DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 10-05150
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

08/28/2012

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Decision

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LYNCH, Noreen A., Administrative Judge:

This case involves security concerns raised under Guideline B (Foreign Influence) and Guideline C (Foreign Preference). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on November 30, 2009. On May 23, 2012, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline B and Guideline C. DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR, and requested a hearing before an administrative judge. The case was assigned to me on July 20, 2012. DOHA issued a notice of hearing

on July 26, 2012, scheduling the hearing for August 7, 2012. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified. I kept the record open for him to submit documentation concerning his passport. He timely forwarded a document which is marked as Applicant's Exhibit (AX) A, and was admitted without objection. DOHA received the transcript (Tr.) on August 14, 2012.

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegations in the SOR under Guideline B (Foreign Influence) and Guideline C (Foreign Preference) with explanations, except for allegation SOR ¶ 1.d. which he denied. He provided additional information to support his case. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Foreign Influence

Applicant is a native of Poland. He received his undergraduate degree in Poland. While in Poland, he served as a teaching assistant in a university. (Tr. 29) He came to the United States in 1992, after obtaining a graduate degree, to work as a computer programmer. His professional life in the United States has been in information technology (IT). He has been in his current position since 1997. He is currently the Director of IT for the company. Applicant has not held a security clearance. He became a naturalized U.S. citizen in February 2000. (GX 1) Applicant is married to a U.S. citizen and has two children who are U.S. citizens.

Applicant and his wife own a home in the United States which is currently valued at approximately $900,000. He has retirement savings which, when combined with his wife's would be around $300,000. (Tr. 28) Applicant earns approximately $208,000 a year. He does not have a bank account in Poland.

Applicant's father, who is deceased, was a dual citizen of the United States and Poland. He divorced Applicant's mother when Applicant was three months old. He remarried. Applicant's step-mother is a dual citizen of Poland and the United States who resides in the United States and Poland. Applicant's father lived in the United States for almost 25 years. Applicant speaks to his step-mother about once a week.

Applicant's mother is a citizen and resident of Poland. She is 72-years old and is not in good health. (Tr. 12) She is a retired architect who lives on a pension. She has no real property and small savings. Applicant did not talk to his mother for almost fifteen years after arriving in the United States. His mother wanted Applicant to return to Poland after he received some professional expertise in the United States. He is now able to communicate with her and he values the relationship. (Tr. 11) He saw her in 2010, when he returned to Poland for his father's funeral. He has frequent contact with her through (Skype) telephone service. He estimates that he talks with her once a week. (GE 2) He acknowledged that he provides his mother with $1,000 a year. (Tr. 33)

Applicant has a half-sister who is a citizen and resident of Poland. She is self-employed as an English tutor. She is the daughter from Applicant's father's second marriage. (GX 2) Applicant has not seen her since 2010, when he went to Poland for his father's funeral. He speaks to her on the telephone through Skype on average once a month. She does not know the nature of Applicant's work. Applicant's brother-in-law is also a citizen and resident of Poland. How owns a private business. Applicant has rare contact with him. He only sees him if visiting Poland. (GX 2)

Applicant has three uncles who are citizens and residents of Poland. They are retired. He does not maintain regular contact with them. He might speak to them once a year by phone. In 2010, he saw them in Poland. However, they did not attend his father's funeral. (Tr. 40; GE 2)

Applicant has three remaining aunts who are citizens and residents of Poland. One aunt died in April 2012. He has rare occasion to speak to them or see them. He last saw them in 2010 at his father's funeral. (GX 2)

Applicant disclosed in his security clearance application and elaborated at the hearing that he has an inheritance from his father. The exact value has not been established as the assets have not been liquidated. He believes that the estimated value is between $25,000 and $30,000. Applicant acquired the right to one-sixth of his father's estate in Poland based on a decision made in July 2011 by a Polish court. He has not received any money to date. (Tr. 27) He has no other financial interests in Poland. He does not receive any benefits from Poland.

Foreign Preference

Applicant was born and raised in Poland and he was a Polish citizen. He came to the United States in 1992 and became a naturalized U.S. citizen in 2000. Applicant explained that he has maintained a dual citizenship for family reasons. He explained that his relationship with his mother was strained for many years since he came to the United States. He now has a good relationship with his mother. Applicant believed that his mother would be upset with him if he gave up his Polish passport. He understood that if he gave up his Polish passport, he would be renouncing his Polish citizenship. (Tr. 11) He was credible when he acknowledged that he believed it was not a separate concern from surrendering his Polish passport. (Tr. 21)

Applicant applied for, and was issued, a Polish passport on January 13, 2000. This was prior to Applicant's naturalization as a U.S. citizen. He renewed his Polish passport on April 30, 2010. At the hearing, Applicant held a valid Polish passport, which does not expire until April 30, 2020. Before the hearing, he did not wish to surrender or destroy his Polish passport. (GX 3)

Applicant traveled to Poland in 2002 and 2003, after becoming a U.S. citizen. He brought both his Polish and his U.S. passports on the trips. He presented his U.S.

passport to the Polish border police in 2002, but was requested to show his Polish passport. In 2003, he carried both passports but used his Polish passport for convenience. He explained that in 2002, just after becoming a U.S. citizen, he was unfamiliar with the implications of his actions. Applicant was sincere when he stated that his U.S. citizenship did not come with a manual or guidelines. He did not consider any involvement with national security. He did not think using his Polish passport was inappropriate or would be viewed in a negative manner. (Tr. 13) Applicant had a Polish government ID (equivalent to a Social Security card) which he has had since his arrival in the United States.

