



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



In the matter of:)
)
) ISCR Case No. 08-04060
)
)
Applicant for Security Clearance)

Appearances

For Government: Eric Borgstrom, Esquire, Department Counsel
For Applicant: *Pro Se*

April 9, 2009

Decision

HEINY, Claude R., Administrative Judge:

Applicant was born in India and came to the U.S. as a student in 1985. In 2001, both Applicant and his wife became naturalized U.S. citizens. Applicant’s parents are naturalized U.S. citizens who live part of the year in India. His older brother lives in California and his younger brother lives in India. Both are naturalized U.S. citizens. Applicant’s mother-in-law is a citizen and resident of India. Applicant has rebutted or mitigated the government’s security concerns under foreign influence. Clearance is granted.

Statement of the Case

Applicant contests the Defense Department’s intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a

¹ 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)

Statement of Reasons (SOR) on October 14, 2008, detailing security concerns under foreign influence.

On October 30, 2008, Applicant answered the SOR, and requested a hearing. On December 15, 2008, I was assigned the case. On January 5, 2009, DOHA issued a notice of hearing scheduling the hearing which was held on January 22, 2009.

The government offered Exhibits (Ex.) 1 through 3, which were admitted into evidence. Applicant testified on his own behalf and submitted Exhibits A through E, which were admitted into evidence. The record was held open to allow Applicant to submit additional information. On January 27, 2009, additional material was submitted. Department Counsel having no objection to the material, it was admitted into the record as Ex. F. On February 3, 2009, the transcript (Tr.) was received.

Findings of Fact

In his Answer to the SOR, Applicant denied the factual allegations in ¶ 1.c of the SOR. He admitted the remaining factual allegations of the SOR, with explanations. Applicant's admissions to the SOR allegations are incorporated herein. After a thorough review of the record, pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 45-year-old software engineer (Tr. 52) who has worked for a defense contractor since July 2007, and is seeking to obtain a security clearance. Coworkers state Applicant is extremely personable, dependable, open and honest. Applicant is very hard working. (Ex. A)

Applicant was born in India. In 1985, he came to the U.S. as a student. He attended a university college of engineering from 1985 to 1991. He obtained a Master of Science degree in electrical engineering and computer science. In 1992, he met his wife while on vacation in India and they married the same year. (Tr. 24) His wife is a quality control chemist for a pharmaceutical company who has a Master's degree in chemistry. (Tr. 24) In November 2001, both he and his wife became naturalized U.S. citizens. In December 2001, Applicant obtained a U.S. passport. (Ex. C) In 2004, his Indian passport expired.

Applicant's parents are naturalized U.S. citizens who live the majority of the year in India. His father was a partner in a firm that made high voltage equipment. (Tr. 27) In 1987, he retired from the company. Applicant's mother is a housewife. None of his relatives or in-laws work for or have worked for the Indian government or any other foreign government. Applicant previously had weekly contact with them, but now his contact is once a month. (Tr. 27) In 1996, his parents obtained their green card, permanent resident status. In 2003, they obtained their U.S. citizenship.

Applicant's younger brother was born in India, came to the U.S. in 1989, is a naturalized U.S. citizen, and currently works in India as a business analyst. His brother

promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

and his sister-in-law worked for a U.S. company in California before they accepted a company transfer to India. They currently work for the same company in India. Their children were born in the U.S. (Tr. 33) They own a house in California and it is their intention to return to the U.S. (Tr. 31)

Applicant's older brother is a naturalized U.S. citizen who owns a software business in California. His older brother has two children born in the U.S. (Tr. 35) Applicant talks with his brother weekly. His older brother was the first of the family to come to the U.S. Applicant has aunts and uncles in India that he contacts less than once a year. (Tr. 50)

Applicant's mother-in-law, a housewife, is a citizen and resident of India who has visited Applicant and his wife in the U.S. four times. Applicant's father-in-law was a textile engineer before his death in 1995. (Tr. 41, 54) Applicant's wife calls her mother once a week. (Tr. 47) Applicant's wife has one brother. Applicant's mother-in-law had been living with his wife's brother prior to his move to the U.S. (Tr. 40) In 2007, Applicant's wife's brother, a business analyst, and Applicant's sister-in-law came to the U.S. Applicant talks to his brother-in-law once every two weeks. (Tr. 40) Applicant's sister-in-law is a U.S. citizen. They are employed in the U.S. Their son, Applicant's wife's nephew, is an Indian citizen.

