



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



In the matter of:)	
)	
)	ISCR Case No. 09-07152
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: Nicole A. Smith, Esq.

02/21/2014

Decision

LYNCH, Noreen A., Administrative Judge:

This case involves security concerns raised under Guideline B (Foreign Influence). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on August 8, 2010. On April 17, 2013, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline B (Foreign Influence). DOD 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) implemented by the DOD on September 1, 2006.

Applicant received the SOR and timely requested a hearing before an administrative judge. The case was assigned to me on January 9, 2014. A notice of hearing was issued on January 15, 2014, scheduling the hearing for January 30, 2014. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection.

Applicant testified, and submitted Applicant Exhibits (AX) A - C, which were admitted without objection. DOHA received the transcript (Tr.) on February 7, 2014.

Administrative Notice

Department Counsel requested that I take administrative notice of relevant facts about India. The request and supporting documents are attached to the record as HX I. Applicant objected to the documents. (Tr. 11) I admitted the documents into the record and took administrative notice as requested by Department Counsel. The facts administratively noticed are set out below in my findings of fact.

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegations in the SOR under Guideline B (Foreign Influence) and offered explanations. He provided additional information to support his case. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant was born in the United States. He is 40 years old. He received his undergraduate and graduate degrees in the United States. He did not serve in the Indian military. He is an information digital content management expert. Applicant has been with his current employer since 1999. (GX 1) Applicant applied for a security clearance in 2006 and held an interim clearance. Due to a mailing error, Applicant did not receive an opportunity to appeal an unfavorable decision. He reapplied for a security clearance in 2009. (Tr. 25)

Applicant's parents are citizens and residents of India. His father was working in the United States when Applicant was born in 1974. The family returned to India when Applicant was about two years old. Applicant returned to the United States in June 1987. Applicant resided with his uncle when he returned to the United States. He has never had Indian citizenship. (Tr. 19)

Applicant married in 2001. He met his wife in India. She is a naturalized U.S. citizen. He and his wife have two children who are U.S. citizens. (GX 3) Applicant never applied for a special status for them, under the Overseas Citizens of India Program or the Person of Indian Origin Program (PIO). (GX 3)

Applicant's mother and father live in India. His father is about 70 years old. His father has been retired for about ten years. Applicant's father was a contracting officer for the Indian government until he retired. He spends his time in retirement with family in India. His father does not know that Applicant is applying for a security clearance. Applicant talks to his parents on the phone approximately every two weeks. (Tr. 27) His mother is 63 years old. She is a homemaker. (Tr. 31)

Applicant's father-in-law and mother-in-law are citizens and residents of India. They are in their mid-60s. His father-in-law works for an engineering firm. His father-in-

law served with the Indian Army from approximately December 1969 until October 2003. He retired as an officer and has a pension from the Indian Government. From March 2004 to December 2005, Applicant's father-in-law served in an important position for another Indian entity. His father-in-law does not have any current contacts with any members of the government or military. Applicant talks to him about once a month. His wife speaks to her father about once a week. (Tr. 35) His father-in-law does not know details about the nature of Applicant's work or his application for a security clearance.

Applicant's brother-in-law and sister-in-law are citizens of India who reside in Singapore. (Tr. 38) Applicant has contact with them about once every six months. (GX 1) His brother-in-law works for a bank, and his sister-in-law is a homemaker.

Applicant owns two homes in the United States. He estimates the value of his primary property as \$1.5 million. His net worth is approximately \$1.6 million. (AX C) He and his wife have savings and retirement accounts in the United States. (Tr. 47) Applicant closed a bank account that he had in India within the past year.

Applicant submitted five letters of recommendation from colleagues, managers, and others who have known him professionally for many years. (AX B) Each attests to Applicant's strong work ethic, loyalty, and dedication to projects. Each is aware of Applicant's family members in India. His senior manager confirms that Applicant takes appropriate security precautions when visiting family overseas.

