



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



In the matter of: )  
 )  
 REDACTED ) ADP Case No. 12-04250  
 )  
 Applicant for Public Trust Position )

**Appearances**

For Government: Fahryn Hoffman, Esq., Department Counsel  
For Applicant: *Pro se*

05/09/2013

**Decision**

MENDEZ, Francisco, Administrative Judge:

Applicant failed to mitigate the foreign influence concerns arising from his deep and continuing connections to India. Although he has lived in the United States since 1996, Applicant’s vulnerability to foreign influence has steadily increased over the years due to his purchase of several pieces of property in India, worth approximately \$190,000. Also, during his background interview, he stated that he has sympathies or preferences for India due to his family members living in India. Notwithstanding his ties to the United States, Applicant’s sympathies for his family in India, coupled with his substantial and active foreign investments, leave him vulnerable to foreign influence. Eligibility for access to sensitive information is denied.

**Statement of the Case**

On December 13, 2012, the Department of Defense (DoD) issued a Statement of Reasons (SOR) recommending that Applicant’s eligibility to occupy an automated data processing (ADP) position, generally referred to as a public trust position, be denied due to concerns arising under Guideline B (Foreign Influence). This action was taken under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960) and Department of Defense Directive 5220.6, *Defense Industrial Personnel*

*Security Clearance Review Program* (January 2, 1992), as amended (Directive).<sup>1</sup> Applicant timely answered the SOR and requested a hearing (Answer).

On April 8, 2013, I was assigned Applicant's case and, after coordinating with the parties, scheduled the hearing for April 25, 2013.<sup>2</sup> At hearing, Department Counsel offered Government Exhibits (Gx.) 1 and 2, which were admitted into evidence without objection. Department Counsel also offered Gx. 3, a proposed summary of facts regarding India. The official, unclassified source documents Department Counsel referenced in Gx. 3 were marked as exhibits for administrative notice (An.) I – XIV. I have considered An. I – XIV in assessing the security concerns at issue and drawn upon them in setting forth the relevant facts about India. The Government's index of exhibits was marked and appended to the record as Hearing Exhibit (Hx.) I.

Applicant appeared at the hearing and testified. He offered Applicant's Exhibit (Ax.) A, which was admitted without objection. I granted his request for additional time post-hearing to submit documents. He timely submitted Ax. B – Ax. F, which were admitted without objection. Applicant's e-mail regarding his post-hearing submission and the Government's response was marked Hx. II. DOHA received the hearing transcript (Tr.) on April 30, 2013, and the record closed on May 6, 2013.

### **Findings of Fact**

Applicant, 46, is married and has two children, ages 12 and 14. He was born, raised, and educated in India. In 1991, he earned a master's degree in India and started working for the Indian subsidiary of a U.S. company. In 1996, he immigrated to the United States. He has continuously lived in the United States since 1996, and became a U.S. citizen in 2008. He surrendered his Indian passport to the proper authorities after becoming a U.S. citizen.<sup>3</sup>

Applicant has worked for his current employer, a U.S. company, since 2003. He is currently a senior database administrator, earning \$135,000 annually. In December 2011, he submitted a public trust application (PTA) to work on a DoD contract involving sensitive, confidential information.<sup>4</sup> Applicant's manager for the past five years writes that Applicant is a "hard-working associate who is very committed to his work."<sup>5</sup>

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<sup>1</sup> Pursuant to a Memorandum from the Office of the Deputy Under Secretary of Defense for Counterintelligence and Security, dated November 19, 2004 (Memorandum), the Defense Office of Hearings and Appeals (DOHA) is directed to utilize the provisions of the Directive, to include Enclosure 2, the adjudicative guidelines, to resolve contractor cases forwarded to it for a trustworthiness determination.

<sup>2</sup> Applicant waived the 15-day notice requirement. (Tr. at 10-12)

<sup>3</sup> Tr. at 33-41, 95-96; Gx. 1; Gx. 2 at 1.

<sup>4</sup> Tr. at 38-39, 97, 102-103; Gx. 2 at 1.

<sup>5</sup> Ax. A; Tr. at 39.

