



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



In the matter of:)
)
) ISCR Case No. 12-04541
)
)
Applicant for Security Clearance)

Appearances

For Government, Charles Morin, Esq., Department Counsel
For Applicant: Christopher Graham, Esq.

07/31/2013

Decision

MASON, Paul J., Administrative Judge:

Applicant’s ties and contacts with immediate and extended family members who are citizens and residents of India have not been mitigated. Eligibility for access to classified information is denied.

Statement of the Case

Applicant signed and certified his Electronic Questionnaire for Investigations Processing (e-QIP) on October 8, 2010. He was interviewed by an investigator from the Office of Personnel Management (OPM) on five occasions: November 5, 2010, December 15, 2010, August 2, 2011, August 29, 2011, and November 21, 2011. Most of the information, except for financial matters, was collected on August 29, 2011. The August 2, 2011 and August 29, 2011 interviews, and the interview on November 21, 2011, addressing only financial matters, which were memorialized in a 22-page affidavit

signed under oath on November 21, 2011, appear in Government Exhibit (GE) 2.¹ The November 5, 2010 and December 15, 2010 interview summaries appear in GE 3 and were signed by Applicant on September 21, 2012. He agreed with the content of the 2010 summaries and indicated that his interrogatory responses and summaries could be admitted in evidence to determine his security suitability. (GE 3)

On February 14, 2013, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing security concerns under foreign influence (Guideline B). The action was taken pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), effective in DOD on September 1, 2006.

Applicant submitted his notarized answer to the SOR on March 22, 2013. A notice of hearing was mailed to Applicant on April 22, 2013, scheduling a hearing for May 23, 2013. The hearing was held as scheduled. The Government's four exhibits and the Applicant's one exhibit (AE A) were admitted in evidence without objection. Applicant testified. The transcript was received by the Defense Office of Hearings and Appeals (DOHA) on June 3, 2013.

Ruling on Procedure

Department Counsel requested that I take administrative notice of certain facts about India. (GE 4) The facts which I will administratively notice appear after Findings of Fact. I also take administrative notice of the facts contained in AE A. The matters administratively noticed are limited to matters that are obvious to the average person, easily verifiable, and relevant to this case.

Findings of Fact

The SOR contains seven allegations under foreign influence (Guideline B). Applicant admitted his mother, sister, and brother-in-law are citizens and residents of India. (SOR 1.a, 1.b, 1.c) He admitted that his aunts, uncles, cousins, and nephew are citizens and residents of India. (SOR 1.d) He implicitly admitted he has an Indian bank account, but denied the amount was always \$4,000. (SOR 1.e) He admitted he owns an apartment in India valued at about \$155,000. (SOR 1.f) He did not provide an answer to SOR 1.g, but stated that his contacts at the Indian Embassy lasted for a certain period of time that has ended. Based on Applicant's admissions and a review of the entire record, I make the following factual findings.

¹ The 22-page affidavit was signed and dated by Applicant and the OPM investigator. Above Applicant's signature is a typewritten paragraph that indicates he read the affidavit, initialed all the pages, and made corrections and placed initials near each correction, He also indicated the document was true and made of his own free will.

Applicant is 52 years old and is employed by a defense contractor. He is applying for a top secret clearance. He has held a security clearance since August 1994. He married a U.S. citizen on November 30, 1986, during graduate school. He has four children, ages 26, 24, 22, and 19. The 26-year-old is pursuing a PhD in neuroscience. The 24-year-old recently completed college. The 22-year-old has autism and attends a job development facility. The 19-year-old is about to begin his second year of college. Applicant began working for his employer in September 2004. (GE 1 at 52-53; Tr. 24)²

