



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



In the matter of:)
)
) ISCR Case No. 11-13281
)
Applicant for Security Clearance)

Appearances

For Government: Caroline H. Jeffreys, Esq., Department Counsel
For Applicant: *Pro se*

12/26/2012

Decision

COACHER, Robert E., Administrative Judge:

Applicant mitigated the security concerns under Guideline B, foreign influence. Applicant's eligibility for a security clearance is granted.

Statement of the Case

On September 21, 2012, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline B, foreign influence. 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), effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR on September 30, 2012, and elected to have his case decided on the written record. Department Counsel submitted the Government's

File of Relevant Material (FORM) on November 8, 2012. The FORM was mailed to Applicant and he received it on November 14, 2012. Applicant was given an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant responded in writing on November 27, 2012 (Reply). Department Counsel asserted an objection on a document dated November 30, 2012, however, she later stated that there was no objection to the Reply submitted by Applicant. The case was assigned to me on December 11, 2012.

Procedural Ruling

Department Counsel requested administrative notice of facts concerning India.¹ Department Counsel provided supporting documents that verify detail and provide context for these facts in the Administrative Notice request. See the India section of the Findings of Fact of this decision, *infra*, for the material facts from Department Counsel's submissions on India. Applicant also provided facts about India in his Reply, and although he did not formally request that I take administrative notice of facts about India, I will do so.

Administrative or official notice is the appropriate type of notice used for administrative proceedings.² Usually administrative notice in ISCR proceedings is accorded to facts that are either well known or from government reports.³

Findings of Fact

In Applicant's answer to the SOR, he admitted all the allegations, to wit, that his mother, father, father-in-law, and mother-in-law are all residents and citizens of India, and that he owns residential property in India valued at about \$39,000. Those admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 37 years old. He was born in India and became a United States naturalized citizen in 2010. He came to the United States in August 1997 to earn a master's degree in computer engineering. He has resided here ever since. He is married and his wife was also born in India. They were married in 2002. She obtained her U.S. citizenship at the same time as Appellant. They have two daughters who were born in the United States and are U.S. citizens.⁴

¹ FORM p. 2.

² 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)).

³ See Stein, *Administrative Law*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice).

⁴ Items 4-5.

Applicant came to the United States in 1997 to further his education. He did this by attaining a master's degree. He stayed in this country and worked in the private sector for several telecommunications companies. He became a homeowner in 2004. In 2005, he and his wife were granted permanent residence status. He is very active in his local community including membership in the local PTA and participating in local community activities. Since becoming a citizen in 2010, he and his wife voted in the 2012 national election. He sold his first home and bought a second home in 2010. He sold his second home when he moved to his current location and is in the process of building a home there. His children do not speak Indian and have been taught only American customs. Both he and his wife have well-paying jobs, with a combined income of about \$200,000 annually. Applicant traveled to India in 2005, 2007, 2010 and twice in 2012, to visit his ailing mother and for her funeral. All the previous visits were to see family. He only has a U.S. passport and renounced his Indian citizenship. His brother and his family are all residents and citizens of the United States.⁵

Applicant has the following relatives who are residents and citizens of India:

1. His father is 66 years old and is a retired general manager for a regional utility company in India. He lives in India. The company he worked for was not associated with the Indian government or the military. He currently receives a retired pension that provides for his financial needs. Applicant has telephone contact with his Father a few times a month, but his work is never discussed.

2. His mother was a resident and citizen of India; however, she passed away in March 2012.

3. His father-in-law and mother-in-law reside in India. His father-in-law is 62 years old and is retired from a manufacturing company. He has never worked for the Indian government or been a part of the Indian military. His mother-in-law is 53 years old, is a housewife, and has never worked outside the home. Applicant has limited contact with his in-laws. He possibly talks to them three to four times a year by telephone. His wife talks to them by telephone about twice a month. They do not rely on Applicant or his wife for any financial support.

In 2002, after he was married, he purchased a plot of land (1,800 sq. ft.) in India for investment purposes. In 2006, he purchased a small apartment (1,000 sq. ft.) in India to have a place to stay when he visited his parents. He believes the value of both properties is less than the \$39,000 he invested. He listed the property for sale with a local realtor. He does not intend to keep the property or to use it as a permanent residence.⁶

⁵ Reply; Item 7.

⁶ Reply; Items 4, 7.

India

I take administrative notice of the following facts. India is a democratic republic with a cooperative relationship with the United States. The United States recognizes India as key to strategic U.S. interests, and has sought to strengthen its relationship with India. The United States and India have been committed to a strategic partnership that has seen expanded cooperation in the areas of civilian nuclear activities, civilian space programs, and technology trade. The United States is India's largest trading partner and investment partner. The U.S. Secretary of Homeland Security, Janet Napolitano, visited India in May 2011 to hold the first round of dialogue concerning operational cooperation, counter-terrorism technology transfers, and capacity building with the India Home Minister.

