



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



In the matter of:)
)
) ISCR Case No. 11-00561
)
Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esquire, Department Counsel

For Applicant: *Pro se*

December 12, 2011

Decision

O'BRIEN, Rita C., Administrative Judge:

Based on a review of the pleadings, testimony, and exhibits, I conclude that Applicant has not mitigated the security concerns related to foreign preference and foreign influence. Accordingly, his request for a security clearance is denied.

Statement of the Case

On April 26, 2011, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) that detailed security concerns addressed in the Directive under Guideline B (Foreign Influence) and Guideline C (Foreign Preference) of the Adjudicative Guidelines (AG). This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry (February 20, 1960)*, as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program (January 2, 1992)* as amended; and the Adjudicative Guidelines implemented by the Department of Defense on September 1, 2006.

In his Answer to the SOR, signed and notarized on May 20, 2011, Applicant denied any security concerns under Guidelines B and C, but admitted all the factual allegations under both guidelines. Department Counsel was prepared to proceed on June 20, 2011, and the case was assigned to me on July 5, 2011. DOHA issued a Notice of Hearing on July 29, 2011, and I convened the hearing as scheduled on August 23, 2011. The Government offered two exhibits, marked and admitted as Government Exhibits (GE) 1 and 2. Applicant offered five exhibits, admitted as Applicant's Exhibits (AE) A through E. The hearing was continued unexpectedly when an earthquake required evacuation of the building.

A second Notice of Hearing was issued on September 21, 2011. After consultation with Department Counsel, Applicant agreed to a date of September 28, 2011. At the hearing on that date, he stated that he waived his right to 15 days notice of the second hearing. DOHA received the transcript of the first hearing (Tr. I) on August 31, 2011, and the second hearing (Tr. II) on October 7, 2011.

Procedural Ruling

At the hearing, the Government requested I take administrative notice of certain facts relating to India. Department Counsel provided a six-page summary of the facts, supported by 16 documents pertaining to India. The documents provide elaboration and context for the summary. I take administrative notice of the facts included in the U.S. Government reports. They are limited to matters of general knowledge, not subject to reasonable dispute. They are set out in the Findings of Fact.

Findings of Fact

Applicant's admissions in response to the SOR are incorporated as findings of fact. After a thorough review of the pleadings, Applicant's response to the SOR, and the evidence, I make the following additional findings of fact.

Applicant, 38 years old, was born in India. He earned a bachelor's degree at an Indian university. He has never worked for the Indian government¹ nor served in the Indian military. (Tr. I, 24) He came to the United States in 1995 at the age of 23, and completed a master's degree in 1998 at a U.S. university. He married his current wife in India in 2000, after which she moved with him to the United States. They became U.S. citizens in 2009 and hold U.S. passports. India's constitution does not permit dual citizenship, and Applicant's acquisition of U.S. citizenship effectively cancelled his Indian citizenship. Applicant's two daughters, who are six and ten years old, are native-born U.S. citizens. (GE 1; AE C, D; Tr. I at 23-27)

¹In almost all instances where the word "government" was used at the August 23, 2011, hearing, the transcript mistakenly inserts the word "embassy." The word "embassy" is correctly used only on pages 10, 11, and 48 to 50.

Applicant began working for his current employer, a defense contractor, as a data architect in May 2010. Previously, Applicant worked as a software consultant. He submitted character reference letters from coworkers who knew him when he worked at an international agency from 1999 to 2010. One coworker, who has known Applicant for ten years, has complete confidence in his character and praised his work ethics. He noted that Applicant worked with confidential budgetary, financial, and personnel information “and showed the utmost care in safeguarding this information and being fully compliant to the {agency’s} information security guidelines.” He was dedicated and loyal, and led highly complex and sensitive projects. Another coworker, who has known Applicant for seven years, worked with him on a daily basis at the same federal agency. He agreed that Applicant was completely trustworthy when handling highly confidential data, he performed at an exceptional level, and was well respected by his colleagues and managers. (GE 1; AE E)

