



**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. 14-04408

Appearances

For Government: Chris Morin, Esquire, Department Counsel

For Applicant: *Pro se*

06/05/2015

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant mitigated the trustworthiness concerns regarding foreign influence. Eligibility to occupy a public trust position is granted.

Statement of the Case

On December 20, 2013, Applicant applied for a public trust position and submitted an Electronic Questionnaire for Investigations Processing (e-QIP).¹ On September 23, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, pursuant to Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (effective within the Department of Defense on September 1, 2006) (AG) for all adjudications and other determinations made under the Directive. The SOR alleged trustworthiness concerns under Guideline B (Foreign Influence), and detailed reasons why the DOD adjudicators could not make a preliminary affirmative finding under the Directive that it is

¹ Government Exhibit 1 (e-QIP, dated December 20, 2013).

clearly consistent with the interests of national security to grant or continue Applicant's eligibility for occupying a public trust position to support a contract with the Department of Defense, and recommended referral to an administrative judge to determine whether such eligibility should be granted, continued, denied, or revoked.

Applicant acknowledged receipt of the SOR on October 8, 2014. In a written statement, notarized on October 21, 2014, Applicant responded to the SOR allegations and requested a hearing before an administrative judge. Department Counsel indicated the Government was prepared to proceed on December 15, 2014. The case was assigned to me on January 13, 2015. A Notice of Hearing was issued on February 13, 2015, scheduling the hearing for March 11, 2015. I convened the hearing, as scheduled.

During the hearing, one Government exhibit (GE 1) and nine Applicant exhibits (AE A through AE J) were admitted into evidence, without objection. Applicant testified. The transcript (Tr.) was received on March 24, 2015. The record closed on March 11, 2015.

Rulings on Procedure

At the commencement of the hearing, Department Counsel requested that I take administrative notice of certain enumerated facts pertaining to India, appearing in 14 written submissions. Facts are proper for administrative notice when they are easily verifiable by an authorized source and relevant and material to the case. In this instance, the Government relied on source information regarding India in publications of the U.S. Department of State,² U.S. Department of Justice,³ U.S. Department of Commerce,⁴ the Congressional Research Service,⁵ the Office of the National Counterintelligence Executive,⁶ and the Office of National Counterintelligence Center.⁷

² U.S. Department of State, Bureau of South and Central Asian Affairs, *Background Note: India*, dated April 17, 2012; U.S. Department of State, *Quick Facts: India*, dated February 10, 2014; U.S. Department of State, Bureau of Counterterrorism, Ch. 2, Country Reports: South and Central Asia Overview, *Country Reports on Terrorism 2013*, undated; U.S. Department of State, Office of the Coordinator for Counterterrorism, Country Reports: South and Central Asia Overview, *Country Reports on Terrorism 2008*, dated April 30, 2009; U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, Country Reports on *Human Rights Practices for 2013: India*, undated.

³ U.S. Department of Justice, Press Release, *Summary of Major U.S. Export Enforcement, Economic Espionage, Trade Secret and Embargo-Related Criminal Cases*, dated February, 2013.

⁴ U.S. Department of Commerce, Bureau of Industry and Security, Press Release: *High-Tech Firms/Executives Sentenced in Export Case*, dated November 21, 2005; U.S. Department of Commerce, Bureau of Industry and Security, Press Release: *Chyron Corporation Settles Charges of Unlicensed Export to India*, dated August 30, 2004; U.S. Department of Commerce, Bureau of Industry and Security, Press Release: *Berkeley Nucleonics Corporation Settles Charges of Unlicensed Exports*, dated June 28, 2004; and U.S. Department of Commerce, Bureau of Industry and Security, Press Release: *Sentry Settles Charges of Unlicensed Exports*, dated June 25, 2004.

⁵ Congressional Research Service, Library of Congress, *U.S.- India Security Relations: Strategic Issues*, dated January 24, 2013.

⁶ Office of the National Counterintelligence Executive, *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage*, FY 2008, dated July 23, 2009; ⁶ Office of the National Counterintelligence Executive, *Foreign Spies Stealing US Economic Secrets in Cyberspace (Report to Congress on Foreign Economic Collection and Industrial Espionage, 2009-2011)*, dated October 2011.

