DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 10-02655
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Julie R. Mendez, Esquire, Department Counsel
For Applicant: Richard Murray, Esquire, Ian Cronouge, Esquire

07/03/2013

Decision

METZ, John Grattan, Jr., Administrative Judge:

Based on the record in this case,[1] Applicant's clearance is denied.

On 8 August 2012, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E, (Personal Conduct), B (Foreign Influence), and K (Handling Protected Information).[2] Applicant timely answered, requesting a hearing before the Defense Office of Hearings and Appeals (DOHA). DOHA assigned the case to me 11 January 2013, and I convened a hearing 27 February 2013. DOHA received the transcript (Tr.) 7 March 2013.

[1]Consisting of the transcript (Tr.), Government exhibits (GE) 1-14 and 17-20, hearing exhibits (HE) I-IV and Applicant exhibits (AE) A-G and I-N. GE 17 was admitted for the sole purpose of identifying GE 1-14 for the record and dealing with their admissibility. AE N was admitted for the sole purpose of identifying AE A-G and I-M for the record and dealing with their admissibility. AE I is the same as GE 5.

[2]DoD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on 1 September 2006.

Findings of Fact

Applicant denied the Guideline E allegations, admitted the Guideline B allegations, and denied the Guideline K allegations. He is the 40-year-old president of his own company since June 2006, employed as a defense contractor. He previously worked as an independent contractor for a defense contractor from January 2002 to June 2006. He seeks to retain the clearance he obtained in approximately May 2005.

On 28 September 2010, Applicant completed a clearance application (GE 1) to initiate the background investigation required for the periodic reinvestigation of his security clearance. Applicant answered "yes" to a multi-part question designed to elicit his past history of contacts with foreign governments or foreign-government officials within the last seven years.[3] Applicant reported that between August 2004 and August 2007, he had contact with his father-in-law, who was during that time the Deputy Chief of Mission (DCM) of the Haitian Embassy, and that through his father-in-law he met two ambassadors from the Haitian Embassy. His explanatory comments implied that these contacts were casual contacts with no official purpose.

Applicant also reported that between October 2009 and September 2010, he had met with the Haitian Minister of Tourism to pitch marketing ideas aimed at soliciting his support should Applicant's company seek international development work in Haiti. He reported business travel to Haiti in October 2009, to pitch a marketing campaign to the Minister of Tourism. He also reported making many short business trips to Haiti between March 2010 and August 2010, to take advantage of increased business opportunities in Haiti in the wake of the January 2010 earthquake. Although he had bought the airplane tickets for his next trip to Haiti on 27 September 2010 and was leaving for Haiti on 29 April (GE 4), his travel comments make no mention of his impending travel.

Applicant estimated that the Government of Haiti (GOH) would receive and manage 20 percent of expected international aid—a minimum of $500 million over 18 months and $2 billion over five years (GE 10). Applicant planned a concerted effort to position his company to take advantage of those potential profits. However, as early as December 2009, Applicant was aware that he might have to create a subsidiary company to establish a firewall between his classified U.S. Government contracts and any potential GOH business he obtained (GE 14). Further, in September 2008, he had been briefed on his company reporting responsibilities, including an extensive list of derogatory information and foreign national contacts that were other than casual. He was also informed that he was required to complete and sign a notification of foreign

[3]Section 20B: Foreign Business, Professional Activities, and Foreign Government Contacts. Question 4.

travel form 30 days before his expected travel. His travel briefing was renewed in May 2010 (AE G).[4]

Nevertheless, Applicant failed to report that he had met with the Minister Consular of the Haitian Embassy in the U.S. to discuss business opportunities in Haiti. He also failed to report that after his father-in-law's term as DCM, his father-in-law was employed—or at least utilized—by Applicant's company to foster official contacts with the Haitian government to solicit business with the Haitian government.[5] He appears also to have failed to report business connections made with Haitian businessmen while in Haiti. And he failed to report that at the time he completed his clearance application, he was the named defendant in a civil suit filed by his business partner. While these falsifications were not alleged in the SOR, I have considered them for permissible purposes, to assess Applicant's credibility on the falsifications that have been alleged.

