

DATE: August 15, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-13004

**ECISION OF ADMINISTRATIVE JUDGE**

**JOAN CATON ANTHONY**

**APPEARANCES**

**FOR GOVERNMENT**

Stephanie Hess, Esq., Department Counsel

**FOR APPLICANT**

Philip B. Raptis, Esq.

**SYNOPSIS**

Applicant owns a U.S. information technology services company which owns an Indian subsidiary with 50 employees. Applicant's brother, a citizen and resident of India, is employed by the Indian subsidiary. Applicant's wife, parents, sister, and mother-in-law are citizens of India. Applicant provides his parents with \$15,000 to \$20,000 in support annually, and they reside in his household for several months each year. Applicant failed to mitigate security concerns under Guidelines B and L of the Directive. Clearance is denied.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On June 14, 2005, under the applicable Executive Order <sup>(1)</sup> and Department of Defense Directive, <sup>(2)</sup> DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision-security concerns raised under Guideline B (Foreign Influence) and Guideline L (Outside Activities) of the Directive. Applicant answered the SOR in writing on June 28, 2005, and elected to have a hearing before an administrative judge. On May 8, 2006, case was assigned to me. On July 12, 2006, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses, offered three exhibits for admission to the record (Ex.s 1 through 3), and offered six documents for administrative notice, which were enumerated I through VI. The Government's exhibits and documents for administrative notice were admitted to the record without objection. Applicant called no witnesses and offered no exhibits for admission to the record. On July 19, 2006, DOHA received the transcript (Tr.) of the proceeding.

**FINDINGS OF FACT**

The SOR contains eight allegations of disqualifying conduct under Guideline B and one allegation of disqualifying conduct under Guideline L. Applicant denied one allegation under Guideline B. He admitted seven Guideline B allegations and offered mitigating information. He denied the Guideline L allegation and offered mitigating information.

Applicant's admissions are incorporated as findings of fact.

Applicant is 45 years old, married, and the father of two children. He was born in India and came to the U.S. in 1981. He obtained a graduate degree in business administration in 1985. Thereafter, he worked at an international organization as a financial analyst and at a U.S. company as a computer programmer. He became a U.S. citizen in 2000. (Ex. 1; Ex. 2.)

Applicant started his own company in 1993. He is a certified public accountant (CPA) and President, Chief Executive Officer, and Chairman, Board of Directors, of a privately-owned U.S. corporation that provides information technology services to federal, state and commercial clients. Applicant owns 99% of the U.S. corporation, which wholly owns a subsidiary company in India. Applicant serves as Chairman, Board of Directors, of the Indian subsidiary, which provides back-office administrative services such as accounting, payroll, and computer maintenance to the U.S. corporation. Applicant planned to task the subsidiary company staff with assisting the U.S. corporation with troubleshooting technical computer problems, an assignment that would require remote access from India to the U.S. company's computer network. (Ex. 2 at 5.)

The U.S. corporation employs approximately 300 people, and the subsidiary company employs 50 people. The annual revenues of the U.S. corporation are approximately \$25 million. The parent company expends approximately \$300,000 per year to maintain and operate the Indian subsidiary, which is registered under the laws of India. Applicant's brother, a citizen and resident of India, is employed full-time by the Indian subsidiary as an accountant. Applicant's employees in India are supervised by Indian citizens in India as well as managers in his U.S. operation. Applicant seeks a security clearance so that his company may serve as a government contractor with access to classified information. (Answer to SOR at 1; Ex. 2 at 5-6; Ex. 3; Tr. 27-28; 33-34; 65; 72; 78; 80; 93-94.)

Applicant's wife is a citizen of India and a permanent U.S. resident. Applicant's mother and father are citizens of India and have U.S. permanent resident status. Applicant's father is a retired businessman and his mother is homemaker. For part of the year, Applicant's parents reside in the U.S. and live in Applicant's home. For the other part of the year, they reside in India. When his parents are residing in the U.S., Applicant provides \$15,000 to \$20,000 annually to them for their support. When they return to India, they take with them any unspent U.S. funds. When his parents are living in India, Applicant speaks with them by telephone once a week. (Ex. 2 at 2; Tr. 34-37; 85-86.)

