

DATE: May 28, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-15345

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant emigrated from India with her family in May 1988 when she was nine years old. With the acquisition of United States citizenship by naturalization in June 1999, she renounced her Indian citizenship. She continued to possess an Indian passport issued to her in 1993, giving no thought to its surrender as it was no longer valid for travel. Applicant did not report her possession of that foreign passport on her October 2000 security clearance application, as she thought disclosure was required of only those foreign passports in current use. At her request, Applicant's foreign passport has since been formally cancelled and her renunciation of her Indian citizenship formally acknowledged by Indian consular officials. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4), issued a Statement of Reasons (SOR), dated February 6, 2002, to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. The SOR was based on foreign preference (guideline C) related to her possession of a foreign passport and on personal conduct (guideline E) because of her failure to disclose on an October 2000 security clearance application that she had held within the last seven years an active passport issued by a foreign government.

Applicant filed an undated response to the allegations set forth in the SOR in which she requested a hearing before a DOHA Administrative Judge. This response was received by DOHA on March 5, 2002, and on March 26, 2002, the case was assigned to me to conduct a hearing. Pursuant to formal notice dated March 29, 2002, a hearing was scheduled for April 24, 2002. At the hearing, prior to the introduction of any evidence, the Government moved to amend subparagraph 1.a. of the SOR to delete the reference to Applicant's foreign passport not expiring until June 2003, based

on the cancellation of Applicant's Indian passport by the foreign consulate. Applicant having no objection thereto, the motion was granted. The Government during its case in chief submitted two documents, Applicant's October 2000 security clearance application and April 2001 signed, sworn statement. Applicant entered one exhibit, a document from the consulate confirming renunciation of her Indian citizenship and cancellation of her Indian passport, and testified on her behalf. With the receipt on ay 3, 2002, of the transcript of the hearing, the case is ripe for a decision.

FINDINGS OF FACT

After a thorough review of the evidence, and on due consideration of the same, I render the following findings of fact:

Applicant is a 23-year-old naturalized citizen of the United States, who has been employed as a software engineer by a United States defense contractor since October 2000. Granted an Interim Secret security clearance for her duties, Applicant seeks a final grant of the Secret security clearance.

Applicant was born in the Republic of India in August 1968 to resident citizens of that nation. Circa May 1988, Applicant emigrated with her family (parents and two older sisters) to the United States. Applicant was educated in the local public school system, where she was exposed to the cultural influences of, and given opportunities afforded, United States native-born citizens.

While still in high school, Applicant traveled to India with her family for three weeks in December 1992/January 1993 to visit family members (grandparents, aunts and uncles) who remain resident citizens of India. A citizen of India, she traveled on a passport issued by that nation. In early June 1993, Applicant's Indian passport was renewed by the Consulate General of India in the United States.

Following her graduation from high school, Applicant in September 1996 commenced her undergraduate studies in computer science at a nearby university. In June 1998, Applicant traveled to Canada with family members. Applicant presented her "green card" at the border of the United States and Canada.

In June 1999, Applicant became a United States naturalized citizen, taking an oath to renounce all foreign allegiances, to support and defend the United States Constitution and its laws, and to bear arms or noncombatant service or civilian service on behalf of the United States if required. Her acquisition of United States citizenship operated as a renunciation of her Indian citizenship. The day after she became a United States naturalized citizen, she was issued a United States passport. Not asked to turn over her foreign passport, Applicant was unaware of any requirement to relinquish the passport or of any procedures to effect its surrender.

In January 2000, Applicant married in the United States a citizen of the Republic of India whom she had met while he was in the United States on a working visa. Applicant has not discussed with him his intentions with respect to future acquisition of United States citizenship.

On August 16, 2000, the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASDC³I) issued a memorandum clarifying the foreign preference adjudicative guideline with respect to the use and/or possession of a foreign passport to the effect that clearance is to be denied or revoked unless an applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States government.