Applicant was born in India in 1961. He attended an Indian university and received a bachelor of science degree in physics with a minor in statistics. In 1983, he received a master's degree in physics at an Indian technology school. Desiring to continue his education, start a family and eventually serve the United States, Applicant immigrated to the United States in 1984 and enrolled in a graduate school program. In December 1990, he completed his PhD in physics. In 1991 and 1992, he undertook some post-doctoral work at another university. He became a naturalized U.S. citizen in August 1992. (Tr. 16-20, 71)

From 1993 to March 1998, Applicant was employed as an electronics engineer for a U.S. Government military research lab. In 1998, Applicant, his wife, and others founded a microwave company. He worked there until he was hired at his current job in September 2004. His present job title is technology development manager. He was a senior program manager in October 2010. (GE 1 at 77, GE 2 at 1, 4; Tr. 21-23)

SOR 1.a. Applicant's mother is 80 years old and is a citizen and resident of India. She has never been employed. She suffers from diabetes and cannot travel. Applicant used to write monthly letters to her, but now telephones her about once a week. She has no ties to a foreign government or military. One of the reasons Applicant maintains the Indian bank account is to have funds immediately available if his mother becomes ill. Applicant's father, a retired employee of a civilian aviation agency of the Indian government, passed away in 1983. His mother receives a pension from her husband's employment. (GE 2 at 9-10; Tr. 25-26, 30-31,39, 45-46)

SOR 1.b, 1.c. Applicant's sister and her husband (Applicant's brother-in-law), citizens and residents of India, live with Applicant's mother. Applicant's sister (SOR 1.b) is a public high school education teacher. Because they live together, Applicant speaks as frequently to his sister as he does to his mother and sees her every time Applicant and his family travel to India. She does not have any ties to a foreign government or military. (GE 2 at 10)

Applicant's brother-in-law (SOR 1.c), a retired pilot of an Indian civilian aviation agency, teaches flying lessons for a private company. Applicant characterized his contact as distant because his brother-in-law has a hearing problem. He has only seen

² The page numbers of GE 1 are typed and located in the upper right hand corner of the page.

his brother-in-law during trips to India. Applicant could not understand why he indicated in his e-QIP that his contact was more than 15 times a year. (GE 2 at 12; Tr. 26, 46-48)

SOR 1.d. Applicant's aunts, uncle, cousin, and nephew are resident citizens of India.³

Aunts. Applicant's mother had three sisters (aunts), but one is deceased. The remaining two aunts are retired teachers. The first aunt is retired from teaching history at an Indian private school. Applicant's only contact with her is during travel to India. He may telephone her to check on his uncle's health condition. Applicant did not know why his e-QIP indicated he had contact with her more than 15 times a year. The first aunt has never had any connections to a foreign government or military. (GE 2 at 10; Tr. 27-28)

Applicant's second aunt is a retired teacher who taught Hindi at a high school. Applicant talks to her by telephone two or three times a month and sees her on his family trips to India. The second aunt has no ties to a foreign government or military.

Uncle. The uncle, a retired chemist working for a private company that manufactured soap and perfumes, is married to Applicant's first aunt above. He is in poor health. Applicant's only contact with his uncle occurs during trips to India. He did not know why his e-QIP indicated his contact was more than 15 times a year. (GE 2 at 10; Tr. 28, 51)

Cousin. This relative is a citizen and resident of India. He is a physics and math teacher. Applicant speaks with him by telephone two or three times a month, in addition to electronic or in-person contact. The cousin handles Applicant's travel arrangements and maintains Applicant's apartment in India. The cousin has no other ties to a foreign government or military. (GE 1 at 85-86, GE 2 at 9; Tr. 51)

Nephew. This relative is a financial risk analyst for a bank in India. Applicant's contact with this relative is electronic, or by telephone once every two weeks, or face-to-face during trips to the country. Applicant did not know why his e-QIP indicated his contact was more than 15 times a year. Applicant's cousin has no affiliation with a foreign government or the military. (GE 1 at 86, GE 2 at 11; Tr. 51-52)

