



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



In the matter of:)
)
 REDACTED) ADP Case No. 12-03718
)
 Applicant for Security Clearance)

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: Eric A. Eisen, Esq.

04/11/2013

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant mitigated the concerns arising from his possession of a passport from India and his other connections to India. He has continuously resided in the United States for over 20 years, and became a U.S. citizen in 2003. He started a family, purchased a home, and worked his entire adult life in the United States. He is deeply involved in his community, and has close friends and family in the United States. He only kept his Indian passport after becoming a U.S. citizen because he was unaware of the proper procedures to follow to relinquish it and, after being provided the information, surrendered it and had it destroyed. He never used his Indian passport on his foreign travel after becoming a U.S. citizen, and his testimony and conduct established that his preferences squarely lie with the United States and he could not be subjected to foreign influence. Eligibility for access to sensitive information is granted.

Statement of the Case

On October 12, 2012, the Department of Defense (DoD) issued a Statement of Reasons (SOR) recommending that Applicant's eligibility for occupancy of an automated data processing (ADP) position, which are generally referred to as public trust positions, be denied due to concerns arising under Guideline B (Foreign Influence)

and Guideline C (Foreign Preference). 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).¹

On November 3, 2012, Applicant answered the SOR and requested a hearing to establish his eligibility for a public trust position (Answer). On December 21, 2012, Department Counsel indicated the Government was ready to proceed with a hearing. On January 23, 2013, I was assigned Applicant's case. After coordinating with the parties, I scheduled the hearing for February 26, 2013.

At hearing, Department Counsel offered Government Exhibits (Gx.) 1 and 2, which were admitted without objection. Department Counsel also submitted Hearing Exhibit (Hx.) I, a proposed summary of facts regarding India. The official, unclassified source documents Department Counsel relied upon in preparing HE I were marked as exhibits for administrative notice (An.) I – XIV and included in the record.² Applicant appeared at the hearing, testified, and offered Applicant's Exhibits (Ax.) A – F that were admitted without objection. Applicant's counsel submitted a bench memorandum that was marked Hx. II. DOHA received the hearing transcript (Tr.) on March 7, 2013.

Findings of Fact

Applicant is 48 years old. He is married and has two children, ages 15 and 18. His children were born and raised in the United States. Applicant's wife is the information technology (IT) director of a small U.S. company and sits on the planning committee of their children's school board. His son is involved in activities at school and in the community, is on track to be awarded Eagle Scout status by the Boy Scouts, and has been accepted to a prestigious U.S. university. Applicant's daughter is similarly involved in school and extracurricular activities.³

Applicant was born in India and immigrated to the United States in 1989 to pursue his master's degree in computer science. Applicant earned his master's degree from a U.S. university in 1992. He decided to remain in the United States, started his professional career, and married in 1993. He has lived in the same U.S. metropolitan

¹ 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.

² Applicant objected to An. II – IX on relevance grounds. I deferred ruling on Applicant's objections and now overrule them. (Tr. at 18-24) Although I agree with Applicant that An. II, a U.S. Government report that is over 10 years old is dated and its relevance is minimal, especially in light of more recent documents, I have considered it in assessing the overall concern. As for the remaining exhibits for administrative notice, they provide general information regarding India, which is relevant in foreign influence cases such as this one. The relevant facts for administrative notice are set forth herein.

³ Tr. at 28-31, 34-35; Gx. 1.

area for the past 20 years and has lived in the same house for nearly 15 years. He has developed numerous friends at work and in his community. He has worked in the IT field for U.S. companies since earning his master's degree. He was granted U.S. citizenship status in 2003 in a naturalization ceremony presided over by the former Secretary of Homeland Security.⁴

Prior to becoming a U.S. citizen, Applicant renewed his Indian passport. It was not set to expire until 2019. After becoming a U.S. citizen, Applicant only used his U.S. passport on his foreign travel, including his trips to India. He paid the \$600 to \$800 for the appropriate visas to visit India. He was unsure how to relinquish his Indian passport to the proper authorities and kept it only if he was asked to return it at a future date. His wife's Indian passport expired some time ago and his children have never had Indian passports. After receiving the SOR and realizing the concern posed by possessing a foreign passport, Applicant surrendered his Indian passport to his facility security officer, who destroyed it. Applicant is not eligible for an Indian passport in the future, because India does not recognize dual citizenship.⁵ No evidence was presented that Applicant applied for or has an Overseas Citizens of India (OCI) card, which is similar to a U.S. green card and confers to its holder certain benefits.⁶ (SOR ¶ 2.a)

Applicant's parents, brothers, father-in-law, mother-in-law, and sister-in-law are Indian citizens, who reside in India. Applicant's father owns his own business and his brothers work for their father. Applicant's mother and his brothers' wives do not work outside the home. They all share a home in India. The family business has no contracts with or ties to the Indian government or military. Applicant's in-laws are retired. His father-in-law owned his own scrap metal business before retiring, while his mother-in-law never worked outside the home. They support themselves now through income generated from their investments. Applicant's sister-in-law (one of his wife's sisters) is married and her husband owns his own import/export business. This business does not involve the importation of technology, and has no connection to the Indian government or military. Applicant's foreign family members in India have no connection or ties to the Indian government or military. Applicant wishes he could travel to India on a more frequent basis to visit his family, but due to anticipated college costs for his children, he has been forced to curtail any such travel.⁷ (SOR ¶¶ 1.a – 1.d)

Applicant's uncle, who convinced him to move to the United States, is a citizen and resident of the United States. Applicant has a number of cousins who are citizens

⁴ Tr. at 31-36, 45-48; Gx. 1; Ax. E.

