

DATE: February 24, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-21302

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

Kathryn Antigone Trowbridge, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's wife's use of her foreign citizenship to protect her financial interests in a substantial inheritance in India exposes Applicant to the potential for foreign influence that could result in the compromise of classified information. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On May 12, 2003, under the applicable Executive Order ⁽¹⁾ and Department of Defense Directive, ⁽²⁾ DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision—security concerns raised under Guideline C (Foreign Preference), Guideline E (Personal Conduct), and Guideline B (Foreign Influence) of the Directive. Applicant answered the SOR in writing on June 12, 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on August 14, 2003. On September 26, 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. At the hearing, Department Counsel moved to amend three SOR allegations as follows: SOR allegation 3.a. would be amended by deleting the word "resident" and replacing it with the word "citizen"; SOR allegation 3.b. would be amended by deleting the word "dollars" and replacing it with the words "Indian rupees"; and SOR allegation 3.j. would be amended by deleting the word "dollars" and replacing it with the words "Indian rupees." Applicant did not object, and Department Counsel's proposed amendments to the SOR were granted. At the close of the hearing, the record was left open for 10 days, until close of business October 6, 2003, so that Applicant could submit any communication he might receive from the Embassy of India indicating receipt of his terminated Indian passport. The record closed with no additional submissions from Applicant. DOHA received the transcript (Tr.) of the proceeding on October 6, 2003.

FINDINGS OF FACT

The SOR contains 14 allegations of disqualifying conduct and conditions. Applicant admitted allegations 1.a., 2.a., 3.c.,

3.d., 3.e., 3.f., 3.g., 3.h., 3.k., and 3.l. He denied allegations 3.a., 3.b., 3.i., and 3.j. Applicant's admissions are incorporated herein as findings of fact.

Applicant was born in India in 1958. He became a naturalized American citizen in 1997. His area of professional specialization is medical life sciences. He holds a doctorate in biochemistry from a research institute in India and a master of science degree in pharmacology from an American university. He is a board-certified toxicologist and directs a practice group in health research for a government contractor.

Before becoming an American citizen, Applicant possessed an Indian passport, which was issued in July 1993, for a ten-year period. When Applicant became a U.S. citizen, in 1997, he acquired a U.S. passport and used it when traveling abroad. He retained the Indian passport for archival purposes but did not use it for travel. It was in his possession in May 2002.

Applicant completed and certified his security clearance application (SF-86) on April 25, 2001. Question 15 on the SF-86 reads as follows:

"In the last 7 years, have you had an active passport that was issued by a foreign government?"

Applicant answered "yes" to Question 15 and identified the issuing country as India. He indicated that the issue date of the passport was April 1987 and the expiration date was February 1997. In his signed, sworn statement, dated May 20, 2002 and at his hearing, Applicant acknowledged that his last Indian passport was issued in July 1993 and expired in July 2003. He denied falsifying his answer and stated that he supplied the wrong information as the result of an honest mistake.

Applicant surrendered his expired Indian passport to the Director of Security at his place of employment, who, in turn forwarded it to the Embassy of India on August 22, 2003, with the request that the Embassy respond with a letter stating the passport had been received and terminated. At his hearing, Applicant provided a letter from the Director of Security stating that as of September 23, 2003, the Embassy of India had not responded to acknowledge receipt of Applicant's expired Indian passport and his request that the passport be terminated. (Ex. A.)

Applicant and his wife expect to inherit considerable sums of money from their parents. Applicant's wife is a citizen of India who resides in the United States. She is a dentist by profession. Applicant and his wife are the parents of a young daughter. Applicant's wife's parents are citizens and residents of India, and upon their deaths, Applicant's wife expects to inherit approximately \$1,000,000. Although she intends to live in the United States permanently, Applicant's wife has elected not to become a U.S. citizen because, as a non-Indian citizen, she would be assessed higher inheritance taxes by the Indian government on her parents' estates.

