



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-00545
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esquire, Department Counsel
For Applicant: *Pro se*

April 24, 2009

Decision

CURRY, Marc E., Administrative Judge:

Applicant mitigated the government’s security concerns raised under Guideline B, Foreign Influence. Clearance is granted.

On September 19, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under 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 on October 10, 2008, and requested an administrative determination. On January 14, 2009, department counsel prepared a File of Relevant Material (FORM). Applicant received it on January 21, 2009, and did not reply. The case was assigned to me on March 24, 2009.

Evidentiary Ruling

At department counsel's request, I took administrative notice of the facts set forth in 13 documents included in the FORM. I shall reference the administrative notice documents in the FORM using Roman numerals.

Findings of Fact

Applicant is a 47-year-old married, man with two children, ages 14 and eight. He became a naturalized U.S. citizen in 2002 (Item 3 at 3). He was originally a citizen of the Republic of India. He lived in the U.S. for five years before becoming a naturalized citizen.

Applicant attended graduate school in the U.S. from 1985 to 1986, earning a Master's Degree in Business Administration. After finishing business school, Applicant moved to Kuwait and worked for a privately held trading and contracting company (Item 4, SOR ¶ 1.e). It conducted business with the Hussein regime of Iraq before the 1990 invasion (*Id.*). Applicant maintains contact with one of his colleagues with whom he worked in Kuwait (Item 4, SOR ¶ 1.f). The colleague continues to reside in Kuwait.

Applicant worked in Kuwait through 1997, then returned to the U.S. Between 1997 and 2001, he worked for two companies as an accountant (Item 8 at 9). Since 2001, he has worked for a defense contractor as a principal cost and schedule analyst (Item 8 at 8).

Applicant's wife is a naturalized U.S. citizen, and she is originally from India (Item 4 at 1; Item 6 at 5). She is a homemaker. She has been a U.S. citizen since 1990 (*Id.*). Both of their children are U.S. citizens by birth. Applicant and his wife were married in 1990 in the U.S. (Item 5 at 12).

Applicant's mother emigrated to the U.S. in July 2005, and is a registered legal alien (Item 4, SOR ¶ 1.b). She is a citizen of India. Before moving to the U.S., she lived in Kuwait from 1981 to 2005 where she worked for an airline company as a sales supervisor (Items 3 at 16; 7 at 4). Applicant's contact with his mother is unknown from the record.

Applicant's father is a citizen and resident of India (Item 4, SOR ¶ 1.c). He lives in a city on the northwestern coast. He lived in Kuwait from 1947 to 1990, working as an administrative manager for a Kuwaiti oil company (Item 7 at 4). He is 77 years old. There is no record evidence as to whether he is currently employed. Applicant speaks with his father by phone periodically (Item 7 at 4). He travels to India approximately every two years to visit (Item 6 at 5). Applicant feels obligated to take care of his affairs, "if anything were to happen" to him (Item 7 at 11).

Applicant's sister is a citizen of India who lives in the U.S. (Item 4, SOR ¶ 1.i). She emigrated to the U.S. in 2004 and is a registered legal alien. Their contact is unknown from the record.

Applicant's mother-in-law is originally from India (Item 4, SOR ¶ 1.h). She became a naturalized U.S. citizen in 1986 (Item 5 at 22). The amount of contact Applicant has with his mother-in-law is unknown from the record.

Applicant's father-in-law, an Indian citizen, has been living in the U.S. since 1979 (Item 4, SOR ¶ 1.g; Item 5 at 21). He is a registered legal alien. Applicant's contact with him is unknown from the record.

Applicant has two cousins who live in the United Arab Emirates (UAE) (Item 4, SOR ¶ 1.d). There is conflicting record evidence as to whether they are UAE citizens or United Kingdom citizens (Item 6 at 4).

India is a multiparty, parliamentary, secular democracy with a population of 1.1 billion (Item II). It has 28 states and seven union territories. U.S. and Indian relations have strengthened during the past 10 years (Item I at 11). Before then, their relationship was strained because India had developed nuclear weapons in contravention of international conventions, (Item I at 11; Item III at 18).

Currently, the U.S. is India's largest trading partner (Item I at 6). Also, the U.S. is India's largest investment partner, and provides \$126 million in annual development assistance (*Id.*). In 2004, the U.S. and India launched the Next Steps in Strategic Partnership (NSSP), an agreement which governed multiple initiatives involving, among other things, energy, trade, democracy promotion, and disaster relief (Item I at 11).

