



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



In the matter of:)
)
-----) ISCR Case No. 14-00336
)
Applicant for Security Clearance)

Appearances

For Government: Gina L. Marine, Esq., Department Counsel
For Applicant: Brendan M. Lill, Esq.

09/04/2014

Decision

HARVEY, Mark, Administrative Judge:

Applicant and his spouse are close to their parents, who are residents and citizens of India. He has frequent contact with his parents and usually visits them annually. Applicant invested over \$300,000 of his personal funds, and his U.S. company invested additional funds to construct a building in India. Applicant owns all the stock in his U.S. company. Applicant or his U.S. company expects to receive about 2.4 million dollars when the building in India is sold, which is about ten times Applicant's annual income in 2013. Although outside activities concerns are mitigated, foreign influence security concerns are not fully mitigated at this time. Eligibility for access to classified information is denied.

Statement of the Case

On September 6, 2013, Applicant signed an Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86) (Government Exhibit (GE) 1). On April 26, 2014, the Department of Defense (DOD) issued a statement of reasons (SOR) to him, alleging security concerns under Guidelines B (foreign influence) and L (outside activities) (Hearing Exhibit (HE) 2). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; DOD 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.

The SOR further informed Applicant that, based on information available to the Government, DOD adjudicators could not make the preliminary affirmative finding that it is clearly consistent with the national interest to grant or continue Applicant's security clearance, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be granted, continued, denied, or revoked. (HE 2)

On May 15, 2014, Applicant responded to the SOR. (HE 3) On July 1, 2014, Department Counsel was prepared to proceed. On July 3, 2014, the Defense Office of Hearings and Appeals (DOHA) assigned the case to another administrative judge, and on July 17, 2014, the case was transferred to me. On July 22, 2014, DOHA sent notice of the hearing, setting the hearing for July 30, 2014. Applicant waived his right to 15 days of notice of the date, time, and place of the hearing. (Tr. 134-135) The hearing was held as scheduled. I received the transcript of the hearing on August 7, 2014.

Procedural Rulings

At the hearing, Department Counsel offered 5 exhibits, and Applicant offered 17 exhibits. (Tr. 15-24; GE 1-5; AE A-Q) There were no objections, and I admitted them into evidence. (Tr. 16, 24; GE 1-5; AE A-Q)

Department Counsel and Applicant requested administrative notice (AN) of facts concerning India. (Tr. 8-9; AN Requests) Department Counsel and Applicant provided supporting documents to show detail and context for those facts. (AN Requests) There were no objections about the accuracy of the AN materials, and I granted Department Counsel and Applicant's requests. (Tr. 9) The AN requests are quoted at pages 5-8, *infra* (some punctuation corrected or omitted).

Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004) and *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). Usually administrative notice at ISCR proceedings is accorded to facts that are either well known or from government reports. See Stein, ADMINISTRATIVE LAW, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice).

Findings of Fact¹

Applicant's SOR response admitted the allegations in SOR ¶¶ 1.a to 1.g, and 2.a, and he provided mitigating information. (HE 3) His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

¹To protect Applicant and his family's privacy, the facts in this decision do not specifically describe employment, names of witnesses, and names of other groups or locations. The cited sources contain more specific information.

Applicant is a 41-year-old information technology (IT) leader, manager, and company owner, who seeks a security clearance to facilitate contracts with the DOD. (Tr. 6) He was born and educated in India. (Tr. 27) He has a bachelor's degree in computer science engineering. (Tr. 27) In 1996, he came to the United States using a nonimmigrant worker visa. (Tr. 27-28) In 2001, he became a U.S. permanent resident, and in 2006, he became a naturalized U.S. citizen. (Tr. 28) Applicant intends to continue to live in the United States, and he intends to retire in the United States. (Tr. 28) He uses his U.S. passport for his foreign travel. (Tr. 51)

Applicant's spouse was born in India; she moved to the United States when she was 23; and she is a naturalized U.S. citizen. (Tr. 121) Applicant's two children are 11 and 13 years old. (Tr. 29) They were born, educated, and reside in the United States. (Tr. 29)

Applicant's oldest brother (44 years old) and his sister-in-law are permanent residents of the United States. (Tr. 60-62; SOR ¶ 1.f) Their two children are citizens and residents of the United States. (Tr. 61) He communicates with his oldest brother about once a month. (Tr. 62)

