



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



In the matter of:)
)
) ISCR Case No. 12-03804
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

03/20/2013

Decision

LYNCH, Noreen A., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application on November 7, 2011. On September 26, 2012, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines B and C. DOD 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 DOD on September 1, 2006.

Applicant received the SOR and timely requested a hearing before an administrative judge. The case was assigned to me on January 4, 2013. A notice of hearing was issued on January 23, 2013, scheduling the hearing for February 28, 2013.

Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Applicant testified, presented the testimony of three witnesses, and submitted Applicant Exhibit (AX) A, which was admitted without objection. DOHA received the transcript (Tr.) on March 8, 2013.

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 objected to the documents. (Tr. 11) I allowed the documents into the record and 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 Guideline C (Foreign Preference) 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 was born in India. He is 39 years old. He received his undergraduate and graduate degree in India. He did not serve in the military in India. He came to the United States in 2000 on an H1-B visa. He has received multiple certifications in information technology. (AX A) Since 2009, he has worked with federal agencies for defense contractors, and has been with his current employer since January 2009. (GX 1) He became a naturalized U.S. citizen in March 2009. (GX 1) Immediately after Applicant obtained his U.S. citizenship, he surrendered his Indian passport and renounced his Indian citizenship.

Applicant's wife also is a native of India. They were married in March 2001, and they have two daughters. She became a naturalized U.S. citizen in 2009, and surrendered her Indian passport and renounced Indian citizenship. She works in the home.

Applicant's two daughters are U.S. citizens. They were born in the United States. Applicant never applied for a special status for them, under the Overseas Citizens of India Program or the Person of Indian Origin Program (PIO). (AX A)

Applicant's mother and brother are citizens and residents of India. His mother is 67 years old and is fighting late-stage cancer. During her career, she had practiced matrimonial law. Applicant wanted to sponsor his mother so she could become a permanent resident in the United States, but due to her poor health, that is not possible. (Tr. 33) She had visited Applicant in the United States when she was well years ago. Applicant maintains periodic contact with her. She does not know anything about the nature of Applicant's work or the fact that Applicant is seeking a security clearance. Applicant does not provide support to his mother. (Tr. 39)

Applicant's brother is a business man who sells agricultural and garden equipment in India. However, he came to the United States on an employment visa and planned to settle in the United States. He is a qualified engineer and wanted to be in the U.S. workforce. However, when his mother became ill, he returned to India to care for her. Applicant's mother lives with his brother. If and when circumstances change, he will legally immigrate to the United States. (Tr. 34) Applicant contacts his brother on a weekly basis. (GX 1)

Applicant's mother-in-law and father-in-law are citizens and residents of India. His father-in-law is a doctor in a small town in India. His mother-in-law is a homemaker. Applicant's interaction with them is limited to phone calls every month or so or an occasional text message. When his father-in-law retires, he and his wife plan to live in the United States. Applicant's in-laws do not depend on Applicant and his wife for financial support. (Tr. 50) His wife calls her parents every few days. (Tr. 42)

Applicant has one sister-in-law who is a citizen and resident of India. She visited Applicant and his wife in the United States. She recently completed her graduate studies in India. Her parents want her to get married soon and find a suitable groom in the United States. Applicant does not maintain regular contact with her. His wife calls her occasionally.

Applicant reserved a condominium in India that is currently under construction. It is a small investment property of approximately \$32,000 value. The project is not yet complete, facing delays of up to 3 years. Applicant pays \$265 a month toward the monthly mortgage. He will sell the property to finance his children's higher education in the United States. He also bought the condominium in case his mother needed another place to live.

Applicant has a foreign national bank account in India. The purpose of the account is to have the needed money each month for the mortgage on the condominium described above. He keeps approximately \$5,000 in the account and replenishes the balance when it falls below \$500. He does this so that he does not incur an additional money transfer fee of \$50 per transaction. He also used the account so that he would have access to Indian currency and did not have to carry cash when he traveled to India. Due to his mother's illness, he has had to make emergency trips to India. In case of an emergency, credit cards or automatic teller machines (ATM) (plastic money) are not accessible.

When Applicant became an adult, his parents purchased the family home in India in his name. Applicant explained that it is customary to buy properties in adult children's names. On a recent trip to India, Applicant provided a Power of Attorney to his mother which essentially transfers the ownership of the property to his mother. She plans to sell it to pay for her growing medical expenses. (AX A) The approximate value of the home is \$70,000.

The SOR alleged a security concern under Foreign Preference because Applicant admits that he has an OCI card. He was credible explaining that the card is nothing more than a visitor visa with no expiration date and no limitations on how frequently he can travel to India. Given his mother's current health condition, and the number of times Applicant has had to visit India on short notice for her surgeries or treatments, the regular tourist visa would not have been a suitable option as it does not permit frequent visits to India. The identity card is a copy of his Indian visa that is stamped on his U.S. passport. (AX A) Applicant travels on his U.S. passport and he surrendered his Indian passport in 2009. The Government acknowledged that based on this evidence, there is no prima facie case under Guideline C (Foreign Preference).

