



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



In the matter of:)	
)	
[REDACTED])	ISCR Case No. 15-06272
)	
Applicant for Security Clearance)	

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: *Pro se*

10/31/2017

Decision

HESS, Stephanie C., Administrative Judge:

This case involves security concerns raised under Guideline B (Foreign Influence). Applicant's close ties to family members, combined with his substantial foreign financial interests, create a risk of divided allegiance. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on March 23, 2015. On March 25, 2016, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guideline B. The DOD acted under Executive Order 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 DOD on September 1, 2006.

Applicant answered the SOR on April 18, 2016, and requested a decision on the record without a hearing. Department Counsel submitted the Government's written case on May 20, 2016. A complete copy of the file of relevant material (FORM), which included

Government Exhibits (GX) 1 through 5, was sent to Applicant on May 23, 2016. He was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on May 31, 2016, and his Response was received by the Defense Office of Hearings and Appeals (DOHA) within the allotted 30 days and admitted without objection. The case was assigned to me on February 10, 2017.

The SOR was issued under the AG implemented on September 1, 2006. The DOD implemented the amended AG on June 8, 2017, while this decision was pending. This decision will be based on the amended AG effective June 8, 2017. The outcome of this case would have been the same if decided based on the former AG.

Department Counsel requested that I take administrative notice of certain facts pertaining to India. The relevant facts are highlighted in my findings of fact, below.

Findings of Fact

Applicant is a 58-year-old president of a defense-contracting firm since August 1989. He was born in India, immigrated to the United States in 1985, and became a naturalized U.S. citizen in 1992. Applicant and his wife, also a naturalized U.S. citizen, married in India in 1987. They have two adult children and a 17-year-old, all born U.S. citizens. Applicant has held a security clearance since 1994. (GX 2; Response.)

The SOR alleges under Guideline B that Applicant's mother, five brothers, sister, and father-in-law are citizens and residents of India. The SOR further alleges that Applicant has seven bank accounts in India with a total balance of approximately \$1,045,066. Applicant admits each of these allegations. His admissions are incorporated in my findings of fact.

India is a multiparty, federal parliamentary democracy with a bicameral parliament and a population of approximately 1.1 billion. Historically the relationship between the United States and India has been favorable and beneficial to both countries. The United States recognizes India as key to strategic interests and has sought to strengthen its relationship with it. India has diplomatic relations with the United States. India and the United States pledged that both countries promised greater cooperation in countering terrorist networks and information sharing. However, India is reticent to discuss its nuclear security measures or allow inspections. India has good diplomatic relations with Iran and supports that country's efforts to develop nuclear energy for peaceful purposes. India's largest supplier of military systems and spare parts is Russia.

India is one of the countries that is most persistently targeted by foreign and domestic terrorist groups, and it continues to experience terrorist and insurgent activities which may affect U.S. citizens directly or indirectly. Anti-Western terrorist groups, some on the U.S. government's list of foreign terrorist organizations, are active in India. In November 2008, terrorists coordinated attacks on multiple locations in Mumbai targeting areas frequented by Westerners, killing at least 183 people, eight of whom were from the

United States. More recent attacks have targeted public places, including areas frequented by Westerners.

The Indian government generally respects the rights of its citizens, but continues to have serious human rights problems including police and security force abuses, extrajudicial killings, disappearances, torture, rape, and widespread corruption that contributed to ineffective responses to crimes. Other human rights problems include disappearances, hazardous prison conditions, arbitrary arrest and detention, and lengthy pretrial detention. Rape, domestic violence, dowry-related deaths, honor killings, sexual harassment, and discrimination against women remain serious problems. A lack of accountability for misconduct at all levels of government persists. Investigations and prosecutions of individuals take place, but lax enforcement, a shortage of trained police officers, and an overburdened and under-resourced court system contribute to infrequent convictions.

India is an avid collector of U.S. proprietary information, and there have been several criminal cases of industrial espionage arising out of India, both from private sources and from the government itself. Examples include: In March 2008, an American businessman pleaded guilty to conspiring to illegally exporting technology to entities in India; in January 2013, the former export control manager of a Pennsylvania-based company pled guilty to the illegal export of products that have military applications to India and China; and, in April 2015, the former owner of the New Jersey-based defense contracting business pled guilty to illegally exporting military blueprints to India. Foreign government and private entities, including intelligence organizations and security services, have capitalized on private-sector acquisitions of U.S. technology.

Applicant travels to India once or twice a year to visit his family members. He speaks to his mother and one of his brothers by telephone once a week. He speaks with: one of his brothers by telephone once a month; his sister, two brothers and father-in-law quarterly; and, his other brother once a year. None of Applicant's foreign family members is affiliated with the government of India. (GX 2; GX 3.)