Applicant's wife was also born in India and is a naturalized U.S. citizen. She works for a U.S. company and earns approximately \$85,000 annually. Applicant's two children were born in the United States. They go to school in the United States and are heavily involved in extracurricular activities.<sup>6</sup>

Applicant purchased his home in 2004. It is worth approximately \$600,000. He recently took out a \$50,000 equity line-of-credit to renovate the home and purchase a house in India. His U.S. retirement and investment accounts are worth about \$760,000.<sup>7</sup>

One of Applicant's brothers has lived in the United States for approximately ten years and is a lawful permanent resident of the United States. He has a job with a major U.S. technology company, is married to a U.S. citizen, and has two children who were born in the United States. (SOR ¶ 1.b) Applicant and his wife have several other family members and close friends that live and work in the United States.<sup>8</sup>

Applicant's mother, his other brother, and his in-laws are citizens and residents of India. Applicant and his wife are close to their family members in India. Applicant provides some financial support to his mother, and visits with his family when he travels to India. He last visited India in 2012. Applicant's family in India does not have any connection to the Indian government.<sup>9</sup> (SOR ¶¶ 1.a, 1.c, and 1.d)

Applicant has a bank account in India, which he uses to buy property in India, pay for his expenses when he travels to India, and pay for some of his mother's living expenses.<sup>10</sup> The balance in the account fluctuates between \$500 and \$5,000. He also has a certificate of deposit with an Indian bank with a balance of approximately \$700.<sup>11</sup>

Applicant and his wife purchased seven properties in India between 1998 and 2012. The properties are currently worth approximately \$190,000. In 2012, Applicant and his wife purchased their most recent property in India, a house, for \$50,000. They purchased the house planning to rent it and use it as a vacation home. They were unable to locate a tenant and do not receive rental income from this property. Applicant explained that all seven properties were purchased as investments. He maintains the properties and has secured life insurance in India to protect his foreign investments.<sup>12</sup>

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<sup>6</sup> Tr. at 33-36, 74, 96-99, 106; Gx. 2 at 2.

<sup>7</sup> Tr. at 41-45, 93-95, 106-109; Ax. B – Ax. F.

<sup>8</sup> Tr. at 36, 63-65, 68-73, 99-102; Gx. 2 at 2; Ax. B.

<sup>9</sup> Tr. at 51-53, 61-63, 65-68, 75-76, 100-101; Gx. 1 at 19-28, 33, 35-38; Gx. 2 at 2-4; Ax. B.

<sup>10</sup> Gx. 1 at 29; Tr. at 51.

<sup>11</sup> Tr. at 56-57, 93; Gx. 2 at 3; Ax. B.

<sup>12</sup> Tr. at 84-90; Gx. 1 at 28-32; Gx. 2 at 3-4; Ax. B. *See also* Tr. at 36, 45-51, 58-60, 78-83.

Applicant does not plan to move back to India. After he retires, he plans to sell the properties in India and transfer the sale proceeds to the United States because the tax rate imposed by India for such financial transactions will be less once he reaches retirement age.<sup>13</sup> Also, Applicant explained that there are some legal issues he would have to resolve before he could sell the properties and transfer the money to the United States. Specifically, he would have to “talk to the Indian Government, to say that I’m going to settle in U.S. I’m not going to come back to India or my kids are not going to come.”<sup>14</sup> (SOR ¶ 1.g – 1.i)

Applicant voluntarily disclosed his foreign family members and investments in his PTA.<sup>15</sup> He also fully discussed these foreign connections during his ensuing background interview. He told the background investigator that, due to his familial relationships, he has sympathies or preferences for India.<sup>16</sup> He confirmed the accuracy of this statement at hearing:

Department Counsel: [Referring to background interview, GE 2] Okay, at the end of each paragraph, it indicates -- it says this sentence, ‘Subject has sympathies or preferences for foreign Governments or entities, as a result of this relationship.’ So, is that accurate, that based on your relationships, you have sympathies and preferences for India?

Applicant: Yes, yes, it's accurate, yes.

Department Counsel: That is accurate?

Applicant: Yes.<sup>17</sup>

Applicant went on to explain that he has no sympathies or preferences for India, the Indian government, or any other foreign government or entity. His sympathies are for his family members living in India.<sup>18</sup>

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<sup>13</sup> Tr. at 91-92.

<sup>14</sup> Tr. at 91.

<sup>15</sup> Gx. 1.

