

DATE: December 13, 2007

In re:)	
)	
)	
-----)	ISCR Case No. 06-23388
SSN: -----)	
)	
Applicant for Security Clearance)	

**DECISION OF ADMINISTRATIVE JUDGE
JUAN J. RIVERA**

APPEARANCES

FOR GOVERNMENT
Allison O’Connell, Esquire, Department Counsel

FOR APPLICANT
Leslie McAdoo, Esquire

SYNOPSIS

Applicant immigrated to the United States in 1988. He was born, grew up, and was educated in India. He became a naturalized U.S. citizen in April 2000. Applicant’s ties of affection and/or obligation and contacts with his wife, children, parents, in-laws, friends, and business associates most whom are citizens and residents of India, in conjunction with his business, property, and investments in India, pose an unacceptable security risk or concern. His favorable information is not sufficient to mitigate the foreign influence security concerns. Clearance is denied.

STATEMENT OF THE CASE

On July 26, 2005, Applicant submitted a security clearance application (GE 1, Electronic Questionnaires for Investigations Processing). On May 11, 2007, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a statement of reasons (SOR) alleging facts and security concerns under Guideline B (Foreign Influence). The SOR informed Applicant that DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to grant him access to classified information and submitted the case to an administrative judge for a security determination.¹ On May 31, 2007, Applicant answered the SOR and requested a hearing.

The case was assigned to me on August 7, 2007. DOHA issued a Notice of Hearing on August 14, 2007, convening a hearing on August 31, 2007. Applicant's attorney requested a continuance by motion dated August 23, 2007, citing medical and personal reasons.² The Government did not object to the motion. I granted a postponement, and rescheduled the hearing for October 15, 2007. The hearing was convened as rescheduled. At the hearing, the government presented three exhibits, marked GE 1-3, to support the SOR. Applicant testified on his own behalf, and presented one exhibit with 31 enclosures, marked AE 1a-ee. DOHA received the transcript (Tr.) on November 21, 2007.

FINDINGS OF FACT

Applicant admitted all the SOR allegations with explanations. 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 40 years old. He was born, raised, and educated in the Republic of India (India) (GE 1). After completing his Bachelor's degree in Business Administration in India, he immigrated to the United States at age 21 under a student visa. Two years later he received a Master's of Science in Business Administration degree from a U.S. university (Tr. 40). He remained in the United States working as a software consultant. He became a naturalized U.S. citizen in April 2000.

In 1995, Applicant founded his own information technology (IT) company. Initially the company was oriented toward commercial clients. After 2001, Applicant moved his company to the Government sector to diversity and to mitigate his business risk. Over the last three years,

¹ See Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992) (Directive), as amended and revised. On August 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guidelines to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated January 1987, as amended, in which the SOR was issued on or after September 1, 2006.

² Applicant's Motion for Continuance, along with its cover sheet, were marked as Appellate Exhibit (App. Exh.) 1.

Applicant's company has acquired contracts with state and federal government agencies. Applicant also owns a second company which is a holding company for the real estate and buildings used by his IT company. As sole owner and principal officer of his IT company, he needs a security clearance for his company to handle certain Government contracts. After he applied for a security clearance in 2005, Applicant was granted an interim security clearance that was revoked in May 2005 with the issuance of the pending SOR (Tr. 104).

Applicant's wife is currently a citizen and resident of India. In 1989, she travelled to the United States under a student visa, and finished her physical therapist degree in 1991. Applicant and his wife met while both attended the same U.S. university. In 1992, they traveled to India to be married in a family ceremony. Applicant has three children born in the United States of this marriage, a daughter age 13, and two boys ages 11 and 9. From 1991 to 1998, Applicant and his family lived in the United States. In 1998, Applicant and his wife decided she would move with their children to India. They wanted their children to grow up in India in the same environment and with the same cultural heritage Applicant and his wife received (Tr. 108). They also wanted their children to spend time with their grandparents. His wife has not applied for citizenship because she does not meet the residence requirements (Tr. 105).

