



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 18-00791
)	
Applicant for Security Clearance)	

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

04/05/2019

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines L (Outside Activities), B (Foreign Influence), and C (Foreign Preference). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on February 10, 2017. On August 15, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines L, B, and C. The DOD CAF acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on September 18, 2018, and requested a decision on the written record without a hearing. Department Counsel submitted the

Government's written case on January 31, 2019. A complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on February 6, 2019, and submitted a response, which is marked as Applicant's Exhibit (AX) A. The case was assigned to me on March 12, 2019.

Department Counsel requested that I take administrative notice of relevant facts about the United Arab Emirates (UAE). The request and supporting documents were not admitted in evidence but are attached to the record as FORM Item 6. I took administrative notice as requested by Department Counsel. In addition, I have taken administrative notice, with no objection from either party, of the facts published by the U.S. Department of State, Bureau of Near Eastern Affairs, in *U.S. Relations with United Arab Emirates* (September 13, 2018), available at www.state.gov and included in the record as FORM Item 7. The facts administratively noticed are set out below in my findings of fact.

Findings of Fact¹

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a and 2.b. He admitted ¶ 3.a in part. His admissions are incorporated in my findings of fact.

Applicant served on active duty in the U.S. Air Force from January 1988 to February 2008, retired as a technical sergeant, and received an honorable discharge. He held a security clearance while on active duty and retained it as a defense contractor.

Applicant married in September 1988, divorced in October 1997, and married his current spouse in August 2011. His current and former spouses are citizens and residents of the United States. He has an adult daughter from his first marriage, who is a citizen and resident of the United States.

Applicant is a 50-year-old owner, president, and chief executive officer of a defense contractor. He is a citizen and resident of the United States. His company does business in the Middle East and is a partner in a joint venture in the United Arab Emirates (UAE). The joint venture provides training, support, operations consulting, and professional services to governmental and military entities in the UAE. His business partner in the joint venture is a citizen and resident of the UAE, and they have quarterly telephonic contact. Their last face-to-face contact was in June 2016. The current memorandum of agreement creating the joint venture expires in May 2019.

The joint venture had a one-year contract in 2015-2016 that provided human resource services for a project in the UAE. The gross value of the contract was about \$3,000,000. The services provided were professional services for edged-impact-

¹ Applicant's personal information is extracted from his security clearance application (FORM Item 2) unless otherwise indicated by a parenthetical citation to the record.

weaponry-training services, the design of bladed weapons, and the development of sporting-tournament programs. The involvement with UAE did not include classified information, special nuclear material, U.S. export-controlled commodities, technical know-how, or technical data. (Certificate Pertaining to Foreign Interests, attached to Item 2.)

Applicant has been unable to compete for or perform defense contracts in the United States until his company's facility clearance is reactivated, and it cannot be reactivated until his security clearance is adjudicated. In January 2017, the Defense Security Service (DSS) reviewed the joint venture's facility clearance and determined that joint venture is not under foreign ownership, control, or influence that requires mitigation. (DSS Letter of Jan. 4, 2017, attached to Item 2.) Applicant's foreign business activities have not been limited to the UAE. The record reflects that he also has done business in Italy and Australia. (Item 2 at 36; Certificate Pertaining to Foreign Interests, attached to Item 3.) His contacts with these countries are not alleged in the SOR.

In order to facilitate the operation of his joint venture in the UAE, Applicant has a bank account in the UAE. When he was interviewed by a security investigator in May 2017, there was no money in the account. (Personal Subject Interview (PSI), attached to SOR Answer.) When he responded to interrogatories in April 2018, the account had the minimum balance required to remain open. He holds an active UAE driver's license, which he needs in order to drive in the UAE if he remains in the UAE for more than 30 days. He held a UAE identity card, which expired in July 2018, and he does not intend to renew it. He held a UAE gate-entry card that expired in July 2017.

The UAE is a federation of monarchies consisting of seven emirates. The rules of the emirates constitute the Federal Supreme Council, the country's highest legislative and executive body. The emirates are under patriarchal rule with political allegiance defined by loyalty to tribal leaders, leaders of individual emirates, and leaders of the federation. The United States has had friendly relations with the UAE since its formation in 1971. The UAE has an influential role in the Middle East and is a key partner for the United States. The two countries enjoy strong bilateral cooperation on many issues, including defense. UAE ports host more U.S. Navy ships than anywhere else outside the United States.

