



**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. 14-05412

Appearances

For Government: Stephanie C. Hess, Esquire, Department Counsel
For Applicant: *Pro se*

10/19/2015

Decision on Remand

HOWE, Philip S., Administrative Judge:

On March 31, 2014, Applicant submitted her Electronic Questionnaire for Investigations Processing (e-QIP). On January 27, 2015, the Department of Defense issued to Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns under Guidelines C (Foreign Preference) and B (Foreign Influence). The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR in writing on February 24, 2015. Applicant requested her case be decided on the written record in lieu of a hearing.

On April 30, 2015, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM), consisting of Items 1 to 4, was provided to the Applicant on May 14, 2015. She was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the file on May 18, 2015. Applicant filed a Response to the FORM within the 30-day time allowed that would have expired on June 17, 2015. She sent documents that I marked as Items 5 to 17 when I received them on October 28, 2015. They were provided to me after this case was remanded to me in an Appeal Board decision of October 15, 2015. Department Counsel had no objections to the admission of these documents into the record.

I received the original case assignment on August 10, 2015. Based upon a review of the pleadings and exhibits, eligibility for access to sensitive information is granted.

Procedural and Evidentiary Rulings

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to India. The pertinent documents were included in the record as Item 4. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

Applicant denied the allegation in Paragraph 1 about foreign preference and admitted the four allegations in Paragraph 2 concerning foreign influence. (Items 1-3)

Applicant is 37 years old, married, and has two children who were born in the United States. Applicant and her husband were born and raised in India. They came to the U.S. on January 2, 2001. They became naturalized U.S. citizens on November 7, 2013. (Item 3)

Applicant works for a defense contractor. She has a bachelor's degree she obtained in India. She has been gainfully employed in the U.S. since 2006. (Item 3)

Applicant had an Indian passport she used to come to the United States. It was then reissued in 2002 and valid until 2010. The passport was again reissued in October

2010 and valid until October 2020 because she was an Indian citizen at the time. She traveled to India six times between 2002 and 2011. After being naturalized she obtained a U.S. passport on November 12, 2013. (Item 3)

Applicant denied the allegation in the SOR that she has a valid Indian passport at the current time. Her Answer stated it was cancelled by the Indian Embassy in the United States on May 1, 2014. She submitted an application to cancel the Indian passport on January 24, 2014, after she obtained her U.S. passport. A renunciation certificate issued by the Republic of India is included with her Answer. Her Indian passport was cancelled, according to the document. In addition, the Indian government issued Applicant an Overseas Citizen of India card that grants her life-long visas to visit India, exemption from some registration requirement in India, and parity with some other persons in "economic, financial and education field, except in matters relating to acquisition of agricultural/plantation properties." (Items 2 and 3)

Applicant's parents are citizens and residents of India. Applicant's Response stated her parents were 65 and 60 years of age, respectively. Her father is a retired banker and her mother a homemaker. Neither of them ever worked for the Indian government or military, according to Applicant's Response. Applicant visits them yearly in India, talks to them weekly by telephone, and sends them money for any of their emergency medical expenses. The money is also used for expenses on Applicant's house in India. They are not co-owners with Applicant of any property in India. (Items 2, 3, 5)

Applicant's parents-in-law are citizens and residents of India. Her father-in-law is 69 years old and a retired college professor. Her mother-in-law is 60 and a homemaker. Neither of them ever worked for the Indian government or military, according to Applicant's Response. When Applicant and her family return to India annually they also visit her in-laws. Applicant talks to them monthly. They visited Applicant in 2013 and 2015, respectively. Applicant does not have any assets co-owned with them. (Items 2, 3, 5)

Applicant visited India for two months in 2011, one month in 2012, and one month from June to July 2013, before becoming a naturalized U.S. citizen. She also traveled to India in 2005, 2008, and 2010. (Items 2 and 3)

Applicant owns a house in India worth about \$300,000 in U.S. currency. Applicant uses the house during her family visits to India instead of staying in hotels. She purchased some of the real estate and inherited other properties. The properties are managed and used by her parents and parents-in-law. They can use the house,

which is located in a larger Indian city with better health care facilities than where they live, when they need medical treatment. (Items 2, 3, 5)

