

DATE: December 15, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-18952

**DECISION OF ADMINISTRATIVE JUDGE**

**MARTIN H. MOGUL**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esq., Department Counsel

**FOR APPLICANT**

Robert Alan Soltis, Esq.

**SYNOPSIS**

Applicant is a 63 year-old, naturalized United States citizen. He was born in India, moved to the United States in 1972, and became naturalized in 1982. Applicant has several immediate family members who are citizens of and reside in India, but they are not in a position to be exploited by India in a way that could force Applicant to choose between loyalty to these family members and his loyalty to the United States. Applicant has a strong attachment to the United States, with a long and successful career and substantial financial interest here, and he is unlikely to respond favorably to any efforts to act against United States interests. Mitigation has been shown. Clearance is granted.

**STATEMENT OF THE CASE**

On May 2, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

In a signed and sworn statement, dated June 16, 2003, Applicant responded in writing to the SOR allegations. He requested a clearance decision based on a hearing record.

On August 8, 2003, this case was assigned to this Administrative Judge to conduct a hearing and issue a written decision. A Notice of Hearing was issued to the parties on September 2, 2003, and the hearing was held on September 15, 2003.

At the hearing, Department Counsel offered five documentary exhibits (Exhibits 1 - 5) and no witnesses were called. Applicant appeared with counsel, offered six documentary exhibits (Exhibits A - F) and offered his own testimony and the testimony of his brother and two other witnesses. The transcript (TR) was received on September 29, 2003.

## FINDINGS OF FACT

In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline B of the Directive because Applicant's immediate family members are not United States citizens and may be subject to duress. The SOR contains six allegations, 1.a. through 1.f., under Guideline B (Foreign Influence). In his response to the SOR, Applicant admits all of the specific allegations. The admitted allegations are incorporated as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the testimony of the witnesses at the hearing, and the admitted documents, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 63 years old. He was born in India, moved to the United States in 1972 and became a naturalized United States citizen in 1982. He received the equivalent of a masters degree in engineering and a Masters of Business Administration. He currently works as a principal systems engineer, for the same company where he has been employed for twenty years. Applicant has never been married and has no children. Applicant assessed the net value of his assets in the United States at approximately one million dollars (Tr at 74, 74).

Applicant has two sisters and one brother who reside in the United States. The brother is a citizen of the United Kingdom, but he is in the process of becoming a United States citizen.

Applicant also has three sisters and one brother who are citizens of and reside in India. His oldest sister was a translator, who worked for a local government agency. She has now retired and is in the process of being treated for cancer (Tr at 65, 66). His second sister works as a zoning officer where she reports to the police commissioner. His third sister is a lawyer and does not work in any government capacity. His brother works for a state in India, where he disburses funds from Norway for the poor (Tr at 80-82). While Applicant's brother and one sister are employed by local governments in India, none of his family work for the central government of India.

When Applicant was given the hypothetical question as to what he would do if he was ever tested as to his loyalty to the United States versus his loyalty to his family, he testified that he would never betray the United States (Tr at 75, 76). Since there has been no actual set of circumstances that occurred similar to the hypothetical fact pattern, I can not give his statement a great deal of consideration ISCR Case No. 02-26826 (November 12, 2003). However, I believe that his testimony was credible.

In addition to Applicant and his brother, two witnesses testified on behalf of Applicant. Both witnesses have known Applicant as a coworker, with whom they worked closely for 20 years. Both witnesses were aware of Applicant's background, and the concern of the Government regarding Applicant's potential foreign influence problems with India. They strongly recommended him for a position of trust without any reservations (Tr at 51-55, 98-103). Applicant also introduced 10 letters of reference from individuals, all of whom have known Applicant for a considerable amount of time. They all made extremely positive recommendations about Applicant's trustworthiness and his character (Exhibit F).

## POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines that must be carefully considered in evaluating an individual's security eligibility and making the overall common sense determination required. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk.

Each adjudicative decision must also include an assessment of: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent

the behavior was; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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 (See Directive, Section E2.2.1. of Enclosure 2).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

### **FOREIGN INFLUENCE (GUIDELINE B)**

E2.A2.1.1. The Concern: A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. These situations could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

E2.A2.1.2. Condition that could raise a security concern and may be disqualifying include:

E2.A2.1.2.1. An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident in, a foreign country;

E2.A2.1.3. Condition that could mitigate security concerns include:

E2.A2.1.3.1. A determination that the immediate family member(s) . . . in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States.

### **BURDEN OF PROOF**

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with

the U.S. Government that is predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability, or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

**CONCLUSIONS**Based on the evidence of record, the Government has established an initial reason to deny Applicant a security clearance because of Guideline B (Foreign Influence) . Applicant's immediate family members are citizens of and reside in India. The Indian citizenship and residency of members of Applicant's immediate family create the potential for foreign influence that could result in the compromise of classified information because it makes Applicant potentially vulnerable to coercion, exploitation, or pressure. The possession of such ties raises a security concern sufficient to require Applicant to present evidence in rebuttal, extenuation, or mitigation sufficient to meet his burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for him.

The evidence of existence of immediate family members, who are citizens of and reside in, India comes within

Disqualifying Condition E2.A2.1.2.1. However, based on the nature of the overall record, including: the lack of involvement of Applicant's family members with the central government of India ; the successful career and significant financial accumulation that Applicant has established since coming to the United States more than 30 years ago; the extremely strong testimony about his feelings concerning the United States and what he would do if faced with a threat from a foreign government; the close relationship of India to the United States; and the strong recommendations for Applicant from two impressive witnesses and the individuals who wrote letters of reference, I have determined that his family members in India do not constitute an unacceptable security risk and Mitigating Conditions E2.A2.1.3.1 applies. After considering all of the evidence of record on these issues, I conclude that the mitigating evidence substantially outweighs the evidence supporting the SOR and, even in the unlikely event pressure was exerted upon Applicant to compromise classified information, he would resist it, and would report the incident to the proper authorities. Guideline B is found for Applicant.

### **FORMAL FINDINGS**

Paragraph 1. Guideline B: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

### **DECISION**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Martin H. Mogul

Administrative Judge