



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



In the matter of:)	
)	
[NAME REDACTED])	ADP Case No. 14-01816
)	
Applicant for Public Trust Position)	

Appearances

For Government: Richard Stevens, Esq., Department Counsel
For Applicant: *Pro se*

09/26/2014

Decision

MALONE, Matthew E., Administrative Judge:

Applicant mitigated the trustworthiness concerns raised by the presence of his family members in India. His request for a position of trust is granted.

Statement of the Case

On October 7, 2013, Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP) to obtain eligibility for an ADP I/II/III position¹ for his job with a defense contractor. After reviewing the results of the ensuing background investigation, Department of Defense (DOD) adjudicators were unable to determine that it is clearly consistent with the interests of national security to grant Applicant's request for a position of trust.²

¹ As defined in Chapter 3 and Appendix 10 of DOD Regulation 5220.2-R, as amended (Regulation).

² Required by the Regulation, as amended, and by the Directive, as amended.

On June 13, 2014, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which, if proven, raise trustworthiness concerns addressed in the adjudicative guidelines (AG)³ for foreign influence (Guideline B). Applicant timely answered the SOR and requested a hearing. The case was assigned to me on August 18, 2014, and I convened a hearing on September 11, 2014. Department Counsel presented Government Exhibits (Gx.) 1 - 3, which were admitted without objection. Applicant testified in his own behalf.

The Government also asked that I take administrative notice of certain facts germane to the issues presented by the pleadings. I granted that request and admitted, as Hearing Exhibit (Hx.) I, Department Counsel's seven-page memorandum, supported by 14 enclosed documents. DOHA received a transcript of the hearing (Tr.) on September 19, 2014.

Findings of Fact

Under Guideline B, the Government alleged that Applicant's parents (SOR 1.a), sister (SOR 1.b), and mother- and father-in-law (SOR 1.c) are citizens of and reside in India. Applicant admitted all of the allegations. His admissions are incorporated in my findings of fact. Having reviewed Applicant's response to the SOR, the transcript, and exhibits, I make the following additional findings of fact.

Applicant is 41 years old. He was born and raised in India, where he earned bachelor's and master's degrees in computer science. After he graduated from college in 1993, he was hired by an India-based information technology (IT) company, some of whose clients were in the United States. In July 1998, Applicant and several co-workers spent three months in the United States supporting an IT system for one of their clients. Applicant returned to India, but immigrated permanently to the U.S. from India in May 2001 on a business visa after he was hired by his current U.S.-based employer. He obtained permanent resident alien status in November 2007, and became a naturalized U.S. citizen in June 2013. In November 2013, he renounced his foreign citizenship and passport. (Answer; Gx. 1 - 3; Tr. 30 - 33, 52 - 53)

Applicant's current employer is an IT company that services automated information systems for various client companies throughout the United States. He has relocated several times depending on where his assigned client is located. In June 2013, he was assigned as IT support for systems used by a company that manages sensitive automated information in the form of personally identifiable information (PII). Applicant applied for a position of trust in connection with this assignment. Applicant has a good record in the workplace. Over the past 13 years, he regularly has received performance-based raises and promotions. (Gx. 1; Gx. 2; Tr. 29 - 30, 36 - 38, 49 - 52)

Applicant and his wife were married in 1999. She is also a native of India who has been naturalized as a U.S. citizen. She was educated as a mechanical engineer,

³ The adjudicative guidelines were implemented by DOD on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006).

but is now a stay-at-home mother. They have one child, a 12-year-old son, who was born in the United States. (Gx. 1; Tr. 35)

Applicant's parents are citizens and residents of India. His father is a retired transportation worker and his mother has always been a housewife. Applicant's sister also is a citizen and resident of India. She is a lecturer in history and journalism at one of the oldest universities in India. Applicant's mother- and father-in-law are citizens and residents of India. He is a retired car salesman, and she has always been a housewife. None of his relatives in India has any official ties to the government there. (Gx. 2; Tr. 28 - 29, 44 - 46)

Applicant talks to his parents by phone each week. His parents often are more interested in talking to their grandson than to Applicant. Applicant's parents have visited him in the United States about every other year. Applicant also has traveled to India several times in the past ten years to see his parents and sister. Neither his family nor his wife's family are dependent in any way on Applicant or his wife. (Gx. 1; Gx. 2; Tr. 40 - 41)

Applicant has not served in India's military, and he has not voted in elections there since immigrating to the United States. He has no foreign financial interests, owns no property overseas, and does not work for any foreign entity. (Gx. 2)

Based on the information⁴ presented in support of the Government's administrative notice request, I make the following findings of fact:

India and the U.S. have had close relations ever since India obtained its independence from Great Britain in 1947. The two governments continue to work closely in pursuit of mutual interests in such issues as international management of nuclear technology, preventing the proliferation of nuclear weapons, and the global war on terror. Because India is important to strategic U.S. interests in the region, the two countries have also engaged in several joint military exercises to ensure stability in southern and southwest Asia. 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.