Applicant has a bank account in India alleged in the SOR to be worth about \$75,000 in U.S. currency at one time. Applicant labelled it a non-resident rupee external bank account that is used by her parents and parents-in-law to take care of the real estate and her relatives' health care needs. Applicant states in her Response that withdrawals can only be made in India. She also stated about \$60,000 from the account was used for renovations on the house. The Response document states the account in June 2015 contains \$4,300. (Items 2, 5, 11)

Applicant's Response lists her home in the United States and three rental properties in the same area as being more valuable than the one house she owns in India. She lists the apparent market values in her Response and attaches exhibits showing the assessed values by her local taxing authorities. Her principal residence is assessed at \$822,670. Her three rental properties are assessed at \$122,630; \$435,000; and \$144,280, respectively. She also submitted documents showing her checking account on May 31, 2015 held \$104,755.21. (Items 10, 12-15)

Applicant's retirement accounts (two of them) total \$295,834.86 as of May 31, 2015. Her Response also states her husband's company, a small business closely held, has annual revenue of about \$1.5 million, demonstrating to her that her connections to the United States are stronger than to India. She contends her family's financial future is tied to the United States. Applicant states that she has worked for her government contractor for the past five years with excellent work reviews from her supervisors. (Items 5, 16, 17)

Applicant submitted four character reference letters. Three letters are from supervisors who have known Applicant from two to nine years. Those letters state she is an excellent worker who interacts very well with her colleagues. Each stated they found Applicant to be trustworthy, honest, and a person of integrity. The fourth letter is from a naturalized U.S. citizen who was born in India and has known Applicant and her family there and in the U.S. since 1990. He stated Applicant is very trustworthy and is firmly planted in the United States. He also asserts that she has good family values. (Items 6-9)

Administrative Notice

Applicant has contacts with India. Accordingly, it is appropriate to discuss the current situation concerning India and the United States. India is the most populous democracy in the world. There have been incidences in the past when parties in the

United States attempted to export military or dual-use technologies to India, such as night vision equipment and missile components. There have been numerous and recent criminal cases concerning export enforcement, economic espionage, theft of trade secrets, and embargo-related criminal prosecutions involving the government of India, private companies, and individuals in India. Finally there are concerns with widespread human rights problems, and terrorist activity, particularly in northwest India.

India and Pakistan have been locked in a tense rivalry since the partition of the subcontinent after the end of British rule in 1947. These two countries have engaged in three wars since 1947 over Kashmir and Jammu, both Indian states. The U.S. State Department strongly recommends avoiding travel in these areas by U.S. citizens.

India continues to experience terrorist and insurgent activities that may affect U.S. citizens. Six Americans were killed in the November 2008 attack in Mumbai. Attacks in 2012 and 2013 show India remains a target for these groups.

The U.S. State Department in a 2013 report stated there are significant human rights problems in India with police and security force abuses, corruption in all levels of the government, and various types of violence. Discrimination and violence against women remain a serious problem.

India's relations with Iran have been positive in years past. It has a lenient stance on Iran, which has caused friction between India and the United States. India has long been a military customer of the Soviet Union in the past and of Russia currently.

In 2015 the United States and India signed a "Declaration of Friendship" because India is growing as a trade partner with the U.S. The two countries are to cooperate on energy, defense, and homeland security. (Item 4)

Policies

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

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 (AG ¶ 2(a)). 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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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

A person who seeks access to sensitive information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to sensitive information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Section 7 of Executive Order (EO) 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty

of the applicant concerned.” See *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline C, Foreign Preference

Under AG ¶ 9 the trustworthiness 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, and then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.”

