



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



In the matter of:)
)
-----) ISCR Case No. 11-01093
)
Applicant for Security Clearance)

Appearances

For Government: Gregg A. Cervi, Esq., Department Counsel
For Applicant: *Pro se*

December 23, 2011

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for a security clearance to work in the defense industry. The action is based on foreign influence security concerns raised by Applicant’s ties or connections to India, the country of his birth. Applicant presented sufficient evidence to explain, extenuate, or mitigate the security concerns. Accordingly, as discussed below, this case is decided for Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (the Agency) issued a statement of reasons (SOR) to Applicant on June 8, 2011. The SOR is equivalent to a complaint, and it detailed the factual basis for the action under the security guideline known as Guideline B for foreign influence.

Applicant timely answered the SOR and requested a decision based on the written record in lieu of a hearing. Department Counsel then exercised his prerogative under the Directive and timely requested a hearing.² The case was assigned to me August 12, 2011. The hearing took place October 19, 2011. The hearing transcript (Tr.) was received October 27, 2011.

Procedural Matters

I took administrative or official notice of certain facts concerning the country of India per Department Counsel's written request.³ At hearing, I deferred ruling on Applicant's relevance objection to certain parts of the request.⁴ The relevance objection is now overruled. Although the contested matters are not relevant to Applicant's particular ties to India, the matters are relevant to the general or overall security situation in India, which is relevant in foreign influence cases such as this one. The facts taken notice of are set out below in the findings of fact.

Findings of Fact

As alleged in the SOR, Applicant admitted the following facts: (1) his parents and brother are citizens and residents of India; (2) his parents-in-law and brother-in-law are citizens and residents of India; and (3) he has a bank account in India valued at approximately U.S. \$25,000. His admissions are accepted and adopted and incorporated herein as findings of fact. In addition, the following findings of fact are supported by substantial evidence.

¹ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended, and DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines published in Enclosure 2 to the Directive.

² Appellate Exhibit I.

³ Exhibit 3.

⁴ Tr. 29–34.

Applicant is a 37-year-old information technology (IT) consultant for a multinational technology and consulting corporation headquartered in the United States. He is seeking an industrial security clearance for the first time, completing an application in August 2010.⁵ A native of India, he immigrated to the United States in 1999 on a work visa, he obtained resident alien status in about 2004, and he became a naturalized U.S. citizen in 2010. He has surrendered his Indian passport to an Indian Consulate in the United States, and the passport was cancelled and returned to him.⁶ He obtained a U.S. passport a few months after his naturalization.⁷

Applicant married his wife in 2000, and they have two children, ages seven and nine, both native-born U.S. citizens. His annual salary is about \$112,000. His wife is also a native of India. She became a naturalized U.S. citizen in 2010. She is employed as an elementary school teacher for a public school district. She earns an annual salary of about \$47,000 teaching math and science. They own a rental property that generates an income of about \$5,000 to \$6,000 annually. Their long-term plans are to remain in the United States, which is the decision they made when they became U.S. citizens.⁸ Their desire is to raise and educate their children here, and they have done their financial planning with that goal in mind.⁹

Outside of work, both Applicant and his wife are “soccer parents” and are also active in their church. They have taught Sunday school classes for two-year-old children and participated in volunteer activities. Applicant has served as a deacon for the past two years, which involves him in the church’s decision-making process.

Applicant’s educational background includes a bachelor’s degree from an Indian technology institute. Employed as an IT consultant, he came to the United States in 1999 on assignment for his then employer, an Indian consulting company that was providing services to a U.S. telecom company. He changed jobs about a year later in 2000, when he accepted a position as a software consultant with another firm. He worked for that firm and then its successor in interest until March 2006, when he began his current job. As an IT consultant, he works as a member of a business development team, and his primary customers are the military departments (e.g., Air Force, Army, etc.). In addition to his employment history, Applicant pursued graduate education in the United States. He earned an MBA from a U.S. technical university in 2006.

Concerning Applicant’s family ties to India, his mother and father are both citizens and residents of India. His father is a retired nurse and has been retired for

⁵ Exhibit 1.

⁶ Exhibit 2.

⁷ Exhibit 1.

⁸ Tr. 71–72.

⁹ Tr. 72.

several years. His mother has always been a homemaker. Applicant has regular telephone calls with his parents about two to three times monthly. He has two brothers, one of whom is a citizen and resident of India. That brother is employed as a project manager for an IT company in India. His other brother lives in the United Kingdom and is employed in the healthcare field. His contact with both brothers is about three telephone calls annually.

Applicant's parents-in-law and brother-in-law are citizens and residents of India as well. His father-in-law is employed as a dean of a management college. His mother-in-law has always been a homemaker. His brother-in-law is employed as an IT consultant for an Indian company. Applicant has little contact with his parents-in-law, but his wife has regular (one to two per month) telephone calls with her parents. His contact with his brother-in-law is more frequent, perhaps 8 to 15 telephone calls annually.

In addition to telephone calls, Applicant has traveled to India for family visits. He made trips in 2000 (for his wedding), 2004, 2005, and 2009, for which the primary purpose was to visit family.

None of Applicant's family members in India are employed by or affiliated with the Indian government or military. His practice is to never mention that his work involves the U.S. military departments or the Defense Department. None of his family members, aside from his wife, know that he has applied for a security clearance.

Applicant has maintained a savings account with an Indian bank since about 1999. The account is held jointly with his father. Initially, he established the account to provide some financial assistance to his parents. He stopped making deposits into the account in about 2003, and his father has since repaid the money. There were no transactions on the account for the last several years, and he has never used the account on his trips to India. He disclosed the account in his security clearance application. He indicated in his reply to the SOR that he intended to close the account and move the money to the United States. At hearing, he explained that he has not closed the account for two main reasons: (1) he assessed the tax implications of moving the money from India to the United States as too costly; and (2) he considers the money an emergency fund for his parents in the event they would need such assistance.¹⁰ The present value of the account is about U.S. \$25,000. His long-term plan is to close the account and bring the money to the United States upon the passing of his parents.