Applicant's sister is a citizen and resident of India. She is a homemaker and the mother of three children. Her husband owns a construction company in India. (Ex. 2 at 3; Tr. 73-74.)

Applicant's mother-in-law, a widow, is a citizen and resident of India. She is a homemaker. Applicant's deceased father-in-law was employed by an oil and gas company owned by the Indian government. Applicant's mother-in-law visited in the U.S. and stayed in Applicant's home twice. Applicant's wife speaks with her mother in India by telephone weekly. (Ex. 2 at 3; Tr. 73-74.)

Applicant denied regular contact with diplomatic officials of the Indian government, but admitted on-going social and business contacts with them. He is active in a political action committee comprised of U.S. citizens of Indian background who contribute financially to the political campaigns of candidates for political office in the U.S. At the invitation of State and Federal elected officials, Applicant has participated in two trade delegations to India. Some of Applicant's U.S. business clients were also appointed to the trade delegations. (Ex. 2 at 6-7; Tr. 53-60.)

Applicant has financial interests in two other businesses. One business is a computer programming company that is also seeking work as a federal contractor. The other business specializes in providing medical billing services to physicians' offices.

In 2004 Applicant traveled to a Central Asian country as a part of the U.S. Congressional delegation to pursue business opportunities there. While in the Central Asian country, Applicant met with several officials in the government to discuss how his business interests could implement e-government technology services for them. (Ex. 2 at 4, 7; Tr. 67-69.)

Applicant traveled to India twice in 2000; once in 2001; twice in 2002; once in 2003; and once in 2004. (Answer to

SOR.) He travels to India at least once a year to visit family and to monitor his business in India. Sometimes, if he serves on a trade delegation, he travels to India more than once a year. (Tr. 54-46.) Applicant would like to purchase land in India and invest approximately \$1 million to construct a facility to house his subsidiary company. (Ex. 2 at 6.)

I take administrative notice that India is a democratic republic with a cooperative relationship with the U.S. ("Background Note: India," U.S. Department of State, December 2005, Government Document for Administrative Notice I.) I also take administrative notice of the 2000 annual report to Congress of the National Counterintelligence Center. The 2000 report identified India as one of seven countries active in pursuing aggressive economic information collection and industrial espionage against the United States. The report identified information targeted by the governments of the seven countries engaged in economic espionage. Relevant targeted categories of information are U.S. Government programs, unclassified and open-source information, business plans, formulas and research, and pharmaceutical intellectual property. <sup>(3)</sup>

## 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 restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process 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, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines 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. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 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.

## CONCLUSIONS

### **Guideline B - Foreign Influence**

In the SOR, DOHA alleged, under Guideline B of the Directive, that Applicant was the 99 % majority owner of a U.S. business and Chairman of the Board of Directors of a wholly-owned subsidiary company in India which performed services for the parent company owned by Applicant (¶ 1.a.); that Applicant's brother, a citizen and resident of India, was employed in India by the wholly-owned Indian subsidiary (¶ 1.b.); that Applicant's mother and father are citizens of India and reside with Applicant in the U.S. for part of the year and also reside in India for part of the year (¶ 1.c.); that Applicant's wife is a citizen of India and a resident of the U.S. (¶ 1.d.); that Applicant's sister is a citizen and resident of

India (§ 1.e.); that Applicant's mother-in-law is a citizen and resident of India (§ 1.f.); that Applicant maintains regular contact with Indian diplomatic officials in the U.S. (§ 1.g.); and that Applicant traveled to India at least twice in 2000, once in 2001, twice in 2002, once in 2003; and once in 2004 (§ 1.h.).