Applicant’s parents are citizens and residents of India. His 66-year-old mother is a life-long homemaker. His 71-year-old father has been retired since the mid-1990s from a management position in a government-owned telephone company. He receives a government pension. Applicant talks with his parents once per week. They last traveled to the United States six years ago when his youngest child was born. They stayed with Applicant for four months. Applicant noted in his interrogatory response that, as one of three children, he has an obligation to care for his parents. (GE 2; Tr. I at 51, 54-61, 65)

Applicant's brother is 39. He is a software consultant for a privately owned company, and his wife is a homemaker. Applicant's 43-year-old sister (Tr. 56) is a homemaker, and her husband is owns an auto parts factory. Applicant last saw them when he visited India in 2010. He speaks with his siblings for a few minutes about once or twice per month. (GE 2; Tr. I at 51, 54-61, 65)

Among Applicant's additional foreign contacts are eight in-laws, three aunts, and three friends, all of whom are citizens and residents of India. His father-in-law is approximately 67. He retired from a bank position, and now manages a private school. Applicant's mother-in-law is a 60-year-old homemaker. They last visited Applicant in 2000. He speaks with them about once or twice per month. Applicant's sisters-in-law are all homemakers. Of his three brothers-in-law, one works at a packaging company, one is an attorney, and one owns an auto parts factory. He speaks with them about once per month. Two of his three aunts are retired schoolteachers, and one is a homemaker. One of the retired teachers worked at a government school.² He speaks with his aunts about once per year. None of Applicant's male relatives, including his in-laws, have served in the Indian military. When he visits India, he visits with all the family members. Applicant speaks to his three friends in India about once per year, and sometimes visit them when he travels to India. Applicant visited his family in India six times between 2004 and 2010, and expects to go in 2012. (GE 1, 2; Tr. I at 44-47, 56-61, 64-71)

² During Applicant's security interview, he stated that all three aunts were homemakers. (GE 2 at page 3)

Applicant has three bank accounts in India for convenience, with total funds of approximately \$5,300. He opened one in about 1998, before his marriage, and the other two between 2000 and 2002. In 2003 and 2004, he purchased two undeveloped plots of land in India for investment purposes. He estimates the total value of the lots to be \$20,000. He intends to hold the land and await a rebound in the real estate market. He does not pay taxes on the lots. In 2004, Applicant purchased a life insurance policy with an Indian company, with a current cash value of about \$10,000. (GE 2; AE A; Tr. II at 11, 30-31)

Applicant has three U.S. bank accounts that total approximately \$23,000. He also has several individual retirement accounts (IRAs) and "529" plans for his daughters' college educations in the United States. He estimated the value of these accounts at \$130,000. He holds a term life insurance policy with a U.S. company. (Tr. II at 16) He does not own a home in the United States. (GE 2; Tr. II at 12-14)

India allows former citizens to obtain an Overseas Citizen of India (OCI) card. The card grants certain rights to former Indian citizens living abroad. The Indian Ministry of Home Affairs website describes the OCI as a life-long visa that allows a former Indian citizen multiple visits to India.³ The holder of an OCI card is not required to register with local police during visits to India, and is considered to be on a par with non-resident Indians for economic, financial, and educational purposes. However, OCI card holders do not have unrestricted rights: they may not vote in Indian elections or hold elected positions in the Indian government. An OCI holder can regain Indian citizenship after maintaining a registered OCI card for five years, and residing in India for one year. (AE D)

The U.S. Department of State (DOS) has stated that an OCI card is "similar to a U.S. 'green card' in that a holder can travel to and from India indefinitely, work in India, study in India, and own property in India (except for certain agricultural and plantation properties)." The DOS also notes that the OCI program "has often been mischaracterized as a dual nationality program. It does not grant Indian citizenship. If you are a U.S. citizen and obtain an OCI card you will not become a citizen of India; you will remain a citizen of the United States." (Administrative Notice, Item IV at p. 11) In addressing the ramifications of the OCI card, the DOHA Appeal Board held that an administrative judge is bound by the official pronouncements of federal agencies on matters of national security.⁴

