DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 21-02921
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Kelly M. Folks, Esq., Department Counsel
For Applicant: *Pro se*

08/29/2023

Decision

HALE, Charles C., Administrative Judge:

This case arises under Guideline L (Outside Activities) and Guideline B (Foreign Influence). Applicant failed to mitigate the potential security concerns raised by his outside activities. Guideline B concerns were mitigated. Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on November 16, 2019. On April 28, 2022, the Department of Defense (DoD) sent him a Statement of Reasons (SOR), alleging security concerns under Guideline L and Guideline B. The DoD acted under Executive Order (Ex. 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) implemented by DoD on June 8, 2017.

Applicant submitted his Answer to the SOR on May 18, 2022, and requested a decision on the record without a hearing. Department Counsel submitted the Government's written case on February 23, 2023. On March 23, 2023, a complete copy of the file of relevant material (FORM), which included Items 1 through 6, was sent to Applicant, who was given an opportunity to file objections and submit material to refute,

extenuate, or mitigate the Government's evidence. Items 1 and 2 (SOR and Answer) are pleadings in the case. Applicant received the FORM on April 11, 2023. The transmittal letter informed Applicant that he had 30 days after receiving the FORM to submit information or objection. Applicant did not submit a response or object to the Government's evidence. Items 3 through 6 are admitted into evidence. The case was assigned to me on July 17, 2023.

Procedural Issues

I have taken administrative notice that Applicant's faith is known for its global missionary work.

Department Counsel submitted a request that I take administrative notice of relevant facts about South Korea. Without objection, I have taken administrative notice of the facts contained in the request. The facts are summarized in the written request and will not be repeated verbatim in this decision. Of particular note:

Republic of Korea

> The Republic of South Korea is a stable constitutional democracy, governed by a president and a unicameral legislature. The country is still technically at war with North Korea. The armistice has endured since 1953. In the past two decades the number and type of political, economic, and social interactions between the two Koreas have increased.
>
> Although South Korea has strong bilateral relations with the United States, the country has been involved in multiple incidents of government espionage and intelligence collection activities that have resulted in U.S criminal proceedings. South Korea is one of the most active countries involved in industrial espionage directed at the United States.
>
> The South Korean Government generally respects human rights and the rule of law. However, in 2021 there were credible reports of restrictions on freedom of expression, including criminal libel laws; government corruption; lack of investigation of and accountability for violence against women; and laws criminalizing consensual same-sex sexual conduct between adults in the military.

Findings of Fact

Applicant admits all the allegations (SOR ¶ 1.a and SOR ¶¶ 2.a through 1.h) with explanations. His admissions are incorporated in my findings of fact.

Applicant was born in the United States and holds U.S. citizenship by birth. He is a single 37-year-old contractor. He earned a bachelor's degree and a master's degree in a joint program from a U.S. university in 2011. Since 2018 he has resided primarily in

South Korea. He temporarily moved to the U.S. due to COVID-19. As a missionary he used a Korean name but has not legally changed his name. He used it to make it easier for those he was serving. He is a member of a church in South Korea. (Item 3 at 7.)

Since 2008, Applicant has held several concurrent positions at business entities that he owns either in whole or in part. (Item 3.) In July 2008, he founded and served as CEO of a company (Co1), and he set up a subsidiary of Co1 in South Korea, which was fully owned by Co1. He established a South Korean bank account for the subsidiary. His name was the only one on the corporate documents for subsidiary of Co1. He caused money to be sent from Co1 to the South Korean bank account he had opened for the subsidiary, but ultimately repatriated the money. (Item 3.) In 2018, while he was recovering from a serious health matter, his partner closed the businesses without his consent. (Items 3 and 4.)

SOR ¶ 1.a: Applicant worked for [a company (Co2)] from about October 2018 until at least April 2020. You also realize income through [Korean company], which is a local Korean corporation that sponsors you with a visa to reside in South Korea. These contemporaneous positions with a U.S. company and a local Korean company could pose a conflict of interest with your security responsibilities and could create an increased risk of unauthorized disclosure of classified or sensitive information.

After recovering from his health issues, Applicant established a new company Co2, which he registered as limited liability corporation in his home state. He is the sole shareholder of Co2. He stated Co2 owns the Korean company in question, and it is as a Korean entity that does business in South Korea for Co2. (Item 5 at 4.) He is also the sole shareholder and only employee of the Korean corporation in question. (Item 5 at 4.) His Korean company sponsors his visa to reside and work in South Korea. (Item 3 at 16.) His Korean company works with at least two entities. Neither the Korean company in question nor his previous one, associated with Co1, are not listed in the employment activities section on his SCA. (Item 3 at 15-19.) The first is a public-private venture between a South Korean company and the municipality of a major city in South Korea. The other is with a U.S. corporation with a regional headquarters in South Korea. (Items 3 and 5.)

SOR ¶ 2.a: Your two friends are citizens and residents of South Korea. Applicant admits having friends who are citizens of South Korea. No government or defense industry ties were cited. (Item 3.)

SOR ¶ 2.b: Your friend, a citizen of South Korea, served as a Librarian in the South Korea military from about January 2014 to about 2018. Applicant admits the allegation and notes all able-bodied males in South Korea are required to perform mandatory military service. His friend had been injured and was assigned as a librarian to complete his service. After leaving military service his friend "counted fish" for the South Korean Ministry of Oceans and Fisheries. (Item 5 at 6.) He notes this person is no longer in the South Korean military and ended his military service at the absolute statutory minimum time.