A former Naval officer describes Applicant as a person who exhibits good judgment, character, and honesty. He is a trusted and valued advisor to his clients. One of the managing directors notes that Applicant has provided direct support to the U.S. Department of Defense for more than 15 years. His loyalty or dedication to the United States has never been questioned. (AX B)

Applicant explained at the hearing that he has many family members in the United States who are U.S. citizens, including his uncle, his sister and her family, and many cousins, nieces, and nephews. He and his wife started a family and he has two children. Applicant is proud of his career in the United States. He has received recommendations from his employers and his clients over the years. He is a dedicated, hardworking American. Since 1999, he has worked for the same organization. He plans to live his life in the United States, and raise and educate his children in the United States. He was born in the United States, and developed both professionally and personally in the United States. His wife and children are with him in the United States. He feels blessed to be in the United States and has been a productive part of the society. He has never had any legal difficulties. He is fiscally responsible. He values integrity, honesty, and courage. Applicant has worked his adult life in the United States and has deep and long-term relationships. He has provided service to the U.S. Government through his work with government contractors. Applicant was credible when he explained that, in the unlikely situation that there would be pressure on him or his family, he would immediately contact his facility security officer.

Applicant traveled to India to see his family and his parents and in-laws came to the United States when his children were born.

Applicant noted that it was disheartening to have his clearance request previously denied because of miscommunication and misunderstanding. He has provided all necessary information concerning his family. He was open and honest throughout the long investigation. He has been active in his community and raises funds for military families. He volunteers with an organization, and serves on a board to help homeless persons find employment. (Tr. 49)

Administrative Notice

India is a multiparty, federal, parliamentary democracy, with a bicameral parliament and a population of approximately 1.1 billion. Its political history since it gained independence from Great Britain in 1947 has included several armed conflicts with Pakistan, assassinations of two prime ministers, sporadic outbreaks of religious riots, and violent attacks by several separatist and terrorist groups in different parts of the country. There is a continuing threat from terrorism throughout the country, including attacks on targets where U.S. citizens or Westerners are known to congregate or visit.

India's size, population, and strategic location give it a prominent voice in international affairs. India has always been an active member of the United Nations. Starting this year, it is a non-permanent member of the Security Council, and it seeks a permanent seat on the Security Council.

The United States and India have differences over India's nuclear weapons programs, the pace of India's economic reforms, and India's bilateral strategic partnership with Iran. Nevertheless, the United States recognizes that India is important to U.S. strategic interests. The strategic partnership between the United States and India is based on shared values such as democracy, pluralism, and the rule of law. Since 2002, the United States and India have held a series of substantive combined exercises involving all military services.

The United States is India's largest foreign investment partner. Since December 2006, direct civilian nuclear commerce with India has been permitted. The two countries have a common interest in the free flow of commerce and resources, including through the vital sea lanes of the Indian Ocean.

The United States and India share a common interest in fighting terrorism and in creating a strategically stable Asia. They are seeking to foster bilateral relations by establishing working groups to address (1) strategic cooperation; (2) energy and climate change; (3) education and development; (4) economics, trade, and agriculture; and (5) science and technology, health, and innovation.

In the past, India had long-standing military supply relationships with the Soviet Union, and Russia remains India's largest supplier of military systems and spare parts. India is one of many countries engaged in economic intelligence collection and

industrial espionage directed at the United States. The United States has longstanding economic issues with India regarding protection of intellectual property rights and trade in dual-use technology. There have been numerous incidents of international businesses illegally exporting, or attempting to export restricted, dual-use technology from the United States to India.

The Indian Government generally respects the rights of its citizens, but there are serious problems involving abuses by police and security forces. Corruption in the police force is pervasive, and police officers often act with impunity. Abuses by police and security forces have occurred primarily in criminal investigations and efforts to suppress separatist and terrorist groups. There is no evidence that India uses torture or abuse against its citizens to extract economic intelligence.

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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. 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, 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 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.” See 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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; see AG ¶ 2(b).

Analysis

Guideline B, Foreign Influence

The security concern under this guideline is set out in 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.

Four disqualifying conditions under this guideline are relevant to this case. First, a disqualifying condition may be raised by “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.” AG ¶ 7(a). Second, a disqualifying condition may be raised by “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.” AG ¶ 7(b). Third, a security concern may be raised if an applicant is “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.” AG ¶ 7(d). Fourth, a security concern may be raised if “a 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.” AG ¶ 7(e).

