSO. (Tr. 38)

Applicant presented two witnesses at the hearing. Each testified that Applicant is a man of his word. They each have had professional dealings with Applicant and recommend him for a security clearance. (Tr. 59-62) They are aware of the SOR allegations. They work closely with Applicant and both hold security clearances and recognize the Applicant has been extremely conscientious about classified or sensitive information. (Tr. 64)

Applicant submitted six affidavits from people who have known him and his work in the United States. (AX B, with 6 attachments) Each has had an opportunity to observe Applicant and do not believe he would succumb to foreign pressure.

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, father, brother and mother-in-law 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. Applicant has lived in the United States since 2007. He was naturalized in 2016. His wife is a naturalized U.S. citizen. He has two children who are U.S. citizens. Applicant speaks to his family members frequently. 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 family could create a risk for foreign influence or exploitation. Applicant's Indian bank account is closed. He will give the apartment property to his parents. 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 under the foreign influence guideline 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.