SOR 1.e, Indian bank account containing approximately \$4,000. In his e-QIP, Applicant indicated he had \$3,000 in an Indian bank account which he opened in December 2008, to have money available to pay his monthly mortgage by direct deduction. He tries to keep the account balance at least \$2,000, though the highest balance in the account has been \$4,000. Under Indian law according to Applicant, he could not purchase the house without a mortgage. Applicant's cousin is authorized to withdraw money from the account for specific reasons or to pay the utilities. Applicant

³ SOR 1.d alleges "uncles," but only one uncle is discussed in the record.

has no other accounts in the country, and would not be economically affected if the account was confiscated. (GE 1 at 89, GE 2 at 19-20; Tr. 31)

SOR 1.f, ownership of apartment valued at about \$155,000. In order to save money while visiting family in India, Applicant purchased an apartment in January 2009. He also wanted a location to accommodate his 22-year old son who has autism. The apartment is in a gated community that is classified a high income group. Applicant traveled to India in 2007, 2008, 2010, 2011, and 2012. He has not traveled to India in 2013. (GE 2 at 19; Tr. 45, 52)

Applicant's U.S. assets include a home valued at approximately \$750,000 with a \$400,000 mortgage balance, a 401(k) retirement account valued at about \$280,000, a mutual fund worth about \$100,000, a savings and bank account totaling about \$3,700, and a deferred compensation fund of \$30,000. His wife has a 401(k) retirement account worth more than \$300,000. Applicant indicated the value of his U.S. property is about ten times the value of his Indian property. (Answer to SOR; Tr. 65-68, 70)

SOR 1.g, Applicant's multiple contacts with individuals of the Indian Embassy in Washington, D.C. In June 2008, Applicant met Official (A) who was an attache to a defense research organization at the Indian Embassy in Washington, D.C. Official A, a resident citizen of India, was in the United States to investigate business opportunities for unclassified projects. In September 2008, Applicant had one additional meeting with Official A to discuss other business opportunities. The activity with Official A was funded by Applicant's employer and Applicant followed proper protocol in compliance with his employer's communication and coordination policies. In November and December 2008, Applicant had continuous contact with Official A for about 25 days in India. Applicant recalled indicating that he considered Official A to be a business associate. Applicant did not consider Official A to be a friend as the November 2011 affidavit indicates. Though his affidavit states that he visited Official A one other time for a few hours when Applicant was lodging in a hotel in India, Applicant could not remember whether the visit occurred during or after 2008. (GE 2 at 12-13; Tr. 54, 60-62)

In 2008, Applicant also met Official B, a second representative from the defense research organization of India who had come to the United States to explore business opportunities. Applicant had only one meeting with Official B. (GE 2 at 13; Tr. 62)

On six occasions, Applicant emailed a brigadier general who he assumed to be a resident citizen of India. The brigadier general wanted to attend a defense display in the United States and Applicant put him in touch with the appropriate company employees to discuss business opportunities. Applicant had no subsequent contact with Official B, or the brigadier general after 2008 and the business projects ended. Applicant has never been solicited by a foreign operative for sensitive information and has no sympathy for another country. (GE 2 at 14; Tr. 63-64)

Applicant has never failed to report his foreign contacts to his employer. He detailed the procedures for travel in the United States or overseas. Before applying for travel, the employee must discuss the travel plan with his supervisor, providing the destination, the purpose of the trip, and what equipment will be taken on the trip. The supervisor must approve the travel. Applicant also informs the employer's security department. The supervisor then sends an email approving or disapproving the trip. Upon his return, Applicant must be debriefed by the security office. Applicant must disclose anything unusual about his contact with foreign nationals. Applicant also provides an email to his supervisor summarizing the events of the travel. (GE 2 at 15)

Character Evidence

In 2007, 2008, and 2009, Applicant taught Hindi during the summer and fall semester at a U.S. community college. He also taught math and physics at a U.S. university in 2010 and the spring of 2011. While Applicant's children were in school, they played soccer and lacrosse. They were significantly involved in playing musical instruments. Applicant's family has chided him about not voting in U.S. elections. He intends to vote in the future. (GE 2 at 6; Tr. 35-36, 69, 73) No additional character evidence from independent sources was presented.

