



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 16-01401
)	
Applicant for Security Clearance)	

Appearances

For Government: Gatha T. Manns, Esq., Department Counsel
For Applicant: *Pro se*

04/27/2018

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant presented sufficient evidence to mitigate alleged foreign influence and personal conduct security concerns. Clearance is granted.

Statement of the Case

On October 3, 2016, the Department of Defense (DoD) issued a Statement of Reasons (SOR) alleging security concerns under the foreign influence and personal conduct guidelines. Applicant answered the SOR and requested a hearing (Answer).

The case was originally assigned to a different judge, but DOHA lost jurisdiction over the matter before a hearing could be scheduled.¹ Applicant's case was reinitiated and I was assigned the matter on January 17, 2018. By agreement of the parties, a hearing was scheduled for March 1, 2018. Applicant testified at the hearing and the exhibits offered by the parties were admitted into the administrative record without objection.² The transcript of the proceeding was received on March 8, 2018.

¹ Appellate Exhibit I.

² Government Exhibits 1 – 3 and Applicant's Exhibits A – D.

On March 9, 2018, after reviewing the entire record, I concluded that the evidence warranted a favorable decision. I informed the parties that, unless an objection was raised, I intended to fairly, quickly, and efficiently resolve the case through summary disposition. See ISCR Case No. 15-03176, n.2 (App. Bd. May 26, 2017) (benchmark for when summary disposition is warranted). Department Counsel objected. The record closed on March 30, 2018.³

Findings of Fact

Applicant immigrated to the United States in 1983, and became a U.S. citizen in 1995. He is married to a U.S. citizen. His two adult children were born, raised, and educated in the United States, and are currently pursuing advanced academic degrees in the United States. Applicant's mother, who suffers from a debilitating medical condition, lives with him. Applicant traveled to India in 2013, in order to disperse his late father's ashes in the River Ganges. Applicant's father also lived with Applicant in the United States before he died.

After moving to the United States, Applicant started his own business, which primarily serves as a federal contractor to the U.S. Government. In 1998, Applicant's business received 8(a) certification from the Small Business Administration. In 1999, after reviewing and assessing Applicant's ties and connections to India, DoD granted Applicant a security clearance. Applicant's company currently employs over 100 U.S. workers, annually does about \$30 million in business in the United States, and has no outstanding line of credit. Applicant voluntarily provided his federal income tax returns from 2012 to 2016, which reflect income totaling over \$5 million each year. Applicant's U.S. assets, properties, and investments total over \$35 million.⁴

In 2011 or 2012, Applicant opened several investment accounts in India for his children, but primarily as a means to fund a wedding for his only daughter. At the time and for several years thereafter, the accounts reaped healthy returns, especially in comparison to the negligible interest rates that U.S. banks were offering for similar investment accounts. As of 2016, the market value of the investment accounts was approximately \$1,600,000. Applicant has no other assets or property in India.

Applicant's daughter earned her master's degree from a prestigious U.S. university and is currently pursuing a professional degree, with the goal of opening her own U.S. business. Her future plans do not include a large wedding in India. Additionally, although the value of Applicant's investment accounts in India have increased since he first opened them six to seven years ago, they have recently started to decrease in value. Applicant plans to liquidate the foreign accounts (or, as he testified, "I'm going to yank it out") and repatriate the money before the accounts lose any more of their value.

Applicant has paid U.S. federal and state income taxes on the interest income and capital gains from his investment accounts in India. He voluntarily provided the account

³ Appellate Exhibit V. No explanation or basis for the objection was provided.

⁴ Transcript (Tr.) 18-32, 38-41; Exhibit 2; Exhibit A; Appellate Exhibit I.

statements for the past five years and the financial reports about the foreign accounts that he submitted to the U.S. Treasury from 2012 to 2016.⁵

On December 24, 2014, Applicant submitted a security clearance application as part of the periodic reinvestigation of his background. He reported his past and present connections to India, but mistakenly forgot to list his foreign investment accounts. He subsequently provided the information about the accounts during his security clearance interview.⁶

Administrative Notice - Republic of India (India).⁷

India is a multiparty, federal, parliamentary democracy. Its political history, since gaining 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 separatist and terrorist groups.

