



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



In the matter of:)
)
) ADP Case No. 12-00722
)
Applicant for Position of Trust)

Appearances

For Government: John B. Glendon, Esq., Department Counsel
For Applicant: Alan Edmunds, Esq.

07/03/2013

Decision

LYNCH, Noreen A., Administrative Judge:

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

Statement of the Case

Applicant submitted a questionnaire for national security positions on August 11, 2011. On December 13, 2012, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing trustworthiness concerns under Guideline B (Foreign Influence). DOD acted under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); DOD Regulation 5200.2R, *Personnel Security Program* (January 1987, as amended (Regulation)) and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

Applicant received the SOR and timely requested a hearing before an administrative judge. The case was assigned to me on April 5, 2013. A notice of hearing was issued on April 17, 2013, scheduling the hearing for May 21, 2013. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant

testified and submitted Applicant Exhibits (AX) A through K, which were admitted without objection. I kept the record open until June 10, 2013, and Applicant timely submitted a packet which was marked as (AX) L-1-8. DOHA received the transcript (Tr.) on June 3, 2013.

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 also submitted an administrative notice packet HX II. (Tr.19) I allowed the documents into the record and took administrative notice as requested by both counsel. The facts administratively noticed are set out below in my findings of fact.

Findings of Fact

In his answer to the SOR, Applicant denied the factual allegations in the SOR under Guideline B (Foreign Influence), and offered explanations. He provided additional information to support his case. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant was born in India. He is 40 years old. He received his undergraduate and graduate degree in India. He did not serve in the military in India. He came to the United States in 1998 on an H-1visa. He has received multiple certifications in information technology. (AX F) Applicant has been with his current employer since August 2011, but has worked in the field for some years. (GX 1) He became a naturalized U.S. citizen in February 2009. (GX 1) Immediately after Applicant obtained his U.S. citizenship, he surrendered his Indian passport and renounced his Indian citizenship.

Applicant's wife also is a native of India. They were married in 1999, and they have one son. (Tr. 22) She became a naturalized U.S. citizen in May 2009, and surrendered her Indian passport and renounced her Indian citizenship. She is not employed outside their home.

Applicant's son is a U.S. citizen. He was born in the United States. Applicant never applied for a special status for him, under the Overseas Citizens of India (OCI) Program or the Person of Indian Origin Program. (Tr. 56)

Applicant's mother is a citizen and resident of India. His mother is ill and Applicant's brother lives with her. Applicant is sponsoring his mother so she can become a permanent resident of the United States. In May 2012, he filed a petition for alien relative (I-130) which has been approved for further processing. (AX A) Applicant expects his mother to move to the United States in the next six months. She will reside with him. Applicant maintains phone contact with her approximately four or five times a year for special occasions. He has visited her in India four times in the past ten years. She does not know anything about the nature of Applicant's work, and she is not aware

that Applicant is seeking a position of trust. Applicant is the elder child and by custom is responsible for his mother. (Tr. 25)

Applicant's father died in 1994. He was employed by the Indian Government. At the time of his father's death, Applicant was still living in India. (Tr. 27)

Applicant's brother (R) is employed with the Indian Government as a postal worker. He is 37 years old. He is a citizen and resident of India. Applicant's brother lives with his mother. Applicant sees his brother when he visits his mother in India. He has seen his brother about four times in the last ten years. (GX 3)

Applicant's sister is a citizen and resident of India. She lives a great distance from Applicant's mother. Applicant has seen her twice in the last ten years. She is married and is not employed outside her home. She does not know anything about Applicant's work. (Tr. 28)

Applicant's brother-in-law (married to his sister) is a citizen and resident of India. He is a machine labor worker for a factory. (Tr. 31) Applicant saw him in 2005 in India. He does not maintain any contact with him.

Applicant's mother-in-law and father-in-law are citizens and residents of India. His father-in-law is a farmer in a small town. His mother-in-law is a homemaker. Applicant's interaction with them is limited to phone calls two or three times a year. They visited Applicant and his wife when Applicant's son was born in the United States. Applicant's in-laws do not depend on Applicant and his wife for financial support. (Tr. 50) His wife calls her parents every few months. (Tr. 51) They do not know the nature of Applicant's work.

Applicant has two brothers-in-law and three sisters-in-law who are citizens and residents of India. He does not maintain contact with them.

In 2003, before obtaining his U.S. citizenship, Applicant bought an apartment in India. It is a small property of approximately \$55,000 value. He no longer owes the mortgage lender. (AX L-5) He is in the process of selling the property. (AX L7-8) He bought the apartment as a vacation home for his mother. On a recent trip to India, Applicant provided a power of attorney so that he may transfer the ownership of the property to someone else if he is not successful in selling the property.

Applicant has a foreign national bank account in India. The money in the account paid the mortgage each month, but he has closed the account. (AX L-3) He also has an account that his mother uses for some medical and living expenses. The current amount in that account is approximately \$70. (AX L-)

Applicant admits he has an OCI card. He was credible explaining that the card is in essence a visitor visa with no expiration date and no limitations on how frequently he can travel to India. Given his mother's current health condition, and the number of times

Applicant has had to visit India on short notice for her surgeries or treatments, the regular tourist visa would not have been a suitable option as it does not permit frequent visits to India. The identity card is a copy of his Indian visa that is stamped on his U.S. passport. (AX F) Applicant travels on his U.S. passport. He will surrender the OCI card when his mother comes to live in the United States.

