



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



In the matter of:)
)
) ISCR Case No. 17-01486
)
Applicant for Security Clearance)

Appearances

For Government: Bryan Olmos, Esq., Department Counsel
For Applicant: *Pro se*

08/10/2018

Decision

CERVI, Gregg A., Administrative Judge

This case involves security concerns raised under Guideline B (Foreign Influence). Applicant mitigated the foreign influence concerns. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on August 30, 2015. On August 10, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline B (Foreign Influence).¹

Applicant answered the SOR on August 22, 2017, and requested a hearing before an administrative judge. The case was originally assigned to me on November 8, 2017.

¹ 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 revised adjudicative guidelines (AG) effective on June 8, 2017.

Department Counsel requested additional time before proceeding, and a hearing scheduled by the Defense Office of Hearings and Appeals (DOHA) for November 16, 2017, was canceled. I was reassigned the case on February 5, 2018. DOHA issued a second notice of hearing on February 22, 2018, and the hearing was convened on March 15, 2018. Government Exhibits (GE) 1 through 3 and Applicant's Exhibits (AE) A through C were admitted into evidence. Applicant testified. The record was held open for Applicant to submit additional exhibits. AE D, including an e-mail, and attached information about his volunteer activities, father's work, and his wife's immigration status were submitted and admitted in evidence without objection. DOHA received the hearing transcript (Tr.) on March 26, 2018.

SOR Amendments

During the hearing, the SOR was amended under my motion, to conform to the evidence to wit: SOR ¶ 1.c was amended to show Applicant's "two" sisters are residents and citizens of India; and SOR ¶ 1.e was added to wit: your spouse is a citizen of India and resident of the United States; and SOR ¶ 1.f was added to wit: your in-laws are citizens and residents of India. The amendment and additions to the SOR were made without objections.

Request for Administrative Notice

Department Counsel requested that I take administrative notice of certain facts about Republic of India. (HE 1) The facts administratively noticed are summarized in the Findings of Fact, below.

Findings of Fact

Applicant is a 29-year-old senior program manager employed by a defense contractor since January 2016. He previously worked for another defense contractor from 2012 to 2015. This is his first application for a DOD security clearance. Applicant holds a master's degree in aerospace engineering awarded in 2012, and a master's in business administration awarded in 2017, both from American universities. Applicant's graduate engineering research project was funded by a DOD agency. He married in December 2016, and has no children. Applicant's spouse is a citizen of India, but resides in the United States with Applicant under a U.S. employment authorization, and has applied for permanent U.S. residency as a precursor to U.S. citizenship.

Applicant was born and raised in India. He moved to the United States when he was 18 years old, to attend an American university, where he earned a bachelor's degree in aerospace engineering, with honors, and then earned two master's degrees. He worked for a U.S. company from 2012 to 2016. He began working for his current employer in 2016 in an advanced leadership program, and is now a program manager. He naturalized as a U.S. citizen in 2015, and renounced his Indian citizenship. He purchased a home in the U.S. in 2013, and has about \$40,000 in equity; a 401k retirement account; and savings of about \$20,000. He has no foreign assets.

Applicant's grandmother, mother, father, two sisters, and in-laws are citizens and residents of India. His mother is a homemaker, and his father is a semi-retired business consultant in medical biotechnology, financial, and business management. Applicant's parents are both U.S. permanent residents. Applicant's father primarily aids Indian and U.S. companies with streamlining or unwinding company operations. He intends to fully retire within two years. One of Applicant's sisters is a pediatrician in India, and the other is a homemaker. None of Applicant's family have shown a particular interest in his jobs or security clearance status, and they have no connection to military or intelligence services.

