



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 10-00594
)	
Applicant for Security Clearance)	

Appearances

For Government: Paul M. Delaney, Esq., Department Counsel
For Applicant: *Pro se*

June 28, 2011

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns pertaining to Guideline B (foreign influence). Clearance is denied.

Statement of the Case

On August 26, 2009, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On December 10, 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 (AG) effective within the Department of Defense for SORs after September 1, 2006.

The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an

administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant answered the SOR on March 9, 2011, and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated April 15, 2011, was provided to him by cover letter on the same day. Applicant received his copy of the FORM on April 21, 2011. He was given 30 days from the date he received the FORM to submit any objections, and information in mitigation or extenuation. On May 17, 2011, he submitted additional information, which was within the 30-day period. On May 24, 2011, Department Counsel reviewed Applicant's response to FORM and did not object to its admissibility. The case was assigned to me on June 3, 2011.

Procedural and Evidentiary Rulings

Request for Administrative Notice

Department Counsel requested administrative notice of facts concerning India. Department Counsel provided supporting documents to show detail and context for those facts. Applicant did not object, and I granted Department Counsel's request. (See FORM.)

Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004) and *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). Usually administrative notice at ISCR proceedings is accorded to facts that are either well known or from Government reports. See Stein, *ADMINISTRATIVE LAW*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice).

Findings of Fact

Applicant admitted all of the SOR allegations with explanations. His answers and explanations are incorporated as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 52-year-old senior engineer, who has been employed by a defense contractor since June 1995. He is a first-time applicant for a security clearance. (GE 1.)

Applicant was born in India, where he was raised, educated, and spent his formative years. The highest level of education that he achieved in India was his PhD degree, which he was awarded in July 1986. Applicant immigrated to the United States

in September 1989. He became a naturalized U.S. citizen in June 2009, and was issued a U.S. passport in July 2009.

Applicant's wife, like him, was born, raised, educated, and spent her formative years in India. They married in India in December 1982. Applicant's wife also became a naturalized U.S. citizen and currently works as an elementary school teacher. They have two adult children; their oldest child was born in India in December 1984 and became a naturalized U.S. citizen. Their youngest child was born in the United States in February 1991. Applicant states that he is not a dual citizen of the United States and India.

Foreign Influence

The security concerns under foreign influence are rather straightforward stemming from Applicant's connections with India. His mother is a citizen and resident of India. Applicant has weekly contact with her by telephone and visits her in India once a year. Applicant's brother-in-law (wife's brother) and sister-in-law (wife's sister) are citizens and residents of India. Applicant has telephone contact with both of them a "couple of times a year" and visits them whenever he goes to India. His sister-in-law is a housewife, and his brother-in-law is a prominent elected official in India. Applicant has a cousin (daughter of his father's brother), who is a citizen and resident of India. Applicant has telephone contact with her a "couple of times a year" and visits her whenever he goes to India. Applicant estimates that his future contact and visits with these relatives will remain the same. (Items 6 and 7.)

Applicant also has a bank account in India with a balance of approximately \$10,000. He explained that he maintains this account "for the sake of my mother." Applicant added that his father passed away and his mother does not receive any social security benefits. As the eldest son, he stated, "I have the responsibility to take care of her day-to-day living expenses and any medical treatments. I am keeping this money solely for her personal needs." (SOR Answer.)

Applicant has a brother and sister, who also immigrated to the United States and became naturalized U.S. citizens. His brother is a manager in a chemical factory and his sister is a physician. (Items 5 and 6.)

In Applicant's response to FORM, he took exception to the fact that Department Counsel raised and discussed security concerns as they pertained to him. He asserts that he is a loyal U.S. citizen, who took his U.S. citizenship oath seriously. (Response to FORM.)

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. India's political history since it

gained independence from Great Britain in 1947 has included: (a) wars with Pakistan in 1947, 1965, and 1971, and the 1999 intrusion of Pakistani-backed forces into Indian-held territory that nearly turned into full-scale war; (b) a 1975 declaration of a state of emergency, with the suspension of many civil liberties; (c) the assassination of Prime Minister Indira Gandhi in October 1984; (d) the assassination of Prime Minister Rajiv Gandhi in May 1991 while he was campaigning for parliamentary elections; (e) sporadic outbreaks of religious riots, in which numerous people have been killed; and (f) violent attacks by a variety of separatist and terrorist groups in different parts of the country.

