



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



In the matter of: )  
)  
) ADP Case No. 17-02888  
)  
Applicant for Public Trust Position )

**Appearances**

For Government: Michelle Tilford, Esq., Department Counsel  
For Applicant: John V. Berry, Esq.

01/30/2019

**Decision**

GARCIA, Candace Le'i, Administrative Judge:

Applicant mitigated the foreign influence trustworthiness concerns. Eligibility for access to sensitive information is granted.

**Statement of the Case**

On October 19, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing trustworthiness concerns under Guideline B, foreign influence. The action was taken under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on November 10, 2017, and elected to have a hearing before an administrative judge. The case was assigned to me on May 10, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing (NOH) on May 29, 2018, scheduling the hearing for June 21, 2018. I convened the hearing as scheduled.

I appended to the record as Hearing Exhibits (HE) I, II, III, and IV, respectively, the Government's request for administrative notice of facts about India, the Government's exhibit list, Applicant's exhibit list, and a 2017 joint report to Congress by the DOD and the U.S. Department of State (DOS) concerning India. Government Exhibit (GE) 1 was admitted in evidence without objection. Applicant testified, called four witnesses, and submitted Applicant's Exhibits (AE) A through K, which were admitted in evidence without objection. DOHA received the hearing transcript (Tr.) on June 29, 2018.

## **Procedural and Evidentiary Rulings**

### **Amendment to the SOR**

At hearing, Department Counsel moved to amend the SOR to conform to the evidence. With no objection, the SOR was amended to read as follows: (1) SOR ¶ 1.b alleges, "You possess two foreign bank accounts with balances totaling approximately \$2,000"; (2) SOR ¶ 1.c alleges, "Your husband owns property in India worth in excess of \$50,000 U.S."; and (3) SOR ¶ 1.d was added and alleges, "Your husband has a bank account in India with a balance totaling approximately \$28,000."<sup>1</sup>

### **Request for Administrative Notice**

Department Counsel's request that I take administrative notice of certain facts about India was included in the record as HE I. Applicant did not object, and requested that I also take administrative notice of certain facts about India, as set forth in HE IV. I have taken administrative notice of the facts contained in HE I and IV. The facts administratively noticed are summarized in the Findings of Fact, below.

## **Findings of Fact**

Applicant admitted all of the SOR allegations. She is 42 years old. She obtained a bachelor's degree from a university in India in 1994. She is married. She has two children; both are native-born U.S. citizens.<sup>2</sup>

Applicant has worked as a tester of health applications for her current employer since October 2016. Within six months, she was promoted to a team lead position in which she has managed a six to eight-person team. She was first granted eligibility to hold a public trust position in December 2016, and she is seeking to maintain her eligibility for access to sensitive information.<sup>3</sup>

Applicant was born in India. She immigrated to the United States in 2001, to join her husband. She was naturalized as a U.S. citizen and obtained a U.S. passport in

---

<sup>1</sup> Tr. at 7-11.

<sup>2</sup> Tr. at 6-11, 41, 69, 71-73, 91-94, 99-100; GE 1.

<sup>3</sup> Tr. at 22-80; GE 1; AE K.

2009. Her husband was also born in India. He immigrated to the United States in 1998, and he also became a naturalized U.S. citizen in 2009. Both Applicant and her husband consider themselves solely U.S. citizens.<sup>4</sup>

Applicant's father, six sisters, brother, mother-in-law, and father-in-law are citizens and residents of India (SOR ¶ 1.a). Her mother died in 1995. She testified that none of her family members in India have ever had ties to the Indian government or military. She travels to India once every two years to visit her family there, and she did so in 2010, 2012, 2014, 2017, and 2018. She testified that she has reported all of her foreign travels to her security officer, as required. She and her husband indicated that none of her foreign family members are aware that she has a public trust position, and are only generally aware that she works in the information technology field as a software tester.<sup>5</sup>

Applicant's father is 80 years old. He was formerly self-employed. He owns farming land in India worth approximately \$70,000 USD. Applicant testified that her brother would inherit her father's land when her father passes away. She maintains biweekly to monthly telephone contact with her father, and she gives him \$150 once yearly.<sup>6</sup>

Applicant's six sisters are ages 61, 58, 56, 54, 52, and 50. They are all homemakers. Their husbands work for private companies--one runs a publication business, another runs a product supply business, one works in education, one works in a private bank, one works as an accountant, and one is retired from a private newspaper. Applicant maintains biweekly to monthly contact with her sisters. Applicant's brother is 46 years old and works for a private company. He lives with their father. Applicant maintains monthly contact with her brother, and she gives him approximately \$100 to \$200 once every two years.<sup>7</sup>