Applicant's spouse is an Indian citizen, residing in the United States since 2017. She has a U.S. employment authorization, and she applied for permanent resident status in 2017. Her attorney attested that he expects her permanent residency interview to occur in the summer or fall of 2018, and for her permanent resident status to be granted. In August 2018, Applicant confirmed that they are still awaiting processing of her permanent resident application. The U.S. Government now estimates the time to process an application will take between 17.5 months to 35.5 months. Applicant's mother-in-law is a stay-at-home mother and his father-in-law owns a rural cold-storage business to store farmer's crops. His brother-in-law is a medical school student. Applicant has regular contact with his parents, and more limited contact with his siblings and in-laws. Applicant has extended family and family friends from India who are long-standing American citizens residing in the United States. He considers himself to be a loyal American citizen and vowed to report any efforts to compromise classified or proprietary information to the appropriate authorities. He acknowledged the danger posed to American lives if classified information is compromised.

Applicant provided evidence of outstanding work performance, and letters from a colleague and director of his company lauding his performance, ethics, professionalism, and trustworthiness. Applicant is an active participant in science, technology, engineering and math (STEM) activities for disadvantaged youth, and mentors an elementary school student in need.

India

India is a multi-party, federal, parliamentary democracy. Recent elections were generally considered free and fair. In a 10-year old report, India was identified as one of 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. The U.S. Department of Justice reported criminal prosecutions in several cases involving theft of U.S. proprietary scientific information and technology and transfers to private Indian citizens or companies, with suspected transfers to the government. 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 extrajudicial killings, torture, rape, corruption and other abuses. Indian counterterrorism

cooperation with the United States has been increasing, and the Indian government is committed to deepening bilateral cooperation of the full spectrum of terrorism threats. The U.S. and India are also cooperating to fight money laundering and terrorism financing.

Law and 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 § 2.

National security eligibility is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. 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 a person’s stability, trustworthiness, reliability, discretion, character, honesty, and judgment. AG ¶ 1(b).

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.” 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 ¶ 1(d).

Analysis

Guideline B, Foreign Influence

The security concern for foreign influence is set out in AG ¶ 6:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 7. The following are potentially applicable in this case:

- (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; and
- (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 has varying degrees of contact with foreign family members who are citizens and residents of India. India was identified as one of 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 is also victimized by terrorist and has problems with conforming to human rights norms. These conditions create a

heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion, and a potential conflict of interest. AG ¶¶ 7(a) and 7(b) have been raised by the evidence.

Conditions that could mitigate foreign influence security concerns are provided under AG ¶ 8. The following are potentially applicable:

(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.; and

(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.

Applicant moved to the United States from India when he was 18 years old, to attend an American university. He worked for a U.S. company from 2012 to 2016. He began working for his current employer in 2016 and is now a program manager. He naturalized as a U.S. citizen in 2015, and renounced his Indian citizenship. He purchased a home in the U.S. in 2013, and has about \$40,000 in equity; a 401k retirement account; and savings of about \$20,000. He has no foreign assets. He has various contact with family members in India. His closest contact is with his parents. His mother is a homemaker, and his father is a semi-retired business consultant. None of his family have ties to military or intelligence agencies. Applicant does not own property or financial resources outside of the U.S., and his spouse is a resident of the United States with a pending application for permanent residency. He has close contact with his extended family in the United States who are long-standing U.S. citizens.

I find it unlikely that Applicant's relationships with family in India will place him in a position of having to choose between those persons and the interests of the United States. India is not known to target family members or U.S. citizens for intelligence activities. Additionally, Applicant has shown a deep relationship and loyalty to the United States that he can be expected to resolve any potential conflict of interest in favor of the United States, and that his familial relationships in India are subordinate to his strong and long-lasting relationship to his life and family in the United States. AG ¶¶ 8(a) and 8(b) are applicable.

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 Guideline B in this whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

I considered Applicant's close and continuing ties to the United States, and his life in the United States over the past 11 years. I find that his devotion to the United States, as evidenced by his education, work history, and ties to his extended family in the U.S., mitigates any concerns raised by his foreign contacts.

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

Formal Findings

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

Paragraph 1, Guideline B: For Applicant

Subparagraphs 1.a-1.f: 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