Applicant and his wife own a home in the United States. His net worth is approximately \$348,000. He and his wife have savings and retirement accounts in the United States. (Tr. 52)

Applicant explained at the hearing that he came to the United States in 1998 to work after completing his education. As soon as he and his wife were eligible, they became U.S. citizens and they embrace their U.S. citizenship. He and his wife started a family and he has one son. Applicant is proud of his career in the United States. He has received favorable recommendations from his employers and his clients over the years. He is a dedicated, hardworking American. He plans to live the rest of his life in the United States, and raise and educate his son in the United States. He has roots in the United States both professionally and personally. His wife and children are with him in the United States. He feels blessed to be in the United States and has been a productive part of the society. He has never had any legal difficulties. He is fiscally responsible. He values integrity, honesty, and courage. He has been a good son to his parents, a good father to his son, a good husband to his wife and a good neighbor in his community. Applicant has worked his adult life in the United States and has deep and long-term relationships in the United States. He has provided service to the U.S. Government through his work with government contractors. Applicant was credible when he explained that, in the unlikely situation that there would be pressure on him or his family, he would immediately contact his facility security officer.

Applicant submitted a character letter from his current supervisor which describes him as a valuable asset to the organization. He is honest, hardworking and trustworthy. He is an excellent IT professional. He is extremely organized and works independently to ensure that a project is completed. Applicant's supervisor states that Applicant's character and professionalism are greatly appreciated. (AX G)

Applicant submitted 11 other letters of recommendation from his employer and colleagues. Applicant is consistently described as a professional who is honest and creative in his work. His work ethic is exceptional. He has great knowledge and expertise garnered from where he has worked for the past years. Furthermore, Applicant is always willing to exceed requirements. He excels in all projects and ensures the mission deadlines are timely and accurate. The letters also note that Applicant is a proud U.S. citizen who is willing to do what is in the best interest of the country. He is on the Board of Directors of his home association and is active in the community.

Administrative Notice

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. Starting this year, it is a non-permanent member of the Security Council, and it seeks a permanent seat on the Security Council.

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 (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.

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. DOD contractor personnel are 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 overarching 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.”

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 safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive information.

Analysis

Guideline B, Foreign Influence

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 trustworthiness 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 trustworthiness concern may be raised if “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).

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).

Applicant has lived and worked in the United States since 1998. He is a naturalized U.S. citizen. Applicant's wife and son reside in the United States. His son is a U.S. citizen and his wife is a U.S. citizen. Applicant will surrender that when his mother lives in the United States.

Applicant's mother, brother, sister, father-in-law, mother-in-law, brother-in-laws, and sisters-in-law are citizens and residents of India. "[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 ties of affection to family members who are citizen-residents of India. His contact with his mother, brother and in-laws ranges from monthly to several times a year. He has visited his mother and brother approximately four times in the past ten years. 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. Applicant saw his mother-in-law when she visited the United States. His wife speaks to her mother every few months. Based on all these circumstances, I conclude that AG ¶¶ 7(a), (b), and (d) are raised. Because of Applicant's foreign national bank account in India and his apartment, I conclude that AG ¶ 7(e) is also raised.

Trustworthiness 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. For these reasons, I conclude that AG ¶ 8(a) is not fully established.

Trustworthiness 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 ties to the United States weigh in his favor when evaluating the question of exploitation or potential conflicts of interest based on ties to India. He has worked with government contractors since 2000. He chose to become a U.S. citizen, even though it resulted in his loss of his Indian citizenship. He and his wife have personal assets, including a home, in the United States worth more than \$380,000. Applicant and his wife surrendered their Indian passports and use their U.S. passports. I conclude that Applicant would resolve any conflict between the interests of the United States and his family in India in favor of the United States. Thus, I conclude that AG ¶ 8(b) is established.

The bank account Applicant maintains in India has a balance of between \$70 and \$135. Applicant has paid the mortgage and has closed the first bank account. (AX D-E) He has started the process of selling the apartment. He prepared a power of attorney so that he could transfer the home ownership from himself to another relative and provided documentation for this issue. His U.S. funds are substantial and they far outweigh his financial interest in India. It is unlikely that the above matters could be used effectively to manipulate him. AG ¶ 8(f) applies.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for a position of trust 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 position of trust 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 naturalized U.S. citizen who has lived in the United States since 1998. He and his wife reside in the United States with their son who is a U.S. citizen. His wife is a U.S. citizen. Applicant was articulate, candid, sincere, and credible at the hearing. He and his wife still have cultural, family, and emotional attachments to India, but they see the United States as the home for their family. Applicant has been

successful in the defense contracting business for many years. His current employer recommends him for his professionalism and integrity.

Applicant chose to leave his home and emigrate from India in search of career opportunities. He wants to provide for his family in the United States. He has worked hard in the information technology field and has received praise for his work ethic and accomplishments. Applicant purchased a home and has significant assets in the United States.

Applicant's foreign contacts represented a security concern because of the potential for conflicts of interest and exploitation. However, Applicant's family has no substantial connections with the Indian government. His apartment in India and his bank account are outweighed by his substantial U.S. financial interests.

India is a partner of the United States in the global war on terrorism. While terrorism and some domestic unrest exist within some areas of India, none of it appears to threaten the enclave in which Applicant's family and property are located. There is no evidence that any of the individuals at issue are involved with, or under scrutiny, by interests antithetical to the United States. Applicant returned to India to visit his ill mother.

Regarding Applicant's life in the United States, he is an American citizen, with a stable family, social, and professional life. His life is focused here. He is admired by his peers. He and his wife intend to continue their lives in the United States. There is no evidence indicating that he may be manipulated or induced to help a foreign power or interest. He credibly stated he would report any attempts to influence him to his security officer. In light of these facts and the country at issue, I find that Applicant successfully mitigated foreign influence concerns.

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 position of trust concerns based on foreign influence. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to sensitive 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.i:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a position of public trust. Eligibility for access to sensitive information is granted.

Noreen A. Lynch
Administrative Judge