



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



In the matter of:)	
)	
)	ISCR Case No. 12-05259
)	
Applicant for Security Clearance)	

Appearances

For Government: Robert Kilmartin, Esq., Department Counsel
For Applicant: Elizabeth L. Newman, Esq.

05/08/2013

Decision

RICCIARDELLO, Carol G., Administrative Judge:

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

Statement of the Case

On December 5, 2012, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline B. The action was taken under 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 within the DOD on September 1, 2006.

Applicant answered the SOR on December 19, 2012, and requested a hearing before an administrative judge. The case was assigned to me March 30, 2013. After coordinating with counsel, the Defense Office of Hearings and Appeals (DOHA) issued

a notice of hearing on April 9, 2013. Applicant waived his right to 15-days notice. I convened the hearing as scheduled on April 22, 2013. The Government offered exhibits (GE) 1 through 4, which were admitted into the record without objection. The Government requested administrative notice be taken of Hearing Exhibit (HE) I. There was no objection, and I granted the request. Applicant and two witnesses testified. He offered Exhibits (AE) A through D, which were admitted into the record without objection. The record was held open until April 29, 2013, to allow Applicant to submit additional documents. Applicant's counsel submitted HE II and requested administrative notice be taken of it. There was no objection, and I granted the request.¹ DOHA received the hearing transcript (Tr.) on May 1, 2013.

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 40 years old. He was born in India. He met his wife in college. They both earned bachelor's degrees in India in 1994. They married in 1995. They moved to the United States the same year. He earned a master's degree in 1999, while working full time. They have two children, ages 14 and 8, who were born in the United States. He and his wife became naturalized citizens in 2005.²

Applicant had a job with an American company when they moved to the United States in 1995. He continued working in business at different companies and continued to excel and advance in the corporate arena. Applicant's wife started a company in 2007. After working in various jobs, Applicant joined his wife as a vice president of the company. He now serves as its president and his wife is responsible for the administration of the company. They have 11 employees. In 2009, as part of their business, Applicant became involved with Company A, an India-based company, to help them target U.S. companies and convince the U.S. companies to use Company A for outsourcing. Applicant was also responsible for training Company A's management in the proper leadership expertise to cultivate an appropriate management structure. Applicant took numerous business trips to India from 2009 to 2011 in support of this client. He had no personal relationship with the people that worked for Company A.³

Applicant's work experience and training was developed under the U.S. corporate structure and he had difficulty transitioning Company A to change their leadership structure and management style. Applicant stated in his answer that due to the recession, his business relationship with Company A did not become as fruitful as

¹ Department Counsel's memorandum is HE III.

² Tr. 25-28, 32-33.

³ Tr. 28-49, 79-84, 128.

he had hoped. He never was able to develop any business interest for Company A. He severed the relationship because it was not profitable, and through his facility security manager, learned that his relationship with a foreign company might adversely affect his ability to obtain a security clearance. After learning the potential security significance it became more important to him to sever the relationship. He had to take time to wind down the business relationship. He began the process in April 2011 and his ties were completely severed in December 2011. He no longer has any business relationship with any foreign businesses. He and his company do not intend on conducting any business with foreign businesses in the future. He indicated that because his company is small, it is difficult to compete with larger companies that conduct business internationally. He intends to conduct business only with U.S.-based companies.⁴

While conducting business in India, Applicant would occasionally have telephone contact with family members there. He did not visit them when he was on business trips due to time constraints. He has traveled in the past to visit his parents, who are citizens and resident of India. He traveled to India extensively from 2006 to 2011. Some of these trips were for business and some were to visit family. Travel from in 2009 and 2010 was personal and not business related. During these trips he used a "persons of Indian origin" [PIO] card. This card is issued to people of Indian origin who are no longer citizens of India. It is used in lieu of a tourist visa that is required to enter India. It is an easier process to get a PIO card than a tourist visa. When Applicant learned that the PIO card could become an issue he turned it into his facility security manager. The facility security manager provided a statement that he has the PIO card and will maintain it.⁵ He does not intend to use the PIO card in the future. In the event Applicant requests it be returned, the facility security manager will contact DOHA immediately. If Applicant returns to India in the future, he intends to apply for a tourist visa and not use the PIO card.⁶