Applicant applied for an Overseas Citizen of India (OCI) card in 2010 for convenience in traveling to India. To obtain the OCI, Applicant sent his Indian passport to

³ Some of the terminology on the website is confusing. It explains that India does not allow Indian citizenship to be held simultaneously with citizenship of another country. On the other hand, it notes that, "...the Government of India decided to grant Overseas Citizenship of India (OCI) commonly known as 'dual citizenship.'" It also states that persons of Indian origin who acquire foreign citizenship can receive an OCI as long as the country where they obtain citizenship allows some form of dual citizenship. (AE D)

⁴ ISCR Case No. 07-13232 at 2-3 (App. Bd. Jul 8, 2008).

the Indian embassy, which cancelled his Indian passport, and issued Applicant the OCI card. The OCI status is represented in Applicant's U.S. passport as a Republic of India "U" visa, dated November 2010. (AE C) Applicant's wife and children followed the same procedure, and all hold OCI cards. He retains possession of his cancelled Indian passport, which was valid until 2013. (GE 2; AE B; Tr. 1, 35-37)

At the hearing, Applicant was asked whether he intended to return to India to live, and answered, "Not in the near future." (Tr. II at 18) As to his long-term intentions, Applicant stated,

It's--currently it looks like, you know, I--I mean, I have thought often of going back, but, you know, it never seemed realistic, to like go back, you know, with the kids' education, and, you know, just everything....for the last five years I have been thinking, okay, I'll go back; but then, you know, I continue to stay here. So I don't know whether I'll go back or not. (Tr. II at 19-20)

He explained that he might live and work in India for a number of years, and then move back to the United States when his daughters attend college. He then commented that America seemed to be a better place "for ladies" and for security. (Tr. II at 21) When asked if he could explain his loyalties to India versus the United States, Applicant testified,

Sure. I mean, you know, I guess your concern is that, you know, if I go back, how could you trust me with, you know, even the clearance and working here. I guess that more comes down to the real character, rather than like a preference. (Tr. II at 22)

He then explained that his preference is not for India, but for his family. If he could return to India and have a comparable standard of living, and be able to spend time with his family, then he would like to keep that option open. (Tr. II at 23)

So it's, it's not that--so, you know, I mean, I can understand your concern because -- but as a foreign national, for me, I would -- you know, it's very natural for me to be inclined to a place where I have grown up, and not--it's--it's the people whom I have been with, and, you know, it's--my parents have not been able to come here.

So, you know, that's the reason why I'm feeling more than -- I have thought of it more. It's just that it's -- it's not easily done. So, you know, I'm not sure when I will go back and if I will go back. But it -- you know -- I think about it. (Tr. II at 23)

Administrative Notice

Republic of India (India)

I take administrative notice of the following facts.⁵ 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. Since gaining independence in 1947, India has had a tumultuous history, particularly with regard to its relations with Pakistan.

The Indian government generally respects the rights of its citizens, but serious problems remain. Police and security forces have engaged in extrajudicial killings of persons in custody, disappearance, torture, and rape. The lack of accountability has permeated the government and security forces, creating an atmosphere in which human rights violations went unpunished.

Despite past differences regarding India's nuclear weapons program, and its cooperation with Iran in some policy areas, the United States recognizes India as key to its strategic interests and has sought to strengthen the relationship. The two countries are the world's largest democracies. Both are committed to political freedom protected by representative government, and share common interests in the free flow of commerce and creating a strategically stable Asia. India has demonstrated its commitment to political freedom. The United States and India issued a joint statement of their intentions to foster bilateral relations by establishing working groups to address strategic cooperation, energy and climate change, education, economics, trade, agriculture, science, technology, health, and innovation.