Notwithstanding, differences remain between the two countries, including concerns about India's nuclear weapons program, abuses of human rights (although, the Indian government is considered to generally respect the human rights of its citizens), and its refusal to sign weapons non-proliferation treaties. Of grave concern is India's increasing cooperation and partnership with Iran and its military forces. Despite advancements in the United States-Indian relations, India has been identified by the U.S. intelligence community as one of the most active collectors of sensitive U.S. economic, industrial, and proprietary information. The United States has sanctioned Indian scientists and chemical companies for transferring to Iran weapons of mass destruction (WMD)-related equipment and/or technology. Additionally, there are numerous documented cases involving the illegal export, or attempted illegal export of U.S. restricted, dual use technology to India.⁷

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

⁷ FORM; Reply.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion to obtain a favorable security decision.”

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that an 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.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline B, Foreign Influence

AG ¶ 6 explains the security concern about “foreign contacts and interests” stating:

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 indicates three conditions that could raise a security concern and may be disqualifying in this case:

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

(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

(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.

(e) a substantial business, financial, or property interest in a foreign country, which could subject the individual to heightened risk of foreign influence or exploitation.

AG ¶¶ 7(a) and 7(b) apply because of Applicant's relationships with his father, father-in-law, and mother-in-law, who are living in India. AG ¶ 7(d) applies because of Applicant's wife's relationship with her Indian parents. AG ¶ 7(e) applies because of his property holdings in India.

Applicant communicates with his father on a monthly basis. His contacts with his in-laws are not as frequent; however, there is a rebuttable presumption that a person has ties of affection for, or obligation to, their immediate family members. Applicant has not attempted to rebut this presumption. Applicant's relationships with his relatives living in India are sufficient to create "a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion." His relatives in India create a concern about Applicant's "obligation to protect sensitive information or technology" and his desire to help those relatives. For example, if the Indian Government or terrorists in India wanted to expose Applicant to coercion, it could exert pressure on his father and his in-laws. Applicant would then be subject to indirect coercion through his relationship with his relatives and classified information could potentially be compromised.

The mere possession of close family ties with a family member living in India is not, as a matter of law, disqualifying under Guideline B. However, if an applicant has a close relationship with even one relative living in a foreign country, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information.

The nature of a nation's government, its relationship with the United States, and its human rights record are relevant in assessing the likelihood that an Applicant's family members are vulnerable to government coercion or inducement. 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 collection operations against the United States. The relationship of India with the United States places a significant, but not insurmountable, burden of persuasion on Applicant to demonstrate that his relationships with his relatives living in India do not pose a security risk. Applicant should not be placed in a position where he might be forced to choose between loyalty to the United States and a desire to assist his relatives living in India who might be coerced by terrorists or other Governmental entities in India.

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."⁸ Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields.

While there is no evidence that intelligence operatives or terrorists from India seek or have sought classified or economic information from or through Applicant, or his relatives living in India, it is not possible to rule out such a possibility in the future. Although Applicant's communications with his relatives, other than his father, living in India are infrequent, he continues to feel an obligation to them and affection for them. Applicant's concern for his relatives is a positive character trait that increases his trustworthiness; however, it also increases the concern about potential foreign influence. Department Counsel produced substantial evidence to raise the issue of potential foreign pressure or attempted exploitation.

AG ¶ 8 lists six conditions that could mitigate foreign influence security concerns:

(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;

⁸ ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

(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;

(d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;

(e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country; 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 has limited contact with his relatives, other than his father, who live in India. His foreign relatives have no government affiliations and are financially self-sufficient. Applicant has fully assimilated himself and his family into the American way of life. He and his wife are responsible, tax-paying, home owning, citizens of the United States. They are raising their children using American customs rather than Indian customs. Because of his deep and longstanding loyalties in the United States, Applicant was able to fully meet his burden of showing that he can be expected to resolve any conflict of interest in favor of the U.S. interest. AG ¶¶ 8(a), 8(b), and 8(c), are applicable.

Applicant has substantial property and other interests in the United States, which include his employment in the United States, and his status in the local community. These interests are sufficient to overcome whatever minor property interest Applicant has in India (which is currently listed for sale), such that it could not be used to influence, manipulate, or pressure the Applicant. AG ¶ 8(f) also applies.

In sum, Applicant has met his burden to show it is unlikely that he will be placed in a position of having to choose between the interests of his family members and the interests of the United States. His longstanding ties in the United States convince me that he can be expected to resolve any conflict of interest in favor of the United States' interest.

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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. The circumstances tending to support approval of Applicant's clearance are more significant than the factors weighing towards denial of his clearance at this time. Although Applicant's relatives live in India, he has fully established himself over the last 15 years with strong ties to the United States. Therefore, he provided sufficient evidence to mitigate the security concerns.

Overall the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under Guideline B, foreign influence.

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:	FOR APPLICANT
Subparagraphs 1.a – 1.c:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Robert E. Coacher
Administrative Judge