



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



In the matter of:

Applicant for Public Trust Position

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ADP Case No. 15-00440

Appearances

For Government: Adrienne Driskill, Department Counsel
For Applicant: *Pro se*

02/21/2017

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings and exhibits, I conclude that Applicant mitigated trust concerns regarding foreign influence concerns. Eligibility for holding a public trust position is granted.

History of the Case

On November 2, 2015, the Department of Defense (DOD) Consolidated Adjudication Facility (CAF) issued a Statement of Reasons (SOR) to Applicant, detailing reasons why DOD adjudicators could not make the affirmative determination of whether to grant eligibility for a public trust position, and recommended referral to an administrative judge to determine whether eligibility to hold a public trust position should be granted, continued, denied, or revoked. The action was taken under Executive Order 10865 (Exec. Or. 10855), *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security*

Clearance Review Program (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AGs) implemented by the DOD on September 1, 2006.¹

Applicant responded to the SOR on March 31, 2016, and requested a hearing. This case was assigned to me on August 22, 2016. The case was scheduled for hearing on November 17, 2016. A hearing was held on the scheduled date for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's application for eligibility to hold a public trust position. At the hearing, the Government's case consisted of two exhibits (GEs 1-2); Applicant relied on one witness (himself) and no exhibits. The transcript was received on November 29, 2016.

Besides the exhibits offered by the parties, I took administrative notice of 13 documents cited in the Government's Administrative Notice. Covered documents included *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage - 2008*, Office of the National Counterintelligence Executive (July 2009); *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage-2000*, Office of the National Counterintelligence Executive (undated); and *2015 Special 301 Report*, Office of the U.S. Trade Representative (2015)

Other documents cited in the Administrative Notice included the following: *Foreign Spies Stealing U.S. Economic Secrets in Cyberspace, Report to Congress on Foreign Economic Collection and Industrial Espionage, 2009-2011*, Office of the National Counterintelligence Executive (October 2011); *Summary of Major U.S. Espionage, Economic Espionage, Trade Secret and Embargo-Related Criminal Cases, January 2008 to the Present* (January 2015); *Press Release, Six Defendants Indicted in Alleged Conspiracy to Bribe Government Officials in India to Mine Titanium Minerals*, U.S. Department of Justice (April 2014); and *Press Release, Former Owner of Defense Contracting Business Pleads Guilty to Illegally Exporting Military Blue Prints to India Without a License*, U.S. Department of Justice (April 2015).

Additional documents covered by the Administrative Notice included the following: *Passports & International Travel Country Information*, U.S. Department of State (April 2015); *Country Reports on Human Rights Practices for 2014: India*, U.S. Department of State (2014); *2014 Country Reports on Terrorism, Chapter 2-Country Reports, South and Central Asia Overview*, U.S. Department of State (2014); *2008 Country Reports on Terrorism, Chapter 2-Country Reports: South and Central Asia Overview*, U.S. Department of State (April 2009); *Passports & International Travel Alert Warnings*, U.S. Department of State (July 2015); and *CRS Report for Congress: U.S.-India Security Relations: Strategic Issues*, Congressional Research Service (January 2013).

1. A memorandum from the Deputy Under Secretary of Defense for Counterintelligence and Security, titled "Adjudication of Trustworthiness Cases," covering the handling of trustworthiness cases under the Directive was issued on November 19, 2004. This memorandum directed DOHA to continue to utilize DOD Directive 5220.6 in ADP contractor cases for trustworthiness determinations (to include those involving ADP I, II, and III positions). (HE 1) Parenthetically, the Directive was designed to implement Exec. Or. 10865.

In addition to the documents requested by Department Counsel for official notice, I also took official notice of *Background Note: India*, U.S. Department of State (April 2012) This document contains important background information covering India. See *Administrative Notice, infra*, at 3-4.

Administrative or official notice is the appropriate type of notice used for administrative proceedings. Administrative notice is appropriate for noticing facts or government reports that are well known. See Stein, *Administrative Law*, Section 25.01 (Bender & Co. 2006). For good cause shown, administrative notice was granted with respect to the above-named background reports addressing the geopolitical situation in India and India's relationship with the United States, consistent with the provisions of Rule 201 of Fed. R. Evid.

Summary of Pleadings

Under Guideline B, Applicant allegedly (a) has a mother and father who are citizens and residents of India; (b) has a sister who is a citizen and resident of India; (c) a mother-in-law and father-in-law who are citizens and residents of India; (d) owns land in India worth approximately \$50,000; and (e) has a bank account in India worth approximately \$4,320.

