DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 15-00299
	)	
	)	
Applicant for Security Clearance	)	

Appearances

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

04/28/2016

Decision

LYNCH, Noreen A., Administrative Judge:

On July 27, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) listing security concerns arising under Guideline C (Foreign Preference) and Guideline B (Foreign Influence). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), implemented in September 2006.

Applicant timely answered the SOR and requested a review based on the written record in lieu of a hearing. Department Counsel submitted a File of Relevant Material (FORM), dated November 24, 2015.[1] Applicant received the FORM on December 2, 2015. On December 18, 2015, responded to the FORM. Applicant submitted documents in response to the FORM, which were admitted without objection. The case

[1]The Government submitted two items for the record.

was assigned to me on March 3, 2016. Based on a review of the pleadings and exhibits, eligibility for access to classified information is granted.

Procedural Issue

Department Counsel and Applicant did not present materials for administrative notice regarding South Africa. I have taken administrative notice of certain facts regarding South Africa from U.S. Department of State documents, which is Exhibit I and entered into the record.

Findings of Fact

In his answer to the SOR, Applicant denied the SOR allegation under Guideline C, but admitted two of the three allegations under Guideline B with explanations.

Applicant is 56 years old. He was born in South Africa. He was conscripted and served in the South African Army from 1985 until 1990. In 1998, he came to the United States. He became a naturalized U.S. citizen in 2008. He received his undergraduate and graduate degrees in South Africa. He is single. He completed a security clearance application in 2014. He has been employed with his current employer since 2008 and has held a security clearance since 2009. He is a senior engineer for the company. He has worked as a contractor since 2005. (Item 2)

FOREIGN PREFERENCE

The SOR alleges under Guideline C that Applicant maintained his South African citizenship due to his foreign financial assets. Applicant denies this allegation. According to South African regulations, South African citizenship is automatically lost upon becoming a U.S. citizen, unless prior permission to become a dual citizen has been granted. Applicant provided documentation to support this claim. In fact, he has taken another step by completing an Application for Renunciation of South African citizenship and forwarding it to the Home Affairs Office in South Africa. The certified response from the Home Affairs Office confirmed that Applicant automatically ceased to be a citizen, when he acquired U.S. citizenship. (AX A)

Although not mentioned in the SOR, Applicant surrendered his South African passport to his Facility Security Officer (FSO) in August 2009. His FSO retained control of the passport until it was forwarded to the South African Embassy in December 2015, along with his official renunciation letter to the Office of Personnel Management. He provided a copy of the letter. (AX C)

FOREIGN INFLUENCE

The SOR alleges under paragraph 1.a that Applicant's sister is a citizen and resident of South Africa, under paragraph 1.b that Applicant owns South African bank accounts, stocks, and mutual funds worth an estimated $90,000, and under paragraph 1.c that Applicant receives a pension from South Africa worth an estimated $82,000.

Applicant's sister lives in South Africa and is married. He maintains contact with her by email and telephone. If he visits South Africa, he sees her. He last saw her in 2014. She has no connection to the South African Government. Applicant's parents are deceased. His father died in late 2013. He has other sisters who live in Canada. (GX 2)

As to allegation 1.b, Applicant admits that he owns South African Bank accounts, stocks and mutual funds worth an estimated total of $90,000. In his Answer to the SOR (Item 1), he noted and provided documentation that South Africa imposes stringent capital controls. Retirement Annuities cannot normally be transferred out of South Africa. The process for performing the transfer of assets (excluding inheritances) is detailed in his attachment. There is a form to actually transfer money once permission is granted. (AX C) The South African Bank uses the term "formal emigration" for the process of winding up one's financial affairs and then making it possible to transfer assets out of South Africa. This is not related to citizenship and applies to any former resident.

Applicant completed the required form and submitted it on September 15, 2015. He has now received the "tax clearance" certificate. (AX B) The liquidation of available assets is a taxable event, which increases the complexity and time to complete the step. He noted the mutual funds were liquidated in March, April, and May 2015 and put in his South African bank account. One fund that matured in 2014 was liquidated and put into his South African bank account.

As to allegation 1.c., Applicant denies receiving a pension from South Africa. He states the only income generated by his South African assets are dividends and interest. That income is retained in South Africa and is approximately $60 a month. He stated that he did have a pension preservation fund that contained a pension from his first employer, but that fund did not provide income and the complete balance has been cashed out into his South African bank account. Finally, he admitted that he has four retirement annuities, but none have been annuitized, and they do not provide any income. One retirement annuity matured in April 2015 and is in a holding account. It does not provide income. (AX B) He provided documentation that states South Africa imposes stringent exchange controls, both limiting the amount that can be transferred out of the country and requiring Reserve Bank authorization for each transaction. Due to the restrictions, he has had limited ability to repatriate all his assets to the United States. (AX C)