Further, Applicant deliberately failed to disclose other extensive contacts with Haitian government officials in efforts to expand his company's business in Haiti: the current Prime Minister (PM), the current and former President, the Chief of Staff (COS) and other members of the Ministry of Justice (MOJ), the Minister of Commerce (MOC), other members of the Ministry of Tourism (MOT) besides the Minister, members of the Ministry of Culture and Communications (MOCC), and members of the National Police (NP), among others not listed in the SOR, but contained in Applicant's records (GE 10).[6]

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[4]The email suggests that Applicant may have submitted travel dates to his FSO at that time, but Applicant did not provide the portion of the email originated by him; even though it was on his computer and he could have provided it.

[5]Company emails (GE 7) reflect that Applicant and his father-in-law were to travel to Haiti in March 2010 to make business contacts with Haitian government officials. Applicant's business credit card records (GE 4) reflect that his father-in-law traveled to Haiti in August 2010, on a trip that overlapped Applicant's business trip to Haiti the same month. Applicant testified (Tr. 172-179) that his travel to Haiti began in earnest in March 2010, after the January 2010 earthquake, and he traveled to Haiti every 6-8 weeks for the next several months. His father-in-law went with him as a paid consultant on most of those trips "to the extent possible to have him help us meet government officials that he knew or his contacts knew."

[6]Applicant's February 2010 email thread (GE 7) recommends that Applicant and his father-in-law travel to Haiti in March 2010 because Applicant's father-in-law is the cousin-in-law of the current PM as well as his former colleague, and can arrange a meeting with the PM. The father-in-law is also able to assess potential target contacts for furthering company business in Haiti. Applicant's 15 May 2010 email to other company officials (GE 6), specifically referenced meeting with the Minister of Tourism, the Chief of Communications, a representative from the MOJ (who was to arrange a meeting with the Minister of Justice), World Bank officials, and a named individual otherwise unidentified. Applicant's 19 May 2010 email update (GE 8) refers to meeting with the COS MOJ (to arrange a meeting with the Minister), meeting with another MOJ official, and meeting with the former President of Haiti. Applicant's 28 May 2010 email (GE 9) refers to making additional inroads to the MOJ, the MOT, and members of the Haitian National Labs (NL), as well as meeting Canadian Embassy representatives, and United Nations (UN) representatives. A company-prepared slide show presenting the business opportunities in Haiti (GE 10) touts the "scores of government officials, industrialists, and other professionals" met by company personnel in Haiti, and records the names and titles of at least 12 GOH officials, one Haitian industrialist, UN personnel, and Canadian Embassy personnel.

Applicant claimed (Tr. 190-191; 255) that he listed all his contacts with other government officials on his clearance application. However, this claim cannot be true for several reasons. First, Applicant's facility security officer (FSO) at the time testified (Tr. 275) that Applicant submitted no supplemental materials with his application, and the application itself allows the Applicant to add as many supplemental pages as needed, renumbering the pages so that the finished copy contains sequential numbering (Tr. 276-277). Second, Applicant himself produced no addendum from his personal records, or any records he prepared of his contacts beyond what was contained in his 2010 slide show (GE 10). Finally, Applicant's current FSO testified (Tr. Tr 344-345) that the electronic system used by Applicant to complete his clearance application is a password-protected system with both username and password unique to the applicant, that the FSO can view, but cannot change the answers on. Applicant's answers to Question 3 end on page 42 of 57. His complete answers to Question 4 are contained on page 43 of 57. His answer to Question 5 begins on page 44 of 57.

Around May 2010, Applicant's FSO became concerned that Applicant had engaged in foreign travel for which he had not given prior notice, or reported any foreign contacts made, as he was required to do (Tr. 64). Between August and November 2010, he traveled to Haiti without prior notice or post-travel reporting. She contacted her Industrial Security Representative (ISR)(the Government representative who serves as the liaison between the company FSO and the Government on security issues) who advised her that it would be better for the Applicant's clearance as well as the company's facility security clearance if the FSO conducted the investigation on the issues and reported it during Applicant's periodic reinvestigation, rather than submit it as an adverse information report. According to the FSO, Applicant did not provide advance notice of his travel plans, did not report his travel after it was completed, and did not report his foreign contacts. In late 2010, he denied to her having traveled to Haiti and denied having met any foreign government officials. When the FSO tried to discuss her concerns with Applicant, he told her that she was not to make any reports via the Government's reporting system without checking with him first. In his view, he was the owner of the company and the reports would be at his discretion (Tr. 67-87). Faced with his obstruction, fearful of his possible retaliation, and experiencing health issues because of the stress of the situation, Applicant's FSO resigned from her job in early January 2011 (AE A). She had never been criticized for her work at the company, and had been recommended for a bonus in June 2010 (GE 18) for her efforts in getting new employees cleared.