Applicant traveled to India in January 2001, January 2005, and December 2006— January 2007. When he traveled to India, he visited relatives and in-laws, in India. His travel to India was facilitated by an Overseas Citizenship of India (OCI) card he obtained in 2006. (Ex. D) The Constitution of India does not allow holding Indian citizenship and citizenship of a foreign country simultaneously. (Ex. 3) The OCI serves as a lifetime visa to visit India. The card allows the holder to enter India at anytime and stay in India as long as the person desires. With the card, the holder is not required to obtain a visa prior to traveling to India. (Ex. 2) Applicant submitted an Indian Form XXII renunciation of his overseas citizenship of India. (Ex. E) Applicant's OCI card has been cancelled. (Ex. F)

In 2005 and 2007, Applicant visited his wife's schoolmate and her husband, citizens of India, living in the United Arab Emirates (UAE). His wife's friend is a housewife and his wife's friend's husband is a project manager for an engineering company. (Tr. 47, 48, Ex. 2) Applicant and his wife would visit her wife's friend because the aircraft stopped in the UAE on its return trip to the U.S. Now there are direct flights from India to the U.S. and Applicant and his wife no longer stop in the UAE. Applicant's wife contacts her friend in the UAE once every six months. (Tr. 49)

In 1998, ten years ago, Applicant purchased a home in the U.S. (Tr. 42) His home has a fair market value of \$300,000 and Applicant has equity of \$150,000. (Tr. 43, Ex. F) Applicant has \$150,000 in his 401(k) retirement plan. He has no property or financial interest in India or any foreign country. (Ex. 2) Applicant has no financial obligations to any of his relatives. (Tr. 29, Ex. 2)

Procedural and Evidentiary Rulings

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to India, along with 13 attachments. The facts administratively noticed are limited to matters of general knowledge and matters not subject to reasonable dispute. Those facts are set out in the Findings of Fact, below.

India

I have taken administrative notice that India is not hostile to the U.S. nor are its interests inimical to the United States. The U.S. and India enjoy good relations. The United States is India's largest trading partner. India's size, population, and strategic location give it a prominent voice in international affairs, and its growing industrial base, military strength, and scientific and technical capacity on issues from trade to environmental protection.

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 India's increasing cooperation with the Iranian military.

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 people.

Although the Indian government generally respects the human rights of its citizens, there remained numerous serious problems and significant human rights abuses. 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 in which human rights violations went unpunished. A number of violent attacks have been committed in recent years by separatist and terrorist groups.

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.

The United States government encourages small and medium size companies to expand their business opportunities in India. Many United States based companies, including large computer service and software development companies, have subsidiary companies and do business in India.

While there is a threat of terrorism in India, as well as in most areas of the world, the area of India where Applicant's family resides is not listed as an area of safety or security concern, or of instability because of terrorism.

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 as to obtaining 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.

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 B, Foreign Influence

AG ¶ 6 explains the Government’s security concern regarding foreign influence:

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 ¶ 7 describes three conditions that could raise a security concern and may be disqualifying 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;²

(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; and

² The mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if only one relative lives in a foreign country and an applicant has contacts with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

(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 has frequent contact with his parents and younger brother, who are U.S. naturalized citizens living in India. Applicant's older brother is a naturalized U.S. citizen living in California. His wife has weekly contact with her mother. Applicant has less frequent contacts with his aunts, uncles, mother-in-law, and other in-laws. However, these relationships with family members create a heightened risk of foreign pressure or exploitation because entities in India have sought U. S. intelligence or proprietary information. His connections to his family also create a potential conflict of interest because the relationship with his brother and parents are sufficiently close in nature and could raise a security concern over his desire to help his family.

The Government produced substantial evidence of those two disqualifying conditions and the burden shifted to Applicant to produce evidence and prove mitigation. Three of the mitigating conditions under AG ¶ 8 are potentially applicable:

(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; and

(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.

AG ¶¶ 8(a) and (c) have some application to Applicant's relationships with his parents, brother, his in-laws, and his wife's friend. None of those relatives are in positions connected with the Indian government or engaged in activities that would likely cause Applicant to be exploited or placed in a position of having to choose between them and the United States. Applicant's contact with his parents is once a month, but it is not clear that the contacts are so casual that they could not create any risk of foreign influence.

AG ¶ 8(c) applies to his wife's friend from school and her husband who live in the UAE. Applicant has visited them twice with the last visit in 2007. With a change in air plane schedules, Applicant's travel to and from India no longer involves a stop in the UAE. Therefore, Applicant's contact with his wife's friend will become even less frequent.

Applicant established the application of AG ¶ 8(b). Based on his relationship and depth of loyalty to the United States, he can be expected to resolve any conflict of interest in favor of U.S. interests. He has lived in the United States since 1985 when he arrived to attend university. After earning his degree and advanced degree, he began working here. In 2001, he became a U.S. citizen as did his wife. Both of his children were born in the U.S. In contrast, his ties to India have become minimal over the years. He has substantial U.S. property. He renounced his Indian citizenship and does not have any financial or property interests there. He has infrequent communication with his aunt and uncles, living there. Since 2001, he visited India three times for recreational purposes, the last visit occurring two years ago.

Whole Person Concept

In addition to evaluating the disqualifying and mitigating conditions under each guideline, the adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. The essence of scrutinizing all appropriate variables in a case is referred to as the “whole person” analysis. 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) the 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.

A Guideline B decision concerning India must take into consideration the geopolitical situation in that country, as well as the dangers existing in India.³ While there is no evidence India is a known collector of U.S. intelligence and sensitive economic information, there have been cases involving the illegal export, or attempted illegal export, of U.S. restricted, dual use technology to India. 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 to slow it flow to foreign governments or its use in military applications.

³ See ISCR Case No. 04-02630 at 3 (App. Bd. May 23, 2007) (remanding because of insufficient discussion of geopolitical situation and suggesting expansion of whole person discussion).

The Appeal Board requires the whole person analysis address “evidence of an applicant’s personal loyalties; the nature and extent of an applicant’s family’s ties to the U.S. relative to his [or her] ties to a foreign country; his or her social ties within the U.S.; and many other [factors] raised by the facts of a given case.” ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007). Substantial mitigating evidence weighs towards granting Applicant’s security clearance.

It has been two years since Applicant traveled to India. His ties to his parents, brother, and in-laws are limited to telephone calls for family news. His communications establish ties of affection to his Indian family members. There is some possibility that Applicant could be placed in a position of having to choose between the interest of a foreign individual, group, organization, or government and the interests of the United States, especially because India has a significant lawless element, who may attempt to harm Applicant’s relatives to gain some kind of advantage over Applicant.

Applicant is a mature person. He has lived in the United States for more than 23 years, and has been a naturalized citizen for the past eight. Applicant’s spouse has been living in the United States since 1992 and is a naturalized U.S. citizen. His two children were born in the United States. He earned a degree and an advanced degree from a U.S. institution. He is a successful member of his business community, providing services to the U.S. government. His ties to the United States are much stronger than his ties to his relatives living in India. His parents and brothers are all U.S. citizens.

There is no evidence Applicant has ever taken any action that could cause potential harm to the United States. He takes his loyalty to the United States seriously. His Indian citizenship was renounced by taking his U.S. oath of citizenship. India does not recognize dual citizenship. Additionally, Applicant’s OCI card has been cancelled. There is not any derogatory information about him in the record.

After weighing the disqualifying and mitigating conditions, and all facts and circumstances in the context of the whole person, I conclude Applicant mitigated the security concerns pertaining to foreign influence.⁴ Overall, the record evidence leaves me without questions as to Applicant’s eligibility and suitability for a security clearance.

Formal Findings

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

Paragraph 1, Foreign Influence: FOR APPLICANT

Subparagraphs 1.a to 1.h: For Applicant

⁴ I conclude that the whole person analysis weighs heavily toward approval of Applicant’s security clearance. Assuming a higher authority reviewing this decision determines the mitigating conditions articulated under AG ¶ 8 do not apply and severs any consideration of them, I conclude the whole person analysis standing alone is sufficient to support approval of a security clearance in this case.

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. Applicant's security clearance is granted.

CLAUDE R. HEINY II
Administrative Judge