Applicant's mother-in-law and father-in-law are approximately 70 and 74 years old, respectively. They are both retired from the same private company, where Applicant's mother-in-law was a typist and her father-in-law was a clerk. They do not receive a pension. Applicant maintains bimonthly telephonic contact with them, and her husband talks to his parents once biweekly to monthly. Applicant's husband travels to India to visit his parents once every three to five years, and he last did so in 2017. Applicant and her husband occasionally provide them with financial support, as further discussed below.<sup>8</sup>

---

<sup>4</sup> Tr. at 22-80, 91-94; AE C.

<sup>5</sup> Tr. at 22-80, 91-116; GE 1.

<sup>6</sup> Tr. at 22-80, 91-116; GE 1.

<sup>7</sup> Tr. at 22-80, 91-116; GE 1.

<sup>8</sup> Tr. at 22-80, 91-116; GE 1.

Applicant and her husband have financial interests in India totaling approximately \$75,000. She has two bank accounts in India that she uses to pay for her expenses when she travels there. The combined balance on both accounts was \$2,000 USD at the time of her October 2017 security clearance application (SCA), and it was \$1,020 USD as of the date of the hearing. Her husband has a bank account in India that his parents use to pay for their medical and daily living expenses. He also uses it to pay for his expenses when he travels to India. Its balance at the time of her SCA was \$28,000 USD, and it was \$24,000 USD as of the date of the hearing. Applicant's husband intends to close his bank account in India when he no longer needs it to pay for his parents' expenses. He also owns one property in India. He purchased it for approximately \$12,000 USD in 1999, before he and Applicant were married, for his parents to live. Its value as of the date of the hearing was \$50,000 USD. Applicant and her husband intend to sell this property when his parents no longer need to live in it, and invest the money from the sale in the United States.<sup>9</sup>

Applicant testified that neither she nor her husband intend to return to India in the future to live, as their life is in the United States. She also testified that they are loyal to the United States. Their assets in the United States total approximately \$1.9 million. This includes their two homes--their primary residence and rental property that they purchased in 2017 and 2014, respectively; their combined annual income of \$200,000; and their retirement and investment accounts.<sup>10</sup>

Applicant has not had any unfavorable issues at work, and she has completed all requisite annual training. She testified that she would report any attempts to blackmail her or her family in India to the proper authorities. Prior to holding her current public trust position, she was a homemaker from 2001 through 2009. She then worked in the public school system for several years from 2009 to 2016. She is involved in her community, to include serving as her children's Girl Scouts treasurer.<sup>11</sup>

Applicant's supervisor and project manager since 2016 described Applicant as a good worker. Her coworker since November 2016 testified that Applicant is an exceptional team lead, a driven and detail-oriented worker, and an honest and likeable individual. A former coworker from the public school system, and a friend of Applicant of ten years, described Applicant as possessing a strong work ethic and an individual who is loyal to the United States. Individuals who know Applicant from Girl Scouts described her as an honest person.<sup>12</sup>

---

<sup>9</sup> Tr. at 22-80, 91-116; GE 1; AE A, B, D, E.

<sup>10</sup> Tr. at 6-11, 22-80, 91-116; AE F, G.

<sup>11</sup> Tr. at 22-91, 116-125; GE 1; AE H, I, J.

<sup>12</sup> Tr. at 22-91, 116-125; GE 1; AE H, J.

## **India**

India and seven other countries were identified, in a 2008 Annual Report to Congress on Foreign Economic Collection and Industrial Espionage, as being involved in economic and industrial espionage. In its 2009 to 2011 Report to Congress, the Office of the National Counterintelligence Executive reported that sensitive U.S. economic information and technology are targeted by the intelligence services, private sector, and citizens of dozens of countries, to include U.S. allies and its partners. The U.S. Department of Justice identified numerous criminal cases concerning export enforcement related to proprietary defense information, economic espionage, theft of trade secrets, and embargo-related criminal prosecutions involving both the Indian government as well as private companies and individuals in India.

Anti-Western terrorist groups, including some on the U.S. Government's list of foreign terrorist organizations, are active in India, and the DOS warns U.S. citizens that India continues to experience terrorist and insurgent activities that may affect U.S. citizens directly or indirectly. The South Asian Terrorism Portal, run by the nonprofit Institute for Conflict Management, reported fatalities during the first half of 2017 due to terrorism and insurgency in India.