In his response to the SOR, Applicant admitted each of the allegations with explanations. He claimed that both he and his wife own land and have bank accounts in India. He claimed that he travels to India most years to visit his parents and in-laws. Further, he claimed that he could not in any way be influenced by the government of India, given that he has lived in the United States for more than 15 years and considers the United States to be his homeland that he is committed to defending. Applicant also claimed that his assets in India are comparatively small. Finally, applicant claimed he has an Masters in Business Administration (MBA) from a local U.S. university and is a director of information technology (IT) with his employer, and designs and builds state-of-the-art IT systems to help provide quality and affordable health care to community, state, and federal health care systems.

Findings of Fact

Applicant is a 43-year-old IT director for a major health management organization who seeks eligibility to hold a public trust position. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Background

Applicant immigrated to the United States in November 2000 and became a U.S. citizen in January 2012. (GE 1; Tr. 32-34) He married in October 2002 and has two children, ages 12 and 8. Both children are U.S. citizens by birth. Applicant's wife became a naturalized U.S. citizen in 2012. (GE 1; Tr. 34-35) Applicant earned a bachelor's degree in engineering in September 1996 in India and an MBA at a

respected U.S. university in August 2010. (GE 1; Tr. 30-31) He claimed no U.S. military service.

Foreign Influence issues

Applicant is an IT director for his employer who supports DOD's health care needs. (Tr. 24-25) He and his wife purchased vacant land in India in 2011 for around \$25,000 and still own the land, which he estimates to be worth around \$50,000. (GE 2; Tr. 51-54) He has no mortgage on this land and earns no income from it, but is liable for property taxes. (Tr. 53-54). They also have a joint bank account in India with a current balance of approximately \$4,320. (GE 2; Tr. 27, 54)

Applicant's parents and sister are citizens and residents of India who reside in the politically stable state of Karala in the southern part of the country. (GE 2; Tr. 36-37, 44) His father is a retired professor; while his mother is a homemaker. (GE 2; Tr. 37-38) Neither of his parents served in the Indian military or have any interests in, or connections with, the Indian government. (GEs 1-2; Tr. 37-40)

Applicant communicates with his parents weekly and makes by-yearly trips to India to see them. (Tr. 47-48) His parents last visited him in the United States in 2015-2016 and stayed with him and his wife between November 2015 and June 2016. (GE 2; Tr. 39-40) His parents possess no detailed knowledge of his work in the United States. (Tr. 38)

Applicant's sister (his only sibling) is a citizen and resident of India who has no interests in or connections with the Indian government. (GEs 1-2; Tr. 41) She is a married homemaker with two children. (Tr. 41-42) His in-laws are also citizens and residents of India. His father-in-law operates a medical clinic; while his mother-in-law is a homemaker. (Tr. 45-46) Applicant maintains monthly contact with his in-laws. (GE 2; Tr. 46) None of his in-laws have any interests in, or connections with, the Indian military or government. (GE 2; Tr. 47-48) Neither his sister nor his in-laws possess any detailed knowledge of his work in the United States. (Tr. 47)

Country information on India

Considered the world's largest democratic republic, India is also a very diverse country, in population, geography, and climate. (*Background Note, India, supra*, at 2-4) India is the world's second most populous country and the world's seventh largest country in area. (*Id.*)

India is a constitutional democracy, whose Constitution defines it as a "sovereign, socialist, secular democratic republic." (*Background Note: India, supra*) It is a "multiparty, federal, parliamentary democracy with a bicameral parliament" and it has an historical reputation for respecting the rights of its citizens. *See id.*

However, there have been reports of extrajudicial killings of persons in custody, disappearances, torture and rape by police and security forces, who generally enjoy *de*

facto impunity. (Country Reports on *Human Rights Practices for 2014: India*, *supra*, at 2-12) The basic problem stems from the lack of clear accountability, which too often has resulted in cited human rights violations going unpunished. (*Id.*, at 1) Police and security officials reportedly use torture and threaten violence during interrogations to extort money and summarily punish prisoners. (*Id.* at 6-8)

Since gaining its independence from Great Britain in 1947, India has been involved in wars with Pakistan in 1947, 1965, and 1971, and has had to defend itself against a 1999 intrusion of Pakistani-backed forces into Indian-held territory that nearly turned into full-scale war. (CRS Report for Congress: *U.S.-India Security Relations*, *supra*, at 7; *Background Note: India*, *supra*, at 3-4) India survived a 1975 declaration of a state of emergency that carried a suspension of many civil liberties. (*Id.* at 3) The country has experienced two assassinations of its leaders: Prime Minister Indira Gandhi in October 1984 and Prime Minister Rajiv Gandhi in May 1991. (*Id.*)

