



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



In the matter of:)
)
) ISCR Case No. 12-11502
)
Applicant for Security Clearance)

Appearances

For Government:
Jeff Nagel, Esquire, Department Counsel

For Applicant:
Sean M. Bigley, Esquire

August 20, 2015

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigation Processing (e-QIP) on March 12, 2012. On January 26, 2015, the Department of Defense issued a Statement of Reasons (SOR) detailing the security concerns under Guideline B (Foreign Influence). The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant submitted an Answer (AR) to the SOR on March 11, 2015, and requested a hearing before an administrative judge. I received the case assignment on June 16, 2015. A notice of hearing was issued on June 19, 2015, and I convened the

hearing as scheduled on July 10, 2015. The Government offered Hearing Exhibits (HE) I and II, and Government Exhibit (GE) 1. GE 1 was received without objection. Applicant testified on his own behalf, called one witness, and submitted HE A and Applicant Exhibits (AE) A through F. AE A through F were also admitted without objection. DOHA received the transcript (Tr.) of the hearing on July 20, 2015. The record was left open for the submission of additional administrative notice material, and on July 13, 2015, Applicant's counsel presented two additional exhibits, marked AE G and H. Department Counsel filed no objections and AE G and H were admitted into the record. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Procedural Ruling

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to the Republic of India (India), contained in HE I. Applicant's counsel raised various objections to the admissibility of some of the governmental documents referenced, but not provided, by Department Counsel in support of his request. Applicant's counsel was particularly concerned with the age of some documents. (Tr. 18.) Applicant's counsel also submitted an administrative notice request contained in HE A at hearing. (Tr. 22.) His requests and the referenced documents were not admitted into evidence but were included in the record. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

Applicant is 51 years old, married, and has two minor children that are both U.S. citizens. He immigrated to the United States in 1987 and was naturalized as a U.S. citizen in 2000. He possesses a master's degree from an American university. He has been employed by a defense contractor since 2005, and seeks a security clearance in connection with his employment in the defense industry. This is his first application for a security clearance. (GE 1; Tr. 64-66, 68-70.)

Applicant was part of a minority community in India. During a vacation to another Indian city in 1984, he was brutally beaten by a mob of locals who used racial slurs during their attack. Applicant lost consciousness and was seriously injured. He still bears physical facial scars from the attack. He explained:

The incident left a scar on my heart and mind. Riots and killings of minorities like Sikhs, Muslims, and Christians are common place in the country. This incident reaffirmed my resolve to get out of India and start a new life in USA. I moved to USA in 1987 and have never once thought of going back to settle in India. My kids, my wife and my life and my loyalty are here. (AE G.)

He left India for the United States as a result of this incident. Applicant presented documentation to support his claims regarding the violence against his minority that occurred in India in 1984. (AE H.) He testified that he does not “fit in” in India. (TR. 35-38.)

The Government alleges that Applicant is ineligible for clearance because he has foreign contacts and interests that could lead to the exercise of poor judgment, unreliability or untrustworthiness on his part, or make him vulnerable to pressure or coercion. Applicant admitted subparagraphs 1.a and 1.b in the SOR. He denied SOR subparagraphs 1.c and 1.d. (AR.)

Applicant’s mother is a citizen and resident of India. She is 84 years old. She worked as an English professor in a semi-private university in India, but is now retired from that position. She is supported by a pension from the Indian government. Applicant visits her annually in India. He uses his American passport to travel to India. He speaks to his mother frequently to inquire about her health. Applicant’s father passed away in 2007. (GE 1; Tr. 48-49.)

Applicant’s mother-in-law and father-in-law are also citizens and residents of India. Applicant’s father-in-law is a retired landscaper for a city government in India. His mother-in-law is a homemaker. They are supported by the pension his father-in-law earned from the city government for which he worked. His wife talks to her parents by phone once a week, although Applicant only talks to them once or twice a year on holidays. Applicant’s wife discusses her children and the health of her parents during their conversations. Applicant’s wife also visits her parents once each year in India. (GE 1; Tr. 28-34, 49.)

When Applicant’s father passed away in 2007, he and his sister inherited real estate in India from their father. They sold the plot they inherited because it was not located close to their mother, and reinvested the money into four different properties in India, where their mother could monitor them. At most, the properties were worth approximately \$500,000, but Applicant’s share was only \$250,000. The rupee has since declined significantly against the dollar, and the value of the properties has declined. Applicant has tried to sell all four properties for the past two years. He has successfully divested himself of his share of three of the properties and provided documentation of their sale. The remaining property, an office space, is currently being leased to a tenant, but will be sold at the termination of the lease. He receives no part of the rent. Applicant testified his share of that property is only about \$78,000. Additionally, that property is not titled in Applicant’s name. He plans to use the funds from the sale of that property to finance his daughter’s college education in the United States, but testified that he has money saved in a 529 savings plan for her college tuition in case he loses his share of his investment in India. He has no intent to invest in India in the future. He also has a bank account in India valued at \$200. His wife has a one-third interest in forest land she inherited, valued at approximately \$1,666. (AE D; AE E; Tr. 39-47, 63-65, 68.)

In 2002 Applicant was diagnosed with an autoimmune disorder. He was told he only had two-to-five years to live, unless he had a kidney transplant. He was placed on his state's kidney transplant list in 2005 and told there would be a five-year wait. His family members were unable to donate a kidney to him due to compatibility issues. He went on dialysis. His physician informed him that a hospital in Pakistan had successfully done a kidney transplant for another patient and that he should investigate that option. Applicant traveled to Pakistan in December 2007 and had a kidney transplant. He was hospitalized for one week in Pakistan. After the transplant, Applicant crossed the boarder into India and planned to travel back to the United States. However, he developed a severe infection that required his hospitalization in India from December 2007 to January 2008. When he recuperated enough to travel, he flew to the United States and was hospitalized here. He discussed his plans to get a kidney transplant in Pakistan with his employer and they expressed no concerns. He was in regular contact with his employer during his six-month recovery. (Tr. 50-56.)

