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

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| In the matter of: | ) | |
| | ) | |
| | ) | ISCR Case No. 07-04281 |
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| | ) | |
| Applicant for Security Clearance | ) | |

## Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel
For Applicant: Richard Murray, Esquire

July 25, 2008

## Decision

RIVERA, Juan J., Administrative Judge:

Applicant failed to mitigate the foreign influence security concerns arising from his relationship and contacts with Indian citizens. Eligibility for access to classified information is denied.

## Statement of the Case

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on September 27, 2006. On July 18, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the Government's security concerns under Guideline B (Foreign Influence).[1] The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it

[1] 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 the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant answered the SOR on August 10, 2007, and requested a hearing before an Administrative Judge. The case was assigned to me on January 28, 2008. DOHA issued a notice of hearing on February 5, 2008. The hearing was convened as scheduled on February 29, 2008. The government offered exhibits (GE) 1 through 7, which were admitted without objection (Tr. 20).[2] Applicant testified on his own behalf, and presented the testimony of two witnesses and seven exhibits, marked AE A through G, which were received without objection. DOHA received the transcript of the hearing (Tr.) on March 10, 2008.

## Findings of Fact

Applicant admitted all SOR allegations. His admissions are incorporated herein as findings of fact. After a thorough review of all evidence of record, I make the following additional findings of fact.

Applicant is a 57-year-old senior professional staff (scientist) working at a U.S. university. He was born, raised, and educated in India. He received his bachelor's, master's, and PhD degrees in India. His parents paid for his education up to his master's degree. He received a full scholarship from the Indian government to attend his PhD studies at a prestigious Indian institute (Tr. 25-26). After completing his PhD, Applicant became a member of the faculty (lecturer) at the Indian institute, and worked there for five years (Tr. 25, 75-83). He still maintains contact with some of his friends from college and with colleagues from his days at the Indian research institute. He has telephone contact with his colleagues once a year, exchanges e-mails sporadically with them, and he visits them when he is in India (Tr. 95).

In 1983, Applicant took a sabbatical from the Indian institute to attend post-doctoral studies at a U.S. university. At the end of his studies, he was offered a two-year position and then, a permanent job at the university. He traveled back to India to consult with his family about his job opportunity. He took the U.S. job and worked at the university for a period of time. After working for a second U.S. employer, in 1989, Applicant was hired by his current employer (Tr. 30, 75).

In 1979, Applicant married his Indian-born spouse in India (GE 1). She was a student at the same university he attended. They have two sons born of this marriage, ages 27, and 18 (Tr. 25-26). In 1996, Applicant and his wife became naturalized U.S. citizens. They decided to become U.S. citizens because their sons were growing up and were being educated as Americans. Their older son came to the United States when he was two years old, and their younger son was born in the United States. Applicant believes his sons would never leave the United States to go back to live in India (Tr.

[2] GEs 6 & 7 were marked for identification and considered for administrative notice only.

32). Applicant and his wife enjoy living and working in the United States. She has worked for a large U.S. bank for the last 20 years. She holds a vice-president position at the bank (Tr. 32).

Applicant's two sons are exceptional students. The eldest attended some of the finest graduate and post-graduate institutions the United States can offer, and is currently attending post-doctoral studies. The youngest is following in his brother's footsteps (Tr. 60-61). Applicant's evidence credibly shows his sons were raised as Americans and are well integrated into the American culture. They were encouraged to participate in school activities, to run for student counsel positions, and to volunteer in community activities. Applicant and his wife set the example for their sons with their involvement in community activities and their volunteer work (AE D, E, F).

All of Applicant's and his wife's immediate and extended family members are residents and citizens of India. He has close ties of affection and/or obligation with his mother and two sisters. He has telephonic contact with his mother at least twice a month. They talk about family issues and her health. They never discuss his business or work related matters. Applicant's sisters (A and B) are both married, each has two children and they are homemakers. Sister A's husband was the general manager for a nationalized bank in India. He retired in 2008, and now works in the private sector (Tr. 40, 78). Sister B's husband worked as a scientist for an Indian government sponsored research laboratory. He specialized in the same scientific field as Applicant. Applicant believes he is now retired and works as an emeritus professor for a government institute (Tr. 41, 79, 107). Applicant has telephonic contact with his sisters once or twice a month; they exchange e-mails sporadically, and he visits with them whenever he is in India (Tr. 43, 94).