Applicant's next oldest brother (43 years old) and his sister-in-law are permanent residents of the United States. (Tr. 61-62; SOR ¶ 1.f) Their two children are citizens and residents of the United States. (Tr. 61-62) He communicates with his next oldest brother about once a month. (Tr. 62)

Applicant owns two homes in the United States. (Tr. 46) The current value of his residential home is about \$725,000, and his equity is about \$450,000. (Tr. 49; AE B) The mortgage on his rental home is paid off in full. (Tr. 47) He has about \$11,000 in his U.S. bank account. (Tr. 47; AE D) The cash value of a \$1 million life insurance policy is \$80,000. (Tr. 48; AE E)

Applicant volunteers in support of religious endeavors in his state. (Tr. 42) He also volunteers and mentors to assist commercial opportunities and businesses in his state. (Tr. 43) He pays his U.S. taxes. (Tr. 46)

Family Connections to India

Applicant's mother and father are citizens and residents of India; he visits them about once a year; and he communicates with them at least twice a month. (Tr. 54-55; SOR ¶ 1.a) He contributes up to \$500 monthly to support his parents, except for one year, he provided \$1,500 because his mother was ill. (Tr. 55-56; SOR ¶ 1.d) His father is retired, except for his work for the India company, discussed *infra*, and his mother is a homemaker. (Tr. 54-55) Applicant's mother or father visited him in the United States in 2008, 2010, and 2013. (Tr. 103)

Applicant's mother-in-law and father-in-law are citizens and residents of India. (Tr. 59; SOR ¶ 1.c) He communicates with them about once a month, and his spouse communicates with them on a weekly basis. (Tr. 59) They are both retired. (Tr. 60)

Applicant's younger brother (39 years old) is a citizen and resident of India. (Tr. 62; SOR ¶ 1.b) He communicates with his younger brother less than once a month. (Tr. 63)

Applicant has never worked for the Indian government or been involved in Indian politics. (Tr. 50) None of his family members have ever worked for the Indian government. (Tr. 55) Applicant traveled to India an average of about once a year, and he stays two or three weeks for each trip. (Tr. 51) Sometimes his U.S. family accompanies him on his visits to India. (Tr. 104) He traveled to India the month before his hearing and stayed in India for almost 30 days. (Tr. 51, 92, 119-120) In 2013, he surrendered his expired Indian passport to a security officer, who destroyed his Indian passport. (Tr. 52-53, 98-99)

Applicant's Other Financial Connections to India and the United States

In 2001, Applicant started a company in the United States (U.S. company) with about 10 employees. (Tr. 29-30) It flourished under the Small Business set aside program. (Tr. 33, 37) By 2004, his U.S. company had about 40 employees. (Tr. 30) Gradually his U.S. company obtained more and more U.S. state and federal government work. (Tr. 30-31) Currently, almost 100 percent of his U.S. company contracts are with state governments and DOD. (Tr. 31, 34-35) Last year, his U.S. company hired about 40 new employees, and now his U.S. company has about 80 employees with less than 10 employees working on commercial contracts. (Tr. 31, 35) In 2013, Applicant's U.S. company had gross revenue of about \$15 million, cost of revenue of about \$10 million, and net income of about \$1 million. (Tr. 36, 114-115; AE P)² The growth and professionalism of his U.S. company has been so impressive that it has garnered publicity from U.S. national publications and awards from a state government. (Tr. 38-41; AE F, G, Q)

Applicant currently owns 100 percent of the shares of common stock issued by his U.S. company, and he plans to distribute 19 percent of the shares of his U.S. company to employees in the future. (Tr. 45, 110; AE A) In 2013, he received wages of about \$100,000 from his U.S. company, about \$100,000 from profits, and about \$10,000 rental income, as well as use of a corporate vehicle. (Tr. 46, 95, 111-112, 115; AE C) His estimated annual income in 2013 was about \$210,000. (Tr. 112)

In 2001, Applicant started the company in India (India company). (Tr. 88; SOR ¶¶ 1.g and 2.a) The India company is a privately held corporation. (Tr. 89) It has about 10 employees and limited operations. (Tr. 32, 64) In 2009, Applicant advertised on the Internet that he was the global chief executive officer (CEO) of both the U.S. and India companies; however, his role changed after 2009. (Tr. 107-108) Applicant is no longer a board member for the India company, and he has divested himself of his India company stock. (Tr. 72) Applicant's parents are the two board members for the India company, and his father is the managing director of the India company. (Tr. 89, 90) Applicant's

² The transcript has errors in the amounts and nomenclature of Applicant's companies and other documents. Applicant's hearing statement was consistent with the information in AE E, insurance information, and AE P, Company Statement of Operations for 2013.

