



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



In the matter of: )  
 )  
 [Redacted] ) ISCR Case No. 09-04925  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Tovah Minster, Esq., Department Counsel  
For Applicant: William F. Savarino, Esq.

April 20, 2011

**Decision**

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FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline B (Foreign Influence). Eligibility for access to classified information is granted.

**Statement of the Case**

Applicant submitted a security clearance application on February 3, 2009. On August 3, 2010, the Defense Office of Hearings and Appeals (DOHA) sent her a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny her application, citing security concerns under Guideline B. DOHA acted 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 adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on August 12, 2010; answered it on August 24, 2010; and requested a hearing before an administrative judge. DOHA received the request on August 26, 2010. Department Counsel was ready to proceed on December

29, 2010, and the case was assigned to me on January 13, 2011. DOHA issued a notice of hearing on February 11, 2011, scheduling the hearing for February 15, 2011. I convened the hearing as scheduled.<sup>1</sup> Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibit (AX) A, which was admitted without objection. DOHA received the transcript (Tr.) on February 22, 2011.

### **Administrative Notice**

Department Counsel requested that I take administrative notice of relevant facts about India. The request and supporting documents are attached to the record as HX I. Applicant objected to basing administrative notice on Enclosure 8 to HX I, the *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage, 2000*, published by the Office of the National Counterintelligence Executive, on the ground that the information is unreliable because it is outdated and based on a very limited survey of unknown companies. (Tr. 13-14.) I took administrative notice as requested by Department Counsel, with the qualification that I would review the entire record and determine what weight, if any, should be given to Enclosure 8. The facts administratively noticed are set out below in my findings of fact.

### **Findings of Fact**

In her answer to the SOR, Applicant admitted all the factual allegations in the SOR and offered explanations. Her admissions in her answer and at the hearing are incorporated in my findings of fact.

Applicant is a native of India. She was educated in India and earned a master's degree in organic chemistry. (Tr. 28.) She came to the United States in June 1994, became a U.S. citizen in September 2004, and destroyed her Indian passport in August 2009. (GX 5 at 5-6; Tr. 26.) She uses her U.S. passport for foreign travel. (Tr. 39.)

Applicant's husband also is a native of India. He received a bachelor's degree in computer engineering in India. He came to the United States in 1986 as a consultant, stayed for about a year, returned to India, and then moved permanently to the United States in 1992 (Tr. 59-60.) He attended graduate school in the United States and earned a master's degree in business administration in September 1992. He became a naturalized U.S. citizen in August 2008, and he surrendered his Indian passport when he became a U.S. citizen. (GX 2 at 3.) Applicant and her husband married in September 1993, and they have two children.

Applicant's husband is the president of a U.S.-based company seeking to continue doing business with the U.S. Government. The company provides information technology (IT) infrastructure support to the U.S. Government and private industry. (Tr.

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<sup>1</sup> Applicant and her husband both applied for security clearances, and both were preliminarily denied because of security concerns under Guideline B. Her husband's case is ISCR Case No. 09-04312. With the consent of all parties, I conducted a joint hearing.

62.) The company has been working as a subcontractor, but in order to bid on defense contracts as a prime contractor, Applicant and her husband need security clearances. (Tr. 101-02.)

Applicant and her husband founded the company in 1998. She owns 51% of the business and her husband owns 49%. (Tr. 29-30, 61-62.) Their company has been a government contractor since it was founded. (Tr. 65.) About 20-25% of its business is from defense-related contracts. Applicant is not an officer in the company, and her involvement in company business is limited. She testified she “looks at the strategies and the processes,” but she is not involved in the details of the business. She works at the company office about three days a month. (Tr. 30.) Neither Applicant nor her husband has a security clearance.

Applicant’s father and mother are citizens and residents of India. Her father is a retired mechanical engineer who worked for an Indian research institute. He receives a government pension. (Tr. 34-35.) Her mother is not employed outside the home. Applicant’s father and mother do not depend on her and her husband for financial support, because the government pension and their savings are sufficient to meet their living expenses. (Tr. 36.) She visits her parents for four to six weeks every year, and she communicates with them by telephone three or four times a month. (Tr. 38, 45; GX 2 at 2.)