Before becoming a U.S. citizen, Applicant traveled to India on his Indian passport. After becoming a U.S. citizen, he formally renounced his Indian citizenship and sent his Indian passport to the Indian embassy. He obtained a U.S. passport in 2006 and uses it exclusively when he travels.⁷

Applicant invested in real estate in India in 1999. He purchased parcel A, a vacant lot in India. He and his wife purchased another vacant lot, parcel B, in 2004, also in India. At the time, the real estate market in India was very strong. When Applicant became aware their foreign property might be a security concern, they attempted to sell the property, but due to the depressed real estate market they were unable. They then chose to divest themselves of the property by transferring the deed to parcel A to

⁴ Tr. 28-49, 79-84, 128.

⁵ GE 3.

⁶ Tr. 40-41, 49-54, 66-67, 85-89, 95-97.

⁷ Tr. 50-51.

Applicant's father and the deed to parcel B to his wife's father. Applicant provided the real estate documents to prove he and his wife no longer own the two properties.⁸

Applicant has no assets in India. All of his assets are in the United States. He conservatively estimated his assets to be approximately \$750,000 to \$800,000. He does not have a bank account in India. He has never voted in India.⁹

Applicant's parents are citizens and residents of India. His parents are in their late 70s. His father is a retired school principal. His mother is a retired teacher. Applicant talks to them on the telephone every two to three weeks. His parents occasionally visit them in the United States and in the past, Applicant occasionally visited his parents in India. He does not intend to return to India to visit them unless there is a medical emergency or one of his parents passes away. Neither parent has worked for the government of India or been involved with any political or military organizations. Applicant provided a one-time monetary gift to his parents in 1997 or 1998, but does not financially support them.¹⁰

Applicant's sister is a citizen and resident of India. He has minimal contact with her. He estimated that he may have contact once every two to three years and it usually involves issues related to their parents. He has had more contact recently due to his father's health and while he was completing the requirements to sell his property in India. She is a homemaker and her husband works for the local public works as an engineer. They have two children. Their son is a permanent resident of the United States and is working here. Their daughter is married and lives in the United States. She permanently resides in the United States, but it is unknown if she is a naturalized citizen. Applicant does not have contact with either of them. He does not believe his sister is involved with the government of India or any political or military organizations.¹¹

Applicant's father-in-law is a citizen and resident of India. Applicant's wife has contact with him every one to two weeks by telephone. He is a retired civil engineer. He worked for a city in India when he was employed. He has no contact with the government of India or any political or military organization. Applicant's wife's brother has lived in the United States since 1993. She has two other brothers, who live in India and own a construction company. She maintains some contact with one brother every few weeks and the other every few months. Neither is involved with the Indian government or any political or military organization.¹²

⁸ Tr. 54-63; AE A, B, C.

⁹ Tr. 63-64.

¹⁰ Tr. 26, 64-67, 78, 92-95; Answer to SOR.

¹¹ Tr. 68-72, 89-91; Answer to SOR.

¹² Tr. 29, 112-115.

Applicant and his wife consider themselves Americans and plan to retire in the United States. They intend for their children to attend college in the United States. They provided evidence that they participate in the traditional events most American families are involved with, including music lessons for the children, swim team, and celebrating traditional holidays.¹³

Applicant has never been contacted by a foreign agent. He credibly testified that if he was ever approached by a foreign agent, or learned his parents were threatened he would contact U.S. officials.¹⁴ A witness testified on Applicant's behalf. He has known him since 2008 and has regular interaction with Applicant. He considers Applicant to be trustworthy and reliable.¹⁵

India

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 years by separatist and terrorist groups. In November 2008, the 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.

India has a history of being involved in criminal espionage and is an active collector of U.S. economic and proprietary information. 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,

¹³ Tr. 73-76, 115-127; AE D.

¹⁴ Tr. 76-77, 98.

¹⁵ Tr. 101-106.

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 cooperation in counter-terrorism, 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(c), the entire process is a conscientious scrutiny 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 access to classified information will be resolved in favor of 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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 the 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.

Section 7 of Executive Order 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 expresses the security concern regarding foreign influence:

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.

