



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



In the matter of:)
)
-----) ISCR Case No. 15-00856
)
Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: *Pro se*

03/31/2016

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny him a security clearance to work in the defense industry. A 56-year-old employee, Applicant was born and raised in India. He has lived and worked in the United States since 2000. He did not meet his burden to present sufficient evidence to explain and mitigate the foreign influence security concern stemming from his ties to India. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 Format) on April 4, 2014.¹ After reviewing the application and information gathered during a background investigation, the Department of Defense

¹ Exhibit 3 (this document is commonly known as a security clearance application).

(DOD),² on August 9, 2015, sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him eligibility for access to classified information.³ The SOR is similar to a complaint. It detailed the reasons for the action under the security guideline known as Guideline B for foreign influence. He answered the SOR in writing on August 27, 2015; he admitted each of the SOR allegations; and he submitted a two-page memorandum wherein he gave a brief explanation for each admission.

Neither Applicant nor Department Counsel requested a hearing, and so the case will be decided on the written record.⁴ On December 30, 2015, Department Counsel submitted all relevant and material information that could be adduced at a hearing.⁵ This file of relevant material (FORM) was mailed to Applicant, who received it on January 8, 2016. He did not reply within the 30-day period from receipt of the FORM. The case was assigned to me on March 14, 2016.

Procedural Matters

The FORM includes Exhibit 4, which is a report of investigation (ROI) summarizing Applicant's interview that took place during the May 2014 background investigation. The summary, Exhibit 4, is not authenticated by a witness as required under ¶ E3.1.20 of the Directive. Department Counsel's written brief includes a footnote advising Applicant that the summary was not authenticated and that failure to object may constitute a waiver of the authentication requirement. Nevertheless, a *pro se* applicant's failure to respond to the FORM does not equate to a waiver of the authentication requirement.⁶ The written record does not demonstrate that Applicant understood the legal concepts of authentication, waiver, and admissibility. It also does not establish that he understood the implications of waiving an objection to the admissibility of the summary. Accordingly, Exhibit 4 is inadmissible and I have not considered it.

² The SOR was issued by the DOD Consolidated Adjudications Facility, Fort Meade, Maryland. It is a separate and distinct organization from the Defense Office of Hearings and Appeals, which is part of the Defense Legal Services Agency, with headquarters in Arlington, Virginia.

³ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006).

⁴ Directive, Enclosure 3, ¶ E3.1.7.

⁵ The file of relevant material consists of Department Counsel's written brief and supporting documents, some of which are identified as evidentiary exhibits in this decision.

⁶ See *Black's Law Dictionary*, 1717 (Bryan A. Garner ed., 9th ed., West 2009), for a definition of waiver.

In addition, I granted Department Counsel's written request to take administrative notice of facts concerning the country of India.⁷

Findings of Fact

Applicant is a 56-year-old employee who is seeking to obtain a security clearance for the first time. He is employed in the field of information technology (IT) for a large technology and consulting company. He has worked for this company since 2007. He was born and raised in India. He entered the United States in August 2000, when he was about 41 years old. He has been employed as an IT professional since at least 2001.

There is some confusion or uncertainty about when Applicant became a U.S. citizen. His security clearance application indicates the following: (1) he obtained a naturalization certificate in June 2007; (2) he obtained a citizenship certificate in August 2013; and (3) he obtained his current U.S. passport in August 2013.⁸ The confusion or uncertainty exists because a person does not hold both types of certificates.⁹ Since Applicant's parents were born in India, I presume Applicant was eligible for a certificate of naturalization, not citizenship. Further confusing the matter, his security clearance application indicates he obtained an Indian passport in 2011 and then used it to travel to India in June–July 2013,¹⁰ although those matters were not alleged in the SOR.

As set forth in the SOR, Applicant has a number of family and financial ties to India. He is married to an Indian citizen who lives in the United States. He has one adult child who is a U.S. citizen and two children who are Indian citizens living in the United States. His brother is a citizen of India who lives in the United States. All of the aforementioned Indian citizens are U.S. permanent resident aliens (the so-called Green card). His mother, father, sister, mother-in-law, and father-in-law are citizens of and residents in India. Applicant owns property in India valued at approximately U.S. \$50,000, and has a bank account worth about U.S. \$2,000. In his answer to the SOR, Applicant provided the following explanations about his ties to India.

⁷ Exhibit 5.

⁸ Exhibit 3.

⁹ See <https://my.uscis.gov/helpcenter/article/what-is-the-difference-between-a-certificate-of-citizenship-and-a-certificate-of-naturalization>. (Certificates of citizenship and naturalization both serve as proof of U.S. citizenship, but the eligibility requirements are different. A citizenship certificate is available for people who were born abroad and automatically acquired or derived U.S. citizenship through birth to or adoption by a U.S. citizen parent or parents. A naturalization certificate is given to a lawful permanent resident after they fulfill the various requirements established by law.)

¹⁰ See ISCR Case No. 14-03629 at 5 (Mar. 17, 2015) (noting that India does not recognize or permit dual citizenship).

Applicant's father is a 93-year-old citizen of and resident in India. His father obtained a Green card at age 90. He elected to return to India for medical care. He is no longer in a position to travel to the United States.

Applicant's mother is an 80-year-old citizen of and resident in India. She obtained a Green card at age 70. She elected to return to India for medical care.

Applicant's brother is a citizen of India as well as a lawful resident of the United States. He obtained a Green card in 2012 and is waiting the required period before applying for U.S. citizenship.

