



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



In the matter of:	)	
	)	
XXXXXXXXXX, XXXXX	)	ISCR Case No. 08-04552
SSN: XXX-XX-XXXX	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Eric Borgstrom, Esq., Department Counsel  
For Applicant: *Pro se*

September 16, 2009

**Decision**

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns pertaining to foreign preference and foreign influence. Clearance is granted.

**Statement of the Case**

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on May 2, 2007. On October 10, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the government's security concerns under Guidelines C (foreign preference) and B (foreign influence). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6; *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

The SOR 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 it recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant answered the SOR on November 5, 2008, and requested that a decision be based on the written record. DOHA received Applicant's answer to the SOR on November 7, 2008. Applicant reconsidered his request for a decision based on the written record, and on February 27, 2009, he requested a hearing before an administrative judge. Department Counsel was prepared to proceed on April 22, 2009. The case was assigned to another administrative judge on April 29, 2009, and was reassigned to me on May 11, 2009, due to caseload considerations. DOHA issued a notice of hearing on April 30, 2009, scheduling the case for May 19, 2009. The hearing was held as scheduled.

The government offered Government Exhibits (GE) 1 through 7, which were received without objection. Applicant offered Applicant Exhibit (AE) A, which was received without objection, and he testified on his own behalf. I held the record open until May 26, 2009 to afford the Applicant an opportunity to submit additional materials. He timely submitted AE B through L, which were received without objection. DOHA received the hearing transcript (Tr.) on June 3, 2009.

## **PROCEDURAL RULINGS**

### **Request for Administrative Notice**

Department Counsel submitted a Request for Administrative Notice (Exhibit (Ex.) I(A)), requesting that I take administrative notice of the summary of facts contained in Ex. I(A) as well as those facts in Exs. I through XIII. Without objection from Applicant, I took administrative notice of the documents offered by Department Counsel, which pertained to India. Tr. 14-15.

Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004)); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings is to notice facts that are either well known or from government reports. See Stein, *Administrative Law*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice). Various facts pertaining to India were derived from Exs. I(A), and I through XIII as contained *infra* under the subheading "India" in this decision.

## **Findings of Fact**

As to the SOR's factual allegations, Applicant admitted SOR ¶¶ 1.a. and 1.b., and 2.a. – 2.f. with explanations. He denied ¶¶ 1 and 2 with explanations. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

### **Background Information**

Applicant is a 39-year-old director of his company, who has been employed by a defense contractor since June 1998. Tr. 21-22, GE 1. He is a first-time applicant for a security clearance. Tr. 22. He successfully held an interim secret security clearance for a brief period of time until it was revoked as a result of these proceedings. He received security training from his Facility Security Office in January 2007. Tr. 60-61.

Applicant was born in April 1970 in India, where he was raised and educated. Tr. 23-24, GE 1. He was awarded a Bachelor of Arts degree in Mathematics in July 1990, and a Master's Degree in Computer Applications in July 1993 from universities in India. Tr. 18-20.

In August 1993 at age 23, Applicant came to the U.S. on an F-1 Student Visa to attend graduate school. Tr. 18. He was awarded a Master's Degree in Computer Science in August 2006. He completed his Ph.D. course work, got "sidetracked," and did not complete his dissertation. Tr. 17, 46-47-48, GE 1. He applied for and received permanent resident alien status in August 2001 and became a naturalized U.S. citizen in February 2007. Tr. 18, GE 1. He was issued his U.S. passport in June 2007. GE 2.

Applicant married his wife, a family friend, in India in January 1997. Tr. 20-21, GE 1. She was already in the U.S. on an F-1 Student Visa when they decided to get married and chose to have their wedding in India. Tr. 30. Applicant's wife became a naturalized U.S. citizen in February 2007. GE 1. They have one three-year-old daughter, who was born in the U.S., and is a U.S. citizen by birth. Tr. 21, GE 1. Applicant's wife was awarded a Ph.D. in Public Administration in May 2009 from a prestigious U.S. university, and currently is not employed outside the home. Tr. 22-23.

### **Foreign Preference**

The SOR alleged under Guideline C that Applicant possessed a valid Indian passport with an expiration date of April 2010. Additionally, the SOR alleged Applicant intended to apply for Overseas Citizenship of India (OCI) status before December 2008. (SOR ¶¶ 1.a., 1.b.) Before the hearing, Applicant submitted documentation that his Indian passport had been destroyed. He also stated that as of November 4, 2008, he would not be applying for OCI status. He explained that OCI status is a travel convenience that would make it easier to visit family members in India. He added that it was not his intent to show any preference for India and hopes the reversal of his intent is sufficient proof of his preference for the U.S. Once he became aware of the government's foreign preference concerns, he took corrective action. Response to

SOR. Department Counsel noted in his opening remarks that concerns under Guideline C had been resolved by Applicant's Response to the SOR. Tr. 10.