In late November 2008, terrorists coordinated attacks in Mumbai, targeting areas frequented by Westerners, which highlighted the risk of Americans becoming intended or unintended victims of terrorism in India. According to the U.S. Department of State, the Indian government generally respects the rights of its citizens, but “serious problems remained.” Police and security forces have engaged in extrajudicial killings of persons in custody, torture, and rape, and “[o]fficials use special antiterrorism legislation to justify the excessive use of force.” “[A]llegations were made that authorities used torture to extort money, as summary punishment, and to obtain confessions. In some instances, these confessions subsequently were used as evidentiary support for a death sentence.” Corruption in the police force is “pervasive and acknowledged by many government officials” and “[o]fficers at all levels acted with considerable impunity and were rarely held accountable for illegal actions.”

The Soviet Union was India’s “main trading partner and most reliable source of economic and military assistance for most of the Cold War.” After the 1979 Soviet invasion of Afghanistan, India “implicitly supported the Soviet occupation.” India had long-standing military supply relationships with the Soviet Union, and Russia remains India’s largest supplier of military systems and spare parts.

Although the United States has sought to strengthen its relationship with India, there are some differences between the United States and India, including differences over India’s nuclear weapons programs and the pace of India’s efforts to economic reforms. Furthermore, during 2007, Members of Congress have expressed concerns at India’s relations with Iran, a country with which India “launched a bilateral ‘strategic partnership,’” including concerns about India’s increasing cooperation with the Iranian military. In July 2009, however, the United States and India issued a joint statement of their intentions to foster bilateral relations by establishing working groups to address (1) strategic cooperation, (2) energy and climate change, (3) education and development, (4) economics, trade, and agriculture, and (5) science and technology, health, and innovation.

In March 2008, the owner of an international electronics business pleaded guilty to conspiracy to illegally export controlled technology to government entities in India that participate in the development of ballistic missiles, space launch missiles, and fighter jets. Furthermore, there have been other cases involving the illegal export, or attempted illegal export, of U.S. restricted, dual use technology to India, including: (1) high-tech testing equipment that posed “an unacceptable risk of being diverted to a weapons of

mass destruction program”; (2) equipment “which can be used in military and civilian aircraft to extract vibration information from engines and to simulate output for calibrating, servicing, and testing that equipment”; (3) “equipment that is used to manufacture a material that improves the accuracy of strategic ballistic missiles with nuclear capabilities”; (4) an animation system to an Indian entity “determined to present an unacceptable risk of diversion to programs for the development of weapons of mass destruction or their means of delivery”; (5) nuclear pulse generators to two Indian entities “that have been determined to present an unacceptable risk of diversion to developing weapons of mass destruction or missiles used to deliver these weapons”; and (6) heat treating containers to an Indian entity “determined to present an unacceptable risk of diversion to developing weapons of mass destruction or missiles used to deliver these weapons.” 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.

Policies

The President of the United States has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Egan* at 528.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, to reach his decision.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a

clearance decision is merely an indication that the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan* at 531; see AG ¶ 2(b).

Analysis

Guideline B, Foreign Influence

Under Adjudicative Guideline ¶ 6, the Government’s concern is:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, he or she 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 sets out four conditions that could raise a security concern and may be disqualifying in this case, including:

(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; 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.

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.¹ Applicant has frequent contacts with his mother in India and has contact to a lesser extent with his in-laws and cousin in India. Applicant feels it is important to maintain these contacts. Applicant makes annual visits to India primarily to visit his mother and sees his other relatives during his visits to India.

These contacts create a risk of foreign pressure or attempted exploitation because there is always the possibility that individuals adverse to the U.S. may exploit the opportunity to obtain information about the United States. Applicant has very strong family ties, contacts, and connections to India. He was born, raised, and educated in India, and has traveled frequently to India to visit family members, especially his mother to whom he provides financial support. Also as noted, Applicant's brother-in-law serves in a prominent political position in India. In short, his connections with his family members in India create a "heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion."

The Government produced substantial evidence raising these four potentially disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove a mitigating condition. The burden of disproving a mitigating condition never shifts to the Government.

Four Foreign Influence Mitigating Conditions under AG ¶ 8 are potentially applicable to these disqualifying conditions:

¹ 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;

(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; 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.

