



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



In the matter of:)
)
) ISCR Case No. 14-02950
)
Applicant for Security Clearance)

Appearances

For Government: Caroline E. Heintzelman, Esq., Department Counsel
For Applicant: *Pro se*

02/04/2015

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline B, foreign influence. Applicant's eligibility for a security clearance is denied.

Statement of the Case

On July 28, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline B, foreign influence. DOD CAF acted 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 on September 1, 2006.

Applicant answered the SOR on August 5, 2014. He requested a hearing before an administrative judge. The case was assigned to me on September 17, 2014. The

Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on October 28, 2014, with a hearing date of December 4, 2014. The hearing was convened as scheduled. The Government offered exhibit (GE) 1, which was admitted into evidence without objection. The Government's exhibit list was marked as a hearing exhibit (HE I). Applicant testified, called one witness, and offered exhibits (AE) A-1 through A-11, which were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on December 17, 2014.

Procedural Ruling

Department Counsel requested administrative notice of facts concerning India.¹ Department Counsel provided supporting documents that verify detail and provide context for these facts in the Administrative Notice request. See the India section of the Findings of Fact of this decision, *infra*, for the material facts from Department Counsel's submissions on India. Applicant requested that I take administrative notice about certain facts related to India.² Despite Applicant's objection to the dated nature of the government-source documents, I will take notice of facts from both proffered sources.

Administrative or official notice is the appropriate type of notice used for administrative proceedings.³ Usually administrative notice in ISCR proceedings is accorded to facts that are either well known or from government reports.⁴

Findings of Fact

In Applicant's answer to the SOR, he admitted SOR allegations ¶¶ 1.b though 1.h, to wit: that his brother is a colonel in the Indian Army and a citizen and resident of India; that his sister, other brother, and mother-in-law are all citizens and residents of India; and that his father-in-law is a resident of India, but a citizen of the Netherlands; that he owns multiple properties in India worth approximately \$580,000 and he has a bank account in India worth approximately \$8,500. He also stated that his mother passed away in March 2014, thereby denying SOR ¶ 1.a. Those admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 53 years old. He was born in India in 1961. He has worked for a federal contractor as a director since March 2001. According to his security clearance

¹ HE II.

² HE III.

³ See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004) and *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)).

⁴ See Stein, *Administrative Law*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice).

application (See Sections 9 and 14), he came to the United States in October 2000, but in his testimony he claims he came to this country when he was 29 years old or in approximately 1990. There is no further explanation in the record about this discrepancy. He became a naturalized U.S. citizen in April 2013. He is married and has two children. His wife and children were all naturalized in April 2013.⁵

Applicant came to the United States in 2000 to pursue employment. From 2000 until 2013, he had permanent residency status, based upon his employment, before he was granted U.S. citizenship. He is a homeowner whose home equity is approximately \$600,000. He has other U.S. assets in the form of a retirement account and other funds totaling approximately \$500,000. Both of his children went to college in this country and they are both current residents here. Applicant has been active in several civic organizations within his community, including the Navy League, the Rotary Club, and he has served as a volunteer for the USO. His annual income is approximately \$140,000. His wife does not work.⁶

Applicant owns property in India valued at approximately \$580,000. This is investment property for which he receives rental income of \$8,000 annually. He expressed a desire to sell the Indian property and transfer the proceeds to the United States. He has contacted a realtor and an accountant, but no evidence of any sale was offered. He also maintains a bank account in India to further his real estate interests there that currently carries a balance of \$15,000.⁷

The status of Applicant's relatives who are alleged to be residents and citizens of India is as follows:

1. His mother passed away in March 2014.⁸

2. His brother and his family. His brother is a colonel in the Indian Army. He is assigned at an ordinance position. He has no involvement with the Indian intelligence service. Applicant has telephone or text contact with him about every four to six weeks. He does not provide them any financial support.⁹

3. His sister is a retired college president. He has contact with her every five or six weeks. He does not provide her any financial support.¹⁰

⁵ Tr. at 19; GE 1.

⁶ Tr. at 21, 23, 25, 41-43; GE 1; AE A-2 to A-11.

⁷ Tr. at 35-40, 45-46; GE 1; AE A-2.

⁸ Tr. at 21; AE A-2.

⁹ Tr. at 26-27, 34; GE 1.

¹⁰ Tr. at 28, 34; GE 1.

4. His older brother works for an import-export business. Applicant last saw this brother at his mother's funeral, but before that he had not seen him in 10 years. He does not provide him any financial support.¹¹

5. His father-in-law and mother-in-law split their time residing in India and Holland. His father-in-law is a retired business executive. His mother-in-law is a housewife. His wife has weekly contact with her mother. He does not provide them any financial support.¹²

Applicant presented the testimony of a friend who has known him for 12 to 14 years. The witness is a former police officer. He opined that Applicant was a quality person who was trustworthy.¹³

India

India is a democratic republic with a cooperative relationship with the United States. The United States recognizes India as key to strategic U.S. interests, and has sought to strengthen its relationship with India. The United States and India have been committed to a strategic partnership that has seen expanded cooperation in the areas of civilian nuclear activities, civilian space programs, and technology trade. The United States is India's largest trading partner and investment partner. India's new prime minister could seek to further U.S. ties to his country by cementing a security partnership.