### **Foreign Influence**

Applicant has three immediate family members, apart from his wife and child. Their relationship to Applicant is as follows:

Mother. She was born in August 1947 in India, and is now 62. She is a resident and citizen of India. (SOR ¶ 2.a.) She is a retired middle school teacher and taught at a private missionary school. Tr. 24, 26, 64, GE 1.

Father. He was born in May 1942 in India, and is now 67. He is a resident and citizen of India. (SOR ¶ 2.a.) He retired from a senior civil service position in 2002 and receives a pension from the Indian government. After retiring from his senior civil service position, he worked as an advisor to a government agency until approximately 2005. After leaving his advisory position in 2005, he began his current position as head of an independent body that develops data protection standards for commercial companies operating within India. The organization is solely funded by its member companies and is not part of or under the control of the Indian government. He has never held a political position with the Indian government. Tr. 24-26, 32-39, Response to SOR, GE 1.

Applicant's father is a board member of at least seven companies in India. (SOR ¶ 2.b.) With the exception of one of those companies, they all appear to be privately owned companies. The one company not privately owned is a utility company owned by a state government in India. Tr. 40-41, 51-52, GE 2, AE K, AE L, Response to SOR.

Sister. She was born in February 1974 in India, and is now 35. She is a resident and citizen of India. She is employed as a vice president of a privately owned advertising company. (SOR ¶ 2.c.) Tr. 24-25, GE 1. She is married to a Bollywood script writer<sup>1</sup> and has no children. Tr. 26, 31.

Applicant communicates with his parents by telephone "[r]oughly once a week." He communicates with his sister "typically" by telephone "[o]nce every three months, perhaps." Tr. 27.

Since moving to the U.S. in 1993, Applicant has traveled to India three times in February 2003, March 2004, and February 2006. Applicant paid for the first two trips, which were personal trips to visit family. His employer paid for the third trip, which was a

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<sup>1</sup> Bollywood is the informal term popularly used for the [Hindi-language film industry](#) based in [Mumbai, India](#). The term is often incorrectly used to refer to the whole of [Indian cinema](#); it is only a part of the Indian film industry. Bollywood is the largest film producer in India and one of the largest centers of film production in the world. The name is a [portmanteau](#) of [Bombay](#) (the former name for Mumbai) and [Hollywood](#), the center of the [American film industry](#). Available at <http://en.wikipedia.org/wiki/Bollywood>.

business trip; however, Applicant was able to see his parents during this trip. Tr. 27-29. (SOR ¶ 2.e.) Applicant's parents came to the U.S. to visit Applicant and his family in December 2008. Tr. 42.

Applicant's mother-in-law was born in April 1943 in India, and is now 66. (SOR ¶ 2.d.) She is a resident and citizen of India. She is a retired liaison officer, who worked for a government-funded independent utility board for a state within India. Applicant speaks to his mother-in-law by telephone "every three months;" however, his wife speaks to her "typically once a week." Tr. 29-30, GE 2. She came to the U.S. to visit Applicant and his family "some time in 2007." Tr. 45. Applicant's father-in-law is deceased.

Applicant's wife has one brother (Applicant's brother-in-law), who is a legal resident of in the U.S. and a citizen of India. He is unmarried and works as a product manager for a major internet travel search engine. Applicant speaks to his brother-in-law "every two or three months;" however, his wife speaks to him "every couple of days." It is Applicant's understanding that his brother-in-law intends to remain in the U.S. Tr. 31-32, 50.

All of Applicant's assets are in the U.S. He and his wife own a home with an estimated value of \$350,000. He has various bank accounts, 401k retirement and cash balance retirement plans totaling \$170,000. He estimates his net worth to be \$250,000. Tr. 42-44, 51. Applicant's annual salary is \$135,000. Tr. 60. Apart from work and spending time with his family, Applicant has limited discretionary free time, but does make time to exercise. Tr. 45-46. Applicant is registered to vote, pays federal and state taxes, and otherwise exercises all rights of U.S. citizenship. Tr. 47, 50-GE 2.