Applicant and his wife own a home in the United States. His net worth is approximately \$900,000. He and his wife have savings and retirement accounts in the United States. (Tr. 52)

Applicant explained at the hearing that he came to the United States in 2000 to work after completing his education. As soon as he and his wife were eligible, they became U.S. citizens and embrace their U.S. citizenship. He and his wife started a family and he has two daughters (now 8 and 4 years old). Applicant is proud of his career in the United States. He has received recommendations from his employers and his clients over the years. He is a dedicated, hardworking American. 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 children are with him in the United States. He feels blessed to be in the United States and has been a productive part of the society. He has never had any legal difficulties. He is fiscally responsible. He values integrity, honesty, and courage. He has been a good son to his parents, a good father to his daughters, a good husband to his wife and a good neighbor in his community. He knows that his family in India also love the United States and would not cause anything that would harm the interests of the United States. Applicant has worked his adult life in the United States and has deep and long-term relationships. He has provided service to the U.S. Government through his work with government contractors. Applicant was credible when he explained that, in the unlikely situation that there would be pressure on him or his family, he would immediately contact his facility security officer.

A senior business analyst who holds a security clearance and who has known him since 2006, testified that Applicant is a friend as well as a professional associate. He is a person of strong character and integrity. She interacts with him on a daily basis and describes Applicant as candid and forthright. (Tr. 18) Another colleague describes Applicant as a man who dedicates himself to work and family. (Tr. 21)

A former classmate who has known Applicant since 1995 testified that Applicant came to the United States at the same time as he did. He interacts with Applicant and his family frequently. He attests to Applicant's work ethic and dedication to projects. Applicant worked with him for approximately six years, and the former classmate has no

reservations as to Applicant's integrity and ability to handle protected information. (Tr. 27)

Applicant submitted a character letter from his current supervisor which describes him as a man with a sense of dedication, responsibility, and good judgment. Applicant's supervisor states that Applicant's character and professionalism rank among the highest he has encountered in his professional career. (AX 1)

Applicant submitted six other letters of recommendation from former supervisors and colleagues. Applicant is consistently described as a professional who is honest and creative in his work. His work ethic is exceptional. He has great knowledge and expertise garnered from the various federal agencies where he has worked for the past years. Furthermore, Applicant is always willing to exceed requirements and excels in all projects to ensure the mission deadlines are timely and accurate. The letters also note that Applicant is a very proud U.S. citizen who is willing to do what is best in the interest of the country.

Administrative Notice

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.

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 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 may be raised if “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 United States, 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 United States. 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 2000. He is a naturalized U.S. citizen. Applicant’s wife and children reside in the United States. His daughters are U.S. citizens and his wife is a U.S. citizen. Neither Applicant nor his wife and children have any special status with India.

Applicant’s mother, brother, father-in-law, mother-in-law, and sister-in-law 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 ties of affection to family members who are citizen-residents of

India. His contact with his mother, brother and in-laws ranges from weekly to monthly. 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 traveled to India to see his mother and brother. He saw them when they visited the United States. His wife speaks to her mother every week. Based on all these circumstances, I conclude that AG ¶¶ 7(a), (b), and (d) are raised. Because of Applicant's foreign national bank account in India and his condominium, I conclude that AG ¶ 7(e) is relevant.

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 mother, brother, mother-in-law, and father-in-law are citizens and residents of India. For these reasons, I conclude that AG ¶ 8(a) is not fully 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's ties to the United States weigh in his favor when evaluating the question of exploitation or potential conflicts of interest based on ties to India. He has worked with government contractors since 2000. He chose to become a U.S. citizen, even though it resulted in his loss of his Indian citizenship. He and his wife have personal assets, including a home, in the United States worth more than \$900,000. Applicant and his wife surrendered their Indian passports and use their U.S. passports. 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.

The bank account Applicant maintains in India has a balance of between \$500 and \$5000. He uses it so that he can transfer money from the account to the mortgage on his condominium in India. Applicant has invested in the condominium that has yet to be built. He spends about \$265 a month on the mortgage. It is for his children's higher education. He transferred the home ownership from himself to his mother and provided documentation for this issue. His U.S. funds are substantial and they far outweigh his financial interest in India. It is unlikely that the above matters could be used effectively to manipulate him. AG 8(f) applies.

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 2000. He and his wife reside in the United States with their two daughters who are U.S. citizens. His wife is a U.S. citizen. Applicant 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 home for their family. Applicant has been successful in the defense contracting business for many years. His current employer recommends him for his professionalism and integrity.

Applicant chose to leave his home and emigrate from India in search of 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 significant assets in the United States.

Applicant's foreign contacts represented a security concern because of the potential for conflicts of interest and exploitation. However, Applicant's family has no connections with the Indian government. His condominium in India and his bank account are outweighed by his substantial U.S. financial interests.

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 that any of the individuals at issue are involved with, or under scrutiny, by

interests antithetical to the United States. Applicant returned to India to visit his ill mother.

Regarding Applicant's life in the United States, he is an 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 his security officer. 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 Guideline C, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on foreign influence and foreign preference. 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
Paragraph 2, Guideline C (Foreign Preference):	FOR APPLICANT
Subparagraph 2.a:	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