India, the world's most populous democracy, uses 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. India is included, along with other countries with whom the U.S. has good relations, on the U.S. State Department's list of the most active collectors of industrial information and technology.

⁴ Much of the information contained in Hx. 1 is from the U.S. Department of State web page. *Sua sponte*, I also consulted other sources in the same web page, as well as the CIA Factbook web pages regarding 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). Not only does India enjoy close relations with the U.S., but it is working to strengthen its ties and advance its mutual interests with France, Israel, China, Iran, the European Union, Japan, and the Association of Southeast Asian Nations (ASEAN).

India's human rights record is uneven. 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. 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. Although, terrorism and separatist activities are generally done in furtherance of internal issues, and are most violent in limited and remote geographic regions, the developing presence of international terrorist organizations is a growing concern. Despite these problems, India is still an open society in which the rule of law is prominent.

India, the world's most populous democracy, uses 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. India is included, along with other countries with whom the U.S. has good relations, on the U.S. State Department's list of the most active collectors of industrial information and technology.

Policies

Positions designated as ADP I or II are classified as "sensitive positions."⁵ In deciding whether a person should be assigned to an ADP position, it must be determined that his or her loyalty, reliability, and trustworthiness are such that it is "clearly consistent with the interests of national security" to do so.⁶ The Regulation also requires that DOD contractor personnel are entitled to the procedural protections in the Directive before any adverse determination may be made.⁷

The Directive requires that each decision be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁸ and consideration of the pertinent criteria and adjudication policies in the adjudicative

⁵ Regulation, ¶ C3.6.15.

⁶ Regulation, ¶ C6.1.1.1.

⁷ Regulation, ¶ C8.2.1.

⁸ Directive. 6.3.

guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole-person” concept, those factors are:

- (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.

The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of eligibility for a position of trust.

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a position of trust for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the Government's case. Because no one is entitled to a position of trust, an applicant bears a heavy burden of persuasion. A person who has access to sensitive information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring applicants possess the requisite judgment, reliability, and trustworthiness of one who will protect sensitive information as his or her own. Any reasonable doubt about an applicant's suitability for access should be resolved in favor of the Government.

Analysis

Foreign Influence

Applicant's parents, sister, and his wife's parents are citizens of India and reside there. By definition, these are persons to whom Applicant is closely bound by affection. This is further manifested in Applicant's frequent phone contact with his family and by frequent travel for visits with his family. Because India is known to aggressively pursue economic and technology information from the United States, and owing to the presence of domestic terrorism there, these relationships reasonably raise trustworthiness concerns about foreign influence. That concern is articulated at AG ¶ 6, as follows:

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.

More specifically, the record requires application of the disqualifying condition at AG ¶ 7(a):

contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion.

By contrast, the record also requires application of the following AG ¶ 8 mitigating 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.

None of Applicant's family are associated with the government of India. His and his wife's parents are retired and have never had any official association with that government. It is reasonable to conclude that there is a heightened risk of pressure by foreign entities when a person has relatives living abroad. However, in this case that risk is greatly attenuated by the open nature of India's society, and by the long-standing close ties between the United States and India. Further, Applicant has firmly established a life in this country. He affirmatively renounced his foreign citizenship and passport, his wife is a naturalized U.S. citizen, and his son is a U.S. citizen by birth here. Applicant's entire personal and professional life is in the United States, and he can be counted on to resolve any conflicting interests consistent with the expectations associated with his position of trust. I conclude the trustworthiness concerns raised by the Government's information have been mitigated.

Whole-Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guideline F. I also have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is a 41-year-old

husband and father, who has demonstrated that he is a responsible, mature adult. His professional career in this country has been successful and he has no financial or property interests outside of the United States. Although he stays in close and frequent contact with his family in India, those relationships do not present an unacceptable risk that Applicant could be forced to compromise the information entrusted to him as part of his current job. A fair and commonsense assessment of all available information shows that the trustworthiness concerns raised by the Government's information are mitigated.

Formal Findings

Formal findings 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 B: FOR APPLICANT

Subparagraphs 1.a - 1.c: For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the interests of national security for Applicant to have access to sensitive automated information. Request for a position of trust is granted.

MATTHEW E. MALONE
Administrative Judge