Applicant does not have any other close and continuing contact with anyone else holding foreign citizenship. None of the relatives discussed *supra* are aware that Applicant is under consideration for a security clearance. No one has approached Applicant with a request or a solicitation to provide classified, sensitive, or proprietary information. Applicant does not have any preference, sympathy, or alliances with foreign interests or governments because of his association with his relatives in India. If Applicant were approached by anyone seeking classified information, he would report such contact to his Facility Security Officer. Tr. 61-62, GE 2.

### **Character References**

Applicant submitted a reference letter from his supervisor/senior company manager. The supervisor has known Applicant for 11 years and stated Applicant in his current role as Director "has shown the ability to successfully lead teams towards completing their assignments. [Applicant] is able to motivate people and is able to get them to perform to the best of their abilities." He concluded by saying that he has no reservations in recommending Applicant for a security clearance because "he has the required traits that will allow him to safeguard information pertaining to matters of national security." AE I.

Additionally, a client and chief systems engineer of his company submitted a reference letter on behalf of Applicant. He stated that Applicant was one of two individuals from his company who “have contributed materially to verification of technology maturity in one of the most critically important aspects of [name] network performance,” and that they are “resources to the [name] program as a whole.” AE J. Applicant submitted nine years (2003-2009) of employee evaluations that document above average performance and fully support the positive comments contained in the reference letters. AE B – H.

## **India<sup>2</sup>**

India and the U.S. have had close relations ever since India obtained its independence from Great Britain in 1947. India is not hostile to the U.S., nor are its interests inimical to the United States. Currently, the U.S. is India’s largest trading partner and largest investment partner. India provides \$126 million in annual development assistance. India’s size, population, and strategic location give it a prominent voice in international affairs, and its growing industrial base, military strength, and scientific and technical capacity on issues from trade to environmental protection are indications that India’s power will continue to increase.

India, the world’s most populous democracy, has a federal form of government, similar to the United States, but with more authority vested in the central government. It has a bicameral legislature modeled after Britain’s parliament, and its members are selected through open elections involving several political parties. India also has an active market-oriented economy, and conducts most of its international trade with the U.S.

The U.S. recognizes India as key to strategic interests and has sought to strengthen its relationship with India. Since the end of the Cold War, India has been an advocate of issues important to non-aligned nations, and is a member of the South Asian Association for Regional Cooperation (SAARC). During the Cold War, the U.S. tried to establish a closer relationship with India immediately after Indian independence in 1947 until 1954 when the non-aligned movement was formed. A second attempt at a closer relationship was made in 1962 following a skirmish between India and China over the border. Both the U.S. and India share a concern over the growth of China. Over the past five years, the two countries have been closer partners than anytime previously. However, there are concerns about India’s relations with Iran, including India’s increasing cooperation with the Iranian military.

Throughout its history, India’s caste system, multi-cultural and multi-ethnic population, and the vestiges of colonial domination have challenged India’s ability to govern certain parts of the country. India is one of the most terror-afflicted countries in the world. In 2008, more than 2300 people died from terrorist incidents in India. Terrorism is mainly concentrated in Kashmir, a disputed area bordering Pakistan where

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<sup>2</sup> The contents of this section are taken in whole or in part from Exs. I(A), I-XIII.

radical Muslim activists are present; central India, where Maoist rebels are fighting on behalf of landless laborers; and southern India, where Hindus and Muslims periodically clash. As a result of sometimes violent separatist movements, provincial law enforcement authorities and military militias have used excessive force to maintain order and defeat domestic terrorism. Terrorism and separatist activities are generally done in furtherance of internal issues, and are most violent in limited and remote geographic regions. Despite these problems, India is still an open society in which the rule of law is prominent.

India considers defeating terrorism and combating violent religious extremism as a critical shared security interest with the U.S. In 2000, the U.S. and India formed a joint working group on counterterrorism. It meets annually and is devoted to extending cooperation on areas such as bioterrorism, aviation security, cyber-security, terrorism, weapons of mass destruction terrorism, and terrorist financing. In 2002, the U.S. and India organized a cyber security forum to safeguard critical infrastructures from attack.

There are differences between the U.S. and India over India's nuclear weapons program. The two governments continue to work closely in pursuit of mutual interests in such issues as international management of nuclear technology, and preventing the proliferation of nuclear weapons. The Indian government buys most of its nuclear technology from the U.S., and it has an excellent record when it comes to protecting its nuclear arsenal.