SOR ¶ 2.c: Your friend, a citizen of South Korea, served as a Katusa in the Korean Augmentation to the US Army. Applicant admits the allegation and notes all able-bodied males in South Korea are required to perform mandatory military service. He notes this person is no longer in the South Korean military and ended his military service at the absolute statutory minimum time. He believes the person served all of his obligated service on U.S. military installations in South Korea.

SOR ¶ 2.d: Your friend, a citizen of South Korea, served in the South Korea military until about May 2016. Applicant admits the allegation and notes all able-bodied males in South Korea are required to perform mandatory military Service. He notes this person is no longer in the South Korean military and ended his military service at the absolute statutory minimum time.

SOR ¶ 2.e: You provide approximately $600 yearly financial support to your friend who is a citizen of South Korea. Applicant admits and explains that the individual in question is a fellow member of the same faith. While he is working in South Korea he allows his friend, who is a student in the United States, to use his car and the friend pays for maintenance while he pays roughly $600 per year for the car insurance. (Item 3 at 34; Item 5 at 9.) The support was his attempt to be a good Samaritan and "paying it forward" for help he had received in the past during his education. (Answer.)

SOR ¶ 2.f: You maintain a bank account in South Korea with an approximate value of $12,835. Applicant admits he maintains both a personal bank account and a bank account for his Korean company, for which he is the only shareholder. He states the primary function of this specified account is to allow him to participate in the Korea National Health insurance. While a resident in South Korea, Applicant pays for national healthcare. (Item 3 at 34.)

SOR ¶ 2.g: You maintain a bank account in South Korea with an approximate value of $620. Applicant admits he maintain both a personal bank and bank account for his Korean company. The primary function of this account is for day to day living expenses. He opened a local bank account for personal use in South Korea in 2018; the value in the account as of the date of his SCA was $620. (Item 3.)

SOR ¶ 2.h: Information as set forth under paragraph 1.a. Applicant admitted SOR ¶ 1.a, which covers his role as sole shareholder of Co2, a U.S. company, and his Korean corporation for which he is the sole shareholder. He has no employees besides himself for the Korean corporation. (Item 5.)

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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant's meeting the criteria contained in the AG. 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." *See* 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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; *see* AG ¶ 2(b).

Analysis

Guideline L: Outside Activities

The security concern for outside activities is set out in AG ¶ 36:

> 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 or sensitive information.

The guideline notes several conditions that could raise security concerns under AG ¶ 37. The following is potentially applicable in this case:

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

(2) any foreign national, organization, or other entity; and

(3) a representative of any foreign interest.

Applicant owns and operates the South Korean company in question, which is a subsidiary of his own U.S. company. AG ¶ 37(a)(2) through 37(a)(3) apply.

AG ¶ 38 cites two conditions that could mitigate 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.

Applicant did not respond to the FORM. As a result there is no evidence in the record he requested an evaluation of the outside employment or activity by an appropriate security or counterintelligence office to show that his South Korean company does not pose a conflict with his security responsibilities or with the national security interests of the United States or that he terminated the employment or discontinued the activity pertaining to his company upon being notified that it was in conflict with his security responsibilities. Applicant has not met his burden, AG ¶¶ 38(a) and 38(b) do not apply.

Guideline B, Foreign Influence

The concern is set forth 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 may be 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 guideline notes several conditions that could raise security concerns under AG ¶ 7. Three are potentially applicable in this case:

> (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;
>
> (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
>
> (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.

Applicant maintains personal, professional, financial, and various business ties to South Korea. While there is no evidence of record that intelligence operatives, industrial espionage agents, criminals or even terrorists from South Korea seek or have sought classified or economic information from or through Applicant, such attempts cannot be ruled out *pro forma*. Before discounting any material risks of foreign influence being brought to bear on Applicant, either directly or indirectly through his South Korean friends and businesses, considerations must take account of South Korea's human rights record, its intelligence-gathering history, and the nature of the South Korean government's relationship with the United States. *See* ISCR Case No. 16-02435 at 3 (App. Bd. May 15, 2018)(citing ISCR Case No. 15-00528 at 3 March 13, 2017). The evidence is sufficient to raise these disqualifying conditions.

AG ¶ 8 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 8 including:

(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;

(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;

(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

(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.

The record evidence is sufficient to mitigate the concerns, AG ¶¶ 8(a)-8(c) and 8(f) apply. The nature of the relationships with his various South Korean friends, as well as the countries where these persons are located, and his activities make it unlikely he will be placed in a position of having to choose between the interests of the United States and some sort of foreign interest. There is no evidence of a conflict of interest. His South Korean company is not doing business with the South Korean defense industry or national government. His financial ties are minimal and consistent with what is necessary to do business in and reside in South Korea. The nature of his South Korean business and his financial interests are such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure him.

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. An 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.

I have incorporated my comments under Guidelines L and B in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Because Applicant requested a determination on the record without a hearing, I had no opportunity to evaluate his credibility and sincerity based on demeanor. *See* ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003). The record evidence shows Applicant is the type of individual who would normally pass through the security clearance process without incident. However, the adjudicative guidelines are there for a reason. I am duty bound to follow AG ¶ 2(b), which requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the foreign influence security concerns, but he did not mitigate the outside activities security concerns. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant his eligibility for access to classified information.

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, Guideline L (Outside Activities):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline B (Foreign Influence):	FOR APPLICANT
Subparagraphs 1.a through 1.h:	For Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Charles C. Hale
Administrative Judge