



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



In the matter of:

Applicant for Public Trust Position

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ISCR Case No. 15-08772

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel

For Applicant: Eric Eisen, Esq.

08/25/2017

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for a public trust position. He presented sufficient evidence to explain, extenuate, or mitigate the security concern stemming from his contacts and interests with the Republic of India. Accordingly, this case is decided for Applicant.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on August 6, 2015. Thereafter, on August 20, 2016, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility, Fort Meade, Maryland, sent Applicant a statement of reasons (SOR), detailing a trustworthiness concerns under Guideline C for foreign preference and Guideline B for foreign influence. Applicant answered the SOR on August 30, 2016. Applicant denied the Guideline C the allegation; Applicant admitted the first and third Guideline B allegations and denied the second Guideline B allegation. He requested a hearing.

The case was assigned to me on June 2, 2017. The hearing was held as scheduled on July 12, 2017. Department Counsel offered Exhibits 1 through 4 (GE), and they were admitted without objection. At the outset of the hearing, the Government withdrew the

Guideline C allegation.¹ Applicant testified and offered Exhibits A through E (AE), and they were admitted without objection. The hearing transcript (Tr.) was received on July 20, 2017.

Procedural Matters

On December 10, 2016, the Security Executive Agent issued Directive 4 (SEAD 4) establishing a “single, common adjudicative criteria for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position.”² The National Security Adjudicative Guidelines (hereinafter “new adjudicative guidelines” or “AG”), which are found in Appendix A to SEAD 4, are to be used in all security clearance cases decisions issued on or after June 8, 2017.³ In light of this explicit direction (and absent lawful authority to the contrary), I have applied the new adjudicative guidelines. ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003) (security clearance decisions must be based on current DoD policy and standards).⁴ DOD CAF adjudicators reviewed this case using the previous version of the adjudicative guidelines, dated September 1, 2006, which were then in effect. My decision and formal findings under the revised Guideline B would not be different under the 2006 Guidelines.

Findings of Fact

Applicant is a 46-year-old associate for a defense contractor where he has worked since November 2014.⁵ He submitted letters of recommendation from co-workers and friends attesting to his job performance, reliability, trustworthiness, and good judgment.⁶ He requires eligibility to occupy a position of public trust for his job responsibilities. Eligibility is necessary, because his job involves access to sensitive but unclassified information.

Applicant was born in India and received his bachelor’s and master’s degrees at universities in India. He arrived in the United States in October 1999 and was naturalized in September 2008. He and his spouse married in India in 1997 and moved to the United States in 1999 for employment opportunities. Applicant’s spouse is 45 years old and was naturalized in the same proceeding where Applicant was naturalized. They have two daughters (ages 11 and 16, both U.S.-born) and live in a home they purchased in 2016.

¹ Tr. 8.

² SEAD 4, ¶ B, *Purpose*.

³ SEAD 4, ¶ C, *Applicability*.

⁴ See also ISCR Case No. 07-00029 at 3 (App. Bd. Dec. 7, 2007) (when the guidelines were last revised, the Board stated: “Quasi-judicial adjudications must be made within the bounds of applicable law and agency policy, not without regard to them.”)

⁵ GE 1.

⁶ AE A, D, and E.

Applicant's spouse has bachelor's and master's degrees she earned at universities in India. She works for the same defense contractor that employs Applicant, and she has a Top Secret clearance that was granted in 2009.⁷

Under Guideline B the SOR alleged that (1) Applicant's father, stepmother, sister, brother, and mother-in-law are citizens and residents of India; (2) Applicant has contributed about \$360,000 to family members living in India since 1999; and (3) Applicant has a friend who is a citizen of India residing in the United States. Applicant admitted with explanations allegations (1) and (3), above. He denied the amount of money he has provided to his Indian relatives, estimating that he has contributed about \$200,000 to \$250,000 during the time period alleged.

Applicant explained that when his father was 55 years old (about 2003), he had a stroke. He was told by his doctors that he could no longer perform the farming field irrigation work that was his profession. As a result, since then he only works part time at a grocery store and a small bank. Applicant's father and stepmother both had heart surgery. In Indian family culture, as the oldest son, Applicant is expected to care for his parents in their times of need. The money Applicant sends is to help his father and stepmother with medical and other expenses.⁸ Applicant testified about his total assets, concluding that they were about \$580,000, which includes an apartment purchased for his father and stepmother in India worth about \$60,000.⁹ The purchase of the apartment was to reduce his father's and stepmother's living expenses. Once his parents pass away, Applicant will have no need for it and will sell it. The apartment is paid in full. Applicant has no other property in India.¹⁰

Of Applicant's recent six trips to India, four were to attend a religious retreat held each December, and two were to be there for his parent's heart surgeries. During those retreat trips, he also visited family. He speaks to his father about once a month and speaks with his stepmother during those calls. He rarely speaks with his mother-in-law. He speaks with his sister weekly and his brother monthly. None of his relatives in India have any connections to the Indian government or military.¹¹

Applicant explained about the friend alleged in the SOR. The friend is his wife's cousin's brother. He works for a healthcare company and lives in Maryland. Applicant and his spouse contacted this distant relative, because Applicant has no family living here, and he thought it would be good for his daughters to have some family here. The relative has grown sons, and he and his wife have green cards. Applicant agreed with the

⁷ GE 1; GE 2; Tr. 17-19, 21-22, 27-28 37-38, 43.

⁸ Tr. 24-25, 30-34, 47.

⁹ Applicant's spouse actually purchased the apartment, but she considers it to be marital property. Tr. 21.

¹⁰ Tr. 26, 43-45, 54. AE C.

¹¹ Tr. 34; 45-47, 51; GE 1.

characterization of them as giving Applicant and his family an “instant local family.”¹² Applicant’s daughters are active in school and after-school activities, such as swimming, basketball, chess, and other intellectual competitions.¹³

Administrative Notice (Republic of India)

In response to the Government’s request, to which Applicant did not object, I have taken administrative notice of the following relevant facts about the Republic of India:

- The 2000 and 2008 Annual Reports to Congress on Foreign Economic Collection and Industrial Espionage identified India as being involved in economic collection and industrial espionage.
- In June 2013, a member of parliament in India and a close advisor to a now-deceased chief minister was among those indicted by the U.S. Department of Justice for allegedly soliciting bribes for himself and other government officials in India in return for approving licenses to mine titanium minerals.
- As of March 2016, India continued to experience terrorist and insurgent activities. Anti-Western terrorist groups active in India, some of which are on the U.S. government’s list of foreign terrorist organizations, include Islamist extremist groups Harkat-ul-Jihad, Harakat ul-Mujahidin, Indian Myjahideen, Jaish-e-Mohammed, and Lashker-e Tayyiba.
- As of 2015, the most significant human rights problems involved police and security force abuses, including extrajudicial killings, torture, and rape: corruption remained widespread and contributed to ineffective responses to crimes, including those against women, children, and members of scheduled castes or tribes, and societal violence based on gender, religious affiliation, and caste or tribe. Other human rights problems included disappearances, hazardous prison conditions, arbitrary arrest and detention, and lengthy pretrial detention. A lack of accountability for misconduct at all levels of government persisted, contributing to widespread impunity.

¹² Tr. 35-36.

¹³ Tr. 48-50.

Law and Policy

The Under Secretary of Defense's Memorandum of November 19, 2004, treats ADP positions as sensitive positions, and it entitles applicants for ADP positions to the procedural protections in the Directive before any final unfavorable access determination may be made. The standard set out in the Manual and the adjudicative guidelines for assignment to sensitive duties is that the person's loyalty, reliability, and trustworthiness are such that assigning the person to sensitive duties is clearly consistent with the interests of national security. Manual ¶ 7.1a(2); AG ¶ 2.b.

A person who seeks access to sensitive 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. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information.

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. The 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 protection of the national security is the paramount consideration. Under AG ¶ 2(b), "[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security." The Government must present substantial evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. 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 national security to grant or continue eligibility for access to sensitive information.

Discussion

Guideline B (Foreign Influence)

The trustworthiness concern under Guideline B (Foreign Influence) is set out in AG ¶ 6, as follows:

Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they result in divided allegiance. They may also be a national security concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

Three disqualifying conditions under this Guideline are relevant:

AG ¶ 7(a): contact, regardless of method, with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;

AG ¶ 7(b): connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology; and

AG ¶ 7(f): substantial business, financial, or property interests in a foreign country, or in any foreign owned or foreign-operated business that could subject the individual to a heightened risk of foreign influence or exploitation or personal conflict of interest.

Applicant's close family ties to his father, stepmother, sister, brother, and mother-in-law, who are citizens and residents of India, and the apartment he and his spouse own in India establish AG ¶¶ 7(a), 7(b), and 7(f). A "heightened risk" is associated with India, given the significant human rights and terrorism problems existent there, and its history of economic collection and industrial espionage.

Application of Guideline B is not a comment on an applicant's patriotism but merely an acknowledgment that people may act in unpredictable ways when faced with choices that could be important to a loved one, such as a family member.¹⁴ Family relationships can involve matters of influence or obligation.¹⁵ Therefore, Applicant's family ties and

¹⁴ ISCR Case No. 08-10025 at 4 (App. Bd. Nov. 3, 2009).

¹⁵ ISCR Case No. 02-04786 (App. Bd. Jun. 27, 2003).

property ownership raise concerns for which he has the burden of persuasion to mitigate.¹⁶

The following mitigating conditions under this Guideline are potentially relevant:

AG ¶ 8(a): contact, regardless of method, with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;

AG ¶ 8(b): connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology;

AG ¶ 8(c): contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation; and,

AG ¶ 8(f): the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

Applicant and his wife have lived in the United States since 1999 and have been naturalized citizens since September 2008. They have two daughters who were born in the United States. They own their own home and have about a half million dollars in assets. They both work for the same defense contractor, and Applicant's spouse was granted a Top Secret clearance in 2009. Applicant and his family are firmly rooted in the United States personally, professionally, and financially.

Applicant's father and stepmother have suffered from medical conditions, and as the only son, Applicant has a tradition-bound duty to help them financially. He has done so, by sending money over the years and by purchasing an apartment for them to live in rent-free, valued at about \$60,000. Once the apartment is no longer needed, Applicant will sell it. The value of the apartment pales when compared with Applicant's assets in the United States. His travels to India were for religious retreats and to attend to his parents in times of health crises.

¹⁶ ISCR Case No. 99-0532 at 7 (App. Bd. Dec. 15, 2000) (When an applicant's ties in a foreign country raise a *prima facie* security concern, the applicant is required to present evidence of rebuttal, extenuation, or mitigation sufficient to carry his burden of persuasion that it is "clearly consistent with the national interest" to grant or continue a security clearance on his behalf).

I conclude that trustworthiness concerns under AG ¶¶ 7(a) and (b) by virtue of Applicant's relationships with his father and stepmother are mitigated under AG ¶¶ 8(a) and (b). I conclude that trustworthiness concerns under AG ¶ 7(f) are mitigated under AG ¶ 8(f). Applicant rarely speaks with his mother-in-law and is in contact with his sister weekly and his brother monthly. I conclude that any trustworthiness concerns about those relationships are mitigated by AG ¶ 8(c).¹⁷

Formal Findings

The formal findings on the SOR allegations are:

Paragraph 1, Guideline C:	Withdrawn
Paragraph 2, Guideline B	For Applicant
Subparagraphs 2.a-c:	For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the interests of national security to grant Applicant eligibility for access to sensitive information.

Philip J. Katauskas
Administrative Judge

¹⁷ I conclude that Applicant's relationship with his distant family member who is an Indian citizen residing in Maryland raises no trustworthiness concern.