U.S. company owns about 95 percent of the India company stock, and Applicant's father owns the remainder. (Tr. 73, 87; AE M) The India company's contracts pertain to internal India work and not to work performed in the United States. (Tr. 64) The India company is separate from Applicant's U.S. company, and the India company will not be permitted access to the U.S. company's classified information. (Tr. 65, 79-80; AE V) Applicant does not have any management responsibilities in the India company, and he does not receive a salary from the India company. (Tr. 64, 81) He spends about one hour a week working on the India company's issues. (Tr. 109) In 2013, the India company had gross revenue of about \$500,000, no cost of revenue, and net income of about \$150,000. (Tr. 36; AE P) He does not personally own any property in India. (Tr. 53) He had about \$10,000 in one bank account and several smaller bank accounts in India, and he closed all of his bank accounts in India. (Tr. 57-58; AEs H-K; SOR ¶ 1.e) However, he may or may not have a joint bank account with his father in India. (Tr. 94)

In about 2007, the India company started construction of a massive building in India. (Tr. 65-66, 70) In about 2010, Applicant loaned the India company about \$350,000 to complete the building. (Tr. 74-75, 79; AE L) His U.S. company provided additional funds to the India company and received stock in return. (Tr. 88-89) In about 2012, the India company decided to sell the large building that is the India company's primary asset. (Tr. 65-66) The building is currently for sale. (Tr. 85) Only about 15 percent of the building is occupied. (Tr. 66) Applicant estimated the building was worth "nearly 2.5 million plus." (Tr. 78, 85, 116-117) The current balance owed on the loan is about \$300,000. (Tr. 79) When the building is sold, Applicant's personal loan will be repaid, and his U.S. company will receive about 95 percent of the sale price after the loan is paid. (Tr. 86, 117-118) When he goes to India, he usually stops and looks at the India company building. (Tr. 92)

India

India is a multiparty, parliamentary democracy with a population of approximately 1.2 billion people. The U.S. and India share common values including the rule of law, respect for diversity, and democratic government. The U.S. Department of State reported in 2012 that bilateral defense and counterterrorism cooperation between the U.S. and India had grown to reach unprecedented levels. In 2009, the U.S. and India launched the U.S.-India Strategic Dialogue, which is a bilateral forum focused on strengthening cooperation between the two countries in several areas, including energy, climate change, trade, education, and counterterrorism. The U.S. supports a reformed United Nations Security Council that includes India as a permanent member. The U.S. is one of India's largest trade and investment partners. Bilateral trade in goods and services between the two countries exceeded \$86 billion in 2011.

The 2008 Annual Report to Congress on Foreign Economic Collection and Industrial Espionage identifies India, along with seven other countries, as being involved in criminal espionage and U.S. export controls enforcement cases in 2008. An earlier version of that report specifically lists India as being among the most active collectors of U.S. economic and proprietary information and highlights specific incidents wherein India engaged in attempts to acquire export-restricted products.

In its 2009-2011 Report to Congress, the Office of the National Counterintelligence Executive noted that sensitive U.S. economic information and technology are targeted not only by Chinese and Russian intelligence services, but also by dozens of other countries. The Report states that: "Some U.S. allies and partners use their broad access to U.S. institutions to acquire sensitive U.S. economic and technology information, primarily through aggressive elicitation and other human intelligence (HUMINT) tactics. Some of these states have advanced cyber capabilities.