Administrative Notice

India is a sovereign, socialist, secular democratic republic with multiple political parties conducting government activities in a federal parliamentary democracy model. The country has about 1.21 billion citizens.

The United States considers India key to its strategic interests and has strengthened its relationship after a period of strained ties caused by India's development of nuclear weapons. The United States has removed or revised U.S. export requirements for sale to India of dual-use and civil nuclear items, including nuclear reactors even though there have been several documented cases involving the attempted or illegal export of U.S. restricted, dual-use technology to India, including technology and equipment that were determined to be applied for prohibited purposes. As of 2000, India was considered actively engaged in economic intelligence collection and industrial espionage directed at the United States. By 2008, India was considered heavily involved in criminal espionage in illegally obtaining U.S. export-related products.

Both countries are dedicated to the free flow of commerce, to fighting terrorism, and establishing stability in Asia. The United States is India's largest trading and investment partner. Foreign assistance to the country was about \$3 billion, with the United States providing about \$126 million in developmental assistance.

India continues to have problems with terrorism. Of the more than 2,300 people who lost their lives in 2008 because of terrorist incidents, 180 were killed during an attack on an internationally known hotel in November 2008. Terrorist activity is also

concentrated in Kashmir, a disputed area bordering Pakistan. Separatist and terrorist groups are still active in other parts of the country.

Regarding human rights issues, the Indian government generally respects its citizens' rights. However, corruption in the police and security forces continues to be a problem, particularly in criminal investigations and during efforts to suppress separatists and terrorist groups. Abusive practices against women and children, and caste-based discrimination persists, despite criminal penalties for violations. But there is no evidence that India uses force or duress to obtain economic intelligence from its citizens.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). Following the security concern definition for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to classified information.

These guidelines must be considered in the context of the nine general factors known as the whole-person concept to enable the administrative judge to 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 access to classified information will be resolved in favor of national security."

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

Analysis

Foreign Influence

AG ¶ 6 expresses the security concern of the foreign influence guideline:

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 U.S. citizens to obtain protected information and/or is associated with a risk of terrorism.

AG ¶ 7 contains two potential disqualifying conditions that may be pertinent in this case:

(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;

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

(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.

The mere possession of ties and contacts with a family member in a foreign country is not disqualifying under Guideline B. On the other hand, if an applicant has close contact with an immediate or extended family member living in a foreign country, this single factor may create a potential for foreign influence that is disqualifying under the guideline. The Government must establish that these family connections create a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion or would create a potential conflict of interest between his obligations to protect classified information and his desire to help his family member who may be experiencing foreign influence.

The foreign influence guideline is not limited to countries hostile to the United States, but applies to friendly nations whose disagreements with the United States may or may not motivate them to engage in some kind of harmful activity against U.S. interests.

SOR 1.g is resolved in Applicant's favor. Applicant credibly testified that in 2008 one of his job responsibilities was to act as a contact person to match Indian officials with appropriate representatives from his employer for business purposes. There is no evidence the contacts continued after the end of 2008. I accept Applicant's explanation that his relationship ended with Official A, although he could not remember the exact date.

However, Applicant's mother, sister, brother-in-law, aunts, uncle, cousin, and nephew are citizens and residents of India. Applicant has weekly contact by telephone with his mother and sister. He has bi-weekly contact by telephone with his cousin and his nephew, and has monthly contact with his aunt. He visited India in 2007, 2008, 2010, 2011, and 2012. Applicant's ties of affection to immediate and extended family members and in India, combined with the threat of terrorism in the country and industrial espionage directed at the United States, create a heightened risk of foreign influence under AG ¶ 7(a). His ties also create a potential conflict of interest under AG ¶ 7(b) between his responsibilities to protect classified information and his desire to help an immediate or extended family member.

