

DATE: July 22, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-08266

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Robert J. Tuidor, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The security concerns raised by a 40-year-old Indian-born naturalized U.S. citizen Applicant with an Indian-born naturalized U.S. citizen wife, two native-born U.S. citizen children, one brother residing in the U.S. (a citizen of India), and parents, parents-in-law, and two other siblings (all citizens and residents of India), with whom he retains a close relationship, none of whom are agents of that foreign government or in a position to be exploited by that government; and, until recently, his continued possession of his Indian passport (but now surrendered to the Indian government), have been mitigated by the evidence developed herein. Clearance is granted.

STATEMENT OF THE CASE

On February 6, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to 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 Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn written statement, dated March 28, 2003, Applicant responded to the allegations set forth in the SOR, and requested a hearing. The case was initially assigned to another Administrative Judge on April 21, 2003, but, due to caseload considerations, was reassigned to, and received by, this Administrative Judge on June 4, 2003. A notice of hearing was issued on June 4, 2003, and the hearing was held before me on June 26, 2003. During the course of the hearing, including an authorized period following the hearing, two Government exhibits, one Applicant exhibit, and the testimony of one Applicant witness (the Applicant), were received. The transcript (Tr.) was received on July 1, 2003.

RULINGS ON PROCEDURE

During the proceeding, under Rule 201(b)(2), Federal Rules of Evidence, Department Counsel requested that Official Notice be taken of certain adjudicative facts as set forth in two documents furnished for consideration. There being no objection interposed by Applicant, Official Notice was taken of the Annual Report to Congress on Foreign Economic Collection and Industrial Espionage--2000, prepared by the National Counterintelligence Center, consisting of 17 pages; and a passport policy "clarification" memorandum issued by the Assistant Secretary of Defense, Command, Control, Communications, and Intelligence (ASD/C³I) on August 16, 2000, consisting of 1 page.

FINDINGS OF FACT

Applicant has admitted all the factual allegations pertaining to foreign preference and foreign influence under Guidelines B (subparagraph 1.a.) and C (subparagraphs 2.a. through 2.d.). Those admissions are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 40-year-old employee of a defense contractor seeking to obtain a security clearance.

Applicant was born in 1962 in India--a nation whose interests are not inimical to the United States. Over the next 26 years, while residing with his family, he exercised the rights and privileges, and performed the responsibilities, of a citizen of India. In 1988 he moved to the United States under a student visa to pursue a master's degree.⁽¹⁾ He received his M.S.I.E. from a university in the United States in May 1992.⁽²⁾ While obtaining his education, as well as thereafter, Applicant was employed in a variety of positions in the United States.

Applicant married an Indian citizen in February 1994, in India.⁽³⁾ He applied for U.S. citizenship in 1995.⁽⁴⁾ In late 1996 and late 1998, while employed in the United States, Applicant used his Indian passport when he took two pleasure trips back to India.⁽⁵⁾ He used it again in 1997 when he took a business trip to Europe.⁽⁶⁾ Upon completing the required immigration and naturalization citizenship process, both he and his wife became naturalized U.S. citizens in September 2000.⁽⁷⁾

Since becoming an American citizen, Applicant has exercised the rights and privileges, and performed the responsibilities, of a citizen of the United States. He obtained, and used, a United States passport when he returned to India for a family reunion in 2001.⁽⁸⁾ Conversely, Applicant has not accepted any benefits from India.

While Applicant has not used his Indian passport since becoming a U.S. citizen, and that passport was not due to expire until August 2005,⁽⁹⁾ he maintained it after he became a naturalized U.S. citizen. He did so because when he inquired of a U.S. Immigration and Naturalization Service (INS) officer what he should do with the Indian passport, he was told he could keep it as a souvenir as it was no longer valid.⁽¹⁰⁾ When the security clearance concerns herein were raised, he took the passport to a "notary officer" who advised him to simply "void" the Indian passport.⁽¹¹⁾ Upon becoming aware of proper surrender procedures, he mailed the Indian passport to the Indian Consulate General via certified mail⁽¹²⁾ with a letter of transmittal indicating he was surrendering it because he is now a naturalized U.S. citizen.⁽¹³⁾

Both of Applicant's parents (ages 65 and 64, respectively), and his wife's parents (ages 63 and 58, respectively),⁽¹⁴⁾ are native-born citizens and life-long residents of India.⁽¹⁵⁾ Applicant's father is a semi-retired entrepreneur, industrialist, businessman who has his own business.⁽¹⁶⁾ His mother is a homemaker.⁽¹⁷⁾ His father-in-law is now retired, after having served as an engineering manager with a state-owned thermal power plant.⁽¹⁸⁾ His mother-in-law is a homemaker.⁽¹⁹⁾ Applicant also has two brothers and a sister, all of whom are Indian citizens,⁽²⁰⁾ with one brother working and residing in the U.S. where he has applied for U.S. citizenship.⁽²¹⁾ His other brother is a software engineer working for a private Indian company,⁽²²⁾ and his sister is a homemaker.⁽²³⁾ Applicant also has two children, both of whom were born in the U.S. and are native-born U.S. citizens.⁽²⁴⁾

