

exhibits (GX) 1 through 3, which were received without objection. Applicant testified on his own behalf, called one witness, and submitted exhibits (AX) A and B, which were admitted in evidence without objection.

I granted Applicant's request to keep the record open until February 8, 2008, to enable him to submit additional matters. On January 23, 2008, he submitted AX C and D, which were admitted without objection. His cover email for AX D stated, "This completes all documents due from me." Department Counsel's response to AX C and D, dated January 24, 2008, is attached to the record as Hearing Exhibit (HX) IV. Because Applicant indicated he had no further documents to submit, I closed the record on January 24, 2008, upon receipt of HX IV. DOHA received the transcript of the hearing (Tr.) on January 25, 2008. Eligibility for access to classified information is granted.

Procedural and Evidentiary Rulings

Request for Administrative Notice

Department Counsel requested that I take administrative notice of certain facts about India and Iran. The request and the attached documents were not admitted in evidence but are attached to the record as Hearing Exhibits (HX) I and II. The facts administratively noticed are set out below.

I declined to rely on three documents attached to HX I as the basis for administrative notice. First, I determined that the Congressional Research Service Report on India-U.S. Relations, dated June 26, 2007, was not appropriate for administrative notice because it reflected the personal analysis of an individual specialist but did not reflect that the views of that specialist were generally accepted or were adopted by the U.S. government. Second, I determined that the Annual Report to Congress on Foreign Economic Collection and Industrial Espionage for the year 2000 was too old and the basis for its conclusions was too limited to be a reliable source of current information. See ISCR Case No. 03-21434 at 4-5 (App. Bd. Feb. 20, 2007). Third, I determined that the Annual Report to Congress on Foreign Economic Collection and Industrial Espionage for the year 2005 was too limited to be the basis for administrative notice about India, since the only reference to India in the report was one incident in 2004 where a U.S. software manufacturer reported that a source code and confidential design documents were stolen from a research and development center in India. I offered Department Counsel the opportunity to offer these three documents as government exhibits, akin to learned treatises under Fed. R. Evid. 803(18), to be given whatever weight I determined appropriate in my decision, and he accepted that offer. The enclosures to HX I were marked as GX 4, 5, and 6 and admitted without objection (Tr. 51-52).

Authentication of a Report of Investigation

Department Counsel presented GX 3, a narrative summary of a security investigator's interview of Applicant under oath that was included in a Report of Investigation, without calling an authenticating witness, as required by Directive ¶ E3.1.20. I explained the authentication requirement to Applicant and determined that he understood the requirement and was willing to waive it. Based on his affirmative waiver of the requirement for authentication, I admitted GX 3 (Tr. 49-50).

Unsigned SOR

The copy of the SOR in the Hearing Office file and Department Counsel's file was unsigned, but Applicant's copy was signed. I directed Department Counsel to obtain a signed copy of the SOR and submit it for the record (Tr. 21-23). A copy of the signed SOR is attached to the record as HX III.

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegations in the SOR, with explanations. His admissions in his answer and at the hearing are incorporated in my findings of fact. I make the following findings.

Applicant is a 43-year-old software engineer for a federal contractor. He was born and educated in India. After obtaining a bachelor of science degree in naval architecture, he worked as a software developer in India. He came to the U.S. on a business trip in April 1991 and decided to remain in the U.S, because he like the way of life in the U.S. and believed the U.S. offered better job opportunities (GX 3 at 2). He renewed his business visa twice, obtained a work visa, and eventually received a permanent resident card in 1996 (Tr. 67). He became a U.S. citizen in January 2002 and obtained a U.S. passport in May 2002 (GX 3 at 1). He has worked for his current employer since December 2005. He obtained a master's degree in business administration from a U.S. university in May 2006 (GX 1 at 10). He received an interim clearance in February 2006, but it was suspended pending the outcome of his security investigation (Tr. 7, 69).

Applicant obtained a passport from the Republic of India in 1999, before he became a U.S. citizen. The passport was valid for ten years, expiring in November 2009. He presented his Indian passport to the Consulate General of the Republic of India in New York City, where it was marked "Cancelled." (Answer to SOR; AX A). He testified at the hearing that he was unsure whether he was a dual citizen, but he would be willing to renounce his Indian citizenship if he was (Tr. 72).