As a first-born son, Applicant also stands to receive an inheritance when his mother dies. He estimates his inheritance will be approximately \$500,000. He testified that he intended to divide the inheritance with his sister and brother. Applicant and his wife have been married since 1986 and have enjoyed considerable financial success in the United States. He estimates that the net worth of their holdings and property in the United States is equal to or surpasses the combined amounts that he and his wife expect to inherit from their parents.

Applicant's mother is a widow and a citizen of India. She resides in India in a home the Applicant rebuilt for her at a cost of approximately \$60,000. Applicant's brother and his family live in the home with the mother. Applicant's mother is also a permanent resident of the United States and resides with Applicant and his family in the United States for part of the year. Applicant is the sole holder of two bank accounts in India. In his signed, sworn statement, Applicant stated the balances in the accounts were approximately \$900 and \$200 respectively. (Ex. 2, at 6.) The account with the larger balance was used to pay for the reconstruction of his mother's home. The account with the smaller balance is used by Applicant for family-related expenses and for currency exchanges when he is in India. Applicant avers that he does not use the accounts for any military, political or government activities in India.

Applicant's sister and her husband are citizens of India who reside in the United Arab Emirates, where he is employed as an engineer by an American company. Applicant's sister holds a law degree but does not practice law. Applicant's brother, sister-in-law, father-in-law and mother-in-law are citizens and residents of India. Applicant's brother is an

accountant and his father-in-law is a retired civil engineer who once worked for the Indian government and for an international organization. Applicant's sister-in-law and mother-in-law are housewives. None is an agent of or connected with the Government of India.

Applicant and his wife visit their families in India every other year. He speaks on the telephone with his mother and brother in India once a month. He speaks with his parents-in-law in India once a month, and his brother and father-in-law send him one or two e-mails per month. Applicant visited his sister in the United Arab Emirates once, in 1998, and he speaks with her by telephone once a month.

Applicant provided a list of his foreign contacts and the frequency of those contacts in his signed, sworn statement. (Ex. 2.) He has been active in several Indian-American community organizations. He contributes about \$1,000 per year to Indian-American educational and charitable organizations. He has contact with the staff of the Indian Embassy when he invites them to attend educational and charitable events sponsored by the organizations to which he belongs. He says he has never had business, political, or military related dealings or relationships with any member of the Indian Embassy. He professes strong feelings of loyalty to the United States.

The National Counterintelligence Center submits an annual report to the U.S. Congress on foreign economic collection and industrial espionage. The Center's annual report for 2000 identified India as one of seven countries active in pursuing aggressive economic information collection and industrial espionage against the United States. The report identified information targeted by the governments of the seven countries engaged in economic espionage. Three relevant targeted categories of information are U.S. Government programs, formulas and research, and pharmaceutical intellectual property.⁽³⁾

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.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An 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.

CONCLUSIONS

Guideline C - Foreign Preference

In the SOR, DOHA alleged, under Guideline C of the Directive, that, on May 20, 2002, Applicant had in his possession an Indian passport that did not expire until July 2003 (§ 1.a.). DOHA alleged that Applicant's possession of a valid Indian passport, after becoming a U.S. citizen and acquiring a U.S. passport, raised a security concern because it showed his preference for India over the United States. E2.A3.1.1. and E2.A3.1.2.2.

In his signed, sworn statement, dated May 20, 2002, and in testimony at his hearing, Applicant acknowledged that he had an active Indian passport issued prior to his naturalization.

In 1997, when he became an American citizen, he acquired a U.S. passport, which he used exclusively. He retained his Indian passport, issued to him in 1993, for historical and archival purposes. The Indian passport expired in July 2003.

Applicant does not claim or exercise dual citizenship, a disqualifying condition under E2.A3.1.2.1. He points out that India does not permit dual citizenship and he de facto renounced his Indian citizenship when he became an American citizen. In June 2003, he relinquished his Indian passport to his employer's security director. The passport was returned to the Indian Embassy in August 2003, by the security director, with Applicant's request that the passport be terminated.

Applicant no longer holds an Indian passport. He has not traveled on an Indian passport since becoming an American citizen. The disqualifying conditions alleged in the SOR no longer apply, and there is no evidence of foreign preference in this case. The finding is for Applicant.

