



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



In the matter of:)
)
) ADP Case No. 14-02299
)
)
Applicant for Public Trust Position)

Appearances

For Government: Daniel F. Crowley, Esquire, Department Counsel
For Applicant: *Pro se*

04/15/2015

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant's eligibility for access to sensitive information is granted.

Statement of the Case

Applicant completed and signed an Electronic Questionnaires for Investigations Processing (e-QIP) on March 27, 2014. The Department of Defense (DOD) Consolidated Adjudications Facility, (CAF) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline B, Foreign Influence on September 8, 2014. The action was taken under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); DOD Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); and the *Adjudicative Guidelines For*

Determining Eligibility for Access to Classified Information (AG) implemented on September 1, 2006.

Applicant acknowledged receipt of the SOR on September 17, 2014. He answered the SOR in writing the same day. He requested a hearing before an administrative judge with the Defense Office of Hearings and Appeals (DOHA). Department Counsel was prepared to proceed on February 7, 2015, and I received the case assignment on February 23, 2015. DOHA issued a notice of hearing on March 3, 2015, and I convened the hearing as scheduled on March 23, 2015. The Government offered one exhibit (GE.) 1, which was received, marked, and admitted into evidence without objection. Applicant testified. Applicant submitted one exhibit (AE) A, which was received, marked, and admitted into evidence without objection. The record closed on March 23, 2015. DOHA received the transcript of the hearing (Tr.) on March 31, 2015.

Procedural and Evidentiary Rulings

Motion to Amend

At the hearing, Department Counsel motioned to amend the SOR to add allegation 1.f concerning assets held by Applicant in India. (Tr. 43-44) SOR allegation 1.f would read as follows: "You have assets in India, including bank accounts, an interest in an apartment, an interest in three pieces of land, and an insurance policy." Applicant did not object to the amendment. The motion to amend the SOR was granted.

Request for Administrative Notice

Department Counsel submitted a request that I take administrative notice of certain facts relating to India. The request and the attached documents were not admitted into evidence, but were included in the record as Hearing Exhibit 1, I-XIV. The facts administratively noticed are limited to matters of general knowledge and matters not subject to reasonable dispute, and they are set out in the Findings of Fact below.

Findings of Fact

In his Answer to the SOR, Applicant admitted all the factual allegations in the SOR. He provided additional information to support his request for eligibility for a public trust position.

Applicant, who is 53 years old, works as a software developer for a DOD contractor. He began his current employment in March 2014. Before starting his current position, Applicant was unemployed for four months. He previously worked analyzing payroll and as a consultant.¹

¹GE 1; Tr. 14-15, 17, 39.

Applicant was born and raised in India. He graduated from high school and college in India. He received his bachelor's degree in 1984 and later received a diploma in computer science. Applicant married in 1998. His wife was born and raised in India. They immigrated to the United States in February 1999. Applicant's 14-year-old daughter is a United State citizen by birth and resides in the United States. Applicant became a United States citizen in 2006 and holds only a United States passport. His wife is also a naturalized United States citizen, holds a United States passport and resides in the United States.²

Applicant currently resides in State A because of his employment. His wife and daughter continue to reside in the family home in State B, where his wife works and his daughter attends school. Applicant and his wife own their home in State B, which he values at \$356,000.³

Applicant's father and father-in-law are deceased. His 80-year-old mother is a citizen and resident of India. Applicant's oldest brother, who is 60 years old, is a citizen and resident of Canada.⁴ Applicant's second brother, who is 58 years old, is a citizen and resident of India. This brother recently retired from his position as a bank clerk in a privately owned bank. The second brother's wife does not work. Applicant's third brother, who is 56 years old, is a citizen of India and a resident of Qatar. He has resided in Qatar for 18 years, where he works as an instrumentation designer for a company owned by the Qatar government. He may retire to India in the future. The third brother's wife works as a bank clerk. Applicant's 50-year-old sister is a citizen and resident of India. She does not work. Her husband is a pediatrician in private practice. His 67-year-old mother-in-law is a citizen and resident of India. She does not work.⁵

Applicant's mother never worked. She now lives with his second brother. He talks with his mother infrequently. She has a hearing problem, especially with long-distance telephone calls. He provides money for her health care when necessary. He speaks with his sister about once a week. He talks with his brother who lives in India when emergencies occur and for celebrations. He occasionally talks with his brother who lives in Qatar. He has occasional email communication with these brothers.⁶

Applicant traveled to India in 2007, 2008, 2011, and 2012 to visit family and friends. He was not approached by officials of the Indian government during his visits.

²GE 1; Tr. 16.

³Tr. 16, 38.

⁴The Government did not allege a security concern about this brother.

⁵GE 1; Tr. 17-22.

⁶Tr. 40-42.