In 1994 or 1995, Applicant and his wife purchased an apartment building in India, in Applicant's wife's name. The purchase price was approximately \$35,000 and the current value is approximately \$135,000. (GX 2; GX 3.) This foreign financial interest was not alleged in the SOR.

In about January 1999, Applicant invested approximately \$500,000 in seven certificates of deposit (CD), valued at approximately \$1,045,066 in December 2014, at a bank in Mumbai, India. Applicant elected to invest in the CDs due to a high interest rate. This money is intended for use for Applicant's retirement, his children's college educations, and for unanticipated or emergency expenses. He states in his April 2015 personal subject interview (PSI), that he is willing to pay early withdrawal penalties and transfer the funds back to U.S. bank accounts. Applicant states that he has properly reported his foreign investments as required by the Federal government. In his Response, he again states his willingness to transfer the money back to the United States. He also states that, "it seems

that the only issue is the money that I invested in India, since none of my family information has changed since I first received my security clearance.”

Applicant purchased his home in July 1993. However, there is no record evidence of the value of his home. Additionally, there is no record evidence of the value, if any, of Applicant’s other U.S.-based assets. Finally, Applicant did not make any affirmative assertions regarding his ties or loyalties to the United States.

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’s 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

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

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.

Given Applicant's ties to his foreign family members and his substantial foreign financial interests, the record evidence establishes the following disqualifying conditions:

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.

AG ¶ 7(a) requires evidence of a “heightened risk.” The “heightened risk” required to raise this disqualifying condition is a relatively low standard. “Heightened risk” denotes risk greater than the normal risk inherent in having a family member living under a foreign government or owning property in a foreign country. The totality of Applicant’s family ties to a foreign country as well as each individual family tie must be considered. “[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); see also ISCR Case No. 09-06457 at 4 (App. Bd. May 16, 2011).

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, (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).

Given India’s significant human rights and terrorism problems, and its history of economic collection and industrial espionage against the United States, Applicant’s relationships with his and his wife’s immediate family members in India, combined with his substantial financial interests in India, create a “heightened risk” of foreign exploitation, inducement, manipulation, pressure, coercion, or personal conflict of interest.

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

Conditions that could mitigate security concerns include:

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 United States;

AG ¶ 8(b): there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, or allegiance to the group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;

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 has held a security clearance since 1994, therefore, he previously mitigated any potential security concerns raised by his contacts with his foreign family members. However, Applicant's substantial foreign-held assets have increased his footprint in India, and changed the potential significance of his ties to his foreign family members. Applicant regularly visits his family members in India, and maintains varying degrees of telephonic contact with each of them. Applicant's ties to his family members are close and frequent, and could potentially create a conflict of interest. AG ¶¶ 8(a) through 8(b) do not apply.

Applicant invested a significant amount of money in CDs in India beginning in 1999, five years after he was first granted a security clearance. Even if Applicant was initially unaware that a substantial financial interest in a foreign country could raise a security concern, he has been aware of the Government's concern since at least March 2016, when he received the SOR.

Furthermore, after answering questions during his PSI about his financial holdings in India in April 2014, and stating his willingness to move them back to the United States,

he did not do so. He did not transfer the money back to the United States after receiving the SOR in March 2016. In his May 2016 response to the FORM, Applicant confirmed his understanding of the Government's concern about his foreign assets, and again stated his willingness to transfer the money from his CDs in India back to the United States. Again, he took no action to mitigate the security concern.

Applicant stated that his accounts in India, totaling at least \$1,045,066, are slated for his retirement, his children's college funds, and emergency expenses. Clearly, these assets are important to Applicant's overall financial portfolio. Additionally, the limited record evidence does not indicate whether Applicant intends to retire in the United States, India, or elsewhere. While there is no record evidence that Applicant has acted in a manner contrary to the interests of the United States, there is also no record evidence of Applicant's "deep and long-standing relationships and loyalties in the United States." AG ¶ 8(b) does not apply.

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. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but I have also considered the following:

Applicant has worked as a defense contractor since 1989, and has held a security clearance since 1994. However, he began investing substantial amounts of money in CDs in India in 1999, and despite his awareness of the Government's concerns, he has not taken action to resolve this issue. Additionally in 1994 or 1995, Applicant and his wife bought an apartment in her name in India, with the current value of at least \$135,000, further increasing Applicant's financial ties to India. Based on the record as a whole, I am unable to unequivocally determine that his personal and financial ties to India do not create a security concern.

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 not mitigated the security concerns raised by his personal and financial ties to India. Accordingly, I conclude he has failed to carry his burden of showing that it is clearly consistent with the national interest to grant his eligibility for access to classified information.

Formal Findings

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline B (Foreign Influence):	AGAINST APPLICANT
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Subparagraphs 1.a – 1.e:	Against Applicant
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Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Stephanie C. Hess
Administrative Judge