



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



In the matter of:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 07-06391

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: *Pro Se*

July 24, 2008

Decision

WESLEY, Roger C., Administrative Judge:

HISTORY OF CASE

On December 13, 2007, 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 granted, continued, denied or revoked.

Applicant responded to the SOR on January 26, 2008, and requested a hearing. The case was assigned to me on March 4, 2008, and was scheduled for hearing on April 9, 2008. A hearing was held on April 9, 2008, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At hearing, the Government's case consisted of two exhibits; Applicant relied on one witness (himself) and two exhibits. The transcript (R.T.)

was received on April 17, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility to access classified information is granted.

Besides its two exhibits, the Government requested administrative notice of 10 documents: *Background Note: India*, U.S. Department of State (October 2007); *Consular Information Sheet*, U.S. Department of State (August 2007); *Country Reports on Human Rights Practices - 2006, India* (March 2007); *Country Reports on State Sponsors of Terrorism*, U.S. Department of State (November 2007); *Country Reports on Terrorism, Chapter 2 - Country Reports*, U.S. Department of State (April 2007); *CRS Report to Congress: India-U.S. Relations* (October 2007); *Annual Report to Congress on Foreign Economic Collection, 2005*, National Center for Intelligence Executive (August 2006); Press Release, Export Privileges Denied to Indian Corporation, U.S. Department of Commerce (December 2007). Press Release, *Man to Plead Guilty in Plot to Export restricted Technology to India*, U.S. Department of Commerce and Commerce (July 2007), *High Tech Firms/Executives Sentenced in Export Case*, U.S. Department of Commerce (November 2005), Press Release, *Chyron Corp Settles charges of Unlicensed Export to India*, U.S. Department of Commerce (August 2004), *Berkely Nucleonics Corp Settles Charges of Unlicensed Exports* (June 2004), *Sentry Settles Charges of Unlicensed Exports*, U.S. Department of Commerce (June 2004).

Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 (App. Bd. April 2007); ISCR Case No. 02-24875 (App. Bd. October 2006). Administrative notice is appropriate for noticing facts or government reports that are well known. See *Stein*, Administrative Law, Sec. 25.01 (Bender & Co. 2006). For good cause shown, administrative notice was granted with respect to the above-named background reports addressing the geopolitical situation in India. *Administrative notice was extended to the documents themselves*, consistent with the provisions of Rule 201 of Fed. R. Evi. This notice did not foreclose Applicant from challenging the accuracy and reliability of the information contained in the reports addressing India's current state.

SUMMARY OF PLEADINGS

Under Guideline B, Applicant is alleged to (a) have a mother who is a citizen and resident of India, (b) provide financial support to his mother, (c) own an apartment in India, (d) have brothers and sisters who are citizens and residents of India, (e) have filed petitions with U.S. immigration authorities in 1996 for the immigration of his brothers to the U.S., (f) to have a roommate (his former spouse) who has parents who are citizens and residents of India, (g) have traveled to India in 1996, 1997, 1998, 2002, 2003, and 2004, and (h) have a son (born in 1995) who resided with his former spouse's parents from October 1995 to 2005, who he could see only through supervised visits because of his maternal grandparents' fear he would leave the country with his son.

For his answer, Applicant admitted all of the allegations in the SOR with explanations. He claimed he sponsored his mother's visits to the U.S., but still feels she is better staying in India to be with her children and grandchildren. He explained that he

has provided financial support to his mother since his father's death in 1991. He claimed his ex-wife's parents, while still citizens of India, are now permanent residents of the U.S. He claimed his travels to India were all socially-related.

FINDINGS OF FACT

Applicant is a 52-year-old staff engineer for a defense contractor who seeks a security clearance. He has since received a salaried layoff notification notice that he will be laid off from his job in April 2008 (see ex. B). The layoff notice does not affect his entitlement to a hearing on his security clearance application (see Directive). The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Applicant's background

Applicant was born and raised in India and attended high school there. While a citizen and resident of India, he obtained bachelors and masters degrees in his chosen field of engineering (R.T., at 39-40).

In 1981, Applicant immigrated to the U.S. to pursue graduate studies in aeronautical engineering. He received two additional advanced degrees from a recognized U.S. university (R.T., at 39-43, 48). He applied for U.S. citizenship and became a naturalized U.S. citizen in 1994 (see ex. 1; R.T., at 44). He married in 1989 and divorced his wife in 1998 (see exs. 1 and 2), and remarried her in February 2008 (ex. A). He has one child from this marriage (now 13 years of age). He retains his dual citizenship with India (see ex. 1).

