



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-07961

Appearances

For Government: Mary Margaret Foreman, Esq., Department Counsel
For Applicant: *Pro se*

03/29/2018

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Statement of the Case

On December 6, 2016, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline C (Foreign Preference) and Guideline B (Foreign Influence).¹ In an unsigned letter, Applicant answered the allegations raised in the SOR. He also requested a decision based on the administrative record without a hearing. On April 7, 2016, the Government issued a File of Relevant Material (FORM) with five attachments ("Items"). The case was assigned to me on October 1, 2017. Based on my review of the record as a whole, I find Applicant mitigated security concerns.

¹ The 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 (Directive); and the adjudicative guidelines (AG) effective within the DOD on or after September 1, 2006. Since that time, the AG was amended. The present AG, applied here, is in effect for any adjudication dated on or after June 8, 2017.

Request for Administrative Notice

The Government requested that I take administrative notice of its proffer of information regarding the Republic of India (India). Having reviewed the information² contained in the FORM at Item 5, I find the following:³

- India is a multi-party, federal, parliamentary democracy, with a bicameral parliament. The president is the head of state, and the prime minister is the head of the government. Recent elections, which were regarded by observers to have been conducted freely and fairly, included more than 551 million participants.⁴

- The 2000 and 2008 Annual Reports to Congress on Foreign Economic Collection and Industrial Espionage identified India as being involved in economic collection and industrial espionage. As of 2015, India remains on the Office of U.S. Trade Representative's Priority Watch List, based on its history of trademark counterfeiting and copyright piracy, and a recognized concern about counterfeit pharmaceuticals being produced in India and shipped to the United States.

- A June 2016 summary from the U.S. Department of Justice details several recent criminal cases involving export and embargo enforcement, economic espionage, and theft of trade secrets, involving either companies and individuals in India or the government of India.

- Counterterrorism cooperation between India and the United States continued to increase in 2016, with both sides committing to deepen bilateral engagement against the full spectrum of terrorism threats. Indian leadership expressed resolve to redouble efforts, in cooperation with the United States and with other like-minded countries, to bring to justice the perpetrators of terrorism. India and the United States pledged to strengthen cooperation against terrorist threats from groups including al-Qa'ida, ISIS, Jaish-e-Mohammad, and Lashkar e-Tayyiba. India continued to experience terrorist and insurgent activities. Anti-Western terrorist groups active in India, some of which are also on the U.S. government's own list of foreign terrorist organizations, include Islamist extremist groups such as Jaish-e-Mohammed, and Lashker-e Tayyiba.⁵

² In addition to the offered information contained in the FORM at Index 5, I also considered relevant information concerning India used in other current DOHA decisions.

³ Unless otherwise noted, the administrative notice facts about India are all taken from FORM, Item 5.

⁴ See <https://www.state.gov/documents/organization/265748.pdf> (U.S. State Department 2016 Human Rights Report for India). This report, along with the 2016 State Department Country Report on Terrorism (cited below in footnote 5), was published in 2017, before this case was assigned to me for a decision. Both reports postdate the previous versions, cited in the FORM. Administrative notice is hereby taken of certain more recent facts referenced in them in order to make assessments based on timely information in cases involving foreign influence.

⁵ See <https://www.state.gov/j/ct/rls/crt/2016/272233.htm#INDIA> (U.S. State Department 2016 Country Report on Terrorism for India).

- As of 2016, the most significant human rights problems involved police and security force abuses, including extrajudicial killings, torture, and rape. Corruption remained widespread and contributed to ineffective responses to crimes, including those against women, children, and members of scheduled castes or tribes. Other human rights problems have included disappearances, hazardous prison conditions, arbitrary arrest and detention, and lengthy pretrial detention. A lack of accountability for misconduct at all levels of government has persisted, contributing to widespread impunity.⁶

- India does not permit its citizens to hold dual citizenship. In 2006, India launched the Overseas Citizens of India (OCI) program. It is not a dual-nationality program and does not grant Indian citizenship.⁷ A U.S. citizen who obtains an OCI card 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). An OCI card holder is ineligible for an Indian passport or for Indian government employment and cannot vote in Indian elections.

Findings of Fact

Applicant is a 53-year-old consultant who has worked for the same employer, a defense contractor, since July 2011. His previous employment, which was in the private or state government sectors, was continuous and dates back to at least 1999. This is his first application for a security clearance. Applicant has earned a bachelor's degree. Applicant is married and has two adult children. Applicant and his wife have owned their own home in this country since 2003. It is where they reside and have raised their children. Applicant considers himself to be exclusively a United States citizen.