India and the United States are partners in the fight against global terrorism. However, according to the Department of State's 2010 report on counterterrorism, India remains one of the countries most afflicted by terrorism. Sporadic outbreaks of religious riots and violent attacks by a variety of separatists and terrorist groups have occurred.

An annual report to Congress on foreign economic collection and espionage described India, along with seven other countries, as involved in criminal espionage and export controls enforcement cases. The cases involve the illegal export, or attempted illegal export, of U.S. restricted, dual-use technology to India, including technology and equipment that present an unacceptable risk of diversion to programs for the development of weapons of mass destruction or their means of delivery. Governmental and private entities, including intelligence organizations and security services, have capitalized on private-sector acquisitions of U.S. technology. The report to Congress noted that foreign collectors "target a wide variety of unclassified and classified information in a range of sectors."

⁵ The facts cited derive from the summary and the 16 U.S. Government documents submitted by Department Counsel.

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the AG.⁶ Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the Guidelines, commonly referred to as the “whole-person” concept. The presence or absence of a disqualifying or mitigating condition does not determine a conclusion for or against an applicant. However, specific applicable guidelines are followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guidelines B and C.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁷ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government’s case.

Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion.⁸ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Therefore, the government has a compelling interest in ensuring that each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or his own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government.⁹

Analysis

Guideline C, Foreign Preference

The security concern involving foreign preference arises when an individual acts in such a way as to indicate a preference for a foreign country over the United States,

⁶ Directive. 6.3.

⁷ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁸ See *Egan*, 484 U.S. at 528, 531.

⁹ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States. (AG ¶ 9)

Under AG ¶ 10, the following disqualifying conditions are relevant:

(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to:

(1) possession of a current foreign passport; and

(b) action to acquire or obtain recognition of a foreign citizenship by an American citizen.

Applicant's Indian passport was valid until 2013. He continued to possess it after he became a U.S. citizen in 2009. He forwarded it to the Indian embassy to be cancelled as part of his application for an OCI card in 2010. During the interim, Applicant possessed a valid foreign passport while he was a U.S. citizen. AG ¶ 10 (a) (1) applied during that period.

The U.S. DOS notes the confusion about whether OCI card holders are dual citizens. Moreover, the language in the Indian government document submitted by Applicant is puzzling. It states that the Indian government does not recognize dual citizenship, *i.e.*, simultaneous citizenship of India and another country. Nevertheless, it refers to the OCI card-holder as an Overseas *Citizen* of India [emphasis added] and describes OCI status with the words "dual citizenship." It also states that a person can obtain an OCI card if the country where he or she obtains new citizenship allows dual citizenship, implying that OCI is a form of citizenship. However, the Appeal Board has held that administrative judges are bound by the pronouncements of federal government agencies, such as DOS. In December 2010, the DOS stated that the OCI program is "mischaracterized" when called a dual nationality program. It stated that the OCI program does not grant Indian citizenship, and that the OCI card is similar to the U.S. "green card." I conclude therefore, that an OCI card does not confer Indian citizenship, and is not the equivalent of an Indian passport. Possession of an OCI card is not disqualifying under AG ¶10 (a)(1).

Applicant's application for an OCI card is an exercise of a right of foreign citizenship that occurred after he became a U.S. citizen in 2009. He sought an OCI card, which required recognition of his former Indian citizenship. He was eligible for an OCI card only because he had been an Indian citizen. He exercised a right granted only to former Indian citizens, but not extended to those who have never been Indian citizens. AG ¶ 10(a) applies.

AG ¶ 11 contains factors that can mitigate disqualifying conditions. I have considered all the mitigating conditions, especially the following:

(b) the individual has expressed a willingness to renounce dual citizenship; and

(e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

India does not recognize dual citizenship. By becoming a U.S. citizen in 2009, Applicant not only showed willingness to renounce his Indian citizenship, but actually did renounce it. He also knew that, when he submitted his Indian passport to the Indian embassy to obtain an OCI card, it would be cancelled, and thus invalidated. AG ¶ 11(b) and (e) apply, and mitigate the concerns under Guideline C.