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, 2002 DOHA LEXIS 83 at **15-16 (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).

Applicant was born in the United States of parents who are citizens of India. He has lived and worked in the United States since he was 13 years old. Applicant’s wife and children reside in the United States. His children are U.S. citizens and his wife is a U.S. citizen. Neither Applicant nor his wife and children have any special status with India.

Applicant’s parents, brother-in-law, sister-in-law, and parents-in-law are citizens and residents of India. “[T]here is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person’s spouse.” ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at * 8 (App. Bd. Feb. 20, 2002). Applicant has ties of affection to family members who are citizen-residents of India. His contact with his parents, brother-in-law and in-laws ranges from weekly to monthly. Applicant has not rebutted this presumption.

After considering the totality of Applicant’s family ties to India as well as each individual tie, I conclude that Applicant’s family ties are sufficient to raise a heightened

risk of foreign exploitation, inducement, manipulation, pressure, or coercion. Applicant traveled to India to see his family. He saw them when they visited the United States. His wife speaks to her father every week. Based on all these circumstances, I conclude that AG ¶¶ 7(a), (b), and (d) are raised. Because of Applicant's foreign national bank account in India, I conclude that AG ¶ 7(e) is relevant.

Security concerns under this guideline can be mitigated by showing that "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(a). India engages in economic and industrial espionage, and it has been involved in incidents involving illegal importation of restricted, dual-use technology from the United States. Applicant's parents, mother-in-law, and father-in-law are citizens and residents of India. For these reasons, I conclude that AG ¶ 8(a) is not fully established.

Security concerns under this guideline can be mitigated by showing "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(b). Applicant's ties to the United States weigh in his favor when evaluating the question of exploitation or potential conflicts of interest based on ties to India. He has worked with government contractors since 1999. He was born in the United States. He and his wife have personal assets, including a home, in the United States worth approximately \$1.6 million. I conclude that Applicant would resolve any conflict between the interests of the United States and his family in India in favor of the United States. Thus, I conclude that AG ¶ 8(b) is established.

Applicant had a bank account in India which had a small balance. He closed the account in the past year. He has no other tangible interest or account in India. It is unlikely that the above matters could be used effectively to manipulate him. AG 8(f) applies to mitigate SOR 1.g.

Whole-Person Concept

Under 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(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 have incorporated my comments under Guideline B in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a U.S. citizen who was born to parents of Indian heritage. He has lived in the United States since the age of 13. He received his education in the United States and resided with his uncle who is a U.S. citizen. He has many relatives in the United States who are U.S. citizens. He and his wife reside in the United States with their two children who are U.S. citizens. His wife is a U.S. citizen. Applicant was articulate, candid, sincere, and credible at the hearing. He and his wife still have cultural, family, and emotional attachments to India, but they see the United States as the home for their family. Applicant has been successful in the defense contracting business for many years. His current employer recommends him for his professionalism and integrity.

Applicant provides for his family in the United States. He has worked hard in the information technology field and has received praise for his work ethic and accomplishments. Applicant purchased a home and has significant assets in the United States.

Applicant's foreign contacts represented a security concern because of the potential for conflicts of interest and exploitation. However, Applicant's family has no connections with the Indian government. At one time, his father and father-in-law worked for the Indian government, but they are now retired.

India is a partner of the United States in the global war on terrorism. While terrorism and some domestic unrest exist within some areas of India, none of it appears to threaten the enclave in which Applicant's family and property are located. There is no evidence that any of the individuals at issue are involved with, or under scrutiny, by interests antithetical to the United States.

Regarding Applicant's life in the United States, he is an American citizen, with a stable family, social, and professional life. His life is focused here. He is admired by his peers. He and his wife intend to continue their lives in the United States. There is no evidence indicating that he may be manipulated or induced to help a foreign power or interest. He credibly stated he would report any attempts to influence him to his security officer.

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 based on foreign influence. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

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.g: For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Noreen A. Lynch
Administrative Judge