The four press releases from the U.S. Department of Commerce and the summary of cases from the U.S. Department of Justice were presented apparently to substantiate that India actively pursues collection of U.S. economic and propriety information, and, therefore, Applicant's relationships with his various family members and extended family members in India raises suspicion of him. None of the cases cited involves Applicant personally or involved espionage through any familial relationship. The anecdotal evidence of criminal wrongdoing of other U.S. citizens is of decreased relevance to an assessment of Applicant's security suitability, especially where there is no evidence that Applicant, or any member of his family or extended family, was ever involved in any aspect of the cited cases or ever targeted by any Indian intelligence official. Furthermore, these press releases are little more than self-congratulatory public relations products issued by public relations offices, with the collateral effect of deterring other criminals contemplating possible attacks on our national security.

After weighing the reliability of the source documentation and assessing the relevancy and materiality of the facts proposed by the Government, pursuant to Rule 201, *Federal Rules of Evidence*, I take administrative notice of certain facts,⁸ as set forth below under the India subsection. However, while I do not reject the facts set forth in the various press releases, the inference that somehow Applicant or his family, or his extended family participated in criminal activity was not argued during the hearing and is specifically rejected.

Findings of Fact⁹

In his Answer to the SOR, Applicant admitted all of the factual allegations pertaining to foreign influence (¶¶ 1.a. through 1.f.) of the SOR. Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact.

Applicant is a 51-year-old employee of a defense contractor, and he is seeking to retain his eligibility for occupying a public trust position to support a contract with the Department of Defense. He has never served with the U.S. military or any other military,¹⁰ but did previously work as a civilian in private industry for an agency reporting

⁷ Office of National Counterintelligence Center, *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage* - 2000, undated.

⁸ Administrative or official notice is the appropriate type of notice used for administrative proceedings. See *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986); ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004)). The most common basis for administrative notice at ISCR proceedings, is to notice facts that are either well known or from government reports. See Stein, *ADMINISTRATIVE LAW*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice). Requests for administrative notice may utilize authoritative information or sources from the internet. See, e.g. *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006) (citing internet sources for numerous documents). Tr. at 22-26.

⁹ The facts in this decision do not specifically describe employment or locations in order to protect Applicant and his family's privacy. The cited sources contain more specific information.

¹⁰ GE 1, *supra* note 1, at 15; Tr. at 39.

to the Indian Ministry of Defense.¹¹ He is a 1981 high school graduate with a 1985 bachelor's degree and a 1988 master's degree.¹² Applicant joined his current employer in June 1999 as a senior programmer analyst,¹³ but he has been hired prospectively by another employer upon the approval of his eligibility for a public trust position.¹⁴

Applicant was born in 1964 in India.¹⁵ After completing his education in India and working there for several years, he immigrated to the United States. He has resided in the U.S. since 1993.¹⁶ He married an Indian citizen/resident in 1994,¹⁷ and they have a daughter, born in 1995, and a son, born in 1999.¹⁸ Applicant and his wife were both naturalized as U.S. citizens in July 2004.¹⁹ When they became naturalized U.S. citizens, they took an oath of allegiance to the United States. That oath included the words: "I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen."²⁰ Applicant renounced his Indian citizenship and surrendered his Indian passport,²¹ and he obtained a U.S. passport.²² Applicant currently possesses an Overseas Citizen of India (OCI) card which is issued to both former and current Indian citizens.²³ If the U.S. Government required him to surrender his OCI card, Applicant would be willing to do so.²⁴

¹¹ GE 1, *supra* note 1, at 15-16; Tr. at 37-38.

¹² Tr. at 37, 54.

¹³ GE 1, *supra* note 1, at 13-14.

¹⁴ GE 1, *supra* note 1, at 12-13.

¹⁵ GE 1, *supra* note 1, at 5.

¹⁶ GE 1, *supra* note 1, at 7; AE A (Statement, dated March 11, 2015), at 3; Tr. at 35.

¹⁷ GE 1, *supra* note 1, at 18-19; Tr. at 36.

¹⁸ GE 1, *supra* note 1, at 17-18.