The growth of the U.S. and India's economic ties has been accompanied by a corresponding growth in their strategic relationship. In 2005, a U.S. - India Joint Statement asserted that, as a responsible state with advanced nuclear technology, India should acquire the same benefits and advantages as other such states. In 2006, Congress passed the Henry J. Hyde United States - India Peaceful Atomic Cooperation Act, which allows direct civilian nuclear commerce with India for the first time in 30 years. This agreement "opens the door" for American and Indian firms to participate in each other's civil energy sector. Specifically, it enables India to buy U.S. nuclear reactors and fuel for civilian use. Also, it removed and/or revised several U.S. export requirements for dual-use and civil nuclear items.

In July 2007, the U.S. and India successfully negotiated an agreement on peaceful nuclear cooperation. This deal is more far-reaching than the Hyde Act. In August 2007, the International Atomic Energy Agency (IAEA) approved the agreement. It has not yet been approved by the 45-member Nuclear Suppliers Group, a group composed of countries that have nuclear energy capabilities that must approve such an agreement under international law. Neither the U.S. Congress nor the Indian parliament has ratified the deal.

Since 2002, the U.S. and India have held a series of "unprecedented and increasingly substantive" combined exercises involving all military services. These exercises ensure stability in southern and southwest Asia and have enabled the U.S. to get a "first look" at fighter jets that Russia designed and sold to India. More than 100 U.S. Special Forces soldiers have undergone counterinsurgency jungle warfare training

conducted by the Indian military. For the past seven years, the U.S. and Indian navies have participated in joint naval exercises conducted near the Indian coast.

India purchases more weapons systems than any other developing country. India purchases the majority of its weapons systems from Russia and Israel. The U.S. began selling weapons systems to India in 2002. In 2007, a U.S. defense contractor negotiated a \$1 billion dollar deal with India for the purchase of military transport aircraft along with related equipment, training and services. In January 2008, the U.S. approved the deal. Currently, U.S. defense contractors are competing with weapons manufacturers from other countries for a contract to sell multi-role, combat aircraft to India. The deal when consummated “could be worth” \$10 billion.

Although the Indian government generally respects the human rights of its citizens, there remain numerous serious problems and significant human rights abuses. India’s human rights record has often been uneven. Police and security forces have engaged in extrajudicial killings of persons in custody, disappearances, torture, and rape. A lack of accountability permeated the government and security forces, creating an atmosphere in which human rights violations went unpunished. A number of violent attacks have been committed in recent years by separatist and terrorist groups.

There have been cases involving the illegal export, or attempted illegal export, of U.S. restricted, dual-use technology to India, including technology and equipment that were determined to present an unacceptable risk of diversion to programs for the development of weapons of mass destruction or their means of delivery. Foreign government entities, including intelligence organizations and security services, have capitalized on private-sector acquisitions of U.S. technology, and acquisition of sensitive U.S. technology by foreign private entities does not slow its flow to foreign governments or its use in military applications.

The United States government encourages small and medium size companies to expand their business opportunities in India. Many U.S.-based companies, including large computer service and software development companies, have subsidiary companies and do business in India. Indian immigrants are the fastest growing legal group of immigrants in the U.S. The Indian-American community is well-entrenched in several U.S. business sectors.

## **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant an applicant 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 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to applicant’s allegiance, loyalty, or patriotism. It is merely an indication 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 may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein 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. 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 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

### Guideline C, Foreign Preference

AG ¶ 9 explains the Government's concern:

When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

AG ¶ 10 sets out one condition that could raise a security concern and may be disqualifying in this case:

(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to:

(1) possession of a current foreign passport.

At the time the SOR was issued, Applicant held a valid Indian passport, and he expressed an intent to apply for OCI status before December 2008. (SOR ¶¶ 1.a., 1.b.) AG ¶ 10(a)(1) has been raised by the evidence.

One foreign preference mitigating condition under AG ¶ 11 potentially mitigates this disqualifying condition:

(e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

As noted by Department Counsel, Applicant took corrective action to mitigate this concern after being made aware of the government's concern by destroying his Indian passport and withdrawing his intent, in writing, to apply for OCI status. Mitigating condition AG ¶ 11(e) is applicable, and for reasons discussed *supra*, Applicant has fully mitigated this concern.

### Guideline B, Foreign Influence

AG ¶ 6 explains the Government's concern about "foreign contacts and interests" stating:

[I]f the individual has divided loyalties or foreign financial interests, [he or she] 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 States citizens to obtain protected information and/or is associated with a risk of terrorism.

