DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 07-13052
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Francisco Mendez, Esq., Department Counsel
For Applicant: Mark S. Zaid, Esq.

July 24, 2008

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has mitigated the Foreign Preference and Foreign Influence security concerns. Eligibility for access to classified information is granted.

On December 14, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline C, Foreign Preference and Guideline B, Foreign Influence. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on January 14, 2008, and elected to have the case decided on the written record in lieu of a hearing. On January 31, 2008, Department Counsel requested a hearing before an Administrative Judge under ¶ E3.1.7 of the Directive. The request is marked Hearing Exhibit (HE) X. The case was

assigned to me on March 11, 2008. DOHA issued a Notice of Hearing on March 26, 2008, scheduling the hearing for April 29, 2008. The case was continued at the request of both parties. Another Notice of Hearing was issued on April 30, 2008, and I convened the hearing as scheduled on May 29, 2008. The Government offered Exhibits (GE) 1 through 5, which were received without objections. Applicant testified on his own behalf, called four witnesses and submitted Exhibits (AE) A through D, which were received without objections. I granted Applicant's request to keep the record open until June 6, 2008, to submit additional matters. Applicant electronically submitted two letters, which were marked AE E and F, and admitted without objections. The e-mail is marked HE XI. DOHA received the transcript of the hearing (Tr.) on June 5, 2008.

Evidentiary Rulings

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to the country where Applicant was born (country A). Applicant did not object and the request was approved. The request and the attached documents were not admitted into evidence but were included in the record as HE I through IX. The facts administratively noticed are set out HE IX, and will not be completely restated in the Findings of Fact, below.

Findings of Fact

Applicant is in his early 50s. He was born in country A. Applicant has a Ph.D., awarded in country A. He worked as a scientist for country A, holding the equivalent of a security clearance. He came to the United States with his family in the early 1990s to work in research for a year and then to return to country A. He decided not to return and was sponsored for a work visa by a U.S. company. He has been contacted periodically by former colleagues and others in country A, asking him to return. Some of the e-mails were unpleasant, but none of the e-mails contained an explicit threat. He received the last such e-mail in about 2003. He is married with two adult children. They all became U.S. citizens in 2000. He is a partner in the ownership of the defense contracting company requesting a security clearance on his behalf.[1]

Applicant's wife was also born in country A. She is a scientist like her husband, but with a different area of expertise. When they came to this country, she and her husband worked very hard to assimilate into American culture. Their children went to American schools and have become very successful. Their youngest child recently graduated from college and will be pursuing a master's degree. Their eldest child has a master's degree and has worked for a major U.S. corporation for a number of years. Their eldest child's spouse is a native-born U.S. citizen who works for a defense contractor and holds a top secret clearance. They have an infant child (Applicant's grandchild).[2] The spouse wrote of Applicant becoming "Americanized":

[1] Tr. at 83-86, 104-108, 124-125; GE 1-5

[2] Tr. at 67-81; GE 4; AE A-C.

> [I]f you ask me if whether [Applicant] has embraced the language, shops like a healthy consumer, is involved in the community, and encourages his children to be involved in local/national activities, then he is a perfect American.[3]

Applicant visited country A about six years ago when his father passed away. His wife did not make the trip. This was his first trip back since he left country A, and he had not seen his father since he left. His father was a career military officer, and retired at a high rank. Applicant has not formally renounced his citizenship in country A. Country A provided him a visa on short notice because of the death of his father and he traveled on his U.S. passport. When Applicant obtained the visa, he was informed that it was issued because of his father's death and that the next time he traveled to country A, he would have to travel on a passport from that country. The other option was to formally apply to renounce his country A citizenship. He decided it would be much simpler to maintain dual citizenship and conduct any future travel to country A on their passport. He renewed his country A passport after he made the trip for his father's funeral. The following year, he traveled to country A to visit his mother and sister on the anniversary of his father's death, utilizing his country A passport. His wife did not make this trip either. Applicant had no contacts on either trip with any representatives of the government of country A, except for the standard entry and exit customs officials. He also had no contacts with any of his former colleagues. The country A passport has since expired. Now that he understands the security ramifications of possessing a foreign passport, he does not intend to renew it or obtain another country A passport.[4]

Applicant's mother and sister are citizens and residents of country A. His mother is in her mid-80s and is not in good health. She was injured about three years ago, requiring hospitalization for about three weeks. Applicant did not return to country A, but his wife went there to be with his mother. She has been retired for several decades. Two of her siblings live in the United States. Applicant's sister is in her mid-50s. She has had medical problems since birth and has never worked. His mother and sister visited Applicant in the United States on several occasions before his father's death. Applicant would like his mother and sister to come to the U.S. to live, but at this time his mother is firmly settled in country A. Applicant does not provide his mother and sister financial support. His mother receives a government pension and his sister receives a type of disability. He talks to them on the telephone several days a week.[5]

Applicant's father-in-law and mother-in-law are citizens and residents of country A. They are in their mid-80s and have been retired for a number of years. They receive a government pension, but have no current direct connection to the government of country A. His wife speaks to her parents about once a week. Applicant speaks to them

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[3] AE C.

