



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



In the matter of: )  
 )  
----- ) ISCR Case No. 14-01047  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Eric Borgstrom, Esq., Department Counsel  
For Applicant: H. David Spirt, Esq.

11/07/2014

**Decision**

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant mitigated security concerns regarding his family members, who are citizens, residents, or citizen-residents of India. Applicant’s eligibility for a security clearance is granted.

**Statement of the Case**

On May 9, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline B (Foreign Influence). 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.

In a letter notarized May 19, 2014, Applicant admitted all eight allegations raised and requested a hearing. I was assigned the case on June 30, 2014. On August 15, 2014, the Defense Office of Hearings and Appeals (DOHA) issued a notice setting the hearing for September 9, 2014. The hearing was convened as scheduled.

The Government offered two documents, which were accepted into the record without objection as exhibits (Exs.) 1-2. Also without objection, it offered a potential

hearing exhibit regarding the Republic of India (India), which was accepted as Ex. 3. Applicant gave testimony, introduced one witness, and offered five documents, which were accepted into the record as Exs. A-E without objection. The transcript (Tr.) of the proceeding was received on September 17, 2014. The record was then closed. Based on a through review of the case file, I find that Applicant carried his burden in mitigating security concerns arising under Guideline B.

### **Request for Administrative Notice**

Department Counsel submitted Requests for Administrative Notice regarding certain facts about the nation of India. Administrative or official notice is the appropriate type of notice used for administrative proceedings. 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)); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings is to notice facts that are either well known or from Government reports. Various facts pertaining to India nation were derived from the offered request and its attachments.

India is a sovereign, secular, democratic republic. It is a multiparty, federal parliamentary democracy with a bicameral parliament and a population of approximately 1.2 billion. Since gaining independence in 1947, India has had a tumultuous history, and continues to experience terrorist and insurgent activities.

The Indian government generally respects the rights of its citizens, but serious problems remain. The most significant human rights problems are security force abuses, including extrajudicial killings, torture, and rape. Authorities infringe on citizens' privacy rights, and widespread corruption at all levels of government continues.

India, along with other countries, has been involved in criminal espionage and cases involving violation of U.S. export controls. Cases have involved 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. Governmental and private entities, including intelligence organizations and security services, have capitalized on private-sector acquisitions of U.S. technology.

Despite past differences regarding India's nuclear weapons program, and its cooperation with Iran in some policy areas, the United States recognizes India as key to its strategic interests and has sought to strengthen the relationship. The two countries are the world's largest democracies, both committed to political freedom protected by representative government. They share common interests in the free flow of commerce, fighting terrorism, and creating a strategically stable Asia.

India and the United States are partners in the fight against global terrorism. A Bilateral Counterterrorism Cooperation Initiative was launched in July 2010. As of 2011, the number of terrorist-related deaths in India had decreased. The State Department's Anti-Terrorism Assistance program has conducted scores of training courses for Indian law enforcement officials. In 2011, a U.S.-India Homeland Security dialogue was established to foster cooperation on various law enforcement issues. As of November 2012, counter-terrorism cooperation with India was described by the Obama administration as a "pillar of the bilateral relationship" between the two countries.

### **Findings of Fact**

Applicant is a 44-year-old research scientist who has worked for his present employer since 1999. He was born in India and moved to the United States in 1993. From 1993 until 1999, he remained in the United States on a non-immigrant student visa. During that time he earned a master's and a doctorate degree. In 2001, he married and decided to seek United States citizenship by applying for a green card. He bought a home in 2005. He received a green card in 2008, after a delay attributable to a name check issue on his application. Tr. 86. Applicant became a naturalized United States citizen in 2013, at which time his employer urged him to apply for a security clearance.

Applicant's wife, an Indian citizen presently working as an engineer in the United States, intends to apply for United States citizenship by the end of this year, when she is eligible. Their two minor children are United States citizens as a result of their birth in this country. They attend local schools. The family is active in their community.

At issue are the following relations, all of whom are citizens and residents of India: Applicant's father, mother, two sisters, father-in-law, mother-in-law, and two brothers-in-law. Also at issue is Applicant's alleged maintenance of two bank accounts in India stated to be worth about \$5,000.