Applicant's father-in-law is 78 years old, and owns a small pharmacy in India. His wife is a 68-year-old homemaker. His wife talks to her parents once a week. Applicant partakes in the telephone conversations whenever his wife talks to her parents and he is around (Tr. 43). Applicant's wife has two brothers and two sisters. One of her two brothers is a doctor at a private hospital. Her other brother is an accountant who used to work for a quasi-government agency. He now works as a private consultant (Tr. 44). Applicant's wife claimed she has contact with her brothers approximately three times a year. One of her sister's husband owns a store. Her sister is a homemaker. The second sister and her husband are both deaf and mute (Tr. 116).

In 1998, Applicant's brother-in-law (a scientist and faculty member of an Indian research institute) and the Director of the Indian research institute invited Applicant to be the guest speaker at a scientific symposium. The Indian research institute is under the auspices of the Indian government. Applicant's immediate supervisor authorized him to attend the symposium. He was required to speak only about information that had been published (Tr. 45, 76). There is no evidence Applicant has compromised or caused the compromise of classified information.

Around 2001-2002, Applicant opened a bank account in India. The purpose of the bank account was to facilitate providing financial support to his parents. He provided financial support to his parents since 1985 (Tr. 97). In 2006, he was providing around $150-$200 a month. When his father died, he decided to stop providing support for his mother because she no longer needed it. He kept money in an Indian bank account in the event his mother had an emergency situation. As of the hearing day, the account had a value of approximately $6,000. He also opened the bank account to facilitate his purchase of real estate property in India (Tr. 48-49, 83).

In 2003, Applicant bought a condominium for his mother's intermittent use (Tr. 50). He claimed when his mother no longer needs it, he will dispose of the condo. He estimated the value of the condo to be around $80,000 (Tr. 80). Applicant's father died in 2006, and in his will, he left Applicant the family home. His mother lives in the home. Applicant has not accepted the inheritance, and is debating whether to do so. He did not provide an estimated value for the property he inherited from his father.

Since his arrival to the United States in 1983, Applicant has travelled frequently back to India to visit his family and to participate in family events. He travelled to India in 1986, 1990, 1998, 2001, 2002, 2004, 2006, and 2007. He also plans to visit his mother and attend a niece's wedding during the later part of 2008 (Tr. 56, 89-94).

Applicant never discusses his work with any of his relatives, including his mother, siblings, and in-laws (Tr. 66). He also averred he never discusses classified information with his brother-in-law (scientist) or any of his friends and colleagues from his days working for Indian research institutions. Applicant is a loyal American. He promised to report to his employer and the FBI any inquiries about his work and/or any possible threat against the United States from any foreigners, U.S. citizens, or from his family members (Tr. 66).

At his hearing, Applicant presented the testimony of his supervisor/manager and a long-time neighbor. The supervisor has known, worked with, and supervised Applicant during the last 10 years on a daily basis. She considers Applicant to be a hard-working, ethical, and dedicated employee. He is perceived as being truthful, honest, and conscientious about enforcement of security rules. According to his supervisor, Applicant has always followed the rules and procedures to protect classified information. She recommended Applicant for a security clearance.

I take administrative notice of the following facts. India is a democratic republic with a cooperative relationship with the United States. The United States recognizes India as a key to strategic U.S. interests, and has sought to strengthen its relationship with India. The United States and India have been committed to a strategic partnership that has seen expanded cooperation in the areas of civilian nuclear activities, civilian space programs, and technology trade. The United States is India's largest trading partner and investment partner.

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

## Policies

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.[3]

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.

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 controlling 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.

The protection of 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."[4] 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

[3] *See Department of the Navy v. Egan,* 484 U.S. 518, 531 (1988).

[4] *Egan, supra,* at 528, 531.

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.