<sup>16</sup> GE 2 at 2-3. See *also* Tr. at 16-17, 26-27 (Applicant was advised that if he objected to the admission of GE 2, it would not be admitted. GE 2 is a DoD report of investigation, namely, the summary of Applicant’s background interview. Applicant affirmatively waived his objection to GE 2 and stated that he wanted me to consider GE 2 because it was “true. It’s correct.” (Tr. at 26)).

<sup>17</sup> Tr. at 77. Applicant’s statement is not alleged as a concern and is only being considered in addressing his case in mitigation. ISCR Case No. 11-03302 at n. 3 (App. Bd. Apr. 23, 2013).

<sup>18</sup> Tr. at 77-78.

Concerning Applicant's country of birth, India is a multiparty, federal, parliamentary democracy with a population of approximately 1.2 billion. Its political history, since gaining 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. 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. Despite the growth of a large urban middle-class, India remains a largely rural and agriculture-based society, and is home to some 500-600 million people living in poverty.

U.S.-Indian relations are grounded on the two countries shared values of democracy, pluralism, and rule of law. Furthermore, the United States is one of India's largest trading and investment partners. 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. Both countries also share a common interest in fighting terrorism and in creating a strategically-stable Asia. Recognizing India's key strategic position, the United States has sought to strengthen its relationship with India. The countries are collaborating in a number of areas, to include energy, climate change, trade, education, and counterterrorism.

Despite the two countries' strategic alliance, differences exist. The United States remains concerned about India's nuclear weapons programs, pace of economic reforms, protection of intellectual property rights, and trade in dual-use technology. Historically, India has been one of several countries that engaged in economic intelligence collection and industrial espionage targeting the United States. Between 2004 and 2008, several individuals and companies were convicted or fined for their roles in illegal exporting or attempting to illegally export restricted technology to India.

The U.S. State Department notes a number of significant human rights problems in India, notably abuses committed by police and security forces. Another significant problem is corruption, which remains at significant levels throughout the Indian government and contributes to widespread impunity at all levels of government.

## **Policies**

Positions designated as ADP I and ADP II are classified as sensitive positions. 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.<sup>19</sup>

When evaluating an applicant's eligibility for a position of trust, an administrative judge must apply the provisions of the Directive, to include the adjudicative guidelines

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<sup>19</sup> Memorandum; Directive, § 3.2. Cf. Department of Defense Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended, ¶¶ C3.1.2.1.1.7, C3.1.2.1.2.3, C6.1.1.1.

(AG or guidelines).<sup>20</sup> In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

In addition to the guidelines, the Directive sets forth procedures that must be followed in trustworthiness adjudications. The Government must present evidence to establish controverted facts alleged in the SOR. While an applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel. An applicant has the ultimate burden of persuasion to establish their eligibility for a public trust position.<sup>21</sup>

In resolving the ultimate question regarding an applicant's eligibility, an administrative judge must resolve any doubt in favor of national security.<sup>22</sup>

## **Analysis**

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

The foreign influence concern is set forth at 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.

An individual's familial ties to a foreign country can raise the foreign influence concern. However, there is no *per se* rule against applicants who have such ties. Instead, in addressing the foreign influence concern, an administrative judge must consider the foreign government involved; the intelligence gathering history of that

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<sup>20</sup> Directive, Enclosure 2. See also, Memorandum from the Office of the Under Secretary of Defense for Intelligence, dated August 30, 2006, directing that the adjudicative guidelines be applied to all adjudications and other determinations made under the Directive and DoD Regulation 5200.2-R.

<sup>21</sup> Directive, Enclosure 3, ¶ E3.1.14 – E3.1.15.

<sup>22</sup> Directive, Enclosure 2, ¶ 2(b).

government; the country's human rights record; and the presence of terrorist activity in that country.<sup>23</sup>

Applicant's brother, who has been living in the United States for ten years, does not raise a foreign influence concern. SOR ¶ 1.b is decided in Applicant's favor.

On the other hand, Applicant's ties to his family in India and investments in India, coupled with the threat of terrorism in India and history of unauthorized U.S. technology transfers to India, raise a heightened risk of foreign influence.<sup>24</sup> This evidence also establishes the following disqualifying conditions under 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;

(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 foreign connections and a finding of heightened risk does not end the analysis, because AG ¶ 8 lists a number of conditions that could mitigate the concern. The following mitigating conditions under AG ¶ 8 are relevant:

(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.;

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<sup>23</sup> See ISCR Case No. 11-04980 at 4 (App. Bd. Sep. 21, 2012).

<sup>24</sup> See ISCR Case No. 09-08512 at 3 (App. Bd. Dec. 1, 2011) (finding of heightened risk upheld on appeal, because applicant and his wife have family members in India and the risk of terrorism in India).

(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; 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.

Applicant has been in this country for more than 15 years, and has been a U.S. citizen since 2003. He and his wife decided to settle in the United States, and started a family here. They both work for U.S. companies, and have close friends and family members in the United States. However, Applicant's connections to India and the potential for foreign influence have not subsided since he immigrated to the United States. Instead, Applicant's ties to India have steadily increased over the years, as he has accumulated a number of properties in India. He has purchased seven properties in India since 1998, and they are currently worth about \$190,000. Although not a large sum in comparison to his real and personal property in the United States, it is still a substantial amount. Furthermore, based on his 15-year track record, it appears likely that Applicant will continue to invest in India and deepen his already strong ties to India, thereby exacerbating his vulnerability to foreign influence.

In addition, Applicant cannot easily free himself from his substantial financial interests in India, because he must get permission from the Indian government before he can sell the properties and transfer the sale proceeds to the United States. Although India is a democracy and a strategic partner of the United States, even friendly countries can pose a significant foreign influence concern.<sup>25</sup> Applicant's inability to free himself of this potential vulnerability to foreign influence without the permission of the Indian government poses a significant concern.

Moreover, Applicant's statement, re-affirmed at hearing, that he has sympathies or preferences for India because of his family connections to India subjects his foreign connections to a heightened level of scrutiny.<sup>26</sup> Applicant's deep sympathies for his family in India, coupled with his substantial property interests in India and the threat of terrorism in India, leave him particularly vulnerable to foreign influence.

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<sup>25</sup> See ISCR Case No. 00-0317, 2002 DOHA LEXIS 83, \*15 (App. Bd. Mar. 29, 2002) (Even friendly countries can pose a security risk because "(i) relations between nations can shift, sometimes dramatically and unexpectedly; (ii) even friendly nations can have profound disagreements with the United States over matters that they view as important to their vital interests or national security; and (iii) not all cases of espionage . . . have involved nations that were hostile to the United States.")

<sup>26</sup> Cf. ISCR Case No. 00-0317, 2002 DOHA LEXIS 83, \*14 (App. Bd. Mar. 29, 2002) ("Once an applicant has expressed a preference for a foreign country then the applicant's other ties to the foreign country are subject to greater scrutiny.")



Individually considered, each one of Applicant's connections to India is arguably mitigated by his deep and longstanding relationships to the United States. However, when considered in total, Applicant's familial connections and financial interests in India, together with the threat of terrorism and other concerns involving India, creates a heightened risk of foreign exploitation that Applicant did not mitigate, especially in light of his accumulation of property in India and statement regarding his sympathies or preferences for India. Consequently, AG ¶¶ 8(a), (b), and (f) do not apply.

### **Whole-Person Concept**

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).<sup>27</sup> I have considered and given due weight to all the favorable and extenuating factors in this case. I specifically considered Applicant's personal character and integrity. He has been candid about his foreign connections from the start of his background investigation. However, his deep connections to India raise a significant foreign influence concern that is not mitigated by his character, honesty, and other favorable record evidence. Close cases, such as the present one, must be resolved in favor of national security.<sup>28</sup> At the same time, this adverse finding is *not* a comment on Applicant's patriotism and loyalty but merely an acknowledgment that people may act in unpredictable ways when faced with choices that could be important to a loved one, such as a family member.<sup>29</sup>

### **Formal Findings**

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

Paragraph 1, Guideline B (Foreign Influence):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraphs 1.c – 1.i:	Against Applicant

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<sup>27</sup> The non-exhaustive list of adjudicative 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.

<sup>28</sup> AG ¶ 2(b). *Cf. Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) ("security-clearance determinations should err, if they must, on the side of denials").

<sup>29</sup> ISCR Case No. 08-10025 at 4 (App. Bd. Nov. 3, 2009).

## **Conclusion**

In light of the record evidence and for the foregoing reasons, it is not clearly consistent with the interests of national security to grant Applicant eligibility for access to sensitive information. Applicant's request for a public trust position is denied.

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Francisco Mendez  
Administrative Judge