



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)	
)	
)	ISCR Case No. 07-13232
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Emilio Jaksetic, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

March 31, 2008

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated the security concerns raised by his foreign preference and foreign influence. Eligibility for access to classified information is granted.

On November 26, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline C, Foreign Preference and Guideline B, Foreign Influence. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on December 12, 2007, and elected to have the case decided on the written record in lieu of a hearing. On December 20, 2007, Department Counsel requested a hearing before an Administrative Judge pursuant to ¶ E3.1.7 of the Directive. The case was assigned to another Administrative Judge on January 23, 2008, and reassigned to me on February 5, 2008. DOHA issued

a Notice of Hearing on February 13, 2008, and I convened the hearing as scheduled on March 13, 2008. The government offered Exhibits (GE) 1 through 3, which were received without objection. Applicant testified on his own behalf, called three witnesses, and submitted Exhibits (AE) A through N, without objection. I granted Applicant's request to keep the record open until March 27, 2008, to submit additional matters. Applicant's counsel submitted 11 pages of documents marked collectively as AE O, and received without objection. The attorney's letter and fax cover sheet are marked Hearing Exhibit (HE) XIV. Department Counsel's memo is HE XV. DOHA received the transcript of the hearing (Tr.) on March 21, 2008.

Procedural and Evidentiary Rulings

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to India. Applicant's counsel did not object. The request and the attached documents were not admitted into evidence but were included in the record as HE I through XIII. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

Applicant is a 41-year-old engineer for a defense contractor. He was born in India. He has the equivalent to a bachelor's degree and a master's degree from Indian universities and a master's degree from an American university. He is married with a seven-year-old child and his wife is pregnant with their second child.¹

Applicant came to the United States in 1992 to attend graduate school. He obtained permanent residence status (green card) and remained in the U.S. He became a U.S. citizen in June 2006. Applicant was married in 1996. His wife was also born in India. She became a U.S. citizen on the same day as Applicant.²

Applicant had an Indian passport that was issued on June 30, 1999, with an expiration date of June 29, 2009. He never used his Indian passport after he became a U.S. citizen. He obtained status as an Overseas Citizen of India (OCI) on December 30, 2006, for convenience of travel to India. The OCI program is discussed below. As part of the process of acquiring OCI status, he had to send his Indian passport to the Indian Embassy, which cancelled the passport on January 17, 2007. When he realized the possession of the OCI card could be a security concern, he formally renounced his OCI status and surrendered the OCI card to the Indian Embassy. The card has been cancelled. His wife and child obtained OCI status at the same time as Applicant. Their OCI status has also been renounced.³

¹ Tr. at 56-57, 59, 80, 83; GE 1.

² Tr. at 78-79; GE 1, 2.

³ Tr. at 57-60, 70-74, 79; Applicant's response to SOR; GE 2; AE H, I, K, O.

Applicant's parents are citizens and residents of India. His father is 80 years old and his mother is 69 years old. His father was an engineer for the state government before he retired about 21 years ago. He receives a pension based on that employment. His mother did not work outside the home. They visited Applicant in the U.S. in 1998.⁴

Applicant has two brothers and a sister. One brother is a citizen and resident of the U.S. He has OCI status. His sister is also a U.S. citizen and resident. His second brother is a citizen and resident of India. He is an engineer for the state government.⁵

Applicant's mother-in-law and father-in-law are citizens and residents of India. His father-in-law is 75 years old and his mother-in-law is 60 years old. He worked in private industry until he retired about 15 years ago. She has not worked outside the home.⁶

Applicant and his wife traveled to India in 2001, 2002, 2004, and 2007, to visit their parents. Because of the distance, all the trips were at least three weeks long. He did not see his brother during the trips. He talks to his parents about once or twice a month. He talks to his brother in India less frequently, about every three months. He does not send financial support to his parents or in-laws. Applicant has no intention of returning to India to live. He has no foreign assets. He owns a house purchased for around \$600,000, with approximately \$70,000 in equity, and he has about \$170,000 in investments and retirement accounts.⁷

Witnesses on Applicant's behalf testified that he is a man of integrity, very honest and trustworthy, with high moral ethics. Character letters state that he has been a very valued employee, who is hard working, mature, intelligent, professional, responsible, loyal, and honorable. He is strongly recommended for a security clearance.⁸

India

According to its constitution, India is a sovereign, socialist, secular, democratic republic. It is a multiparty, federal, parliamentary democracy with a bicameral parliament and a population of approximately 1.1 billion.

