DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 11-14339
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Alison O'Connell, Esquire, Department Counsel

For Applicant: Christopher Graham, Esquire

02/05/2013

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the pleadings, testimony, and exhibits, I conclude that Applicant failed to mitigate the Government's security concerns under Guideline B, Foreign Influence. His eligibility for a security clearance is denied.

Statement of the Case

On July 23, 2009, Applicant signed and certified an Electronic Questionnaire for Investigations Processing (e-QIP). On September 4, 2012, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under 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) effective within DOD for SORs issued after September 1, 2006.

On September 18, 2012, Applicant answered the SOR and requested a hearing before a DOHA administrative judge. The case was assigned to me on November 30,

2012. I convened a hearing on January 7, 2013, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses, introduced one exhibit (Ex. 1), and offered a summary of facts found in ten official U.S. Government source documents for administrative notice. The source documents were identified as Exs. I, II, III, IV, V, VI, VII, VIII, IX, and X. (Hearing Exhibit (HE) I.) The Government's Ex. 1 was admitted without objection.

Applicant objected to my taking notice of facts in three official source documents submitted for administrative notice (Exs. III, IV, and V) because they dealt with espionage by Russian agents in the United States. Applicant stated that the facts of his case did not show that he or any member of his family was involved in espionage. Thus, to take notice of such facts could be prejudicial to his case. Guideline B specifically requires that adjudication under the foreign influence adjudicative guideline "can and should consider the identity of the foreign country to 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." Accordingly, I overruled Applicant's objection and included Exs. III, IV, and V among the source documents of which I took notice. *See* Guideline B, ¶ 6.

Applicant testified, called no other witnesses, and offered three exhibits, which I marked and identified as Ex. A, B, and C, and admitted without objection. DOHA received the transcript (Tr.) of the hearing on January 15, 2013.

Findings of Fact

The SOR contains eight allegations of security concern under AG B, Foreign Influence (SOR ¶¶ 1.a. through 1.h.). In his Answer to the SOR, Applicant admitted all eight allegations and provided additional information. Applicant's admissions are admitted as findings of fact.

After a thorough review of the record in the case, including witness testimony, exhibits, relevant policies, and the applicable adjudicative guideline, I make the following findings of fact:

Applicant is 45 years old, married, and the father of two children. He is employed as a telecommunications network engineer by a government contractor. He was granted a security clearance in October or November of 2009. In December 2009, Applicant was arrested for Driving Under the Influence (DUI); it was his first offense. He completed a substance abuse education program in 2010. In April 2011, he was convicted and sentenced to 12 months of probation before judgment. In April 2012, he successfully completed all requirements of his probation. (Ex. 1; Ex. C; Tr. 39-42.)

Applicant's DUI is not alleged in the SOR, nor is any conduct under the alcohol consumption adjudicative guideline.[1] However, his arrest and conviction generated a review of his record, which resulted in the Guideline B security issues raised in the SOR. (Ex. A; Tr. 41-42.)

Applicant was born, raised, and educated in the former Soviet Union. When he was approximately 17 years old, he was admitted to a select academy which trained engineers to serve in the several branches of the Soviet military. After five years of study, he received a master's degree in electronics in 1990, was commissioned as an officer, and was assigned to prepare equipment for training military students in the field. (Ex. 1; Tr. 23-25, 42-45.)

In exchange for his education, Applicant was expected to serve in the Soviet military for 20 years. However, after serving for one year and about four months, he was involuntarily retired when the Soviet Union, in a bilateral agreement with the United States, reduced the number of service members serving in its military forces. Applicant then went to work for several companies in the Russian commercial sector as a telecommunications engineer. Applicant's education at the Soviet military academy and his service in the Soviet military is alleged at SOR ¶ 1.g. (Tr. 22-24; 42-45.)

In 1997, Applicant, his wife, and their young son immigrated to the United States. They, and his wife's parents, were sponsored for U.S. residency by an uncle of Applicant's wife. Applicant's father-in-law later died. (Ex. 1; Tr. 25, 35.)

After arriving in the United States, Applicant acquired work as a telecommunications network engineer. He has worked for his current employer, a government contractor, for nine years. (Ex. 1; Ex. A; Tr. 26-27.)

Applicant's wife was also born, raised, and educated in the former Soviet Union. She is employed in internet technology support by a public library. Applicant and his wife became U.S. citizens in 2002. Their minor son was also naturalized and became a U.S. citizen. Applicant's daughter was born in the United States in 2000 and is a U.S. citizen. (Ex. 1; Tr. 28-29, 38.)

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[1] I considered Applicant's DUI only for the purpose of chronology in this case. I did not consider it in arriving at my findings or in my conclusion. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

> (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

(citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)).

Applicant's mother and father immigrated to the United States in 2002 or 2003. They became U.S. citizens in 2009. They are also dual citizens of Russia. They own an apartment in Russia, valued at about $20,000, which they lease to tenants. Applicant's sister, a citizen and resident of Russia, manages the apartment for them and collects rent from the tenants, which she uses, in part, for her support. Applicant's parents' most recent travel to Russia occurred in 2009 or 2010. Applicant's parents' dual citizenship and their ownership of real property in Russia are alleged at SOR ¶¶ 1.a., 1.b., and 1.c. Applicant's sister's Russian citizenship and residency in Russia are alleged at SOR ¶ 1.d. (Tr. 30-32, 52-53, 59-60.)

