



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



In the matter of:

)
)
)
)
)
)

ISCR Case: 09-02662

Applicant for Security Clearance

Appearances

For Government: John B. Glendon, Esquire, Department Counsel
For Applicant: Brian Bannon, Esquire

January 31, 2011

Decision

DAM, Shari, Administrative Judge:

Based upon a review of the record as a whole, eligibility for access to classified information is granted.

History of Case

On March 27, 2007, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On February 17, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) 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 Adjudicative Guidelines effective within the Department of Defense for SORs issued after September 1, 2006.

After having been granted an extension, Applicant answered the SOR in writing on March 30, 2010, and requested a hearing before an administrative judge. On May 13, 2010, he filed a Supplemental Answer to the SOR. On August 17, 2010, DOHA assigned the case to me and issued a Notice of Hearing on August 23, 2010, setting the hearing for October 6, 2010. On that date, Government Exhibits (GE) 1 through 13 were admitted into evidence by a stipulation by the parties. At the hearing, Applicant filed a Second Supplemental Answer to the SOR. He testified and called four witnesses. Applicant Exhibits (AE) A through H were admitted into evidence by a stipulation of the parties. AE I through T were admitted for purposes of administrative notice without objection. AE U was marked for identification purposes only. DOHA received the hearing transcript (Tr.) on October 19, 2010.¹

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. The request and the attached documents pertinent to India are included in the record as Hearing Exhibit (HE 1) along with 15 attachments. The documents were admitted over Applicant's objections. (Tr. 6.) The facts administratively noticed are limited to matters of general knowledge and pertinent to India, and not subject to reasonable dispute. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

In his initial Answer, Applicant admitted the factual allegations contained in ¶¶ 1.a through 1.g of the SOR and provided explanations. Those answers are incorporated into these findings of fact.

Applicant is 55 years old. He was born in India. After completing high school, he graduated from an Indian university with a bachelor's degree in engineering in 1976. He worked in a family owned business for a year and then immigrated to the United States in 1978, at the age of 29. He then started a full-time position with a U.S. company while pursuing a master's degree in business administration. In 1981, he completed that degree. In December 1984, he became a naturalized U.S. citizen. He relinquished his Indian passport after he became a U.S. citizen because he was "no longer a citizen of India." (Tr. 92-93.) In 1985, he completed a second bachelor's degree in computer science. He subsequently worked for two more U.S. companies before forming a company in March 1995 that provides services to companies and the federal government. (Tr. 47-52.) He has held a secret security clearance since approximately 1984.

¹ISCR Case: 09-03068 references the Decision pertinent to Applicant's spouse's security clearance application.

In June 1982, Applicant married his wife in India. She was born there and immigrated to the United States in 1983. She became a naturalized U.S. citizen in June 2006. (Answer.) She owns her own consulting company. Applicant and his wife have three children, all of whom were born in the United States. Two have graduated from college and one lives at home. (Answer.)

Both of Applicant's parents were born and raised in India. They are deceased. His mother died in 1997 and his father died in 2009. His father lived in the United States from 1975 to 1982 and taught business courses at a U.S. college. He subsequently returned to India and became an elected member of the national Indian parliament from 1992 to 1998. In 2008, he returned to the United States to reside with Applicant until the early summer of 2009 when he returned to India before his death. His father had U.S. permanent resident alien status in 2008 when he was in the United States. (Tr. 66; GE 11.)

Applicant is one of five children, all born in India. Applicant's brother is deceased. (Tr. 115.) His eldest sister and her husband are citizens and residents of India. They have U.S. permanent resident alien status and intend to move here in another year to be with their children. Both are retired and spend time in the United States. They were in the United States at the time of this hearing. (Tr. 72, 87.) His sister was a teacher and his brother-in-law was employed with the Indian Government in the field of agriculture. He visits or calls this sister and brother-in-law sporadically. (Tr. 70-72.) One of Applicant's sisters is a naturalized U.K. citizen and resides in Scotland. (GE 11.) Another sister is a naturalized U.S. citizen, residing in the United States with her husband and family. He is estranged from this sister. (Tr. 115.) His sister-in-law, who was married to his brother, is a citizen and resident of India. She is a homemaker. He has little communication with her. He has seen her six or seven times over the past 30 years. (Tr. 69; Answer.)