The growth of the U.S. and India's economic ties has been accompanied by a corresponding growth in their strategic relationship. In 2005, "a U.S. - India Joint Statement asserted that 'as a responsible state with advanced nuclear technology, India should acquire the same benefits and advantages as other such states'" (Item III at 6). In 2006, Congress passed the Henry J. Hyde United States - India Peaceful Atomic Cooperation Act, which allows direct civilian nuclear commerce with India for the first time in 30 years (Item I at 11). This agreement "opens the door" for American and Indian firms to participate in each other's civil energy sector (Item I at 12). Specifically, it enables India to buy U.S. nuclear reactors and fuel for civilian use. Also, it removed and/or revised several U.S. export requirements for dual-use and civil nuclear items (Item III at 41).

Since 2002, the U.S. and India have held a series of "unprecedented and increasingly substantive" combined exercises involving all military services (Item III at 51). These exercises have enabled the U.S. to get a "first look" at fighter jets that Russia designed and sold to India (*Id.*). More than 100 U.S. Special Forces soldiers have undergone counter insurgency jungle warfare training conducted by the Indian

military. For the past seven years, the U.S. and Indian navies have participated in joint naval exercises conducted near the Indian coast (*Id.*).

India purchases more weapons systems than any other developing country (Item III at 50). India purchases the majority of its weapons systems from Russia and Israel (Item III at 50). The U.S. began selling weapons systems to India in 2002. In 2007, a U.S. defense contractor negotiated a \$1 billion dollar deal with India for the purchase of military transport aircraft along with related equipment, training and services (Item III at 48). In January 2008, the U.S. approved the deal (*Id.*). Currently, U.S. defense contractors are competing with weapons manufacturers from other countries for a contract to sell multi-role, combat aircraft to India (Item III at 52). The deal when consummated “could be worth” \$10 billion (*Id.*).

India has a positive relationship with Iran investing nearly \$10 billion in the Iranian economy since 2000 (Item III at 30). India “firmly opposes the emergence of any new nuclear powers in the region” (*Id.*).

India and Israel are engaging in joint, new missile technology development. In 2008, India launched into space an Israeli military satellite (Item III at 50). This elicited a formal complaint from the Iranian government which contended that the satellite will be used to monitor its nuclear program (*Id.* at 50, footnote 155).

The U.S. Department of Commerce Bureau of Industry and Security maintains an Entity List composed of end-users who have been determined to present an unacceptable risk of diversion to programs for the development of weapons of mass destruction or their means of delivery. The Bureau of Industry and Security also regulates dual-use technologies that may have military applications. U.S. firms seeking to conduct business with organizations on the Entity List must obtain licenses from the Bureau of Industry and Security (Item XI).

As of 2000, India’s Department of Atomic Energy (DAE) and its Nuclear Power Corporation (NPC) were on the Entity List (Item XII). As of 2002, Bharat Dynamics, an Indian-based corporation, was on the Entity List (Item XIII). As of 2004, the Indian Space Research Organization’s Space Applications Center was on the Entity List (Item XI). As of 2007, the Indira Gandhi Centre for Atomic Research was on the Entity List (Item VIII). Hindustan Aeronautics, an Indian company, was on the Entity List in 1998 (Item IX). The U.S. removed it from the List in 2001 (*Id.*).

In July 2007, the U.S. and India successfully negotiated an agreement on peaceful nuclear cooperation. This deal is more far-reaching than the Hyde Act (Item III at 7). In August 2007, the International Atomic Energy Agency (IAEA) approved the agreement. It has not yet been approved by the 45-member Nuclear Suppliers Group, a group composed of countries that have nuclear energy capabilities who must approve such an agreement under international law (Item II at 6). As of the U.S. election of 2008, neither the U.S. Congress nor the Indian parliament had ratified the agreement (*Id.* at 4-7).

India is one of the most terror-afflicted countries in the world (Item IV at 3). In 2008, more than 2300 people died from terrorist incidents in India (*Id.*). Terrorism is concentrated in Kashmir, a disputed area bordering Pakistan where radical Muslim activists are present, central India, where Maoist rebels are fighting on behalf of landless laborers, and southern India, where Hindus and Muslims periodically clash (Item III at 73-75).

India considers defeating terrorism and combating violent religious extremism as a critical shared security interest with the U.S. (Item III at 55). In 2000, the U.S. and India formed a joint working group on counterterrorism. It meets annually and is devoted to extending cooperation on areas such as bioterrorism, aviation security, cyber-security, terrorism, weapons of mass destruction terrorism, and terrorist financing (Item III at 55). In 2002, the U.S. and India organized a cyber security forum to safeguard critical infrastructures from attack (Item III at 35).

