



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 17-03445 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: *Pro se*

06/13/2018

Decision

COACHER, Robert E., Administrative Judge:

Applicant mitigated the security concerns under Guideline B, foreign influence. Applicant's eligibility for a security clearance is granted.

Statement of the Case

On October 13, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline B. The DOD CAF acted under Executive Order (EO) 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 June 8, 2017.

Applicant answered the SOR on November 10, 2017, and requested a hearing before an administrative judge. On January 19, 2018, the case was assigned to me. On March 1, 2018, the Defense Office of Hearings and Appeals (DOHA) notified Applicant

that the hearing was scheduled for March 19, 2018. I convened the hearing as scheduled. Government exhibits (GE) 1-2 were admitted in evidence without objection. The Government's exhibit list, discovery letter, and request for administrative notice were marked as hearing exhibits (HE) I-III. Applicant testified, but offered no exhibits at the hearing. Post-hearing, he submitted an exhibit (AE A), which was admitted without objection. DOHA received the transcript (Tr.) on March 26, 2018.

Procedural Rulings

Administrative Notice

I took administrative notice of facts concerning India. Department Counsel provided supporting documents that verify, detail, and provide context for the requested facts. The specific facts noticed are included in the Findings of Fact.¹

Administrative or official notice is the appropriate type of notice used for administrative proceedings.² Usually administrative notice in ISCR proceedings is accorded to facts that are either well known or from U.S Government reports.³

Findings of Fact

In Applicant's answer to the SOR, he admitted all the SOR allegations. His admissions are incorporated into the findings of fact. After a thorough and careful review of the evidence, I make the following additional findings of fact.

Applicant is 54 years old. He came to the United States from India in 1990 on a student visa. He received a master's degree and began working in this country as a software engineer. In 1994, he moved to the state where he currently resides. He married his wife in 1995. He was granted U.S. citizenship in 2004. He did not retain his Indian citizenship. His wife is a naturalized U.S. citizen. His two children are native-born U.S. citizens.⁴

The SOR alleged that Applicant's three brothers, a sister, and his mother-in-law are citizens and residents of India; and he is co-owner of a home in India valued at approximately \$200,000.

¹ The Government's request and the supporting background documents were marked as hearing exhibit (HE) III.

² See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004) and *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986).

³ See Stein, *Administrative Law*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice).

⁴ Tr. at 6, 17-18, 20; GE 1.

Applicant was born in India, but has resided in the United States since 1990. He married his wife here, has owned his own home here since 1997, and his two children were born and attend school here. He estimated his current net worth of his U.S.-assets is approximately \$500,000. He has no plans to ever return to India, except to visit family. His last visit was in November 2017 to attend a wedding. He usually travels to India once every two to three years, usually for some sort of family gathering. When he visits, none of his Indian relatives inquire about the nature of his work. His sole loyalty is to the country he adopted and where his family lives, the United States.⁵

Applicant's three brothers reside and are citizens of India. All work in the retail business. None have any affiliation with the Indian government. Applicant has infrequent contacts with them averaging about once every two or three months. All three brothers live in the house they inherited (along with Applicant) from their father. Applicant's sister is a homemaker, whose husband is in the garment business. They have no government ties and Applicant's contact is once every two months. Applicant provides no financial support for any of his siblings. Applicant's mother-in-law has no affiliation to the Indian government. She receives a small pension from her teachers' retirement fund (approximately \$300 monthly). Applicant's contact with her is about once every three months. She visited the United States once when his son was born.⁶

Applicant inherited a 25 percent share of his father's home when he died. His three brothers inherited the remaining interest. Applicant estimated that the property is valued at about \$200,000. His three brothers and their families reside in the home and Applicant derives no financial benefit from it. He does not believe his brothers intend to sell the property because they would then have no place to live. If they were to sell the property, he would likely not accept his share of the proceeds.⁷

Applicant offered recommendations from three coworkers. He is described as professional and an outstanding employee.⁸

India is a sovereign, socialist, secular, democratic republic. It is a multiparty, federal parliamentary democracy with a bicameral parliament and a population of approximately 1.1 billion.