[4] Tr. at 93-99, 103; Applicant's response to SOR; GE 4, 5; AE D.

[5] Tr. at 99-102, 111, 119-120; Applicant's response to SOR; GE 4, 5.

much less frequently, on special occasions such as holidays or birthdays. His wife has visited her parents in country A about five times in the last eight years. She also visited Applicant's mother and sister on the trips. She used her passport from country A to enter and exit country A, and her U.S. passport otherwise. Applicant did not go to country A with his wife on any of those occasions. Other than customs officials, she had no interaction with country A government officials.[6]

Applicant does not own any foreign assets. He has considerable assets in the U.S. He has not voted in country A since he became a U.S. citizen. He has voted in U.S. elections. He is willing to renounce his dual citizenship, but he has not formally done so. He does not intend to return to country A. His wife is willing to travel there again if necessary to assist his mother or sister.[7]

Two very senior engineers who work for the U.S. military testified on Applicant's behalf. They are working on a defense program that looks at our defense systems through the capabilities and technologies of other countries. One of the witnesses admitted that there are certain systems that the U.S. just does not understand. This particular program has been in effect for a number of years and utilizes "world class scientists" from countries that have the desired technologies. Applicant is one of those "world class scientists." His background and expertise have provided the Department of Defense with information it would not otherwise obtain. The witness testified that Applicant "is an excellent individual to help us develop these capabilities." He met the Applicant in about 2001, and is familiar with his work. He has met and interacted with Applicant periodically since then. He is very familiar with Applicant's background and recommends him for a security clearance.[8]

The second senior government engineer testified similarly. He has known Applicant since 2004, as a defense contractor. He and Applicant are at different geographic locations, but they are in contact as often as a dozen times a week, and the witness visits Applicant's location about four to six times per year. He also testified that Applicant's background and research provides as he stated "a perspective that we didn't really pursue in the United States," with "techniques that we still don't understand." He would like Applicant to be able to work directly with his team on their projects. To truly harness Applicant's expertise and test the data, it is necessary that he have access to classified data. He also recommends Applicant for a security clearance.[9]

The manager of the U.S. Government program that is seeking to have Applicant work on their classified projects was unable to attend the hearing but wrote a letter on Applicant's behalf. He oversees the team of "world class scientists" and has known Applicant since 2000. He wrote that Applicant brings a unique perspective to their effort.

[6] Tr. at 67-81, 104; Applicant's response to SOR; GE 5.

[7] Tr. at 112-119, 130-131; GE 5.

[8] Tr. at 17-32.

[9] Tr. at 33-43.

His experience and ability to apply non-traditional techniques has "opened [their] eyes to many possibilities previously ignored." He believes Applicant is a tremendous asset to their program, the U.S. military, and the U.S. Government.[10]

The chief executive officer of Applicant's company testified on his behalf. He and Applicant are business partners. He is a retired military officer, with extensive experience in intelligence. He knew Applicant even before he came to the U.S. He testified that he and Applicant share the same political, ethical, and moral convictions and he trusts him completely. He stated that Applicant has unique insight and has the ability to create new technology for the government's benefit. He recommended Applicant for a security clearance.[11]

Country A

The facts pertaining to country A are set out HE IX, and will not be completely restated here. It has serious human rights issues, including torture, summary executions, disappearances, arbitrary detentions, corruption, media suppression, life-threatening prison conditions, and corruption in law enforcement. There is a threat of terrorism, including taking hostages and bombings. Country A's intelligence capability is significant and it aggressively targets the United States.

Policies

When evaluating an applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, Administrative Judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense 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 classified 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

[10] AE F.

[11] Tr. at 44-65.

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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified 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 classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that adverse 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 also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline C, Foreign Preference

The security concern relating to the guideline for Foreign Preference is set out in AG ¶ 9:

> When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

The guideline notes several conditions that could raise security concerns under AG ¶ 10. Two are potentially applicable in this case:

> (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;

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

Applicant possessed and used a country A passport while a U.S. citizen. AG ¶ 10(a) is applicable. The renewal of his passport from country A while a U.S. citizen could raise concerns under AG ¶ 10(b), as an action to obtain recognition of his country A citizenship.

Conditions that could mitigate Foreign Preference security concerns are provided under AG ¶ 11. Three are potentially applicable:

(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; and

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

Because he had not formally renounced his country A citizenship when he became a U.S. citizen, country A continued to consider Applicant a citizen of that country. As such, he was required to use a country A passport to enter that country. Country A permitted Applicant to enter country A for his father's funeral using his U.S. passport because it was an emergency. He was informed that he would have to travel there in the future with a country A passport. The alternative was to formally apply to renounce his citizenship and apply for a visa. Applicant renewed his country A passport for expediency and used it to travel to country A the following year. The passport is now expired and Applicant does not intend to renew it or obtain another one. He is willing to renounce his country A citizenship and is resigned to the fact that he may never travel there again. AG ¶ 11(a) is partially applicable. AG ¶¶ 11(b) and (e) are applicable.