In 2005, the U.S. and India signed a treaty on criminal matters institutionalizing law enforcement cooperation and creating regularized channels for mutual assistance (Item III at 54). It was subsequently ratified (*Id.* at footnote 174). Counterinsurgency efforts have improved as the U.S. has provided training to local Indian police forces (*Id.*).

Hundreds of Indian commandos are stationed in Afghanistan assisting U.S. troops (Item III at 33). India has committed approximately \$1.2 billion toward Afghanistan's reconstruction (*Id.*). In 2008, the Taliban bombed India's embassy in Afghanistan in an effort to force their withdrawal from the country. In response, India remained involved in Afghanistan, and pledged an additional \$450 million dollars to the war and reconstruction efforts (*Id.*).

India generally respects the rights of its citizens. (Item II at 1). It has a vibrant civil society, a free press, and a robust, democratic, political system (Item II at 14; Item III at 36). However, its judiciary is only "somewhat effective" (*Id.*). India has numerous laws protecting human rights, but lacks a coherent, well-developed mechanism to enforce them. Serious problems exist including extrajudicial killings of persons in custody, disappearances, and torture by police forces (Item II at 2).

Indian immigrants are the fastest growing legal group of immigrants in the U.S. (Item III at 20). The Indian-American community is well-entrenched in several U.S. business sectors (*Id.*).

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 overarching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2©, 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."

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 as to obtaining a favorable security decision.

Analysis

Guideline B, Foreign Influence

AG ¶ 6 explains the foreign influence security concern 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.

The government alleges that the status of Applicant's relatives as Indian citizens and/or residents generates foreign influence security concerns. Also, the government alleges that Applicant's prior employment with a company in Kuwait, and his continuing association with friends who remain employed there, and relatives who live in Kuwait generates a security risk.

Applicant's wife is no longer an Indian citizen. She is now a naturalized U.S. citizen. I find for Applicant as to SOR subparagraph 1.a.

Although India is not a paragon of democracy, it is certainly not a hostile, totalitarian state seeking to project its power worldwide through the brute intimidation or coercion of its citizens domestically and abroad. Consequently, none of Applicant's relatives who are Indian citizens living in the U.S. generate security risks. I have resolved SOR subparagraphs 1.b, and 1.g through 1.i in Applicant's favor.

Applicant has no cousins residing in Kuwait, as alleged in the SOR. It is unclear from the record, whether they are citizens of the UAE or the U.K. Absent any SOR allegations concerning these countries, I conclude that these relationships do not generate a security risk. SOR subparagraph 1.d is resolved in Applicant's favor.

A "current and accurate assessment of the 'geopolitical situation' and the security/intelligence profile of the [foreign] country vis-a-vis the United States is crucial in Guideline B cases" (ISCR Case No. 07-05686 at 4, n. 3 (App. Bd. Nov. 12, 2005)). Here, the government's allegations of a security risk generated by Applicant's past employment with a privately owned, Kuwaiti company, and continuing friendship with a current employee are unsupported by any record evidence concerning Kuwait's geopolitical situation. Moreover, the company conducted business with Iraq's Hussein regime nearly 20 years ago, before it invaded Kuwait. I conclude the allegations listed in subparagraph 1.e and 1.f do not generate security risks.

In evaluating whether Applicant's relationship with his father living in India generates a security risk, a comparison of the Revised Adjudicative Guidelines and the earlier edition of the Adjudicative Guidelines governing foreign influence is instructive. Under the earlier edition, *any* contact with a family member residing in a foreign country generated a security risk (DODD 5220.6, E.2.A.2.1.2.1 (January 2, 1992)). Moreover, the Appeal Board in interpreting ¶ E.2.A.2.1.2.1 of the pre-revised Adjudicative Guidelines held that the existence of one relative living in a foreign country, with whom an applicant had contacts, was enough, alone, to generate a potential for compromise of classified information (ISCR Case No. 03-02382 (App. Bd., Feb. 8, 2001)).

The Revised Adjudicative Guidelines changed ¶ E.2.A.2.1.2.1. Now, the contact with the foreign family member generates a security risk only if the contact creates a *heightened* risk of foreign exploitation, inducement, pressure or coercion (AG ¶ 7(a)). Security clearance decisions must be based on current DoD policy and standards (See ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003)). Because the Appeal Board's foreign influence analysis regarding foreign relatives, as described in the previous paragraph, was predicated on the pre-revised guideline, it no longer has any precedential value (See ISCR Case No. 02-17369 at 3-4 (App. Bd., May 23, 2006)).