Applicant’s older brother is a citizen and resident of India who works as a salesman for a medical equipment company. Her older brother’s wife is a citizen and resident of India employed as a teacher in a public elementary school. (Tr. 39-41.) Her younger brother is a civil engineer employed by an Indian governmental agency. (Tr. 42.) Applicant’s sister is a citizen and resident of India, and she is married to the manager of a private IT company. She does not work outside the home. Applicant visits her siblings once a year and communicates with them by telephone once or twice a month. (Tr. 44-45.)

Applicant’s mother-in-law is a citizen of India and resides with Applicant and her husband in the United States. Her mother-in-law moved to the United States in November 2007 and obtained her green card in 2008. She is the beneficiary of her deceased husband’s pension from the Indian Government. (GX 2 at 2.) She spends about a month in India every year. (Tr. 54.)

Applicant’s brother-in-law has been a U.S. citizen since 2007. He holds a security clearance and is the facility security officer (FSO) of their company. (GX 2 at 2; Tr. 75.)

Applicant has an uncle who is a citizen and resident of India and is employed by an Indian Government agency as an engineer. (Tr. 43.) Applicant’s only contact with her uncle was one phone call from him about a year ago. (Tr. 47.)

In 2004, Applicant’s husband and his brother bought a villa in India. They split the cost of purchasing the villa, and it is jointly owned by Applicant’s husband, his brother,

and his mother. (Tr. 70-74.) The villa is vacant when not being used by her husband, her brother-in-law, or their families. Her husband's share in the villa is worth about \$100,000. (GX 2 at 4; Tr. 49-50, 55, 74.) Applicant has no direct financial interest in the villa, and no evidence was presented indicating that she has any inheritance interest in the property or any legal rights to the property as the spouse of one of the owners.

In 2006, Applicant's husband purchased an apartment in India as an investment. It is under construction and will be a rental property when it is completed. It is worth about \$300,000. (GX 2 at 4; Tr. 68.) In 2007, he purchased a parcel of undeveloped land in India, worth about \$400,000. (GX 2 at 4.) These two properties are owned solely by her husband.

Applicant's husband has two bank accounts in U.S.-owned banks in India. One is a checking account with a balance of about \$25,000, which he uses to pay his Indian mortgages, and the other is a certificate of deposit worth about \$100,000. (GX 2 at 4.) He purchased the certificate of deposit because it offered a high rate of interest. (Tr. 80.) His assets in India are solely in his name. (Tr. 56.) He paid cash for all his real estate investments in India. (Tr. 77.) He testified that he has no emotional attachment to his Indian real estate holdings and would not hesitate to dispose of them if necessary. (Tr. 99-100.)

Applicant and his wife have jointly-owned bank accounts, mutual funds, and securities worth about \$6 million, retirement accounts worth about \$190,200, and educational saving accounts for their children worth about \$355,000. Their real estate in the United States is jointly owned. (Tr. 56.) The total equity in their primary residence, vacation home, rental properties and three investment properties in the United States is about \$3,708,000. (AX A.) Applicant's husband estimates that the value of their company is about \$30 million. (Tr. 85.)<sup>2</sup>

India is a multiparty, federal, parliamentary democracy, with a bicameral parliament and a population of approximately 1.1 billion. Its political history since it gained independence from Great Britain in 1947 has included several armed conflicts with Pakistan, assassinations of two prime ministers, sporadic outbreaks of religious riots, and violent attacks by several separatist and terrorist groups in different parts of the country. There is a continuing threat from terrorism throughout the country, including attacks on targets where U.S. citizens or Westerners are known to congregate or visit.

India's size, population, and strategic location give it a prominent voice in international affairs. India has always been an active member of the United Nations. India is a non-permanent member of the Security Council, and it seeks a permanent seat on the Security Council.

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<sup>2</sup> The value of the personal and business assets held by Applicant and her husband was established solely through their testimony. No corroboration of the value of the assets was presented by way of tax assessments, independent appraisals, contracts of sale, or similar documents. Since Department Counsel did not contest the evidence regarding the value of the assets, I accepted the testimony of Applicant and her husband as true and accurate.

