

DATE: February 20, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-13190

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Caram J. Abood, Esq.

SYNOPSIS

Applicant, a 40-year-old computer software engineer, immigrated to the U.S. from India. The Government alleged foreign preference and foreign influence security concerns based on his possession of an Indian passport and having immediate family members who are citizens and residents of India. The evidence established that Applicant now has a U.S. passport and his Indian passport was canceled. The members of his immediate family living in India are not foreign agents or in a position to be exploited in such a way as to force Applicant to choose between loyalty to his family and to the U.S. Applicant established that it is in the national interest to grant his clearance. Clearance is granted.

STATEMENT OF THE CASE

Applicant, an employee of a defense contractor, applied for a security clearance so he could work with classified information. The Defense Office of Hearings and Appeals (DOHA), the federal agency tasked with determining an applicant's eligibility for access to classified information, was unable to make the affirmative finding that it is in the national interest to grant Applicant a clearance. In accordance with the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ DOHA issued a Statement of Reasons (SOR) on 13 June 2002 detailing why a clearance was not granted and recommending Applicant's case be referred to an administrative judge to determine whether the clearance should be denied/revoked. In the SOR, DOHA alleged Applicant failed to meet the foreign preference (Guideline C) and foreign influence (Guideline B) personnel security guidelines.

Applicant answered the SOR in a writing, dated 26 July 2002, that was notarized on 30 July 2002. Applicant requested that a decision be made without a hearing. On 1 November 2002, Applicant, through an attorney, requested a hearing before an administrative judge. The case was originally assigned to Administrative Judge John Erck on 8 November 2002 and, due to Judge Erck's caseload, was transferred to Administrative Judge Claude Heiny. On 18 December 2002, the case was transferred to me because of the region rotation of judges. A hearing was scheduled for 7 January 2003. At the request of Applicant and his attorney, the hearing was delayed until 4 February 2003. On that date, I convened a hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government's case consisted of six exhibits. Applicant testified on his own behalf and submitted 12 exhibits, 3 of which are attached to his Answer to the SOR. A transcript (Tr.) of the proceeding was received on 13 February 2003.

FINDINGS OF FACT

Applicant is a 40-year-old computer software engineer. Tr. 18; Ex. 2. He emigrated from India to the U.S. in January 1990. Tr. 18. In 1993, he went to India to marry, after which he returned to the U.S. A few months later, his wife joined him in the U.S. She is a physician. In 1996, they visited India to visit their parents and relatives. They both became U.S. citizens on 29 May 2001. Applicant and his wife have three children, all born in the U.S. *Id.*; Tr. 18.

Applicant's mother is a physician and his brother is a mechanical engineer. Both are citizens and residents of India. Applicant's brother works for a major U.S. construction firm and travels to Saudi Arabia on behalf of his employer. Tr. 19-22; Answer to SOR. Applicant's father-in-law is an ophthalmologist. He and his wife are citizens and residents of India. Tr. 22. Applicant's mother and his in-laws have visited him in the U.S. His brother has not. Applicant keeps in touch with his immediate relatives and in-laws via telephone and e-mail. Tr. 31-32. He has no foreign financial interests, and he does not support any of his relatives in India. Tr. 35.

Applicant and his wife had Indian passports, but they both renounced their Indian citizenship and their passports were cancelled. Exs. B, C. Applicant was issued a U.S. passport on 8 June 2001. Ex. 2.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to "United States citizens . . . whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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. Directive, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Exec. Or. 10865 § 2. *See* Exec. Or. 12968 § 3.1(b).

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at *6-8 (App. Bd. 2001). Once the Government has established by substantial evidence a *prima facie* case against the applicant, the applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Exec. Or. 12968 § 3.1(b).

Under Guideline C, an individual who acts in such a way as to indicate a preference for a foreign country over the United States, represents a security risk because he may be prone to provide information or make decisions that are harmful to the interests of the United States. Directive,

¶ E2.A3. .1.1. Under Guideline B, a security risk may exist when an individual's immediate family, 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. Directive, ¶ E2.A2.1.1.

CONCLUSIONS

Guideline C-Foreign Preference

In the SOR, DOHA alleged that Applicant's possession of a valid Indian passport raised a security concern because it showed his preference for India over the U.S. *See* Directive ¶ E2.A3.1.2.2.

Applicant has demonstrated that he no longer holds a foreign passport and that he has renounced his Indian citizenship. There is no evidence of foreign preference in this case. The finding must be for Applicant.

Guideline B-Foreign Influence

In the SOR, DOHA alleged security concerns existed because Applicant's mother, brother, and in-laws are citizens and residents of India. Under Guideline B, a security concern may exist when an applicant has an immediate family member or a person to whom he has close ties of affection or obligation who is a citizen or resident of, or present in, a foreign country. Directive ¶ E2.A2.1.2.1. It may be a mitigating condition that the immediate family members or persons to whom an applicant has close ties of affection are not agents of a foreign power or in a position to be exploited by a foreign power that could force the applicant to choose between loyalty to the person(s,) involved and the United States. Directive ¶ E2.A2.1.3.1.

Through Applicant's security clearance application, his Answer to the SOR, and his admissions at the hearing, the Government established a *prima facie* case against him. Nevertheless, Applicant has successfully mitigated those security concerns. Applicant's mother, brother, and in-laws do not appear to be agents of the government of India.

Applicant is committed to the U.S. and the American way life. He intends to remain a citizen of the U.S. and to raise his family here. During the hearing, Applicant invoked the memory of Kalpana Chawla, an astronaut who died in the breakup of the space shuttle Columbia. Like the Applicant, Ms. Chawla was born and raised in India, became a U.S. citizen, and had many members of her immediate family still living in India. Applicant takes his oath of allegiance to the U.S. seriously. Like Ms. Chawla, he wants to serve his country, the U.S., and be an example for his children. He understands his responsibilities as a citizen to protect the national interest and will report any attempts to subvert it. After observing and hearing Applicant, I am convinced that his family members in India do not represent a credible security risk to this nation.

FORMAL FINDINGS

Conclusions as to each of the allegations in the SOR as required by Exec. Or. 10865 § 3, ¶ 7 and the Directive ¶ E3.1.25, are as follows:

Paragraph 1. Guideline C: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

DECISION

In light of all of 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.

James A. Young

Administrative Judge

1. Exec. Ord. No. 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.