DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
REDACTED	)	ISCR Case No. 14-02454
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Tovah A. Minster, Esq., Department Counsel
Benjamin Dorsey, Esq., Department Counsel

For Applicant: *Pro se*

12/07/2015

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant did not mitigate security concerns regarding his foreign familial connections to the Republic of Korea (South Korea). Clearance is denied.

History of the Case

On July 31, 2014, the Department of Defense (DOD) sent Applicant a Statement of Reasons (SOR), alleging that his circumstances raised security concerns under the foreign preference and foreign influence guidelines.[1] Applicant answered the SOR and requested an administrative determination on the record. With his Answer, Applicant submitted a letter from his employer, noting that Applicant turned in his foreign passport to the Facility Security Officer (FSO).

[1] This action was taken under Executive Order (E.O.) 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 implemented by DOD on September 1, 2006.

Department Counsel sent Applicant a file of relevant material (FORM). Apparently, after receiving the FORM, Applicant requested a hearing. His request was not communicated to the hearing office and another administrative judge issued a decision. Said decision was subsequently rescinded, and the case was assigned to me for hearing. At the parties' request, I have not considered the contents of the FORM or the prior decision issued by the other administrative judge. However, in case of appellate review, the FORM and the decision have been included in the case file. *See* Transcript (Tr.) at 17-21; Hearing Exhibit (Hx.) I.

Applicant's hearing was convened on July 23, 2015.[2] Department Counsel moved to amend the SOR to withdraw the foreign preference security concern. Without objection, I granted the motion. Tr. at 22-23.

Department Counsel offered exhibit (Ex.) 1, Applicant's security clearance application, and Ex. 2, a request for administrative notice. The request is a four-page document, listing proposed facts about South Korea that Department Counsel seeks for administrative notice. Both exhibits were admitted without objection at hearing. However, as Applicant had only quickly read through the source documents cited by Department Counsel in support of the proposed facts for administrative notice, I provided Applicant additional time post-hearing to review the documents, raise any objections, and provide any additional matters for my consideration. Tr. at 27-34.[3]

Applicant testified and offered Ex. A – D.[4] After the hearing, he timely submitted Ex. E – G. All exhibits were admitted without objection. The hearing transcript was received by the Defense Office of Hearing and Appeals (DOHA) on July 31, 2015, and the record closed on November 20, 2015.[5]

Procedural Ruling

DOHA administrative judges must make certain that an applicant "received fair notice of the issues raised, had a reasonable opportunity to litigate those issues, and was not subjected to unfair surprise." ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014). *See also*, Directive, ¶ E3.1.10, administrative judges are responsible for ensuring

[2] Prior to scheduling the hearing, Applicant's former counsel requested to withdraw from the matter and I granted said request. *See* Hx. I.

[3] ISCR Case No. 04-11571 at 2 (App. Bd. Feb. 8, 2007) ("By design, the DOHA process encourages Judges to err on the side of initially admitting evidence into the record, and then to consider a party's objections when deciding what, if any, weight to give to that evidence.").

[4] Ex. D is a U.S. State Department document regarding U.S. relations with South Korea. This exhibit was admitted without objection and the facts highlighted by Applicant are accepted for administrative notice. Tr. at 37-38, 68-69.

[5] The record was originally kept open until August 7, 2015. I reopened the record in light of a recent Appeal Board decision to permit the Government to supply copies of the source documents referenced in Ex. 2. *See* Hx. III – V. Department Counsel submitted portions of the source documents, which were marked Hx. VI and admitted into the record without objection.

that DOHA proceedings are conducted "in a fair, timely and orderly manner." Accordingly, to ensure Applicant was provided fair notice of the evidence to be offered against him at hearing and to alleviate the danger of unfair surprise, I issued a prehearing order requiring the parties to exchange documents, to include any request for administrative notice, prior to the hearing. *See* Hearing Exhibit (Hx.) II.[6]

Department Counsel complied with the order and sent Applicant their request for administrative notice, as well as the source documents cited in the request, well in advance of the hearing. Tr. at 32-33. After the hearing, Applicant objected to Department Counsel's request for administrative notice. Specifically, the portion of Ex. 2 seeking administrative notice that the 2000 *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage (Annual Report)* "ranks Korea as one of the seven countries most actively engaging in foreign economic collection and industrial espionage against the United States." And, the adverse inference that South Korea remains an active foreign collector of U.S. information based on a short passage from the 2007 *Annual Report* noting that the major foreign collectors remain "active." *See* Ex. 2 at 1-2.[7] In challenging these proposed facts for administrative notice, Applicant provided updated versions of the *Annual Report*, which were admitted as Ex. G.

Post-hearing, Department Counsel submitted the cover sheet and a page from the appendix of the *2000 Annual Report*. *See* Hx. VI. The appendix provides the responses of less than 12 unnamed U.S. companies, not the findings or pronouncements of a federal department, agency, or official. These company officials provided the adverse "ranking" about South Korea requested for administrative notice. Nowhere else in the *2000 Annual Report* is South Korea identified as engaging in collection activity against the United States. Subsequent *Annual Reports* identify other countries that engaged in such activity, but South Korea is not one of those countries.

After reviewing the source documents and applicable Appeal Board precedent, I am not convinced that the proposed fact and adverse inference Department Counsel wants me to draw regarding South Korea are proper for administrative notice. In short, I am not convinced that these matters are the official position of the U.S. Government regarding South Korea. Thus, they are not suitable for administrative notice.

[6] *See also*, ISCR Case No. 01-26893 n. 2 (App. Bd. Oct. 16, 2002) ("official or administrative notice can be taken of authoritative statements or documents made or issued by the President of the United States or appropriate federal departments, agencies, or officials . . . *Of course, such action should be undertaken with reasonable notice to applicants to avoid undue surprise or unfairness in these proceedings*.") (emphasis added).

[7] Applicant states: "I noticed a false statement on [Ex. 2]. . . . On the bottom paragraph, on page 1 of (Ex. 2), it stated that The Annual Report released in 2008 indicates that the major foreign collectors remain active" which reference "2007 Annual Report to Congress on Foreign Economic Collection and Industrial Espionage" implying that South Korea is one of major foreign collectors. I reviewed Annual Report of 2007 but it only states that "The bulk of the collection activity, however, comes from denizens of a core group of fewer than 10 countries, which include China and Russia", South Korea is not mentioned as a collector. Rather, Appendix B of the same document specify the countries involved espionage in 2007; China, Cuba, India, Indonesia, Iran, Iraq, Pakistan, Suriname, Taiwan, and United Arab Emirates are among the list, but **NOT** South Korea." Ex. E (emphasis in original).

However, I collectively marked as Ex. 3 the four pages from the *2000 and 2007 Annual Reports* that were submitted post-hearing; admitted Ex. 3 into the record; and given it the appropriate weight in assessing the foreign influence security concern. *See* ISCR Case No 03-21434 at 4-5 (App. Bd. Feb. 20, 2007), after upholding judge's decision not to accept the 2000 *Annual Report* for administrative notice for similar reasons noted herein, the Board remanded the case to permit Department Counsel to reoffer the report "for inclusion in the record as an ordinary exhibit . . . [in order] to permit the development of a full and complete record by the parties."

Republic of Korea (South Korea)

After thoroughly considering the evidence and documents admitted into the record, both at hearing and post-hearing, I take administrative notice of the following relevant facts regarding South Korea:

South Korea is a stable, democratic country. The United States and South Korea have been close allies since 1950. U.S.-South Korea ties are based on common values of democracy, human rights, and the rule of law. The United States has maintained military personnel stationed in South Korea in support of the U.S. commitment to help South Korea defend itself against external aggression, primarily from the Democratic People's Republic of Korea (North Korea). In recent years, the U.S.-South Korea alliance has expanded into a deep, comprehensive global partnership. The U.S. State Department recently noted that "People-to-people ties between the United States and South Korea have never been stronger." (Ex. D)

The government of South Korea generally respects the human rights of its citizens. Security forces reported to civilian authorities, which maintained effective control over security forces and those forces did not commit human rights abuses. The U.S. State Department's recent human rights report regarding South Korea reflects:

> The primary human rights problems reported were the government's interpretation of the National Security Law (NSL) and other laws to limit freedom of expression and restrict access to the internet . . . . The law prohibits arbitrary arrest and detention, and the government generally observed these prohibitions. The NSL grants authorities the power to detain, arrest and imprison persons believed to have committed acts intended to endanger the "security of the state."

(Ex. 2, Source Document XIII at 1 and 3)

South Korea has been the unauthorized recipient of export controlled dual-use U.S. technology. (Ex. 2 at 2)

The following information regarding South Korea is not proper for administrative notice.[8] However, it derives from evidence offered by Department Counsel that provides further historical context to the matters accepted for administrative notice regarding South Korea's unauthorized receipt of export controlled U.S. technology. Applicant received notice regarding the Government's intent to offer this evidence, was provided an opportunity to litigate and challenge the evidence, and he did not object to its admission. Although the source document the adverse information is based upon is somewhat dated, Applicant failed to provide any evidence to contradict or rebut it. Consequently, I have considered the following information regarding South Korea in assessing the potential for a heightened risk of foreign influence.

> In 1996, an unofficial U.S. Government publication noted that South Korea had a history of collecting protected U.S. information. (Ex. 2, Source Document I)[9] Also, nearly 20 years ago, a South Korean native who became an American citizen and worked as a computer specialist for the U.S. Navy was convicted of committing espionage for South Korea – he admitted to giving secret DOD and State Department documents to an agent of South Korea. (Ex. 2, Source Document IV at 2)[10]

---

[8] *See generally*, ISCR Case No. 05-11292 (App. Bd. Apr. 12, 2007), noting that DOHA administrative judges may take official notice of uncontroverted facts, such as "Official pronouncements by the President, State Department, Department of Defense, or other appropriate federal agency on matters of national security are equivalent to legislative facts for purposes of DOHA adjudications in that they bind the Judge and are not subject to refutation."

[9] Department Counsel submitted this proposed fact for administrative notice, and cited a 1996 Interagency OPSEC Support Staff *Intelligence Threat Handbook*. In ISCR Case No 03-21434, the Appeal Board held, *inter alia*, an administrative judge's refusal to accept for administrative notice the *Handbook* was proper, because "the document on its face states it is 'an unofficial publication of the U.S. Government. Contents are not necessarily the views of, or endorsed by, any Government agency.' In light of the caveat quoted above, we find no reason to conclude that the Judge abused his discretion in declining to take official notice of this document." *Id*. at 3. Post-hearing, Department Counsel submitted the index and a few pages from the *Handbook*. At the bottom of the index page is the website for the Federation of American Scientist (FAS). The FAS is not a U.S. Government agency. Instead, it is "a non-profit membership organization, with members from the academic, non-profit and government communities" that was originally founded by "many of the Manhattan Project scientists who wanted to prevent nuclear war, and it is one of the longest serving organizations in the world dedicated to reducing nuclear and other catastrophic threats and informing the public debate by providing technically-based research and analysis on these issues." Publically available at https://fas.org/about-fas, and has been included in the record as Hx. VII. An administrative judge may only accept those matters that are proper for administrative notice. Here, I am unconvinced that this proposed fact is the official position of the U.S. Government. Accordingly, it is not proper for administrative notice.

[10] In ISCR Case No. 04-11571 at 3 (App. Bd. Feb. 8, 2007), the Board cautioned DOHA judges on the over reliance on "court decisions evidencing a single, anectodal, incident of espionage on behalf of a foreign country, are not particularly probative as to the overall political and intelligence profile of that country vis-à-vis the United States. Therefore, such documents should be accorded considerably less weight than official executive branch documents and reports describing in broader terms the political and intelligence profile, or the human rights record, of a foreign country." Thus, I have not accepted this matter for administrative notice, but as evidence relevant to the heightened risk analysis.

Findings of Fact

Applicant was born in South Korea. He earned a degree in business administration in South Korea, and immigrated to the United States in 1999. He earned a degree in business information technology from a U.S. school in 2002, and became a U.S. citizen in 2013. A coworker submitted a statement noting Applicant's work ethic, integrity, trustworthiness, and high character. (Tr. at 41-43; Ex. 1; Ax. C)

Applicant's wife is also a naturalized U.S. citizen, and they have two children who were born in the United States. Applicant and his wife have rented their home for the past four years. Applicant has a U.S. retirement account valued at less than $10,000. He and his wife do not have any foreign financial investments, property, or interests. One of Applicant's siblings, who is alleged at SOR 2.e, and all of his wife's family are U.S. citizens living in the United States. (Tr. at 41-47; Ex. 1; Ex. A; Ex. E; Ex. F)

Applicant has worked for his current employer for the past three years. This is his first application for a security clearance. He disclosed on his application his foreign familial connections and travel to South Korea. (Tr. at 44, Ex. 1)

Applicant's mother, father, and three of his siblings are resident-citizens of South Korea. Applicant's father, a retired employee of the South Korean government, receives a pension from the government of South Korea. Applicant sent his mother about $2,000 on her birthday. He traveled to South Korea for his father's 80th birthday about a month before his hearing. He communicates frequently with his parents. His three siblings in South Korea have no connection to the government of South Korea or other foreign country. He communicates with them less frequently than he does his parents. (Tr. at 49-66) His family in South Korea is aware that he is applying for a U.S. security clearance. (Tr. at 51-52)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are eligible for access to classified information "only upon a finding that it is clearly consistent with the national interest" to authorize such access. E.O. 10865, § 2.

When evaluating an applicant's eligibility, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by

the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15.

In resolving the ultimate question regarding an applicant's eligibility, an administrative judge must resolve "[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security." AG ¶ 2(b). Moreover, recognizing the difficulty at times in making suitability determinations and the paramount importance of protecting national security, the Supreme Court has held that "security clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See also*, ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009), "[o]nce a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance."

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. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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." E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

Analysis

Guideline B, Foreign Influence

The foreign influence security concern is explained at 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.[11]

[11] ISCR Case No. 09-07565 at 3 (App. Bd. July 12, 2012) ("As the Supreme Court stated in *Egan*, a clearance adjudication may be based not only upon conduct but also upon circumstances unrelated to

Applicant's sibling identified in SOR 2.e, resides in the United States. Applicant's connection to and contact with this family member does not raise a foreign influence security concern. Thus, SOR 2.e is decided in Applicant's favor.

On the other hand, Applicant's connection to and contact with his close family members in South Korea requires further analysis. An individual is not automatically disqualified from holding a security clearance because of their familial connections in a foreign country. Instead, in assessing an individual's vulnerability to foreign influence, an administrative judge must take into account the foreign government; the intelligence gathering history of that government; the country's human rights record; and other pertinent factors.[12]

South Korea is a staunch ally of the United States, and is a democratic nation governed by the rule of law. However, foreign influence security concerns are not limited to countries hostile to the United States. The Appeal Board has cautioned DOHA administrative judge's against overreliance on "simplistic distinctions between 'friendly' nations and 'hostile' nations when adjudicating cases under Guideline B," because such "ignores the historical reality that (i) relations between nations can shift, sometimes dramatically and unexpectedly; (ii) even friendly nations can have profound disagreements with the United States over matters that they view as important to their vital interests or national security; and (iii) not all cases of espionage against the United States have involved nations that were hostile to the United States." ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002).

Here, Applicant's familial connections in South Korea, as alleged in SOR 2.a – 2.d, raise the foreign influence security concern. Applicant's contacts with his parents, who are financially dependent on South Korea, raise a heightened risk of foreign influence. Furthermore, the information received into the record regarding South Korea, coupled with its unauthorized receipt of export controlled dual-use U.S. technology, raises a reasonable inference that, at least, in the past South Korea was engaged in espionage-related activity targeting the United States.[13] Accordingly, the record evidence establishes the following disqualifying conditions:

> AG ¶ 7(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; and

---

conduct, *such as the foreign residence of an applicant's close relatives*.") (emphasis added) (internal citation omitted).

[12] ISCR Case No. 05-03250 at 4 (App. Bd. Apr. 6, 2007) (setting forth factors an administrative judge must consider in foreign influence cases).

[13] *See also*, ISCR Case No. 14-02496 (App. Bd. May 14, 2015) and ISCR Case No. 11-02842 (App. Bd. Jun. 7, 2012), where Board upheld adverse determinations involving familial connections to another staunch U.S. ally with a past history of espionage-related activity targeting the United States.

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

An individual with close relatives in a foreign country faces a high, but not insurmountable hurdle in mitigating security concerns raised by such foreign familial ties. I have considered all the applicable mitigating conditions, and the following were potentially raised by the evidence:

AG ¶ 8(a): the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.; and

AG ¶ 8(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.

AG ¶ 8(a) is not established. Applicant's parents are financial dependent, in large measure, on the pension his father receives from the government of South Korea. Although South Korea is a democratic country that follows the rule of law, its past history of espionage-related activity targeting protected U.S. information and receipt of export controlled dual-use technology raises concerns that subtle forms of foreign influence or pressure could be brought to bear on Applicant through his parents.

AG ¶ 8(b) is not established. Applicant's ties to the United States are not insignificant. He has lived in the United States for nearly a decade. He resides, works, and has started a family in the United States. However, his relationship with and strong bonds to his family in South Korea, primarily his parents, raises the concern that he could be placed in the unenviable position of having to choose between his loved ones residing in a foreign country and safeguarding classified information. *See* ISCR Case No. 01-26893 at 9-10 (App. Bd. Oct. 16, 2002), "[e]ven good people can pose a security risk because of facts and circumstances not under their control."

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a). I hereby incorporate my Guideline B analysis. Applicant

presented a strong case in mitigation and in support of his request for access to classified information, to include his honesty from the start of the security clearance process. However, this and the other favorable record evidence are insufficient to outweigh the security concern posed by his connections to and contact with his close family members in South Korea. Consequently, I resolve the foreign influence security concerns raised by Applicant's familial connections to South Korea in favor of national security. AG ¶ 2(b).

At the same time, I note that this adverse finding is "not a comment on Applicant's patriotism but merely an acknowledgment that people may act in unpredictable ways when faced with choices that could be important to a loved-one, such as a family member." ISCR Case No. 08-10025 at 4 (App. Bd. Nov. 3, 2009).

Formal Findings

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

Paragraph 1, Guideline C (Foreign Preference):	WITHDRAWN
Subparagraph 1.a:	Withdrawn
Paragraph 2, Guideline B (Foreign Influence):	AGAINST APPLICANT
Subparagraphs 2.a – 2.d:	Against Applicant
Subparagraph 2.e:	For Applicant

Conclusion

In light of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant access to classified information. Applicant's request for a security clearance is denied.

____
Francisco Mendez
Administrative Judge