Born in India, Applicant was raised and educated in that country, ultimately earning a bachelor's degree in 1986. In 1992, he married his wife in India. The two had their first child in India, before immigrating to the United States in 1996. Their second child was born in this country. Applicant became a naturalized United States citizen in June 2008. Both Applicant's wife and eldest child have also become naturalized United States citizens.

Remaining in India are Applicant's brother and three sisters, as well as his in-laws, who remain citizens and residents of that country. None of Applicant's family or in-laws have worked for the government of India or held political office, and all are at or near retirement.

Applicant's brother is a retired accountant who worked in the private sector. They speak by phone weekly. Regarding his sisters, one is a high school principal, one is a

⁶ See U.S. State Department 2016 Human Rights Report for India.

⁷ As noted in ISCR Case No. 15-06593 (Sept. 26, 2017) at 4: "[An] OCI card is essentially a multiple entry visa and facilitates [sic] travel to India. It does not grant any privileges of Indian citizenship, except for unlimited travel to and from India." Citing to *"Dual Nationality," U.S. Embassy & Consulates in India*. U.S. Embassy & Consulates in India, US State Department, US Government (Retrieved 21 April 2017), Wikipedia notes: "Most overseas countries such as the [United States of America](#) do not recognise the OCI as citizenship of another country." See https://en.wikipedia.org/wiki/Overseas_Citizenship_of_India#Overseas_recognition

school teacher, and one is a private sector accountant. Applicant speaks with each of them once a week or once a month by phone. He visits them about once a year.

Applicant's father-in-law has no occupation. Applicant's brothers-in-law work as a computer technician and an accountant, respectively. One sister-in-law is a teacher, and the other is a housewife. Applicant speaks with them about once a month by phone.

In about 1993, before he emigrated from India, Applicant, a brother, and their father bought a property in India. It is now co-owned with his brother. Applicant estimates its value at \$50,000. In addition, Applicant may inherit a 1/5th share of his parent's estate, which includes a home worth about \$150,000. Applicant also maintains a bank account in India so he can help family members financially, if needed.

In 2010, Applicant applied for and received an Overseas Citizen of India (OCI) card for travel to India. It expires in April 2050. The card serves as an extended visa and is only available to former citizens of India. He has only used it to ease transit when visiting family in India.

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 adjudicative goal is a fair, impartial, and commonsense decision. Under the AG, 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 in making a decision. The protection of the national security is the paramount consideration. Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.

Under the Directive, the Government must present evidence to establish controverted facts alleged in the SOR. 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 seeking access to classified information enters into a fiduciary relationship with the Government based on trust and confidence that transcends beyond normal duty hours. The Government reposes a high degree of trust and confidence in those to whom it grants access to classified information. Decisions include consideration of the possible risk the applicant may fail to safeguard such information.

Analysis

Guideline C – Foreign Preference

Guideline C at AG ¶ 9 notes that when an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may provide information or make decisions that are harmful to the interests of the United States. Foreign involvement raises concerns about an individual's judgment, reliability, and trustworthiness when it is in conflict with U.S. national interests or when the individual acts to conceal it. By itself, the fact that a U.S. citizen is also a citizen of another country is not disqualifying without a showing of such conflict or attempt at concealment. The same is true for a U.S. citizen's exercise of any right or privilege of foreign citizenship and any action to acquire recognition of a foreign citizenship.

Under AG ¶ 10, conditions that could raise a security concern and may be disqualifying include:

AG ¶ 10(a): applying for and/or acquiring citizenship in any other country;

AG ¶ 10(b): failure to report, or fully disclose when required, to an appropriate security official, the possession of a passport or identity card issued by any country other than the United States; and

AG ¶ 10(c): failure to use a U.S. passport when entering or exiting the U.S.

As noted, when an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he may be prone to provide information or make decisions that are harmful to the interests of the United States. Applicant has rebutted the allegation, in part, in SOR ¶ 1.a that he exercised a foreign preference for India over the United States by obtaining an OCI card. He presented persuasive documentary evidence that the OCI visa does not confer rights of citizenship because India does not permit dual citizenship. For that reason, obtaining and using the OCI visa is not an exercise of foreign citizenship.