U.S.-Indian relations are grounded on the two countries shared values of democracy and the rule of law. The United States is one of India's largest trading and investment partners. Despite the two countries strategic alliance, differences exist. The United States remains concerned about reports of significant human rights abuses, the threat posed by terrorist, and the transfer of sensitive, proprietary information to India.

Law, Policies, and Regulations

This case is decided under Executive Order (E.O.) 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 National Security Adjudicative Guidelines (AG), which became effective on June 8, 2017.

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Instead, persons are only eligible for access to classified information "upon a finding that it is clearly consistent with the national interest" to authorize such access. E.O. 10865 § 2.

When evaluating an applicant's eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner,

⁵ Tr. 33-38, 42-44; Exhibit A; Exhibit C; Exhibit D.

⁶ Tr. 41-45; Exhibit 1. Security clearance investigators apparently became aware of the large foreign investment based on the reports that Applicant filed with the Department of the Treasury, and asked him about it during the interview.

⁷ See generally Exhibit 3 and U.S. State Department website (state.gov).

considering all available and reliable information, in arriving at a fair and impartial decision. AG ¶ 2.

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15.

Administrative Judges must remain fair and impartial, and carefully balance the needs for the expedient resolution of a case with the demands of due process. Therefore, an administrative judge will ensure that an applicant: (a) receives fair notice of the issues, (b) has a reasonable opportunity to address those issues, and (c) is not subjected to unfair surprise. Directive, ¶ E3.1.10; ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

In evaluating the evidence, a judge applies a “substantial evidence” standard, which is something less than a preponderance of the evidence. Specifically, substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive, ¶ E3.1.32.1.⁸

Any doubt raised by the evidence must be resolved in favor of the national security. AG ¶ 2(b). See also Security Executive Agent Directive 4 (SEAD 4), ¶ E.4. Additionally, the Supreme Court has held that responsible officials making “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline B, Foreign Influence

Foreign contacts and interests are a national security concern if they result in divided allegiance. Likewise, a concern arises if a person's connections, contacts, or

⁸ However, a judge's mere disbelief of an applicant's testimony or statements, without actual evidence of disqualifying conduct or admission by an applicant to the disqualifying conduct, is not enough to sustain an unfavorable finding. ISCR Case No. 15-05565 (App. Bd. Aug. 2, 2017); ISCR Case No. 02-24452 (App. Bd. Aug. 4, 2004). Furthermore, an unfavorable decision cannot be based on non-alleged conduct. ISCR Case No. 14-05986 (App. Bd. May 26, 2017). Unless an applicant is provided notice that unalleged conduct raises a security concern, it can only be used for specific limited purposes, such as assessing mitigation and credibility. ISCR Case No. 16-02877 at 3 (App. Bd. Oct. 2, 2017).

interests in a foreign country leave them vulnerable to pressure or coercion by any foreign interest. However, a person is not *per se* disqualified from holding a security clearance because they have familial, financial, or other ties to a foreign country. Instead, in assessing a person's potential vulnerability to foreign influence, a judge considers the foreign country involved, the country's human rights record, and other pertinent factors.⁹

In assessing the security concerns at issue, I considered the disqualifying and mitigating conditions listed under Guideline B, including the following:

AG ¶ 7(b): connections to a foreign . . . 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 . . . country by providing that information or technology;

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

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; 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.

An applicant with familial, personal, or financial ties to a foreign country faces a high, but not insurmountable hurdle, in mitigating security concerns raised by such foreign ties. An applicant is not required "to sever all ties with a foreign country before he or she can be granted access to classified information." ISCR Case No. 07-13739 at 4 (App. Bd. Nov. 12, 2008). However, what factor or combination of factors may mitigate security concerns raised by an applicant with such foreign ties or connections is not easily identifiable or quantifiable. ISCR Case No. 11-12202 at 5 (App. Bd. June 23, 2014).