¹⁹ GE 1, *supra* note 1, at 7; Tr. at 35-36.

²⁰ 8 C.F.R. § 337.1(a) (1995).

²¹ GE 1, *supra* note 1, at 8.

²² Tr. at 39-40. Applicant did not realize that his U.S. passport would expire, and while he intended to renew it, he had not done so believing he needed to present it during this hearing. See Tr. at 40.

²³ GE 1, *supra* note 1, at 8; Tr. at 40-44. An OCI card holder is entitled to the following benefits: a multiple entry, multi-purpose life-long visa for visiting India; exemption from registration with local police authority for any length of stay in India; parity with non-resident Indians in respect of economic, financial and educational fields, except in relation to acquisition of agricultural or plantation properties; OCI can be used as identity proof for application of PAN Card and driving license as well as for opening a bank account if the OCI card holder is residing in India. An OCI card holder is not entitled to: vote; to be a member of a legislative assembly or of a legislative council or of the Parliament of India; to hold Indian constitutional posts such as that of the President, Vice President, Judge of the Supreme Court or High Court, etc. He/she cannot normally hold employment in the Indian Government. The OCI is similar to the "green card" in the United States. See <https://www.indian.embassy.org>.

²⁴ Tr. at 45.

Since he emigrated from India in 1993, Applicant has visited India on only four occasions, three of which occurred before he became a U.S. citizen: 1994 (when he was married), 1998 (when his father passed away), 2003, and 2012.²⁵ He has no plans to return to India at any time in the near future.²⁶

Applicant maintained a savings account with an Indian bank with a balance of approximately \$1,500. He explained that credit cards and U.S. dollars are not readily accepted throughout India, and foreign currency remittance facilities are limited, especially in the areas where members of his extended family reside. Because of safety concerns in carrying large amounts of cash within India during his visits there, he maintained the account to enable him to use the bank ATMs at local branches.²⁷ Upon learning of the Government's security concerns regarding the account, Applicant submitted a written request to the bank to close it.²⁸ It was anticipated that the actual closure might take up to three weeks from receipt of the request.²⁹

In addition to the savings account, Applicant and his wife invested in two parcels of undeveloped land in India. It was their intention to sell the properties in the future to cover their children's higher education expenses.³⁰ He estimated their combined worth to be approximately \$6,000.³¹ Once again, upon learning of the Government's security concerns regarding the Indian real estate, Applicant offered two options: if the Government asks him to sell it right away, he will do so; and if the Government tells him to take his time to get a better price, he will do that as well.³² Applicant has designated his brother-in-law to explore sale possibilities in an effort to sell both properties, but because of the economy and currency fluctuations, the offers received have been too low.³³ While his wife owns one parcel of undeveloped land in India, worth an estimated \$7,600, which she too is trying to sell,³⁴ Applicant has no other bank accounts, financial investments, other financial interests, or real estate in India.³⁵

²⁵ AE A, *supra* note 16, at 3; Tr. at 45-46.

²⁶ Tr. at 46.

²⁷ AE A, *supra* note 16, at 2; Applicant's Answer to the SOR, dated October 21, 2014, at 2; GE 1, *supra* note 1, at 28; Tr. at 52-54.

²⁸ AE A, *supra* note 16, at 2; Tr. at 52-55; AE G (Closure Request, dated March 1, 2015).

²⁹ Tr. at 54-55.

³⁰ Applicant's Answer to the SOR, *supra* note 27, at 2; AE A, *supra* note 16, at 2; GE 1, *supra* note 1, at 29-31; Tr. at 47-50; AE H (Sale Deed, dated July 20, 2012); AE I (Sale Deed, dated July 30, 2012).

³¹ GE 1, *supra* note 1, at 30-31; Applicant's Answer to the SOR, *supra* note 27, at 2; Tr. at 48-50.

³² Tr. at 50-51.

³³ Tr. at 51-52.

³⁴ GE 1, *supra* note 1, at 30; Tr. at 55-57.

³⁵ Tr. at 55.