Applicant and his family, as well as his wife's family, remain quite close, and they see each other with reciprocal visits every few years. (25) They try to see each other every two or three years, and speak by telephone once a month. (26)

Neither Applicant nor his wife has any financial interests in India whereas their entire holdings are in the U.S. where they have a home, bank account, stocks, and a retirement plan. (27) It is not likely that he will inherit any property from his parents. (28)

Applicant considers himself a loyal citizen of the U.S., (29) and routinely exercises the privilege of voting in national, state, and local elections. (30)

Applicant has been employed by his employer, a government contractor, since December 1997. The quality of his performance has not been divulged.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An Administrative Judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision set forth in Section E.2.2., Enclosure 2, of the Directive, are intended to assist the Administrative Judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an Administrative Judge should consider are: (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 voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

GUIDELINE C - FOREIGN PREFERENCE: 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.

GUIDELINE B - FOREIGN INFLUENCE: A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, pertaining to both adjudicative guidelines are set forth and discussed in the Conclusions section below.

As noted above, on August 16, 2000, ASD/C³I issued a passport policy clarification pertaining to Adjudicative

Guideline C--foreign preference. I have taken Official Notice of the memorandum which states, in pertinent part:

The purpose of this memorandum is to clarify the application of Guideline C to cases involving an applicant's possession or use of a foreign passport. The guideline specifically provides that "possession and/or use of a foreign passport" may be a disqualifying condition. It contains no mitigating factor related to the applicant's personal convenience, safety, requirements of foreign law, or the identity of the foreign country. The only applicable mitigating factor addresses the official approval of the United States Government for the possession or use. The security concerns underlying this guideline are that the possession and use of a foreign passport in preference to a U.S. passport raises doubt as to whether the person's allegiance to the United States is paramount and it could also facilitate foreign travel unverifiable by the United States. ***Therefore, consistent application of the guideline requires that any clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government.*** Modification of the Guideline is not required. (Emphasis supplied)

Since the protection of the national security is the paramount determinant, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security,"⁽³¹⁾ or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. 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 that are grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment of the witness testimony, demeanor, and credibility, and after application of all appropriate legal precepts and factors, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

With respect to Guideline C, the government has superficially established its case. Applicant has been portrayed as a person who failed to formally surrender his Indian passport and acted in such a way as to indicate a preference for a foreign country--in this instance, India--over the United States, and in so doing, he may be prone to provide information or make decisions that are harmful to the interests of the United States. However, there is evidence of only one citizenship, that of the U.S., with no evidence of any *current active* exercise of, or preference for, foreign citizenship, much less dual citizenship, other than the recent possession of the foreign passport, which he has since surrendered in a manner consistent with DoD policy. In my estimation, Applicant's status in this regard technically falls within foreign preference disqualifying condition (DC) E2.A3.1.2.2. (*possession and/or use of a foreign passport*), but Applicant also seemingly enjoys the benefit of foreign preference mitigating condition (MC) E2.A3.1.3.1. (*dual citizenship is based solely on parents' citizenship or birth in a foreign country*); MC E2.A3.1.3.2 (*indicators of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship*); and MC E2.A3.1.3.4. (*individual has expressed a willingness to renounce dual citizenship*). Also supporting Applicant are the following adjudicative

process factors E2.2.1.2. (*the circumstances surrounding the conduct, to include knowledgeable participation*); E2.2.1.5. (*the voluntariness of participation*); and E2.2.1.7. (*the motivation for the conduct*). Applicant had no intention of ever using the Indian passport and only kept it upon the erroneous advice of an official of the U.S. government--an INS officer--who advised him keep it as a souvenir as it was no longer valid. Applicant's contentions in this regard are unrebutted, and it appears his action in keeping the Indian passport were innocent and involuntary and based on erroneous advice.

As noted above, in August 2000, ASD/C³I issued a passport policy clarification. The declared intent of the ASD/C³I memo was "to clarify the application of Guideline C to cases involving an applicant's possession or use of a foreign passport." In this instance, Applicant never used the passport after he was naturalized. The ASD/C³I memo further states there are no mitigating factors "related to an applicant's personal convenience, safety, requirements of foreign law, or the identity of the foreign country," a phrase which I construe to relate solely to the use of a foreign passport, and not to mere possession of same. On the other hand, the memo states "consistent application of the guideline requires that any clearance be denied or revoked unless the applicant surrenders the foreign passport. . . ." In my view, Applicant has already "surrendered" the passport with no intent to renew it. Thus, I conclude Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the government's case with respect to Guideline C. Accordingly, allegation 1.a. of the SOR is concluded in favor of Applicant

With respect to Guideline B, the Government has established its case. Applicant has been portrayed as a person who is a potential security risk because members of his immediate family or persons to whom he is bound by affection, influence, or obligation--in this instance, Applicant's parents, his parents-in-law, and his three siblings--are not citizens of the U.S. or may be subject to duress. This situation raises the potential for vulnerability to coercion, exploitation, or pressure, and the exercise of foreign influence that could result in the compromise of classified information. In support of its contentions, the government has cited the fact Applicant's parents, parents-in-law, and siblings are citizens of India (and one of those siblings resides in the U.S.).