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

## Analysis

### Guideline B, Foreign Influence

Under Guideline B, the government's concern is that:

> Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, he or she may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

AG ¶ 6.

AG ¶ 7 sets out three conditions that could raise a security concern and may be disqualifying in this case, including:

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

(b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information; and

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

The mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if only one relative lives in a foreign country and an applicant has contacts with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information.[5] Applicant has frequent contacts and a close relationship of affection and/or obligation with his mother, siblings, and his in-laws. His mother and siblings are citizens and residents of India. The closeness of the relationship is shown by Applicant's frequent telephone contacts with his mother and siblings, his financial support to his parents, and his frequent trips to India to visit his family. Additionally, he has a bank account in India, owns a condo (a vacation home), and has a potential inheritance of a home in India.

These contacts create a risk of foreign pressure or attempted exploitation because there is always the possibility that Indian agents may exploit the opportunity to obtain information about the United States. His connection to his in-laws and long-time Indian friends and colleagues also creates a potential conflict of interest because his relationships are sufficiently close to raise a security concern about his desire to help them by providing sensitive or classified information.

These close relationships create a higher risk of foreign pressure or attempted exploitation because of India's cooperation and partnership relationship with Iran, a country with interest inimical to the United States. His connections to his Indian family also create a potential conflict of interest because his relationships are sufficiently close to raise a security concern about his desire to help his family by providing sensitive information. Applicant's frequent travel to India also creates a higher risk of foreign inducement, manipulation, pressure or coercion by the Indian government, friends, and former colleagues working as scientist for Indian institutions.

The government produced substantial evidence raising these three potentially disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove a mitigating condition. The burden of disproving a mitigating condition never shifts to the government.

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[5] *See* ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

Six Foreign Influence Mitigating Conditions under AG ¶ 8 are potentially applicable to these disqualifying conditions:

> (a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U. S.;
>
> (b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;
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> (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;
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> (d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;
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> (e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country; and
>
> (f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

After considering the totality of the facts and circumstances in Applicant's case, I conclude that AG ¶ 8(a) and 8(c) partially apply. Appellant did not establish "it is unlikely [he] will be placed in a position of having to choose between the interests of [his Indian family] and the interests of the U.S." His frequent contacts and close relationships with his Indian family members could potentially force him to choose between the United States and India. He did not meet his burden of showing there is "little likelihood that [his relationships with his Indian family members] could create a risk for foreign influence or exploitation."

Applicant has traveled to India eight times since he immigrated to the United States in 1983. He has plans to travel to India in 2008 to visit his mother and attend a niece's marriage. He and his wife became U.S. naturalized citizen in 1996. He has contacts and close relationships with his mother, sisters, and with his wife's family who are citizens and residents of India. Applicant also has contacts and close relationship

with Indian friends (university professors and scientist), most of whom he has known and has remained in contact with since his college days in India.

The nature of India's government, its relationship with the United States, and its human rights record are relevant in assessing the likelihood that 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. I considered that the Indian government is a democratic republic with a cooperative relationship with the United States. India generally respects the human rights of its citizens. India is not a hostile country nor are its interests inimical to the United States. The United States and India enjoy good relations and the United States is India's largest trading partner.

Notwithstanding, India's aggressive collection of proprietary and economic information, its industrial espionage against the United States and its partnership with Iran raises the burden of persuasion on Applicant to demonstrate that his immediate family members in India do not pose a security risk and that he will not be placed into a position to be forced to choose between loyalty to the United States and his Indian family members.[6] India's partnership with Iran raises further concerns. Iran has an adversarial stance with the United States, a negative human rights record, and it is likely that Iran would target any citizen in an attempt to gather classified or sensitive information from the United States.

Applicant received an Indian government scholarship to attend his PhD studies. He worked for a prestigious Indian research institute (under the auspices of the Indian government) for five years before coming to the United States to attend post-doctorate studies on a sabbatical. His brother-in-law is a scientist working for an Indian research institute, and he specializes in the same area Applicant does. Applicant keeps contact with college friends and colleagues from his days at the Indian institute. Thus, it is more likely the Indian government is monitoring Applicant's work, his trips to India, and his communications with family and friends.

