

KEYWORD: Outside Activities; Foreign Influence

DIGEST: Despite efforts to lessen his control of a company he founded in the U.S., Applicant failed to mitigate security concerns raised regarding his ownership of Indian entities and involvement in other industry related activities in his country of origin. Applicant also has family living in India and owns rental real estate. Clearance is denied.

CASENO: 03-14052.h1

DATE: 07/19/2005

DATE: July 19, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-14052

DECISION OF ADMINISTRATIVE JUDGE

CHARLES D. ABLARD

APPEARANCES

FOR GOVERNMENT

James P. Norman, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Despite efforts to lessen his control of a company he founded in the U.S., Applicant failed to mitigate security concerns raised regarding his ownership of Indian entities and involvement in other industry related activities in his country of origin. Applicant also has family living in India and owns rental real estate. Clearance is denied.

STATEMENT OF THE CASE

On August 19, 2004, the Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry* 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. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn written statement, dated September 30, 2004, Applicant responded to the allegations set forth in the SOR, and requested a hearing. The case was assigned to me on February 10, 2005, and a Notice of Hearing was issued April 1, 2005, for a hearing on May 17, 2005. The Government introduced five exhibits at the hearing and requested that administrative notice be taken of three documents. The Applicant introduced 15 exhibits. All were accepted into evidence. The Applicant and one witness testified on his behalf. The transcript was received on June 9, 2005.

FINDINGS OF FACT

Applicant admitted all of the factual allegations and offered explanatory comments for each. Those admissions are incorporated herein as findings of fact. After a complete review of the evidence in the record and upon due consideration of the record the following additional findings of fact are made:

Applicant is a 62-year-old who came to the U.S. in 1964 from India to study. He has an MBA and a Master's degree in physics. He became a citizen in 1982. He has been a successful businessman working in software engineering having founded his own company now employing 36 persons. He served as President, Chief Executive Officer while holding a majority share of the corporate stock. He has been recognized for his business acumen and contributions to the city where the company is located. The company does commercial as well as government work for several federal agencies.

He founded another company in India that works as a subsidiary of the U.S. company on commercial work largely for Indian subsidiaries of U.S. companies. It is a member company of Software Technology Parks of India, an autonomous non-profit society under the Ministry of Communications and Information Technology of the Government of India, that promotes and facilitates software exports from India. He also founded an institute in India that honors a pioneer software engineer and provides training and consulting to the Indian software industry. Applicant's U.S. company owns nearly all of the stock of the institute. Neither of his Indian organizations is profitable. Applicant also founded a consortium of 240 programmers involved in software development of which his Indian subsidiary is a member.

Applicant's parents-in-law and brother and sister-in-law are all citizens of and live in India. He is the sole owner of rental property in India valued at \$100,000.00 and the owner with other

family members of five acres of agricultural property. He has a bank account in India and traveled there 31 times between 1996 and 2003. Three Indian citizens work as managers for his U.S. company.

When the issue in this case arose Applicant divested himself of ownership of a majority interest in his U.S. company and installed a U.S. citizen employee as president who was a witness for him in the hearing. By board resolution he has no access to classified work of the company. Applicant's son was given shares of stock by Applicant and he is now the largest shareholder in the company with 32%. The son is a Ph.D candidate at a major U.S. university and is not involved in the business or in the subject matter of Applicant's business, software engineering. Applicant has taken a lesser role in the U.S. company as a result of this case and serves as director of global development. Also, he has resigned as a

director of, and reduced his activities in, the Indian subsidiary and the other Indian organizations in which he has founded and been active.

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.

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." Executive Order No. 10865 § 2. *See* Executive Order No. 12968 § 3.1(b).

Initially, the Government must establish, by something less than a preponderance of the 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. The applicant then bears the burden of demonstrating that it is clearly consistent with the national interest to grant or continue the applicant's clearance. "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* Executive Order No. 12968 § 3.1(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. Having immediate family members who are citizens of, and residing in a foreign country, may raise a disqualifying security concern. Directive, ¶ E2.A2.1.2.1.