The UAE is a regional and global financial and transportation hub, and terrorist organizations exploit it send and receive financial support. It is a drug-transshipment point for illegal traffickers and its position as a major financial center makes it vulnerable to money laundering. There have been numerous instances in which U.S. dual-use and military components have been shipped to Iran, Iraq, and Afghanistan through the UAE, using methods making it appear that UAE was the final destination.

The U.S. Department of State regards two emirates, Abu Dhabi and Dubai, as medium-threat locations for terrorist activity directed at or affecting U.S. Government interests. The UAE's participation in the anti-ISIS coalition and the Yemen civil war has increased the likelihood of terrorist attacks against Western interests.

The UAE maintains effective control over its security forces. The most significant human-rights issues have involved allegations of torture in detention, arbitrary arrest and detention, government interference with privacy rights, restrictions on assembly and association, and the inability of citizens to choose their government in free and fair elections.

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “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). The guidelines presume a nexus or rational connection between proven conduct under any of the

criteria listed therein and an applicant's security suitability. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr.20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

Analysis

Guideline L, Outside Activities

The SOR alleges that Applicant is a business partner in a joint venture that is incorporated and doing business in the UAE. AG ¶ 36 expresses the security concern pertaining to outside activities: "Involvement in certain types of outside employment or activities is of security concern if it poses a conflict of interest with an individual's security responsibilities and could create an increased risk of unauthorized disclosure of classified information."

AG ¶ 37 describes conditions that could raise a security concern and may be disqualifying:

(a) any employment or service, whether compensated or volunteer, with:

- (1) the government of a foreign country;
- (2) any foreign national, organization, or other entity;
- (3) a representative of any foreign interest; and,

(4) any foreign, domestic, or international organization or person engaged in analysis, discussion, or publication of material on intelligence, defense, foreign affairs, or protected technology;

(b) failure to report or fully disclose an outside activity when this is required.

Applicant's joint venture in the UAE is sufficient to establish AG ¶ 37(a)(2). AG ¶ 37(b) is not established, because there is no evidence that Applicant has failed to report or fully disclose his activity as required.

AG ¶ 38 provides conditions that could mitigate security concerns:

(a) evaluation of the outside employment or activity by the appropriate security or counterintelligence office indicates that it does not pose a conflict with an individual's security responsibilities or with the national security interests of the United States; and,

(b) the individual terminated the employment or discontinued the activity upon being notified that it was in conflict with his or her security responsibilities.

AG ¶ 38(a) is established. Applicant's involvement with the UAE does not involve classified information, nuclear materials, or export-controlled commodities, or protected technical knowledge or data. His company was cleared by DSS.

AG ¶ 38(b) is not yet established, but it will be applicable when the current memorandum of agreement expires in May 2019.

Guideline B, Foreign Influence

The SOR alleges that Applicant's business partner is a citizen and resident of the UAE (SOR ¶ 2.a) and that Applicant has a bank account in the UAE (SOR ¶ 2.b). The security concern under this guideline is set out in AG ¶ 6:

Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they result in divided allegiance. They may also be a national security concern if they create circumstances in which the individual maybe manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

The following disqualifying conditions under this guideline are relevant:

AG ¶ 7(a): contact, regardless of method, 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;

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 classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology; and

AG ¶¶ 7(f): substantial business, financial, or property interests in a foreign country, or in any foreign owned or foreign-operated business that could subject the individual to a heightened risk of foreign influence or exploitation or personal conflict of interest.

AG ¶¶ 7(a) and 7(f) require substantial evidence of a "heightened risk." The "heightened risk" required to raise one of these disqualifying conditions is a relatively low standard. "Heightened risk" denotes a risk greater than the normal risk inherent in living or having business associates or business interests subject to a foreign government.

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

Furthermore, "even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security." ISCR Case No. 00-0317 (App. Bd. Mar. 29, 2002). Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. Nevertheless, the nature of a nation's government, its relationship with the United States, 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, or the country is known to conduct intelligence operations against the United States. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. See *generally* ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision to grant clearance where administrative judge did not consider terrorist activity in area where family members resided).