Applicant has substantial financial assets and investments in the U.S., including a residence valued at nearly \$291,000; a 401(k) retirement account worth over \$466,000; another 401(k) retirement account worth over \$24,000; a pension with an annual benefit of over \$6,000; and investments and various accounts worth nearly \$225,000.³⁶ He estimates his net worth in the U.S. to be roughly \$850,000.³⁷

There are three members of Applicant's family and one member of his extended family who remain citizen residents of India. His father, a former educator, is deceased.³⁸ His mother, an unemployed widow receiving her husband's retirement pension, is over 70 years old, and she resides with Applicant's sister.³⁹ His sister, an unemployed widow receiving her husband's retirement pension as well as income from the family farm, is nearly 50 years old, and she resides with her two children and her mother.⁴⁰ His brother, a clerk at a secondary school, is in his mid-40's, and he resides with his wife and two children.⁴¹ His mother-in-law, an uneducated, unemployed widow receiving income from her family farm lands, is over 60 years old, and she resides with her son.⁴² Neither of Applicant's parents, his mother-in-law, or any of Applicant's siblings has ever had any affiliation with the Indian government or intelligence service.⁴³

The frequency of Applicant's on-going contacts with the members of his family and extended family is varied. Because she is not computer savvy and has difficulties initiating telephone calls, Applicant calls his mother on an average of two to four times per year to inquire as to her health and well-being.⁴⁴ He last saw her during his return to India in 2012.⁴⁵ She visited him in the U.S. once when his daughter was born.⁴⁶ Applicant has, on occasion in the past, sent his mother between \$200 and \$300 for medical emergencies, with the most recent instance taking place in 2011.⁴⁷ He calls his siblings about two times per year.⁴⁸ He last saw them in 2012.⁴⁹ Applicant rarely speaks

³⁶ AE A, *supra* note 16, at 3; AE J (Account Summaries, various dates); Tr. at 72-75.

³⁷ Tr. at 77.

³⁸ GE 1, *supra* note 1, at 20-21; AE A, *supra* note 16, at 1.

³⁹ AE A, *supra* note 16, at 1; Tr. at 58-59.

⁴⁰ AE A, *supra* note 16, at 1; Tr. at 62-63.

⁴¹ AE A, *supra* note 16, at 1; Tr. at 65-66.

⁴² AE A, *supra* note 16, at 2; Tr. at 69.

⁴³ AE A, *supra* note 16, at 1-2; GE 1, *supra* note 1, at 21-27; AE C (Affidavit, dated September 3, 2015); AE D (Affidavit, dated September 3, 2015); AE E (Affidavit, dated September 3, 2015); AE F (Affidavit, dated September 3, 2015); Tr. at 63-64, 69.

⁴⁴ GE 1, *supra* note 1, at 21-22; Tr. at 59-60.

⁴⁵ Tr. at 60.

⁴⁶ Tr. at 62.

⁴⁷ Tr. at 60-61.

⁴⁸ Tr. at 63, 66.

to his mother-in-law, but he is aware that his wife calls her on a monthly basis.⁵⁰ He last saw his mother-in-law in 2012.⁵¹

Applicant's wife is a teacher assistant in the local public school system.⁵² His daughter is a pre-medicine student studying biology at a local university, where she is on the Dean's list with a perfect grade point average. His son is an honors student in a local high school, and he intends on pursuing a career in medicine or engineering in college.⁵³ They serve as volunteers at the local hospital and various fundraising events.⁵⁴ Applicant is also very active in the community. He is a regular volunteer with the local food bank and with Habitat for Humanity. He also has volunteered in activities supporting the fight against a specific disease.⁵⁵

Applicant contends that he has strong connections to the United States, and he considers them to be stronger than his connections to India. He has made his home here and is raising a family with two children. He greatly values his country, the U.S., and he will always be loyal to the U.S.⁵⁶ He also noted that the value of his assets in India are negligible when compared with his more substantial assets in the U.S.⁵⁷

India

In 1947, the United Kingdom partitioned the Indian subcontinent into the largely Hindu India and the Muslim Pakistan, and granted them independence. The relationship between India and Pakistan has been strained, if not actually hostile, ever since, essentially over a dispute about Kashmir. During the Cold War, India's foreign policy was one of nonalignment with either of the two major power blocs. Nevertheless, while the United States generally aligned itself with Pakistan, India moved closer to the Soviet Union and received significant military support from the relationship. However, since the collapse of the Soviet Union in 1991, India has moved closer to the United States. The United States and India are the world's largest democracies, and the United States is India's largest trade and investment partner. They have common principles and shared national interests, including defeating terrorism, preventing weapons proliferation, and

⁴⁹ Tr. at 64, 66.