In recent years, India has been confronted with sporadic outbreaks of religious riots that resulted in numerous deaths and casualties, and violent attacks by by insurgents and domestic and international terrorist groups in various parts of the country. See Administrative Notice, *supra*, at 4; *Passports & International Travel Country Information*, *supra*, at 2; and *2014 Country Reports on Terrorism, Chapter 2-Country Reports, South and Central Asia Overview*, *supra*, at 1, 5. The Indian state of Jammu and Kashmir remains unstable, and a number of terrorist groups operate there, particularly along the Line of Control that separates Indian and Pakistani-controlled Kashmir. See Administrative Notice, *supra*, at 4; *Passports & International Travel Country Information*, *supra*; and *Country Reports on Human Rights Practices for 2014: India*, *supra* at 2. Serious examples include the coordinated attacks in November 2008 on multiple locations in Mumbai, targeting areas frequented by Westerners and killing at least 183 people, including 165 civilians and eight individuals from the United States. See *2008 Country Reports on Terrorism, Chapter 2-Country Reports: South and Central Asia Overview*, *supra*, at 3 and *Passports & International Travel Alert Warnings*, *supra*, at 2.

Before its demise in the early 1990s, the Soviet Union was India's principal and most reliable trading partner, and an important source of economic and military assistance. (*Background Note: India*, *supra*, at 8-9) U.S. efforts to strengthen its ties with India have been hampered some by U.S. differences over India's nuclear weapons programs, its cooperation with the Iranian military, its lack of a negotiated resolution of the Kashmir dispute with Pakistan, and the pace of India's efforts to achieve long-planned economic reforms. (CRS Report for Congress: *U.S.-India Security Relations, Strategic Issues*, *supra*, at 11, 22-23, and 45)

Important U.S. concerns have been raised, too, over reported cases involving government-sponsored entities and their illegal export, or attempted illegal export, of U.S. restricted dual use technology to India, including: (1) military night vision components; (2) vibration amplifiers and cable assemblies for use in both military and civilian aircraft; (3) manufacturing equipment related to improving the accuracy of strategic ballistic missiles with nuclear capabilities; and (4) multiple cases involving

illegal export of products presenting what the U.S. Government deemed to be an unacceptable risk of diversion to programs for the development of weapons of mass destruction: or related delivery systems. See Administrative Notice, *supra*, at 3-4, and the specific cases referenced therein. (*Id.*)

Recommended travel restrictions do exist for U.S. citizens visiting India. The State Department cautions U.S. citizens to avoid travel in general (with several noted exceptions) to the state of Jammu and Kashmir. (Administrative Notice, *supra*, at 3-4; *Background Note: India*, *supra*; and Passports & International Travel, Country Information: India, *supra*)

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified [privacy] information. These guidelines include "[c]onditions that could raise a trustworthiness concern [public trust position] and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate [trustworthiness concerns]."

The AGs must be considered before deciding whether or not eligibility to hold a public trust position should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable public trust risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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.

Viewing the issues raised and evidence as a whole, the following individual guideline is pertinent in this case:

Foreign Influence Concerns

The Concern: 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. See AG ¶ 6.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's eligibility to hold a public trust position may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a public trust position depends, in large part, on the relevance and materiality of that evidence. See *United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain public trust position eligibility. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused privacy information before it can deny or revoke eligibility to hold a public trust position. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to protect privacy information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her trustworthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Executive Order 10865 that all [trustworthiness] determinations be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her trust eligibility. "[T]rustworthiness] determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Trustworthiness concerns are raised over Applicant's family members who are citizens and residents of India. Both Applicant and his wife, and their families, have deep roots in India, a country rich in history and socio/political traditions, constitutional government, and institutional respect for human rights, intermixed with periodic reports of abuses by police and government authorities. Despite encouraging efforts in the development of strategic partnerships between India and the United States in recent years, there have been cited instances of illegal and damaging export practices by Indian firms and individuals to create dual use diversion risks.

The Government urges security concerns over risks that Applicant's parents, sister, and in-laws could be subjected to coercion, pressure, or undue influence that could make Applicant vulnerable to succumbing to pressure to disclose sensitive information in his custody or control. It urges trustworthiness concerns as well over Applicant's sister and in-laws residing in India, who might be subject to undue foreign influence by Indian government authorities to access classified information in Applicant's possession or control.