Other than this bank account, neither Applicant nor his wife has business, financial, or property interests in India, as all such matters are in the United States. Their U.S. financial interests consist, in general terms, of the following: a primary residence, owned since 2006, with a market value of about \$250,000 and equity of about \$90,000; a rental property (a duplex) with a market value of about \$150,000 and equity of about \$40,000; cash accounts worth about \$80,000; retirement and other investment accounts worth about \$220,000; and about \$20,000 in college savings

¹⁰ Tr. 50–51.

accounts for their children.¹¹ Including the home equity and the Indian bank account, their financial assets total about \$475,000, of which \$450,000, about 95 percent, is located in the United States.¹²

Applicant presented letters of recommendation from two coworkers, both of whom are retired field grade U.S. military officers.¹³ Both letters are highly favorable and both assess Applicant as a suitable candidate for a security clearance. For example, a retired Air Force colonel, who has worked closely with Applicant for the past two years, believes that Applicant possesses the necessary attributes to properly handle and safeguard classified information, and he has seen nothing to suggest that Applicant's allegiance lies somewhere other than with the United States.¹⁴

Concerning Applicant's country of birth,¹⁵ India is a multiparty, federal, parliamentary democracy with a population of approximately 1.1 billion. Its political history, since gaining 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. India is a nonpermanent 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.

¹¹ Tr. 46–50.

¹² Tr. 75.

¹³ Exhibits A and B.

¹⁴ Exhibit B.

¹⁵ The facts about India have been gleaned from Department Counsel's request to take administrative notice and decisions from other judges in cases involving foreign influence and India. *E.g.*, ISCR Case No. 09-04312 (Foreman, J., Apr. 20, 2011).

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 five areas of mutual interest: (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 long-standing 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.

Law and Policies

It is well-established law that no one has a right to a security clearance.¹⁶ As noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."¹⁷ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.¹⁸ An

¹⁶ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

¹⁷ 484 U.S. at 531.

¹⁸ Directive, ¶ 3.2.

unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁹

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.²⁰ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.²¹ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²² In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²³ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.²⁴ The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.²⁵

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant facts and circumstances, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.²⁶ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Discussion

The central issue here is does Applicant's family ties to and financial interest in India, his country of birth, disqualify him from eligibility for a security clearance. Under Guideline B for foreign influence,²⁷ the suitability of an applicant may be questioned or

¹⁹ Directive, ¶ 3.2.

²⁰ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

²¹ Directive, Enclosure 3, ¶ E3.1.14.

²² Directive, Enclosure 3, ¶ E3.1.15.

²³ Directive, Enclosure 3, ¶ E3.1.15.

²⁴ *Egan*, 484 U.S. at 531.

²⁵ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²⁶ Executive Order 10865, § 7.

²⁷ AG ¶¶ 6, 7, and 8 (setting forth the security concern and the disqualifying and mitigating conditions).

put into doubt due to an applicant's foreign connections and interests. The overall concern under the guideline is:

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.²⁸

The guideline contains several disqualifying conditions. Given the undisputed evidence of Applicant's family ties to and financial interest in India, I have especially considered the following disqualifying conditions:

AG ¶ 7(a) contact with a foreign family member, business, or professional associate, friend, or other person who is a citizen of or a resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;

AG ¶ 7(b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect classified information or technology and the individual's desire to help a foreign person, group, or country by providing that information; and

AG ¶ 7(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 guideline also provides the certain facts and circumstances may mitigate foreign influence security concerns. Given the evidence here, I have especially considered the following mitigating conditions:

AG ¶ 8(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 United States;

²⁸ AG ¶ 6.

AG ¶ 8(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 United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest; and

AG ¶ 8(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 is a mature, well-educated adult who is enjoying success as an IT consultant with a large, well-known multinational corporation headquartered in the United States. He was articulate, serious, candid, and credible at the hearing. He has lived and worked in the United States since 1999, a period of 12 years, which is a substantial period for 37-year-old man. He married in 2000, and his wife works as an elementary school teacher for a public school district. Together, they are involved in their local community and are raising their children here. The \$25,000 in the Indian bank account is not a minor or trivial sum, but it is a small percentage of their financial assets and does not result in a conflict of interest. He has the wholehearted support of two coworkers—both retired field grade U.S. military officers—who vouched for his security suitability. He exercises discretion in not discussing the nature or details of his work with his Indian family members. Naturally, he and his wife still have cultural and family ties to India, which is the world's largest electoral democracy. But it is evident that they see the United States as their home, both for their careers and family. Considering the evidence as a whole, this is not a case of “divided loyalties”²⁹ with an applicant who has one foot in the United States and one foot in his native country. On the contrary, the evidence shows Applicant has both feet firmly rooted in the United States. These facts and circumstances are unlikely to change, they weigh in his favor, and they lead me to conclude that Applicant can be expected to resolve any potential foreign influence or pressure by either coercive or non-coercive means in favor of the U.S. interest.

After weighing the disqualifying and mitigating conditions under Guideline B, and evaluating the evidence in light of the whole-person concept,³⁰ I conclude Applicant has mitigated the foreign influence security concerns. Accordingly, I conclude he has met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information. This case is decided for Applicant.

²⁹ AG ¶ 6.

³⁰ AG ¶ 2(a)(1)–(9).

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline B: For Applicant

Subparagraphs 1.a–1.c: For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Michael H. Leonard
Administrative Judge