AG ¶ 10 describes four conditions that could raise a trustworthiness concern and may be disqualifying. Three of those conditions apply to Applicant:

(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to:

(1) possession of a current foreign passport;

(2) military service or a willingness to bear arms for a foreign country;

(3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country;

(4) residence in a foreign country to meet citizenship requirements;

(5) using foreign citizenship to protect financial. or business interests in another country;

(6) seeking or holding political office in a foreign country; and,

(7) voting in a foreign election;

(b) action to acquire or obtain recognition of a foreign citizenship by an American citizen; and

(d) any statement or action that shows allegiance to a country other than the United States: for example, declaration of intent to renounce United States citizenship; renunciation of United States citizenship.

Applicant held an Indian passport that was scheduled to expire in 2020. She is a native of India and obtained U.S. citizenship in November 2013. Applicant also has slightly over \$300,000 of real property and other assets in India, which she wants to protect for her future use. She uses them annually on her visits, and her family members reside on at least some of the properties. Therefore, AG ¶ 10 (a) (1), (3), and (5) are established.

Possession of the Indian passport show Applicant took action to obtain recognition of her Indian citizenship after obtaining U.S. citizenship in 2013. AG ¶ 10 (b) is established. Applicant retained her Indian passport after becoming a U.S. citizen. AG ¶ 10 (d) is established.

AG ¶ 11 provides six conditions that could mitigate trustworthiness concerns. Four conditions may apply:

(a) dual citizenship is based solely on parents' citizenship or birth in a foreign country;

(b) the individual has expressed a willingness to renounce dual citizenship;

(c) exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor; and

(e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

Applicant was born in India, raised, and educated there. She and her husband immigrated to the U.S. and became naturalized citizens. Until she became a U.S. citizen she had and used her Indian passport. After she became a U.S. citizen in 2013, she renounced her Indian citizenship and surrendered her Indian passport on January 24, 2014. AG ¶ 11 (a), (b), and (e) are established.

Applicant exercised her rights and privileges of Indian citizenship before she became a U.S. citizen. However, after renunciation of her Indian citizenship and surrender of her Indian passport, she accepted the overseas citizen of India card

granting her special visa and other privileges. She can exercise them as an adult and a U.S. citizen, so that AG ¶ 11 (c) is established in part.

There is another fact to consider in the mitigation discussion. After surrendering her Indian passport, Applicant was issued a card by the Indian Embassy in the United States stating she is an "Overseas Citizen of India" in March 2014. This card gives Applicant "life-long" visas to visit India, exemption from some registration requirements in India, and parity in economic, financial, education fields except in agricultural matters. These are benefits extended to her by India. This overseas citizen card would help her protect her property in India and ease her entrance into the country. It is a benefit she receives from the Indian government based on her birth there. However, this document is essentially only a visa that Applicant can use with her U.S. passport to travel to India.

This factor is to be considered as countervailing to the mitigation of her other actions after becoming a U.S. citizen. It is a minor factor because other travelers to India would need or can obtain a visa for entry into India. The SOR does not allege it but Applicant admits its issuance in her Answer and included a copy of the document as part of her Answer.

Guideline B, Foreign Influence

AG ¶ 6 expresses the trustworthiness concern regarding foreign influence:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in 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.

AG ¶ 7 describes nine conditions that could raise a trustworthiness concern and may be disqualifying. Five conditions may apply:

(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;

(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; and

(i) conduct, especially while traveling outside the U.S., which may make the individual vulnerable to exploitation, pressure, or coercion by a foreign person, group, government, or country.

Applicant's parents and parents-in-law are citizens and residents of India. She traveled to India annually between 2011 and 2013. Before 2011 she traveled three times to India after arriving in the United States in 2001. Another factor is that she shares living quarters with her husband who has parents living in India. Both sets of parents have traveled to the United States to visit Applicant. These foreign contacts consequently create a heightened risk because of evidence regarding terrorist activities in India and the Indian government's human rights abuses. AG ¶ 7 (a), (b), and (d) are established.

Applicant has \$300,000 worth of real estate in India used by her parents, parents-in-law, and herself and family on their trips to India. She also has another \$75,000 in a bank account in India that she can use when in India, as alleged in the SOR. Applicant makes almost annual trips to India and it is likely she will continue to travel there for family purposes. These substantial financial and property interests in India can subject her to a heightened risk of foreign influence and exploitation because she may potentially want to retain ownership of these assets. AG ¶ 7 (e) is established.