Guideline B, Foreign Influence

The security concern relating to the guideline for Foreign Influence is set out in AG ¶ 7:

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 guideline notes several conditions that could raise security concerns under AG ¶ 7. Three are potentially applicable in this case:

> (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; and
>
> (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.

Applicant's mother, sister, and in-laws are citizens and residents of country A. Applicant received e-mails from people in country A after he did not return from his trip to the U.S. He traveled to country A on two occasions in the last six years. Country A has serious human rights issues, has been threatened by terrorism, and aggressively targets the United States for intelligence. His contacts, connections, and family members in country A create a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion, both through him and through his wife. It also creates a potential conflict of interest. AG ¶¶ 7(a), (b), and (d) have been raised by the evidence.

SOR ¶ 2.c states "Your concern about your disabled sister in [country A] keeps you in conflict with the needs of your employer to serve in full and on your best to the United States interests." This allegation is already embodied in SOR ¶ 2.b, which states "Your sister is a citizen and resident of [country A]." SOR ¶ 2.c is concluded for Applicant.

Conditions that could mitigate Foreign Influence security concerns are provided under AG ¶ 8:

> (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;

(c) 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;

(d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;

(e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country; 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 came to this country in the early 1990s to work for a year and then return to country A. He loved the United States and wanted his family to benefit from everything that it means to be American. He decided to remain in the United States, which likely caused some consternation in country A. He and his family have prospered here. It is a reciprocal relationship as his family has much to offer the U.S. They all became U.S. citizens in 2000. Applicant is a loyal American and a respected scientist that can provide the Department of Defense with knowledge they would not otherwise have access to. His children and grandchild are firmly planted in the U.S. I expect Applicant to resolve any conflict of interest in favor of the U.S. interests. AG ¶ 11(b) is partially applicable. However, because of his close foreign family ties and the nature of that foreign country, I am unable to find any of the mitigating conditions to be fully applicable.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance 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 security clearance must be an overall common sense 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 was born in country A. He came to the U.S. in the early 1990s for what was to be a one-year assignment, but he never left. He traveled to country A for his father's funeral about six years ago. Because it was an emergency, he was given a visa and permitted to enter using his U.S. passport. He was told that he would have to use a country A passport in the future. He traveled to country A the following year on the anniversary of his father's death. He used a country A passport. The passport has expired; he does not intend to renew it or obtain another country A passport. He is willing to renounce his dual citizenship.

Applicant's mother, sister and parents-in-law remain in country A. I considered the totality of Applicant's family ties to country A. The nature of a nation's government, its relationship with the U.S., and its human rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, the country is known to conduct intelligence operations against the United States, or the foreign country is associated with a risk of terrorism. Country A has human rights issues, has been victimized by terrorism, and is known to conduct intelligence operations against the United States. The complicated relationship of country A to the United States places a significant, but not insurmountable burden of persuasion on Applicant to demonstrate that his immediate family members in country A do not pose a security risk.

Applicant possesses unique background, experience, and knowledge. Three U.S. Government representatives attested to the value of Applicant's work. While extremely impressive, those are not relevant factors for consideration, as the Appeal Board has held:

> The value of an applicant's expertise to a defense contractor or military service is not relevant or material to determining the applicant's eligibility for a security clearance. An applicant's expertise is not a measure of whether that applicant demonstrates the high degree of judgment, reliability, and trustworthiness that must be reposed in persons entrusted with classified information.[12]

While Applicant's expertise may not be relevant, his judgment, reliability, and trustworthiness are clearly relevant. Those characteristics, as proven by Applicant's witnesses, are undisputed.

[12] ISCR Case No. 06-20062 at 3 (App. Bd. Jul. 15, 2008) (internal citation omitted).

Applicant's mother is elderly and his sister is disabled. His father-in-law and mother-in-law have been retired for a number of years. They all receive some form of compensation from the country A government, but have no direct connection to that government. Applicant was sincere, open, and honest at the hearing. In the unlikely event that his mother, sister, in-laws, or his wife through his in-laws, were subjected to coercion or duress from the country A government, I find that because of his uncompromising commitment to this country and his children, that Applicant would resolve any attempt to exert pressure, coercion, exploitation, or duress in favor of the United States.

Overall, the record evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the Foreign Preference and Foreign Influence security 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 C:	FOR APPLICANT
Subparagraphs 1.a-1.e:	For Applicant
Paragraph 2, Guideline B:	FOR APPLICANT
Subparagraphs 2.a-2.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 for a security clearance. Eligibility for access to classified information is granted.

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Edward W. Loughran
Administrative Judge