Applicant's wife's uncle is a citizen and resident of Russia. He owns a telecommunications company in Russia. Applicant's wife has contact with him two or three times a year. Applicant's mother-in-law, who resides in the United States, is a dual citizen of Russia and the United States. The citizenship and residency of Applicant's wife's relatives are alleged at SOR ¶¶ 1.e. and 1.f. (Tr. 32-35.)

Applicant has maintained contacts with a high school friend and a friend from his Soviet military academy, both of whom are citizens and residents of Russia. Both individuals work in technical engineering and network communications. In the past, Applicant's contacts with his military academy colleague occurred three to five times a year. He reports his current contacts are now between one and two times a year. (Ex. 1; Tr. 33-34, 46-48.)

The military academy Applicant attended is no longer in existence. However, the graduates maintain contact with one another, and they have had reunions about every five years since they graduated in 1990. Applicant has attended two such reunions. In 2009, he traveled to the former Soviet Union, and he attended a reunion with about 35 or 40 of his former military academy classmates. Some of the classmates were still serving in the military. The SOR alleges at ¶ 1.h. that Applicant maintains contact with former academy classmates. (Tr. 36, 45-49, 62-63.)

The chief services officer for Applicant's employer provided a letter of character reference for the record. This individual noted that Applicant possessed a high level of professional and technical expertise that he used to help the firm's customers achieve success. Additionally, the chief services officer stated that Applicant was reliable and possessed a sound work ethic. (Ex. A.)

Applicant argued that his background had been reviewed and his eligibility for a security clearance had been determined in 2009. He stated that since 2009, his parents had become U.S. citizens, and he claimed that nothing else in his circumstances had changed since he had been granted a clearance in 2009. He therefore questioned the need to review again his security clearance eligibility. (Tr. 10-12.)

I take administrative notice of the following facts about Russia, which appear in official U.S. government publications provided by Department Counsel to Applicant and to me:[2]

> According to information compiled for the National Counterintelligence Executive's 2011 Report to Congress on Foreign Economic Collection and Industrial Espionage, Russia's intelligence services are conducting a range of activities to collect economic information and technology from US targets, and [Russia] remains one of the top three most aggressive and capable collectors of sensitive US economic information and technologies, particularly in cyberspace. Non-cyberspace collection methods include targeting of US visitors overseas, especially if the visitors are assessed as having access to sensitive information. Two trends that may increase Russia's threat over the next several years [are] that many Russian immigrants with advanced technical skills who work for leading US companies may be increasingly targeted for recruitment by the Russian intelligence services; and a greater number of Russian companies affiliated with the intelligence services will be doing business in the United States.
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> On June 28, 2010, the U.S. Department of Justice announced the arrests of ten alleged secret agents for carrying out long-term, deep-cover assignments on behalf of Russia. Within weeks, all ten defendants pleaded guilty in federal court and were immediately expelled from the United States. On January 18, 2011, convicted spy and former CIA employee Harold Nicholson, currently incarcerated following a 1997 espionage conviction, was sentenced to an additional 96 months of imprisonment for money laundering and conspiracy to act as an agent of the Russian government for passing information to the Russian government between 2006 and December 2008.
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> Beyond collection activities and espionage directed at the United States, Russia has provided various military and missile technologies to other countries of security concern, including China, Iran, Syria, and Venezuela. [Russian President Vladimir] Putin's return is unlikely to bring immediate, substantive reversals in Russia's approach to the United States, but because of Putin's instinctive distrust of US intentions and his transactional approach towards relations, it is likely that he will be more confrontational with Washington over policy differences. Continuing concerns about US missile defense plans will reinforce Russia's reluctance to engage in further nuclear arms reductions and Russia is unlikely to support additional sanctions against Iran. Russian intelligence and security services continue to target Department of Defense interests in support of Russian security and foreign policy objectives.

[2] I have omitted footnotes that appear in the quoted materials.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that "no 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 an applicant's 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 and modified.

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, the administrative judge applies these guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion in obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours 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 or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to 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." *See also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Under Guideline B, Foreign Influence, "[f]oreign 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." AG ¶ 6.

Additionally, adjudications under Guideline B "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 U.S. citizens to obtain protected information and/or is associated with the risk of terrorism." AG ¶ 6.

A Guideline B decision assessing the security worthiness of a U.S. citizen with Russian contacts must take into consideration Russia's ongoing and aggressive efforts to collect sensitive U.S. economic and technological information. American citizens with immediate family members who are citizens or residents of Russia could be vulnerable to coercion, exploitation, or pressure.