AG ¶ 7 indicates two conditions that could raise a security concern and may be disqualifying in this case, including:

- (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
- (b) connections 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.

The mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if only one relative lives in a foreign country and an applicant has contacts with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001). Applicant has frequent contact with his parents and sister. These close relationships create a potential risk of foreign exploitation, inducement, manipulation, pressure, or coercion meriting a close examination of all circumstances.

The government produced substantial evidence of these two disqualifying conditions as a result of Applicant's admissions and evidence presented. The government established Applicant's parents and sister are resident citizens of India, and that Applicant maintains frequent contact with them by telephone and travel. Additionally, Applicant's father was a senior career civil servant employed by the Indian government and in his post-government employment is active in the telecommunications and computer field in the private sector. The burden shifted to Applicant to produce evidence and prove a mitigating condition. The burden of disproving a mitigating condition never shifts to the government.

Two foreign influence mitigating conditions under Guideline ¶ 8 are potentially applicable to these disqualifying conditions:

- (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 U.S.; and

(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.

Applying common sense and life experience, there is a rebuttable presumption that a person has ties of affection for, and/or obligation to his immediate family. ISCR Case No. 04-07766 at 4 (App. Bd. Sept. 26, 2006); ISCR Case No. 01-03120 at 4 (App. Bd. Feb. 20, 2002). Applicant has demonstrated the indicia of ties of affection for and/or obligation to his parents and sister by telephone contact as well as his travel to India in 2003, 2004, and 2006. His parents and mother-in-law have also visited him in the U.S.

Applicant's mother is retired and is not associated with or affiliated with the Indian government. His father is a retired senior civil servant and receives a government pension from the Indian government. His post-retirement position as head of an Indian body that develops data protection standards for commercial companies operating within India is funded by member companies and is not part of or under the control of the Indian government. Although a board member of at least seven companies, only one company appears not to be privately owned, but rather is owned by a state government versus the federal government of India.

His sister is vice president of a privately owned advertising company and his brother-in-law is a Bollywood script writer. Neither his sister nor brother-in-law is associated with or affiliated with the Indian government. The record does not identify what influence, if any, the Indian government could exert on Applicant's parents and sister as a result of their being resident citizens of India. However, their presence in India and Applicant's foreign travel creates concerns under this Guideline. As such, the burden shifted to Applicant to show his relatives in India and travel there does not create security risks.

"[T]he nature of the foreign government involved in the case, and the intelligence-gathering history of that government are important evidence that provides context for all the other evidence of the record . . ." See, e.g., ISCR Case No. 04-0776 at 3 (App. Bd. Sept. 26, 2006); see also ISCR Case No. 02-07772 at 7 (App. Bd. Aug. 28, 2003). As noted *supra* under the subheading "India," India has engaged in economic espionage and has had cordial relations with governments hostile to the U.S. Notably, the affects of terrorism have been felt within India's borders.

Applicant denies having "divided loyalties" between the U.S. and any foreign country. It should be noted Applicant's allegiance to the U.S. was not challenged in this proceeding.

On balance, Applicant has not met his burden of showing there is “little likelihood that [his relationship with his parents and sister] could create a risk for foreign influence or exploitation.” The nature of the India’s government and its ongoing intelligence gathering activities against the U.S. places Applicant in just this position, given his close relationship with his family and their continued presence and connection with India. Accordingly, mitigating conditions 8(a) does not apply. However, Applicant’s deep and longstanding relationships with and within the U.S. warrant application of mitigating condition 8(b).

### **Whole Person Concept**

In addition to the enumerated disqualifying and mitigating conditions as discussed previously, I have considered the general adjudicative guidelines related to the whole person concept under Directive ¶ E2.2.1. “Under the whole person concept, the Administrative Judge must not consider and weigh incidents in an applicant’s life separately, in a piecemeal manner. Rather, the Judge must evaluate an applicant’s security eligibility by considering the totality of an applicant’s conduct and circumstances.”<sup>3</sup> The directive lists nine adjudicative process factors (APF) that are used for “whole person” analysis.

Because foreign influence does not involve misconduct, voluntariness of participation, rehabilitation and behavior changes, etc., the eighth APF, “the potential for pressure, coercion, exploitation, or duress,” Directive ¶ E2.2.1.8, is the most relevant of the nine APFs to this adjudication.<sup>4</sup> In addition to the eighth APF, other “[a]vailable, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.” Directive ¶ E2.2.1. Ultimately, the clearance decision is an overall commonsense determination. Directive ¶ E2.2.3.