Applicant's father is a 78-year-old retired civil engineer who worked for the Indian government on various projects. He receives a pension for his years of service. He lives with his 67-year-old wife, Applicant's mother, a homemaker. Their oldest daughter is a married homemaker with two sons. Her husband works in the private sector for a large company. Applicant's youngest sibling, also a sister, is a physician married to a physician. The couple works for a private clinic and a private hospital, respectively, and have two minor children. Tr. 86. Applicant speaks with his parents and siblings about every week by telephone.

Applicant sees his family in India about every two years "because that's when [he has] enough vacation to go to India." Tr. 32. His last trip occurred after receiving a U.S. passport, so he traveled on that passport. His Indian passport and citizenship have been formally relinquished. Ex. C. He usually stays for three to four weeks for a "typical family visit." Tr. 33. When in India, his wife accesses a non-resident external account (NRE) at a local bank, where an account balance of about \$2,300 is maintained in order that she can make withdrawals directly in rupees when visiting. Applicant's wife

maintains the bank's automatic withdrawal card. Tr. 82. The account is in her name; Applicant is not listed as a joint holder on the account. Ex. A. Because the account is for a non-resident, "the money is fully repatriable back to the United States." Tr. 35, 37. As they leave, she transfers the balance to an interest bearing account in her name until they return. Tr. 35. Any interest thus acquired is taxable in the United States.

When traveling to India to see his family, Applicant flies to and from a peaceful and remote area distant from the current tensions in Islamabad and Pakistan. Tr. 64. His U.S. passport bears his Overseas Citizen of India (OCI) number on page three, under the section for visas. The OCI card is for Persons of Indian Origin (PIOs) who were citizens of India on 26th January, 1950, or thereafter, or were eligible to become citizens of India on 26th January, 1950, except if otherwise specified by the Government of India. One is required to have relinquished one's Indian citizenship in order to be eligible for the card. Tr. 55-56. OCI is not to be misconstrued as 'dual citizenship'. OCI does not confer political rights, but is used to facilitate security and transit. Tr. 41, 45, 74-75. It is considered to be a travel permit or visa. Tr. 46. Applicant has no intention of returning to India to live. Tr. 46-47.

Applicant's father-in-law is in his 70s. Retired, he used to work for a private sector international entity. Applicant's mother-in-law is a homemaker. Other than Applicant's wife, they have a daughter who lives in the United States and is married to a United States citizen. Applicant's wife has contact with her family abroad almost each week by telephone. Applicant's in-laws visit the United States often. Neither Applicant, members of his family, or his in-laws are involved in political activity. Applicant has no real estate or financial interests in India.

Applicant specifically chose to become a U.S. citizen after he married and the couple contemplated children. He is happy with his decision to settle here. He owns his own home. He has not yet had the chance to vote in a domestic election. He entertained his parents on one visit, in 2012 or 2013, and helped entertain his in-laws on a trip here in 2013. Applicant is a valued employee and he enjoys his work. He earns \$100,000 a year in salary and has a 401(k) account. Applicant has favorable recommendations from current and former colleagues.

## **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 not drawn 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.

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**

The security concern relating to the guideline for Foreign Influence is set out in AG ¶ 6:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is

known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

Applicant has ties of affection, independently or through his wife, for his parents, sisters, and in-laws, who are all citizen-residents of India. He or his wife has contact with them about once a week. He visits his family in India about every two years. His parents have visited him in the United States once. Through his wife, he has access to a nominal bank balance in India, which he uses when visiting India. In the United States, he shares a marital home with his wife, a citizen of India. Such ties constitute a heightened risk of foreign influence. Disqualifying conditions AG ¶¶ 7(a), (b), and (d) apply:

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) connection 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; and

AG ¶ 7(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.

However, his wife's NRE's nominal balance and the fact any interest accrued is reportable to the United States obviates application of ¶ 7(e):

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.

In finding disqualifying conditions applicable, I specifically note that AG ¶ 7(a) requires substantial evidence of a heightened risk. The heightened risk required to raise a disqualifying condition 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 substantial assets in a foreign nation. Terrorist activities have transpired within India. This fact is sufficient to find a heightened risk exists in this case. In addition, foreign family ties can pose a security risk even without a connection to a foreign government. This is because an applicant may be subject to coercion or undue influence when a third party pressures or threatens an applicant's family members. Under these facts, a third-party coercion concern potentially exists in India. Therefore, the evidence provided is sufficient to raise the above disqualifying conditions.