Guideline E - Personal Conduct

In the SOR, DOHA alleged, under Guideline E of the Directive, that Applicant deliberately falsified material facts on his SF-86 when, in response to Question 15, he stated that his Indian passport was issued in 1987 and expired in 1997 when in fact his Indian passport was issued in 1993 and expired in 2003. (§ 2.a.)

The security concern under Guideline E, Personal Conduct, is with conduct or behavior which demonstrates questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty or unwillingness to comply with rules and regulations. Individuals who exhibit such conduct may not possess the personal qualities required to properly safeguard classified information. E2.A5.1.1. When an applicant deliberately omits, conceals, or falsifies relevant and material facts on a personal security questionnaire, a security concern arises under E2.A5.1.2.2 of Guideline E. The security concerns resulting from lack of candor or truthfulness in answering the questions on an SF-86 can be mitigated if the falsification was an isolated incident, was not recent, and the individual subsequently provided correct information voluntarily. E2.A5.1.3.2. The security concern can also be mitigated if the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts. E2.A5.1.3.3.

In his signed, sworn statement of May 20, 2002, Applicant acknowledged that he possessed an active Indian passport issued before he became a naturalized American citizen. He stated that the Indian passport was issued to him in July 1993 and would expire in July 2003. In his answer to the SOR, Applicant acknowledged misunderstanding Question 15 of the SF-86 and entering an erroneous answer on his SF-86. At his hearing, Applicant explained in detail how he misunderstood Question 15 and how he had no intent to conceal, omit, or falsify relevant and material information on his SF-86. He characterized his conduct in writing down the wrong effective dates for his Indian passport as "a dumb mistake." (Tr. 36.)

I have considered the record as a whole, and I have applied the whole person standard to the facts alleged. I find Applicant has successfully provided a credible explanation for his conduct that rebuts the disqualifying condition alleged by the Government. Because Applicant's falsification was not deliberate and was the result of a mistake, it is unnecessary to apply any mitigating conditions. The finding is for Applicant.

Guideline B - Foreign Influence

In the SOR, DOHA alleged security concerns under Guideline B, Foreign Influence, because Applicant's wife is a citizen of India who resides in the United States; his mother, brother, sister-in-law, father-in-law and mother-in law are citizens of India who reside in India; and his sister and brother-in-law are citizens of India who reside in the United Arab Emirates. (¶¶ 3.a., 3.b., 3.c., 3.d., 3.e., 3.f., 3.g., 3.h.) A security concern can 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. E2.A2.1.1 and E.A2.1.2.1. A security concern can also exist when an applicant shares living quarters with a person, regardless of citizenship status, if a potential for adverse foreign influence or duress exists. E2.A2.1.2.2. The SOR also alleged that Applicant had two bank accounts in India and that he and his wife would likely someday inherit substantial sums of money from their parents' estates. (¶¶ 3.i., 3.j., 3.k., and 3.l.) A security concern exists if an Applicant has a substantial financial interest in a country that could make him vulnerable to foreign influence. E2.A2.1.2.8.

It is 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. E2.A2.1.3.1. It is also a mitigating condition that the Applicant's foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities. E2.A2.1.3.5.

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 under disqualifying condition E2.A2.1.2.1. Nevertheless, Applicant has successfully mitigated most of those security concerns by demonstrating that none of his immediate family members are agents of a foreign power and that his mother, siblings, and in-laws are not in a position to be exploited by a foreign power in a way that could force the individual to choose between the person involved and the United States.

SOR subparagraphs 3.i., 3.j., 3.k. and 3.l. allege that Applicant and his wife have financial interests in India that are relevant to a determination of his security worthiness. A security concern is raised when an Applicant has a substantial financial interest in a country, or in any foreign-owned or operated business that could make the individual vulnerable to foreign influence. E2.A2.1.2.8. An applicant's foreign financial interests may be mitigated if they are minimal and not sufficient to affect the individual's security responsibilities. E2.A2.1.3.5. The Appeal Board has stated that "[i]n assessing the significance of a foreign financial interest, a Judge must not only consider the dollar amount of the foreign financial interest, but also its value in comparison to the applicant's financial interests in the United States, as well as any other record evidence concerning the facts and circumstances of the applicant's foreign financial interest and foreign ties." ISCR Case No. 01-18860 at 3 (App. Bd. March 17, 2003.)