Applicant's conduct while in India visiting her family and property and spending from her bank account may make her vulnerable to exploitation, pressure, or coercion by the Indian government or terrorists within India. Her work for a defense contractor in the U.S. makes her more vulnerable. AG ¶ 7 (i) is established.

AG ¶ 8 provides six conditions that could mitigate trustworthiness concerns. Three mitigating conditions may apply:

(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.

Applicant has close connections with India through her family and her substantial monetary assets located there, consisting of a house and a bank account. Applicant submitted new documents showing her Indian bank account is only about \$4,300 now, not the amount alleged in the SOR. She made frequent trips to India before becoming a U.S. citizen to visit her family. They traveled to the United States to visit her. She intends to continue traveling there. India is friendly to the United States. Her relatives are retired and not engaged in daily active commerce or governmental positions to be of any concern to influence Applicant's trustworthiness.

Applicant has been in the United States for 14 years. She has been a citizen for less than two years. She carries an overseas Indian citizenship card equivalent to a visa granting her certain privileges to travel to India and maintain ownership of her assets there. Her connections are only familial in India with her relatives who are senior citizens and retired from any business. They never worked for the Indian government or a military organization or contractor there.

All of these facts show that it is not likely she will have a conflict of interest if placed in a position to choose between her family, her assets, India, and the interests of the United States where she showed she has more substantial assets than in India. AG ¶ 8 (a) is established.

Applicant has substantial financial interests in the United States that she has shown in her Response and supplemental documents. Her assets in India are about \$300,000. Her U.S. assets are her family home, three rental properties, and retirement savings. They total over \$1 million. She asserted in her Response her husband's small business does over \$1 million in revenue annually in the U.S. Her children were born here. Applicant has been in the United States for 14 years. Applicant has been a citizen of the United States less than two years, but has immersed herself totally in the U.S. economy and community. She demonstrated deep loyalties to the United States after making the voluntary decision to resettle in this country, such that she can be expected to resolve any conflict in favor of the U.S. interest. To emigrate from India she would have had to comply with all legal requirements to move to the United States, demonstrating her commitment to comply with laws that affect her. She has worked hard in 14 years to accumulate significant assets outweighing the value of her property in India. AG ¶ 8 (b) is established.

The house in India and the bank account there Applicant uses to maintain the property and help her family members are relatively less significant than her U.S. assets, as she has shown. They are not likely to result in a conflict for Applicant when balanced against her U.S. assets. Because of that disparity they could not reasonably be used effectively to influence, manipulate, or pressure Applicant by any Indian entity. AG ¶ 8 (f) is established.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a trustworthiness determination by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) 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 trustworthiness determination must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all facts and circumstances surrounding this case. Applicant was an adult who immigrated to the United States in 2001. She works for a defense contractor. Applicant maintains strong family connections to her native India with her relatives living there. She made routine trips back to India since arriving in the U.S., and she has a home and a bank account located in India that she would want to use and protect. While there is a heightened risk regarding India with the internal terrorist and anti-government threats, plus the human rights abuses that occur there, Applicant demonstrated that her substantial U.S. assets and connections to the United States outweigh her financial and familial connections to India. The recent efforts to improve the bi-lateral relationship between India and the United States work to mitigate the potential for pressure, coercion, exploitation, or duress. Applicant showed she has stronger connections to the U.S. than India now.

Furthermore, Applicant submitted strong letters about her trustworthiness from three of her supervisors who have worked with her in the past nine years. The fourth letter was from a friend who is also an immigrant from India and now a U.S. citizen who has known Applicant since 1990. He wrote highly of her family values and trustworthiness.

Overall, the record evidence leaves me without questions or substantial doubts as to Applicant's eligibility and suitability for a position of trust. For all these reasons, I conclude Applicant mitigated the trustworthiness concerns arising under the guidelines for Foreign Preference and Foreign Influence.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline C:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline B:	FOR APPLICANT
Subparagraph 2.a to 2.d:	For Applicant

Conclusion

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

PHILIP S. HOWE
Administrative Judge