AG ¶ 8 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 8 including:

AG ¶ 8(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, or government and the interests of the U.S.; and

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 U.S., that the individual can be expected to resolve any conflict of interests in favor of the U.S. interests.

Applicant has the burden to demonstrate evidence to refute or mitigate the allegations.

The mere possession of close family ties to persons in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if only one relative lives in a foreign country and an applicant has frequent, non-casual contacts with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. Here, Applicant's parents, sisters, and in-laws live in India. The nature of the foreign country must be considered in evaluating the likelihood of exploitation. The United States and India have a long-standing, stable relationship, and share common strategic goals. India is a democracy and a partner in combating terrorism. Given the nature of the country involved, it is unlikely that the Indian government would exploit Applicant or his relatives based on their relationship. It is unlikely that Applicant would have to choose between the interests of his family in India and the interests of the United States. AG ¶ 8(a) applies.

Moreover, Applicant has developed strong ties to the United States, which weigh in his favor when evaluating the question of exploitation or potential conflicts of interest based on ties to India. He has lived in the United States for 21 years, coming to this country in order to continue his academic studies. He met and married his wife 15 years ago. With the idea of settling down and starting a family, Applicant initiated the process to become a U.S. citizen. The couple subsequently had two children, both U.S. citizens, who attend local schools. Applicant bought a home in the United States, where he lives with his wife and children. He has built a career here; his investments are here. His wife is settled in her professional niche. Applicant is now a U.S. citizen. He has no intention to return to India to live. He is already building toward a future for his family and a retirement in the United States.

In contrast, Applicant's parents, sisters, and in-laws are well-settled in India, from where they maintain weekly or bi-weekly contact with Applicant. He visits India every couple of years. His use of an OCI card underscores that he has chosen U.S.

citizenship over Indian citizenship because the acquisition of the card requires that one first relinquish their Indian citizenship. Applicant has no property interests in India, but has investments in the United States, including a home. His wife has arranged to have a type of nominal external account where any interest acquired is reportable to the United States. Other than his father's status as a pensioner of the Indian government, none of his family members has connections with the Indian government or military. Their jobs bear no apparent nexus to information gathering, police enforcement, or the monitoring of terrorist groups.

There is insufficient evidence to conclude Applicant's relationships abroad are so deep and longstanding as to outweigh the factors comprising his life and maturation in the United States, including his education, career, marriage, children, activities, home, retirement savings, and credible expressions of intent regarding his future. I conclude that Applicant would choose his significant U.S. ties over his foreign connections, in the event a conflict of interest arose. AG ¶ 8(b) applies.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). 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 incorporated my comments under the three guidelines at issue in my whole-person analysis. Most of the factors in AG ¶ 2(a) were addressed under the above guideline, but some warrant additional comment.

Applicant is a 44-year-old research professional who has worked for the same company since 1999. He came to the United States two decades ago to continue his education, then stayed to start a career. When he married in 2001, he decided to seek U.S. citizenship and looked forward to starting a family of his own. He has since had children, become a respected employee, bought a home, paid U.S. taxes, opened and maintained a retirement account, and become a United States citizen. Meanwhile, his wife is building her own career and intends to begin the process of seeking U.S. citizenship at the end of this year. Applicant travels only on a U.S. passport, using an OCI card emphasizing he has relinquished his Indian citizenship. He has expressed his intent to remain here and not again become an Indian citizen. He considers the United States to be his home. His maintenance of ties and occasional visits with relatives in India are genuine and respectful, but those ties do not outweigh his present life, commitments, and responsibilities in the United States.



When disqualifying conditions are raised, the burden is then placed on an applicant to proffer facts and evidence in mitigation of the security concerns raised. Here, Applicant presented sufficient information about himself, his family, and the country at issue to mitigate foreign influence security concerns. Clearance is granted

### **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.h: 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.

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Arthur E. Marshall, Jr.  
Administrative Judge