According to the U.S. Department of Justice, there have been numerous, recent criminal cases concerning export enforcement, economic espionage, theft of trade secrets, and embargo-related criminal prosecutions involving both the government of India and private companies and individuals in India. In January 2013, the former export control manager of a Pennsylvania-based company pleaded guilty to the illegal, unlicensed export to India and China of over 57 microwave amplifiers, products that have military applications. In November 2011, an employee of a Utah-based scientific company was charged with stealing company proprietary information for use in India. In March 2008, a Minnesota-based company pleaded guilty to submitting false export licenses to the Commerce Department in connection with the shipment of nuclear testing equipment to an entity in India. In 2008, the Department of Justice brought two separate cases against defendants charged with illegally exporting controlled products to Indian government entities involved in the development of ballistic missiles, as well as space launch vehicles and combat fighter jets.

Other such cases concerning the illegal export, or attempted illegal export, of U.S. restricted, dual-use technology to India have included: (1) military night vision components; (2) vibration amplifiers and cable assemblies, for use in both military and civilian aircraft; (3) manufacturing equipment related to improving the accuracy of strategic ballistic missiles with nuclear capabilities;" and, multiple cases involving illegal export of products presenting what the U.S. Government deemed to be "an unacceptable risk of diversion to programs for the development of weapons of mass destruction" or related delivery systems.

India and Pakistan have been locked in a tense rivalry since the partition of the subcontinent following independence from Great Britain in 1947. The principal source of contention has been Kashmir, whose Hindu leadership chose to join India at the time, despite a Muslim majority population. India and Pakistan have engaged in three full-scale wars between 1947 and 1971, and as recently as 1999, a Pakistani military intrusion into Indian-held territory nearly led to another full-scale war. The Indian states of Jammu & Kashmir remains unstable, and a number of terrorist groups operate there, particularly along the Line of Control separating Indian and Pakistani-controlled Kashmir. The State Department strongly recommends avoiding travel to the states of Jammu and Kashmir.

India continues to experience terrorist and insurgent activities that may affect U.S. citizens. Anti-Western terrorist groups, some on the U.S. Government's list of foreign terrorist organizations, are active in India, including Islamist extremist groups such as Harkat-ul-Jihad-i-Islami, Harakat ul-Mujahidin, India Mujahideen, Jaish-e-

Mohammed, and Lashkar-e Tayyiba. India remains subject to violent terrorist attacks and continues to be one of the most persistently targeted countries by transnational and domestic terrorist groups. Most notably, in late November 2008, terrorists coordinated attacks on multiple locations in Mumbai, targeting areas frequented by Westerners and killing at least 183 people, 165 of whom were civilians, including 6 Americans. Subsequent terrorist attacks in 2012 and 2013 underscore that India remains targeted.

According to the U.S. Department of State's 2013 Human Rights Report, the most significant human rights problems in India were police and security force abuses, including extrajudicial killings, torture, and rape; widespread corruption at all levels of government, leading to denial of justice; and separatist, insurgent, and societal violence. Other human rights problems included disappearances, poor prison conditions that were frequently life threatening, arbitrary arrest and detention, and lengthy delays or the denial of justice. Rape, domestic violence, dowry-related deaths, honor killings, sexual harassment, and discrimination against women remained serious problems. Widespread impunity at all levels of government remained a serious problem. Investigations into individual cases and legal punishment for perpetrators occurred, but in many cases a lack of accountability due to weak law enforcement, a lack of trained police, and an overburdened, under-resourced court system created an atmosphere of impunity.

The United States and India share a number of security perspectives, including those on China and Asian balance of power calculations, terrorism, Afghanistan, maritime issues, and weapons of mass destruction. However, on a practical rather than strategic level, considerable differences remain, particularly as to Pakistan and Iran.

India's relations with Iran have traditionally been positive. While India has reluctantly supported some measures against Tehran, it has been careful not to break ties, since to do so would increase India's energy dependence on the Arab Persian Gulf states. Since 2008, imports into India from Iran have dropped from 16% to 10% of India's total import volume, and pressure from the U.S. has spurred India to plan an additional 11% reduction in 2013. India remains firm in protecting its diplomatic and trade ties with Iran not only to demonstrate its strategic autonomy, but also to ensure diversity in its energy resource providers. India "emphatically supports Tehran's right to the peaceful use of nuclear energy," though they are "keen to prevent the emergence of another nuclear power in the region." India's traditionally lenient stance on Iran has been a perennial source of friction with the United States.