In September 2000, Applicant was awarded a Bachelor of Science degree, *cum laude*, in computer science. The following month, she started working as a computer software engineer for her current employer. In conjunction with her defense-related duties, Applicant executed on October 30, 2000, a security clearance application (SF 86) on which she disclosed her birth in the Republic of India, her acquisition of United States naturalized citizenship and United States passport in June 1999, the United States residency and citizenship through naturalization of her father and two sisters, and the Indian citizenship and United States residency of her mother. ⁽¹⁾ Applicant answered "No" to question 15 on the form ["In the last 7 years, have you had an active passport that was issued by a foreign government?"]. Equating in her mind the term "active passport" with current use of a foreign passport, Applicant did not disclose her possession of a foreign passport, which had been rendered invalid because of her acquisition of United States citizenship.

In December 2000, Applicant traveled to India for five weeks with her spouse to visit his gravely ill father who died during their stay. During that visit to India, Applicant stayed with his spouse's sister and his uncle, who reside together. Applicant also visited with her maternal grandparents, her paternal grandmother, as well as some of her father's siblings, all of whom remain resident citizens of India. Applicant traveled to India on her United States passport.

In April 2001, Applicant was interviewed by a special agent of the Defense Security Service (DSS). Applicant disclosed infrequent contact with family members in India who are either farmers or homemakers. Regarding the Indian citizenship of some members of her immediate family, Applicant explained her mother had not become a United States citizen because she is not proficient in the English language and does not feel capable of passing the required examination. Applicant indicated she was unaware of her spouse's intentions with regard to acquiring United States citizenship, but added he was working as a software engineer for a United States corporation in an unclassified facility. Applicant volunteered to the agent that she possessed both United States and Indian passports. Expressing a willingness to relinquish her foreign passport, Applicant indicated she was unaware of the procedures for proper surrender. Applicant presented her foreign passport to the agent to confirm she had not used it since January 1993. Denying any intent to use the foreign passport in the future, Applicant offered the foreign passport to the agent. Her passport was returned to her with the advice that she retain it for the time being. Applicant indicated she did not maintain dual citizenship status with India, and she expressed loyalty to the United States.

On February 6, 2002, DOHA issued an SOR to Applicant alleging foreign preference concerns related to her possessing a passport issued by the Republic of India, and personal conduct concerns related to her failing to disclose her possession of that foreign passport on her SF 86. On receipt of the SOR, Applicant was apprised of the ASDC³¹ memorandum regarding the use and possession of foreign passports. On learning that she should not be in possession of a foreign passport, Applicant forwarded her passport to the Consulate General of India for cancellation. On or before March 20, 2002, the consulate cancelled Applicant's Indian passport, noting she had renounced her Indian citizenship and acquired "United States Nationality."

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future. *See* Directive 5220.6, Section 6.3 and Enclosure 2, Section E2.2. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior. *See* Directive 5220.6, Enclosure 2, Section E2.2.4.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

Foreign Preference

E2.A3.1.1. The Concern: When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

E2.A3.1.2. Conditions that could raise a security concern and may be disqualifying also include:

E2.A3.1.2.2. Possession and/or use of a foreign passport

E2.A3.1.3. Conditions that could mitigate security concerns include:

E2.A3.1.3.2. Indicators of possible foreign preference occurred before obtaining United States citizenship

Personal Conduct

E2.A5.1.1. *The Concern*: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

E2.A5.1.2. Conditions that could raise a security concern and may be disqualifying also include:

None applicable.

* * *

Under the provisions of Executive Order 10865 as amended and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

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Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion conduct, it is clearly consistent with the national interest to grant or continue her security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. See Enclosure 2 to the Directive, Section E2.2.2.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of the Applicant, I conclude the following with respect to guidelines C and E:

Born in the Republic of India, Applicant emigrated to the United States with her parents and sisters when she was a child. She attended public schools in her local community in the United States. At age fourteen, she traveled on an Indian passport to India with her family to see relatives. Six months after her return, her foreign passport was renewed by the Indian consulate in the United States. Her use and renewal of the foreign passport at that time do not raise foreign preference concerns, as they occurred before she acquired United States citizenship. (2) Following her high school graduation, Applicant in September 1996 pursued her undergraduate degree at a university in this country. In June 1999, she acquired United States naturalized citizenship, which operated as a renunciation of her foreign citizenship. The day after she became a United States citizen, she was issued a United States passport. She elected to pursue gainful employment in the United States on earning her bachelor's degree, and in October 2000 she commenced work for a United States defense contractor.