CONCLUSION

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors and conditions above, I conclude the following with respect to all allegations set forth in the SOR:

The applicable Guidelines cited in the SOR concerning Outside Activities-Guideline L provides as disqualifying conditions (DC) involvement in certain types of outside employment or activities if they pose a conflict with an individual's security responsibilities and could create an increased risk of unauthorized disclosure of classified information. (E2.A12.1.1.) Conditions that could raise a security concern and may be disqualifying include any service, whether compensated, volunteer, or employment with a foreign country; any foreign national; a representative of any foreign interest; (E2.A12.1.2.1, 2, and 3)

Conditions that could mitigate security concerns (MC) include:

1 Evaluation of the outside employment or activity indicates that it does not pose a conflict with an individual's security responsibilities; (E2.A12.1.3.1.)

2 The individual terminates the employment or discontinues the activity upon being notified that it is in conflict with his or her security responsibilities. (E2.A12.1.3.2.)

The applicable guideline concerning foreign influence (Guideline B) provides as a disqualifying condition (DC) that a security risk may exist when an individual's family and foreign associates to whom he has close ties of affection or obligation are not citizens of the United States or may be subject to duress. (E2.A2.1.1.) Such facts could create the potential for foreign influence that could result in the compromise of classified information.

Conditions under Guideline B that could raise a security concern and may be disqualifying include 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.A2.1.2.1.) Possible mitigating conditions (MC) that might be applicable are a determination that the family members and associates 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 persons involved and the U.S. (E2.A2.1.3.1.), or that foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities. (E2.A2.1.3.5.)

Based on the evidence of record, including Applicant's admissions, the Government established reasons to deny him a security clearance because of foreign influence. Having established such reasons, the Applicant had the burden to establish security suitability through evidence which refutes, mitigates, or extenuates the disqualification and demonstrates that it is clearly consistent with the national interest to grant a security clearance. ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

Applicant's business continues to operate with new management and a lesser role for him. However, it is not at all clear that with a security clearance Applicant's role as leader of the company would not resume notwithstanding changes in titles. His son is the current owner of the controlling shares of stock once owned by Applicant who gave him the shares. The current president is beholden to Applicant for the position he now holds. Applicant is impressive as an entrepreneur and aggressive businessman. He has done very well with the company and has established links with his country of origin through a variety of enterprises. The fact that the Indian companies are not now making a profit does not mitigate the concerns that these are foreign based entities and pose a continuing problem in view of the type of work performed by the parent U.S. company. The changes in ownership and management to insulate him from the classified work of the company may be successful but to grant him a clearance based on these actions would be to ignore the reality of the history of the company, his strong leadership, and the fact that the controlling shares are held in the family by someone who has no professional interest in the company or ability to provide direction to it. No mitigating conditions are applicable.

Applicant's family members who remain in India present a continuing problem under Guideline B as does ownership in rental property of significant value. No mitigating conditions are applicable as to the family members. The agricultural property is of little concern in view of the multiple family owners and the minimal value of Applicant's interest. So too is the mere existence of a bank account and the fact that his U.S. company has three Indian nationals on the payroll since there was no evidence of how this account was used and what these individuals do for the company. Mitigating conditions are applicable to those allegations.

In all adjudications the protection of our national security is of paramount concern. Persons who have access to classified information have an overriding responsibility for the security of the nation. The objective of the security clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. The "whole person" concept recognizes that we should view a person by the totality of their acts and omissions. Each case must be judged on its own merits taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

After considering all the evidence in its totality and as an integrated whole to focus on the whole person of Applicant, I conclude that it is not clearly consistent with the national interest to grant clearance to Applicant.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1. Guideline L: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Paragraph 2 Guideline B: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: For Applicant

Subparagraph 2.e.: For Applicant

Subparagraph 2.f.: Against Applicant

Subparagraph 2.g.: For Applicant

Subparagraph 2.h.: Against Applicant

DECISION

After full consideration of all the facts and documents 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.

Charles D. Ablard

Administrative Judge