⁵ Tr. at 41-42, 45-47; Gx. 2 at 1; Ax. A; An. XIII at 11 ("India does not permit its citizens to hold dual nationality.").

⁶ See *generally*, An. XIII at 11 (OCI card holders "can travel to and from India indefinitely, work in India, study in India, and own property in India . . . An OCI card holder, however, does not receive an Indian passport, cannot vote in Indian elections, and is not eligible for Indian government employment.").

⁷ Tr. at 40-41, 51-57; Gx. 2 at 2-3.

and residents of the United States. His brother-in-law and another sister-in-law, who were also originally from India, are citizens and residents of the United States. Applicant tries to get together with his extended family in the United States at least once a year, around the holidays. Applicant testified that his future and that of his family is in the United States.⁸ One of Applicant's brothers-in-law, who is originally from India, works as a U.S. defense contractor and has an active security clearance, writes:

On many occasions, during our discussions, one of the favorite topics of discussion has generally been comparison of USA with India and other countries in the world. In such discussions, I've always known [Applicant] as one who feels very fortunate to be in USA and considers himself to be extremely lucky to be a US citizen. Another topic of our discussion has been information security as that is an area common to both of us professionally. . . . He has always come through as someone who knows this area very well and very cognizant of the need to handle sensitive information with due care.⁹

In 2011, Applicant invested a substantial amount in a high-yield certificate of deposit (CD) offered by a bank in India. Due to the exchange rate, he lost about \$15,000 and the current balance in the account is approximately \$130,000. He plans on transferring the funds back to the United States once he recoups his losses. Applicant and his wife are the only individuals who have access to this account. They do not use the account to support their foreign family members. Applicant disclosed this foreign financial interest on his application for a public trust position. He is willing to relinquish the account if it poses a concern and, although not a small amount, it amounts to just about 10% of his overall financial portfolio. He has no other foreign property or financial interest. His net worth, to include his home and numerous U.S. investments, is in excess of one million dollars.¹⁰ (SOR ¶ 1.e)

Applicant has never voted in elections in India. He has voted in multiple U.S. elections. He and his family have numerous close friends and extended family in the United States. He owns his home in the United States outright and has lived there for nearly 15 years. He has worked as an IT security specialist for U.S. companies for the last ten years. He worked for a major U.S. investment bank from 2004 to 2011, where he was subject to an in-depth background check prior to being hired. He signed a non-disclosure agreement with his former employer and did not reveal the sensitive information he had access to in his prior position.¹¹ A former manager writes that Applicant's "quality of work . . . was extremely high . . . and so often exceeded my expectations." The former manager goes on to state that Applicant handled his former

⁸ Tr. at 41, 50-51.

⁹ Ax. E at 2.

¹⁰ Tr. at 42-43, 48-49, 58-59, 62-63; Gx. 1 at 32-33; Gx. 2 at 3; Ax. B.

¹¹ Tr. at 28-30, 49, 59-61, 64-66; Gx. 1; Ax. B; Ax. E.

employer's proprietary information "with utmost sensitivity and security."¹² Applicant voluntarily left his job with the investment bank to go to work for his current employer, protecting U.S. Government IT systems. His family in India knows he works in computers in general, but is not aware of his work for the U.S. Government.¹³

Applicant's neighbor of nearly 15 years, who before retiring was an employee of a major defense contractor and held a security clearance for ten years, writes that Applicant is the "epitome of a good neighbor." She writes about how Applicant and his wife helped her and her disabled husband, when she had a stroke two years ago. She goes on to state:

Although he wasn't a citizen when we first met, I would never have known. During all the of the years we have been neighbors, there is no time that I've heard or seen anything at the [Applicant's] home that would ever cause me to question their loyalty to America. [Applicant] has always displayed the utmost honesty and integrity. He is a responsible, hardworking family man who is also a good citizen.¹⁴

Concerning Applicant's country of birth,¹⁵ 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.

¹² Ax. E at 5.

¹³ Tr. at 60-66; Gx. 1. See also Ax. D (threat posed to U.S. from cyber attacks).

¹⁴ Ax. E at 1.

¹⁵ The facts about India are taken from An. I – XIV and Ax. C – D.

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 subjected to regulatory fines 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 national interest.¹⁶

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 (AG or guidelines).¹⁷ 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.¹⁸

In resolving the ultimate question regarding an applicant's eligibility, an administrative judge must resolve any doubt in favor of national security.¹⁹

¹⁶ 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.