AG ¶¶ 7(a), 7(b), and 7(f) are established. Applicant's relationship with his business partner appears to be an arms-length impersonal relationship. The record contains no evidence regarding the reliability or trustworthiness of Applicant's partner. The joint venture has not involved sensitive or classified information or materials. However, the risk of terrorism, the activities of drug traffickers, and the exploitation of the UAE as an illegal transshipment point for dual-use and protected military equipment

are sufficient to establish the “heightened risk” in AG ¶¶ 7(a) and 7(f) and the potential conflict of interest in AG ¶ 7(b).

The following mitigating conditions are potentially relevant:

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 United States;

AG ¶ 8(b): there is no conflict of interest, either because the individual’s sense of loyalty or obligation to the foreign person, or allegiance to the group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;

AG ¶ 8(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; and

AG ¶ 8(f): the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

AG ¶ 8(a) is not established. The record contains insufficient information to evaluate the nature of Applicant’s relationship with his business partner. The UAE’s vulnerability to terrorism, exploitation by illegal drug traffickers, money laundering, and illegal transshipment of dual-use and military equipment preclude a finding that a future conflict of interest is unlikely.

AG ¶ 8(b) is established. Applicant’s ties to the UAE are strictly commercial. His only business associate in the UAE is his partner. There is no evidence that he has any close friends in the UAE. He and his immediate family are life-long citizens and residents of the United States. He served honorably in the U.S. Air Force for 20 years. He has held a security clearance for many years without incident.

AG ¶ 8(c) is not established. Applicant’s quarterly contacts with his partner in the UAE are arguably infrequent, but they are business-related and not casual.

AG ¶ 8(f) is established. Applicant’s last contract with the UAE was substantial, but he has no current contracts. His UAE bank account has a minimal balance. His memorandum of agreement with the UAE expires in May 2019.

Guideline C, Foreign Preference

The SOR alleges that Applicant holds an active UAE identity card, UAE driver's license, and a UAE gate card (SOR ¶ 3.a). Applicant has refuted the allegations that he has an active UAE identity card and gate card. He admits that he has an active UAE driver's license.

The concern under this guideline 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 provide information or make decisions that are harmful to the interests of the United States. Foreign involvement raises concerns about an individual's judgment, reliability, and trustworthiness when it is in conflict with U.S. national interests or when the individual acts to conceal it. *By itself*; the fact that a U.S. citizen is also a citizen of another country is not disqualifying without an objective showing of such conflict or attempt at concealment. The same is true for a U.S. citizen's exercise of any right or privilege of foreign citizenship and any action to acquire or obtain recognition of a foreign citizenship.

The relevant potentially disqualifying conditions are:

AG ¶ 10(b): failure to report, or fully disclose when required, to an appropriate security official, the possession of a passport or identity card issued by any country other than the United States;

AG ¶ 10(d) participation in foreign activities, including but not limited to:

- (1) assuming or attempting to assume any type of employment, position, or political office in a foreign government or military organization; and
- (2) otherwise acting to serve the interests of a foreign person, group, organization, or government in any way that conflicts with U.S. national security interests;

Neither disqualifying condition is established. There is no allegation or evidence that Applicant failed to disclose his possession of a UAE identity card when required. There is no evidence that he assumed or attempted to assume any position in the UAE government or military and no evidence that he acted to serve the interests of any entity in a way that conflicted with U.S. national security interests.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances and applying the adjudicative factors in AG ¶ 2(d).²

I have incorporated my comments under Guidelines L, B, and C in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guidelines L, B, and C, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his participation in a joint venture in the UAE.

Formal Findings

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

Paragraph 1, Guideline L, Outside Activities:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline B (Foreign Influence):	FOR APPLICANT
Subparagraphs 2.a and 2.b:	For Applicant
Paragraph 3, Guideline C (Foreign Preference):	FOR APPLICANT
Subparagraph 3.a:	For Applicant

² The factors are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Conclusion

I conclude that it is clearly consistent with the national security interests of the United States to continue Applicant's eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman
Administrative Judge