Positions designated as ADP I and ADP II are classified as "sensitive positions." See DOD Regulation 5200.2-R, *Personnel Security Program*, ¶¶ C3, 1.2, 1.1.7, and C3. 1.2..3 (Jan. 1987, as amended) (the Regulation). Holding a public trust position involves the exercise of important fiducial responsibilities, among which is the expectancy of consistent trust and candor.

Because Applicant's parents, sister, and in-laws have Indian citizenship and residency in India, they present potential heightened trustworthiness risks covered by disqualifying condition (DC) ¶ 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," of the AGs for foreign influence. The citizenship/residence status of these family members in India pose some potential concerns for Applicant because of the risks of undue foreign influence that could potentially impact the privacy interests subject to Applicant's control.

Although ADP I and ADP II positions are not expressly covered by Exec. Or. 10865 or the Directive, which apply to contractor personnel, historically, the same principles covering these positions have been applied in Regulation 5220.2 governing military and civilian personnel. The definitions used in the Regulation to define ADP I and ADP II positions have equal applicability to contractors covered by the Directive.

Neither Applicant's wife (a U.S. Naturalized citizen who resides with Applicant in the United States) nor his parents, sister, and in-laws who reside in India have any identified Indian government or military service affiliation. As a result, less consideration of DC ¶ 7(b), "connection 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," and DC ¶ 7(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,” are warranted. To be sure, there is no evidence in the record that Applicant’s parents, sister, and in-laws residing in India, have any history of being subjected to any coercion or influence, or appear to be vulnerable to the same.

The AGs governing collateral clearances do not dictate *per se* results or mandate particular outcomes for applicants with relatives who are citizens/residents of foreign countries in general. What is considered to be an acceptable risk in one foreign country may not be in another. See ISCR Case No. 00-0317 at 6 (App. Bd. March 29, 2002) The AGs take into account the country’s demonstrated relations with the U.S. as an important consideration in gauging whether the particular relatives with citizenship and residency elsewhere create a heightened security risk. The geopolitical aims and policies of the particular foreign regime involved do matter.

While the reports of human rights abuses and terrorist activities in certain sectors of India, along with identified illegal exporting of potential dual-use technology to India, are matters of continuing security concern to the United States, India’s emergent status as a strategic partner of the United States in controlling the proliferation of nuclear weapons is an important political development that serves to promote political solidarity, and reduce security risks and concerns between the two nuclear powers.

Based on his case-specific circumstances, MC ¶ 8(a), “the nature of the relationships with foreign persons, the country in which these persons are located, or the persons or activities of these 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 a foreign individual, group, organization, or government and the interests of the United States,” has partial application to Applicant. Neither Applicant’s parents, sister, nor in-laws residing in India pose any heightened security risks that could subject them to potential pressures and influence from Indian government and military officials. Any heightened risks that might be posed due to India’s economic collection practices are more than outweighed by the country’s close bilateral relations with the United States and Applicant’s demonstrated commitments to protecting the United States’ security and privacy interests.

Applicant’s property interests in India consist of one jointly owned vacant plot of land and a modest joint bank account. Based on the information provided by Applicant these assets appear to be relatively low valued assets relative to Applicant’s reported assets in the United States where Applicant and his wife and children reside. The modest assets he holds in India are not enough to warrant any serious concerns about potential conflicts of interest.

Another mitigating condition available to Applicant is MC ¶ 8(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 U.S.

interest.” Applicant’s demonstrated loyalty and professional commitments to the United States are well demonstrated and sufficient under these circumstances to neutralize any potential conflicts that are related to his relationships with his parents, sister, and in-laws.

Whole-person assessment is available also to minimize Applicant’s exposure to potential conflicts of interests with his parents, sister, and in-laws. Most importantly, Applicant is not aware of any risks of coercion, pressure, or influence that his parents, sister, and in-laws residing in India might be exposed to. So, in Applicant’s case, the potential risk of coercion, pressure, or influence being brought to bear on him, his parents, sister, and in-laws is minimal and mitigated. Applicant has lived in the United States since 2000 and has been a naturalized U.S. citizen since 2012. He has enjoyed success in his U.S. employment relationships and has two children who are citizens of the United States by birth.

Overall, potential security concerns over Applicant’s having family members in India are sufficiently mitigated to permit safe predictive judgments about his ability to withstand risks of undue influence attributable to his familial relationships in India. Favorable conclusions warrant with respect to the allegations covered by Guideline B.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE B (FOREIGN INFLUENCE): FOR APPLICANT

Subparagraphs 1.a through 1.e: For Applicant

Conclusions

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant’s eligibility to hold a public trust position. Eligibility to hold a public trust position is granted.

Roger C. Wesley
Administrative Judge