Concerning Pakistan, U.S. policy and India policy have often been at odds. Although the current Indian government has actively engaged in a peace process with Pakistan's government, Indian officials have long maintained that Pakistan's security services, in particular its Inter Services Intelligence agency, are at the heart of the region's and perhaps the world's problems with Islamic extremism—a perspective that places India at odds with the U.S., whose policy has conceived of Pakistan's security institutions as key players in resolving such problems, even as U.S. doubts persist.

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 has remained reticent to discuss its nuclear security measures or allow inspections. India has also refused to accede to the nuclear Non-Proliferation Treaty despite U.S. policy supporting its universality.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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 applicant's 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 adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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, 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 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 "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. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, 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 about applicant's allegiance, loyalty, or patriotism. It 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 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). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[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

Foreign Influence

AG ¶ 6 explains the security concern about "foreign contacts and interests" stating:

[I]f 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 ¶ 7 indicates three conditions that could raise a security concern and may be disqualifying in this case:

(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;

(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 of foreign influence or exploitation.

Applicant was born and educated in India. His parents, parents-in-law, and brother are citizens and residents of India. He has frequent contacts with his parents and parents-in-law living in India. He sent money to his parents.

India company owes Applicant about \$300,000. Assuming the India-company-owned building, with an estimated value of about 2.5 million dollars sells, for that amount, Applicant should receive repayment of his loan of about \$300,000. Applicant's U.S. company should also receive about 95 percent of the 2.2 million dollar remainder, or about 2.1 million dollars. Applicant owns all of the stock in his U.S. company, and could pay himself the 2.1 million dollars, or he could otherwise use the funds to develop his U.S. company. Applicant has "a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the [Applicant] to heightened risk of foreign influence or exploitation." See ISCR Case No. 12-00120 (App. Bd. Feb. 10, 2014) (affirming denial of security clearance because of applicant's connections to India and noting administrative judge's findings of heightened risk in relation to family relationships and property interests of \$340,000 in India). AG ¶ 7(e) applies.

None of the disqualifying conditions apply to SOR ¶¶ 1.b, 1.e, and 1.f. Applicant has limited contacts with his younger brother living in India; he closed the bank account in his name in India that had a balance of \$10,000 in it; and two of his brothers are living in the United States as permanent U.S. residents. SOR ¶¶ 1.b, 1.e, and 1.f are mitigated.

AG ¶ 7(d) applies to SOR ¶ 1.c. Applicant lives with his spouse in the United States. His spouse is close to her parents, who are residents and citizens of India. She communicates with her parents on a weekly basis.

There is a rebuttable presumption that a person has ties of affection for, or obligation to, their immediate family members. See *generally* ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at *8 (App. Bd. Feb. 20, 2002). Applicant has ties of affection and obligation to his spouse, and she is close to her parents. "[A]s a matter of common sense and human experience, 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. 07-17673 at 3 (App. Bd. Apr. 2, 2009) (citing ISCR Case No. 01-03120 at 4 (App. Bd. Feb. 20, 2002)). This concept is the basis of AG ¶ 7(d). Thus, an indirect, but important tie remains between Applicant and his in-laws living in India. Indirect influence from Applicant's in-laws living in India, through Applicant's spouse to Applicant, could result in a security concern.

Applicant's relationships with residents of India create a concern about Applicant's "obligation to protect sensitive information or technology" and his desire to

help his spouse and her parents, or his own parents, who are in India. For example, if terrorists or government officials in India wanted to expose Applicant to coercion, they could exert pressure on his in-laws or parents in India. Applicant would then be subject to coercion through his relatives and classified information could potentially be compromised.

Applicant and his spouse's possession of close family ties with their family living in India, is not, as a matter of law, disqualifying under Guideline B. However, if an applicant or their spouse has a close relationship with even one relative, living in a foreign country, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. See *Generally* ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

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 or inducement. 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 collection operations against the United States. The relationship of India with the United States, places some, but not an insurmountable burden of persuasion on Applicant to demonstrate that his and his spouse's relationships with family members living in India do not pose a security risk. Applicant should not be placed into a position where he might be forced to choose between loyalty to the United States and a desire to assist relatives in India.

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, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. See ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002).