The United States and India have differences over India's nuclear weapons programs, the pace of India's economic reforms, and India's bilateral strategic partnership with Iran. Nevertheless, the United States recognizes that India is important to U.S. strategic interests. The strategic partnership between the United States and India is based on shared values such as democracy, pluralism, and the rule of law. Since 2002, the United States and India have held a series of substantive combined exercises involving all military services.

The United States is India's largest foreign investment partner. Since December 2006, direct civilian nuclear commerce with India has been permitted. The two countries have a common interest in the free flow of commerce and resources, including through the vital sea lanes of the Indian Ocean.

The United States and India share a common interest in fighting terrorism and in creating a strategically stable Asia. They are seeking to foster bilateral relations by establishing working groups to address five areas of mutual interest: (1) strategic cooperation; (2) energy and climate change; (3) education and development; (4) economics, trade, and agriculture; and (5) science and technology, health, and innovation.

In the past, India had long-standing military supply relationships with the Soviet Union, and Russia remains India's largest supplier of military systems and spare parts. India is one of many countries engaged in economic intelligence collection and industrial espionage directed at the United States. The United States has longstanding economic issues with India regarding protection of intellectual property rights and trade in dual-use technology. There have been numerous incidents of international businesses illegally exporting, or attempting to export restricted, dual-use technology from the United States to India.

The Indian Government generally respects the rights of its citizens, but there are serious problems involving abuses by police and security forces. Corruption in the police force is pervasive, and police officers often act with impunity. Abuses by police and security forces have occurred primarily in criminal investigations and efforts to suppress separatist and terrorist groups. There is no evidence that India uses torture or abuse against its citizens to extract economic intelligence.

India does not recognize dual citizenship. Foreign citizens entering India are required to obtain a visa. Travelers entering on tourist visas are not allowed reentry within two months, unless they obtain specific permission. Non-citizens of Indian origin may obtain a "person of Indian origin" (PIO) card, which allows unlimited travel to and from India.<sup>3</sup>

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<sup>3</sup> There is no evidence that Applicant and her husband have sought or obtained PIO cards.

## 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 have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “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. Thus, a decision to deny a security clearance 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 (4th 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. 92-1106 at 3, 1993 WL 545051 at \*3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition,

and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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). “[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

### Guideline F, Foreign Influence

The SOR alleges Applicant’s husband has a certificate of deposit, an apartment, a villa, and undeveloped real estate in India worth about \$900,000 (¶ 1.a). It alleges that Applicant’s parents, two brothers, one sister, and an uncle are citizens and residents of India (¶¶ 1.b and 1.c). It alleges that Applicant’s father is a retired employee of the Indian Government and receives a pension from the Indian Government (¶ 1.d). It alleges that Applicant’s brother and uncle are employees of the Indian Government (¶ 1.e). Finally, it alleges that Applicant’s mother-in-law is a citizen and resident of India and receives a pension from the Indian Government (¶ 1.f).

The security concern under this guideline is set out in AG ¶6:

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 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.

Four disqualifying conditions under this guideline are relevant to this case. First, a disqualifying condition may be raised by “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.” AG ¶ 7(a). Second, a disqualifying condition may be raised by “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.” AG ¶ 7(b). Third, a security concern may be raised if an applicant is “sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.” AG ¶ 7(d). Fourth a security

concern also may be raised by “a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation.” AG ¶ 7(e).

AG ¶¶ 7(a), (b), (d), and (e) all require substantial evidence of a “heightened risk.” The “heightened risk” required to raise one of these disqualifying conditions is a relatively low standard. “Heightened risk” denotes a risk greater than the normal risk inherent in having a family member living under a foreign government or owning property in a foreign country. The totality of Applicant’s family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003).

Guideline B is not limited to countries hostile to the United States. “The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States.” ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

Furthermore, “even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security.” ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at \*\*15-16 (App. Bd. Mar. 29, 2002). Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. Nevertheless, the nature of a nation’s government, its relationship with the U.S., and its human rights record are relevant in assessing the likelihood that an applicant’s family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence operations against the U.S. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. See *generally* ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision to grant clearance where administrative judge did not consider terrorist activity in area where family members resided).