Applicant owns an apartment in India that he purchased in January 2009. The current value of the property is \$155,000. Applicant also has an Indian bank account containing \$3,000. The financial interest could subject Applicant to a heightened risk of foreign influence outlined in AG ¶ 7(e).

The Government has presented sufficient evidence under AG ¶¶ 7(a), 7(b), and 7(e). The burden then moves to Applicant to present evidence under AG ¶ 8 that demonstrates he is unlikely to be placed in a position of having to choose between his family members and U.S. interests. The potential mitigating conditions are:

(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the position 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, group, government, or country is minimal, or the individual has such deep and long-lasting 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;

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that I could create a risk for foreign influence or coercion; 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 has a strong relationship to his immediate family members who are citizens and residents of India. His relationship to more distant family members is not as strong, but still periodic. He has visited these family members almost yearly since 2007. Given Applicant's bonds of affection to his immediate and extended family members,

together with the unpredictability of terrorist activity in India, I cannot confidently conclude it is unlikely Applicant will be placed in a position of having to choose between the interests of his family members and U.S interests. I am unable to apply AG ¶ 8(a).

Applicant has lived in the U.S. since 1984. He was married in the United States in 1986 and became a naturalized U.S. citizen in 1992. His four children were born and are receiving their education in this country. However, his contacts and visits with his family members, who are citizens and residents of India, are frequent in scope and nature. There is insufficient evidence to conclude that there is no conflict of interest, either because Applicant's obligation to his foreign family members is so minimal or that he has "such deep and longstanding relationships and loyalties in the U.S., . . .," that he can be expected to resolve any conflict in favor of the United States. AG ¶¶ 8(b) and 8(c) do not apply.

Viewing Applicant's \$155,000 apartment and \$3,000 bank account in isolation, one could conclude that he has significant financial interests in India. However, his Indian assets are less than one/tenth the value of his U.S. assets and it is unlikely they could be used effectively to influence or pressure Applicant. AG ¶ 8(f) applies to Applicant's Indian financial interests.

Whole-Person Concept

I have evaluated this case under the specific disqualifying and mitigating conditions of the foreign influence guideline. I now consider those findings in the context of the nine general factors of the whole-person concept identified in 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 the participation was 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 on careful consideration of the specific guidelines and nine factors for the whole-person concept.

The evidence supporting a security application is meaningful. After receiving two degrees in India, Applicant immigrated to the United States in 1984 and enrolled in a graduate school program. In December 1990, he completed his PhD in physics. In 1991 and 1992, he undertook some post-doctoral work at another university. He became a naturalized U.S. citizen in August 1992. He received his security clearance in 1994.

After working at a U.S. Government military research lab for five years, Applicant, his wife, and others founded a microwave company. He worked there until he was hired

by his current employer in September 2004. Between 2007 and 2011, Applicant taught Hindi, math, and physics at a college and a university. While Applicant's children were in school, they played soccer and lacrosse, but were primarily involved in playing musical instruments. What is missing from Applicant's case is independent character evidence, e.g., performance evaluations and character endorsements, that would provide probative insight into his U.S. relationships, loyalties, and reputation during his professional career.

There is more evidence supporting denial of Applicant's security application than evidence in favor. Overall, Applicant has close ties with his family members in India. His contacts with them are weekly to monthly. He has visited them almost yearly since 2007. Having weighed and balanced the evidence under the disqualifying and mitigating conditions in the context of the nine factors of the whole-person concept and the terrorist activity that continues to exist in India, Applicant has not mitigated the security concerns associated with foreign influence.

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 (Foreign Influence, Guideline B):	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	Against Applicant
Subparagraphs 1.e-1g:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Paul J. Mason
Administrative Judge