While there is no evidence that intelligence operatives or terrorists from India seek or have sought classified or economic information from or through Applicant, his spouse, or his relatives living in India, nevertheless, it is not possible to rule out such a possibility in the future. International terrorist groups are known to conduct intelligence activities as effectively as capable state intelligence services, and India has a problem with terrorism. Applicant and his spouse's relationships with family members living in India create a potential conflict of interest because these relationships are sufficiently close to raise a security concern about his desire to assist relatives in India by providing sensitive or classified information. Department Counsel produced substantial evidence of Applicant and his spouse's contacts with family living in India. Department Counsel

has raised the issue of potential foreign pressure or attempted exploitation, and further inquiry is necessary about potential application of any mitigating conditions.

AG ¶ 8 lists six conditions that could mitigate foreign influence security concerns including:

(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;

(d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;

(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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

AG ¶¶ 8(a) and 8(c) have limited applicability. Applicant and his spouse have frequent contacts with their parents, who are living in India. Their loyalty and connections to family living in India are positive character traits. However, for security clearance purposes, those same connections negate the possibility of mitigation under AG ¶ 8(a), and Applicant failed to fully meet his burden of showing there is “little likelihood that [his spouse’s relationships with her relatives who are India citizens] could create a risk for foreign influence or exploitation.”

AG ¶ 8(b) partially applies. A key factor in the AG ¶ 8(b) analysis is Applicant’s “deep and longstanding relationships and loyalties in the U.S.” Applicant has significant connections to the United States. In 1996, Applicant immigrated to the United States from India, and he became a U.S. citizen in 2006. His spouse and two children are U.S. citizens, and live in the United States. When he took an oath and swore allegiance to the United States in 2006, as part of his naturalization as a U.S. citizen, and when he volunteered to assist the U.S. Government as a contractor, he manifested his patriotism, loyalty, and fidelity to the United States over all other countries.

Applicant’s relationship with the United States must be weighed against the potential conflict of interest created by his relationships with family living in India. Applicant and his spouse frequently communicate with their parents living in India. There is no evidence, however, that terrorists, criminals, the Indian Government, or those conducting espionage have approached or threatened Applicant, his spouse, or their family to coerce Applicant for classified or sensitive information.³ As such, there is a reduced possibility that Applicant or his family living in India would be specifically selected as targets for improper coercion or exploitation. Of course, the primary risk to his family living in India is from terrorists and other lawless elements and not the Indian Government.

While the U.S. Government does not have any burden to prove the presence of such evidence, if such record evidence were present, Applicant would have a heavier evidentiary burden to mitigate foreign influence security concerns. It is important to be mindful of the United States’ sizable financial and diplomatic investment in India. Applicant and his spouse’s family in India could become potential targets of terrorists because of Applicant’s support for the United States, and Applicant’s potential access to classified information could theoretically add some risk to Applicant’s family from lawless elements in India.

AG ¶¶ 8(d) and 8(e) do not apply. The U.S. Government has not encouraged Applicant’s involvement with family members living in India. Applicant is not required to report his contacts with citizens or residents of India.

AG ¶ 8(f) does not apply to Applicant’s interest in the building owned by India company in India. Applicant has a substantial investment in India. His interest in the

³There would be little reason for U.S. enemies to seek classified information from an applicant before that applicant has access to such information or before they learn of such access.

building in India is about 2.4 million dollars, which is ten times his income in 2013. AG ¶ 8(f) applies to SOR ¶ 1.d. The amount of money that Applicant provides to his parents is insufficient in comparison to his assets and income to establish a security concern. SOR ¶ 1.d is mitigated.

In sum, Applicant and his spouse's connections to family living in India are significant. They communicate with family in India frequently and are close to them. He travels to India almost every year and stays for two to three weeks. The month before his hearing, he went to India for almost 30 days. Security concerns are not analyzed in a piecemeal assessment. Instead, the overall situation must be considered. The primary impediment to Applicant's access to classified information is his interest, through his U.S. company, in the India company building, which amounts to over two million dollars. Once his U.S. company and Applicant have divested of their interest in India company and its primary asset, this impediment to his access to classified information could be mitigated. Foreign influence security concerns under Guideline B are not mitigated at this time.