Guideline B, Foreign Influence

AG ¶ 6 expresses the security concern under Guideline B:

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 conditions that could raise a security concern and may be disqualifying. I have considered all the disqualifying conditions, and find that the following are relevant to the 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;

(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 heightened risk of foreign influence or exploitation.

The possession of family ties with a resident or citizen of a foreign country is not disqualifying under Guideline B, unless those ties create a heightened risk of foreign exploitation or a potential conflict of interest. The country in question must be considered. Violent attacks by separatists and terrorist groups have occurred in India. In addition, according to the Department of State, it remains one of the countries most afflicted by terrorism. Applicant's testimony and the record evidence indicate that he has ties of affection and obligation to his Indian family. He stated in his interrogatory response that he has an obligation to assist his family in India. He talks with his Indian parents by telephone weekly, and with other family members once or twice per month. He visits India regularly, and intends to continue visiting his family there in the future. He has obtained an OCI card, a life-long visa allowing unrestricted visits, in order to ensure the ease of his future travel to India. Applicant's ties and contacts in India, with family members to whom he has a sense of affection and obligation, represent a heightened risk of exploitation and a potential conflict of interest. AG ¶ 7(a) and (b) apply.

For approximately seven years, Applicant has owned two lots in India, valued at about \$20,000. He holds these properties as investments, and intends to keep them until the real estate market improves. He also has three bank accounts with funds of about \$5,300, which he has maintained for ten or more years. The property in India represents the only real estate Applicant owns. AG ¶ 7(e) applies.

I have also considered the mitigating conditions under Guideline B, AG ¶ 8, especially the following:

(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.

Applicant maintains contact with the Indian relatives and friends listed in the SOR. Although his weekly contact with his parents is the most frequent, he also keeps in touch with siblings once or twice per month. Moreover, he testified that he is considering returning to India to be with his family. The facts demonstrate that his contacts with his family are not casual, and that he has strong ties of affection and obligation to them. Given this attachment, I cannot confidently conclude that he would resolve any conflict of interest in favor of the United States. AG ¶ 8(b) and (c) do not

apply. Applicant has several bank accounts and two properties in India. However, his funds located in U.S. banks outweigh the value of these financial ties to India. AG ¶8(e) applies. However, the mitigation under AG ¶ 8(e) is insufficient to outweigh the disqualifying conduct under Guideline B.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the relevant circumstances. I have evaluated the facts presented and have applied the appropriate adjudicative factors under the cited guidelines. I have also reviewed the record before me in the context of the whole-person factors listed in 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the cited guidelines, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

I considered the extent of Applicant's U.S. ties, including his more than 15 years in the United States, his U.S. graduate education, his substantial financial ties, and his wife and children, who are U.S. citizens. However, Applicant's attachment to India and his family there raises security concerns. He maintains ongoing relationships with foreign citizens, including his parents, sister, brother, and numerous in-laws. His attachment to his parents is evident from his statement in the interrogatory response that he has an obligation to care for them, his weekly contact with them, and his regular visits to see them in India. His attachments are also apparent in his ambivalence about his intentions to remain in the United States. He has an emotional attachment to the country where he was born and raised and where many of his close family members live. All these facts raise security concerns as to how Applicant would resolve any conflicts of interest that might arise.

For all these reasons, I conclude Applicant has not mitigated the cited security concerns. A fair and commonsense assessment of the available information bearing on Applicant's suitability for a security clearance shows he has not satisfied the doubts

raised under the guidelines for foreign influence and foreign preference. Such doubts must be resolved in favor of the Government.

Formal Findings

Formal findings on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1, Guideline C:	FOR APPLICANT
Subparagraph 1.a	For Applicant
Paragraph 2, Guideline B	AGAINST APPLICANT
Subparagraphs 2.a – 2.g	Against Applicant
Subparagraph 2.h – 2.j	For Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the national interest to allow Applicant access to classified information. Applicant's request for a security clearance is denied.

RITA C. O'BRIEN
Administrative Judge