Applicant's father-in-law and mother-in-law were born in India. His mother-in-law died in the summer of 2010. (Tr. 103.) His father-in-law is an elected member of an Indian state assembly. He has visited his father-in-law about 15 times since leaving India in 1977. Applicant sometimes makes a courtesy telephone call to him, if he travels to another part of the country. (Tr. 59-60.) Applicant does not discuss business or politics with his father-in-law. (Answer.) His father-in-law "loves America." (Tr. 63.)

Applicant has traveled to India approximately three times each year between 2002 and 2006. He traveled there four times in 2007 and twice in 2008. (Answer.) Some of the trips have been for the purpose of seeing his father and family, some have been for business purposes, and others have been for a combination of personal and business purposes. (Tr. 78-79.) Applicant notifies his facility security officer of his travel plans to India. (Tr. 123; GE 11.) While in India, no one has ever questioned him about his work as a federal contractor. (Tr. 86) He would notify his facility security officer if he encountered an inappropriate inquiry. (Tr. 97.) He also returned for his father's funeral in the summer of 2009 and his mother-in-law's funeral in the summer of 2010.

Applicant's estimated net worth in the United States is approximately \$4 million. (Tr. 76.) Applicant and his wife have approximately \$2,000 deposited in an Indian bank account that was opened in 1982 when they were married. They have used the account while traveling in the India. (GE 11.) He intends to close it. (Tr. 77.) There is no information that he has a police record or derogatory financial records. He has never been fired from a job. He has never been arrested. He has never used illegal drugs or been involved in an alcohol-related incident. (GE 1.) There is no evidence in the record that Applicant breached any security policies or procedures while holding a security clearance for more than 20 years.

Applicant is active in community activities and a volunteer for several local charities. His company has donated equipment to the city's high school. He has encouraged handicapped individuals to join his company and provided special training for them. (Tr. 89.) He participates in professional organizations pertinent to his training and background. (Tr. 89.)

Three witnesses testified on behalf of Applicant. All have security clearances. A former director for a federal agency testified. He retired from the U.S. Navy after 27 years. He has known Applicant for 20 years and worked with him over that period of time. He has no reason to believe that Applicant would be disloyal to the United States or that he prefers India to the United States. (Tr. 23-28.) The second witness was a senior executive with a federal agency for many years. He was an active duty officer with the U.S. Army from 1975 to 1984. He has known Applicant since 1989. He initially met him in a supervisory role, and subsequently became a personal friend. He has never had a reason to question Applicant's trustworthiness. (Tr. 29-32.) He stated that Applicant is "overjoyed . . . at being a U.S. citizen." (Tr. 33.) The third witness is a retired Senior Chief Storekeeper in the Navy. He has known Applicant as an employee since 1998. He has no reason to question Applicant's loyalty to the United States. (Tr. 33-38.)

In addition to the three witnesses, Applicant submitted character letters from six other people, most of whom hold security clearances. All of them have worked with Applicant in some capacity. The letters strongly support Applicant's efforts to secure a security clearance and assert his integrity and trustworthiness. (AE A, C, D, F, H, and I.)

At the hearing, Applicant credibly and sincerely expressed pride in his U.S. citizenship. He has no intention to return to India to live. He has decided that "America is our home . . . and this is the country we belong to. This is the country we live in. I have full loyalty to the United States of America." (Tr. 97.)

India

I take administrative notice of the following facts: 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 in which human rights violations went unpunished. A number of violent attacks were committed in recent years by separatist and terrorist groups. In November 2008, the terrorists coordinated an attack at a hotel in Mumbai frequented by westerners.

The United States recognizes India as key to its strategic interests and has sought to strengthen its relationship with it. 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 and private entities, including intelligence organizations and security services, have capitalized on private-sector acquisitions of U.S. technology. In March 2008, an American businessman pleaded guilty to conspiring to illegally export technology to entities in India.

The United States 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 addressing differences and shaping a dynamic and collaborative future. The U.S. and India seek to elevate the strategic partnership further to include cooperation in counter-terrorism, defense, education, and joint democracy promotion.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) 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 commonsense decision. According to AG ¶¶

2(b) and 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 the 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.