¹⁷ 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.

¹⁸ Directive, Enclosure 3, ¶ E3.1.14 – E3.1.15.

¹⁹ Directive, Enclosure 2, ¶2(b).

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 for a public trust position who have familial ties to a foreign country. Instead, in addressing the foreign influence concern, key factors an administrative judge must consider are: the foreign government involved, the intelligence gathering history of that government, the country's human rights record, and the presence of terrorist activity in that country.²⁰

Applicant's strong ties to his family members in India and his foreign investment raise the foreign influence concern. These foreign connections, in light of the threat of terrorism in India and history of unauthorized U.S. technology transfers to India, establish 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;²¹

(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;

²⁰ See ISCR Case No. 11-04980 at 4 (App. Bd. Sep. 21, 2012).

²¹ See ISCR Case No. 09-08512 at 3 (App. Bd. Dec. 1, 2011) (judge's finding that element of "heightened risk" was established was sustained on appeal, because Applicant and his wife has close familial ties to India and the risk of terrorism in India).

(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 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 to the case at hand:

(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.;

(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.

AG ¶¶ 8(a) and 8(b) apply. Applicant has been in this country for more than 20 years, and he has been a U.S. citizen since 2003. His entire professional career has been in the United States. He started a family in the United States, and his children were born and raised in the United States. Applicant and his family are deeply involved in their community, and have numerous close friends and family members in the United States. While he and his wife still have family in India that they care for, their life and future are in the United States. India is a democracy and strategic partner of the United States. Technology has been illegally exported to India, but the documents provided for administrative notice do not show that coercion was utilized. I find that it is unlikely Applicant will be placed in a position of having to choose between the interests of the Indian government or his family members in India and the interests of the United States. I further find there is no conflict of interest, because Applicant can be expected to resolve any conflict of interest in favor of the United States.

AG ¶ 8(f) also applies. Although the amount in the CD in an Indian bank is not small, it is not sufficient to influence Applicant. First, it pales in comparison to Applicant's substantial financial and property holdings in the United States. Second, Applicant voluntarily disclosed this investment in his application for a public trust position and, thus, can be expected to reveal any attempt to influence him through this passively held investment. Third, the money is immaterial when compared to Applicant's strong ties to the United States, not the least of which is his immediate family.

Guideline C, Foreign Preference

Under AG ¶ 9, the concern involving foreign preference arises “[w]hen an individual acts in such a way as to indicate a preference for a foreign country over the United States.” Such an individual “may be prone to provide information or make decisions that are harmful to the interests of the United States.”

Applicant's possession of an Indian passport after becoming a U.S. citizen raises this concern and also establishes the disqualifying condition at AG ¶ 10(a), “exercise of any right, privilege or obligation of foreign citizenship,” to include “possession of a current foreign passport.”

Applicant mitigated the foreign preference concern. He only retained his former Indian passport after becoming a U.S. citizen because he was uncertain how to relinquish it to the Indian authorities. When provided the necessary information, Applicant surrendered his Indian passport without hesitation and had it destroyed. Furthermore, he never used his Indian passport after becoming a U.S. citizen, and his testimony and conduct over the past 20 plus years demonstrates that he does not have a preference for India or any other foreign country over the United States. Specifically, Applicant established the mitigating condition at AG ¶ 11(e), “the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.”

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance 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).²² I incorporate my comments under Guidelines B and C herein and note some additional whole-person factors. Although this is Applicant's first application for a public trust position, he has handled and safeguarded sensitive information for years while working for U.S. companies in the private sector. He is also at the forefront of defending IT systems against adversaries, both foreign and domestic,

²² 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.

who would like to cause damage to this nation. He voluntarily left the private sector to work as a contractor for the U.S. Government, applying his unique skills to his adopted country's security. Trustworthiness adjudications entail a certain degree of predictive judgment, where an applicant's past history is the best indicator of future conduct. Applicant established that he has a history of properly handling and safeguarding sensitive information and there is no reason to doubt his ability to do so going forward.

Additionally, Applicant's personal character and integrity, which are vital matters to be considered in assessing an individual's suitability for a position of trust, are unassailable. Applicant has been candid about his foreign connections from the start of his background investigation. Furthermore, I had an opportunity to observe his demeanor while he testified. I found him forthcoming with details regarding his foreign connections to India and wholly credible when he testified about his deep and long-standing relationships to the United States. These favorable whole-person factors, in conjunction with the mitigating conditions noted above, mitigate the concerns at issue. Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility for a public trust position.

Formal Findings

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

Paragraph 1, Guideline B (Foreign Influence):	FOR APPLICANT
Subparagraphs 1.a – 1.e:	For Applicant
Paragraph 2, Guideline C (Foreign Preference):	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of the record evidence and for the foregoing reasons, it is clearly consistent with the national interest to grant Applicant eligibility for access to sensitive information. Applicant's request for a public trust position is granted.

Francisco Mendez
Administrative Judge