



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



In the matter of:)	
-----)	
SSN: -----)	ISCR Case No. 07-04450
)	
Applicant for Security Clearance)	

Appearances

For Government: Jennifer I. Goldstein, Esquire, Department Counsel
For Applicant: B. Daniel Lynch, Esquire

February 11, 2008

Decision

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on April 27, 2005 (Government Exhibit 1). On July 11, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant, which detailed security concerns under Guidelines C and B stating why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked. The action was taken 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 revised adjudicative guidelines (AG) promulgated by President Bush on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on July 19, 2007. He answered the SOR in writing on July 29, 2007, and requested a hearing before an Administrative

Judge. Department Counsel was prepared to proceed on September 18, 2007, and I received the case assignment on September 20, 2007. DOHA issued a notice of hearing on October 4, 2007, and I convened the hearing as scheduled on October 19, 2007. The Government offered Government Exhibits 1 through 3, which were received without objection. Applicant testified on his own behalf, called three additional witnesses, and submitted Applicant's Exhibits I through N, without objection. DOHA received the transcript of the hearing, and the record closed, on October 29, 2007. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Procedural Ruling

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to the Republic of India. (Transcript at 12-15.) The request and the attached documents were not admitted into evidence, but were included in the record as Government Exhibits 4 through 10.

The Applicant also submitted a formal request that I take administrative notice of certain facts relating to the current state of relations between the United States and the Republic of India. (Transcript at 16-19.) The request and the attached documents were not admitted into evidence, but were included in the record as Applicant's Exhibits A through H. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

The Applicant is 57 and married. He is employed by a Defense contractor as a Software Engineer and seeks a Secret level clearance in connection with his employment in the defense industry. In his Answer to the SOR, dated July 29, 2007, Applicant admitted subparagraphs 2.b. and 2.c. and denied the other subparagraphs, with explanations. He also provided additional information to support his request for eligibility for a security clearance.

Paragraph 1 (Guideline C - Foreign Preference)

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has acted in a way that shows a preference for another country ahead of the United States.

The Applicant was born in India in 1950. His wife's uncle, an American citizen, sponsored the Applicant and his family for emigration to the United States beginning in 1987. The Applicant and his family waited patiently while the system worked and were allowed to emigrate to the United States in 1999. He became a naturalized American

citizen in March 2005. (Government Exhibit 1, Section 3.). His wife was born in India, and is also an American citizen. (Transcript at 94.) They were married in 1979, and have two children born in India. Both children are citizens of the United States (Government Exhibit 1, Section 9; Transcript at 47, 61.) The Applicant credibly testified that he does not believe himself to be a dual citizen of India and the United States. (Transcript at 101-102.)

The Applicant had an active Indian passport he acquired in 1998 when he was still an Indian citizen. This passport was valid through 2008. (Government Exhibit 2.) When he was informed of the Government's concerns about his having an Indian passport, he submitted it to the Indian authorities. Applicant's Exhibit I shows that the Indian authorities invalidated his passport with a stamp stating, "Passport cancelled as acquired U.S. nationality."

The Applicant also submitted his current American passport. The passport shows that it was properly used by the Applicant to travel to India in 2005, containing a visa from the Indian government. (Government Exhibit 2; Applicant's Exhibits J and K.)

Paragraph 2 (Guideline B - Foreign Influence)

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has foreign contacts and interests that could lead to the exercise of poor judgment, unreliability or untrustworthiness on the part of the Applicant.

The Applicant has three brothers and three sisters. One of his brothers lives in the United States and is an American citizen. (Transcript at 107-109.) The Applicant's other siblings continue to live in India. The Applicant has very little contact with his family in, or out, of India. His primary contact is through his older brother, who the Applicant talks to about twice a year. He is not close to the other members of his family, including his brother here in the United States. (Transcript at 91-94, 103 -116.)

Since moving to the United States in 1999, the Applicant has traveled to India three times. These trips occurred in 2003, 2005 and 2006. The last two trips were after he became an American citizen and were made using his American passport.

The Applicant's two daughters testified at length about their life in the United States. (Transcript at 47-80.) The evidence shows that the daughters are loyal American citizens who have quickly taken to American culture and have great pride in this country and in their family. (Applicant's Exhibit M.) In addition, the evidence shows that the Applicant and his family have more contacts with his wife's family, all of whom live here and are almost all American citizens.

The Applicant testified that he wanted to move to the United States primarily for his daughters, so they could achieve a good education. After he arrived here, the Applicant saw how the American system was working and wanted to be part of it. That is why he made the decision to become an American citizen. (Transcript at 125-127.)

During his time in India, the Applicant worked for a Research Establishment connected with the Indian Ministry of Defense (Research Establishment).¹ (Government Exhibit 3.) The Applicant worked for the Research Establishment from 1976 to 1999 as a Scientist. His work at the Research Establishment was different from his current employment. The Applicant testified that he did not handle classified information during the time he worked for the Research Establishment. He has no continuing connections to the Research Establishment and does not receive any pension from the Indian government in connection with his work there. (Transcript at 86-91.)

The Applicant has contacts with India. Accordingly, it is appropriate to discuss the relationship between India and the United States at this time.² India is a federal republic, and the prime minister leads the executive branch of the government. The United States is India's leading trading partner. India generally respects the rights of its citizens; however, numerous serious problems remain. The United States has had concerns over India's nuclear weapons program and the pace of economic reforms. "In the past, these concerns may have dominated U.S. thinking about India, but today the U.S. views India as a growing world power with which it shares common strategic interests."³ The United States recognizes India as a key to strategic U.S. interests. The recent past has seen an increase in joint military exercises (Applicant's Exhibits A and B); progress on nuclear issues (Applicant's Exhibits C and G); an emphasis on defense industry cooperation (Applicant's Exhibit E at 3-4); and, a growing strategic partnership with India (Applicant's Exhibit H).

Mitigation

The Applicant submitted letters of recommendation. They show that the Applicant is respected in his industry, and in his community. (Applicant's Exhibits L and N.)

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

¹"Research Establishment" is not the real name of the organization.

²All of the following statements are supported by the documents submitted by the Department Counsel, or the Applicant's counsel, in support of their respective requests for administrative notice. (Administrative Judge Exhibit I and attachments.)

³U.S. Department of State, Bureau of South and Central Asian Affairs, *Background Note: India*, dated December 2006 at 10.

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 over-arching adjudicative goal is a fair, impartial and common sense 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. In addition, the Administrative Judge may also rely on his own common sense, as well as his knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining 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 the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Finally, as emphasized by President Eisenhower in Section 7 of Executive Order 10865, "Any determination under this order . . . shall be a determination 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

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the

continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant may have been a dual citizen of India and the United States, and had a valid Indian passport in the recent past (Guideline C); and that the Applicant has family members overseas, and he was employed by an entity of the Indian government (Guideline B). The Applicant, on the other hand, has successfully mitigated the Government's case.

Paragraph 1 (Guideline C - Foreign Preference)

Turning first to Guideline C, the Applicant has mitigated the Government's concerns about his possible dual citizenship with India, and his possession of his Indian passport after becoming an American citizen. The concern is stated thus under this Guideline, *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 be prone to provide information or make decisions that are harmful to the interests of the United States.*

The Applicant had a valid Indian passport after becoming an American citizen. Accordingly, Disqualifying Condition 10(a)(1) applies to the facts of this case: *Conditions that could raise a security concern and may be disqualifying include: (a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to: (1) possession of a current foreign passport.*

The Applicant sent his passport to the Indian authorities, who invalidated it for use because he had become an American citizen. Accordingly, as required by Mitigating Condition 11(e) his Indian passport has *been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.*

The Applicant submitted credible testimonial evidence that he does not believe himself to be a dual citizen of India and the United States. The action of the Indian government in invalidating his passport because of his acquisition of American citizenship provides support of that position. Mitigating Condition 11(b) applies to this case: *the individual has expressed a willingness to renounce dual citizenship.* In addition, Mitigating Condition 11(a) also applies as his *dual citizenship is based solely on parents' citizenship or birth in a foreign country.* Guideline C is found for the Applicant.

Paragraph 2 (Guideline B - Foreign Influence)

The concern under Guideline B is styled as follows:

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.

The Applicant has faint family connections to India. For whatever reasons, it became obvious during the hearing that the Applicant and his family are much closer to his wife's family, all of whom live in the United States and are almost all American citizens. His current family connections to India, which consists of twice yearly telephone calls to his brother, are tenuous at best. His trips to India are consistent with an American citizen visiting his prospective in-laws and returning for his daughter's wedding reception in India.

The Applicant worked for over 20 years for a defense related entity of the Indian government. I have considered this fact very carefully in this case, but I find that this connection is mitigated. I find this for several reasons: the Applicant stopped working for this entity eight years ago; the Research Establishment, and the Applicant's work there, is totally different from his current employment; the Applicant receives no pension from the Indian government for his work there; and, he has no personal connections with any of his former co-workers.

All of these connections must also be viewed in the context of the Indian government, and in particular the current stance of the United States with regard to India. Certainly, as shown by the Government, there have been concerns with India in the past. However, as abundantly shown by the Applicant, the strategic stance between the United States and India has changed dramatically in the last few years in a more positive direction. It is an important point when the Under Secretary of State for Political Affairs makes a major policy address specifically discussing in positive tones "an increase in the defense industrial cooperation, along with an overall increase in the military to military ties between the two governments [United States and India]." (Applicant's Exhibit E at 4.) Finally, India is a democracy, heavily dependent on the United States. There is little to no chance that the government of India would attempt to use the Applicant's family against him, much less that he would respond positively to such an overture. (See Transcript at 134.)

Based on the evidence the Government has presented, the following Disqualifying Condition applies to this case: 7.(a) *Contact with a foreign family member . . . 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 . . . 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 . . . by providing that information.*

The Applicant has provided compelling evidence to show that the following Mitigating Conditions also apply to this particular case, given his particular background: 7(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.;* and (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.*

In conclusion, I have also considered the information concerning the Indian government and its relations with the United States, provided by Department Counsel and the Applicant's counsel. After a review of all of the information, Paragraph 2 is found for the Applicant.

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) 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 evidence shows that the Applicant is a patriotic American citizen. The Applicant eloquently testified about the importance of his family in the United States, and his pride in being an American citizen and a member of the defense industry. He is knowledgeable about security and

understands his responsibility. I find that there is little or no “potential for pressure, coercion, exploitation, or duress” as set forth in AG ¶ 2(a)(8). Using the whole person standard, the Applicant has mitigated the security significance of his foreign connections and alleged foreign preference and is eligible for a security clearance.

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons.

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 THE APPLICANT
Subparagraph 1.a:	For the Applicant
Subparagraph 1.b:	For the Applicant
Paragraph 2, Guideline B:	FOR THE APPLICANT
Subparagraph 2.a:	For the Applicant
Subparagraph 2.b:	For the Applicant
Subparagraph 2.c:	For the Applicant

Conclusion

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

WILFORD H. ROSS
Administrative Judge