



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



In the matter of: )  
 )  
----- ) ISCR Case No. 14-03809  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Alison O'Connell, Esq., Department Counsel  
For Applicant: Orest J. Jowyk, Esq.

05/18/2016

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to revoke his eligibility for access to classified information. He met his burden to present sufficient evidence to explain and mitigate the foreign influence security concern stemming from his family ties to India. Accordingly, this case is decided for Applicant.

**Statement of the Case**

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 Format) on November 18, 2013.<sup>1</sup> After reviewing the application and information gathered during a background investigation, the Department of Defense

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<sup>1</sup> Exhibit 1 (this document is commonly known as a security clearance application).

(DOD),<sup>2</sup> on December 23, 2014, sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him eligibility for access to classified information.<sup>3</sup> The SOR is similar to a complaint. It detailed the reasons for the action under the security guidelines known as Guideline B for foreign influence and Guideline C for foreign preference. He answered the SOR in writing on February 9, 2015, and requested a hearing.

The case was assigned to me on October 28, 2015. The hearing was held as scheduled on January 7, 2016. The transcript of the hearing (Tr.) was received on January 15, 2016.

### **Procedural Matters**

At the beginning of the hearing, Department Counsel withdrew the foreign preference allegation under ¶ 1 of the SOR, which was based on Applicant's use of an Overseas Citizen of Indian (OCI) registration certificate (essentially a visa) issued by the government of India to facilitate travel to India.<sup>4</sup> Accordingly, the foreign preference matter under Guideline C is not an issue in this case.

Without objections, I granted Department Counsel's written request to take administrative notice of facts concerning the country of India.<sup>5</sup> In addition, on my own motion, I took administrative notice of recent statements made by Defense Secretary Ash Carter concerning the defense partnership between the United States and India, a partnership rooted in shared ideals, mutual interests, and a spirit of innovation.<sup>6</sup>

### **Findings of Fact**

Applicant is a 61-year-old program manager for a technology company.<sup>7</sup> He described himself as a multi-disciplinary talented person with a scientific, technical, and

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<sup>2</sup> The SOR was issued by the DOD Consolidated Adjudications Facility, Fort Meade, Maryland. It is a separate and distinct organization from the Defense Office of Hearings and Appeals, which is part of the Defense Legal Services Agency, with headquarters in Arlington, Virginia.

<sup>3</sup> This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006).

<sup>4</sup> Tr. 11–12.

<sup>5</sup> Exhibit 2; 14–15.

<sup>6</sup> Appellate Exhibit I; 72–74.

<sup>7</sup> Tr. 26–27, 70–71.

management background.<sup>8</sup> His education includes bachelor's degrees in mathematics and electronics and a master's degree in computer science. He married his second wife in 2000, as his first marriage ended in divorce. He has two adult sons from his first marriage.

Applicant has worked for this technology company since September 2012. The DOD granted him a security clearance at the secret level in October 2012, and his current application is to upgrade the level to top secret.<sup>9</sup> With the benefit of an interim top-secret clearance, he deployed twice to Afghanistan, once in 2013 for about 30 days and again in 2014 for about 30 days.<sup>10</sup> As described by the company's chief executive officer (CEO), Applicant volunteered to be the first person from the company to go to Afghanistan to lead the transition of the contract and ensured the success of continued, uninterrupted operations of manned intelligence, surveillance, and reconnaissance flight missions in support of U.S. military in Afghanistan.<sup>11</sup> The living conditions were difficult,<sup>12</sup> and the bases where Applicant lived and worked were subject to indirect fire on a regular basis.<sup>13</sup> Back in the United States he continues to perform important work by leading a technical group working on matters involving satellite resources.<sup>14</sup>

Applicant presented extensive evidence (four statements and one witness) of his good character.<sup>15</sup> Taken together, this information shows Applicant is highly regarded by his work colleagues and they consider him to be an honest, reliable, and trustworthy person. The witness described Applicant as a "brilliant engineer" who has a wide range of experience that is applicable to much of the work the company performs for the Defense Department.<sup>16</sup> He believes Applicant has a "strong moral compass" and is "absolutely top" in the areas of reliability, trustworthiness, and good judgment.<sup>17</sup>

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<sup>8</sup> Exhibit A.

<sup>9</sup> Tr. 5, 18–21.

<sup>10</sup> Tr. 32–43.

