DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 07-13940
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: *Pro Se*

June 3, 2008

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,[1] the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on January 28, 2008. The SOR is equivalent to an administrative complaint and it details the factual basis for the action. The SOR alleges security concerns under Guideline C for foreign preference. For the reasons discussed below, this case is decided against Applicant.

In addition to the Executive Order and Directive, this case is brought under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005. The Revised Guidelines were then modified by the Defense Department, effective

[1] Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended, and DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive).

September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive. They apply to all adjudications and other determinations where an SOR has been issued on September 1, 2006, or thereafter.[2] The Directive is pending revision or amendment. The Revised Guidelines apply here because the SOR is dated after the effective date.

Applicant's Answer to the SOR was signed by him on February 5, 2008, and he indicated he did not wish to have a hearing. His reply or answer consisted of his handwritten responses on the SOR. Accordingly, the case will be decided based on the written record in lieu of a hearing.

On March 25, 2008, the government submitted its written case consisting of all relevant and material information that could be adduced at a hearing. This so-called file of relevant material (FORM)[3] was mailed to Applicant on March 31st and it was received by him on April 8th. He did not reply to the FORM within the allowed 30-day period. The case was assigned to me on May 27, 2008.

Procedural and Evidentiary Rulings

First, in its FORM, the government moved to amend SOR as follows: (1) to add ¶ 2 setting forth a security concern under Guideline B for foreign influence; (2) to add ¶ 3 setting forth a security concern under Guideline E for personal conduct; (3) to delete ¶ 1.c and replace it as ¶ 2.a under Guideline B; and (4) to delete ¶ 1.b and replace it as ¶ 3.a under Guideline E. The motion appears to be in order because it conforms to the evidence and for other good cause (to allege two additional security guidelines). As Applicant did not reply to the FORM, he likewise did not reply to the motion. Accordingly, the motion to amend is granted. For clarity, the factual allegations in SOR ¶¶ 1.a, 2.a, and 3.a will be described in the findings of fact.

Second, the government included in its FORM as an item of documentary evidence an account of an interview of Applicant (Exhibit 5). The interview was part of a report of investigation (ROI) prepared by the U.S. Office of Personnel Management. The ROI indicates that the Applicant's interview was an unsworn declaration made in April 2007.

The general rule is that a background ROI may not be received and considered by an administrative judge.[4] The exception to the general rule is "[a]n ROI may be

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[2] *See* Memorandum from the Under Secretary of Defense for Intelligence, dated August 30, 2006, Subject: Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005).

[3] The government's brief includes several attachments referred to as items. They are referred to as exhibits herein.

[4] *See* Directive, Enclosure 3, ¶ E3.1.20.

received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence."[5]

In past cases, the government included an ROI in its FORM without an attempt to authenticate it or offer some other method of getting the evidence to the trier of fact (for example, stipulation). The ROI was excluded from consideration in those cases. Here, the government authenticated the ROI through Applicant. In particular, in about December 2007, it issued an interrogatory asking Applicant to review the ROI and state if it accurately reflected the information he provided during the interview (Exhibit 5). Applicant indicated it did, and he did not provide any additional information about the interview. Accordingly, without objections, the ROI is admitted as a business record or a public record or both and it will be considered.

Third, in its FORM, the government requested that official or administrative notice be taken of information about Mexico and referred to two documents from the State Department (Exhibit 6–background note and Exhibit 7–travel warning).[6] The request did not specify the particular facts to be noticed. Both documents are voluminous (12 and 13 pages) and address diverse and multiple subjects. It is not the role of an administrative judge to review these documents and select the particular facts that are relevant to the government's case. Accordingly, the request to take official or administrative notice is denied due to its lack of specificity.

Findings of Fact

Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 47-year-old employee who is a native-born U.S. citizen. He has worked for his current employer since April 2002. His current position or job title is tech trainer. His employment history includes active duty military service as well as service in a state national guard.

Applicant completed a security-clearance application in January 2007 (Exhibit 4). In it, he reported that he has lived in a border town in Mexico since about April 2003, and that he lives there due to the low cost of living (Exhibit 4 at 2, 9). He crosses the U.S.–Mexico border daily whenever he commutes to and from work.

SOR ¶ 1.a alleges that Applicant has resided in Mexico since about April 2003 despite that he is a U.S. citizen employed in the U.S. Applicant admits this allegation in his Answer. In addition, it is established by the information in his security-clearance application noted above.

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[5] *Id*.

[6] FORM at 5.

SOR ¶ 2.a alleges that Applicant currently resides with a girlfriend and her son, both of whom are Mexican citizens, in Mexico. Applicant admits this allegation in his Answer. In addition, it is established by the information in his security-clearance application and the summary of his interview (Exhibit 5). He lives with his girlfriend, an unemployed housewife, and her son. He has weekly contact with his girlfriend's immediate family, and Applicant has contact with the girlfriend's ex-husband whenever the ex-husband visits his son.