AG ¶ 8(b) partially applies because Applicant has developed a sufficient relationship and loyalty to the United States, that he can be expected to resolve any conflict of interest in favor of the United States' interests. He has lived in the United States for approximately 25 years. He has been a naturalized U.S. citizen for around 12 years. His children have inculcated U.S. values. Applicant and his wife have established themselves as successful American citizens. He has worked hard for numerous employers in the United States, and continues his track record of diligent labor.

[6] *See* ISCR Case No. 02-13595 at 3 (App. Bd. May 10, 2005) (stating an applicant has "a very heavy burden of persuasion to overcome the security concerns" when parents and siblings live in Iran). *See also* ISCR Case No. 04-11463 at 4 (App. Bd. Aug. 4, 2006) (articulating "very heavy burden" standard when an applicant has family members living in Iran).

Available evidence suggests Applicant is truthful, honest, and conscientious about security matters. His current supervisor testified he has followed the rules and regulations set forth by his company to protect classified information. His participation as a guest speaker at an Indian research institute symposium was sanctioned by his employer. AG ¶ 8(d) applies with respect to SOR ¶ 1. f.

Applicant's information suggests his financial and business interests in the United States are valued at around $1.3 million. In contrast, the value of his bank account and condo in India equals around $86,000. Applicant failed to provide information concerning the estimated value of the house he inherited from his father, but has not accepted. AG ¶ 8(f) partially applies.

**Whole Person Concept**

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

> (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

Applicant strongly averred he and his family are loyal Americans, that they have woven themselves into the fabric or America through their long-term participation in the community, their volunteer work, and their jobs. Applicant has lived in the United States for 25 years and has been a naturalized citizen for 12 years. When he became a U.S. citizen, he swore allegiance to the United States. His two sons are also U.S. citizens. They were raised and educated in the United States as Americans. They are currently attending some of the best learning institutions the United States can offer. Applicant credibly testified that he and his wife decided to become U.S. citizens when they realized their sons were being brought up as Americans and it was not likely their sons would leave the United States to go back to live in India.

Applicant's statement about his loyalty to the United States is credible. There is no reason to believe that he would take any action which could cause potential harm to his sons' and his lifestyle in the United States. There is no evidence he has ever taken

any action which could cause potential harm to the United States, or that he lacks honesty and integrity. He has the respect and trust of his supervisor and U.S. neighbor.

Numerous circumstances weigh against Applicant in the whole person analysis: India's relationship with Iran, India's aggressively seeking sensitive or protected U.S. information, that Applicant was born and educated in India, he worked in Indian universities and at an Indian research institute for five years, and he maintains contact with Indian friends and scientists. In sum, he had significant connections to India before he immigrated to the United States – connections that he continues to maintian. Applicant has frequent and non-casual contact with his family members living in India. These contacts create a risk of foreign pressure or attempted exploitation because there is always the possibility that Indian agents or others hostile to U.S. interests may attempt to use Applicant's family members living in India to obtain information about the United States.

Applicant also failed to establish the value of the property he inherited in India. As such, I cannot determine whether the value of all of his financial interest is such that it could not be used effectively to influence, manipulate, or pressure Applicant.

"Because of the extreme sensitivity of security matters, there is a strong presumption against granting a security clearance. Whenever any doubt is raised . . . it is deemed best to err on the side of the government's compelling interest in security by denying or revoking [a] clearance." *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990). After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude she has not mitigated the security concerns pertaining to foreign preference. The evidence leaves me with doubts as to Applicant's security eligibility and suitability.

For all these reasons, I conclude Applicant has failed to mitigate the concerns arising from her foreign influence security concerns.

## 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:

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| Paragraph 1, Guideline B: | AGAINST APPLICANT |
| Subparagraphs 1.a-1.e: | Against Applicant |
| Subparagraph 1.f: | For Applicant |
| Subparagraphs 1.g-1.l: | Against Applicant |

## Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant's security clearance. Eligibility for access to classified information is denied.

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JUAN J. RIVERA
Administrative Judge