When Department Counsel explained to Applicant that by surrendering his Polish passport, he was not renouncing his Polish citizenship, he decided to surrender his Polish passport the next day to his security officer. He sent a post-hearing submission that confirms that he did surrender the passport to the security officer. (AX A)

Applicant sincerely and credibly states that as far as his allegiance, he can only reaffirm that his wife and two daughters are natural-born Americans. They do not speak Polish, and would not consider moving to Poland or any other country as an alternative to living in the United States. He has no intention of living in Poland. Applicant was candid and sincere when he stated that acting against the interest of the United States would be acting against his family and the future of his daughters. For that reason, his allegiance to the United States is clear and unequivocal.

Policies

"[N]o 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 applicants 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 AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines 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 made "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. Thus, a decision to deny a security clearance 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 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).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[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

Guideline B, Foreign Influence

The security concern under this guideline is set out in AG ¶ 6:

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

One disqualifying condition under this guideline is relevant. A disqualifying condition 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).

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, "even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security." ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Finally, friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. Nevertheless, the nature of a nation's government, its relationship with the U.S., 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 U.S. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. *See generally* ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision to grant clearance where administrative judge did not consider terrorist activity in area where family members resided). No evidence was admitted concerning Poland's government, espionage by Poland against the United States, or terrorism in Poland.

Applicant has lived and worked in the United States since 1992. He is a naturalized U.S. citizen. Applicant's wife and children are U.S. citizens.

Applicant's mother, step-mother, uncles, aunts and his half-sister live in Poland. "[T]here is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse." ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at * 8 (App. Bd. Feb. 20, 2002). Applicant admitted his close relationship with his mother and step-mother.

After considering the totality of Applicant's family ties to Poland as well as each individual tie, I conclude that Applicant's family ties are sufficient to raise an issue of a potential conflict of interest. Applicant sends his mother money and talks to her on the phone. He also talks to his step-mother and half-sister. He saw his family in 2010 for his father's funeral. Based on all these circumstances, I conclude that AG ¶ 7(b) is raised.

AG ¶ 7(e) "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 a heightened risk of foreign influence or exploitation" is also raised. Applicant has acquired a one-sixth right of inheritance based on his father's death. The amount is approximately $25,000.

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).

Security concerns under this guideline can be mitigated by showing "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(b).

Security concerns under this guideline can be mitigated by showing "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." AG ¶ 8(f) is raised in mitigation.

Applicant came to the United States in 1992. He married a U.S. citizen. He became a U.S. naturalized citizen. He has two children who are U.S. citizens. He has significant professional and personal ties to the United States. There is no indication that Applicant's relatives are in positions or are involved in activities that would place Applicant in a position of having to choose between his family living in Poland and those of the United States. In light of Applicant's close ties to the United States, it is unlikely that he would not choose his relatives in Poland over his life in the United States. I find mitigating condition AG ¶ 8(a) and (b) apply.

Foreign Preference

When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decision that are harmful to the interests of the United States.

Dual citizenship standing alone is not sufficient to warrant an adverse security clearance decision. ISCR Case No. 99-0454 at 5, 2000 WL 1805219 (App. Bd. Oct. 17, 2000). Under Guideline C, "the issue is not whether an applicant is a dual national, but rather whether an applicant shows a preference for a foreign country through actions." ISCR Case NO. 98-0252 at 5 (App. Bd. Sep. 15, 1999).

A disqualifying condition may arise from "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." AG ¶ 10(a)(1). As of the date of the hearing, Applicant held a valid Polish passport.

Security concerns under this guideline may be mitigated by evidence that "dual citizenship is based solely on parents' citizenship or birth in a foreign country." AG ¶ 11(a) Applicant initiated renewal of his Polish passport in April 2010. He believed this was a symbolic gesture for his mother. He did not understand the implications. Applicant surrendered his Polish passport to his security officer. He provided documentation in a post-hearing submission. He receives mitigation under AG 11(e) "the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated." He has mitigated the foreign preference security concerns.

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 the applicant's conduct and all relevant circumstances. An 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 Guidelines B and C in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a naturalized U.S. citizen who has lived in the United States since 1992. He and his wife and children reside in the United States, and are U.S. citizens. He was articulate, candid, sincere, and credible at the hearing. Applicant's home is in the United States. Applicant has been successful in his work. His current employer recommends him for his security clearance.

Applicant chose to leave his home and pursue his career in the United States. He is firmly established in the United States. The overwhelming majority of his assets are

located in the United States. His small inheritance from his father's estate does not outweigh his substantial financial ties to the United States. Although Applicant has some familial ties to Poland, I am convinced that it is likely he will resolve any issues in favor of the United States.

There is no evidence any of the individuals at issue are involved with, or under scrutiny, by interests antithetical to the United States. His family members in Poland do not know the specifics of his work.

Regarding Applicant's life in the United States, he is an American citizen, with a stable family, social, and professional life. His life is focused here. He has now surrendered his Polish passport. He understands that by doing so, he does not automatically renounce his dual citizenship. His concern was about his mother. He has loyalty to the United States. His professional career has blossomed in the United States. There is no evidence indicating that he may be manipulated or induced to help a foreign power or interest. He credibly stated he would report any attempts to influence him to security. In light of these facts and the country at issue, I find that Applicant successfully mitigated foreign influence concerns, as well as foreign preference concerns.

After weighing the disqualifying and mitigating conditions under Guideline B, and Guideline C, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on foreign influence and foreign preference. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegation in the SOR:

Paragraph 1, Guideline C:	FOR APPLICANT
Subparagraphs 1.a-1e:	For Applicant
Paragraph 2, Guideline B:	FOR APPLICANT
Subparagraphs 2.a-2.g:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Noreen A. Lynch
Administrative Judge