



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [Redacted]) ISCR Case No. 19-00224
)
 Applicant for Security Clearance)

Appearances

For Government: Andrea Corrales, Esq., Department Counsel
For Applicant: *Pro se*

08/23/2019

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline B, raised by Applicant’s family members and property in India. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on August 18, 2016. On February 8, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline B. The DOD CAF acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on February 25, 2019, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on March 18, 2019, and the case was assigned to me on April 23, 2019. On May 8, 2019, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for June 12, 2019. I convened the hearing as scheduled. Government Exhibit (GX) 1 was admitted in evidence without objection. Applicant testified but did not present the testimony of any other witnesses or submit any documentary evidence. I kept the record open until July 17, 2019, to enable him to submit documentary evidence. He timely submitted Applicant's Exhibits (AX) A through T, which were admitted without objection. DOHA received the transcript (Tr.) on June 25, 2019.

Department Counsel requested that I take administrative notice of relevant facts about India. The request and supporting documents are attached to the record as Hearing Exhibit (HX) I. I kept the record open to enable Department Counsel to expand her request for administrative notice, and she timely submitted HX II. I took administrative notice as requested by Department Counsel. On my own motion, I took administrative notice of the facts recited in HX III. The facts administratively noticed are set out below in my findings of fact.

Findings of Fact

In Applicant's answer to the SOR, he admitted all the allegations. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 41-year-old systems analyst employed by a defense contractor since March 2016. He was born and educated in India. He entered the United States in February 2008 to accept a job offer from a U.S.-based company. He became a U.S. citizen in June 2015. In February 2011, he married a naturalized U.S. citizen, who is employed as a business analyst and manager for a U.S.-based corporation. (Tr. 29.) He and his wife have a five-year-old child. He has never held a security clearance.

Applicant testified that his immigration to the United States was the culmination of a long-cherished dream that he held since childhood. As a child, he was captivated by books and television programs about the United States. As he grew older, he was "exposed to the different challenges in the Indian society, widespread poverty, lack of education, superstitions, corruption in government and law enforcement, class systems, general indifference towards human life, lack of respect for human life, bad infrastructure [and] limited opportunities." (Tr. 20-21.) He and his wife have immersed themselves in studying the history, culture, and government of the United States. (Tr. 24.) He grew up in a lower middle-class family in India, and is grateful for the quality of life he and his family now enjoy in the United States. (Tr. 24.)

Applicant's mother and sister are citizens and residents of India. His mother has never worked outside the home. (Tr. 33.) His father was a traffic controller for the Indian railways, and he passed away in April 2019. (Tr. 34.) He received a pension upon retirement, and Applicant's mother now receives the pension. (Tr.38.)

Applicant has two brothers. One is a citizen and resident of India serving as a colonel in the Indian Army as an infantry officer. This brother expects to retire from the Indian Army in April 2020, when he qualifies for his pension. Applicant talks to him by telephone every other week. (Tr. 36-37.)

Applicant's other brother is a citizen of India working in the United States as a guest worker sponsored by a U.S. company. He has applied for a green card and intends to remain in the United States. (Tr. 31.)

Applicant's sister is not employed outside the home. She is married to a pediatrician in private practice in India. (Tr. 26.) She and her husband have been sponsored for immigration to the United States by Applicant's brother-in-law. Applicant talks to his sister by telephone weekly. (Tr. 32, 36-37.)

Applicant owns two condominiums and a parcel of undeveloped land in India. (Tr. 39.) They were purchased as investment properties. (Tr. 44.) He signed the purchase contracts for the two condominiums in 2007, purchasing one for about \$30,000 and the other for about \$25,000. Both were under construction at the time. He completed the payments for both condominiums in October 2010, at which time he was given titles for the property. The two condominiums are each rented for about \$150 per month, which is deposited directly into his mother's bank account. (Tr. 40-43.) In April 2015, he purchased a tract of undeveloped land in India for about \$43,000. He testified that his only sources of income for the past 11 years have been from the United States, except for the small rental income from his investment properties, which is paid directly to his mother. (Tr. 25.) Applicant and his siblings have an inheritance interest in their parents' home, which is worth about \$100,000. (Tr. 44.)

In a post-hearing submission Applicant stated that he intends to sell the two condominiums in India. The sales will require his presence in India, and he plans to travel to India in November or December 2019 to complete the sales. (AX U.)

Applicant purchased his family home in the United States in December 2016 for about \$307,000. (AX H.) His balance on the mortgage loan is about \$138,705. (AX I.) He also owns two condominiums in the United States that are rental properties. He purchased them in 2015 for \$115,000 and \$55,000. (AX J; AX L.) His net rental income from the rental properties is about \$800 per month. He also purchased a parcel of residential land in the United States for about \$3,000, as an investment. (AX K; AX P.) There are no unpaid mortgage loans in these investment properties. (Tr. 45-46.) In September 2017, he purchased seven parcels of undeveloped land in the United States for \$245,000, borrowing \$196,000 to make the purchase. (AX O.) He has about \$70,700 in retirement accounts. (AX Q; AX R; AX S.) He owns one car worth about \$15,000 on which there is no loan. (AX T.) He estimates that he and his wife have about \$100,000 in cash and other assets. (Tr. 47.)