During a November 2010 subject interview with a Government investigator (GE 2), Applicant discussed his October 2009 business trip to Haiti and March and June 2010 business trips to Haiti. However, he failed to disclose travel to Haiti in September 2010 and November 2010.[7] He again misrepresented his father-in-law's connection to

[7]Applicant bought his September 2010 tickets the day before he completed his clearance application, and traveled the day after his application (GE 3). His passport (GE 2) confirms his entry into Haiti in September 2010 and his exit in mid-October 2010. He bought his November 2010 tickets in late-October 2010 (GE 3) and his passport (GE 2) confirms his entry into Haiti in mid-November 2010 and his exit about a week later.

his business interests by claiming that the only foreign contacts he made through his father-in-law were casual contacts he made while his father-in-law was employed at the Haitian embassy, but did not disclose the fact that at the time, Applicant was mining his father-in-laws current contacts with the Haitian government.[8] Again, some of those misrepresentations were not alleged in the SOR, so I will not consider them on the merits of the case, but I will consider them on the issue of Applicant's credibility.

In January 2011, as part of Applicant's periodic reinvestigation, the former FSO was interviewed by a Government investigator (AE B). As she had been advised by her ISR, she reported the results of her investigations, chronicling his unreported business trips to Haiti, his unreported contacts with Haitian government officials, and his attempts to regulate her reporting adverse information about company employees. These reports were required by the National Industrial Security Program Operating Manual (NISPOM).

In July 2011, Applicant was again interviewed by a Government investigator, and executed a sworn statement (GE 5). Applicant stated that although his company Vice President was a legal permanent resident (LPR) of the U.S., originally from Turkey, he had never, to Applicant's knowledge, been affiliated with the Turkish government However, Applicant had met his employee in 2004, when the employee worked in the Turkish Embassy as a contractor (Tr. 207, AE J).[9] In addition, Applicant's website (GE 13) biography of this employee states "[b]etween 1997-2004 [last name] worked at the Defense Office of the Turkish Embassy in Washington DC as the Assistant to the Defense Cooperation Attache (DCA)."

In his sworn statement, Applicant also described to the investigator the steps he was preparing to take to expand his business in Haiti, including establishing the subsidiary company to provide the necessary firewall between his U.S. government work and his work in Haiti. He reported traveling to Haiti on business in January 2011, March 2011 (twice), April 2011, and May 2011 to promote his company and meet with Government officials. Many of these officials were either officials he had met during his 2010 trips to Haiti (but did not report on his September 2010 clearance application) or officials whose predecessors he had met, but not reported during his 2010 trips to Haiti. What he failed to disclose is that, as of 28 February 2011 (GE 12), Applicant's company had several business proposals pending action in Haiti.

[8]The Government investigator reported (GE 2): "Subject and his father in law (sic) have had contact with foreign government or representatives. The subject's father in law (sic) is a former diplomat from Haiti to the embassy in the USA. The subject would meet and greet the people his father in law (Sic) was working with in passing while picking him up." This recitation is consistent with Applicant's comments on his clearance application that suggested those contacts were purely casual. However, those representations ignore the fact that in November 2010, Applicant's father-in-law had traveled to Haiti in at least March 2010, August 2010, and November 2010 to meet with Haitian government officials on behalf of the company.

[9]Applicant's assertion (Tr. 209) that because his employee was merely a contractor in the Turkish Embassy he was not "affiliated" with the Turkish government is not credible.

Applicant's wife was born in the U.S. while her father was serving his first assignment as a diplomat in the Haitian Embassy. Over the next 40 years he served similar assignments on and off, as the ruling government changed. When he was not connected to the ruling government, he worked as an insurance salesman. When he served as DCM from August 2004 to August 2007, he renewed his connections to the Haitian government. Applicant clearly recognized his father-in-law's value to Applicant's business prospects in Haiti before the January 2010 earthquake, but after the earthquake his father-in-law became nearly invaluable to Applicant's company. Haiti is the poorest country in the Western hemisphere, with a long history of official corruption. The Haitian government was about to gain control over a significant portion of the billions of dollars in foreign aid being poured into Haiti because of the earthquake, and Applicant was uniquely positioned to take advantage of that control through his father-in-law's connections to the Haitian government. Applicant spent most of 2010 and 2011 attempting to take advantage of those connections.