In Applicant's response to FORM, he provided a tax clearance certificate from the South African Revenue Services (SARS). The tax certificate is then sent to a local bank representative to request authorization to export the assets. The local bank then exports the non-inheritance portion of the bank account. However, the estate has not been completed. He can then request that his retirement accounts be liquidated into his bank account. Each transfer to the United States requires permission, with associated costs and delay. He needs about six transfers to move all his assets. Applicant noted that the South African assets are not particularly substantial, being less than 15% of his net worth. He sold his home in South Africa when he left the country and purchased a home in the United States. (Item 2) He has paid state and local taxes in the United States. He

provided a partial list of his investment portfolio in the United States. (Attachment 14) The amount of funds represented is about $1,300,000.

ADMINISTRATIVE NOTICE

The United States established diplomatic relations with South Africa in 1929 following the United Kingdom's recognition of South Africa's domestic and external autonomy within the British Empire. Until the 1990's, the South African Government followed a policy of white domination over the majority black population, and racial separation (apartheid). From the 1970's through the early 1990's, U.S.-South African relations were severely affected by South Africa's racial policies.

Since the end of apartheid and with the advent of democracy in 1994, the two countries have enjoyed a bilateral relationship. South Africa is a strategic partner of the United States, particularly in the areas of health, security, and trade. The two countries share development objectives throughout Africa, and South Africa plays a key economic and political role on the African continent. The United States seeks opportunities for increased U.S.-South African cooperation on regional and international issues. In 2010, the United States and South Africa launched a strategic dialogue aimed at deepening cooperation on a range of issues of mutual interest and concern.

South Africa has made remarkable strides toward building a prosperous and peaceful democracy since 1994, but faces many challenges, including high unemployment, HIV/AIDS, crime, and corruption. U.S. assistance focuses on improving healthcare, increasing education standards and teacher training, building capacity in agriculture to address regional food security, and developing clean energy to adapt to global climate changes. Improving the capacity of South Africa's security force will enable it to take a lead role in regional stability and security efforts.

U.S.-South African economic and trade relations are strong. South Africa is eligible for preferential trade benefits under the African Growth and Opportunity Act. The United States and South Africa have a bilateral tax treaty eliminating double taxation. A bilateral Trade and Investment Framework Agreement is in place.[2]

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known

[2]U.S. Department of State - U.S. Relations with South Africa, Fact Sheet, dated October 7, 2015.

as the "whole-person concept." An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

The U.S. Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ."[3] The burden of proof is something less than a preponderance of evidence.[4] The ultimate burden of persuasion is on the applicant.[5]

A person seeking access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. This relationship transcends normal duty hours and endures throughout off-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 the applicant may deliberately or inadvertently fail to protect classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."[6] "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[7] Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.[8] The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant's character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

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[3] *See also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

[4] *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

[5] ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

[6] *See also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

[7] ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

[8] *Id*.

Analysis

Guideline C, Foreign Preference

Under AG ¶ 9 the security concern involving foreign preference arises, "[W]hen 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."

AG ¶ 10 describes conditions that could raise a security concern and may be disqualifying:

> (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. This includes but is not limited to:
>
> > (1) possession of a current foreign passport;
> >
> > (2) military service or a willingness to bear arms for a foreign country;
> >
> > (3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country;
> >
> > (4) residence in a foreign country to meet citizenship requirements;
> >
> > (5) using foreign citizenship to protect financial. or business interests in another country;
> >
> > (6) seeking or holding political office in a foreign country; and
> >
> > (7) voting in a foreign election;
>
> (b) action to acquire or obtain recognition of a foreign citizenship by an American citizen;
>
> (c) performing or attempting to perform duties, or otherwise acting, so as to serve the interests of a foreign person, group, organization, or government in conflict with the national security interest; and,
>
> (d) any statement or action that shows allegiance to a country other than the United States: for example, declaration of intent to renounce United States citizenship; renunciation of United States citizenship.

SOR ¶ 2.a alleges Applicant was using his South African citizenship to protect his financial interests. Applicant has substantial South African financial interests. AG ¶ 10(a)(5) applies.

AG ¶ 11 provides conditions that could mitigate security concerns:

> (a) dual citizenship is based solely on parents' citizenship or birth in a foreign country;
>
> (b) the individual has expressed a willingness to renounce dual citizenship;
>
> (c) 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;
>
> (d) use of a foreign passport is approved by the cognizant security authority;
>
> (e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated; and
>
> (f) the vote in a foreign election was encouraged by the United States Government.

Applicant became a naturalized U.S. citizen in 2008. He surrendered his South African passport to his FSO in 2009. He ceased to be a citizen of South Africa when he became a U.S. citizen. His former country does not recognize dual citizenship. He officially renounced his South African citizenship. AG ¶ 11(b) applies. Applicant has mitigated the security concerns under the foreign preference guideline.

