



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



In the matter of:)
)
) ISCR Case No. 10-04255
)
Applicant for Security Clearance)

Appearances

For Government: Julie Mendez, Esq., Department Counsel
For Applicant: Joseph Testan, Esq.

August 30, 2011

Decision

LYNCH, Noreen A., Administrative Judge:

This case involves security concerns raised under Guideline B (Foreign Influence). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on November 23, 2009. On April 26, 2011, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline B. DOHA acted 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) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR and timely requested a hearing before an administrative judge. The case was assigned to me on June 16, 2011. DOHA issued a notice of hearing on June 27, 2011, scheduling the hearing for July 26, 2011.

Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Applicant testified, presented the testimony of two witnesses, and submitted Applicant's Exhibits (AX) A through J, which were admitted without objection. DOHA received the transcript (Tr.) on August 2, 2011.

Administrative Notice

Department Counsel requested that I take administrative notice of relevant facts about India. The request and supporting documents are attached to the record as HX I. Applicant did not object to documents. (Tr. 13) I took administrative notice as requested by Department Counsel. The facts administratively noticed are set out below in my findings of fact.

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegations in the SOR under Guideline B (Foreign Influence) and offered explanations. He provided additional information to support his case. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a native of India. He received his undergraduate degree in India. He did not serve in the military in India. He came to the United States in 1990 on a student visa and obtained an advanced degree from an American university in 1992. In 2001, Applicant obtained another graduate degree in computer science. He has almost 20 years experience in the field of information technology, and has been with his current employer since 2010. Applicant has held a security clearance since 2006. (AX F) He became a naturalized U.S. citizen in July 2002, (GX 1). Immediately after Applicant obtained his U.S. citizenship, he surrendered his Indian passport and renounced his Indian citizenship. (Tr. 37)

Applicant's wife also is a native of India. They were married in March 1998, and they have one son. His wife came to the United States in 2002. (Tr. 42) She became a naturalized U.S. citizen in 2008.

Applicant's son is a U.S. citizen. He was born in Canada and came to the United States in 2002. He was never an Indian citizen (Tr. 44) Under Indian law, dual citizenship is not recognized. (AX F) Applicant never applied for a special status for his son, such as the Overseas Citizens of India Program or the Person of Indian Origin Program. (AX A)

Applicant's parents are citizens and residents of India. His father, who is 67 years old, owned a small business. His mother, who is 62 years old, is a homemaker. They are not aware of Applicant's work or his application for a security clearance. (Tr. 49) They do not speak English. They have no affiliation with the government. Applicant speaks to them on the phone every few weeks. He visited them in 2007 and 2009 for about ten days each trip. (Tr. 68)

Applicant's three sisters are citizens and residents of India. Two sisters are married homemakers. His third sister is mentally ill and is cared for by Applicant's mother. Neither his sisters nor brothers-in-law know that Applicant is seeking a security clearance. Applicant does not have extensive contact with his brothers-in-law, but he speaks to his two sisters once every two or three weeks. His unmarried sister lives with his mother. Applicant speaks to her when he calls his mother. (Tr. 47) He also does not have contact with his sister-in-law. (Answer to SOR) Applicant's wife speaks to her sister on the phone once a month. (Tr. 64)

Applicant's father-in-law is a citizen and resident of India. His father-in-law is retired. Applicant's father-in-law does not depend on Applicant and his wife for financial support. (Tr. 45) Applicant speaks to his father-in-law once a year or less. His wife calls him once every two or three months. (Tr.66)

Applicant and his wife own a home in the United States. The value of the home is approximately \$400,000. He and his wife have savings and retirement accounts worth about \$100,000 or more. (AX I) Their real estate in the United States is jointly owned. (AX J) Applicant has a college savings plan for his son. (AX G)

Applicant explained at the hearing that he came to the United States to receive an education. He plans to live the rest of his life in the United States, and raise and educate his children in the United States. He has roots in the United States both professionally and personally. His wife and son are with him in the United States. His wife is established in a career. His son is in middle school and participates in many activities. His family attends a local temple. Applicant has worked his adult life in the United States and has deep and long-term relationships. He has held a clearance and handled sensitive information, providing service to the U.S. Government through his work with government contractors. Applicant was credible when he explained that if in the unlikely situation that there would be pressure on him or his family, he would immediately contact his facility security officer. (Tr. 49)