A Guideline B security concern exists when an applicant's immediate family, including cohabitants, and other persons to whom he or she might be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. A person who places a high value on family obligations or fidelity to relationships in another country may be vulnerable to duress by the intelligence service of the foreign country or by agents from that country engaged in industrial espionage, terrorism or other criminal activity. The more faithful an individual is to family ties and obligations, the more likely the chance that the ties might be exploited to the detriment of the United States.

Applicant's case requires the recognition that India, while friendly to the U.S., has a history of economic espionage against the U.S. and has been a significant collector of proprietary information from U.S. government contractors. Even though India is not hostile to the U.S., it nevertheless could pose a threat to the security of the U.S. *See* ISCR Case No. 02-26976, at 4-5 (App. Bd. Oct. 22, 2004) American citizens with immediate family members who are citizens or residents of India could be vulnerable to coercion, exploitation, or pressure.

Applicant's admissions raise five possible Guideline B security concerns. Applicant's brother, sister, and mother-in-law are citizens and residents of India. His wife, father, and mother are citizens of India and U.S. permanent residents who reside with him in his household. The citizenship and residency of Applicant's brother, sister, and mother-in-law raise security concerns under Disqualifying Condition (DC) E2.A2.1.2.1. of Guideline B. Additionally, Applicant shares his home with his wife and parents, who are citizens of India and with whom he has close relationships, thus raising the potential for adverse foreign influence or duress, a security concern under DC E2.A2.1.2.2. of Guideline B.

Applicant's on-going social and business contacts with officials connected with the government of India raise security concerns under DC E2.A2.1.2.3. and DC E2.A2.1.2.6. Additionally, Applicant employs his brother, a citizen and resident of India, in his wholly-owned subsidiary, raising another security concern under DC E2.A2.1.2.6. Applicant's wholly-owned subsidiary in India represents a substantial financial interest that could make Applicant vulnerable to foreign influence, thus raising a security concern under DC E2.A2.1.2.8.

An applicant may mitigate foreign influence security concerns by demonstrating that immediate family members are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force an applicant to choose between loyalty to the foreign associates and loyalty to the U.S. Mitigating Condition (MC) E2.A2.1.3.1. While the evidence does not establish that Applicant's wife, parents, brother, sister, and mother-in-law are agents of a foreign power, they are citizens of India, and Applicant failed to demonstrate that they could not be exploited by a foreign power in a way that could force him to choose between loyalty to them and to the U.S. These Guideline B concerns also extend to foreign connections derived from marriage and not from birth. In reviewing the scope of MC E2.A2.1.3.1, DOHA's Appeal Board has stated that the term "associate(s)" reasonably contemplates in-laws and close friends. ISCR Case No. 02-12760, at 4 (App. Bd. Feb. 18, 2005) Accordingly, MC E2.A2.1.3.1 does not apply to Applicant's case.

An applicant may mitigate foreign influence security concerns under MC E2.A2.1.3.2. if he shows his contacts with foreign citizens are the result of official United States Government business. While Applicant served on trade delegations and had social and business interactions with Indian and other foreign government officials, his testimony indicated he was advancing his own business objectives and not those of the United States Government. Accordingly, MC E2.A2.1.3.2. is inapplicable.

An applicant may also mitigate foreign influence security concerns if he shows his contacts and correspondence with foreign citizens are casual and infrequent. C E2.A2.1.3.3. Applicant's contacts with his family members reflect an intensely familial relationship that cannot be considered casual. His relationship with his parents is thoughtful and filial. He provides his parents with monetary support and he speaks with them by telephone weekly when they are living in India. Applicant is also a kind and attentive husband, brother, and son-in-law. He travels at least once a year to India to visit his family members there. Accordingly, MC E2.A2.1.3.3. does not apply to Applicant's relationship with his wife, parents, brother, sister, and mother-in-law.

Applicant expends approximately \$300,000 each year to maintain and staff his Indian subsidiary. He has expressed a

plan to spend \$1 million to build a facility in India to house the staff and operations of the subsidiary. The evidence shows Applicant's financial interests in India are not minimal. They are sufficient to affect his security responsibilities, making MC E2.A2.1.3.5. inapplicable to the facts of Applicant's case.

Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Therefore, nothing in this decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

Applicant failed to put forward evidence that could mitigate the security concerns discussed herein and demonstrate that he would not be vulnerable to foreign influence that would result in the compromise of classified information. Accordingly, the allegations in subparagraphs 1.a. through 1.h. of the SOR are concluded against the Applicant.

### **Guideline L - Outside Activities**

In the SOR, DOHA alleged Applicant raised concerns under Guideline L, Outside Activities, with the following information: that he was President, Chairman of the Board of Directors, 99% majority owner, and Chief Executive Officer of a U.S. information technology services corporation that wholly owned and operated a subsidiary company in India that performed administrative services for the parent company. DOHA also alleged that Applicant was Chairman of the Board of Directors of the subsidiary company in India (§ 2.a.).

An individual's involvement in certain types of outside employment activities is of security concern if it poses a conflict with his security responsibilities and could create an increased risk of unauthorized disclosure of classified information. Directive § E2.A12.1.1. In this case, conditions that could raise a security concern and may be disqualifying include any service, whether compensated, volunteer, or employment, with a foreign country, any foreign national, or a representative of any foreign interest. Disqualifying Condition (DC) E2.A12.1.2., DC E2.A12.1.2.1., DC E2.A12.1.2.2., and DC E2.A12.1.2.3. An additional cause for concern under Guideline L is any service, whether compensated, volunteer, or employment with "any foreign, domestic, or international organization or person engaged in analysis, discussion, or publication of material on intelligence, defense, foreign affairs, or protected technology." DC E2.A12.1.2.4.

As President, Chairman of the Board of Directors, and Chief Operating Officer of a privately-held U.S. corporation and as Chairman of the Board of Directors of a subsidiary company in India, Applicant seeks to become a U.S. government contractor with access to classified information. Applicant's subsidiary company is organized under the laws of India and employs approximately 50 individuals who are citizens and residents of India. The employees in India are supervised by Indian citizens as well as managers in the U.S. parent corporation. They perform administrative functions that could permit them to access protected technology and classified information held by the parent company. Accordingly, Applicant's employment arrangement with the Indian subsidiary company raises security concerns under DC E2.A12.1.2.2. and DC E2.A12.1.2.3.

While nothing in the record suggests that Applicant's present business relationship with the subsidiary company in India involves protected technology or the compromise of classified information, the possibility exists that, in the course of business, Applicant's parent company could acquire access to protected technology or classified information at some time in the future, thereby causing a concern under DC E2.A12.1.2.4.

An individual can mitigate security concerns arising under Guideline L if an evaluation of the outside employment or activity indicates that it does not pose a conflict with the individual's security responsibilities. (MC) E2.A12.1.3.1. At his hearing, Applicant failed to demonstrate that his employment of foreign nationals in his Indian subsidiary to support his government contracts in the U.S. would not pose a conflict with his individual security responsibilities. Thus, C E2.A12.1.3.1. is inapplicable in mitigation.

An individual may also mitigate security concerns arising under Guideline L if he terminates or discontinues the activity upon being notified that it is in conflict with his security responsibilities. MC E2.A12.1.3.2. This mitigating condition is inapplicable to the facts of Applicant's case. Accordingly, the Guideline L allegation in the SOR is concluded against

the Applicant.

## FORMAL FINDINGS

The following are my conclusions as to the allegations in the SOR:

Paragraph 1. Guideline B: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1d.: Against Applicant

Subparagraph 1e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: Against Applicant

Paragraph 2. Guideline L: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

## DECISION

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 or continue a security clearance for Applicant. Clearance is denied.

Joan Caton Anthony

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. 2000 Annual Report to Congress on Foreign Economic Collection and Industrial Espionage, Appendix, at un-numbered pages 1-3, as prepared by the National Counterintelligence Center. Admitted as Government's Document V for administrative notice.