Applicant's mother, father, and brother are citizens and residents of India. They reside in the state of Goa, in the western part of India (Tr. 73). They reside in the "ancestral house," which they own, along with Applicant's brother (Tr. 74). Applicant has telephonic contact with them about once or twice a month (Tr. 79). Between 1991

and 2001, he sent money to his parents as gifts on four or five occasions, in amounts between \$500 and \$1,000. He sent the money via bank transfers to an Indian bank account in his name and his mother's. He has not sent his family any money since 2001. After the bank inquired why there had been no activity since 2001, he closed the account on January 23, 2008 (Tr. 59; AX C at 62). There was less than \$5,000 in the account when he closed it (GX 2 at 4).

Applicant's mother is a retired teacher who worked in a private, church-related school (Tr. 75). She has been retired for about ten years (Tr. 76). Her pension is paid by the school, not the government (Tr. 76). She visited Applicant for about 20 days in 2007 (Tr. 86-87). His mother lives on her retirement pension and financial support from his brother, and she no longer needs financial support from Applicant (Tr. 60).

Applicant's father is a self-employed insurance agent. He previously owned an office services business, a restaurant, and a ship repair yard (Tr. 77).

Applicant's brother is a human resources manager for a U.S.-owned company in India (Tr. 61). A second brother died in a swimming accident in April 2006 (GX 3 at 3).

None of Applicant's family members have been employed by the Indian government, military organizations, or government contractors (GX 3 at 3). None of his family members have been arrested or detailed by Indian authorities (Tr. 85-86).

Applicant traveled to India in 1997 for his brother's wedding, in 2001 and 2004 to visit his family, and in 2006 for his brother's funeral (Tr. 80). He used only his U.S. passport after becoming a U.S. citizen. He reported his last two trips to his employer and received a security briefing before both trips (AX D at 3-4).

Now that the bank account is closed, Applicant owns no assets or property in India. He owns a condominium in the U.S. and has about \$100,000 in retirement funds and \$270,000 in investments in the U.S. (Tr. 88).

Applicant's facility security officer, who holds a clearance and retired from the U.S. Army after 24 years of service, testified that Applicant is "a great guy," who is dedicated, hard-working, knowledgeable, and helpful. He testified he would give Applicant a clearance if he had the authority (Tr. 97).

Government documents presented by Department Counsel reflect concern in the U.S. Congress about India's increasing cooperation with Iran and transfers of equipment and technology related to weapons of mass destruction to Iran by Indian companies (GX 4). The documents also reflect that in the year 2000 India was as a major practitioner of industrial espionage (GX 5).

I have taken administrative notice of the facts below. India's Constitution describes it as a "sovereign, socialist, secular democratic republic." It is a multiparty, federal, parliamentary democracy. The U.S. and India are the world's largest

democracies. The U.S. is India's largest trading partner and largest investment partner. In the past, U.S. policy toward India was dominated by concerns over India's nuclear weapons programs and slow pace of economic reforms. More recently, the U.S. has regarded India as a growing world power with which it shares common strategic interests. Since 2004, bilateral cooperation between the U.S. and India has significantly increased in civil nuclear, civil space, and high-technology commerce.

The government of India generally respects the rights of its citizens, but it has experienced major problems with extrajudicial killings of persons in custody, harsh prison conditions, lengthy pretrial detention without trial, disappearances, and torture and rape by police and security forces. Physical abuse and excessive force have been used to combat terrorism and suppress violent insurgencies operating primarily in the northeast part of the country. Human rights violations often go unpunished because of lack of accountability and endemic corruption in the government and police forces. A number of anti-Western terrorist groups are active in India.

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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the 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.

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or.

10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. It is merely an indication 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 which disqualify, or may disqualify, the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein 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. 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 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline B, Foreign Influence

The SOR alleges that Applicant’s mother, father, and brother are citizens and residents of India (SOR ¶ 1.a), and that he and his mother are co-owners of a joint bank account in India (SOR ¶ 1.b). The concern under this guideline is as follows: “Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.” AG ¶ 6.

Two disqualifying conditions under this guideline are relevant to this case. First, a disqualifying condition may be raised by “contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion.” AG ¶ 7(a). Second, a disqualifying condition may be raised by “connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual’s obligation to

protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information." AG ¶ 7(b). Applicant's contacts with and connections to his immediate family members in India are sufficient to raise these two disqualifying conditions.

A security concern also may be raised by "a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation." AG ¶ 7(e). Applicant's joint bank account was dormant for about six years and has been closed. I conclude Applicant has refuted this allegation, and I resolve it in his favor.