He was not involved in any criminal activity nor was he approached by individuals connected with terrorists organizations, foreign intelligence, foreign security, or foreign military. No one attempted to obtain any information from him about businesses in the United States or from the United States government. His family members in India are not politically active. They do not have contacts with government officials, and they are not involved in volunteer organizations.⁷

Besides the home in State B, Applicant has three 401k accounts in the United States with a total value of \$91,000. His wife has a retirement account in the United States valued at approximately \$250,000. Applicant's mother unilaterally purchased three pieces of land for him in India. The first piece of land is worth approximately \$2,381; the second piece land is worth \$754; and the third piece of land is worth approximately \$606.⁸ The land is titled in his name and he plans to sell the land after his mother dies. Applicant's wife purchased with her mother an apartment in India worth approximately \$23,810. Applicant's name is not on the title, and his wife will sell the apartment when her mother dies.⁹

Applicant owns a pension insurance policy that he purchased in India. This policy is worth approximately \$1,016. Because this is a pension policy, Applicant cannot close it or buy it back. Applicant receives less than \$100 every six months as a payout from this account. He give this money to his mother. Applicant opened a checking account when he lived in India. Applicant borrowed about \$9,500 from his sister and deposited \$7,936 in his checking account. The account has a current value of approximately \$8,600. His mother receives the interest from this account. Applicant has a nonresident checking account that he opened after he arrived in the United States worth approximately \$1,650. His wife has two bank accounts in India. She recently deposited \$7,936 in each account. With existing funds, the two accounts have a total value of approximately \$16,761. His wife invested money for their daughter's education in India's banks because the interest rate was higher. She plans to return the money to he United States in the future. His wife also recently cashed United States stocks valued at \$20,000 and the money remained in the United States.¹⁰

Applicant's land and bank accounts in India have a total value of approximately \$15,029. His individual holdings in the United States are his three retirement accounts totaling \$91,000. He and his wife share joint ownership of a house in State B, which cost \$356,000 at the time of purchase. His wife has a retirement account in the United

⁷GE 1; Tr. 23.

⁸AE A identifies the value of the land in India in rupies. At the hearing, the parties stipulated to a conversion rate of 63 rupies to one U.S. dollar. The estimated value is based on this stipulation. AE A; Tr. 27-28.

⁹AE A; Tr. 23-30; 38-39.

¹⁰AE A; Tr. 31-37, 39.

States valued at approximately \$250,000, and she has assets in India valued at approximately \$40,571.

India

I take administrative notice of the following facts. India is the largest democratic country in the world. Like the United States, India is committed to political freedom protected by a representative government. The United States and India share a common interest in the free flow of commerce and resources, in fighting terrorism and in creating a strategically stable Asia. Although the two countries differed over India's nuclear weapons program and the pace of economic reforms in India, the United States views India as a growing world power with which it shares common strategic interests. Because of their strong partnership, the United States and India enjoy a very active working relationship on many issues, including terrorism, space, and nuclear weapons. The United States has authorized the sales of certain arms to India. India is a collector of economic information and maintains a positive relations with Iran. The Government contends that India seeks to obtain proprietary information by violating United States export laws and references specific cases, but does not provide any detailed information about these cases.¹¹ The government of India generally respects the rights of its citizens, although some serious human rights problems remain. The Indian government does not support or sponsor terrorism or terrorist organizations. However, several terrorist organizations, including Harkat-ul-Jihad-i-Islam, Harakat ul-Mujahidin, Indian Mujahideen, Haish-e-Mohammed, and lashkar-e Tayyiba, and insurgent groups continue to operate, particularly in the northeast areas along the Pakistan and China borders. Several of these areas are designated "restricted areas" by the Indian government and require special permission to visit. Applicant's family lives many hundreds of miles from these restricted areas.¹²

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." (See Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.) "The standard that must be met for . . . assignment to sensitive duties is that, based on all available information, 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." (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. Department of Defense contractor personnel are

¹¹There is no evidence that the Government of India was involved in, or sanctioned, the criminal activity mentioned in the Government's brief.

¹²HE 1;

afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. (See Regulation ¶ C8.2.1.)

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 the factors listed in the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion to obtain a favorable trustworthiness decision.

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. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Section 7 of Executive Order (EO) 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline B, Foreign Influence

AG ¶ 6 expresses the security concern regarding foreign influence:

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 United States 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 describes conditions that could raise a security concern and may be disqualifying:

- (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;
- (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;
- (d) 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; and
- (e) 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.

Applicant's wife and daughter are citizens and residents of the United States and are not a trustworthiness concern. His oldest brother is a citizen and resident of Canada and is not a trustworthiness concern. His mother, mother-in-law, one brother, and sister are citizens and residents of India. This brother is a retired bank clerk. His mother, mother-in-law, and sister do not work. His third brother is a citizen of India, living in Qatar and working for a company owned by the Qatar government. Applicant maintains

a normal familial relationship with his mother and siblings living in India. He talks with them by telephone regularly and periodically visits them in India. He does not provide regular financial support for his mother; however, he does provide money for health care when necessary. He provides support primarily through interest earned on one bank account and his small insurance policy. His sister recently agreed to loan him about \$9,500, most of which he placed in a bank account for his mother's use. He owns three pieces of land worth less than \$4,000, which his mother purchased for him. His wife has assets worth approximately 40,000 in India. His family relationships and assets are not *per se* a reason to deny Applicant a trustworthiness determination, but his contacts with his family members must be considered in deciding whether to grant Applicant a trustworthiness determination. The Government must establish that these family relationships create a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion by terrorists or would create a potential conflict of interest between his obligations to protect sensitive information and his desire to help his family members by providing that information.