In 1999, Applicant's wife established a company in India with the same name as Applicant's company in the United States (Tr. 111). The Indian company was established with Applicant's wife as the sole owner to take advantage of economic benefits in India available only to native Indian investors/owners (Tr. 112). Because of his U.S. citizenship, if Applicant was included as an owner the company would not have been entitled to any Indian economic benefits. Applicant's company and his wife's company have worked together since 1999. The Indian company was created to support Applicant's company in the United States (Tr. 166), and to compete for business partnerships with American companies seeking business partners in India. As of the day of the hearing, the Indian company was "dormant," but it still had 4-5 people in India working for Applicant's U.S. company. Between 2000 and 2004, the Indian company produced revenues of approximately \$200,000 a year (Tr. 116). Applicant's wife and his mother were appointed "Directors" of the Indian company and they oversaw its operations. Their positions were not full time jobs, and they usually worked one day a week. Applicant personally did most of the monitoring of the projects assigned to his wife's Indian company over the telephone, Internet, or during his trips to India (Tr. 113).

Between April 2000 and his hearing date, Applicant traveled to India 29 times (Tr. 117-118). Of those 29 visits, 23 were to visit his family and to explore business opportunities. He was trying to generate additional business with U.S. companies seeking partnership with Indian companies and to maintain client relationships (Tr. 121). From 2000 to 2006, Applicant spent at least five months, and up to 10 months in 2002, of each year living in India (Tr. 124). He intends to travel to India in November 2007 for business and to visit his family (Tr. 83).

In January 2007, Applicant's wife and children moved to the United States with the intent to remain permanently in the United States (Tr. 60). The children briefly attended U.S. schools. His wife and children traveled during the summer vacation to India to visit their family. Her 75-year-old father became ill, and she and the children stayed in India to help with his care. They are waiting for her father to get better and then plan to return to the United States.

As of the SOR date, Applicant owned three apartments free and clear in India. One he purchased in 1991 for his parents to live in. The apartment is still registered in the builder's name because of a legal dispute. Applicant had planned to have his name and his parents name placed into the deed (Tr. 64-65). However, due to the security clearance concerns raised by his owning property in India, Applicant testified he intends to transfer the apartment ownership to his parents. His parent's apartment is worth approximately \$100,000. The second apartment he purchased in 1999 for him and his wife to live in (Tr. 110). This apartment is worth approximately \$130,000. The family outgrew it, and in 2004 he purchased a third apartment for him and his family to live in (Tr. 110). It is worth approximately \$170,000. The smaller apartment was rented to a friend, and he kept it as an investment property. Because of the security clearance concerns raised by his owning property in India, Applicant relinquished all property rights to both apartments to his wife (Tr. 66-67, AE 1r, s, and t).

Applicant and his wife have had one joint bank account in India for the last 10 years. He puts money in it to support his wife, his parents, and for him to write checks (Tr. 69-70). As of October 2007, he had approximately \$18,000 in the account. During the last five years he has had a fixed monthly deposit of around \$10,000-\$12,000 deposited into the account (Tr. 75).

When Applicant's wife is living in India and he is in the United States, Applicant contacts his wife every day by telephone or the Internet. He has contacts with his parents at least twice a week. He contacts his parents-in-law once a month (Tr. 90), and has contact with his two retired Army uncles about once every two years. He had contacts with his wife's sibling two to four times a year.

While living in India, Applicant had frequent personal contacts with most of his family members, in-laws, friends, and professional associates. He has contacts with his parents daily, with his uncles two to four times a week (Tr. 126), and his in-laws once a week. Applicant has contacts with his friends and professional associates almost daily, since most of them work for him. Applicant has five cousins living in the United States who work for him. Two of them are green card holders, and three have work visas. He has frequent contact with them when he is in the United States.

Applicant and his wife do not own a home in the United States. He explained he has not purchased a home in the United States because he has been investing his money to grow his business. All of his real estate assets in the United States are owned by a holding company. Applicant owns one account in the United States with a value of approximately \$51,000. He estimates his company's assets total around 1.5 million dollars (Tr. 81-82). His company employs approximately 50 employees, and has a gross revenue of around \$6 million a year.