Applicant's team manager recommends him for a security clearance. He testified at the hearing that Applicant is dependable and does an excellent job. (Tr. 17) Applicant possesses excellent skills, work ethic, and experience. Applicant is a valued member of the team. In sum, Applicant is described as honest, forthright, reliable, and of the highest character. (Tr. 20)

The Director of the defense contract group for whom Applicant works, has known Applicant since 2009. She described Applicant as having unique technology skills and expertise. (Tr. 25) He has had access to confidential data and has not had any incidents with failing to protect such data. His clients describe him as a hard worker who follows through on given tasks. (Tr. 26) Applicant is conscientious about deadlines and is well regarded by his peers. Applicant has been involved in some challenging projects and received positive feedback.

Applicant submitted twelve letters of recommendation from peers, friends, and former supervisors who have known him since 1995. He is admired for his sense of dedication, responsibility, and good sense of judgment. He is a loyal citizen and a responsible member of the community. (AX B)

India is a multiparty, federal, parliamentary democracy, with a bicameral parliament and a population of approximately 1.1 billion. Its political history since it gained independence from Great Britain in 1947 has included several armed conflicts with Pakistan, assassinations of two prime ministers, sporadic outbreaks of religious riots, and violent attacks by several separatist and terrorist groups in different parts of the country. There is a continuing threat from terrorism throughout the country, including attacks on targets where U.S. citizens or Westerners are known to congregate or visit.

India's size, population, and strategic location give it a prominent voice in international affairs. India has always been an active member of the United Nations. Starting this year, it is a non-permanent member of the Security Council, and it seeks a permanent seat on the Security Council.

The United States and India have differences over India's nuclear weapons programs, the pace of India's economic reforms, and India's bilateral strategic partnership with Iran. Nevertheless, the United States recognizes that India is important to U.S. strategic interests. The strategic partnership between the United States and India is based on shared values such as democracy, pluralism, and the rule of law. Since 2002, the United States and India have held a series of substantive combined exercises involving all military services.

The United States is India's largest foreign investment partner. Since December 2006, direct civilian nuclear commerce with India has been permitted. The two countries have a common interest in the free flow of commerce and resources, including through the vital sea lanes of the Indian Ocean.

The United States and India share a common interest in fighting terrorism and in creating a strategically stable Asia. They are seeking 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 the past, India had long-standing military supply relationships with the Soviet Union, and Russia remains India's largest supplier of military systems and spare parts. India is one of many countries engaged in economic intelligence collection and industrial espionage directed at the United States. The United States has longstanding economic issues with India regarding protection of intellectual property rights and trade in dual-use technology. There have been numerous incidents of international businesses illegally exporting, or attempting to export restricted, dual-use technology from the United States to India.

The Indian Government generally respects the rights of its citizens, but there are serious problems involving abuses by police and security forces. Corruption in the police force is pervasive, and police officers often act with impunity. Abuses by police and security forces have occurred primarily in criminal investigations and efforts to suppress separatist and terrorist groups. There is no evidence that India uses torture or abuse against its citizens to extract economic intelligence.

India does not recognize dual citizenship. Foreign citizens entering India are required to obtain a visa. Travelers entering on tourist visas are not allowed reentry within two months, unless they obtain specific permission. Non-citizens of Indian origin may obtain a “person of Indian origin” (PIO) card, which allows unlimited travel to and from India.

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President 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.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching 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.

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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “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. Thus, a decision to deny a security clearance is merely an indication the applicant 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 therein and an applicant’s security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline B, Foreign Influence

The SOR alleges Applicant’s mother is a citizen and resident of India (¶ 1.a), Applicant’s father is a citizen and resident of India (¶ 1.b), his three sisters are citizens and residents of India (¶ 1.c), Applicant father-in-law is a citizen and resident of India (¶ 1.d), Applicant’s three brothers-in-law are citizens and residents of India (¶ 1.e). It also alleges Applicant’s sister in-law is a citizen and resident of India (¶ 1.f).

The security concern under this guideline 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 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.

Four disqualifying conditions under this guideline are relevant to this case. First, a disqualifying condition may be raised by “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.” AG ¶ 7(a). Second, a disqualifying condition may be raised by “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.” AG ¶ 7(b). Third, a security concern may be raised if an applicant is “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.” AG ¶ 7(d). Fourth a security concern also may be raised by “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 heightened risk of foreign influence or exploitation.” AG ¶ 7(e).