In determining if such a risk exists, I must look at Applicant's assets and relationships and contacts with his family, as well as the activities of the Government of India and of terrorist organizations within India's borders. The risk that an applicant could be targeted for manipulation or induced into compromising sensitive information is real, not theoretical. Applicant's relationship and contacts with his family in India raise a heightened risk and a security concern because significant terrorism activities occur within the borders of India. The evidence of record fails to show that the Indian Government targets United States citizens in the United States or in India by exploiting, manipulating, pressuring, or coercing them to obtain protected information. Thus, the concern that the Indian Government will seek classified information is moderate.

Under the guideline, the potentially conflicting loyalties must be weighed to determine if an applicant can be expected to resolve any conflict in favor of United States interests. In determining if Applicant's contacts in India cause trustworthiness concerns, I considered that India and the United States have a strong relationship, which includes working together on international security issues and trade. There is no evidence that the Indian Government targets United States citizens for protected information. The human rights issues in India, although improving, and terrorist activities continue to be a concern. While none of these considerations by themselves dispose of the issue, they are all factors to be considered in determining Applicant's vulnerability to pressure or coercion because of his family, bank accounts, and property in India. Applicant's contacts with his family, the bank accounts, and the property raise a heightened risk under AG ¶¶ 7(a) and (b) and a concern under AG ¶ 7(e).

The Foreign Influence guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 8(a) through ¶ 8(f), and 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, 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 United States interest; 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.

While he has lived in the United States for over 15 years and has abandoned his Indian citizenship to become a citizen of the United States, Applicant still has close ties with his family members in India. He travels to India regularly, and in between visits, he routinely communicates with his family members. His elderly mother and mother-in-law have always been homemakers and do not have ties with the Indian government. His one brother living in India is retired, does not have contacts with the Indian government, and is not involved in activities which would raise the interests of the Indian government. His sister is a homemaker and married to a physician in private practice. The contacts and activities of his mother, mother-in-law, brother, and sister in India do not involve the Indian government. Their normal daily lives and activities in India are unlikely to place Applicant in a position of having to choose between the interests of the United States and the interests of a foreign individual, group, organization, or government. Applicant voluntarily chose to give up his Indian citizenship when he decided to become a United States citizen, as did his wife. Most of his assets are in the United States, where he has worked and lived for more than 15 years. His decisions reflect his loyalty to the United States and not to India. Thus, he can be expected to resolve any conflict of interest in favor of the United States.

Applicant's third brother lives in Qatar, where he works for a company owned by the Qatar government. No information was provided that Qatar or his brother's work raises a heightened security concern. However, it does not appear to relate to the Indian defense establishment, and is not a security concern. Applicant has mitigated the security concerns raised by his family members in India under AG ¶¶ 8 (a) and (b).

Applicant's three pieces of land, one small pension policy, and two bank accounts total less than \$17,000. His wife has a shared interest in a piece of property and two bank accounts valued at just over \$40,000. Their total financial assets in the United States total more than \$700,000, making it highly unlikely that he could be

subject to coercion or pressure because of the money and property in India or a need for money. Applicant placed the money in these accounts, not the Government of India, for his convenience. Except for the small pension policy, he can withdraw the money from two bank accounts at any time. He can also sell his land, but does not wish to insult his mother by selling the land while she is alive. This money is not controlled by the Government of India. He has mitigated the security concerns about their minor financial interest in India under AG ¶ 8(f).

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 the 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) 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. The decision to grant or deny a trustworthiness determination requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a trustworthiness concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a public trust position should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate trustworthiness concern.

The evidence in support of granting a position of trust to Applicant under the whole-person concept is more substantial than the evidence in support of denial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant maintains strong connections with his family in India. He visits them regularly, and in between, he routinely talks with various family members by telephone. Despite his family relationships, he made a decision over 15 years ago to leave his family and move to the United States. He has established a home for himself, his wife and his daughter in the United States, and he has worked for United States companies for many years.

After seven years in the United States, he applied for United States citizenship, knowing that he would lose his Indian citizenship and his rights as an Indian citizen. He has accumulated significant assets in the United States, not in India. He and his wife total assets in India constitute less than 10% of their total wealth. These assets in India are insufficient to place him in a position of vulnerability to future exploitation or coercion. His decision to move to the United States and to abandon his Indian citizenship reflects his choice to be loyal to the United States and to resolve any conflicts in favor of the United States.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a position of trust. For all these reasons, I conclude Applicant mitigated the trustworthiness concerns arising from his family in India under Guideline F.

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 B:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant

Conclusion

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

MARY E. HENRY
Administrative Judge