The Indian government generally respects the rights of its citizens, but numerous serious problems remain. Police and security forces have engaged in extrajudicial killings of persons in custody, disappearances, torture, and rape. The lack of accountability permeated the government and security forces, creating an atmosphere

⁴ Tr. at 65-66, 76-77, 80; Applicant's response to SOR; GE 1, 2.

⁵ Tr. at 66, 77, 83-84; Applicant's response to SOR; GE 1, 2.

⁶ Tr. at 67, 77-78; Applicant's response to SOR; GE 2.

⁷ Tr. at 68, 74-76, 79; Applicant's response to SOR; AE J, N.

⁸ Tr. at 25-55; AE A-G.

in which human rights violations went unpunished. A number of violent attacks have been committed in recent years by separatist and terrorist groups.

The U.S. recognizes India as key to strategic interests and has sought to strengthen its relationship with India. The two countries are the world's largest democracies, both committed to political freedom protected by representative government, and share common interests in the free flow of commerce, in fighting terrorism, and in creating a strategically stable Asia. However, differences over India's nuclear weapons program and pace of economic reform exist. There are also concerns about India's relations with Iran, including their increasing cooperation with the Iranian military.

There have been cases involving the illegal export, or attempted illegal export, of U.S. restricted, dual use technology to India, including technology and equipment which were determined to present an unacceptable risk of diversion to programs for the development of weapons of mass destruction or their means of delivery. Foreign government entities, including intelligence organizations and security services, have capitalized on private-sector acquisitions of U.S. technology, and acquisition of sensitive U.S. technology by foreign private entities does not slow its flow to foreign governments or its use in military applications.

The U.S. views India as a growing world power with which it shares common strategic interests. There is a strong partnership between the two countries and they are expected to continue to address differences and shape a dynamic and collaborative future. The U.S. and India are seeking to elevate the strategic partnership further to include cooperation in counter-terrorism, defense cooperation, education, and joint democracy promotion.

“Overseas Citizens of India”

The Constitution of India does not allow one to hold Indian citizenship and citizenship of a foreign country simultaneously. India decided to grant Overseas Citizenship of India. Commonly, but incorrectly, known as “dual citizenship.” Persons of Indian origin who migrated from India and acquired citizenship of a foreign country other than Pakistan and Bangladesh are eligible for grant of OCI as long as their home countries allow dual citizenship in some form under their local laws.⁹ The U.S. Department of State Consular Information Sheet on India addressed dual nationality:

In 2006, India launched the “Overseas Citizens of India” (OCI) program, which has often been mischaracterized as a dual nationality program, as it does not grant Indian citizenship. Thus, an American who obtains an OCI card is not a citizen of India and remains a citizen of the United States. An OCI card in reality is similar to a U.S. “green card” in that a holder can travel to and from India indefinitely, work in India, study in India, and own property in India (except for certain agricultural and plantation properties).

⁹ GE 3; AE L.

An OCI holder, however, does not receive an Indian passport, cannot vote in Indian elections and is not eligible for Indian government employment.¹⁰

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. 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.

¹⁰ HE II.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline C, Foreign Preference

The security concern relating to the guideline for Foreign Preference is set out in AG ¶ 9:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 10. Two are potentially applicable in this case:

(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to:

(1) possession of a current foreign passport;

(3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country;

(b) action to acquire or obtain recognition of a foreign citizenship by an American citizen.

Applicant’s last Indian passport was issued in 1999, while he was still an Indian citizen. It was scheduled to expire in 2009. He continued to possess it after he became a U.S. citizen, but he never used it. India does not recognize dual citizenship, and the passport was cancelled in 2007, when Applicant obtained OCI status. AG ¶ 10(a) was applicable while the passport was valid. Applicant was subsequently granted status as an Overseas Citizen of India. Despite the misnomer, this is not citizenship. The U.S. State Department equated it to a U.S. green card. No Foreign Preference disqualifying condition has been raised by Applicant’s OCI status.