<sup>11</sup> Exhibit B.

<sup>12</sup> Tr. 38.

<sup>13</sup> Tr. 40–41.

<sup>14</sup> Exhibit E.

<sup>15</sup> Exhibits B, C, D, and E; Tr. 74–84.

<sup>16</sup> Tr. 76.

<sup>17</sup> Tr. 80, 82.

## **1. *Applicant's background in India and immigration to the United States***

Applicant was born, raised, and educated in India. He studied and was awarded the two bachelor's degrees in 1974 and 1977, respectively. He worked as a programmer analyst for an Indian electrical firm during 1974–1978. He immigrated to the United States in January 1979 on a student visa. He was awarded the master's degree in May 1980. Thereafter, he began a long career working in technology, including working for major financial institutions.<sup>18</sup>

During 1996–2004, he founded and served as the CEO of his own technology company. He grew the business to a 400-employee company with offices in the United States, Australia, India, and the United Kingdom. He sold the company and used the sale proceeds to support his family for the next eight years while he and his wife took an extended sabbatical, the details of which are discussed below.

## **2. *Applicant's ties to India and the United States***

Applicant became a naturalized U.S. citizen in March 1988.<sup>19</sup> His current U.S. passport was issued to him in 2008. His wife is also a native of India as well as a naturalized U.S. citizen. She is employed by the same technology company as Applicant, as she has subject-matter expertise working with financial management software. The DOD granted her a security clearance at the secret level for her current employment.<sup>20</sup> His twin sons are native-born U.S. citizens who are living and working in the United States. One son is an attorney and the other is a research scientist. Both are unmarried. In addition to his wife and sons, Applicant has a large extended family who are citizens of and residents in the United States.<sup>21</sup> This includes a younger brother who is employed by a communications and information technology company.<sup>22</sup>

Applicant's father, age 88, and mother, age 84, are both lifelong citizens of and residents in India. (SOR ¶¶ 2.a and 2.b) He described his father as mobile, but significantly aged, while his mother is ill and bedridden.<sup>23</sup> His father retired in 1992 after a career spent working for two privately-owned companies. His mother has never worked outside the home. They both reside on a farm that contains a small school for underprivileged children in a small village in rural India. His father or mother have never had any employment with or other service connected to the Indian government, and

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<sup>18</sup> Exhibit A.

<sup>19</sup> Exhibit N.

<sup>20</sup> Tr. 68

<sup>21</sup> Tr. 63–64.

<sup>22</sup> Tr. 63.

<sup>23</sup> Tr. 29.

neither receives a pension or income based on any service with the Indian government or military. Applicant calls his parents regularly, generally on a weekly basis, and he sees them in person when visiting India.

Applicant has two sisters in addition to his younger brother. One sister is 56 years old and she is a citizen of and a resident in India. (SOR ¶ 1.c) She runs the school for underprivileged children on her father's farm. Her husband works as a jewelry designer. The school serves children from the local village who are unable to afford the small fee to attend the local school. She has never had any employment with or other service connected to the Indian government. She receives no pension or income from the Indian government or military. Applicant calls his sister regularly, generally weekly, and sees her in person when he is in India visiting their parents.

Applicant's other sister is 58 years old and she is a citizen of and a resident in the United States, although she travels back and forth to India to provide care for her parents. (SOR ¶ 1.d) She lives with her daughter and granddaughter in the United States.

In addition, Applicant has a small bank account (worth about \$1,000 to \$2,000) in India co-owned by him and his wife that they use to help his parents, and a small bungalow in India (valued at about U.S. \$50,000 to \$60,000) co-owned by his wife and mother-in-law.<sup>24</sup> Applicant understands that he has no property rights or financial interests in the bungalow. The bungalow is now on the market for sale.<sup>25</sup> Otherwise, Applicant has no financial, business, or property interests in India. Here in the United States, in addition to a household annual income of about \$300,000, they have financial assets worth about \$1.1 million.<sup>26</sup> The assets include two residential properties, one of which they have owned since at least 2000. The second home in their state of current residence was purchased in February 2015 for about \$500,000.<sup>27</sup>

### **3. *Applicant's extended sabbatical in Indian during 2004–2012***

After successfully selling his technology company, Applicant decided it was the right time and he was the right age to explore a longstanding philosophical or spiritual question.<sup>28</sup> To that end, he along with his wife lived in India for the next eight years

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<sup>24</sup> The financial matters in India were not alleged in the SOR.