Department counsel argues that Indian agents are known to target citizens to obtain protected information. In support of this contention, she references five instances in which the government either fined or prosecuted U.S. companies for selling dual-use technology to India in contravention of the U.S. Department of Commerce Bureau of Industry and Security's regulations (BIS). None of the Administrative Notice Documents that detail these episodes (Items IX-XIII) referenced agents of the Indian government.

Absent any evidence of Indian government complicity these cases appear more demonstrative of the greed and duplicity of the U.S. companies that attempted to circumvent the regulatory scheme governing such transactions rather than any industrial espionage on the part of the Indian government. In reaching this conclusion, I considered the lucrative and competitive nature of the Indian market for high technology products and weapons systems.

Although none of the cases that the government referenced detailed examples of the Indian government targeting dual use technology, two cases involved an Indian business, and a multinational company with an Indian office that were charged, respectively, with circumventing U.S. export control regulations (Items VII - VIII). Also, the inclusion of several Indian government agencies and businesses on the BIS list of foreign entities that may “pose a significant risk of being involved in activities that are contrary to the national security or foreign policy interests of the U.S.,” (15 C.F.R § 744.11(b)), must be considered in the heightened risk analysis. The BIS does not prohibit U.S. companies from selling dual-use technologies to foreign government agencies and companies on the Entity List. Instead, it regulates the commerce (15 C.F.R. § 730.6.2(5)). U.S. companies seeking to conduct business with entities on the List must apply for a license. There is a “presumption of approval” for license applications to sell dual-use technologies to the Indian entities on the list (15 C.F.R., Pt. 744, supp. 4).

Nevertheless, evidence that an Indian business and a multinational business with an office in the U.S. and India have attempted to circumvent U.S. export regulations to acquire protected technologies generates a risk of inducement or coercion. However, this risk is balanced against the 2005 U.S. - India Joint Statement, the countries’ extensive military and law enforcement cooperation, and their rapidly growing cooperation on issues involving sensitive technologies.

The risk of terrorism in India is also a factor to consider in assessing the security risk. Over the past five years, India has been victimized by brazen and spectacular episodes of terrorism. Terrorism, however, is often indiscriminate by nature. The possibility that it may be employed against specific individuals, such as the family member of a security clearance holder, is higher in countries that openly espouse it, are hostile to the U.S., or are controlled partially by terrorist organizations. None of these characteristics apply to India. Although the contested border with Pakistan is a flashpoint for terrorism, and pockets of central and southern India experience terrorism stimulated by ethnic and political unrest, these factors are counterbalanced by India’s firm commitment to countering terrorism, both domestically and internationally, and its robust democratic system. Over the years, India has sought U.S. counterterrorism assistance and provided counterterrorism assistance to the U.S. Also, it is playing a crucial role in the reconstruction of Afghanistan, and has been unfazed by the Taliban’s violent efforts to compel its withdrawal.

India’s relationship with the U.S. is as close as it has been in its 60 years of independence. In the 1990s, the major point of contention was development of India’s

nuclear program. Now, the U.S., under the Hyde Act, is engaging in civilian nuclear commerce with India for the first time in 30 years. India and the U.S. have some significant foreign policy differences, particularly with respect to Iran. Generally, however, India's foreign policy and strategic interests are congruent with those of the U.S.

Upon examining Applicant's relationship with his father together with India's security/intelligence profile vis a vis the U.S., I conclude that AG ¶ 7(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," does not apply.

Assuming for the sake of argument that AG ¶ 7(a) applies, it is mitigated by AG ¶¶ 8(a), the nature of the relationships with the 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.," and 8(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." Applicant's father is an elderly, retired oil company administrator who spent his career in Kuwait before returning to India. It is unlikely given his father's status, India's positive relationship with the U.S., and generally democratic society, that India would attempt to coerce or induce Applicant to compromise U.S. national security through his relationship with his father. Moreover, Applicant received his graduate school education in the U.S. nearly 25 years ago, was married in the U.S. nearly 20 years ago, and has two children who were both born in the U.S., and has been working in the U.S. for approximately 12 years. His father is his only relative who continues to live in India.

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.

Upon evaluating the innocuous nature of Applicant's contact with his father, together with India's emergence as a staunch U.S. ally, its commitment to democracy, and its increasingly expanding economic and security ties with the U.S., I conclude Applicant has mitigated the foreign influence security concern. Clearance is granted.

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:

Paragraph 1, Guideline B: FOR APPLICANT

Subparagraphs 1.a - 1.i: 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.

MARC E. CURRY
Administrative Judge