While Applicant's conduct has been largely consistent with her United States citizenship, she continued to possess her Indian passport until 2002. Possession of a foreign passport after acquisition of United States citizenship is potentially disqualifying under guideline C (*see* E2.A3.1.2.2.). As set forth by the ASDC³I in his August 2000 memorandum clarifying the foreign preference guideline with respect to the possession and/or use of a foreign passport, possession of a foreign passport could facilitate foreign travel unverifiable by the United States and it raises doubts of primary allegiance. Although Applicant's acquisition of United States citizenship operated as a renunciation of her foreign citizenship, there is no evidence the Indian authorities were apprised of her change in citizenship status until 2002. Travel on her Indian passport may well have remained a viable option for her until the passport's recent cancellation. However, as confirmed by her use of her United States passport for travel to India in December 2000, Applicant had no intent to travel on that Indian passport. With the understanding that India does not recognize dual citizenship, Applicant did not consider this passport to be valid for travel after she acquired her United States citizenship. Her retention of her foreign passport was not intended as an act of foreign preference. As of her DSS interview in April 2001, Applicant was willing to surrender her foreign passport to the Government.

Applicant's benign reason for possessing the foreign passport notwithstanding, revocation of her security clearance is required unless she surrenders the foreign passport or obtains official approval from the United States Government for its use. On learning of that requirement, Applicant forwarded her Indian passport to the Consulate General of India. With the cancellation of her foreign passport on or before March 20, 2002, foreign preference concerns related to possession and/or use of the Indian passport have been mitigated. While Applicant continues to have cultural ties to India, (3) there is little likelihood, if any, that she will act in preference to India over the United States. Subparagraph 1.a. (as amended) is resolved in her favor.

Applicant did not disclose her possession of that foreign passport on her security clearance application executed in October 2000. Personal conduct (guideline E) concerns exist where the omission of relevant and material facts from any personnel security questionnaire was deliberate (*see* E2.A5.1.2.2.). Applicant explained that she misinterpreted question 15 [In the last 7 years, have you had an active passport that was issued by a foreign government?], and thought it applied only to current use of a foreign passport. Given that Applicant understood her foreign passport to be no longer valid as of the time she executed the SF 86, and she had not used the Indian passport for travel since January 1993, her denial of any intentional misrepresentation is accepted. Applicant brought her foreign passport with her to her DSS interview in April 2001, but her purpose in doing so was not to correct an earlier act of known concealment. Rather, she presented the document to the DSS agent to confirm no active use. Subparagraph 2.a. is found for the Applicant, as her negative response to question 15 on the SF 86 was not an act of deliberate concealment or falsification.

FORMAL FINDINGS

Formal Findings as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline C: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Paragraph 2. Guideline E: FOR THE APPLICANT

Subparagraph 2.a.: For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Elizabeth M. Matchinski

Administrative Judge

1. According to the information provided by Applicant on her SF 86, United States citizenship was acquired by Applicant's father in September 1997, by one sister in November 1993, and the other in March 2000. Applicant explained in a signed, sworn statement of April 2001 that her mother has not sought United States citizenship because of a lack of English language proficiency.
2. *See* E2.A3.1.3.2. Indicators of possible foreign preference occurred before obtaining United States citizenship.
3. Applicant testified she speaks her native language fluently. She is married to an Indian citizen and she and her spouse live in the same home as her parents. Since her mother lacks sufficient proficiency in English to pursue United States naturalization, it is likely Applicant speaks her native tongue at home.