SOR ¶ 3.a alleges that during the April 2007 interview with an authorized investigator for the Defense Department, Applicant stated that he does not have Mexican residency. The allegation does not assert that this statement is false or misleading, but that is the implication based on reading the FORM in its entirety. Applicant denies this allegation in his Answer. He explained that he made it clear to the investigator that he lived in Mexico, but has a post office box in the U.S. According to the summary of his interview, Applicant stated that he does not have Mexican citizenship or residency (Exhibit 5 at 2). As noted above, Applicant disclosed the fact that he has lived in Mexico since 2003 in his security-clearance application.

Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. To start, no one has a right to a security clearance.[7] As noted by the Supreme Court in 1988 in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[8] A favorable decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.[9] An unfavorable decision: (1) denies any application; (2) revokes any existing security clearance; and (3) prevents access to classified information at any level.[10] Under *Egan,* Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[11] The government has the burden of presenting

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[7] *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) ("It is likewise plain that there is no 'right' to a security clearance, so that full-scale due process standards do not apply to cases such as Duane's.").

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

[9] Directive, ¶ 3.2.

[10] Directive, ¶ 3.2.

[11] ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

evidence to establish facts alleged in the SOR that have been controverted.[12] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[13] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[14] In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.[15] The agency appellate authority has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[16]

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.[17] Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

Analysis

The foreign influence and foreign preference guidelines will be addressed together because they are factually related. Under Guideline B for foreign influence,[18] a security concern may arise due to foreign contacts and interests "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."[19] And under Guideline

[12] Directive, Enclosure 3, ¶ E3.1.14.

[13] Directive, Enclosure 3, ¶ E3.1.15.

[14] Directive, Enclosure 3, ¶ E3.1.15.

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

[16] ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

[17] Executive Order 10865, § 7.

[18] Revised Guidelines at 5–6 (setting forth the security concern and the disqualifying and mitigating conditions).

[19] Revised Guidelines at 5.

C for foreign preference,[20] a security concern may arise "[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."[21]

For foreign influence, there are two disqualifying conditions[22] under Guideline B that could raise a security concern and may be disqualifying in this case:

> DC 1. [C]ontact with a foreign family member, business, or professional associate, friend, or other person who is a citizen of or a resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion; and
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> DC 4. [S]haring 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.

Both of these DC apply based on the following facts: (1) Applicant lives in Mexico; (2) Applicant lives with a girlfriend who is a Mexican citizen and resident; and (3) Applicant has contact with Mexican border officials whenever he crosses the border.

For foreign preference, none of the four specific DC under Guideline C apply to the facts of this case. But the fact that Applicant has chosen to live in Mexico with a Mexican girlfriend falls within the concern expressed under Guideline C because these actions indicate a preference for Mexico over the United States. Whatever Applicant's motivation for living in Mexico may be, his actions nonetheless raise a security concern.

Both guidelines contain conditions that may mitigate the security concerns.[23] I reviewed the MC under each guideline and conclude none apply in Applicant's favor. His ties and connections to Mexico are substantial and ongoing, and there is no indication things will change in the future. The evidence shows this is a case of divided interests because Applicant has, both literally and figuratively, one foot in Mexico and one foot in the United States. This is not a case where an applicant is living in a foreign country as a condition of his employment. Instead, Applicant has decided to live in Mexico for his own reasons. Although his situation is not illegal or immoral, his ties and connections to Mexico are not clearly consistent with the national interest of the U.S. Accordingly, Guidelines B and C are decided against Applicant.

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[20] Revised Guidelines at 7–8 (setting forth the security concern and the disqualifying and mitigating conditions).

[21] Revised Guidelines at 7.

[22] Revised Guidelines at 5.

[23] Revised Guidelines at 6–8.

Personal conduct under Guideline E[24] includes issues of false statements and credible adverse information that may not be enough to support action under any other guideline. In particular, a security concern may arise due to:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [that may] raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.[25]

A statement is false when it is made deliberately (knowingly and willfully). An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

In dispute here is the truthfulness of Applicant's statement about whether or not he has residency in Mexico when he said he did not in his April 2007 interview. This allegation is supported by the summary of his interview (Exhibit 5 at 2). But Applicant denies this allegation and explained that he made his position clear to the investigator. Resolving this dispute is hampered by the summarized nature of Applicant's interview (as compared with a verbatim sworn statement) and the lack of a hearing where this matter could have explored in detail. In addition, the evidence is crystal clear that Applicant disclosed that he has lived in Mexico since 2003 when he completed his security-clearance application, which predates the interview. It is difficult to imagine how the government could have been mislead or deceived in light of his disclosure. Based on this skimpy record, the evidence is insufficient to establish that Applicant deliberately made a false or misleading statement during the April 2007 interview. Accordingly, Guideline E is decided for Applicant.

To conclude, Applicant did not present sufficient evidence to rebut, explain, extenuate, or mitigate the security concerns. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, the whole-person concept (including Applicant's military service) was given due consideration and that analysis does not support a favorable decision. This case is decided against Applicant.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

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[24] Revised Guidelines at 10–12 (setting forth the security concern and the disqualifying and mitigating conditions).

[25] Revised Guidelines at 10.

Paragraph 1, Guideline C:	Against Applicant
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline B:	Against Applicant
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	For Applicant
Subparagraph 3.a:	For Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Michael H. Leonard
Administrative Judge