Applicant's father (who worked for a federal government bank in India) is deceased. His mother is a citizen and resident of India. (R.T., at 61-62). He provides her monthly financial support that ranges from \$100.00 to \$50.00 (R.T., at 63-64). Applicant has five brothers and five sisters who are citizens and residents of India. (R.T., at 73-74). One of the brothers worked for a federal government bank before his retirement two years ago (R.T. at 74-75), and one of his sister's husbands was a research at a state-operated university in India (R.T., 79-80. None of his other brothers and sisters have any experience in working for the Indian government (R.T., at 81).

Applicant owns an apartment unit in India. He pays his youngest brother about \$300.00 a year to manage the apartment unit (R.T., at 64-68). His mother currently resides in this unit, which Applicant estimates to be worth about \$10,000.00 (R.T., at 65-66). None of Applicant's brothers or sisters have ever served in India's military. His sisters all reside in India.

In 1996, Applicant filed petitions with the U.S. Immigration Service for the immigration of all five of his brothers to the U.S. (R.T., at 84-86). While one of his brothers has obtained his green card and will be immigrating to the U.S. to work, the other applications have likely lapsed for inactivity (R.T., at 86).

In 2005, Applicant resumed living with his former spouse (W) at the time. They have resided together continuously since 2005 with their son. W, too, is of Indian descent and has parents who are citizens and former residents of India. W's parents remain citizens of India, but have since taken up residence in the U.S. (R.T., at 88). Applicant and W have a son who was born to them in 1995. Following his separation from W in 1995, W took their son to India to live with W's parents. His son stayed with W's parents for the ensuing 10 plus years (*i.e.*, October 1995 to 2005). During this period, Applicant was allowed only supervised visits to see his son, because his son's maternal grandparents were fearful that Applicant might attempt to leave India with his son (R.T., at 52-53). Since his return to the U.S. in 2005, his son has resided with Applicant and W in their U.S. residence (R.T., at 55-57)

Applicant has traveled to India regularly since 1997. He reports his trips to India in 1997, 1998, 2002, 2003, 2004 and 2007 to visit his parents and siblings (R.T., at 96-99). His son accompanied him on his last trip to India to visit his mother and W's parents (R.T., at 99-100).

Applicant's spouse has two sisters who reside in the U.S. and a third sister who still resides in India. W's father practiced privately as a physician in India; he never worked for the Indian government or military (R.T., at 90-91). W's mother was a nurse at one time, but is currently retired. W's sister who resides in India is a homemaker; her husband worked in the PRC for a year, but is currently looking for a job in India.

Applicant maintains monthly contact with his mother and little contact with any of his siblings (R.T., at 82-83). W talks to her sisters weekly (R.T., at 94). No government or military officials have ever tried to exert any pressure or influence over his immediate and extended family members (R.T., at 40-41).

Applicant has no relatives of either his immediate family or extended family who currently work for the Indian government. He does have numerous aunts and uncles, nephews and nieces who are citizens and residents of India who work exclusively in the private sectors (R.T., at 101-02).

Applicant owns a home in the U.S., which he values at about \$600,000.00 (R.T., at 103). He has a mortgage on the home of approximately \$475,000.00 (R.T., at 104).

India's country status

Considered the world's largest democratic republic, India is also a very diverse country, in population, geography and climate (*see Consular Information Sheet*, U.S. Department of State (August 2007));. India is the world's second most populous country and the world's seventh largest country in area (*id.*).

India is a constitutional democracy, whose Constitution defines it as a 'sovereign, socialist, secular democratic republic' (*see Background Note: India*, U.S. Department of State (October 2007)). It is a "multiparty, federal, parliamentary democracy with a

bicameral parliament” and an historical reputation for respecting the rights of its citizens (see *id.*). True, there have been reports of extrajudicial killings of persons in custody, disappearances, torture and rape by police and security forces, who generally enjoy de facto impunity (see *Country Reports on Human Rights Practices - 2006, India* U.S. Department of State (March 2007)). The basic problem stems from the lack of any clear accountability, which too often has resulted in cited human rights violations going unpunished (see *id.*, at 1). Police and security officials reportedly use torture and threaten violence during interrogations to extort money and summarily punish prisoners (*id.* at 6).