Applicant is highly regarded by his employer. He was promoted to “systems engineer” after 14 years of experience, instead of the 20 years of experience that is usually required. (Tr. 19.) His performance is evaluated on a four-point system: (1) below expectations; (2) meets expectations; (3) exceeds expectations; and (4) far exceeds expectations. His evaluations for 2016, 2017, and 2018 rated him as exceeding expectations. (AX B; AX C; AX D.) He was the “Employee of the Quarter” for the 4th quarter of 2016, and the “Rookie of the Year for 2016. (AX E; AX F.)

The Republic of India is a federal parliamentary republic. Its government consists of a president, prime minister, bicameral legislature, and a supreme court. Observers of recent elections considered them fair and free despite isolated instances of violence. India and the United States share interests in global security, stability, and economic prosperity. The United States supports India’s emergence as a leading global power and a vital partner. In 2018, the United States and India affirmed India’s designation as a major defense partner of the United States and agreed to expand defense and security cooperation. Indian governmental agencies, private companies, and individuals are frequently involved in the illegal transfer of sensitive data and dual-use equipment to India. Several anti-Western terrorist groups are active in India. India experiences terrorist attacks, including those by Pakistan-based terrorist organizations. Human-rights issues include widespread corruption; and lack of criminal investigations or accountability for rape, domestic violence, dowry-related deaths, and honor killings. A lack of accountability at all levels of government contributes to widespread impunity and discrimination based on religious affiliation, sexual orientation, gender identity, and caste or tribe.

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard

classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

Analysis

Guideline B, Foreign Influence

The SOR alleges that Applicant’s father, mother, and sister are citizens and residents of India (SOR ¶¶ 1.a-1.c); that one of his two brothers is a citizen and resident of India currently serving in the Indian military (SOR ¶ 1.d); that he owns two apartments in India worth about \$130,000 (SOR ¶ 1.e); and that he owns land in India worth about \$43,000 (SOR ¶ 1.f).

The security concern under this guideline is set out in AG ¶ 6:

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 maybe 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, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

Guideline B is not limited to countries hostile to the United States. “The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States.” ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

Furthermore, “even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security.” ISCR Case No. 00-0317 (App. Bd. Mar. 29, 2002). Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. Nevertheless, the nature of a nation’s government, its relationship with the United States, and its human-rights record are relevant in assessing the likelihood that an applicant’s family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence operations against the United States. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. *See generally* ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision to grant clearance where administrative judge did not consider terrorist activity in area where family members resided).

The following disqualifying conditions under this guideline are potentially applicable:

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 classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology; 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.

AG ¶¶ 7(a) and 7(f) require substantial evidence of a “heightened risk.” The “heightened risk” required to raise one of these disqualifying conditions is a relatively low standard. “Heightened risk” denotes a risk greater than the normal risk inherent in having a family member living under a foreign government.

When foreign family ties are involved, the totality of an applicant’s family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003). Applicant’s family ties to his mother, sister, and a brother who is a senior officer in the Indian Army; his substantial investments in real estate in India; India’s involvement in economic espionage; widespread corruption in the Indian government; and the vulnerability of his family members to terrorist attacks are sufficient to establish the “heightened risk” in AG ¶ 7(a) and 7(f) and the potential for a conflict of interest in AG ¶ 7(b).

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 U.S;

AG ¶ 8(b): there is no conflict of interest, either because the individual’s sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., 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.

AG ¶ 8(a) is not established. Applicant is close to his mother, sister, and brother. Although India is a friendly country, it is involved in economic espionage, has serious human-rights problems, and is vulnerable to terrorism.

AG ¶ 8(b) is established. Applicant has lived and worked in the United States since February 2008. He has been a U.S. citizen since June 2015. He is married to a U.S. citizen and his child is a U.S. citizen. He has immersed himself in the history and culture of the United States, and he is deeply grateful for the lifestyle he and his family enjoy in the United States. One of his brothers works in the United States and is seeking permanent U.S. residence. His sister and her husband have applied for immigration to the United States. His other brother is a senior officer in the Indian Army, but he is a combat soldier and is not involved in governmental policy-making, development of sophisticated technology, military intelligence, or industrial development. I am satisfied that Applicant will resolve any potential conflict of interest in favor of the United States.

AG ¶ 8(c) is not established. Applicant has not overcome the presumption that his contacts with his immediate family members are not casual. See ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002).

AG ¶ 8(f) is established. The value of Applicant's investments in India is greatly outweighed by his assets in the United States. He has no emotional attachment to the investment properties, and he gives the small rental income from his Indian investments to his mother. He is in the process of divesting himself of his Indian investments.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

I have incorporated my comments under Guideline B in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Applicant was candid, sincere, and persuasive at the hearing. After weighing the disqualifying and mitigating conditions under Guideline B, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by family ties and financial investments in India.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline B (Foreign Influence): FOR APPLICANT

Subparagraphs 1.a-1.f: For Applicant

Conclusion

I conclude that it is clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman
Administrative Judge