I have considered all of the disqualifying conditions under the foreign influence guideline. The facts of Applicant's case raise security concerns under disqualifying conditions AG ¶¶ 7(a), 7(b), and 7(i).[3]

Applicant's father, mother, and mother-in-law are naturalized U.S. citizens who maintain dual citizenship with Russia. Applicant's parents own an apartment in Russia, which they rent to tenants. Applicant's sister, a citizen and resident of Russia, helps to manage the apartment and uses some of the rent proceeds for her own support.

[3] AG ¶ 7(a) reads: "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(b) reads: "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 ¶ 17(i) reads: "conduct, especially while traveling outside the U.S., which may make the individual vulnerable to exploitation, pressure, or coercion by a foreign person, group, government, or country."

Applicant's wife's uncle, a resident and citizen of Russia, owns a telecommunications company in Russia. Applicant's wife has contact with her uncle two or three times a year. Applicant's familial relationships with citizens and residents of Russia create a heightened risk of foreign exploitation, inducement, manipulation, or coercion.

In 1990, Applicant graduated from a Soviet military academy with a master's degree in electronics, and he was commissioned as an officer in the Soviet military. Although he was involuntarily retired from the Russian military in a reduction in force in about 1991 or 1992, he has maintained relationships with one high school classmate and one classmate from his military school days. Both individuals are knowledgeable in electronics and telecommunications. In the past, Applicant had contact with his military school classmate three to five times a year. In recent years, Applicant has reduced his contacts to one or two a year.

Additionally, even though his military academy no longer exists, Applicant has remained a part of the alumni group from the school, which holds reunions every five years. Applicant has attended two of the five-year reunions. In 2009, he traveled to the former Soviet Union for a reunion, which was attended by 35 to 40 of his former classmates, including several who were still serving in the Russian military. Applicant's connections to this group of former Russian military academy colleagues could create a potential conflict of interest between Applicant's obligation to protect sensitive information and his desire to help a foreign group by providing protected or classified information. By traveling to Russia for class reunions with his former military academy colleagues, some of whom are active in the Russian military, Applicant made himself vulnerable to exploitation, pressure, or coercion by a foreign group or government.

Several mitigating conditions under AG ¶ 8 might be applicable to Applicant's case. If "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.," then AG ¶ 8(a) might apply. If "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," then AG ¶ 8(b) might apply. 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," then AG ¶ 8(c) might apply.

Applicant's father, mother, and mother-in-law are U.S. citizens who hold dual citizenship with Russia. Applicant's sister is a citizen and resident of Russia. Applicant's parents own real property in Russia, which they rent to tenants. Applicant's wife has an uncle who is a citizen and resident of Russia, and she has contact with him about twice a year. Applicant and his wife have ongoing relationships with these five individuals who are Russian citizens. These contacts are not casual but familial and consistent.

Additionally, since graduating from a Russian military academy 23 years ago, Applicant has maintained contact with one of his classmates on a regular basis, and he has twice traveled to Russia for reunions with his military academy classmates. His most recent trip was in 2009, when he met with 35 to 40 of his former classmates. Applicant's conduct in traveling to his reunions and his relationships with his former classmates raise concerns that he could be targeted for exploitation, pressure, or coercion by the government of Russia in ways that might also threaten U.S. security interests. Applicant's relationships with this group are strong and enduring. It not possible to conclude that Applicant can be expected to resolve such conflicts in favor of the U.S. interest.

Applicant failed to rebut the Government's allegations that his contacts with his family members and former classmates who are citizens of Russia created a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion. Applicant's contacts and relationships with these individuals could force him to choose between loyalty to them and the security interests of the United States. (ISCR Case No. 03-15485 at 4-6 (App. Bd. June 2, 2005); ISCR Case No. 06-24575 (App. Bd. Nov. 9, 2007)) I conclude that the mitigating conditions identified under AG ¶¶ 8(a), 8(b), and 8(c) do not apply to the facts of Applicant's case.

Nothing in Applicant's answers to the Guideline B allegations in the SOR suggested he was not a loyal U.S. citizen. Section 7 of Executive Order 10865 specifically provides that industrial security clearance 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."

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 the applicant's conduct and all relevant 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.

I considered the potentially disqualifying and mitigating conditions in light of the whole-person concept and all the facts and circumstances surrounding this case. Applicant is a talented and valued employee of a U.S. government contractor. He was granted a security clearance in 2009. He argues that he should retain his clearance in the present because he was deemed security worthy in the past.

Applicant misunderstands the nature of a security clearance. A security clearance is a privilege that exists only so long as the Government has confidence that an individual can be entrusted with classified and privileged information. If certain facts in the individual's background come to light, even after the individual has been granted a security clearance, the Government retains the right---and indeed has an affirmative obligation---to review those facts and determine if the individual remains security worthy. In this case, Applicant's relationships and contacts with Russian citizens, both family members and former classmates, raise serious unmitigated concerns about his vulnerability to coercion and his heightened risk for foreign influence.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising under AG B.

Formal Findings

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

Paragraph 1, Guideline B: AGAINST APPLICANT

Subparagraphs 1.a. – 1.h.: Against Applicant

Conclusion

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

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Joan Caton Anthony
Administrative Judge