Applicant has over one million dollars worth of assets in the United States, consisting of real estate, bank savings, stocks, bonds, mutual funds, and personal property. His sister is a citizen of the United States, residing in Singapore. He and his wife are active in their children's parent-teacher associations. They volunteer for community activities. He testified his entire social circle is in the United States. (GE 1; AE F; Tr. 38, 47, 73.)

Applicant's coworkers wrote letters of support on his behalf. He is said to have a strong work ethic, and to be honest, loyal, and trustworthy. He is highly regarded by his peers and his program offices. (AE C.)

Administrative Notice

Applicant has contacts with India. Accordingly, it is appropriate to discuss the current situation concerning India and the United States.¹ India is the most populous democracy in the world. There have been incidents in the past when parties in the United States attempted to export military or dual-use technologies to India. There have been numerous and recent cases concerning export enforcement, economic espionage, theft of trade secrets, and embargo-related criminal prosecutions involving the government of India, private companies, and individuals in India. In addition, there is a history of political differences between the United States and India. Finally, there are concerns with widespread human rights problems and terrorist activity, particularly in northwest India. (HE I.)

However, this year the President of the United States and the Prime Minister of India signed the "Dehli Declaration of Friendship." The Office of the Press Secretary at the White House issued a press release about the Declaration. India has emerged as a

¹All of the following statements are supported by the documents submitted by the Department Counsel in HE I or Applicant's counsel in HE A, in support of their requests for administrative notice and the referenced documents or attachments.

growing partner and President Obama indicated “we see India’s emergence as good for the United States and good for the world.” President Obama issued a press release that indicated the United States and India collaborate on economic growth, advancements in energy and climate change, defense, and homeland security. Both countries renewed the “2005 Framework for the U.S.-India Defense Relationship” in 2011. India’s tremendous economic growth offers a key market for U.S. exports and India is among the “fastest growing investors in the United States.” Trade between the two nations is strong. (HE A.)

Policies

Security clearance decisions are not made in a vacuum. When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used as appropriate in evaluating an applicant’s eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in AG ¶ 2(a) describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that, “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, “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.”

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to

classified information. Security clearance decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Finally, as emphasized in Section 7 of Executive Order 10865, "Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the applicant's conduct and the granting or continued holding of a security clearance. If such a case has been established, the burden then shifts to the applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government's case. The applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

Paragraph 1 (Guideline B - Foreign Influence)

The concern under Guideline B is expressed as follows at AG ¶ 6:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

AG ¶ 7 describes conditions that could raise a security concern and may be disqualifying. The following three conditions are potentially:

(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;

(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; and

(e) substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation.

Applicant's mother and in-laws are citizens and residents of India. He travels to India annually, and spent time recuperating there after his kidney transplant. He also shares living quarters with his wife, who has ties to her parents in India. Disqualifying conditions AG ¶¶ 7(a) and 7(d) require both the presence of foreign contacts and a heightened risk. I find there is sufficient evidence regarding terrorist activities in India and the Indian government's human rights abuses to establish a heightened risk. I find AG ¶¶ 7(a) and 7(d) apply.

Additionally, although he divested himself of the majority of his assets in India, he still has a financial interest in an office space in India valued at \$78,000. Applicant has sufficient financial interests in India to raise this concern. AG ¶ 7 (e) applies.

Applicant has provided compelling evidence to show that the following mitigating conditions under AG ¶ 8 also apply to this case, given his particular background:

(a) the nature of the relationships with foreign persons, the country in which these people 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.;

(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; and

(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.

Applicant proved that he is a conscientious and patriotic citizen, and member of the defense industry. He has lived in the United States for more than 28 years. His wife and children are U.S. citizens. He has substantial family and financial ties in the United States that significantly outweigh his contacts and sole remaining investment in India. His mother and in-laws are low-visibility pensioners in India. That status, along with the absence of any significant Government or political affiliation, plus the improved U.S. relations with India, minimize any heightened risk of exploitation from their presence

there. The testimony and record show that Applicant has completely and fully assimilated into the American way of life. He understands and appreciates what the United States has provided him: an advanced education, a successful career, and a good life free of the discrimination he faced in India. As stated, his net worth in the United States is over one million dollars. Based on my analysis of the available information, Applicant has overcome the adverse inference arising from his property and family members' presence in India. There is no conflict of interest for Applicant. Given the history of discrimination he faced in India and his deep longstanding relationships in the United States, he can be expected to resolve any conflicts in favor of the U.S. interest. Guideline B is found for Applicant.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. 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. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. My Guideline B analysis is applicable to the whole-person analysis as well. I have also specifically examined the relationship between the United States and India, which has improved dramatically, particularly this year. The evidence shows that Applicant is a patriotic American citizen. Applicant testified eloquently, emotionally, and at great length about the importance to him of being a citizen of the United States. He is highly respected for his integrity and honesty by those that provided reference letters for him. Accordingly, based on the available evidence, I find that there is little or no "potential for pressure, coercion, exploitation, or duress" as set forth in AG ¶ 2(a)(8). Using the whole-person standard, Applicant has mitigated the security significance of his alleged foreign influence and is eligible for a security clearance.

On balance, it is concluded that Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the

evidence supports a finding for Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline B:	FOR APPLICANT
Subparagraphs 1.a through 1.d:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Jennifer I. Goldstein
Administrative Judge