The Indian government generally respects the rights of its citizens, but serious problems remain. Police and security forces have engaged in extrajudicial killings of persons in custody, disappearance, torture, and rape. The lack of accountability permeated the government and security forces, creating an atmosphere in which human rights violations went unpunished. A number of violent attacks were committed in recent

⁵ Tr. at 17-18, 20; 23-24; GE 1.

⁶ Tr. at 25-31; GE 2.

⁷ Tr. at 32-33; GE 2.

⁸ AE A.

years by separatist and terrorist groups. In November 2008, terrorists coordinated an attack at a hotel in Mumbai, frequented by westerners.

The United States recognizes India as key to strategic interests and has sought to strengthen its relationship with it. The two countries are the world's largest democracies, both committed to political freedom protected by representative government, and share common interests in the free flow of commerce, in fighting terrorism, and in creating a strategically stable Asia. However, differences over India's nuclear weapons program and pace of economic reform exist. There are also concerns about India's relations with Iran, including their increasing cooperation with the Iranian military.

There have been cases involving the illegal export, or attempted illegal export, of U.S. restricted, dual-use technology to India, including technology and equipment which were determined to present an unacceptable risk of diversion to programs for the development of weapons of mass destruction or their means of delivery. Foreign government and private entities, including intelligence organizations and security services, have capitalized on private-sector acquisitions of U.S. technology. In March 2008, an American businessman pleaded guilty to conspiring to illegally exporting technology to entities in India.

The United States views India as a growing world power with which it shares common strategic interests. There is a strong partnership between the two countries and they are expected to continue addressing differences and shaping a dynamic and collaborative future. The United States and India seek to elevate the strategic partnership further to include counterterrorism, defense, education, and joint democracy promotion.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a careful weighing of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

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

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 and endures throughout off-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 that an 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.

Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline B, Foreign Influence

AG ¶ 6 explains the security concern about “foreign contacts and interests” 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.

AG ¶ 7 indicates conditions that could raise a security concern and may be disqualifying 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;

(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

(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.

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 or inducement. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member or friend is associated with or dependent upon the government, the country is known to conduct intelligence collection operations against the United States, or the foreign country is associated with a risk of terrorism. The relationship between India and the United States places a significant, but not insurmountable burden of persuasion on Applicant to demonstrate that his relationships with his relatives living in India do not pose a security risk. Applicant should not be placed in a position where he might be forced to choose between loyalty to the United States and a desire to assist his relatives living in India who might be coerced by governmental entities, or pressured to assist India.

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."⁹ Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields.

⁹ ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

The relationship he has with his Indian siblings and mother-in-law is sufficient to cause the application of AG ¶¶ 7(a) and 7(b). His interest in the property owned jointly with his brothers satisfies the requirements of AG ¶ 7(f).

AG ¶ 8 lists conditions that could mitigate foreign influence security concerns, including:

(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.;

(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;

(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

(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 credibly testified that his family and life are here in the United States, where he has resided since 1990. He has minimal contact with siblings and his mother-in-law. That contact is limited to once every two to three months. He presented sufficient evidence to establish that it is unlikely that he would be placed in a position to choose between the interest of his family living in India and those of the United States. AG ¶ 8(a) applies. AG 8(c) partially applies.

Applicant has met his burden to establish his “deep and longstanding relationships and loyalties in the U.S.” He has resided in the United States for over 28 years. He became a U.S. citizen in 2004. His wife is a U.S. citizen and his two children were born here. His U.S.-based financial assets far surpass his small interest in a home in India, which he acquired through inheritance. The evidence supports that Applicant has longstanding ties to the United States and would resolve any conflict of interest in favor of the United States. AG ¶¶ 8(b) and 8(f) apply.

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 the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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. The circumstances tending to support granting Applicant's clearance are more significant than the factors weighing towards denying his clearance. I considered the recommendations of his coworkers. I also considered his strong ties to this country, thereby demonstrating his longstanding loyalty to the United States. Therefore, he provided sufficient evidence to mitigate the security concerns.

Overall the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude that the security concerns arising under Guideline B, foreign influence concerns were mitigated.

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:

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| Paragraph 1, Guideline B: | FOR APPLICANT |
| Subparagraphs 1.a: - 1.d: | 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.

Robert E. Coacher
Administrative Judge