<sup>25</sup> Tr. 30.

<sup>26</sup> Exhibit F.

<sup>27</sup> Tr. 71.

<sup>28</sup> Tr. 43–46.

during 2004–2012. He disclosed his travel, his residential addresses, and employment in India in his security clearance application.<sup>29</sup>

Upon arrival in India, Applicant rented living quarters for his wife near her extended family. He then wandered, going to different spiritual places where he met with spiritual masters (e.g., yogis and mahatmas) who guided him on his spiritual journey.<sup>30</sup> He would be away for six months or so at a time, returning to visit his wife and his parents. And he would sometimes perform some form of charity work on the instruction of the spiritual masters. He eventually found his own spiritual master or guru, a man who was over 100 years of age, who is now deceased.<sup>31</sup>

During this period, in 2008, Applicant's wife and mother-in-law bought the bungalow in India.<sup>32</sup> In addition to the spiritual journey, Applicant worked periodically, without financial compensation, consulting for three companies in India.<sup>33</sup> He relied on the proceeds from the sale of his company to support himself and his wife during this period.<sup>34</sup> In addition to the time in India, he and his wife traveled to the United Kingdom in 2009 and to France in 2010 for tourism or vacation.<sup>35</sup>

During a trip to the United States in 2011, Applicant met with the CEO of the technology company who invited him to join the company due to his expertise.<sup>36</sup> He returned to India and consulted with his spiritual master who advised him to do the work for the company; his wife was also ready to return to the United States after more or less living on her own for eight years; and his twin sons were 25 or 26 years old and he wanted to see them get settled.<sup>37</sup> He and his wife returned to the United States in 2012, and they began their respective jobs with the technology company. Other than his deployments to Afghanistan, Applicant has lived and worked in the United States without interruption since 2012. His intention was to return to the United States once he

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<sup>29</sup> Exhibit 1.

<sup>30</sup> Tr. 45–46.

<sup>31</sup> Tr. 48–49.

<sup>32</sup> Tr. 49–50.

<sup>33</sup> Tr. 50–53.

<sup>34</sup> Tr. 53.

<sup>35</sup> Exhibit 1.

<sup>36</sup> Tr. 53.

<sup>37</sup> Tr. 54.

completed his spiritual journey, and he never considered renouncing his U.S. citizenship or giving up his U.S. passport.<sup>38</sup>

#### **4. Applicant's credibility during the hearing**

Applicant was businesslike, thoughtful, and respectful throughout the hearing, and he answered questions in an open and honest way. I was favorably impressed by Applicant, and I had no concerns about his credibility or truthfulness.

### **Law and Policies**

It is well-established law that no one has a right to a security clearance.<sup>39</sup> As noted by the Supreme Court in *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>40</sup> Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.<sup>41</sup> An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.<sup>42</sup>

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>43</sup> The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>44</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate

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<sup>38</sup> Tr. 60–62.

<sup>39</sup> *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10<sup>th</sup> Cir. 2002) (no right to a security clearance).

<sup>40</sup> 484 U.S. at 531.

<sup>41</sup> Directive, ¶ 3.2.

<sup>42</sup> Directive, ¶ 3.2.

<sup>43</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>44</sup> Directive, Enclosure 3, ¶ E3.1.14.

facts that have been admitted or proven.<sup>45</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>46</sup>

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>47</sup> The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.<sup>48</sup>

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.<sup>49</sup> Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

## Discussion

The gravamen of the SOR under Guideline B is whether Applicant's family ties to India disqualify him from eligibility for access to classified information. Under Guideline B for foreign influence,<sup>50</sup> the suitability of an applicant may be questioned or put into doubt due to foreign connections and interests. The overall concern is:

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

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<sup>45</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>46</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>47</sup> *Egan*, 484 U.S. at 531.

<sup>48</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

<sup>49</sup> Executive Order 10865, § 7.

<sup>50</sup> AG ¶¶ 6, 7, and 8 (setting forth the concern and the disqualifying and mitigating conditions).



States citizens to obtain protected information and/or is associated with a risk of terrorism.<sup>51</sup>

There are three additional considerations in analyzing the evidence in this case. First, in the defense industry, foreign-born engineers and scientists play a critical role in developing and implementing new technology, and that technology may be of interest to others whose interests are contrary to the United States. Second, most foreign travel is for vacation, business, education, or to visit family, which is normal and not by itself a security concern. The significance of foreign travel depends upon the country involved and the nature of an applicant's contacts in that country. Third, foreign travel is also relevant when it is an indication of the strength of an applicant's family ties to that country.