Applicant's sister is a citizen of and resident in India. She has been married to an Indian citizen since 1977. Applicant described his sister as a well-regarded attorney who practices law in a particular court.

Applicant's spouse is a citizen of India as well as a lawful resident of the United States. She is not yet eligible to apply for U.S. citizenship, but she intends to do so.

Applicant's son is a citizen of India as well as a lawful resident of the United States who is in the process of applying to become a naturalized citizen. He attended high school in the United States and is attending college here.

Applicant's daughter is a citizen of India as well as a lawful resident of the United States. Still a minor at age 17, she is not eligible to apply for naturalization until age 18 unless both parents are U.S. citizens. She is currently attending high school in the United States.

Applicant's parents-in-law are citizens of and residents in India. His mother-in-law is a senior citizen who is enjoying a retired life. His father-in-law is also retired after working many years working as a veterinarian.

Applicant owns property (not otherwise described but presumed to be real estate) in India valued at about U.S. \$50,000. He made the purchase by obtaining a \$30,000 loan from his 401(k) account as well as by using proceeds from the sale of an ancestral property. The bank account is tied to the ancestral property too, as it was used to deposit his share of the sale proceeds. He does not earn income in India.

Law and Policies

It is well-established law that no one has a right to a security clearance.¹¹ As noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the

¹¹ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

side of denials.”¹² Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.¹³ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁴

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁵ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁶ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁷ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁸

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹⁹ The DOHA Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.²⁰

The AG set forth the relevant standards to consider when evaluating a person’s security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a

¹² 484 U.S. at 531.

¹³ Directive, ¶ 3.2.

¹⁴ Directive, ¶ 3.2.

¹⁵ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁶ Directive, Enclosure 3, ¶ E3.1.14.

¹⁷ Directive, Enclosure 3, ¶ E3.1.15.

¹⁸ Directive, Enclosure 3, ¶ E3.1.15.

¹⁹ *Egan*, 484 U.S. at 531.

²⁰ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

person a security clearance is not a determination of an applicant's loyalty.²¹ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Discussion

The gravamen of the SOR under Guideline B is whether Applicant's ties to India disqualify him from eligibility for access to classified information. Under Guideline B for foreign influence,²² the suitability of an applicant may be questioned or put into doubt due to foreign connections and interests. The overall concern is:

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.²³

The guideline contains several disqualifying conditions. Given the evidence of Applicant's ties to India, I have considered the following disqualifying conditions:

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;

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

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.

²¹ Executive Order 10865, § 7.

²² AG ¶¶ 6, 7, and 8 (setting forth the concern and the disqualifying and mitigating conditions).

²³ AG ¶ 6.

Based on U.S. concerns about (1) industrial and economic espionage, (2) the risk of terrorism in India, (3) India's relationships with Iran, Pakistan, and Russia, and (4) human-rights matters, India meets the heightened-risk standard in AG ¶¶ 7(a) and (e). This conclusion is based on the facts set forth in Department Counsel's administrative notice request.²⁴

Likewise, the guideline contains several mitigating conditions. Given the evidence here, I have considered the following mitigating conditions:

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, 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.

Applicant's family and financial ties to India are sufficient to raise a concern. Applicant is a U.S. citizen living in the United States, but many of his immediate and extended family members are Indian citizens, Indian residents, or both. In addition, although \$2,000 in a foreign bank account is a minor sum of money, Applicant has a foreign property interest valued at about \$50,000, which cannot be considered minor. This is especially so given that I know nothing about Applicant's business, financial, or property interests in the United States. Taken together, his ties to India are sufficient to raise a concern or a potential conflict of interest due to foreign influence.

Applicant appears to be a successful IT professional who has spent the last 15 years or so living and working in the United States. He obtained U.S. citizenship in 2007 or 2013, the record is not clear. It also appears that he, his spouse, and three children intend to make the United States their home. Nevertheless, deciding this case is hindered by the lack of information, because the written record concerning Applicant is

²⁴ Exhibit 5; *see generally* ISCR Case No. 14-03629 at 6-7 (Mar. 17, 2015) (discussing background information on India, including information of the nature of Indian's government, which is a parliamentary democracy, as well as the U.S.-Indian relationship, which President Obama stated will be vital to the U.S. strategic interests in Asia-Pacific and across the globe).

limited to the SOR, Applicant's answer to the SOR, and Applicant's security clearance application. He did not take advantage of the opportunity to respond to the FORM.

The security clearance process is not a zero-risk program, because nearly every person presents some risk or concern. Many cases come down to balancing that risk or concern. Here, Applicant has family and financial ties to India. Those circumstances should not be dismissed or overlooked as fanciful or unrealistic, especially considering the matters the United States views of concern in India. Given the dearth of the written record, I am not satisfied that Applicant's ties to the United States are strong enough to outweigh and overcome the concern or potential conflict of interest presented by his family and financial ties to India. Accordingly, I cannot be confident that Applicant can be expected to resolve such a concern or potential conflict of interest in favor of the U.S. interest.

Applicant did not meet his burden to present sufficient evidence to explain and mitigate the foreign influence security concern stemming from his ties or connections to India. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.²⁵ Accordingly, I conclude that he did not meet his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline B:	Against Applicant
Subparagraphs 1.a–1.k:	Against Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information.

Michael H. Leonard
Administrative Judge

²⁵ AG ¶ 2(a)(1)–(9).