The OCI visa does not fall under the plain meaning of the disqualifying condition at AG ¶ 10(a), because it was not an “exercise of any right, privilege, or obligation of foreign citizenship after becoming a U.S. citizen,” nor does it fall under the other disqualifying conditions at AG ¶ 10(b), (c), or (d). But that does not end the analysis, because possession and use of the OCI visa does fall under the general concern at AG ¶ 9, by acting “in such a way as to indicate a preference for a foreign country over the United States.” The OCI visa, although not a privilege or benefit of citizenship, is a privilege or benefit extended to Applicant as a *former* citizen of India. Accordingly, the DOD was justified in inquiring into Applicant’s possession and use of the OCI visa after becoming a U.S. citizen.

Applicant has rebutted the allegation, in SOR ¶ 1.a, that he demonstrated a foreign preference by exercising his rights as a former citizen of India by obtaining an OCI card after becoming a United States citizen. Persuasive documentary evidence

was introduced indicating the OCI visa does not constitute an exercise of foreign citizenship because India does not permit dual citizenship. The OCI visa does not fall under the plain meaning of the disqualifying condition at AG ¶ 10(a), because it was not an “exercise of any right, privilege, or obligation of foreign citizenship after becoming a U.S. citizen,” nor does it fall under the other disqualifying conditions at AG ¶ 10(b), (c), or (d). But that does not end the analysis, because possession and use of the OCI visa does fall under the general concern at AG ¶ 9, by acting “in such a way as to indicate a preference for a foreign country over the United States.” The OCI visa, although not a privilege or benefit of citizenship, is a privilege or benefit extended to Applicant as a former citizen of India. Accordingly, the DOD was justified in inquiring into Applicant’s possession and use of the OCI visa after becoming a U.S. citizen.

Conditions that could mitigate security concerns include:

AG ¶ 11(a) the foreign citizenship is not in conflict with U.S. national security interests;

AG ¶ 11(b) dual citizenship is based solely on parental citizenship or birth in a foreign country, and there is no evidence of foreign preference;

AG ¶ 11(c) the individual has expressed a willingness to renounce the foreign citizenship that is in conflict with U.S. national security interests;

AG ¶ 11(d) the exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen;

AG ¶ 11(e) the exercise of the entitlements or benefits of foreign citizenship do not present a national security concern;

AG ¶ 11(f) the foreign preference, if detected, involves a foreign country, entity, or association that poses a low national security risk;

AG ¶ 11(g) civil employment or military service was authorized under U.S. law, or the employment or service was otherwise consented to as required by U.S. law; and

AG ¶ 11(h) any potentially disqualifying activity took place after receiving the approval by the agency head or designee.

In mitigation, like the disqualifying conditions at AG ¶ 10, this case does not fall under any of the mitigating conditions at AG ¶ 11. That, however, does not end the analysis. First, I considered the circumstances surrounding Applicant’s conduct, to include his knowledgeable participation in acquiring the OCI card. He was not working for a defense contractor at the time. He did not know at the time, nor should he have known, that his possession and use of the OCI visa would fall under the scrutiny of DOD security officials in the future.

Second, I considered Applicant's motivation in obtaining the OCI visa. He explained he obtained the OCI visa simply for ease of transit to and within India. In other words, his motivation was convenience (as opposed to taking advantage of an opportunity without regard for the consequences), which is benign or neutral and not a demonstration of a preference for India over the United States. Had his motivation been otherwise, he could have decided to remain an Indian citizen living in the United States as a lawful resident alien and traveled on an Indian passport, a course of action he rejected when he became a U.S. citizen. Applicant's possession and use of the OCI visa, although not a minor or trivial matter, does not justify an unfavorable clearance decision based on a foreign preference. Applicant met his burden to present sufficient evidence to explain and mitigate the concerns under foreign preference.

Guideline B, Foreign Influence

The security concern relating to the guideline for Foreign Influence is set out in AG ¶ 6:

Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they result in divided allegiance. They may also be a national security concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, considerations such as whether it is known to target U.S. citizen to obtain classified or sensitive information or is associated with a risk of terrorism.⁸

AG ¶ 7 lists conditions that could raise a security concern and may be disqualifying. The following apply to Applicant's case:

AG ¶ 7(a): contact, regardless of method, 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(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 or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information; and

⁸ While not sufficient to dismiss related concerns, I note that while India's governmental and private entities, including intelligence organizations and security services, have been known to capitalize on private-sector acquisitions of U.S. technology, there is insufficient information to conclude that India's interests target U.S. citizens for classified or sensitive information. I also note that while terrorism exists within India, it is being vigorously fought by the state.