Applicant's response to these allegations was to attempt to embroil his former FSO in a civil suit brought by his former business partner in June 2010 over ownership percentages, and his January 2011 countersuit , alleging her misconduct. That suit was settled in January 2012 (GE 2), with Applicant buying out his former partner's interest in the company for about $500,000. Applicant also attempted disparage his former FSO by portraying her as an incompetent FSO and disgruntled employee. Yet, he never criticized her performance while she was an employee, and gave her a bonus for her performance in June 2010. Further, in addition to claiming that he always gave required notice of foreign travel to his FSOs, and had his current FSO testify to that fact, neither he nor she produced any documentation to corroborate that claim. Consequently, although I admitted GE 19, 20, AE E, F, and K-M, and considered them, I gave them virtually no weight in making my decision, particularly where my most important analyses are based on Applicant's own documents which reveal his misrepresentations and omissions and his failure to document any of his countering claims from electronic records in his possession.

Applicant's work and character references consider him honest and trustworthy, and recommend him for his clearance. He is very involved in community activities.

Policies

The adjudicative guidelines (AG) list factors to evaluate a person's suitability for access to classified information. Administrative judges must assess disqualifying and mitigating conditions under each issue fairly raised by the facts and situation presented. Each decision must also show a fair, impartial, and commonsense consideration of the factors listed in AG ¶ 2(a). The applicability of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific guidelines should be followed when a case can be measured against them, as they are policy guidance governing the grant or denial of a clearance. Considering the SOR allegations and the evidence as a whole, the relevant adjudicative guideline is Guideline E (Personal Conduct), Guideline B (Foreign Influence), and Guideline K (Handling Protected Information).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to applicant to refute, extenuate, or mitigate the Government's case. Because no one has a right to a security clearance, the applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the required judgement, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels deciding any reasonable doubt about an Applicant's suitability for access in favor of the Government.[10]

Analysis

The Government established a case for disqualification under Guidelines E and K, and Applicant did not mitigate the security concerns. Throughout 2010, Applicant deliberately acted to inhibit or prevent his FSO from performing her required duties as FSO. He failed to give her advance notice of his foreign travel to Haiti, failed to give her post-travel reports of his travel, and failed to disclose his foreign contacts while in Haiti. He did so because he did not want anything to interfere with his business prospects in Haiti, which was a fast-paced environment that he wanted to take advantage of. Others in the company were aware of his travels and contacts, but that information was not shared with the FSO. The trips were scheduled on such short notice that the 30-days notice required by the company could not be met, but Applicant did not give what advance notice was possible. His conduct prevented his FSO from meeting her responsibilities under the NISPOM, which violated his responsibilities under the NISPOM.[11]

Further, in September 2010, when Applicant's clearance was up for periodic investigation, he deliberately misrepresented his father-in-law's involvement in his Haitian business pursuits and deliberately under reported his contacts with Haitian government officials. His FSO at the time could not have altered his clearance application, so if the other Haitian government contacts are not on his application, it is because he did not report them.

Applicant continued those misrepresentations and under reporting during a subject interview with a Government investigator in November 2010. He failed to update

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

[11] ¶ 34 (g): any failure to comply with rules for the protection of classified or other sensitive information; (h) negligent or lax security habits that persist despite counseling by management . . .

his foreign travel and foreign contacts with the investigator when given the opportunity to do so.[12] His explanations for not updating his information are not credible.

Finally, Applicant falsified his sworn statement to the Government investigator in July 2011 by misrepresenting his company's presence in Haiti and his Vice President's past connection to the Turkish government. These falsifications, along with the falsifications that were not alleged, were enough to shift the burden to Applicant[13] regardless of his alleged interference with his FSO's official responsibilities.

None of the Guideline E or K mitigating conditions apply. The concealed and misrepresented information was relevant and material to a clearance decision. Applicant did not disclose this information until well after his reinvestigation was underway, and he never was really forthcoming with the Government investigators.[14] The idea that this constitutes a prompt, good-faith disclosure defies credibility. Applicant's interference with his FSO's security responsibilities and his failure to report his foreign travel and his foreign contacts to his FSO as required were clearly aimed at keeping the Government uninformed about his foreign business pursuits when he did not have the corporate structure in place to protect Government interests, and giving him the maximum amount of flexibility pursuing those foreign business interests while the opportunities were still fresh. His security violations are recent, they were not due to improper or inadequate training, and he does not demonstrate a positive attitude toward the discharge of his security responsibilities.[15]

The Government has an interest in examining an Applicant's foreign travel and foreign contacts in real time to determine if any Government interests are implicated. The FSO is the Government's agent in that regard, through contacts with the ISR. The Government also has an interest in examining all relevant and material adverse information about an applicant before making a clearance decision. The Government relies on applicants to truthfully disclose that adverse information in a timely fashion, not when they perceive disclosure to be prudent or convenient. Further, an applicant's willingness to report adverse information about himself provides some indication of his willingness to report inadvertent security violations or other security concerns in the future, something the Government relies on to perform damage assessments and limit the compromise of classified information. Applicant's conduct suggests he is willing to

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[12]¶ 16(a) deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, . . . [or] determine security clearance eligibility or trustworthiness. . .; (b) deliberately providing false or misleading information regarding relevant facts to an . . . investigator . . .;

[13]The falsifications and omissions that were not alleged in the SOR may not be considered on the merits of the Guideline E allegations, but may be considered as relevant to the Applicant's credibility, his whole person analysis, and to establish absence of mistake on the falsifications that were alleged.

[14]¶ 17(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

[15]¶ 35.

put his personal needs ahead of legitimate Government interests. Accordingly, I resolve Guidelines E and K against Applicant.

The Government established a case for disqualification under Guideline B, and Applicant failed to mitigate the security concerns. Under Guideline B (Foreign Influence), an applicant's foreign contacts and interests may raise security concerns if the individual 1) has divided loyalties or foreign financial interests, 2) may be manipulated or induced to help a foreign person, group, organization, or government in a way contrary to U.S. interests, or 3) is vulnerable to pressure or coercion by any foreign interest. Foreign influence adjudications 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, whether the country is known to target U.S. citizens to obtain protected information and/or is associated with a risk of terrorism.[16] Evaluation of an individual's qualifications for access to protected information requires careful assessment of both the foreign entity's willingness and ability to target protected information, and to target expatriates who are U.S. citizens to obtain that information, and the individual's susceptibility to influence, whether negative or positive. More specifically, an individual's contacts with foreign family members (or other foreign entities or persons) raise security concerns only if those contacts create a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion.[17]

Applicant's father-in-law worked for the GOH, on and off for 40 years, during past and present iterations of the Haitian government. Applicant sought to use his father-in-law's contacts with the Haitian government to meet any government official who could help Applicant position his company at the front of the line for Haitian contract work with one of most corrupt government's in the Western hemisphere. Put another way, Applicant curried the influence his father-in-law could bring to bear on the Haitian government. He did so without creating the corporate entities necessary to protect the Government's interests. He could not help but be influenced by the prospect of the significant financial rewards represented by his preeminent position with the Haitian government. I resolve Guideline B against Applicant.

Ultimately, this case comes down to the credibility of the Applicant and his former FSO. I considered both their demeanor and their possible motives to misrepresent themselves, both before and during the hearing. I found her credible and him not. Disgruntled or not, Applicant's evidence that the FSO had a possible financial interest in the outcome of the civil suit or a reason to wish his company ill was unconvincing. On the other hand, Applicant had clear motives to want to keep information about his foreign travels, foreign contacts, and foreign business interests from his FSO and the Government: his share of between $500 million and $2 billion of disaster aide to be administered by the GOH, a government to which Applicant had inside access that he was more than willing to exploit.

[16]¶ 6.

[17]¶ 7 (a).

Formal Findings

Paragraph 1. Guideline E:	AGAINST APPLICANT
Subparagraphs a-h:	Against Applicant
Paragraph 2. Guideline B:	AGAINST APPLICANT
Subparagraphs a-b:	Against Applicant
Paragraph 3. Guideline K:	AGAINST APPLICANT
Subparagraphs a-d:	Against Applicant

Conclusion

Under the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance denied.

JOHN GRATTAN METZ, JR
Administrative Judge