Since gaining its independence from great Britain in 1947, India has been involved in wars with Pakistan in 1947, 1965 and 1971, and has had to defend itself against a 1999 intrusion of Pakistani-backed forces into Indian-held territory that nearly turned into full-scale war ((see *Background Note: India, supra*, at 7 and *CRS Report to Congress: India-U.S. Relations* (October 2007)). India survived a 1975 declaration of a state of emergency that carried a suspension of many civil liberties (see *Background Note: India, supra*, at 3). The country has experienced two assassinations of its leaders: Prime Minister Indira Ghandi in October 1984 and Prime Minister Rajiv Ghandi in May 1991 (see *id.*). In recent years, India has been confronted with sporadic outbreaks of religious riots (which resulted in numerous deaths and casualties, and violent attacks by separatist groups in various parts of the country (*id.*).

Before its demise in the early 1990s, the Soviet Union was India’s principal and most reliable trading partner, and an important source of economic and military assistance (see *CRS Report to Congress: India-U.S. Relations, supra*, at 9; *Background Note: India, supra*, at 8). U.S. efforts to strengthen its ties with India have been hampered some by U.S. differences over India’s nuclear weapons programs and the pace of India’s efforts to achieve long-planned economic reforms.

Important U.S. concerns have been raised, too, over reported cases involving government sponsored entities and their illegal export, or attempted illegal export, of U.S. restricted dual use technology to India, including (1) high-tech testing equipment that posed potential risks of diversion to a weapons of mass destruction program, (2) dual use equipment that can be used in military and civilian aircraft to extract engine vibration information, (3) equipment that can be used to manufacture material that improves the accuracy of strategic ballistic missiles with nuclear capabilities, (4) an animation system that can be diverted to weapons of mass destruction technology, (5) nuclear pulse generators to two Indian entities capable of mounting diversion to the development of weapons of mass destruction or missiles, and (6) heat treating containers to an Indian entity capable of mounting diversion to the development of weapons of mass destruction or missiles (see Press Release, Export Privileges Denied to Indian Corporation, U.S. Department of Commerce (December 2007); *Press Release, Man to Plead Guilty in Plot to Export Restricted Technology to India*, U.S. Department of Commerce and Commerce (July 2007), *High Tech Firms/Executives Sentenced in Export Case*, U.S. Department of Commerce (November 2005), *Press Release, Chyron*

Corp Settles charges of Unlicensed Export to India, U.S. Department of Commerce (August 2004)).

Recommended travel restrictions do exist for U.S. citizens visiting India. The State Department cautions U.S. citizens to avoid travel in general (with several noted exceptions) to the state of Jammu & Kashmir (see *Consular Information Sheet*).

Policies

The revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (effective September 2006) list Guidelines to be considered by administrative judges in the decision making process covering DOHA cases. These Guidelines require the administrative judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the administrative judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the administrative judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Foreign Influence

The Concern: "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 the this Guideline can and should considered 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" (see Adjudicative Guidelines, ¶ 6).

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a

reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

ANALYSIS

Born and raised in India, Applicant became a naturalized U.S. citizen in 1994. He married his wife in 1989 and resumed living with her since their divorce in 1998 (remarrying her in 2008). Security concerns focus on Applicant's mother and siblings who currently reside in India, and his wife's family members who are also citizens of India who are either currently residing in the U.S. (her parents) or in India (her siblings).

Applicant and his wife and family have deep roots in India, a country rich in history and socio/political traditions, constitutional government and institutional respect for human rights, intermixed with periodic reports of abuses by police and government authorities. Despite encouraging efforts in the development of strategic partnerships between India and the U.S. in recent years, there have been cited instances of illegal and damaging export practices by Indian firms associated with the Indian government to create dual use diversion risks.

The Government urges security concerns over risks that Applicant's mother, siblings and family members, as well as his wife and her family members residing in India, might be subject to undue foreign influence by Indian government authorities to access classified information in Applicant's possession or control. Because Applicant and his wife have family members who have Indian citizenship by birth and reside currently in India, they present potential heightened security risks covered by disqualifying condition (DC) 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," of the Adjudication Guidelines for foreign influence. The citizenship/residence status of these family members in India pose some potential concerns for Applicant because of the risks of undue foreign influence that could compromise sensitive or classified information under Applicant's possession and/or control.

Because none of Applicant's family or W's family have any identified prior military or government service, no consideration of DC 7(b), "connection 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," is warranted. To be sure, from what is known from the presented evidence, none of W's immediate family residing in India have any political affiliations with the Indian government or military. Nor do they have any history to date of being subjected to any coercion or influence, or appear to be vulnerable to the same.