Applicant's parents, extended family, most of his friends, and professional associates, as well as his in-laws, and his wife's extended family, are residents and citizens of India. Applicant's father is a 72-year-old retired colonel who served in the Indian Army. His mother is a 62-year-old homemaker. Applicant has two maternal uncles that retired as senior officers in the Indian Army. He has frequent contact with them when he is in India. Applicant has five friends in India with whom he has regular contact. He had frequent contact with a childhood friend who

is a colonel in the Indian Army (once a week). He had infrequent contact with two Indian friends living in Switzerland. He had infrequent contact (two to four times a year) with two other Indian friends residing in India. Applicant has three professional associates, who are residents and citizens of India. He had frequent contact with a professional associate, who is an officer in the Indian Army and worked for Applicant in some of the projects Applicant's company or his wife's company had outsourced in India (Tr. 92).

Applicant strongly averred he is a loyal U.S. citizen with personal, professional, and financial commitments in the United States. Applicant is aware of the security concerns raised by his family and friends in India, by his frequent travel to India, and his business and investments in India. To minimize the security concerns, he has been moving his business to the United States, and plans to move his wife and children permanently to the United States (Tr. 102). Applicant's sister became a naturalized U.S. citizen within the last two years. She is a U.S. resident.

I take administrative notice of the following facts. India is a democratic, parliamentary, federal 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. India has been supportive of U.S. efforts in the global war on terrorism.

Notwithstanding, there are concerns about India's abuses of human rights, government corruption, increasing cooperation with Iran, and India's lack of protection of U.S. intellectual property rights. Moreover, India has been identified by the U.S. intelligence community as one of the most active collectors of sensitive U.S. economic and proprietary information. Even though India is not hostile to the United States, India's theft of sensitive and proprietary information threatens the national security in both military and economic terms.

POLICIES

The Directive sets forth adjudicative guidelines which must be considered in evaluating an Applicant's eligibility for access to classified information. Foremost are the disqualifying and mitigating conditions under each adjudicative guideline applicable to the facts and circumstances of the case. However, the guidelines are not viewed as inflexible ironclad rules of law. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive,³ and the whole person concept.⁴ Having considered the record evidence as a whole, I conclude Guideline B (Foreign Influence) is the applicable relevant adjudicative guideline.

³ Directive, Section 6.3. states, "Each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2 . . ."

⁴ AG ¶ 2(a). states, ". . . The adjudication process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. . . ."

BURDEN OF PROOF

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.⁵ The government has the initial burden of proving controverted facts alleged in the SOR. To meet its burden, the government must establish a prima facie case by substantial evidence.⁶ The responsibility then shifts to the applicant to refute, extenuate or mitigate the government's case. Because no one has a right to a security clearance, the applicant carries the ultimate burden of persuasion.⁷

A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest to ensure each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting national security.⁸

The scope of an administrative judge's decision is limited. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. Executive Order 10865, § 7.

CONCLUSIONS

Under Guideline B (Foreign Influence), 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 conditions that could raise a security concern and may be disqualifying in this case, including:

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

⁶ Directive, ¶ E3.1.32.1; ISCR Case No. 02-12199 at 3 (App. Bd. Apr. 3, 2006) (Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.); ISCR Case No. 98-0761 at 2 (App. Bd. Dec. 27, 1999) (Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.).

⁷ *Egan*, *supra* n. 5, at 528, 531.

⁸ See *id.*; AG ¶ 2(b).

(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;*⁸ * * *

(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

(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 or 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.⁹ Applicant has frequent contacts and a close relationship of affection and/or obligation with his wife, parents, in-laws, his and his wife's extended family, friends, and business associates, who are residents and citizens of India. These contacts create a heightened risk of foreign pressure or attempted exploitation because there is the possibility that Indian agents may exploit the opportunity to obtain intelligence, classified, or economic information about the United States.

His connection to his family members and with his wife's family also create a potential conflict of interest because his relationships are sufficiently close to raise a security concern about his desire to help them or the government of India by providing sensitive or classified information. Moreover, Applicant's business, financial investments, and property interests in India could subject him to heightened risk of foreign influence.

The Government produced substantial evidence raising these four 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.

Four Foreign Influence Mitigating Conditions under Guideline ¶ 8 are potentially applicable to these disqualifying conditions:

⁹ See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

(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;

(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,

(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 none of the mitigating conditions apply. The evidence shows Applicant has strong feelings of affection and a strong sense of obligation to his wife's parents, in-laws, extended family, and friends. The closeness of the relationships is shown by Applicant's frequent contacts with them, his frequent travels to India, his prolonged stays in that country, and his purchase of real estate properties for his parents and his wife. Applicant also has significant business investments in India that compliment his business in the United States. His frequent travel to India and his lengthy stays in that country also underscore the importance Applicant places in his business, financial, and property interests in India.