Conditions that could mitigate Foreign Preference security concerns are provided under AG ¶ 11, including:

(a) dual citizenship is based solely on parents’ citizenship or birth in a foreign country;

(b) the individual has expressed a willingness to renounce dual citizenship;

(c) exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor;

(d) use of a foreign passport is approved by the cognizant security authority; and

(e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

India does not recognize dual citizenship. When Applicant became a U.S. citizen, he in essence gave up his Indian citizenship. Like almost everybody else in his situation, he still had his Indian passport after becoming a U.S. citizen, but he did not use it. The passport was canceled by the Indian Embassy as part of the process for Applicant to obtain OCI status. He has formally renounced his OCI status and surrendered the OCI card to the Indian Embassy. AG ¶¶ 11(b) and (e) are applicable.

Guideline B, Foreign Influence

The security concern relating to the guideline for Foreign Influence is set out in AG ¶ 7:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 7. Three are potentially applicable in this case:

(a) 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;

(b) 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;

(d) sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.

Applicant's parents, brother, and parents-in-laws are citizens and residents of India. His father worked as an engineer for the state government before he retired about 21 years ago. He collects a pension based on that employment. His brother presently works as an engineer for the state government. India is the world's largest democracy, works closely with the U.S. on many matters, shares common strategic interests, and generally respects the rights of its citizens. But it also continues to have some human rights issues, has been victimized by terrorist attacks, and restricted, dual use technology has been illegally exported to India. This creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion. It also creates a potential conflict of interest. AG ¶¶ 7(a), (b), and (d) have been raised by the evidence.

Conditions that could mitigate Foreign Influence security concerns are provided under AG ¶ 8:

(a) 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.;

(b) 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;

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation;

(d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;

(e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country; and

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

Applicant came to the U.S. as a young man to further his education. He remained, obtained a successful career as an engineer, married, had a child with another on the way, and became a U.S. citizen. While he and his wife still have family in India that they love, their life and future are here. India is a democracy and strategic partner of the U.S. Technology has been illegally exported to India, but the documents provided by Counsel do not show that coercion was utilized. I find that it is unlikely Applicant will be placed in a position of having to choose between the interests of the Indian government or his family members in India and the interests of the United States. I further find there is minimal conflict of interest, because Applicant can be expected to resolve any conflict of interest in favor of the United States. AG ¶¶ 8(a) and 8 (b) are partially applicable. Because Applicant has been a U.S. citizen for less than two years, I am unable to find the mitigating conditions fully applicable. No other mitigating condition is applicable.

Whole Person Concept

Under the whole person concept, the 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. The 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 common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant was born in India. He came to the U.S. in 1992 to further his education. He obtained permanent residency status, remained in the U.S., thrived and became an established, highly regarded engineer, with considerable U.S. ties and assets. He and his wife became U.S. citizens in June 2006. He has a seven-year-old child and his wife is pregnant with their second child. His life, immediate family, professional career, and future are now here.

I considered the totality of Applicant's family ties to India. There is a strong partnership between the U.S. and India and they share common strategic interests. However, 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."¹¹ The distinctions between friendly and unfriendly governments must be made with caution. Relations between nations can shift, sometimes dramatically and unexpectedly. 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. 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.

India is a democracy that generally respects the rights of its citizens, but numerous serious problems remain. Like almost every country, including the United States, it has been victimized by terrorist acts. Restricted, dual use technology has been illegally exported to India, but there is no indication that India utilizes coercion against its citizens for espionage purposes. Many of our allies conduct intelligence gathering against the U.S. India would be risking a great deal by raising the stakes, and attempting to use duress against one of its citizens in an attempt to coerce a U.S. citizen to commit espionage. Applicant is obviously closer to his parents than his brother. He speaks to him much less frequently and did not see him on any of his recent visits to India. Applicant's father is 80 years old and has been retired for 21 years. While his brother does work for the state government and his father receives a pension, Applicant's position, assets, and ties in the U.S. make economic coercion through his brother or father extremely unlikely to happen and even less likely to succeed.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the Foreign Preference and Foreign Influence security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

¹¹ ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

Paragraph 1, Guideline C:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline B:	FOR APPLICANT
Subparagraphs 2.a-2.h:	For Applicant

Conclusion

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

Edward W. Loughran
Administrative Judge