After considering the totality of the facts and circumstances in Applicant's case, I conclude that only mitigating condition AG ¶ 8(b) partially applies.

AG ¶ 8(b) partially applies because Applicant has developed a sufficient relationship and loyalty to the United States, that he can be expected to resolve any conflict of interest in favor of the United States' interests. He has lived in the United States for approximately 22 years. Applicant has established himself as an American citizen and embarked on a successful career. He appears to have a track record of diligent labor as an employee of his company. Although this mitigating condition is partially applicable, it is insufficient to overcome the foreign influence security concerns.

The FORM does not contain information regarding Applicant's financial and business interests in the United States. This lack of information precludes an analysis of asset comparison and therefore, it is uncertain to what extent AG ¶ 8(f) would apply.

Applicant has frequent contact and a close relationship with his mother in India and to a lesser extent with his in-laws and cousin. Understandably, Applicant has a strong bond with his mother and as the eldest son has a strong sense of responsibility and obligation towards her. As such, in addition to maintaining frequent contact with his mother by telephone, he also maintains a bank account in India for his mother's benefit valued at approximately \$10,000.

Guidelines ¶¶ 8(a) and 8(c) do not fully apply. Applicant did not establish "it is unlikely [he] will be placed in a position of having to choose between the interests of a

foreign individual, . . . , or government and the interests of the U.S.” His frequent contact and a close relationship with his mother could potentially force him to choose between the United States and India. His contact with his in-laws and cousin triggers partial application of AG ¶ 8(c). However, even with partial application of AG ¶ 8(c), he did not meet his burden of showing there is “little likelihood that [his relationships with his Indian family members] could create a risk for foreign influence or exploitation.”

Applicant’s brother-in-law holds a prominent elected office in India and his sister-in-law is a housewife. His brother-in-law is associated and affiliated with the Indian government. The same cannot be said of his sister-in-law or cousin. The record does not identify what influence, if any, the Indian government could exert on Applicant’s mother, in-laws and cousin as a result of their being resident citizens of India. However, their presence in India and Applicant’s foreign travel creates concerns under this Guideline. As such, the burden shifted to Applicant to show his relatives in India and travel there does not create security risks.

“[T]he nature of the foreign government involved in the case, and the intelligence-gathering history of that government are important evidence that provides context for all the other evidence of the record” See, e.g., ISCR Case No. 04-0776 at 3 (App. Bd. Sept. 26, 2006); see also ISCR Case No. 02-07772 at 7 (App. Bd. Aug. 28, 2003). As noted *supra* under the subheading “India,” India has engaged in economic espionage and has had cordial relations with governments hostile to the U.S. Notably, the affects of terrorism have been felt within India’s borders.

Applicant denies having “divided loyalties” between the U.S. and any foreign country. It should be noted Applicant’s allegiance to the U.S. was not challenged in this proceeding. Notwithstanding, foreign influence mitigating conditions cannot fully be applied in this case, and the security concerns cannot be fully mitigated because there is no reason for India to contact his relatives about Applicant until he receives access to classified information. Even taking for granted that apart from Applicant’s brother-in-law, his Indian family members currently have low-key non-controversial lifestyles, and that the Indian government or factions within India have not contacted them about Applicant in the past, such factors are insufficient to mitigate the security concerns because of the nature of such entities and its relationship to the United States.

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) 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.

My comments in the Analysis section are incorporated in my whole-person analysis. I recognize and appreciate Applicant's frustration with a process that he believes questions his loyalty and commitment to the United States. However, it is the presence of relatives in India and Applicant's connection with those relatives, particularly his mother that raises foreign influence concerns. In reaching my decision, I was also limited to the information contained within the FORM. In any event, Applicant should not construe the final outcome of this decision as an adverse assessment of his integrity or as questioning his loyalty as a U.S. citizen.

"Because of the extreme sensitivity of security matters, there is a strong presumption against granting a security clearance. Whenever any doubt is raised . . . it is deemed best to err on the side of the government's compelling interest in security by denying or revoking [a] clearance." *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990). For reasons discussed *supra*, Applicant has not mitigated or overcome the Government's case. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole-person factors"² and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines.

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:	AGAINST APPLICANT
Subparagraph 1a – 1e:	Against Applicant

²See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant's security clearance. Eligibility for access to classified information is denied.

ROBERT J. TUIDER
Administrative Judge