AG ¶ 7 describes conditions that could raise a security concern and may be disqualifying. I have considered all of them and the following are potentially applicable:

- (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 the individual’s desire to help a foreign person, group, or country by providing that information;
- (d) sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure or coercion; 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.

AG ¶¶ 7(a) and (d) require substantial evidence of a “heightened risk.” The “heightened risk” required to raise one of these disqualifying conditions is a relatively low standard. “Heightened risk” denotes a risk greater than the normal risk inherent in having a family member living under a foreign government or owning property in a foreign country. The totality of Applicant’s family ties to a foreign country as well as each individual family tie must be considered.

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.”¹⁶

Applicant’s parents, sister, and father-in-law are citizens and residents of India. India’s human rights records, terrorism activities, and its government’s relationship with other foreign governments, such as Iran and Russia, raise security concerns. I find AG ¶¶ 7(a), 7(b), and 7(d) apply to Applicant’s relatives mentioned above. Applicant has divested himself of property he and his wife owned in India. Applicant no longer has any ties to Company A in India or any other company there. I find AG ¶ 7(e) does not apply and there are no security concerns regarding financial interests in India.

I have also analyzed all of the facts and considered all of the mitigating conditions for this security concern under AG ¶ 8 and conclude the following are potentially applicable:

- (a) the nature of the relationship 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 and 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 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 interests in favor of the U.S. interests; and
- (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.

¹⁶ ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

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. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the foreign government or the country is known to conduct intelligence operations against the United States. India is a democracy and has a strong partnership with the United States. However, its human rights record and its history of economic espionage raise concerns.

Applicant and his wife have lived in the United States since 1995 and have been naturalized citizens since 2005. Their children were born in the United States. They are loyal to the United States and intend on retiring here. All of their assets are located in the United States. Except for Applicant's parents and father-in-law, they do not maintain close ties with any other family members in India. Applicant has traveled to India in the past on business and the occasional family visit. They do not intend to return to India to live and will only return if it is an emergency regarding their parents health or when they pass away. Applicant parents and his father-in-law in India do not have any unusual affiliation with the Indian government. They are all retired. His sister and her husband also do not have an affiliation with the Indian government. Applicant has minimal contact with his sister and her family, except to receive information about his parents' well-being.

Applicant's contact with family members in India is unlikely to create a risk of foreign exploitation. Applicant maintains a relationship with his parents and his wife with her father. They are retired and do not hold positions that raise any unusual security concerns or place them in a heightened risk scenario. His sister and her husband do not work in high-profile jobs that might be targeted. I find it is unlikely Applicant might be placed in a position of having to choose between the interests of his family, including his sister, and his wife's father in India and the interests of the United States. I find AG ¶ 8(a) applies. Applicant and his wife have been in the United States almost all of their adult lives. They have assimilated into the American culture and have a deep sense of loyalty to the United States. I am confident that Applicant can be expected to resolve any conflicts in favor of U.S. interests. I find AG ¶ 8(b) applies. AG ¶ 8(c) does not apply because Applicant's relationship with his parents and his wife's with her father is more than casual and infrequent. Applicant's contact with his sister is only to inquire about his parents' health and needs. He maintains a relationship with her for this purpose. His contact with his sister is infrequent, but it is not casual. AG ¶ 8(c) does not apply to Applicant's relationship with his sister.

Applicant's use of a PIOC instead of a tourist visa does not raise any unusual security concerns. He did not use an Indian passport after becoming a U.S. citizen. He renounced his Indian citizenship. He relinquished his PIOC to his facility security manager and does not intend to use it in the future.

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(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 my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant and his wife immigrated to the United States in 1995. Their children were born in the United States, and they have been naturalized citizens since 2004. He has established his family roots in the United States. He and his wife own a company they founded in the United States. They embrace the American culture. All of their assets are in the United States. Their only remaining close ties to India are their parents. Applicant has no intention of returning to India to live or to develop business interests there. I have considered his demeanor and candor during his hearing. I believe Applicant would resolve any conflict of interest in favor of the United States. I am convinced that Applicant has deep and longstanding relationships and loyalties in the United States.

Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under the guideline for 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, 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 a security clearance. Eligibility for access to classified information is granted.

Carol G. Ricciardello
Administrative Judge