Applicant testified that he owned two bank accounts in India, which together held deposits equaling approximately \$1100 in U.S. dollars. He said he deposited money in one of the accounts to pay for materials and the services of workmen who rebuilt his mother's house. Over the period of renovation, the equivalent of 60,000 U.S. dollars were disbursed from the account. The other account held a small amount of money for Applicant to use as currency when he visited India. When compared with his current net worth, Applicant's two bank accounts in India represent minimal foreign financial interests and are not sufficient to affect his security responsibilities. Thus, mitigating condition E2.A2.1.3.5. applies to Applicant's two bank accounts in India. Neither bank account is of security concern, and the finding is for Applicant.

Applicant has also testified that when his mother and his wife's parents die, he and his wife expect to inherit money from their estates. He estimated the current value of his expectancy to be \$500,000, and he stated that, as the first-born son, it was his intention to divide his inheritance with his brother and sister. The current value of his wife's expectancy is \$1,000,000. He estimated his and his wife's current net worth to be \$1,500,000. These assets, he said were the result his earnings and those of his wife, a dentist, in the United States. Applicant stated that he would not compromise security issues on the basis of his expected inheritance. (Tr. 59-60.)

The current dollar amount of the expectancy Applicant has in his mother's estate represents a substantial, albeit uncertain, interest. Like all accumulated wealth, the expectancy is subject to the vagaries of financial market conditions and world events. Additionally, Applicant does not know whether he will outlive his mother and when, if ever, such

expectancy will be realized and received. DOHA's Appeal Board has recognized the uncertainties surrounding an expectancy and has ruled that an applicant does not have a financial stake in a country merely because he may inherit real or personal property at some time in the future from his parents who currently reside in that country. ISCR Case No. 97-0403 at 3 (App. Bd. May 13, 1998.) Thus, Applicant's expectancy is not a security concern under E2.A2.1.2.8., and, accordingly, the finding is for him.

The matter of Applicant's wife's expectancy does raise security concerns, however. While her expectancy is as speculative as her husband's, Applicant's wife has elected to forego U.S. citizenship in order to maximize her foreign inheritance and to avoid being assessed death taxes as a non-Indian citizen. In so doing, she has expressed a preference for Indian citizenship and is using her foreign citizenship to protect her financial or business interests in India. As Applicant's spouse, by virtue of the marital relationship, her financial interests are also his, and, thus, her election to use her foreign citizenship to shield her substantial financial interests in India exposes him to the potential for adverse foreign influence or duress. Under Guideline B, disqualifying condition E2.A2.1.2.2. applies to these facts. While it can be determined under mitigating condition E2.A2.1.3.1. that Applicant's wife is not an agent of a foreign power, it cannot be determined that, as a citizen of India with an interest in using her citizenship to protect their joint financial interests, she is not in a position to be exploited by a foreign power in a way that could force Applicant to choose between loyalty to her and to the United States. Accordingly, I find for the Government as to allegations 3.a. and 3.j. of the SOR.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline C.: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Paragraph 2. Guideline E.: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Paragraph 3. Guideline B.: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: For Applicant

Subparagraph 3.c.: For Applicant

Subparagraph 3.d.: For Applicant

Subparagraph 3.e.: For Applicant

Subparagraph 3.f.: For Applicant

Subparagraph 3.g.: For Applicant

Subparagraph 3.h.: For Applicant

Subparagraph 3.i.: For Applicant

Subparagraph 3.j.: Against Applicant

Subparagraph 3.k.: For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Joan Caton Anthony

Administrative Judge

1. Exec. Or. 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.
3. 2000 Annual Report to Congress on Foreign Economic Collection and Industrial Espionage, Appendix, at un-numbered pages 1-3, as prepared by the National Counterintelligence Center. Admitted as Government's Exhibit 2 for administrative notice.