



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-06688

Appearances

For Government: Daniel Crowley, Esq., Department Counsel
For Applicant: William F. Saverino, Esq.

12/19/2016

Decision

CERVI, GREGG A., Administrative Judge:

Applicant mitigated the foreign preference and foreign influence security concerns. Eligibility for access to classified information is granted.

Statement of the Case

Applicant completed a Questionnaire for National Security Positions (SF 86)¹ on February 20, 2014. On June 17, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline C, foreign preference, and Guideline B, foreign influence.²

Applicant responded to the original SOR on July 16, 2016, and requested a hearing before an administrative judge. The case was assigned to me on November 15, 2016,

¹ Also known as a Security Clearance Application (SCA).

² The action was taken under Executive Order (EO) 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) implemented by the DOD on September 1, 2006.

after Applicant requested an expedited hearing and waived the 15-day notice requirement. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on November 16, 2016, scheduling the hearing for November 21, 2016. The hearing was convened as scheduled. Government Exhibits (GE) 1 and 2 were admitted into evidence. Applicant Exhibits (AE) A through G were admitted without objection. Applicant and her facility security officer (FSO) testified at the hearing. Department Counsel's discovery letter is admitted as Hearing Exhibit (HE) 1. DOHA received the hearing transcript (Tr.) on November 29, 2016.

Procedural Matters

Without objection, I granted a request from Department Counsel to take administrative notice of facts concerning the country of India. The administrative notice and supporting documents are admitted as HE 2.

Findings of Fact

Applicant is 44 years old and employed as an enterprise architect for a federal contractor since 2015. She is seeking a security clearance. She was born, raised, and educated in India. She was awarded a bachelor's degree in home science (health science and child development/nutrition) from an Indian university in 1993. She earned a second bachelor's degree in computer science from an American university in 2003. She immigrated to the United States in 2000, after her Indian-born husband obtained a job in the United States. He is also employed as an information technology (IT) professional and holds a public trust position for work on contracts for a U.S. government agency. Applicant and her husband became naturalized U.S. citizens in 2008. They have two children, who are solely U.S. citizens.

Applicant has an Indian passport, issued in September 2008, before her naturalization was completed.³ It expires in 2018. Once she acquired U.S. citizenship, her Indian passport was officially canceled, and she was issued a U.S. passport. Since becoming a U.S. citizen, she has not used her Indian passport to travel. On August 22, 2016, Applicant turned in her passport to her FSO, who testified that he will hold it while Applicant is employed with the company with a security clearance, or destroy it if she directs. Applicant's parents, sisters and mother-in-law are citizens of India. They all reside in India, except for one sister that resides in the United Arab Emirates (UAE).

India is a multi-party, federal, parliamentary democracy. The president, elected by an electoral college, is the chief of state, and the prime minister is the head of the government. Recent elections were generally considered free and fair. However, India is among the most active countries involved in economic and industrial espionage. They are also among the most active in U.S. trademark counterfeiting and copyright piracy. India continues to experience terrorist and insurgent activities that may affect U.S. citizens, especially in the Indian states of Jammu and Kashmir. Anti-western terrorist groups are active in India, including Islamist extremist groups that target public places frequented by westerners. Indian police and security forces are known for human rights abuses including

³ She also held an expired Indian passport issued in 1998 that expired in 2008. The expired passport was relinquished to her facility security officer along with the current passport.

extrajudicial killings, torture, rape, corruption and other abuses.

Applicant's mother, father, and sister live in central India, about 800 miles from Jammu and Kashmir. Her father is a retired electric utility worker living on a pension, and her mother was a homemaker. Her younger sister works as a business analyst for an IT company. Her other sister works as a secretary for a private company in the UAE, while her husband is an ophthalmologist at a private hospital. They moved to UAE after her husband was offered employment there. Applicant's mother-in-law lives in a small town in southwestern India, 870 miles from Jammu and Kashmir. She is a retired grade school teacher. Her husband is deceased. None of her family members have ties to a foreign government or military.

Applicant speaks to her parents or mother-in-law about once in three to four months, and to her sisters about every three to four weeks. Based on her employer's security training, she has reduced her personal contact with her family based on her recognition that frequent contact may raise foreign influence concerns. Her younger sister visited last year, and Applicant traveled to India in 2015 using her U.S. passport. She expects to travel to India every three to four years to visit her family. Neither Applicant nor her husband provide any financial support for their family members, and they do not have property or financial interests in India.

She and her husband own their home and a rental property in the U.S. valued at \$1.24 million, and they have U.S. assets, investments and other financial accounts worth \$550,000. Applicant's coworkers, FSO, and program manager praise her professionalism, ethics, honesty, reliability, and trustworthiness. Applicant testified that her primary loyalty and dedication are to her spouse and children, and her life in the U.S.

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 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.” 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

Applicant’s parents, sister and mother-in-law are citizens and residents of India. Another sister is an Indian citizen living and working in the UAE.

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

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.

Three disqualifying conditions under this AG ¶ 7 are potentially relevant:

- (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; and
- (c) 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.

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).

AG ¶ 7(a) requires 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. I am satisfied that the intelligence collection activities and human rights abuses by India are sufficient to establish the "heightened risk" in AG ¶ 7(a).

The following mitigating conditions under AG ¶ 8 are potentially relevant:

(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; and

(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.

Applicant has close and continuing ties of affinity to her parents and sisters, and ties to her mother-in-law, through her marriage. However, when balancing the typical ties between parents and siblings, against her own family, husband and children residing in the U.S., her greatest interests are in the U.S. It is unlikely she will be placed in a position of having to choose between the interests of her extended family over her immediate family. Applicant's extended family do not have governmental ties, or live in an area of the India that is vulnerable to risk of government or foreign coercion, manipulation, or terrorism. Likewise, her sister in the UAE is not employed by the government, nor does she or her husband have ties to any foreign government or military.

Applicant resides in the U.S. as an American citizen, with her spouse and children, also American citizens. Her career was formed by her education in the United States, and she has a home and substantial assets in the U.S. She is a highly regarded employee and is strongly supported by her FSO, coworkers and program manager. Mitigating condition ¶ 8(a), (b), and (c) apply.

Guideline C, Foreign Preference

The security concern for foreign preference is set out in AG ¶ 9:

When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

The guideline notes several conditions that could raise security concerns under AG ¶ 10. The following are potentially applicable in this case:

(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to:

(1) possession of a current foreign passport.

Applicant possessed an Indian passport because of her immigration status, and held it after becoming a U.S. citizen. Her possession of an Indian passport as a U.S. citizen implicates AG ¶¶ 10(a)(1).

Conditions that could mitigate foreign preference security concerns are provided under AG ¶ 11. The following is potentially applicable:

(e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

Applicant became a naturalized U.S. citizen in 2008. Once becoming a naturalized U.S. citizen, her foreign passport was canceled. She did not travel with the passport, and she surrendered it her FSO with the understanding that it must remain in her employer's possession as a condition of her security clearance, or destroy it. AG ¶ 11(e) applies.

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 relevant 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. I have incorporated my comments under Guidelines C and B in my whole-person analysis.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the foreign influence and foreign preference security concerns.

Formal Findings

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

Paragraph 1, Guideline C:	For Applicant
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline B:	For Applicant
Subparagraphs 2.a – 2.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.

GREGG A. CERVI
Administrative Judge