DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 23-01669
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Rhett Petcher, Esq., Department Counsel
For Applicant: *Pro se*

12/23/2024

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Decision

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FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant is an employee of a defense contractor. In September 2019, he self-reported his part-time employment as a consultant for a U.S. law firm representing a Russian company. On November 2, 2023, the Defense Counterintelligence and Security Agency (DCSA) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines L, B, and E. The DCSA acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (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), which became effective on June 8, 2017.

Applicant answered the SOR on January 22, 2024, denied all the allegations, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on February 29, 2024. The case was assigned to me on October 8, 2024. On October 15, 2024, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled to be conducted by video teleconference on November 13, 2024. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Department Counsel requested that I take administrative notice of relevant facts about Russia, and I granted the motion without objection. The facts administratively noticed are set out in my findings of fact. Applicant testified and submitted Applicant's Exhibits (AX) A through C, which were admitted without objection. He also submitted a written opening statement that I have marked as AX D. DOHA received the transcript (Tr.) on November 22, 2024.

Findings of Fact

Applicant was a foreign service officer from May 1972 until he retired in December 1999. In 2003, he was hired by a defense contractor and served as a senior vice-president for national security programs until August 2014, when he was hired by his current employer as an adjunct senior fellow. He holds a doctorate in economics. He married in November 1974, divorced in December 1978, married in July 1985, divorced in October 2020, and married in November 2020. He has an adult son, and adult daughter, and an adult stepdaughter. He has held a security clearance since 1972.

As an adjunct senior fellow employed by a defense contractor, Applicant participates in occasional classified tabletop exercises sponsored by the Department of Defense. He requires a security clearance to participate in these exercises.

Applicant serves as the executive director of a business leaders forum, which has been sponsored by his employer for about 24 years. The forum is comprised of business leaders from Russia, the United States, and Europe. He meets several times a year with each member, most of whom are Russian private business leaders and reside in Moscow. He briefs them on political, economic, and foreign policy developments in Western Europe and the United States. He interacts only with Russian business leaders and does not interact with government officials. (GX 1 at 32-35)

In September 2019, a major U.S. law firm invited Applicant to work part time as a consultant and assist it in representing a Russian motor vehicle manufacturer who had been subjected to sanctions imposed by the Treasury Department's Office of Foreign Assets Control (OFAC). The Russian company was one of the largest motor vehicle manufacturers in Russia. Applicant was hired because of his background as an economist and his 40 years of experience in Russia-related issues. (Tr. 23) The owner of the Russian company had been identified by the U.S. Treasury Department as a Specially Designated National (SDN),[1] He was seeking new owners, including a German automobile

[1] OFAC publishes a list of individuals and companies owned or controlled by, or acting for or on behalf of targeted countries as well as individuals, groups, and entities, such as terrorists and narcotics traffickers

manufacturer. The law firm's plan for persuading OFAC to lift the sanctions was to dilute the control exercised by the sanctioned Russian owner by creating a board of directors dominated by the United States and Europe. The law firm informed OFAC that if the sanctions were lifted, it would create a new nine-member board of directors, with at least five members from Western Europe, and Applicant would be the chairman of the board. (GX 3; AX D) The Treasury Department issued licenses in 2019, 2020, and 2021, permitting the law firm and Applicant to carry out their efforts on behalf of the motor vehicle manufacturer. (GX 2 at 11-14) Applicant sometimes accompanied the lawyers to meetings with OFAC.

During his employment as a consultant, Applicant was paid $20,000 per month, which ultimately came from the fee paid to the law firm by the Russian company. The law firm discontinued Applicant's role as a consultant in February 2022, when Russia invaded Ukraine. Applicant never became a member of the board or its chairman. (GX 2 at 7, 11-16)

In June 2023, Applicant began working as a consultant to a venture-capital firm based in the United States that invests in medical research and development. (AX A) He was paid $10,000 a month. (GX 2 at 9; Tr. 31) The firm is owned by a Russian national who lives outside Russia in another European country. Applicant's contract defined the scope of work as "assess global political risks faced by the [company's] organization." (GX 2 at 9) The company was concerned about the "reputational risk" of being owned by a Russian, even though the Russian owner of the company was not an SDN. Applicant suggested that the firm consider a procedure used by other foreign companies, which consists of creating a special security board consisting of U.S. citizens with security clearances who would monitor the company's activities. The firm was not interested in Applicant's proposal. (Tr. 28-32) Applicant's consulting contract ended in December 2023. (Tr. 35)

In June 2023, Applicant began working as a consultant to a gold and silver producer located in Europe with assets in Russia. He received a retainer of $5,000. The parent company is located outside Russia and is not under U.S. sanctions, but its affiliate in Russia, where the gold and silver are processed, is under sanction. The parent company has divested its financial interest in the Russian affiliate, but it still uses the Russian company to process the gold and silver. Applicant's involvement with the company was limited to providing strategic advice for dealing with OFAC. (Tr. 36-37) The company asked Applicant if it should engage with OFAC directly or through its embassy. Applicant suggested that they engage OFAC directly. The company followed his advice and received a "comfort letter" from OFAC, informing them that using the Russian company to process its products would not make them vulnerable to sanctions. (Tr. 37) Applicant's consulting contract with this client ended on November 30, 2024. (Tr. 16) The client proposed a six-month extension of the contract for $5,000, but it did not ask for further advice or assistance and did not pay Applicant any additional fees. (Tr. 39)

designated under programs that are not country-specific. They are called Specially Designated Nationals (SDNs). Their assets are blocked and U.S. persons are generally prohibited from dealing with them.