In deciding whether Applicant's family members are in a position to be exploited, I considered India's form of government.¹⁰ India is a democratic republic with a friendly relationship with the United States. India is a key to strategic U.S. interests, and both countries have worked to strengthen their relationship. India has been supportive of U.S. efforts in the global war on terrorism. Notwithstanding, the security concerns remain because of India's active role as a collector of sensitive U.S. economic and proprietary information which could threaten U.S. national security in both military and economic terms.

Considering the totality of the circumstances, Applicant did not establish it is unlikely he will be placed in a position of having to choose between the interests of his family and the interests of the United States. His frequent contacts and close relationship with his family, his

¹⁰ The focus is not the country or its people. The focus of the analysis is on its rulers and the nature of the government they impose. This approach recognizes that it makes sense to treat each country in accordance with the level of security concern or threat it presents to the United States.

wife's family, and friends could potentially force him to choose between the United States and India. There is also an enhanced risk of potential exploitation or influence because of his father, uncles, friends, and business associates' service as senior officers in the Indian Army. Some of Applicant's friends and business associates worked for Applicant in his company's projects even though they were still serving in the Indian Army. Applicant did not meet his burden of showing there is little likelihood that his relationship with his family, in-laws, and friends could create a risk for foreign influence or exploitation.

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' interest. He has lived in the United States for approximately 20 years. He is a naturalized U.S. citizen, and his two children were born in the United States. He has substantial financial and business interests in the United States. Although this mitigating condition is partially applicable, these facts are insufficient to overcome the security concerns.

In addition to the enumerated disqualifying and mitigating conditions as discussed previously, I have considered the general adjudicative guidelines related to the whole person concept under AG ¶ 2(a). "Under the whole person concept, the Administrative Judge must not consider and weigh incidents in an applicant's life separately, in a piecemeal manner. Rather, the Judge must evaluate an applicant's security eligibility by considering the totality of an applicant's conduct and circumstances."¹¹ The directive lists nine adjudicative process factors (factors) which are used for "whole person" analysis. Additionally, other "[a]vailable, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination." AG ¶ 2(a). Ultimately, the clearance decision is "an overall common sense determination." AG ¶ 2(c).

Applicant's testimony shows Applicant is a loyal U.S. citizen. There is no evidence he has ever taken any action which could cause potential harm to the United States. He takes pride in being an American citizen and would like to move all of his family and business to the United States. He has worked diligently for several defense agencies for approximately four years.

Notwithstanding, his favorable evidence is not sufficient to mitigate the foreign influence security concerns. Although Applicant has lived in the United States for almost 20 years, he grew up and was educated in India. He came to the United States at age 21, having spent most of his formative years in India. Although Applicant's children were born in United States, Applicant and his wife have been raising their children in India because they want them "to grow up in India in the same environment and with the same cultural heritage" he and his wife received. His wife has not applied for U.S. citizenship. Applicant purchased three apartments in India for his parents, wife, and investment purposes. However, he does not own a home in the United States. Since 2000, Applicant has been spending at least five months of every year in India, either with his family or on business related matters.

¹¹ ISCR Case No. 03-04147 at 3 (App. Bd. Nov. 4, 2005) (quoting ISCR Case No. 02-01093 at 4 (App. Bd. Dec. 11, 2003)).

Applicant has substantial financial and business investments in both the United States and India. The company in India is owned and managed on paper by his wife, but in reality, Applicant controls and manages both the U.S. and Indian companies. Applicant transferred ownership of two of his apartments in India to his wife. Notwithstanding, his wife's ownership of the company and the two apartments, he is so close to his wife and children that the divestiture does not insulate him from any possible conflict of interest, risk of foreign influence, or exploitation. Considering the totality of the facts and circumstances, including his background, education, and business success, it is likely Indian authorities are aware of Applicant's contacts with his family, in-laws, friends, professional associates, property, and business investments in India.

"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."¹² After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the 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:

Paragraph 1, Guideline B: **AGAINST APPLICANT**

Subparagraphs 1.a – 1.h **Against Applicant**

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Clearance is denied.

Juan J. Rivera
Administrative Judge

¹² *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990).