DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
XXXXXXXXXX, XXXXX	)	ISCR Case No. 14-01819
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

12/04/2015

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns under Guideline B (foreign influence). Clearance is denied.

Statement of the Case

On December 5, 2013, Applicant submitted a Questionnaire for National Security Positions (SF-86). On June 30, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry,* dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guideline B. The SOR detailed reasons why DOD was unable to find that it is clearly consistent with the national interest to grant a security clearance for Applicant, and referred his case to an administrative judge for a determination whether his clearance should be granted or denied.

On July 28, 2014, Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated March 30, 2015, was provided to him by letter dated April 22, 2015. Applicant received the FORM on April 28, 2015. He was afforded 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant timely submitted additional information after receipt of the FORM, which was received without objection from Department Counsel.[1] On August 12, 2015, DOHA assigned the case to me.

Procedural Ruling

Department Counsel requested administrative notice of facts concerning relating to South Korea. Department Counsel provided supporting documents to show detail and context for these facts. Applicant did not object, and I took administrative notice of all of the facts in all of the documents. *See* the South Korea sections of the Findings of Fact of this decision, *infra*. (FORM: Items 5 – 10)

Administrative or official notice is the appropriate type of notice used for administrative proceedings. *See* ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004) and *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). Usually administrative notice at ISCR proceedings, is accorded to facts that are either well known or from government reports. *See* Stein, ADMINISTRATIVE LAW, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice).

Findings of Fact

Applicant admitted all of the SOR allegations with explanations. (Item 2) His SOR answers are incorporated in my findings of fact.

Background Information

Applicant is a 43-year-old staff software and computer engineer employed by a defense contractor since March 2008. He is a first-time applicant for a security clearance. (Item 3)

Applicant was born and raised in South Korea. He received the majority of his education in South Korea to include his high school diploma in March 1990, his bachelor's degree in March 1997, and his master's degree in March 1999. Applicant served his mandatory military service in the South Korean Air Force from January 1992 to July 1994, and was discharged as a staff sergeant. (Item 3, Item 4)

[1]Applicant's additional information will be referred to as "FORM response."

Applicant entered the United States in September 2002 and became a naturalized U.S. citizen in December 2012. He received his most recent U.S. passport in February 2013. Applicant attended graduate school in the United States from September 2002 to March 2008 and was awarded a doctorate degree in January 2008. He remained in graduate school for a short time after receiving his degree to complete pending research. (Item 3, Item 4)

Applicant married his wife, a South Korean national, in South Korea in August 2002. His wife is employed at a U.S. hospital as a registered nurse. Applicant has an eight-year-old son and a five-year-old daughter. Both children were born in the United States and are U.S. citizens by birth. (Item 3, Item 4)

Foreign Influence

A number of factors were developed during Applicant's background investigation raising security concerns under this Guideline. As noted Applicant's wife is a citizen of South Korea. Her current status in the United States is lawful permanent resident alien. (Item 2, Item 3) Applicant's two minor children are dual citizens of the United States and South Korea. His children acquired their South Korean citizenship through their parents at birth. When Applicant's children reach the age of 18, they will have the option of renouncing or retaining their South Korean citizenship. (Item 2, Item 3)

By virtue of Applicant's children holding South Korean citizenship, they are eligible to receive about $90 per month per child as an educational stipend from the South Korean government until age five. Applicant's children were receiving this stipend at the time he submitted his SF-86, but Applicant "has not made any efforts to maintain [his] children's South Korean citizenship to make them eligible to receive the stipend." Applicant's son has not received his stipend since November 2013. (Item 2, Item 3)

Applicant has a number of relatives who are citizens and residents of South Korea to include his mother and father, his two sisters, his mother-in-law and his father-in-law, his brother-in-law, and his nephew. His mother is a homemaker and his father is a retired commercial engineer. One of his sister's is a school cafeteria worker and the other sister is unemployed, but was previously employed by the telephone company. His mother-in-law is a homemaker and father-in-law is a retired train station worker. (Item 2, Item 3, Item 4) The FORM does not contain information regarding the occupations of his brother-in-law or his nephew.

Applicant provides approximately $2,000 annually to both his father and father-in-law. He described this money as gifts versus support to commemorate major family events such as birthdays or seasonal events. Applicant sends this money in increments about four to five times during the year. (Item 2, Item 3)

Applicant's wife has maintained a bank account since 2008 in South Korea for the purpose of being able to conveniently wire money to their parents. (Item 4) Applicant traveled to South Korea in November 2008 and in March and April 2013 for the purpose of visiting family. (Item 2, Item 3, Item 4) The FORM did not develop facts showing

Applicant's connections to the United States other than those discussed *supra.* Nor did the FORM contain any character references or employment information. Applicant stated in his FORM response that he would be "more than happy to take actions to remove any adversities shown on the statement of reasons." He added, "Whether I will have a security clearance or not, United States of America is my country and my children's country. I am proud of working for [defense contractor] supporting national security and our international partners." (FORM response)

South Korea[2]

South Korea is currently a stable, democratic republic. The United States and South Korea have been close allies since 1950, and have fought communism on the Korean peninsula and in Vietnam. The United States, since 1950 and currently, has thousands of U.S. military personnel stationed in South Korea, and frequently conducts joint military operations with South Korea. About 2.3 million Koreans live in the United States. The United States has promised over the next four years to provide $11 billion in force enhancements in Korea. South Korea is the United States' seventh largest trading partner. The recently signed free trade agreement between the United States and South Korea will generate billions of dollars in additional economic growth and job creation in both countries.

The South Korean government generally respects the human rights of its citizens. Criminals violate the human rights of some South Korean citizens. South Korea has some political prisoners, and some rules regarding arrest and detention are vague.

South Korea does not recognize dual citizenship. There have been circumstances where U.S. citizens with connections to South Korea were drafted into the South Korean army.

In recent years, the United States and South Korea have differed in their diplomatic approaches towards North Korea. The United States' position is more assertive in its attempts to curtail North Korea's development of advanced military technology, such as ballistic missiles and nuclear weapons. South Korea has emphasized steps towards unification of North and South Korea.

Industrial espionage includes seeking commercial secrets. South Korea has a history of collecting protected U.S. information. In 2000, South Korea was listed as one of the seven most active countries engaged in foreign economic collection and industrial espionage against the United States. In 1997, Lockheed Martin was fined for unlicensed export to South Korea and that same year a civilian employee of the U.S. Navy passed classified documents to the South Korean naval attaché to the United States. On

[2]The facts in the section concerning South Korea are from Department Counsel's factual summary, except for some comments in the first paragraph about the relationship between the United States and South Korea, which are from the U.S. Department of State, *Background Note: South Korea*, Oct. 2008 and U.S. Department of State, *Country Specific Information: Republic of Korea,* January 2, 2009.

multiple occasions, South Korea has been the unauthorized recipient of sensitive technology, in violation of U.S. export control laws.

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." *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 applicant's 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 meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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, 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 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 "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. *See also* Executive Order 12968 (Aug. 2, 1995), § 3.1. 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 about applicant's allegiance, loyalty, or patriotism. It 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue her security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[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

Foreign Influence

AG ¶ 6 explains the security concern about "foreign contacts and interests" stating:

> if the individual has divided loyalties or foreign financial interests, [he or she] 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.

AG ¶ 7 indicates three conditions that could raise a security concern and may be disqualifying in this case:

> (a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;
>
> (b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information; and
>
> (d) sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.

Applicant's wife, children, parents, siblings, and in-laws are citizens of South Korea. All except his spouse and children reside in South Korea. Applicant has regular and non-casual contact with his family members in South Korea. Applicant's children have received educational benefits from South Korea. Information regarding details and

nature of employment for some of Applicant's relatives living in South Korea was not developed in the FORM.

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

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 collection operations against the United States. The relationship of South Korea with the United States, places a significant, but not insurmountable burden of persuasion on Applicant to demonstrate that his relationship with his family living in South Korea, as well as South Korean government and diplomatic officials, do not pose a security risk.

Applicant should not be placed into a position where he might be forced to choose between loyalty to the United States and a desire to assist family members.[3] South Korea was listed as one of the seven most active countries engaged in foreign economic collection and industrial espionage against the United States. On multiple occasions, South Korea has been the unauthorized recipient of technology controlled under U.S. export control laws. It is conceivable that Applicant might be targeted through a family member in an attempt to gather information from the United States. As noted, information regarding the occupation of several of Applicant's family members was not developed.

While there is no evidence that intelligence operatives from South Korea seek or have sought classified or economic information Applicant, nevertheless, his relationship with his relatives whose occupations were not developed or unknown creates a potential conflict of interest because his relationship with his family is sufficiently close to raise a security concern about his desire to assist those family members by providing sensitive or classified information. Department Counsel produced substantial evidence of Applicant's contacts with his family members to raise the issue of potential foreign

[3] An applicant with relatives in Iran, for example, has a much heavier burden to overcome than an applicant with relatives living in South Korea. *See* ISCR Case No. 02-13595 at 3 (App. Bd. May 10, 2005) (stating an applicant has "a very heavy burden of persuasion to overcome the security concerns" when parents and siblings live in Iran). *See also* ISCR Case No. 04-11463 at 4 (App. Bd. Aug. 4, 2006) (articulating "very heavy burden" standard when an applicant has family members living in Iran); ISCR Case No. 07-12471 at 9 (A.J. May 30, 2008) (listing numerous recent cases involving U.S. citizens with Iranian connections whose clearances were denied, and citing no recent cases where the Appeal Board affirmed the grant of a clearance for someone with immediate family members living in Iran).

pressure or attempted exploitation. AG ¶¶ 7(a), 7(b), and 7(d) apply, and further inquiry is necessary about potential application of any mitigating conditions.

AG ¶ 8 lists six conditions that could mitigate foreign influence security concerns 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 U.S.;
>
> (b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;
>
> (c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation;
>
> (d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;
>
> (e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country; and
>
> (f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

None of the foreign influence mitigating conditions fully apply. South Korea's extensive history of collection activities creates a significant burden for Applicant to demonstrate that his family members are not subject to coercion or influence by the government of South Korea or business entities in South Korea. Applicant has frequent contact with his family members in South Korea, and there is a presumption that he has a non-casual relationship with his immediate family members including his in-laws.

Also, there is no information in the FORM as to whether Applicant's wife has any siblings or other family members in South Korea. Given the limited information contained in the FORM, Applicant has not provided sufficient evidence to overcome the significant burden in mitigation. The ultimate burden rests with the Applicant who has the burden of demonstrating evidence of refutation, extenuation, or mitigation sufficient

to overcome the *prima facie* case against him. Applicant must demonstrate that no conflict exists.

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. I have incorporated my comments under Guideline B in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under this guideline, but some warrant additional comment.

A Guideline B decision concerning South Korea must take into consideration the geopolitical situation in South Korea, as well as the dangers existing in South Korea.[4] South Korea is a known collector of U.S. intelligence and sensitive economic information; however, South Korea has been a close military ally of the United States since the Korean war began in 1950. South Korea and the United States have close relationships in diplomacy and trade. About 2.3 million Koreans live in the United States.

Applicant's frequent communications and visits with his family establish his ties of affection to his family. South Korea has a history of targeting U.S. industries for sensitive information and firms have engaged in export violations, sending sensitive, technologically advanced equipment to South Korea and other economic espionage. There is some possibility that Applicant could 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. It is possible that South Korean intelligence agents or those conducting industrial espionage could attempt to pressure Applicant to gain some kind of advantage over Applicant to obtain classified or sensitive information.

[4] See ISCR Case No. 04-02630 at 3 (App. Bd. May 23, 2007) (remanding because of insufficient discussion of geopolitical situation and suggesting expansion of whole person discussion).

There is nothing in the FORM to suggest that Applicant is not a productive and law-abiding member of society. From the very limited information available in the FORM, he is a well-educated and valued employee, who is making a contribution to the national defense. However, the FORM lacks information regarding some of the occupations of Applicant's relatives in South Korea, his connections to the United States, or detailed information regarding his employment. The process does not permit an administrative judge to speculate on such matters and must therefore make his or her decision on the facts contained in the record.

After weighing the evidence of Applicant's connections to South Korea and to the United States, and all the facts in this decision, I conclude Applicant has not carried his burden of mitigating the foreign influence security concerns.

I take this position based on the law, as set forth in *Department of Navy v. Egan,* 484 U.S. 518 (1988), my "careful consideration of the whole person factors"[5] and supporting evidence, my application of the pertinent factors under the Adjudicative Process, all the evidence in this decision, and my interpretation of my responsibilities under the Guidelines. For the reasons stated, I conclude he is not eligible 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 1, Guideline B:	AGAINST APPLICANT
Subparagraphs 1.a to 1.k:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Clearance is denied.

Robert J. Tuider
Administrative Judge

[5] *See* ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).