India continues to experience significant human rights abuses. In its 2018 annual human rights report for India, the DOS identified the following as India's most significant human rights problems: police and security force abuses; widespread corruption; reports of political prisoners in certain states; instances of censorship and harassment of media outlets including some critical of the government; and a lack of accountability for misconduct at all levels of government, contributing to widespread impunity.

The Central Monitoring System (CMS) in India, a mass electronic surveillance data-mining program installed by a government-owned center, continued to allow governmental agencies to monitor electronic communication in real time without informing the subject or a judge. The CMS also provides agencies with centralized access to the telecommunications network, the ability to hear and record mobile, landline, satellite, and Voice over Internet Protocol phone calls, read private e-mails and text messages, and track geographical locations of people in real time.

## **Policies**

The Under Secretary of Defense's Memorandum of November 19, 2004, treats ADP positions as sensitive positions, and it entitles applicants for ADP positions to the procedural protections in the Directive before any final unfavorable access determination may be made. The standard set out in the adjudicative guidelines for assignment to sensitive duties is that the person's loyalty, reliability, and trustworthiness are such that assigning the person to sensitive duties is clearly consistent with the interests of national security. AG ¶ 2.b.

A person who seeks access to sensitive information enters into a fiduciary relationship with the Government predicated upon trust and confidence. 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 sensitive information.

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the 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. The 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 protection of the national security is the paramount consideration. Under AG ¶ 2(b), "[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security." The Government must present substantial evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. 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 national security to grant or continue eligibility for access to sensitive information.

## **Analysis**

### **Guideline B, Foreign Influence**

The trustworthiness concern for foreign influence is set out in AG ¶ 6:

Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a trustworthiness concern if they result in divided allegiance. They may also be a trustworthiness concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

The guideline notes several conditions that could raise trustworthiness concerns under AG ¶ 7. The following are potentially applicable in this case:

(a) contact, regardless of method, 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;

(b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology;

(e) shared 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; and

(f) substantial business, financial, or property interests in a foreign country, or in any foreign owned or foreign-operated business that could subject the individual to a heightened risk of foreign influence or exploitation or personal conflict of interest.

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding sensitive 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 United States, 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 United States. 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).

AG ¶ 7(a) requires 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. Applicant's family members are citizens and residents of India. India was identified as involved in economic and industrial espionage. In addition, terrorist activities, significant human rights abuses, and government monitoring of communications and geographical locations of people are present in India. Applicant's foreign contacts create a potential conflict of interest and a heightened risk of foreign exploitation, inducement, manipulation, pressure, and coercion, both directly as well as through her husband and their financial interests in India. AG ¶¶ 7(a), 7(b), 7(e), and 7(f) have been raised by the evidence.

Conditions that could mitigate foreign influence trustworthiness concerns are provided under AG ¶ 8. The following are potentially applicable:

(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 United States;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, or allegiance to the group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;

(c) 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; and

(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.

AG ¶ 8(a) is not established for the reasons set out in the above discussion of AG ¶¶ 7(a), 7(b), 7(e), and 7(f). AG ¶ 8(c) is also not established, as Applicant and her husband visit their family in India once every two to five years, they communicate with them frequently, and they provide financial support to them.

However, Applicant's deep and longstanding relationships and loyalties in the United States are sufficient to establish AG ¶ 8(b). She has lived in the United States since 2001. She has been a citizen since 2009. Her husband and children are citizens and residents of the United States. In addition, AG ¶ 8(f) is established, as Applicant and her husband's assets in the United States total approximately \$1.9 million, as compared to their financial interests in India of approximately \$75,000.



## **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a public trust position by considering the totality of the applicant's conduct and all relevant circumstances. The 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 public trust position 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. Applicant's ties to India are outweighed by her deep and longstanding relationships and loyalties in the United States. I am confident that she will resolve any conflict of interest in favor of the United States.

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 trustworthiness concerns raised by her foreign family connections and financial interests. Accordingly, I conclude she has carried her burden of showing that it is clearly consistent with national security to grant her eligibility for access to sensitive information.

### **Formal Findings**

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

Paragraph 1, Guideline B: For Applicant

Subparagraphs 1.a - 1.d: For Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is granted.

---

Candace Le'i Garcia  
Administrative Judge