According to Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline B, Foreign Influence

The security concern for foreign influence is set out in AG ¶ 6:

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 county 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, which 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

(e) 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 a heightened risk of foreign influence or exploitation.

Applicant's sister, brother-in-law, sister-in-law, and father-in-law are citizens and residents of India. India is the world's largest democracy, works closely with the United States 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) and (b) have been raised by the evidence.

Applicant has \$2,000 deposited into an account in an Indian bank. That amount represents an insignificant percentage of his net worth and is insufficient to raise a security concern under AG ¶ 7(e).

After the Government produced substantial evidence of those disqualifying conditions, the burden shifted to Applicant to rebut and prove mitigation. Three mitigating conditions under AG ¶ 8 are potentially applicable to the disqualifying conditions raised in this case:

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).

(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.

The nature of a nation's government, its relationship with the United States, and its human rights record are relevant in assessing the likelihood that 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 that government, the country is known to conduct intelligence operations against the United States, or there is a serious problem in the country with crime or terrorism. India's close, friendly relationship to the United States, its adherences to human rights standards and rule of law, its leading role in the suppression of terrorists, and the lack of evidence that India uses coercive tactics in its espionage targeting of the United States, all tend to negate a concern that Appellant's relationships with his sister, brother-in-law, sister-in-law, and father-in-law who is a state representative rather than a national figure, pose a security risk. Hence, AG ¶ 8(a) has some application.

Applicant produced significant evidence establishing AG ¶ 8(b). He has lived in the United States since 1977. His wife is a naturalized U.S. citizen and his children were born in this country. He attended graduate school at two U.S. colleges. He participates in various community and professional organizations. He has strong financial ties to the United States through his business and investments, which total \$4 million. Other than a small bank account, he does not own any property in India. He has held a security clearance for more than 20 years without question or incident. His colleagues, who work in close contact with him, consider him to be trustworthy and loyal to the United States. He considers himself to be a citizen of the United States and no longer a citizen of India. Based on those deep and longstanding connections and loyalties to the United States, he can be expected to resolve any conflict of interest in favor of the U.S. interest.

AG ¶ 8(c) does not have application to the security concerns raised as a result of his Applicant's contacts with his four family members residing in India because they are

sufficiently frequent and cannot be considered casual. He has visited all of them over the years and maintained some, albeit limited, communication with them.

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 relevant 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.

According to 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. 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 others raised by the facts of a given case." ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007).

I considered the potentially disqualifying and mitigating conditions in light of all facts and circumstances surrounding this case. Although this case pertains to Guideline B, the security concerns do not arise from any questionable conduct by Applicant, but rather from circumstances that warrant further analysis. Applicant is a 55-year old man, who was born in India, but has lived in the United States for 33 years and has been a naturalized U.S. citizen since 1984. His spouse has been living in the United States since 1983 and is a naturalized U.S. citizen. His three children were born in the United States. He has a successful business in the United States and assets worth \$4 million. His ties to the United States are much stronger than his ties to family members living in India. There is no evidence that he has ever taken any action that could cause potential harm to the United States. He takes his loyalty to the United States seriously, and relinquished his Indian passport after he became a U.S. citizen. Since approximately 1984, he has held a security clearance without incident. He notifies his security officer when he travels to India. His coworkers and employees assess him as ethical and responsible, praising his loyalty to the United States. He expressed a deep allegiance to the United States and gave credible testimony in response to the security concerns alleged in this case.

I weighed the totality of Applicant's family ties to India, a strong U.S. ally, against his ties to the United States. Since 2002, he has traveled to India with some frequency, but not always for the purpose of visiting his family. Both parents are now deceased. Applicant has limited interactions with his father-in-law, who is a state politician and loves the United States. His sister and brother-in-law in-laws spend time in the United States with their children and intend to move here within a year. He has limited contact with his sister-in-law. Applicant's position, assets, and established connections in the United States make economic coercion through any of the four relatives living in India, extremely unlikely. In the event such a conflict arose, I am persuaded that Applicant would resolve the conflict of interest in favor of the United States.

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. Overall, the record evidence leaves me without questions or doubts 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 Enclosure 3 of the Directive, are:

Paragraph 1, Guideline B: FOR APPLICANT

Subparagraphs 1.a through 1.g: 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.

SHARI DAM
Administrative Judge