AG ¶ 7(f): substantial business, financial, or property interests in a foreign country, or in any foreign owned or foreign-operated business that could subject the individual to a heightened risk of foreign influence or exploitation or personal conflict of interest.

Several foreign and indigenous terrorist groups within India create a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion. AG ¶ 7(a) raises a security concern regarding Applicant's immediate family members including his father-in-law, who are citizens of and reside in India.

AG ¶ 7(b) is applicable because Applicant's connections with his family members and in-laws in India create a potential conflict of interest between Applicant's obligation to protect sensitive information or technology and his desire to help those relations by providing that information.

AG ¶ 7(f) applies because Applicant has a bank account, property, and financial interests in India.

AG ¶ 8 lists conditions that could mitigate foreign influence security concerns. Of these conditions, four potentially apply to Applicant's case:

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;

AG ¶ 8 (b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, or allegiance to the 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;

AG ¶ 8(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

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.

AG ¶ 8(a) applies because Applicant's family members and in-laws in India are not in positions that may result in his having to choose the interests of the foreign government over the interests of the United States. Moreover, none of Applicant's family or in-laws has worked for the government of India or held political office. Applicant's brother and one sister are retired private sector accountants, while his other two sisters

work in lower education. Applicant's father-in-law has no occupation. Applicant's brothers-in-law work as a computer technician and an accountant, respectively. One sister-in-law is a teacher, while the other does not work outside the home. None of these family members are in positions that should make Applicant vulnerable to compromise.

I find AG ¶ 8(b) applies. While Applicant has familial obligations to his relatives and in-laws who are citizens of and reside in India, his wife resides with him in the United States. Applicant's children are here. Applicant is a U.S. citizen. Applicant has longstanding ties to the United States, having lived in the United States since 1996. He has worked for the same company in the United States for 7 years. Applicant can be expected to resolve any conflict in favor of U.S. interests.

AG ¶ 8(c) does not apply because Applicant's relationship with his family members and in-laws in India cannot be described as casual and infrequent.

AG ¶ 8(f) applies. While not much is known about Applicant's financial holdings in the United States, it is clear he earns a notable income, and that he owns and maintains a house fit for a family of four since 2003. It can be deduced from his occasional bank transfers that he maintains bank accounts in this country. In comparison, he owns a \$25,000 interest in a property he co-owns with a brother and a 1/5th share of his parent's estate, worth about \$30,000. It is highly unlikely that Applicant's assets in India are a sufficiently significant lure against Applicant's home, career, and family in this country. This makes it unlikely that a conflict would arise regarding Applicant's assets in India that would place him in a compromising position. Security concerns raised under Foreign Influence are mitigated.

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed in the AG. 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. I incorporated my comments under the guideline at issue in my whole-person analysis. Some of the factors related to the whole-person concept have already been discussed, but some warrant emphasis.

Applicant is a 53-year-old consultant who has worked for the same employer since July 2011. He has earned a bachelor's degree. Applicant is married and has two grown children. Applicant and his wife have owned their own home in this country since 2003. He considers himself to be exclusively a United States citizen.

Applicant was born in India and married in 1992, before immigrating to the United States. He became a naturalized United States citizen in 2008. Today, Applicant, his wife, and two children are all U.S. citizens living in this country.

Before accepting employment with a defense contractor, Applicant obtained an OCI visa for ease of transit to India. He did not obtain the card for any other purpose, nor did he see it as an exercise of foreign citizenship. It was simply a way for him to visit relations in India as they face their elder years and retirement. By all accounts, he is content living in the United States as a citizen and resident. It is here that Applicant has spent his adult life and raised a family. The evidence indicates that this is where his immediate family, profession, and home are located, factors outweighing his less influential assets and relations in India.

With regard to foreign preference and foreign influence security concerns stemming from Applicant's ties or connections to India. I have no doubts about his reliability, trustworthiness, or good judgment based on the record presented. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or vice versa. I also gave due consideration to the whole-person concept. Accordingly, I conclude that he has met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant his eligibility for access to classified information.

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 C:	FOR APPLICANT
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Subparagraphs 1.a:	For Applicant
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Paragraph 2, Guideline B:	FOR APPLICANT
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Subparagraphs 1.a-1.e:	For Applicant
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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 a security clearance. Eligibility for access to classified information is granted.

Arthur E. Marshall, Jr.
Administrative Judge