Outside Activities

AG ¶ 36 describes the outside activities security concern stating, "Involvement in certain types of outside employment or activities is of security concern if it poses a conflict of interest with an individual's security responsibilities and could create an increased risk of unauthorized disclosure of classified information."

AG ¶ 37 describes the conditions that could raise a security concern and may be disqualifying under the outside activities guideline. AG ¶ 37 provides:

(a) any employment or service, whether compensated or volunteer, with:

(1) the government of a foreign country;

(2) any foreign national, organization, or other entity;

(3) a representative of any foreign interest;

(4) any foreign, domestic, or international organization or person engaged in analysis, discussion, or publication of material on intelligence, defense, foreign affairs, or protected technology; and

(b) failure to report or fully disclose an outside activity when this is required.

AG ¶¶ 37(a)(2) and (4) apply. In 2009, Applicant advertised on the Internet that he was the founder, part-owner, chairman and CEO of India company, which was located in India and performing IT work. India company sought work in sensitive matters involving information technology.

AG ¶ 38 provides one condition that could mitigate security concerns in this case: “(b) the individual terminated the employment or discontinued the activity upon being notified that it was in conflict with his or her security responsibilities.” Applicant’s involvement with India company has decreased, and he is no longer involved in the day-to-day operations of that company. He has divested himself of his India company stock and his India company board membership. He has separated the operational IT features of his India company from his U.S. company. Applicant reduced his connections with India company and ensured that his India company and U.S. company are separate entities for work-related projects. AG ¶ 38(b) applies and outside activities concerns are mitigated.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an Applicant’s eligibility for a security clearance by considering the totality of the Applicant’s conduct and all 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. I have incorporated my comments under Guidelines B and L in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

The factors weighing towards approval of Applicant’s security clearance are less substantial than the factors weighing against its approval. There is no evidence that Applicant has engaged in criminal activity, abused alcohol or illegal drugs, or committed any security violations. When he was naturalized as a U.S. citizen in 2006, he swore allegiance to the United States. His spouse and two children are U.S. citizens and reside in the United States. His two brothers and their spouses and children live in the United States. He volunteered to serve as a contractor supporting the DOD. There is no evidence that terrorists or other foreign elements have specifically targeted Applicant.

Applicant is an extraordinary businessman and leader. The growth and professionalism of his U.S. company has been so impressive that it has garnered publicity from U.S. national publications and awards from a state government. Applicant volunteers in support of religious endeavors in his state. He also volunteers and mentors to assist commercial opportunities and businesses in his state. He pays his

U.S. taxes. His contributions to his family, city, state, and the U.S. Government are remarkable, and his potential for even greater accomplishments is unlimited.

A Guideline B decision concerning India must take into consideration the geopolitical situation and dangers there.⁴ India is a dangerous place because of violence from terrorists and other lawless elements, but not as dangerous as many other countries. Terrorists continue to threaten the Indian Government, the interests of the United States, and those who cooperate and assist the United States. The Indian Government does not fully comply with the rule of law or protect civil liberties in some instances. The United States and Indian Governments are allies in the war on terrorism. India and the United States have close relationships in diplomacy and trade. India and the United States have sometimes had profound policy disputes.

There are foreign influence security concerns arising from Applicant's parents and his spouse's parents living in India, and his financial interest in the India company's building in India that warrant greater weight than his connections to the United States. Applicant and his spouse's parents are Indian citizens, who live in India. They frequently communicate with their parents. He travels to India annually. Applicant's financial interest in the India property at 2.4 million dollars is about ten times his income in 2013. His close connections to family in India make Applicant more vulnerable as a target of coercion by lawless elements in India. His family and financial interests in India will be at a greater risk if his clearance is granted.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Although outside activities concerns are mitigated, I conclude Applicant has not carried his burden and foreign influence concerns are not mitigated at this time. Eligibility for access to classified information is denied.

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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraphs 1.d to 1.f:	For Applicant
Subparagraph 1.g:	Against Applicant

⁴ See ISCR Case No. 04-02630 at 3 (App. Bd. May 23, 2007) (remanding because of insufficient discussion of geopolitical situation and suggesting expansion of whole-person discussion).

Paragraph 2, Guideline L:

FOR APPLICANT

Subparagraph 2.a:

For 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 eligibility for a security clearance. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge