DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
--------	)	ISCR Case No. 14-02747
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Robert J. Kilmartin, Esquire, Department Counsel
For Applicant: *Pro se*

03/24/2015

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Decision

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GALES, Robert Robinson, Administrative Judge:

Applicant mitigated the security concerns regarding foreign influence and foreign preference. Eligibility for a security clearance and access to classified information is granted.

Statement of the Case

On November 25, 2013, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application.[1] On September 26, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive,

[1] Item 4 (e-QIP, dated November 25, 2013).

effective September 1, 2006. The SOR alleged security concerns under Guideline C (Foreign Preference) and Guideline B (Foreign Influence) and detailed reasons why the DOD CAF could not make an affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

It is unclear when Applicant received the SOR as there is no receipt in the case file. In a statement, dated and notarized on November 5, 2014,[2] Applicant responded to the SOR allegations and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM) was provided to Applicant on January 12, 2015, and he was afforded an opportunity, within a period of 30 days after receipt of the FORM, to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the FORM on January 30, 2015, but as of March 11, 2015, he had not submitted any further documents or other information. The case was assigned to me on March 16, 2015.

Findings of Fact

In his Answer to the SOR, Applicant admitted all but one of the factual allegations pertaining to foreign influence and foreign preference in the SOR (SOR ¶¶ 1.a.1, 1.a.2, 1.a.4, 2.a., and 2.b.). Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 24-year-old employee of a defense contractor. He has been serving as a mechanic since August 2011.[3] He had previously been employed by various employers in the United States. Applicant is registered with the Selective Service, but has never served in the U.S. military or any other military,[4] and he has never held a security clearance.[5] He has never been married.[6]

Foreign Influence and Foreign Preference

Applicant and his two brothers were born in the United States.[7] His parents were citizens of Mexico.[8] Applicant's mother had a valid U.S. visa for approximately ten years, but his father was deported from the U.S. about three decades ago because he

[2] Item 3 (Applicant's Answer to the SOR, dated November 5, 2014).

[3] Item 4, *supra* note 1, at 9.

[4] Item 4, *supra* note 1, at 14.

[5] Item 4, *supra* note 1, at 25-26.

[6] Item 4, *supra* note 1, at 16.

[7] Item 4, *supra* note 1, at 5, 19-20; Item 5 (Personal Subject Interview, dated February 18, 2014), at 1, 4.

[8] Item 4, *supra* note 1, at 16-19; Item 5, *supra* note 7, at 3.

was in the United States without proper documentation.[9] Applicant's father is an artist and his mother operates a small business selling Mexican artwork.[10] Applicant's brothers are both married and reside in Mexico.[11] Applicant was educated through high school in Mexico.[12] Following his high school graduation, Applicant attended an additional class in English in the U.S.[13] Applicant resides with his parents in Mexico.[14] No member of Applicant's family has any relationship to the Mexican government, its military, or intelligence services.[15] Applicant has a U.S. passport, but has never held a Mexican passport.[16]

When Applicant attempted to exercise his right to vote as a U.S. citizen in 2006, he was denied that opportunity because he did not have a U.S. residence address.[17] He did vote in Mexican federal elections in 2006 and 2012.[18] Applicant does not have any financial interests, including real property, or bank accounts, in Mexico, and has no interest in purchasing real estate in Mexico.[19] Applicant's total loyalty is to the United States, and while he possesses dual citizenship with Mexico and the United States, he is willing to renounce his Mexican citizenship.[20]

About three years ago, Applicant applied to the U.S. Customs and Border Protection (CBP) for the SENTRI Program (Secure Electronic Network for Travelers Rapid Inspection) as a "Trusted Traveler." His application was approved.[21] The SENTRI Program provides expedited CBP processing for pre-approved, low-risk travelers. Applicants must voluntarily undergo a thorough biographical background check against criminal, law enforcement, customs, immigration, and terrorist indices; a 10-fingerprint law enforcement check; and a personal interview with a CBP Officer.[22]

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[9] Item 3, *supra* note 2, at 4; Item 5, *supra* note 7, at 3-4.

[10] Item 5, *supra* note 7, at 3.

[11] Item 3, *supra* note 2, at 4; Item 4, *supra* note 1, at 19-20.

[12] Item 5, *supra* note 7, at 2; Item 3, *supra* note 2, at 5.

[13] Item 3, *supra* note 2, at 5.

[14] Item 3, *supra* note 2, at 5.

[15] Item 5, *supra* note 7, at 3-4; Item 4, *supra* note 1, at 17-19.

[16] Item 4, *supra* note 1, at 6-7.

[17] Item 3, *supra* note 2, at 6.

[18] Item 3, *supra* note 2, at 6. *But see* Item 4, *supra* note 1, at 22, wherein Applicant denied ever voting in an election in a foreign country.

[19] Item 4, *supra* note 1, at 21; Item 5, *supra* note 9, at 2.

[20] Item 5, *supra* note 9, at 2.

[21] Item 3, *supra* note 2, at 5.

[22] *See* SENTRI, at http://www.cbp.gov/travel/trusted-traveler-programs/sentri

Applicants may not qualify for participation in the SENTRI program if they:

- Provide false or incomplete information on the application;
- Have been convicted of any criminal offense or have pending criminal charges to include outstanding warrants;
- Have been found in violation of any customs, immigration, or agriculture regulations or laws in any country;
- Are the subject of an ongoing investigation by any federal, state, or local law enforcement agency;
- Are inadmissible to the United States under immigration regulation, including applicants with approved waivers of inadmissibility or parole documentation; or
- Cannot satisfy CBP of their low-risk status.

Once applicants are approved they are issued Radio Frequency Identification Document (RFID) cards that will identify their record and status in the CBP database upon arrival at the U.S. port of entry. SENTRI users have access to specific, dedicated primary lanes into the United States at Southern land borders. SENTRI members may also use the NEXUS lanes when entering the U.S. from Canada by land. U.S. citizens and U.S. lawful permanent residents enrolled in SENTRI are also able to use Global Entry kiosks and are eligible for TSA Precheck.[23]

The Government has conceded that there is "no heightened risk associated with Mexico."[24]

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance."[25] 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. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."[26]

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating

[23] SENTRI, *supra* note 22.

[24] FORM, at 2.

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

[26] Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

conditions, which are used in evaluating an applicant's eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

In the decision-making process, facts must be established by "substantial evidence."[27] The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.[28]

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to 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. Furthermore, "security clearance determinations should err, if they must, on the side of denials."[29]

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."[30] Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict

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

[28] *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

[29] *Egan*, 484 U.S. at 531.

[30] *See* Exec. Or. 10865 § 7.

guidelines the President and the Secretary of Defense have established for issuing a clearance. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

Guideline B, Foreign Influence

The security concern under the Foreign Influence guideline is set out in AG ¶ 6:

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

The mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if only one relative lives in a foreign country and an applicant has contacts with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information.[31] Applicant's close relationships with his parents, both of whom are citizens of Mexico, and his two brothers, both of whom are native-born citizens of the United States, and all of whom are residents of Mexico, are current security concerns for the Government. Applicant's decision to reside with his parents in Mexico is also a current security concern.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 7(a), it is potentially disqualifying where there is "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." In addition, it is potentially disqualifying under AG ¶ 7(d) where there is "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." AG ¶¶ 7(a) and 7(d) apply in this case. However, the security significance of these identified conditions requires further examination of Applicant's respective relationships to determine the degree of "heightened risk" or potential conflict of interest.

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

The guideline also includes examples of conditions that could mitigate security concerns arising from foreign influence. Under AG ¶ 8(a), the disqualifying condition may be mitigated where:

> the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.

Similarly, AG ¶ 8(b) may apply where the evidence shows:

> there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest.

In assessing whether there is a heightened risk because of an applicant's relatives or associates in a foreign country, it is necessary to consider all relevant factors, including the totality of an applicant's conduct and circumstances in light of any realistic potential for exploitation. One such factor is the potential for pressure, coercion, exploitation, or duress. In that regard, it is important to consider the character of the foreign power in question, including the government and entities controlled by the government within the relevant foreign country. Nothing in Guideline B suggests it is limited to countries that are hostile to the United States.[32] In fact, the Appeal Board has cautioned against "reliance on overly simplistic distinctions between 'friendly' nations and 'hostile' nations when adjudicating cases under Guideline B."[33]

Nevertheless, the relationship between a foreign government and the United States may be relevant in determining whether a foreign government or an entity it controls is likely to attempt to exploit a resident or citizen to take action against the United States. It is reasonable to presume that although a friendly relationship, or the existence of a democratic government, is not determinative, it may make it less likely that a foreign government would attempt to exploit a U.S. citizen through relatives or associates in that foreign country.

As noted above, Applicant and his two brothers are native-born U.S. citizens, and while his two brothers are married and reside near their parents, Applicant resides with his parents, in Mexico. Applicant works in the United States and crosses the international border on a daily basis. After undergoing an extensive investigation, Applicant qualified for the SENTRI program as a trusted traveler. It remains unclear as to what the significant security concerns might be for the Government has conceded

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

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

that there is "no heightened risk associated with Mexico," and has offered no evidence to indicate or substantiate conditions that could constitute a heightened risk in this instance. Moreover, it appears that the Government's main concern is not the actions of the Mexican government or those of criminals, terrorists, and narco-terrorists in conducting illegal terrorist attacks, extortion, and kidnappings. The sole concern appears to be simply that three brothers who are native-born U.S. citizens, including Applicant, have parents who are Mexican citizen-residents, and Applicant continues to reside with them. No member of Applicant's family has any relationship to the Mexican government, its military, or intelligence services. Applicant has no financial and property interests in Mexico. It is unlikely that Applicant would have to choose between the interests of his family and the interests of the United States.

There is always a potential for a "heightened risk" of foreign exploitation, inducement, manipulation, pressure, or coercion when one resides in a foreign country. However, the potential for such risk is considerably diminished in this instance and there is little substantial risk of any kind of foreign exploitation, inducement, manipulation, pressure, or coercion to disqualify Applicant from holding a security clearance.

Applicant is a native-born U.S. citizen, is registered with the Selective Service, has a U.S. passport, and has worked in the United States all his working life. He has been employed in the United States as a mechanic by a federal contractor since August 2011. He is a trusted traveler under the SENTRI Program. He is disappointed that he cannot bring his parents into the United States so they could reside here. I am persuaded that Applicant's loyalty to the United States is steadfast and undivided, and that he has "such deep and longstanding relationships and loyalties in the U.S., that [he] can be expected to resolve any conflict of interest in favor of the U.S. interest." AG ¶¶ 8(a) and 8(b) apply.

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(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" is potentially disqualifying. This includes AG ¶ 10(a)(3), "accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country;" AG ¶ 10(a)(4), "residence in a foreign country to meet citizenship requirements;" and AG ¶ 10(a)(7), "voting in a foreign election," all of which may raise security concerns. Applicant was born in the United States to Mexican citizens. He was raised and educated in Mexico. He has resided in Mexico his entire life. He has voted in Mexican federal elections. By

his actions in obtaining his high school education in Mexico and voting in Mexican federal elections, Applicant exercised the rights and privileges of foreign citizenship. AG ¶¶ 10(a)(3) and 10(a)(7) apply. AG ¶ 10(a)(4) does not apply for Applicant's continuing residence in Mexico has nothing to do with meeting Mexican citizenship requirements. Applicant's Mexican citizenship was derived from his parents' Mexican citizenship.

The guideline also includes examples of conditions that could mitigate security concerns arising from foreign preference. Under AG ¶ 11(a), the disqualifying condition may be mitigated where the "dual citizenship is based solely on parents' citizenship or birth in a foreign country." Similarly, AG ¶ 11(b) may apply where "the individual has expressed a willingness to renounce dual citizenship." In addition, AG ¶ 11(c) may apply if the "exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor."

Applicant, a native-born U.S. citizen, has dual Mexican citizenship based solely on his parents' citizenship. Dual citizenship, by itself, is not an automatic bar to a security clearance. It is only a security concern if the individual has actively exercised the rights and privileges of the foreign citizenship after becoming a U.S. citizen. Applicant accepted educational benefits from Mexico by attending Mexican schools through his high school graduation, but those rights occurred when Applicant was still a minor. He voted in two Mexican federal elections, but he was still considered a minor when he voted in 2006. Applicant's exercise of the right to vote in Mexico in 2012 occurred when he was 22 years old. That one action, not his decision to reside with his parents in Mexico, is the sole decision having security significance. Applicant stated unequivocally that he is willing to renounce his Mexican citizenship. Considering Applicant's explanations and his actions, I find ¶¶ 11(a) and 11(b) apply, while 11(c) only partially applies.

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 commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, I have evaluated the various

aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.[34]

There is some evidence against mitigating Applicant's situation, because his parents remain Mexican citizen-residents. He resides with them, and he maintains a close and continuing contact and relationship with them. He voted in a Mexican federal election in 2012.

The mitigating evidence under the whole-person concept is more substantial. Applicant declared that his life is here in the United States and that he loves this country. His only disappointment is that he could not bring his parents to the United States so that they could reside here, and he could have attended school here. His two brothers are native-born U.S. citizens. Moreover, while there might be a minimum "heightened risk" of negative activities occurring in Mexico, it should also be remembered that terrorists and would-be terrorists are also active in the United States, creating a substantial risk here as well. Applicant is a trusted traveler who crosses the Mexican-U.S. border on a daily basis to work with a government contractor. He has no financial and property interests in Mexico. There is a reduced risk of foreign exploitation, inducement, manipulation, pressure, or coercion. Overall, the record evidence leaves me without substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his foreign influence and foreign preference. *See* AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

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
Subparagraph 1.a.1:	For Applicant
Subparagraph 1.a.2:	For Applicant
Subparagraph 1.a.3:	For Applicant
Subparagraph 1.a.4:	For Applicant

[34] *See U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); *See also* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Paragraph 2, Guideline B:	FOR APPLICANT
Subparagraph 2.a.:	For Applicant
Subparagraph 2.b.:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

ROBERT ROBINSON GALES
Administrative Judge