

DATE: May 23, 2005

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-00066

## **DECISION OF ADMINISTRATIVE JUDGE**

**ROGER E. WILLMETH**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Erin C. Hogan, Deputy Chief Department Counsel

#### **FOR APPLICANT**

William F. Savarino, Esq.

### **SYNOPSIS**

Applicant has mitigated security concerns regarding his outside activities by terminating his company's agreement with an Indian corporation. He no longer requires that company's services, having hired employees to perform the work. Applicant has also thereby mitigated foreign influence concerns to the extent he no longer engages in foreign travel to India to further that business relationship or has regular contact with that company's directors. Remaining foreign influence concerns regarding his parents are also mitigated. His parents have permanent residence status in the United States, spend half of each year here, and intend to apply for U.S. citizenship. Although Applicant's father receives a small pension from the Indian Government, Applicant's parents are not financially dependent on it, receiving greater income from their investments. Clearance is granted.

### **STATEMENT OF THE CASE**

On January 12, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to the applicable Executive Order [\(1\)](#) and Department of Defense Directive (Directive), [\(2\)](#) issued a Statement Reasons (SOR) to Applicant. The SOR details security concerns under Guideline B (Foreign Influence) and Guideline L (Outside Activities). The SOR states that DOHA was unable to find that it is clearly consistent with the national interest to grant him access to classified information and recommends that his case be submitted to an Administrative Judge.

On January 27, 2004, Applicant answered the SOR and requested a hearing. The case was assigned to me on May 28, 2004. A notice of hearing was issued on June 24, 2004 and the hearing was held on July 22, 2004. During the hearing, three Government exhibits (Govt Ex), eight Applicant exhibits (Ap Ex), and the testimony of Applicant were received. The transcript (Tr) was received on August 5, 2004.

### **FINDINGS OF FACT**

Having thoroughly considered the evidence in the record, I make the following findings of fact:

Applicant is a 45-year-old president and CEO of a U.S. systems integration and development company. He is the sole shareholder in the company. (SOR ¶ 2.a). Applicant is seeking a security clearance.

Applicant was born in India. He came to the United States with his parents when his father was posted to the Indian Embassy in Washington, DC in 1979. Applicant's father was employed by the Indian Government as an accountant until his retirement in 1991. He receives a small pension from the Indian Government. However, Applicant's parents receive a greater income from their investments. (SOR ¶ 1.b).

When his father was transferred back to India in 1983, Applicant remained in the United States to complete his education. Applicant married a citizen of India in 1986. He became a naturalized citizen of the United States in 1992. His wife became a U.S. citizen in 1999. They have two children.

Applicant's parents are citizens of India, where they reside for approximately six months each year. They are also permanent residents of the United States where they reside for the remainder of each year. Applicant's father states that he and his wife intend to apply for U.S. citizenship. Applicant's parents live with him for approximately three months each year and with Applicant's sister, who is a U.S. citizen, for approximately three months each year. (SOR ¶ 1.a). His parents are the sole shareholders in an Indian software development company. (SOR ¶ 1.d and ¶ 2.c).

In February 2001, Applicant traveled to India to visit family and to interview prospective suppliers of software development. He selected his parents' company to provide software development services to his company for a commercial product. (SOR ¶ 1.c and ¶ 2.b). Applicant traveled to India in February 2002 and November 2002 to visit family and conduct business with his parents software development company. (SOR ¶ 1.g and ¶ 2.c). On July 19, 2004, Applicant terminated his company's relationship with his parents' software development company. He has hired employees to provide the services formerly provided by his parents' company.

Applicant's cousin is a director of his parents' software development company. Beginning in February 2001, Applicant had electronic contact with him related to business matters on a daily basis and telephonic contact with him related to business matters on a monthly basis. Applicant also had electronic contact with another director of his parents' company on a biweekly basis. Since July 2003, most of the contact with his parents' company is through Applicant's staff. (SOR ¶ 1.e, ¶ 1.f, and ¶ 2.c).

Applicant's wife does not hold a security clearance. She is the sole shareholder in a U.S. corporation that contracts with Applicant's company. (SOR ¶ 2.d).