The Appeal Board requires the whole person analysis to address “evidence of an applicant’s personal loyalties; the nature and extent of an applicant’s family’s ties to the U.S. relative to his [or her] ties to a foreign country; his or her ties social ties within the U.S.; and many others raised by the facts of a given case.” ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007).

I have carefully considered Applicant’s family connections and personal connections to India. Several circumstances weigh against Applicant in the whole person analysis. India has at times engaged in conduct contrary to U.S. interests such

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<sup>3</sup> ISCR Case No. 03-04147 at 3 (App. Bd. Nov. 4, 2005) (quoting ISCR Case No. 02-01093 at 4 (App. Bd. Dec. 11, 2003)); ISCR Case No. 05-02833 at 2 (App. Bd. Mar. 19, 2007) (citing *Raffone v. Adams*, 468 F.2d 860 (2nd Cir. 1972) (taken together, separate events may have a significance that is missing when each event is viewed in isolation).

<sup>4</sup> See ISCR Case No. 02-24566 at 3 (App. Bd. July 17, 2006) (stating that an analysis under the eighth APF apparently without discussion of the other APFs was sustainable); ISCR Case No. 03-10954 at 5 (App. Bd. Mar. 8, 2006) (sole APF mentioned is eighth APF); ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006) (remanding grant of clearance because Judge did not assess “the realistic potential for exploitation”), *but see* ISCR Case No. 04-00540 at 6 (App. Bd. Jan. 5, 2007) (rejecting contention that eighth APF is exclusive circumstance in whole person analysis in foreign influence cases).

as illegal export, or attempted illegal export of U.S. restricted dual-use technology to India. India also has a mixed human rights record. India may attempt to use Applicant's parents and sister who live in India to obtain such information. Also, Applicant spent his formative years in India. He has visited India three times recently in 2003, 2004, and 2006. Although Applicant has no immediate plans to visit India, he did not rule out visiting India in the future. Applicant also maintains frequent contact with his family members in India. These contacts and visits are manifestations of the strong affection and regard Applicant has for family members in India.

There is mitigating evidence that weighs towards grant of Applicant's security clearance. Applicant immigrated to the U.S. when he was 23 years old, and received the major portion of his graduate education in the U.S. He has lived in the U.S. for the past 16 years, and has one U.S.-born child. His assets in the U.S. are substantial in contrast to having no assets in India. He is a U.S. citizen and U.S. passport holder. His wife is a U.S. citizen. His brother-in-law is a "green card" holder, who intends to remain in the U.S. and apply for U.S. citizenship when eligible. His ties to the United States are stronger than his ties to his parents and sister in India. There is no evidence Applicant has ever taken any action that could cause potential harm to the United States. He takes his loyalty to the United States very seriously, and he has worked diligently for a defense contractor since June 1998. The evidence contains no derogatory record evidence about the Applicant.

I considered the totality of Applicant's family ties to India and the government's material relating to India. I conclude that, in the unlikely event that Applicant's family in India could be subject to coercion or duress from the Indian government in an attempt to obtain sensitive information, Applicant, because of his deep and longstanding relationships and loyalties in the U.S., would resolve any attempt to exert pressure, coercion, exploitation, or duress in favor of the United States. Noteworthy is Applicant's cooperation and willingness to address the government's concern as it pertains to his possession of an Indian passport and intent to apply for OCI status. When he became aware of the government's concerns, he took prompt corrective action to address those concerns. I also considered his character evidence, years of loyal and honorable service working for a defense contractor, and potential for future service.

This case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. This analysis must answer the question whether there is a legitimate concern under the facts presented that the Indian government or its agents might exploit or attempt to exploit Applicant's family members in such a way that this U.S. citizen would have to choose between his pledged loyalty to the U.S. and those family members. After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude Applicant has mitigated the security concerns pertaining to foreign influence and preference.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my “careful consideration of the whole person factors”<sup>5</sup> and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has mitigated or overcome the government’s case. For the reasons stated, I conclude he is eligible for access to classified information.

### **Formal Findings**

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline C:	FOR APPLICANT
Subparagraphs 1.a. - 1.b.:	For Applicant

Paragraph 2, Guideline B:	FOR APPLICANT
Subparagraphs 2.a. – 2.f.:	For Applicant

### **Conclusion**

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 eligibility for a security clearance for Applicant. Clearance is granted.

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ROBERT J. TUIDER  
Administrative Judge

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<sup>5</sup>See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).