⁵⁰ Tr. at 69.

⁵¹ Tr. at 69.

⁵² AE A, *supra* note 16, at 3.

⁵³ AE A, *supra* note 16, at 3.

⁵⁴ Tr. at 77.

⁵⁵ Tr. at 77; AE A, *supra* note 16, at 3.

⁵⁶ AE A, *supra* note 16, at 4.

⁵⁷ Tr. at 79.

maintaining regional stability. They are also both committed to political freedom protected by representative government.

In the course of its history since independence, two Indian prime ministers were assassinated, and there have been continuing hostilities between India and Pakistan. Anti-western Islamist extremist/terrorist groups, including some on the U.S. Government's list of foreign terrorist organizations, are active in India, and there have been Islamic terrorist attacks in India, most notably the coordinated terrorist attacks on multiple locations in Mumbai in November 2008. After the Al-Qaeda attacks on the United States on September 11, 2001, Indian intelligence agencies provided the United States with substantial information on that terrorist organization's activities in Pakistan and Afghanistan. Since that time, the U.S.-India security cooperation has flourished, with greatly increased counterterrorism cooperation. U.S. diplomats rate military cooperation among the most important aspects of the transformed bilateral relations. The two countries have held a series of unprecedented and increasingly substantive combined military exercises.

In 2008, Secretary of State Clinton acknowledged the new administration's desire to "further strengthen the excellent bilateral relationship" between the two countries. There is considerable support for a deepened U.S. partnership with India, and congressional advocacy of closer relations with India is generally bipartisan and widespread. However, disagreements exist. Some Indian officials express concern that the United States is a "fickle" partner that may not always be relied upon to provide the reciprocity, sensitivity, and high-technology transfers sought by India. Some U.S. government officials have criticized India's extensive trade and investment barriers, its nuclear weapons programs, the pace of India's economic reforms, its human rights practices, and its inadequate laws and ineffective enforcement of intellectual property rights protection.

In 2010, addressing a joint session of the Indian Parliament, President Obama noted some fundamental common interests held by India and the U.S. when he said:

We are two great republics dedicated to the liberty and justice and equality of all people. And we are two free market economies where people have the freedom to pursue ideas and innovation that can change the world. And that's why I believe that India and America are indispensable partners in meeting the challenges of our time.⁵⁸

Under its constitution, India is a "sovereign, socialist, secular, democratic republic." It is a multiparty, federal, parliamentary democracy, with a bicameral parliament, including the Council of States and the House of the People. While the central government has greater power in relation to its states, the position of president

⁵⁸ Congressional Research Service, Library of Congress, *U.S.- India Security Relations: Strategic Issues*, dated January 24, 2013, at 39, citing White House transcript for Nov. 8, 2010, at <http://www.whitehouse.gov/the-press-office/2010/11/08/remarks-president-joint-session-indian-parliament-new-delhi-india>.

is largely ceremonial. The real national executive power is centered in the Cabinet (senior members of the Council of Ministers), led by the prime minister. India's independent judicial system began under the British, and its concepts and procedures resemble those of Anglo-Saxon countries. Nevertheless, there are significant human rights issues in India, including extrajudicial killings, torture, and rape by police and security forces; widespread corruption at all levels of government; and dowry-related deaths, honor killings, and discrimination against women. In many cases there is a lack of accountability due to weak law enforcement and an overburdened, under resourced court system.

There is evidence that India and some Indian nationals are active participants in economic espionage, industrial espionage or trade secret theft, and violations of export-control regulations.