## POLICIES

"[N]o 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 occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants 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 (February 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions and mitigating conditions for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that 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, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified

information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the conditions listed in the Directive's guidelines and the applicant's security worthiness. *See* ISCR Case No. 95-0611 at 2 (May 2, 1996). (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (December 19, 2002); *see* 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. Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of national security. Directive ¶ E2.2.2.

## CONCLUSIONS

### Guideline B: Foreign Influence

A security risk may exist when an individual's immediate family, including co-habitants, 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 create the potential for foreign influence that 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. The Directive ¶ E2.A2.1.1.

Conditions that could raise a security concern and may be disqualifying under Guideline B also include ¶ E2.A2.1.2.6, *conduct which may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government* (Disqualifying Condition 6). Applicant's business relationship with his parents' Indian software development company, including his travel to India to further that relationship and regular contact with directors of that company, raise Disqualifying Condition 6.

After understanding the problem posed by his business relationship with his parents' software development company, Applicant terminated that relationship. Moreover, he no longer needs the service that company was providing because he has hired employees in his own company to provide the software development services. Therefore, Applicant has mitigated the security concern raised in SOR ¶ 1.c through ¶ 1.g.

Conditions that could raise a security concern and may be disqualifying under Guideline B also 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 or present in, a foreign country* (Disqualifying Condition 1). The record raises Disqualifying Condition 1 with regard to Applicant's parents who are citizens of India and reside there for approximately half of each year. Another condition that could raise a security concern and may be disqualifying under Guideline B is ¶ E2.A2.1.2.3, *relatives, co-habitants, or associates who are connected with any foreign government*. Applicant's father is a retired employee of the Indian Government.

Conditions that could mitigate security concerns include ¶ E2.A2.1.3.1 (Mitigating Condition 1). Mitigating Condition 1 applies with a determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters) co-habitant, or associate(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. Based on the record, Applicant's parents are not agents of a foreign power nor are they in a position to be exploited by a foreign power. They are permanent residents of the United States and intend to apply for U.S. citizenship. They otherwise reside in India, which has a democratic government. The connection Applicant's father has with the Indian Government ended with his retirement in 1991 except for a small pension he receives. However, his parents' financial security is not dependent upon this pension because of the income they receive from their investments. Therefore, based on the application of these mitigating conditions, including Mitigating Condition 1, I find in favor of Applicant with regard to SOR ¶ 1.a and ¶ 1.b.

### Guideline L: Outside Activities

Involvement in certain types of outside employment or activities is of security concern if it poses a conflict with an

individual's security responsibilities and could create an increased risk of unauthorized disclosure of classified information. The Directive ¶ E2.A12.1.1. Conditions that could raise a security concern and may be disqualifying under Guideline L include *any service, whether compensated, volunteer, or employment with any foreign national*, ¶ E2.A12.1.2.2 (Disqualifying Condition 2).

Conditions that could mitigate security concerns under Guideline L include ¶ E2.A12.1.3.2 (Mitigating Condition 2). Mitigating Condition 2 applies where the individual terminates the employment or discontinues the activity upon being notified that it is in conflict with his or her security responsibilities. This is exactly what Applicant did when he was advised that his company's business relationship with his parents' company presented a security concern. He terminated the relationship. Moreover, Applicant has no need to re-establish it because he has hired employees to provide the service. This mitigates the disqualifying condition. The business that Applicant's company does with his wife's company fails to raise a security concern under Guideline L because her company is a U.S. corporation. Department Counsel acknowledged that the record supported a finding in favor of Applicant under Guideline L. [\(3\)](#) Therefore, I find in favor of Applicant with regard to SOR ¶ 2.

## FORMAL FINDINGS

Formal findings, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1. Guideline B: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: For Applicant

Subparagraph 2.d: For Applicant

Subparagraph 2.e: For Applicant

Subparagraph 2.f: For Applicant

Subparagraph 2.g: For Applicant

Paragraph 2. Guideline L: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: For Applicant

Subparagraph 2.d: For Applicant

## DECISION

In light of all the evidence in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

*Signed*

**Roger E. Willmeth**

**Administrative Judge**

1. Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended and modified.
3. Tr 84.