Notwithstanding, differences remain between the two countries, including concerns about India's nuclear weapons program, abuses of human rights (although, the Indian government is considered to generally respect the human rights of its citizens), and its refusal to sign weapons non-proliferation treaties. Of grave concern is India's cooperation and partnership with Iran and its military forces. Despite advancements in the United States-Indian relations, India has been identified by the U.S. intelligence community as one of the most active collectors of sensitive U.S. economic, industrial, and proprietary information. The United States has sanctioned Indian scientists and chemical companies for transferring to Iran weapons of mass destruction (WMD)-related equipment and/or technology. Additionally, there are numerous documented cases involving the illegal export, or attempted illegal export of U.S. restricted, dual use technology to India.¹⁴

¹¹ Tr. at 30, 34; GE 1.

¹² Tr. at 31-32, 34.

¹³ Tr. at 48-51.

¹⁴ HE II (References I though XIV), HE III.

Policies

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 used 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 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.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion to obtain a favorable security 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. Decisions include, by necessity, consideration of the possible risk that an 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.

Section 7 of Executive Order 10865 provides that decisions shall be "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

Guideline B, Foreign Influence

AG ¶ 6 explains the security concern about “foreign contacts and interests” stating:

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 indicates four conditions that could raise a security concern and may be disqualifying in this case:

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

AG ¶¶ 7(a) and 7(b) apply because of Applicant’s relationships with his two brothers, sister, father-in-law, and mother-in-law, who are living in India and because of Applicant’s relationship with his brother who is an officer in the Indian Army. AG 7(d) applies because of Applicant’s wife’s relationship to her parents. AG ¶ 7(e) applies because of his property holdings in India.

Applicant communicates with his younger brother on a regular basis. His contacts with his older brother and sister are not as frequent. His wife has weekly contact with her parents. There is a rebuttable presumption that a person has ties of affection for, or obligation to, their immediate family members. Applicant has not attempted to rebut this presumption. Applicant's relationships with his relatives living in India are sufficient to create "a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion." His relatives in India create a concern about Applicant's "obligation to protect sensitive information or technology" and his desire to help those relatives. For example, if the Indian Government wanted to expose Applicant to coercion, it could exert pressure on his family and his in-laws. Applicant would then be subject to indirect coercion through his relationship with his relatives and classified information could potentially be compromised.

The mere possession of close family ties with a family member living in India is not, as a matter of law, disqualifying under Guideline B. However, if an applicant has a close relationship with even one relative living in a foreign country, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information.

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 or inducement. 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 collection operations against the United States. The relationship of India with the United States places a significant, but not insurmountable, burden of persuasion on Applicant to demonstrate that his relationships with his relatives living in India do not pose a security risk. Applicant should not be placed in a position where he might be forced to choose between loyalty to the United States and a desire to assist his relatives living in India who might be coerced by governmental entities in India.

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."¹⁵ Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields.

While there is no evidence that intelligence operatives from India seek or have sought classified or economic information from or through Applicant, or his relatives

¹⁵ ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

living in India, it is not possible to rule out such a possibility in the future. Although Applicant's communications with his relatives, other than his younger brother, living in India are infrequent, he continues to feel an obligation to them and affection for them. Applicant's concern for his relatives is a positive character trait that increases his trustworthiness; however, it also increases the concern about potential foreign influence. Department Counsel produced substantial evidence to raise the issue of potential foreign pressure or attempted exploitation.

AG ¶ 8 lists six conditions that could mitigate foreign influence security concerns:

(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.;

(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;

(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;

(d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;

(e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country; 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 has regular contact with his relatives who live in India. His brother has a significant government affiliation as a high-ranking officer in the Indian Army. Applicant came to the United States in 2000, but did not become a citizen until 2013. Although he has made a nice life for himself and his family in this country, the evidence does not support that he has sufficient deep and longstanding relationships and loyalties such that he would resolve any conflict in favor of U.S. interests. 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. None of the mitigating conditions are

applicable to the Applicant's relationship to his brother who is a colonel in the Indian Army, but ¶ 8(a) applies to his sister, older brother, and his in-laws.

Applicant has substantial property and other interests in the United States, which include his employment in the United States, and his status in the local community. However, he also has substantial financial interests in India. He stated his intention was to sell his interests in the Indian property, but he presented no evidence of progress toward that end, other than to contact a realtor. These Indian property interests are substantial enough to create a conflict of interest such that they could be used to influence, manipulate, or pressure the Applicant. AG ¶ 8(f) does not apply.

In sum, Applicant has not met his burden to show it is unlikely that he will be placed in a position of having to choose between the interests of his family members and the interests of the United States.

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. 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.

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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. The circumstances tending towards denial of Applicant's clearance are more significant than the factors weighing towards granting of his clearance at this time. Applicant's brother's military connection and his substantial property interests in India create a potential conflict that he failed to provide sufficient mitigating evidence to overcome.

Overall the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline B, foreign influence.

Formal Findings

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

Paragraph 1, Guideline B:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraphs 1.c – 1.f:	For Applicant
Subparagraphs 1.g – 1.h:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Robert E. Coacher
Administrative Judge