On its face, the large amount of funds Applicant has invested in an Indian financial institution raises a concern that he could be pressured or induced through the investment to act in a manner inconsistent with his fiduciary obligations as a cleared federal contractor. However, Applicant established that he will resolve any potential conflict of interest raised by his financial and other connections to India in favor of the United States. Of note, although large, the total amount in the foreign bank accounts pales in comparison to Applicant's U.S. assets, property, and investments. Moreover, this foreign financial

⁹ See generally AG ¶ 6. See also ISCR Case No. 05-03250 at 4 (App. Bd. Apr. 6, 2007) (setting forth factors an administrative judge must consider in foreign influence cases).

interest is Applicant's ties to the United States go far beyond his substantial financial stake in this country. He has lived in the United States for more than half his life, built a successful, thriving business in the United States, and raised two successful children. His wife, children, and mother all live in the United States. Applicant has no other close ties or connections to India. *Contrast with* ISCR Case No. 15-07079 (App. Bd. Oct. 19, 2017), where applicant and her husband had significant close financial and familial ties to India.

Additionally, the circumstances giving rise to the foreign financial investment tend to mitigate the security concerns at issue. Applicant opened the foreign bank accounts to pay for *his* dream wedding for his daughter. She apparently does not share the same vision for her own future and, for multiple reasons, Applicant expects to close the foreign bank accounts soon and repatriate the money. Applicant did not hide the fact about the investment accounts in India. Instead, he dutifully reported them to the Treasury Department and paid U.S. taxes on his gains from these foreign investments. He has held a security clearance without issue since 2009 and for the past decade has been awarded several federal contracts. For all these reasons, I find that the above listed mitigating conditions apply.

Security clearance assessments about a person require a judge to closely examine the individual's conduct and circumstances, both past and present. In a Guideline B case this assessment necessarily requires a judge to consider the relevant foreign country at issue. Furthermore, a past favorable clearance adjudication does not bar security officials from reassessing an applicant's eligibility, especially when new matters arise.

After considering the potential security concern posed by Applicant's foreign financial investment and weighing the evidence, both favorable and unfavorable, including the matters admitted into the record regarding India, I find that Applicant presented sufficient evidence to mitigate the foreign influence security concern.¹⁰

Guideline E, Personal Conduct

Conduct involving dishonesty during the security clearance process, such as the deliberate falsification of a security clearance application, raises a serious security concern. See *generally* AG ¶¶ 15, 16(a). Applicant established that he mistakenly did not list the foreign financial investment in India on his current security clearance application. His testimony at hearing was credible. Additionally, his testimony was consistent with the record evidence. Specifically, Exhibits A, B, and D show that Applicant reported the foreign investment accounts to the IRS and has paid a substantial amount in federal and state income taxes on the gains he has realized from the investment. Although Applicant recognizes that informing the IRS of the foreign investment accounts does not excuse his failure to report the information on his clearance application, his disclosure of the accounts to the IRS corroborates his assertion that he had no intent to hide or conceal this information from the Government.

¹⁰ Furthermore, the nature of the foreign financial interest, i.e., passively-held investment accounts that are being managed by a financial institution which happens to be located in India, favor mitigating the foreign influence security concern.

Furthermore, Applicant disclosed other pertinent information, including regarding his other foreign connections and contacts, on his current and past security clearance applications. Applicant was also candid and forthright throughout the security clearance process about the foreign investment accounts. Notably, Applicant voluntarily provided five years of income tax returns and bank records, and documentation about the U.S. taxes he has paid on the foreign investment. In short, Applicant exhibited the candor expected of all clearance holders. Accordingly, I find that Applicant did not deliberately falsify his security clearance application and met his burden of proof and persuasion in demonstrating that the Government can continue to entrust him with a security clearance.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive, ¶ E3.1.25, are:

Paragraph 1, Guideline B (Foreign Influence):	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of the record evidence, it is clearly consistent with the interests of national security to grant Applicant initial or continued eligibility for access to classified information. Applicant's request for a security clearance is granted.

Francisco Mendez
Administrative Judge