Character References

Applicant's supervisor has known him for about one year. She characterized him in very favorable terms, noting that Applicant is trustworthy, reliable, organized, efficient, and extremely competent. She considers Applicant's performance and professional conduct to have been exemplary.⁵⁹ Current and former coworkers, one of whom has known him since 1996, another since 1999, and another since 2001, are equally effusive in support of Applicant. Applicant is considered honest, reliable, dedicated, trustworthy, highly motivated, dependable, humble, hardworking, passionate about his work, and very productive, with impeccable character.⁶⁰

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance."⁶¹ As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. Positions designated as ADP I/II/III are classified as "sensitive positions."⁶² "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."⁶³ Department of Defense contractor

⁵⁹ AE B (Character Reference, undated).

⁶⁰ AE B (Character References, undated).

⁶¹ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

⁶² Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.

⁶³ Regulation ¶ C6.1.1.1.

personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made.⁶⁴

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for a public trust position.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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 common sense decision. 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence."⁶⁵ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.⁶⁶

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information. Furthermore, security clearance determinations, and by inference, public trust determinations, should err, if they must, on the side of denials.⁶⁷ In reaching this

⁶⁴ Regulation ¶ C8.2.1.

⁶⁵ "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

⁶⁶ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

⁶⁷ *Egan*, 484 U.S. at 531.

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.

Analysis

Guideline B, Foreign Influence

The trustworthiness concern relating to the guideline for Foreign Influence is set out in AG ¶ 6:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

The mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if only one relative lives in a foreign country, and an applicant has contacts with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified or sensitive information.⁶⁸ Applicant's relationship with his mother, two siblings, and his wife's mother, as well as his financial interests in India, are current trustworthiness concerns for the Government.

The guideline notes several conditions that could raise trustworthiness concerns. 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" is potentially disqualifying. Similarly, under AG ¶ 7(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" may raise security concerns. In addition, under AG ¶ 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," may raise security concerns. Also, it is potentially disqualifying under AG ¶ 7(e) if there exists "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." I find AG ¶¶ 7(a), 7(b),

⁶⁸ See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 at 12 (App. Bd. Feb. 8, 2001).

7(d), and 7(e) apply in this case. However, the security significance of these identified conditions requires further examination of Applicant's respective relationships with his family members and extended family members who are Indian citizen-residents, as well as closer examination of his foreign financial interests, to determine the degree of "heightened risk" or potential conflict of interest.

The guideline also includes examples of conditions that could mitigate security concerns arising from foreign influence. Under AG ¶ 8(a), the disqualifying condition may be mitigated where "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." Similarly, AG ¶ 8(b) may apply where the evidence shows "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." In addition, AG ¶ 8(c) may apply where "contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation." Also, AG ¶ 8(f) may apply when "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." In this instance, Applicant's relationship with his mother and siblings is not casual but it is infrequent. Accordingly, AG ¶ 8(c) does not apply as it pertains to them. However, considering Applicant's more casual and infrequent relationship with his mother-in-law, AG ¶ 8(c) does apply.

In assessing whether there is a heightened risk because of an applicant's relatives or associates in a foreign country, it is necessary to consider all relevant factors, including the totality of an applicant's conduct and circumstances, in light of any realistic potential for exploitation. One such factor is the potential for pressure, coercion, exploitation, or duress. In that regard, it is important to consider the character of the foreign power in question, including the government and entities controlled by the government within the relevant foreign country. Nothing in Guideline B suggests it is limited to countries that are hostile to the United States.⁶⁹ In fact, the Appeal Board has cautioned against "reliance on overly simplistic distinctions between 'friendly' nations and 'hostile' nations when adjudicating cases under Guideline B."⁷⁰

Nevertheless, the relationship between a foreign government and the United States may be relevant in determining whether a foreign government or an entity it controls is likely to attempt to exploit a resident or citizen to take action against the United States. It is reasonable to presume that although a friendly relationship, or the

⁶⁹ See ISCR Case No. 00-0317 at 6 (App. Bd. Mar. 29, 2002); ISCR Case No. 00-0489 at 12 (App. Bd. Jan. 10, 2002).