The guideline contains several disqualifying conditions. Given the evidence of Applicant's family ties to India, I have considered the following disqualifying conditions:

AG ¶ 7(a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion; and

AG ¶ 7(b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect classified information or technology and the individual's desire to help a foreign person, group, or country by providing that information.

Based on U.S. concerns about (1) industrial and economic espionage, (2) the risk of terrorism in India, (3) India's relationships with Iran, Pakistan, and Russia, and (4) human-rights matters, India meets the heightened-risk standard in AG ¶ 7(a). This conclusion is based on the facts set forth in Department Counsel's administrative notice request.<sup>52</sup>

Applicant's family ties to India are sufficient to raise a concern. Applicant is a U.S. citizen living in the United States, but his elderly parents and one sister are citizen-residents of India, and his second sister is a regular visitor to India. It was obvious to me that Applicant has close ties of affection or obligation or both to his parents, a circumstance I am certain that Applicant does not dispute. In addition, his travel to and residence in India during 2004–2012 is indicative of the strength of his ties to his family to India. Taken together, these matters are sufficient to justify further review.

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<sup>51</sup> AG ¶ 6.

<sup>52</sup> Exhibit 2.

The guideline also contains several mitigating conditions. Given the evidence here, I have especially considered the following mitigating conditions:

AG ¶ 8(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the United States; and

AG ¶ 8(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest.

Applicant is a successful engineer and entrepreneur who has spent the majority of his adulthood living and working in the United States. He has lived, obtained higher education, and worked in the United States since 1979, excluding the eight-year period of 2004–2012, when he was in India. Nearly all of his financial assets are in the United States, as are his wife, twin sons, sister, brother, and extended family members. His ties or connections to his family in India are what you would expect given his age and family circumstances. There is nothing unusual or odd about his family ties to India.

Applicant's travel to and residence in India during 2004–2012 is an unusual or special circumstance. It is not the type of special purpose travel for shorter periods that is sometimes seen in security clearance cases (e.g., tax havens and adoption of children). In assessing this circumstance, I have considered Applicant's motivation for his travel to and residence in India.<sup>53</sup> Based on the totality of facts and circumstances, I am persuaded that his primary motivation was to undertake a rather challenging spiritual journey, which required him to meet with various spiritual masters. It was a bit of a happenstance that the spiritual masters were in India. The fact that Applicant was born in India and had parents and a sister living there were part of the equation too, but not his primary motivation.

The security clearance process is not a zero-risk program, because nearly every person presents some risk or concern. Many cases come down to balancing that risk or concern. Here, Applicant has family ties to India. Those circumstances should not be dismissed or overlooked as fanciful or unrealistic, especially considering the matters the United States views of concern in India. Nevertheless, on balance, I am satisfied that his ties to the United States outweigh and overcome his ties to India, a country he left in 1979 so he could immigrate to the United States. Indeed, he appears to be a model immigrant in many ways. He also took the extra step of volunteering to deploy to Afghanistan, in 2013 at the age of 59 and again in 2014 at the age of 60, to perform

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<sup>53</sup> AG ¶ 2(a)(7) ("the motivation for the conduct").

important work under difficult and dangerous conditions in support of the U.S. military. Those matters are entitled to substantial weight, they reflect great credit upon Applicant, and they are indicative of his dedication to the United States. Viewing the record evidence as a whole, I am confident that Applicant can be expected to resolve any potential concern or potential conflict of interest in favor of the U.S. interest.

Applicant met his burden to present sufficient evidence to explain and mitigate the foreign influence security concern stemming from his family ties to India. I have no doubts about his reliability, trustworthiness, and good judgment. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.<sup>54</sup> Accordingly, I conclude that he has met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

### **Formal Findings**

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline C:	Withdrawn
Subparagraph 1.a:	Withdrawn
Paragraph 2, Guideline B:	For Applicant
Subparagraphs 2.a–2.d:	For Applicant

### **Conclusion**

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for access to classified information.

Michael H. Leonard  
Administrative Judge

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<sup>54</sup> AG ¶ 2(a)(1)–(9).