



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



In the matter of:)	
)	
[REDACTED])	ISCR Case No. 15-07414
)	
Applicant for Security Clearance)	

Appearances

For Government: Rhett E. Petcher, Esq., Department Counsel
For Applicant: *Pro Se*

04/28/2017

Decision

MARINE, Gina L., 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 (SCA) on March 3, 2015. On June 6, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline B. The DOD CAF acted under Executive Order (Exec. Or.) 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.

Applicant answered the SOR on June 20, 2016, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on December 21, 2016, and the case was assigned to me on January 25, 2017. On February 27, 2017, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for March 27, 2017. I convened the hearing as scheduled.

Government Exhibits (GE) 1 and 2 were admitted into evidence without objection. I appended to the record a letter that Government sent to Applicant as Hearing Exhibit (HE) I, and Government's request for administrative notice of relevant facts about the Republic of India as HE II. Applicant testified and submitted Applicant's Exhibits (AE) A through D and F, which were admitted without objection. I sustained the Government's objection to AE E and did not admit it into evidence. I admitted AE G over the Government's objection. Two witnesses testified on behalf of Applicant. Upon Applicant's request, I left the record open until April 24, 2017. Applicant timely provided additional documents that I admitted as AE H through J without objection; thereupon, at Applicant's request, I closed the record on April 13, 2017. DOHA received the transcript (Tr.) on April 4, 2017.

Findings of Fact¹

Applicant is 56 years old and has been married for almost 15 years. He and his wife have a daughter, age 14. Applicant received his bachelor's degree from a university in India in 1985 and his master's degree from a university in the United States in 1989. Since then, Applicant has worked as an engineer for U.S. companies. He has been employed full time with his current federal-contractor employer for over three years. This is his first application for a security clearance.²

Applicant was born in Kuwait and moved to India when he was eight years old. He immigrated to the United States in 1987, as a citizen of India, after he graduated college.³ In 2008, he became a naturalized U.S. citizen with his wife, a citizen of India by birth.⁴ Their daughter is U.S. citizen by birth. His wife's parents are citizens and residents of the United States.

Applicant has three brothers. Brother A is a citizen of the United States who has resided here for over 30 years. He is an engineer who works for a U.S. federal contractor. Brothers B and C are citizens and residents of India. Brother B manages his mother's portfolio of land, with help from Brother C, and does some freelance sound engineering.⁵ Brother C was a manager of a food company but is now in between jobs.⁶ He previously lived in the United States where he attained a master's degree and

¹ Unless otherwise indicated by citation to another part of the record, I extracted these facts from Applicant's SOR answer, SCA (GE 1), and the summary of his personal subject interview (GE 2). I considered that GE 2 was not authenticated as required by Directive ¶ E3.1.20. However, at hearing, Applicant did not object to me considering it when offered the opportunity to do so, and he confirmed that it accurately summarized the facts as he recalled them from the interview. (Tr. at 23.)

² Tr. at 9.

³ Tr. at 17 and 60.

⁴ See also Tr. at 49, and 61-62.

⁵ Tr. at 52.

⁶ Tr. at 52-53.

worked as an engineer at the same company as Applicant.⁷ Applicant's father passed away when he was in high school.⁸ His mother resides with Brother A in the United States.⁹ She has sponsored Brothers B and C for U.S. citizenship and their applications are pending.¹⁰

Applicant communicates with Brothers B and C by phone approximately once every three to six months or once a week if his mother is there visiting.¹¹ She visits about once a year.¹² Applicant recently became aware that his name is included on a deed to a plot of land that his mother owns in India, worth approximately \$82,000. She plans to give it to Brother C, who is in the process of coordinating the transfer.¹³ More recently, he has spoken with Brother C more frequently due to this deed issue.¹⁴ His mother also owns other land in India that she intends to transfer at some point to Brothers B and C.¹⁵ There was no evidence presented that Applicant's name is on the deeds to this other land.

Applicant remains in contact with former boarding school and college classmates who are citizens and residents of India. He communicates with most of them by email; some approximately once every six months, and some more or less often. He disclosed closer relationships with two of these friends on his SCA. He communicates with one weekly by email or telephone. He sees the other one about once a year in the United States and communicates with him by phone and electronically. Both are employed in the private sector.¹⁶

Applicant last travelled to India in April 2006.¹⁷ He used an Indian passport that expired in April 2016. Applicant surrendered his inactive Indian passport and renounced

⁷ Tr. at 40, 53-54. The record does not state for how long Brother C lived and worked in the United States, but does state that he returned to India in 2004 (Tr. at 54.)

⁸ Tr. at 17.

⁹ Tr. at 50.

¹⁰ Tr. at 47, 62-63.

¹¹ Tr. at 63-66.

¹² Tr. at 65.

¹³ Tr. at 27-28, 46-47, 59-60.

¹⁴ Tr. at 64-66.

¹⁵ Tr. at 57-59, and 76-77.

¹⁶ See *also* Tr. at 17, and 55-57.

¹⁷ See *also* Tr. at 70.

his Indian citizenship in March 2017.¹⁸ Although he has not made any specific plans to do so, he is contemplating returning to India with his daughter who has never been.¹⁹

Applicant has made the United States his home with his wife and daughter.²⁰ He maintains assets in the United States totaling approximately \$746,952, including substantial equity in his home, two retirement accounts, and a savings plan established for his daughter's future education in the United States.²¹ He earns an annual salary of approximately \$133,000.²² Applicant is highly regarded for both his character and work performance, including by a senior pastor of the church where he is an active member and volunteer.²³

Administrative Notice (Republic of India)

In response to the Government's request, to which Applicant did not object, I have taken administrative notice the U.S. Government's pronouncements concerning the Republic of India, as outlined in HE II and the documents appended thereto, including the following:

- 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.
- India continues 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.
- The most significant human rights problems involve police and security force abuses, including extrajudicial killings, torture, and rape; corruption remains

¹⁸ AE D, AE I, and Tr. at 66-67. I considered that the Consulate returned Applicant's cancelled passport to him. However, because the passport is expired, his possession of it is not security significant.

¹⁹ Tr. at 73.

²⁰ Tr. at 17 and 42.

²¹ AE B, AE H; Tr. at 42, 50, 70-71, and 74.

²² AE B; Tr. at 71.

²³ AE A, Tr. at 34-40, and 74-75.

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 include disappearances, hazardous prison conditions, arbitrary arrest and detention, and lengthy pretrial detention. A lack of accountability for misconduct at all levels of government persists, contributing to widespread impunity.

Policies

“[N]o one has a ‘right’ to a security clearance.”²⁴ 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.”²⁵ 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.”²⁶

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.”²⁷ 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.

²⁴ Department of the Navy v. Egan, 484 U.S. 518, 528 (1988).

²⁵ Egan at 527.

²⁶ Exec. Or. 10865 § 2.

²⁷ Exec. Or. 10865 § 7.

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.²⁸ “Substantial evidence” is “more than a scintilla but less than a preponderance.”²⁹ The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability.³⁰ Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts.³¹ An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government.³²

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.”³³ “[S]ecurity clearance determinations should err, if they must, on the side of denials.”³⁴

Analysis

Guideline B (Foreign Influence)

The security concern under Guideline B (Foreign Influence) 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.

²⁸ See Egan, 484 U.S. at 531.

²⁹ See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

³⁰ See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

³¹ Directive ¶ E3.1.15.

³² See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

³³ ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

³⁴ Egan, 484 U.S. at 531; See also AG ¶ 2(b).

Two disqualifying conditions under this guideline are relevant:

AG ¶ 7(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; and

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 sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information.

Applicant's close ties to family and friends who are citizens and residents of India (SOR ¶¶ 1.a and 1.b) establish AG ¶¶ 7(a) and 7(b). 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. Since the plot of land in India that Applicant co-owns with his family was not alleged, I can consider it only for the purposes of evaluating mitigation. However, even if it was alleged, the land would not establish AG ¶ 7(e)³⁵ given that its value is not substantial as compared to the value of Applicant's U.S. assets.

The following mitigating conditions under this guideline are potentially relevant:

AG ¶ 8(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;

AG ¶ 8(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

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.

³⁵ AG ¶ 7(e): 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.

For the reasons set out in the discussion of AG ¶¶ 7(a) and 7(b), AG ¶ 8(a) is not established.

AG ¶ 8(b) is established. Applicant has resided in the United States for almost 30 years. During that time, he attained his post-graduate degree from a U.S. university, met and married his wife of 15 years with whom he became a naturalized citizen, had a daughter who is being educated in the United States, accumulated significant U.S. assets, and remained gainfully employed by U.S. companies. Applicant's mother, Brother A, and his wife's parents are citizens and residents of the United States. While Applicant still has close ties to family and friends who are citizens and residents of India, his significant financial interests, future plans, and loyalties are in the United States. Therefore, I have no doubt that Applicant would resolve any conflict of interest in favor of the United States.

AG ¶ 8(f) is established. The plot of land that Applicant co-owns with his family is nominal in value as compared to the significant assets that he owns in the United States.

Whole-Person Concept

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. In applying 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.

I have incorporated my comments under Guideline B in my whole-person analysis, and considered the factors in AG ¶ 2(a). Applicant was candid, sincere, and credible at the hearing. He is highly regarded for his character and work performance. I do not doubt that his allegiance is with the United States, where he has made his home. After weighing the disqualifying and mitigating conditions under Guideline B, and evaluating all the evidence in the context of the whole person and the "heightened risk" associated with India, I conclude that Applicant has mitigated the security concerns raised by his ties to India. Accordingly, I conclude that 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.b: For Applicant

Conclusion

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

Gina L. Marine
Administrative Judge