Based on my review of the evidence, I conclude the security concerns manifested by the Government, in this instance, are largely unfounded. The citizenship and residency status of Applicant's family members, standing alone, is sufficient to raise security concerns over the possibility of Applicant's vulnerability to coercion, exploitation, or pressure. However, the mere possession of family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B: [\(32\)](#)

The language of [Guideline] B (Foreign Influence) in the Adjudicative Guidelines makes clear that the possession of such family ties *may* pose a security risk. Whether an applicant's family ties in a foreign country pose a security risk depends on a common sense evaluation of the overall facts and circumstances of those family ties. *See* ISCR Case No. 98-0419 (April 30, 1999) at p. 5.

As noted above, Applicant's father is a semi-retired entrepreneur, industrialist, businessman who has his own business; his father-in-law is now retired, after having served as an engineering manager with a state-owned thermal power plant; one brother is a software engineer working for a private Indian company; another brother resides in the U.S. and has applied for U.S. citizenship; and all the women in the family are homemakers. The evidence indicates they are not involved in any "intelligence work" for the Indian government, and they have no "official ties" to the Indian government. Applicant also has a wife who is a naturalized citizen of the U.S. and two native-born U.S. citizen children, all of whom reside with him in the U.S.

India is a friendly democracy which is not hostile to the United States, and its interests are not inimical to the U.S. There is, however, some concern because India has been identified as one of those countries which practices industrial espionage and is an "active collector" of foreign economic information. [\(33\)](#) That concern is diminished, in this instance, because Applicant does not work in any of the critical technologies supposedly targeted by active collector nations. Furthermore, the government has offered no evidence to indicate a heightened level collection activities in Applicant's area of expertise. These facts, when considered in light of the nature of the government in India, facilitate an analysis involving the adjudicative guidelines and the various applicable conditions set forth therein.

The residence and citizenship of Applicant's family members are clearly of security concern under foreign influence

disqualifying condition (DC) E2.A2.1.2.1. (*an immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country*). However, also applicable, in this instance, is Foreign Influence Mitigating Condition (MC) E2.A2.1.3.1. (*a determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States*), as well as C E2.A2.1.3.5. (*foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities*). Considering the citizenship and residency status of Applicant's wife and children, I do not consider them to constitute unacceptable security risks. Thus, I conclude Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the Government's case with respect to Guideline B. Accordingly, allegations 1.a. through 1.d. of the SOR are concluded in favor of Applicant.

For the reasons stated, I conclude Applicant is suitable for access to classified information.

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 C: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Paragraph 2. Guideline B: FOR THE APPLICANT

Subparagraph 2.a.: For the Applicant

Subparagraph 2.b.: For the Applicant

Subparagraph 2.c.: For the Applicant

Subparagraph 2.d.: 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.

Robert Robinson Gales

Chief Administrative Judge

1. Government Exhibit 2 (Statement of Subject, dated March 6, 2002), at 2.
2. Government Exhibit 1 (Security Clearance Application (SF 86), dated October 10, 2000), at 2.
3. *Id.*, at 3.
4. Tr., at 27.
5. Government Exhibit 1, *supra* note 2, at 6.
6. *Id.*

7. *Id.*, at 1, 5.
8. Government Exhibit 2, *supra* note 1, at 2; Tr., at 38-39.
9. Applicant Exhibit A (Applicant's Indian Passport), at 6.
10. Tr., at 28.
11. *Id.*
12. Applicant Exhibit A (letter from employer human resources manager, dated July 1, 2003), *supra* note 9, at 2.
13. *Id.* (letter from Applicant to Consulate General, dated June 30, 2003), at 3.
14. Government Exhibit 1, *supra* note 2, at 3-4.
15. *Id.*
16. Tr., at 33.
17. *Id.*
18. *Id.*, at 34.
19. *Id.*
20. Government Exhibit 1, *supra* note 2, at 4.
21. Tr., at 35.
22. *Id.*, at 34-35.
23. *Id.*, at 35.
24. Government Exhibit 1, *supra* note 2, at 3-4.
25. Government Exhibit 2, *supra* note 1, at 2.
26. Tr., at 36.
27. Tr., at 30-31.
28. *Id.*, at 31.
29. *Id.*
30. *Id.*, at 31-32.
31. *See* Exec. Or. 12968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995. However, the Directive uses both "clearly consistent with the national interest" (*see* Sec. B.3; Sec. C.2.; and Sec. D.2.; Enclosure 3, Sec. 1.; and Sec. 25), and "clearly consistent with the interests of national security" (*see* Enclosure 2 (Change 3), Adjudicative Guidelines, at 2-2).
32. *See* ISCR Case No. 98-0507 (Appeal Board Decision and Reversal Order, May 17, 1999), at 10.
33. *See* Annual Report to Congress on Foreign Economic Collection and Industrial Espionage--2000, prepared by the

National Counterintelligence Center, found at <http://www.nacic.gov/reports/fy00.htm>, at 15.