Applicant’s parents, siblings, and an uncle are citizens and residents of India. Her father is a retired government employee and receives a pension from the Indian Government. Her younger brother is a government employee. Applicant’s sister is married to the manager of an IT company, engaged in the same general business as Applicant and her husband. Her mother-in-law visits India for about a month every year and receives her deceased husband’s pension from the Indian Government. “[T]here is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person’s spouse.” ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at \* 8 (App. Bd. Feb. 20, 2002). Applicant has not rebutted this presumption.



After considering the totality of Applicant's family ties to India as well as each individual tie, I conclude that Applicant's family ties are sufficient to raise a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion. The sources of this heightened risk include governmental agencies engaged in economic and industrial espionage, private companies seeking to obtain restricted U.S. technology, and terrorists targeting Westerns to further their political goals. Thus, I conclude that AG ¶¶ 7(a), (d), and (e) are established.

In addition, Applicant's husband has substantial financial interests in India. The heightened risk in his case is based primarily on the nature and high value of his assets, which could cause him and his family to face a conflict between protecting his assets and protecting the interests of the United States. Although Applicant has no ownership interest in these assets, their loss or diminution in value would have a significant impact on the family financial situation. Thus, I conclude that AG ¶ 7(e) also is established.

Security concerns under this guideline can be mitigated by showing that "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." AG ¶ 8(a). India engages in economic and industrial espionage, and it has been involved in incidents involving illegal importation of restricted, dual-use technology from the United States. Applicant's mother-in-law is a citizen of India, and she spends substantial time in India. Applicant's siblings are citizens and residents of India. Some of her family members are employed by the Indian Government or receive pensions from the Indian Government. Her sister's husband holds a managerial position in an Indian IT company. Her husband holds assets worth about \$900,000 in India. For these reasons, I conclude that AG ¶ 8(a) is not established.

Security concerns under this guideline can be mitigated by showing "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." AG ¶ 8(b). Applicant's husband has substantial financial interests in India, totaling more than \$900,000. However, he is a wealthy man. Applicant and her husband have personal assets in the United States worth more than \$10 million, in addition to a business worth about \$30 million. Applicant and her husband have no emotional attachment to the real estate holdings in India, and would readily dispose of them if necessary. Applicant and her husband surrendered their Indian passports and use their U.S. passports to travel to and from India. They have not taken advantage of the convenience of an Indian PIO card. Instead, they visit India as American tourists. Applicant and her husband aspire to raise their families in the United States and watch them marry and have families in the United States. I conclude that Applicant would resolve any conflict between the interests of the United States and India in favor of the United States. Thus, I conclude that AG ¶ 8(b) is established.

Security concerns under this guideline also may be mitigated by showing that “contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.” AG ¶ 8(c). There is a rebuttable presumption that contacts with an immediate family member in a foreign country are not casual. ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002). Applicant’s contacts with her parents and siblings are frequent and not casual. However, AG ¶ 8(c) applies to her isolated contact with her uncle.

Security concerns arising from financial interests can be mitigated if “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.” AG ¶ 8(f). I conclude that this mitigating condition is not established because the magnitude of Applicant’s husband’s investments in India could result in a conflict. However, I am satisfied, for the reasons set out in the above discussion of AG ¶ 8(b), that Applicant and her husband would resolve any conflict in favor of the United States.

### **Whole-Person Concept**

Under the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of the applicant’s conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual’s age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guideline B in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a mature, well-educated woman, married to a successful entrepreneur who has made his fortune in the United States. She is devoted to her husband and children, and she aspires to have her children grow up and have families in the United States. She was candid, sincere, and credible at the hearing.

After weighing the disqualifying and mitigating conditions under Guideline B, and evaluating all the evidence in the context of the whole person, I conclude Applicant has

mitigated the security concerns based on foreign influence. Accordingly, I conclude she has carried her burden of showing that it is clearly consistent with the national interest to grant her eligibility for access to classified information.

### **Formal Findings**

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline B (Foreign Influence):                   FOR APPLICANT

Subparagraphs 1.a-1.f:   For Applicant

### **Conclusion**

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman  
Administrative Judge