⁷⁰ ISCR Case No. 00-0317 at 6 (App. Bd. Mar. 29, 2002).

existence of a democratic government, is not determinative, it may make it less likely that a foreign government would attempt to exploit a U.S. citizen through relatives or associates in that foreign country. In this instance, it is more likely that an indiscriminate Islamist terrorist attack on a public place might cause collateral injury or death to Applicant's mother and siblings rather than a targeted attempt by the Indian Government to obtain sensitive information from them.

As noted above, since the breakup of the Soviet Union, the United States and India have developed an increasingly warm and friendly relationship, making it unlikely that the Indian government would attempt coercive means to obtain sensitive information. However, it does not eliminate the *possibility* that India would employ some non-coercive measures in an attempt to exploit a relative. While Applicant's mother and siblings, as well as his mother-in-law, still reside in India, there may be speculation as to "some risk," but that speculation, in the abstract, does not, without more, establish sufficient evidence of a "heightened risk" of foreign exploitation, inducement, manipulation, pressure, or coercion to disqualify Applicant from holding a public trust position.

There is no evidence that Applicant's mother or siblings, or his mother-in-law are, or have been, political activists, challenging the policies of the Indian government; that terrorists have approached or threatened Applicant or his mother or siblings, or his mother-in-law, for any reason; that the Indian government has approached Applicant; that his mother or siblings, or his mother-in-law, currently engage in activities that would bring attention to themselves; or that his mother or siblings, or his mother-in-law, are even aware of Applicant's work. As such, there is a reduced possibility that they would be targets for coercion or exploitation by the Indian government, which may seek to quiet those who speak out against it. Applicant has met his burden of showing there is little likelihood that those relationships could create a risk for foreign influence of exploitation. Applicant is fully involved in his children's lives and activities. He and his wife and children have "such deep and longstanding relationships and loyalties in the U.S., that [they] can be expected to resolve any conflict of interest in favor of the U.S. interest." As to his mother and siblings in India, AG ¶ 8(a) applies. As to his mother-in-law, ¶ 8(b) applies.

Applicant has been a resident of the United States since 1993. He became a naturalized U.S. citizen, and he, his wife, and their two children reside in the United States. The estimated value of Applicant's foreign financial interests is insubstantial, especially when compared with his financial interests in the U.S. Moreover, as he was in the process of divesting himself of his two parcels of undeveloped real estate and closing his modest bank account, he will soon no longer have any foreign financial interests in India. AG ¶ 8(f) applies.

It is true that, before becoming a U.S. citizen in 2008, Applicant visited India on only four occasions, three of which occurred before he became a U.S. citizen. Those three trips should have no current trustworthiness significance.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a public trust position by considering the totality of the applicant's conduct and all the 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 public trust position 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 the facts and circumstances surrounding this case. Applicant and his "closest family" -- his wife and two children -- are U.S. citizens residing in the United States. His mother, siblings, and mother-in-law are all Indian citizen residents. Applicant is not vulnerable to direct coercion or exploitation through his wife or children, and the realistic possibility of pressure, coercion, exploitation, or duress with regard to them is low.

A Guideline B decision concerning India must take into consideration the geopolitical situation in that country, as well as the potential dangers existing there. India, as is true with the United States, is a democracy with advanced nuclear capabilities. Both countries have both been victims of Islamic terrorists. Because both nations share a common vision for the future, it is in India's interests to maintain friendship with the U.S. to counterbalance international terrorism. It is very unlikely India would forcefully attempt to coerce Applicant through his mother, siblings, or mother-in-law, all still residing in India. Furthermore, while there is evidence that India is an active participant in economic espionage, industrial espionage or trade secret theft, or violations of export-control regulations, there is no evidence that Applicant has been targeted.

As noted above, Applicant's entire life is now centered in the United States. This is where his children are growing up and where they have school, friends, and involvement in community and school affairs. He is well respected by his friends and colleagues for his honesty, integrity, and truthfulness. That he and his mother and siblings keep in relatively close contact should not be considered a negative factor. (See AG ¶¶ 2(a)(1) through 2(a)(9).)

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant mitigated the trustworthiness concerns arising from his foreign influence concerns.

Formal Findings

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

Paragraph 1, Guideline B:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility to occupy a public trust position to support a contract with the Department of Defense. Eligibility is granted.

ROBERT ROBINSON GALES
Administrative Judge