

DATE: June 25, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-26829

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

Kathryn Antigone Trowbridge, Department Counsel

FOR APPLICANT

Thomas L. McGovern III, Esq.

SYNOPSIS

Applicant has several immediate family members who are citizens of and reside in India, but they are not in a position to be exploited by India in a way that could force Applicant to choose between loyalty to these family members and his loyalty to the United States. Applicant has a strong attachment to and substantial financial interests in the United States, and he is unlikely to respond favorably to any efforts to act against United States interests. Mitigation has been shown. Clearance is granted.

STATEMENT OF THE CASE

On November 23, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, 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 clearance should be denied or revoked.

In a signed and sworn statement, dated December 6, 2002, Applicant responded in writing and with attachments to the SOR allegations, and he filed an amended response on December 9, 2002. He requested a clearance decision based on a hearing record.

On January 28, 2003, this case was assigned to another Administrative Judge, but on January 30, 2003, because of caseload consideration, the case was reassigned to me to conduct a hearing and issue a written decision. A Notice of Hearing was issued to the parties on February 3, 2003, and the hearing was held on February 26, 2003.

At the hearing, Department Counsel offered five documentary exhibits (Exhibits 1 - 5) and no witnesses were called. Applicant appeared with counsel, offered 27 documentary exhibits (Exhibits A - AA) and offered his own testimony, the testimony of his wife and the testimony of three other witnesses. The transcript (TR) was received on March 11, 2003.

FINDINGS OF FACT

In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline B of the Directive because Applicant's immediate family, and other persons to whom he may be bound by affection, influence, or obligation, are not United States citizens or may be subject to duress and that he has traveled to his native India on a number of occasions. The SOR contains six allegations, 1.a. through 1.f.,, under Guideline B (Foreign Influence). In his response to the SOR, Applicant denies SOR 1.a. and 1.d., and he admits 1.b., 1.c., 1.e. and 1.f. I find as follows:

Applicant is 38 years old. He was born in India in 1964, moved to the United States in 1987 and became a naturalized United States citizen in 1998. He has a masters degree in computer science. He is the president, chief executive officer and founder of a company which is a defense contractor. Applicant has been extremely successful in his business and has a significant financial interest in the United States.

Applicant's wife was born in India, married the Applicant and came to the United States in 1992. She became a naturalized United States citizen in 2002. Applicant and his wife have two children, who are native born United States citizens. (Tr at 90-93.)

Applicant's father and mother, sister and her family, brother and his family, father in-law, mother in-law and sister-in-law and her family are citizens of and reside in India. Applicant's father worked for a state government agency, the Department of Forestry, where he was responsible for the maintenance of national parks. He has been retired for ten years. (Tr at 53, 54) (Exhibit D.) Applicant's father in-law was a veterinarian, who worked for a local government agency. He has been retired for "a couple of years." He is financially independent. (Tr at 97.) (Exhibit J.) None of Applicant's other family members, who are citizens of and reside in India, are employed in any capacity by the government of India.

In addition to Applicant and his wife, three witnesses testified on behalf of Applicant. The first was a retired Air Force Colonel, who had been in the Air Force for 30 years and now owns his own company. This witness has known Applicant for 10 years and considers himself a friend and mentor to the Applicant. The second witness was a retired Army Colonel, who had spent 27 years in the Army and currently has a position as a director of a company. He has known Applicant as a friend and associate for 13 years. The final witness was hired by Applicant to be the executive vice president of Applicant's company and now holds the position of president. He has known and worked closely with Applicant for two years.

All three witnesses were aware of Applicant's background, and the concern of the Government regarding Applicant's potential foreign influence problems with India.. They all strongly recommended him for a position of trust without any reservations.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines that must be carefully considered in evaluating an individual's security eligibility and making the overall common sense determination required. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk.

Each adjudicative decision must also include an assessment of: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 (See Directive, Section E2.2.1. of Enclosure 2).

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:

FOREIGN INFLUENCE (GUIDELINE B)

E2.A2.1.1. The Concern: 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 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.

E2.A2.1.2. Conditions that could raise a security concern and may be disqualifying include:

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 in, a foreign country;

E2.A2.1.3. Conditions that could mitigate security concerns include:

E2.A2.1.3.1. A determination that the immediate family member(s) . . . in question are not agents of a foreign power or 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.

BURDEN OF PROOF

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with

the U.S. Government that is predicated upon trust and confidence. Where 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 he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the 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."

CONCLUSIONSBased on the evidence of record, the Government has established an initial reason to deny Applicant a security clearance because of Guideline B (Foreign Influence) . Applicant's immediate family members are citizens of and reside in the India. The Indian citizenship and residency of members of Applicant's immediate family create the potential for foreign influence that could result in the compromise of classified information because it makes Applicant potentially vulnerable to coercion, exploitation, or pressure. The possession of such ties raises a security concern sufficient to require Applicant to present evidence in rebuttal, extenuation, or mitigation sufficient to meet his burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for him.

The evidence of existence of immediate family members, who are citizens of and reside in, India comes within Disqualifying Condition 1. However, based on the nature of the overall record, including: the lack of government involvement of Applicant's family members, Applicant's significant financial success and his family history since coming to the United States, the close relationship of India to the United States, and the strong recommendations for Applicant from three very impressive sources, I have determined that his family members in India do not constitute an unacceptable security risk under Mitigating Conditions 1. After considering all of the evidence of record on these issues,

I conclude that, even in the unlikely event pressure was exerted upon Applicant to compromise classified information, he would resist it, and would report the incident to the proper authorities.

FORMAL FINDINGS

Paragraph 1. Guideline B: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For 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.

Martin H. Mogul

Administrative Judge