Applicant has never registered as an agent of a foreign power. The law firm informed Applicant that he might be required to register if the sanctions against the motor vehicle company were lifted, because Congress has the authority to invalidate an OFAC decision, and the law firm might need his help in explaining and defending the OFAC decision. He completed the documentation to become an agent of a foreign power, realizing that he might not be able to hold a security clearance if he was registered as an agent. However, he never submitted his application, the sanctions were never lifted, and the law firm terminated its representation of the company. (GX 2 at 22)

As requested by Department Counsel, I have taken administrative notice that Russia is one of the most aggressive collectors of economic information and technological intelligence from U.S. sources. Russia uses cyber operations as an instrument of intelligence collection, using sophisticated and large-scale hacking to collect sensitive information, influence the political process in the United States, and undermine Euro-Atlantic unity.

Russia also uses commercial and academic enterprises that interact with the West, recruitment of Russian immigrants with advanced technical skills, and penetration of public and private enterprises by Russian intelligence agents to obtain sensitive technical information. The areas of highest interest include alternative energy, biotechnology, defense technology, environmental protection, high-end manufacturing, and information and communications technology.

Russian agents have been involved in intrusions affecting U.S. citizens, corporate entities, international organizations, and political organizations in the United States. Russia has attempted to position itself as a competitor to the United States by undermining norms within the existing international systems and aiming to undermine core systems of the West, such as NATO and the European Union.

In response to Russia's invasion of Ukraine in February 2022, the United States imposed sweeping sanctions and other economic measures. OFAC has added over 2,500 Russian targets to the SDN list, ranging from senior government officials to high net-worth individuals, Russian officials, manufacturing firms, financial institutions, and technology suppliers.

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* at 531. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." See ISCR Case No. 17-04166 at 3 (App. Bd. Mar. 21, 2019) It is "less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 620 (1966). "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. 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* at 531.

Analysis

Guideline L, Outside Activities

The security concern under this guideline 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 following disqualifying conditions under this guideline are potentially applicable:

> AG ¶ 37(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, and
>
> AG 37(b): failure to report or fully disclose an outside activity when this is required.

Applicant's active participation in the law firm's efforts to lift sanctions against a foreign automobile manufacturer, his advice to a Russian-owed medical research company, and his advice to a gold and silver producer with a Russian affiliation establishes AG ¶ 37(a)(2) and AG ¶ 37(b)(3).

AG ¶ 37(b) is not established. Applicant reported his activities to his facility security officer, he received licenses from the U.S. Government to provide the services, and he was prepared to register as an agent of a foreign power when he learned that it might be required.

The following mitigating conditions are potentially applicable:

> AG ¶ 38(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 interest of the United States; and

AG ¶ 38(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 advice to Russian companies regarding OFAC sanctions was open and in accordance with the rules governing the imposition and lifting of sanctions. He informed his security office of his activities. There is no evidence that Applicant disclosed protected information to any of the three entities that he advised.

AG ¶ 38(b) is established. Applicant's activities with the motor vehicle manufacturer ceased when Russia invaded Ukraine in February 2022. His advice to the medical research company described a procedure that could mitigate the "reputational risk" of being owned by a Russian, and the company chose to not follow his advice. His contract with this company ended in December 2023. His advice to the gold and silver producer was limited to the procedure for dealing with OFAC. His contract with this company ended in November 2024. The company proposed a six-month extension, but no additional services have been requested or provided.

Guideline B, Foreign Influence

The Guideline L concerns are cross-alleged under this guideline. 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 are potentially 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; and

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.

AG ¶¶ 7(a) and 7(b) are established. The "heightened risk" required to raise one of these disqualifying conditions is a relatively low standard. Russia's use of commercial enterprises that act with the West is sufficient to establish the heightened risk in AG ¶ 7(a) and the potential conflict of interest in AG ¶ 7(b).

The following mitigating conditions are potentially applicable:

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; and

AG ¶ 8(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.

Both mitigating conditions are established. Applicant has a long history of service to the United States and has held a security clearance and served in sensitive positions for many years. There is no evidence that he developed personal ties of friendship or obligation with any Russian business owners or operators. There is no evidence that he provided any protected information or technology to foreign business owners. The subject matter of his services consisted of strategies for dealing with OFAC. It did not involve protected information. There is no evidence that he had any financial interest in the foreign businesses with whom he had contact. He fully disclosed his activities to his facility security office and obtained licenses from the U.S. Treasury Department for his activities in Russia.

Guideline E, Personal Conduct

The Guideline L security concerns are cross-alleged under this Guideline. The security concern under this guideline is set out in AG ¶ 15: "Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. . . .

The following disqualifying condition under this guideline is relevant:

> AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes . . . engaging in activities which, if known, could affect the person's personal, professional, or community standing.

This disqualifying condition is not established. Applicant's activities with foreign nationals affected by the UFAC sanctions were open, limited, and legitimate efforts within the law to seek exceptions to the sanctions. There is no evidence that he provided protected information to the companies who hired him or went beyond advice regarding OFAC sanctions. No other disqualifying conditions are established.

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(d):

> (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, B, and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Applicant served as a foreign service officer for 27 years and has worked for defense contractors for more than 20 years. He has held a security clearance for more than 50 years, apparently without incident. He was candid, sincere, and credible at the hearing.

I did not apply any mitigating conditions under Guideline E, because no disqualifying conditions were established under that guideline. After weighing the disqualifying and mitigating conditions under Guidelines L and B and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his outside activities and business connections with Russia.

Formal Findings

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

Paragraph 1 (Guideline L, Outside Activities):	FOR APPLICANT
Subparagraphs 1.a-1.c:	For Applicant
Paragraph 2 (Guideline B, Foreign Influence):	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3 (Guideline E, Personal Conduct):	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

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

LeRoy F. Foreman
Administrative Judge