Guideline B, Foreign Influence

The security concern under Guideline B is set out in AG ¶ 6 as follows:

> 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.

A disqualifying condition may be raised by "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." AG ¶ 7(a). A disqualifying condition also may be raised by "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." AG ¶ 7(b). In addition, another disqualifying condition may exist when "a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign operated business, which could subject the individual to heightened risk of foreign influence or exploitation." AG ¶ 7(e).

Applicant's sister is a citizen and resident of South Africa. Applicant maintains some contact with her by phone, and he visits her when he is in South Africa. She has no connection to a foreign government. Based on this evidence, AG ¶ 7(a) and 7(b) are raised. Applicant has substantial property interests in South Africa. AG ¶ 7(e) is also raised.

Since the Government produced evidence to raise disqualifying conditions in AG ¶¶ 7(a), (b), and (e) the burden shifted to Applicant to produce evidence 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).

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. *See* ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Nevertheless, 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 operations against the United States, or the foreign country is associated with a risk of terrorism.

While there is no evidence that intelligence operatives from South Africa seek or have sought classified or economic information from or through Applicant, or his sister living in South Africa, nevertheless, it is not possible to rule out such a possibility in the future. International terrorist groups are known to conduct intelligence activities as effectively as capable state intelligence services. Applicant's relationship with his sister creates a potential conflict of interest because these relationships are sufficiently close to raise a security concern.

Security concerns under this guideline can be mitigated by showing that "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." AG ¶ 8(a). The totality of an applicant's family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003). Similarly, AG ¶ 8(b) can mitigate concerns when "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(c) can mitigate if "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." AG ¶ 8(f) can mitigate "if the value or routine nature of the foreign business, financial, 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."

AG ¶ 8(b) applies. A key factor in the AG ¶ 8(b) analysis is Applicant's "deep and longstanding relationships and loyalties in the U.S." Applicant has been in the United States since 1998. He has been employed since 2005 with the same company. He has held a security clearance. He is praised by his employer. He is a naturalized U.S. citizen. He has chosen a life in the United States. His financial, professional, and personal ties are in the United States. Applicant took an oath and swore allegiance to the United States when he became a naturalized U.S. citizen. He manifested his patriotism, loyalty, and fidelity to the United States over all other countries.

As to the financial interests, Applicant has sold his home in South Africa and purchased a home in the United States. He has a professional position as a senior engineer. He started the process of liquidating the retirement funds and other accounts. He produced information to show that this is not a short process. He has renounced his South African citizenship and he has started the entire process of having his money transferred out of South Africa. However, South Africa imposes strict capital controls. He is now in possession of a tax clearance certificate which will permit the next step in the procedure to take place. He is doing all that he can in good-faith to complete the process, which could take three to six months. He admits due to inheritance issues, there have been some delays.

Applicant's relationship with the United States must be weighed against the potential conflict of interest created by his relationship with his sister in the South Africa. Moreover, there is no evidence, however, that terrorists, criminals, the South African government or those conducting espionage have approached or threatened Applicant, or his sister. As such, there is a reduced possibility that either Applicant or his sister living in South Africa would be specifically selected as targets for improper coercion or exploitation.

Applicant's property interests in the United States exceed $1million and his property interests in South Africa are about $100,000. His employment in the United States also has significant economic value. His financial interests are more than ten times greater than his South African interests. AG ¶ 7(f) applies.

In sum, Applicant has renounced his South African citizenship officially. He is not a dual citizen once he became a naturalized U.S. citizen. He surrendered his passport to his FSO. He is a senior engineer working with the same company since 2005. He has mitigated the foreign influence concerns. Applicant's connections to the United States are strong. He is committed to his professional life in the United States. There is substantial mitigation in this case. He has worked with the investigative process and secured all documents to begin to transfer his assets from South Africa to the United States. It is not a quick process. He is recommended by his employer. He can be expected to resolve any conflict of interest in favor of the United States. Foreign influence security concerns are mitigated under Guideline B. Even if security concerns are not mitigated under Guideline B, they are mitigated under the whole-person concept, *infra.*

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 an 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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the whole-person factors. Applicant is 56 years old. He came to the United States in 1998 after his professional education to work in the United States. He has one sister in South Africa. He has relinquished his South African passport and renounced his South African citizenship officially. He has provided sufficient documentation that he has put in process the plan for transferring his assets to the United States. He has significant monetary investments

in the United States. For all the foregoing reasons, I find that Applicant mitigated the foreign preference and foreign influence concerns.

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 :	FOR APPLICANT
Subparagraphs 1.a-1c:	For Applicant
Paragraph 2, Guideline C :	FOR APPLICANT
Subparagraph 2.a:	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 a security clearance. Clearance is granted.

NOREEN A. LYNCH.
Administrative Judge