Guideline B is not limited to countries hostile to the United States. “The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States.” ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

Furthermore, “even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security.” ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. Nevertheless, the nature of a nation’s government, its relationship with the U.S., and its human rights record are relevant in assessing the likelihood that an applicant’s family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence operations against the U.S. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. See *generally* ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision to grant clearance where administrative judge did not consider terrorist activity in area where family members resided).

Applicant has lived and worked in the United States since 1990. He is a naturalized U.S. citizen. Applicant’s wife and son reside in the United States. His son is a U.S. citizens and his wife is a U.S. citizen. His son is not a dual citizen with India. Neither Applicant nor his wife and son have any special status with India.

Applicant’s parents, three sisters and brothers-in-law are citizens and residents of India. His wife’s mother, father, and sibling are citizens and residents of India. “[T]here is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person’s spouse.” ISCR Case No. 01-03120,

2002 DOHA LEXIS 94 at * 8 (App. Bd. Feb. 20, 2002). Applicant has not rebutted this presumption.

After considering the totality of Applicant's family ties to India as well as each individual tie, I conclude that Applicant's family ties are sufficient to raise a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion. Applicant speaks to his father-in-law once or twice a year on the phone. He speaks to his family on the phone every few weeks. His wife speaks to her family on occasion. Based on all these circumstances, I conclude that AG ¶¶ 7(a), (b), and (d) are raised. Applicant's financial interests in India are non-existent. I conclude that AG ¶ 7(e) is not an issue.

Security concerns under this guideline can be mitigated by showing that "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." AG ¶ 8(a). India engages in economic and industrial espionage, and it has been involved in incidents involving illegal importation of restricted, dual-use technology from the United States. Applicant's parents are citizens and residents of India. His siblings are citizens and residents of India. His father-in-law, brothers-in-law, and sister-in-law are citizens and residents of India. For these reasons, I conclude that AG ¶ 8(a) is not established.

Security concerns under this guideline can be mitigated by showing "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." AG ¶ 8(b). Applicant has held a security clearance without incident for many years. He has worked with government contractors during this time. Applicant's financial interests are totally in the United States. He and his wife have personal assets, including a home, in the United States worth more than \$500,000. Applicant and his wife surrendered their Indian passports and use their U.S. passports. They have not taken advantage of the convenience of an Indian PIO card. I conclude that Applicant would resolve any conflict between the interests of the United States and his family in India in favor of the United States. Thus, I conclude that AG ¶ 8(b) is established.

Whole-Person Concept

Under the whole-person concept, an 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. An 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. I have incorporated my comments under Guideline B in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a naturalized U.S. citizen who has lived in the United States since 1990. He and his wife reside in the United States with their son who is a U.S. citizen. His wife is a U.S. citizen. He was articulate, candid, sincere, and credible at the hearing. He and his wife still have cultural, family, and emotional attachments to India, but they see the United States as the future home for their family. Applicant has been successful in the defense contracting business for many years. He has held a security clearance. His current employer recommends him for his professionalism and integrity.

Applicant chose to leave his home and emigrate from India in search of an education and career opportunities. He wants to provide for his family in the United States. He has worked hard in the information technology field and has received praise for his work ethic and accomplishments. Applicant purchased a home and has maintained excellent credit. He has a net worth of more than \$500,000. His family intends to remain in the United States.

India is a partner of the United States in the global war on terrorism. While terrorism and some domestic unrest exist within some areas of India, none of it appears to threaten the enclave in which Applicant's family and property are located. There is no evidence any of the individuals at issue are involved with, or under scrutiny, by interests antithetical to the United States. Applicant has not returned to India since 2009.

Regarding Applicant's life in the United States, he is a contented American citizen, with a stable family, social, and professional life. His life is focused here. He is admired by his peers. He and his wife intend to continue their lives in the United States. There is no evidence indicating that he may be manipulated or induced to help a foreign power or interest. He credibly stated he would report any attempts to influence him to security. In light of these facts and the country at issue, I find that Applicant successfully mitigated foreign influence concerns.

After weighing the disqualifying and mitigating conditions under Guideline B, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on foreign influence. Accordingly, I conclude he

has carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline B (Foreign Influence): FOR APPLICANT

Subparagraphs 1.a-1.f: For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Noreen A. Lynch
Administrative Judge