Since the government produced substantial evidence to raise the disqualifying condition in AG ¶¶ 7(a) and (b), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. Applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns under this guideline can be mitigated by showing that "the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S." AG ¶ 8(a). The totality of an applicant's family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003).

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. See ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Nevertheless, the nature of a nation's government, its relationship with the U.S., and its human rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence operations against the U.S.

Applicant's family members are not connected to or dependent on the government of India. They are economically self-sufficient. None of them are involved in high-technology businesses susceptible to economic espionage. Their modest social and economic standing, lack of political involvement, and geographical separation from insurgent movements make them unlikely targets of terrorism.

India is a friendly country, a democracy, and a strategic and economic partner. While it has experienced human rights abuses, many of those abuses were due to an antiquated and inefficient legal system, a government campaign against terrorism and violent insurgencies, and an undisciplined and unsupervised law enforcement system. Although India has been identified as a practitioner of economic espionage, there is no evidence that it uses torture or abuse of its citizens to extract economic information. The U.S. and India have had serious disagreements in the past, and India's relationships with Iran have raised some concerns, but the relationship between the U.S. and India has evolved into a close economic, technological, and strategic partnership. Given its vibrant and close relationship with the U.S., it is unlikely India would risk damaging that relationship by abusing its own citizens to coerce a U.S. citizen to betray his country. I conclude AG ¶ 8(a) is established.

Security concerns under this guideline also can be mitigated by showing "there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest." AG ¶ 8(b).

Applicant decided to stay in the U.S. and become a citizen because he was attracted to the way of life in the U.S. His future and his livelihood are in the U.S. When he learned his foreign passport was a concern, he cancelled it. When asked if he was willing to renounce his Indian citizenship, he answered "yes" without hesitation. He appears to have no political or cultural ties to India. He was sincere, open, and credible at the hearing. On the other hand, he is close to his family members, especially his mother. He is unmarried and has no family members in the U.S. I find the evidence regarding this mitigating condition inconclusive. Accordingly, I conclude Applicant has not carried his burden of establishing AG ¶ 8(b). However, as noted in the preceding paragraph, I am satisfied that it is unlikely that a conflict of interest will arise.

Guideline C, Foreign Preference

The SOR alleges that Applicant received an Indian passport in November 1999 and indicated a preference to keep it (SOR ¶ 2.a). The concern under this guideline is as follows: "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." AG ¶ 9. A disqualifying condition may arise from "exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen," including but not limited to "possession of a current foreign passport." AG ¶ 10(a)(1).

Dual citizenship standing alone is not sufficient to warrant an adverse security clearance decision. ISCR Case No. 99-0454 at 5, 2000 WL 1805219 (App. Bd. Oct. 17, 2000). Under Guideline C, “the issue is not whether an applicant is a dual national, but rather whether an applicant shows a preference for a foreign country through actions.” ISCR Case No. 98-0252 at 5 (App. Bd. Sep 15, 1999).

Security concerns under this guideline may be mitigated by evidence that “dual citizenship is based solely on parents’ citizenship or birth in a foreign country.” AG ¶ 11(a). This mitigating condition is established.

Security concerns under this guideline also may be mitigated by if “the individual has expressed a willingness to renounce dual citizenship.” AG ¶ 11(b). Applicant stated, without hesitation or qualification, that he was willing to renounce his Indian citizenship. This mitigating condition is established.

Finally, security concerns may be mitigated if “the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.” AG ¶ 11(e). This mitigating condition is established.

Whole Person Concept

Under the whole person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of the applicant’s conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a): “(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) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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.” Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept. Some of these factors were addressed above under Guidelines B and C, but some warrant additional comment.

Applicant is a mature, well-educated, and very intelligent adult. He was sincere and candid at the hearing. He has a reputation as a dedicated and helpful person. His facility security officer, a veteran of military service, was very impressed by Applicant and testified he would grant a clearance if he had the authority. Applicant’s lack of political or cultural attachment to India was obvious at the hearing. His family lives in a part of India geographically distant from the ongoing violent insurgencies.

After weighing the disqualifying and mitigating conditions under Guidelines B and C, and evaluating all the evidence in the context of the whole person, I conclude

Applicant has mitigated the concerns based on foreign influence and foreign preference. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

Formal Findings

My formal findings on the allegations set forth in the SOR, as required by the Directive ¶ E3.1.25, are set out below.

Paragraph 1, Guideline B (Foreign Influence):	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline C (Foreign Preference);	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge