



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



In the matter of: )  
 )  
 [Redacted] ) ISCR Case No. 14-04412  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Ross Hyams, Esq., and Alison O’Connell, Esq., Department Counsel  
For Applicant: Christopher Graham, Esq.

09/03/2015

**Decision**

FOREMAN, LeRoy F., Administrative Judge:

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

**Statement of the Case**

Applicant submitted a security clearance application on February 22, 2014. On September 8, 2014, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline B. The DOD acted 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) implemented by the DOD on September 1, 2006.

Applicant answered the SOR on November 17, 2014, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on April 30, 2015, and the case was assigned to me on June 8, 2015. On June 15, 2015, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for July 16, 2015. I convened the hearing as scheduled. Government Exhibits

(GX) 1 through 3 were admitted in evidence without objection. GX 3 is Department Counsel's request that I take administrative notice of relevant facts about India. The facts administratively noticed are set out below in my findings of fact. Department Counsel's letter to Applicant transmitting copies of the Government's documentary evidence is attached to the record as Hearing Exhibit (HX) I. Applicant testified, but did not call any witnesses or submit any documents. DOHA received the transcript (Tr.) on July 24, 2015.

Based on Applicant's testimony that he had received clearances from other government agencies, I kept the record open until July 31, 2015, to enable the parties to submit memoranda of law on the issue whether Applicant was entitled to a security clearance based on reciprocity. Counsel for both sides timely submitted memoranda, which are attached to the record as HX II and III.

### **Findings of Fact**

In his answer to the SOR, Applicant admitted SOR ¶¶ 1.a-1.f. He admitted SOR ¶ 1.g in part. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is the 49-year-old president and owner of a company seeking to do business as a federal contractor. His wife is the co-owner of the company and the facility security officer. He has never held a security clearance. However, he has served in public trust positions with other government agencies. (Tr. 21, 48, 55-56.)

Applicant was born in India. He attended college in India and received a bachelor's degree in May 1987. He came to the United States in September 1989, attended a U.S. university, and obtained a dual master's degree in computer science and management in 1992. He stayed in the United States on a work visa, became a permanent U.S. resident in 2000, became a U.S. citizen in May 2006, and renounced his Indian citizenship when he became a U.S. citizen. After working for several U.S. companies, he started his own business in 2008. (Tr. 22; GX 1.)

Applicant and his wife married in India in January 1992. His wife accompanied him to the United States, and they both became U.S. citizens in May 2006. They have two sons who are U.S. citizens. Applicant has a prepaid college tuition program for his sons. (Tr. 48.) The older son has graduated from high school and will begin studying at a U.S. college in the fall; the younger son is in the 11<sup>th</sup> grade. (Tr. 25.) Applicant and his wife have made substantial financial contributions to extracurricular activities at the high school attended by both sons. (Tr. 27.)

Applicant's father, mother, sister, mother-in-law, father-in-law, and brother-in-law are citizens and residents of India. His father is a retired steel worker and is in poor health. His mother is a homemaker who has never worked outside the home. His sister is a medical doctor, pursuing a post-graduate degree at a private medical college in India. His father-in-law is a retired civil engineer. His mother-in-law, who is incapacitated

as a result of a stroke, has never worked outside the home. His brother-in-law is a medical doctor teaching pediatrics at a private medical college in India. No immediate family members or in-laws have worked for the Indian government or military services. (Tr. 28-32.)

Applicant maintains infrequent contact with several citizens and residents of India. He visits an elementary school classmate, now employed by the Indian Income Tax Department, when he travels to India to visit family. He last met with his classmate in 2014. They exchange pleasantries on social media every two or three months, but have no other contact. He exchanges pleasantries via social media with a childhood friend who is a school teacher in a private school, a high school and college friend who teaches in a college in India, and his wife's oldest brother, who is a small-business owner.

Applicant has occasional social-media contact with two cousins in India. One cousin who works for an Indian information technology (IT) company and the other is a homemaker. Neither cousin has been associated with the Indian government or military service. Applicant also has a cousin who is a citizen of India, lives in the United Kingdom, and works for an IT company. His cousin's wife has a doctorate in environmental consulting. (Tr. 37.) Another cousin, who also works in IT, lives in Switzerland. Applicant last saw this cousin in India in 2014, at a wedding. Applicant has contact two or three times a year with his cousins. (Tr. 36-39.)

When Applicant visits India, he visits a maternal uncle, who is a medical doctor. His uncle retired from the government medical service in India about ten years ago but has never been involved with the Indian military services. Applicant sometimes meets his uncle while visiting his parents in India. (Tr. 39-40.)

Applicant talks with his sister and brother-in-law, who look after his parents in India, about once a month. His conversations with them are limited to discussing the well-being of his parents. (Tr. 40-41.)

Applicant purchased his first home in the United States in May 2001, and he purchased his current home in May 2004, which is now worth about \$600,000. (GX 1 at 9-11; Tr. 48.) He has about \$250,000 in his individual retirement account. He and his wife have no foreign investments, other than a bank account in India, in which they maintain a nominal balance of about \$3,000. (Tr. 49.) He uses the account to provide easy access to funds for local expenses while visiting family members in India.

Applicant has traveled to India four times during the last ten years to visit his family. His last visit was in 2014 (Tr. 34, 50.) His parents have no pensions, and he gives them about \$500 a month. (Tr. 33-35.)

A business associate, who retired as a senior executive in a U.S. government agency and has known Applicant for about seven years, describes him as a person of high integrity, with strong loyalty to the United States. (Attachment A to Answer to

SOR.) An employee of Applicant's company, who also retired as a senior U.S. government executive, states that Applicant has strong roots in his community and is very knowledgeable about U.S. history, politics, culture, and current affairs. He is confident that Applicant would resolve any conflict of interest in favor of the United States. (Attachment B to Answer to SOR.)

Applicant has voted in every election since becoming a U.S. citizen. He and his wife are actively involved with local cultural and charitable organizations. (Tr. 42.) On one occasion since becoming a U.S. citizen, Applicant contributed about \$90 to an Indian charitable organization involved with the rural poor. (Tr. 44.)

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. 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.

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 fighting terrorism, creating a strategically stable Asia, and the free flow of commerce and resources, including through the vital sea lanes of the Indian Ocean.

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 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.

India does not recognize dual citizenship. Foreign citizens entering India are required to obtain a visa. Travelers entering on tourist visas are not allowed reentry within two months, unless they obtain specific permission. Non-citizens of Indian origin may obtain a "Person of Indian Origin" (PIO) card, which allows unlimited travel to and from India.

When Applicant travels to India to visit his family, he uses his U.S. passport. Although he is eligible, he has never requested a PIO card from the Indian government. (Tr. 42.) He does not intend to live in India again.

### **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 and 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 that 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**

### **Reciprocal Clearances**

An applicant may be entitled to a security clearance without further investigation or adjudication if he or she was previously granted a clearance or access based upon a current investigation of a scope that meets or exceeds that necessary for the clearance or access being sought. Department of Defense Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation), ¶ C4.1.1; DOD 5200.22-M, *National Industrial Security Program Operating Manual* (NISPOM), ¶ 2-204. Applicant is seeking a top secret clearance, which requires a comprehensive background investigation. The scope of an investigation required for a public trust position varies widely according to the sensitivity of the position. See *generally* Regulation Chapter 3. Applicant presented no evidence regarding the sensitivity of the positions of public trust that he held with other government agencies or the scope of the investigation completed by other government agencies. Thus, I conclude that Applicant has not established that he is entitled to a security clearance based on reciprocity.

### **Guideline B, Foreign Influence**

The security concern under this guideline is set out in AG ¶ 6 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.

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).

Four disqualifying conditions under this guideline are potentially relevant to this case:

AG ¶ 7(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;

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 sensitive information or technology and the individual’s desire to help a foreign person, group, or country by providing that information;

AG ¶ 7(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; and

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

AG ¶¶ 7(a), (d), and (e) all require substantial evidence of a “heightened risk.” The “heightened risk” required to raise one of these disqualifying conditions is a relatively low standard. “Heightened risk” denotes a risk greater than the normal risk inherent in having a family member living under a foreign government.

Where foreign family ties are involved, the totality of an applicant’s family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003). There is a rebuttable presumption that contacts with an immediate family member in a foreign country are not casual. ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002). There is also 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); see *also* ISCR Case No. 09-06457 at 4 (App. Bd. May 16, 2011).

Applicant’s family ties in India, the multiple areas of potential disagreement between India and the United States, the incidents of illegal export of restricted, dual-use technology from the United States to India, and the continuing threat of terrorism throughout India are sufficient to establish the heightened risk in AG ¶¶ 7(a), (d) and (e), and the potential conflict of interest in AG ¶ 7(b). The following mitigating conditions under this guideline are potentially relevant:

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 U.S.;

AG ¶ 8(b): there is no conflict of interest, either because the individual’s sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., 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) is not established for the reasons set out in the above discussion of AG ¶¶ 7(a), (d) and (e).

AG ¶ 8(b) is established. Applicant has lived in the United States since 1989, owned a home in the United States since 2001, became a citizen in 2006, and owned his own business since 2008. He has held public trust positions, apparently without incident. His wife and two sons are U.S. citizens. He is committed to educating his sons in the United States. He has substantial financial investments in the United States, and he actively participates in local political and educational activities. He has never applied for a PIO card, even though it would facilitate visiting his family in India.

AG ¶ 8(c) is not established for Applicant's family members and in-laws, because Applicant has not rebutted the presumption that contacts with family members are not casual, and he has not rebutted the presumption that he has ties of affection for or obligation to his spouse's immediate family members. However, this mitigating condition is established for his casual and infrequent contacts with former classmates, childhood friends, cousins, and his maternal uncle.

AG ¶ 8(f) is established for Applicant's bank account in India. Its value is nominal in comparison to Applicant's assets in the United States.

### **Whole-Person Concept**

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. In applying 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.

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 was candid, sincere, and credible at the hearing. He has served in public trust positions with other government agencies and is highly respected by