Applicant and his immediate family members (*i.e.*, his mother, siblings and family members residing in India) have deep family roots in India. The same is true with Applicant's wife, who also has immediate family members who are citizens and residents of India. Their citizenship status and presence in India does not by itself create a heightened risk. Applicant/W's contacts with their family members are manageable risks, and clearly not of the magnitude that could make them subject to a heightened security risk of pressure or compromise under Guideline B. As a country, India has a lengthy history of constitutional government and generally recognized respect for human rights and the rule of law. It continues to be a country with emerging strategic relationships with the U.S., and a country that at present does not present a heightened risk under Guideline B.

The Adjudicative Guidelines governing collateral clearances do not dictate *per se* results or mandate particular outcomes for applicants with relatives who are citizens/residents of foreign countries in general. What is considered to be an acceptable risk in one foreign country may not be in another. While foreign influence cases must by practical necessity be weighed on a case-by-case basis, guidelines are available for referencing in the supplied materials and country information about India.

Unlike the old Adjudicative Guidelines, the new ones do take into account the country's demonstrated relations with the U.S. as an important consideration in gauging whether the particular relatives with citizenship and residency elsewhere create a heightened security risk. The geopolitical aims and policies of the particular foreign regime involved do matter. As historically demonstrated, India has long been known to be a country with democratic traditions, and generally recognized respect for human rights and the rule of law. While the reports of illegal exporting of potential dual use technology has been matter of some security concern to the U.S., India's emergent status as a strategic partner of the U.S. in controlling the proliferation of nuclear weapons is an important political development that serves to promote political solidarity, and reduce security risks and concerns between the two nuclear powers.

Based on his case-specific circumstances, MC 8(a), "the nature of the relationships with foreign persons, the country in which these persons are located, or the persons or activities of these 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 a foreign individual, group, organization, or government and the interests of the U.S." is available

to Applicant. Neither Applicant nor his immediate or extended family residing in India pose heightened security risks that could subject them to potential pressures and influence from Indian government and military officials.

Of benefit to Applicant, too, is MC 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 U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest.” Applicant’s demonstrated loyalty, patriotism, and professional commitments to the U.S., is well demonstrated and enough under these circumstances to neutralize all potential conflicts that are implicit in his relationships with his immediate, and extended family members, and his wife’s family members. MC 8(c), “contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create risk for foreign influence or exploitation,” has some applicability, too, based on Applicant own infrequent contacts with his ex-wife’s family members residing in India.

Two other mitigating conditions have mixed application to Applicant’s situation. MC 8(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,” has some prospective value. But there is really no documented record of Applicant’s prior reporting of his contacts with members of his family and his wife’s family, respectively, to warrant any more than minimal consideration at this time. On the other hand, MC 8(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.” has a good deal more application to Applicant’s situation. His financial interests in India (primarily an apartment unit managed by his younger brother) are relatively small compared to his U.S. interests.

Whole person assessment is available also to minimize Applicant’s exposure to conflicts of interests with his Indian family members. Most importantly, Applicant is not aware of any risks of coercion, pressure, or influence that any of his, or his wife’s, family members might be exposed to. So, in Applicant’s case, the potential risk of coercion, pressure, or influence being brought to bear on him, his ex-wife who is living with him, or any of their respective family members is minimal and mitigated.

Overall, any potential security concerns attributable to Applicant’s relations with his wife and their respective family members residing in India, are sufficiently mitigated to permit safe predictive judgments about Applicant’s ability to withstand risks of undue influence attributable to his familial relationships in India. Favorable conclusions warrant with respect to the allegations covered by Guideline B.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors and conditions enumerated in E2.2.2 of the Adjudicative Process of Enclosure 2 of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

GUIDELINE B: (FOREIGN INFLUENCE): FOR APPLICANT

Sub-para. 1.a :	FOR APPLICANT
Sub-para. 1.b:	FOR APPLICANT
Sub-para. 1.c:	FOR APPLICANT
Sub-para. 1.d:	FOR APPLICANT
Sub-para. 1.e:	FOR APPLICANT
Sub-para. 1.f:	FOR APPLICANT
Sub-para. 1.g:	FOR APPLICANT
Sub-para. 1.h:	FOR APPLICANT

CONCLUSIONS

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 Applicant's security clearance. Clearance is granted.

Roger C. Wesley
Administrative Judge