DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
REDACTED	)	ISCR Case No. 15-02652
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: Bradley P. Moss, Esq.

10/05/2017

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant presented sufficient evidence to mitigate alleged foreign influence security concerns. Clearance is granted.

Statement of the Case

On December 14, 2015, the Department of Defense (DoD) issued a Statement of Reasons (SOR) alleging that Applicant's connections to and contact with relatives in Kazakhstan, as well as his two-years of involuntary military service in the Soviet military and the work he did for the U.S. Government at a Russian lab over two decades ago, raised a security concern under the foreign influence guideline. Applicant answered the SOR and requested a hearing (Answer).

By agreement of the parties, the hearing was held on April 25, 2017. Applicant testified and called a former co-worker as a witness. The exhibits offered by the parties were admitted into the administrative record without objection.[1] The transcript (Tr.) of the proceeding was received on May 2, 2017.

[1] Government Exhibits 1 – 3; Applicant's Exhibits A – D. Correspondence, the notice of hearing, the case management order, the source documents referenced in Exhibit 3, and Applicant's index of exhibits were marked Appellate Exhibits I – V.

After fully considering the evidence and the respective position of the parties,[2] I concluded that the undisputed record evidence justified a favorable decision. I then notified both sides that the case appeared appropriate for summary disposition in Applicant's favor.[3] Department Counsel objected to the issuance of a summary decision.[4]

Findings of Fact

Applicant is a 48-year-old defense contractor who was first granted a security clearance in approximately 2009. He was born in a part of the former Soviet Union that is now a part of Kazakhstan. At 17, he left home to attend college. After attending college for a year, he was drafted into the Soviet military. For the next two years, Applicant was part of a small air defense unit on a remote military outpost near the Chinese border. After completing his two-years of compulsory military service, Applicant received his military discharge, returned to school, and completed his undergraduate and graduate studies. During the two-years Applicant was a conscript in the Soviet military, he did not have access to classified information. He was paid roughly $7 a month, and is not entitled to a military pension. He has not served in or had any further connection to any foreign military. Applicant's two-years of compulsory foreign military service in the late 1980s is alleged at SOR 1.c.[5]

While attending college, Applicant met and married his wife. She was also born in what is now Kazakhstan. She ran away from home at 16 to get away from what Applicant described as a "troubled family." She had no contact with her parents thereafter, and recently found out that her parents died some twenty years ago.[6]

While in college, Applicant got a part-time job to support himself and his wife. He was hired by a private company that imported food and produce, and sold it to local markets in Russia. The company subsequently went out of business. Applicant's part-time employment with this private company from 1991 to 1994 is alleged at SOR 1.e.[7]

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[2] In her opening remarks, Department Counsel stated: ". . . and at the end of the hearing, unless [Applicant[is able to present sufficient evidence of mitigation, the Government expects to ask Your Honor to find that it's not clearly consistent with the national interest to grant him a security clearance." (Tr. 6) At the conclusion of the hearing, counsel stated: "So the Government acknowledges that he [Applicant] has presented some evidence of mitigation, based on the fact that he has worked for the U.S. government for a number of years and lived here a number of years. And therefore we leave it to Your Honor's discretion to determine whether or not to grant him a security clearance." (Tr. 72-73) Although the arguments of counsel have no evidentiary value, a judge should be able to reasonably rely on such statements in making their independent assessment of a case and deciding which ones may be resolved through summary disposition, especially when counsel essentially concedes that an applicant has met their burden of proof.

[3] *See generally* ISCR Case No. 15-03176, n.2 (App. Bd. May 26, 2017).

[4] Appellate Exhibit VI. The record is silent as to what record evidence led Department Counsel to take a position contradicting the Government's earlier stated position.

[5] Tr. 22-23, 32-33.

[6] Tr. 43-44, 61-63, 70-71.

[7] Tr. 34-35, 58-59.

After earning an advanced degree, Applicant was hired by a Russian lab to work on a research project funded by a U.S. Government agency. Applicant's work was strictly in the theoretical arena. He was paid by the U.S. Government agency, earning about $150 a month, which was about three times the going rate for similar work in Russia at the time. Applicant's theoretical research work for the U.S. Government at the Russian lab from 1994 to 1996 is alleged at SOR 1.d.[8]

In 1996, Applicant immigrated to the United States. He was sponsored for an exchange visitor program by the same U.S. Government agency that had employed him in Russia. He then worked in the United States for the next three years on research projects for the U.S. Government. He was paid directly by the U.S. Government for his work. He applied to stay in the United States under an immigration program for people with special skills and backgrounds. He was granted a work visa, and was hired by a U.S. company doing contract work for the U.S. Government. Applicant then applied for permanent U.S. residency status through a "national interest waiver program." He was granted permanent residency status in 2001 through this program and five years later, in 2006, became a naturalized U.S. citizen. He has resided continuously in the United States and has worked for the U.S. Government for the past 20-plus years.[9]

Applicant, his wife, and his children are U.S. citizens. His children came to the United States when they were toddlers. They are now young adults, working or studying in the United States. Applicant's wife has her own career in the United States. They own a home in the United States, which they have lived at since 2002. They have no foreign financial interests, property or assets. All their tangible assets and property are in the United States. They do not provide financial support to any foreign persons, and are not financially indebted to any foreign government, person, entity or group.[10]

In 2004, Applicant took a trip to Russia to rid himself of his last link to the country - an apartment that he and his wife once owned. He explained that his wife had been granted the apartment, which she had helped construct, by the Soviet Union. When the Soviet Union fell, the ownership of the apartment reverted to Applicant and his wife. They hired a real estate agent and sold the apartment for less than $20,000. Applicant and his wife claimed the income they received from the sale of their old Russian apartment on their U.S. income tax returns.

Also during this 2004 trip, Applicant met with some of his old colleagues from the Russian lab that he worked at in 1994-96. He had seen some of these people through the years at scientific conferences and they continued to cite his research in articles that they had published in scientific journals. Applicant has not traveled back to Russia since the 2004 trip. He maintains casual and infrequent contact with his former colleagues in Russia through social media. He has not told any foreign acquaintance about his work as a federal contractor, and his social media page does not contain any indication about his

[8] Tr. 23-25, 35-38, 59-61.

[9] Tr. 26-31.

[10] Tr. 41-50, 61-63; Exhibit 1 at 9-10.

work for the U.S. Government. [11] Applicant summed up his current connections to Russia as follows: "There's nothing left for me in Russia. I don't have relatives. I don't have friends. It's just a placed I lived for a few years."[12]

Applicant's only living relatives in Kazakhstan are his sister-in-law and two nephews. His brother died in 1997, and Applicant's sister-in-law lived with her in-laws (Applicant's parents) until about 2002. Applicant then started sending his sister-in-law money (about $200 a month) to help defray the cost of raising her children (his nephews) on her own. She stopped accepting Applicant's financial help about 10 years ago, when her oldest son graduated from school and got a job. Applicant explained that his sister-in-law and his nephews are a very proud people and, if he were to offer them any support at this time, they would flatly refuse it. His sister-in-law and his nephews have no connection to any foreign government or military. Applicant's contact with his sister-in-law has steadily decreased over the years. He last spoke with her over a year ago, to inform her that his mother had died. Applicant's parents were of modest means and, so, he did not receive an inheritance when they died.[13] Applicant's mother and sister-in-law are alleged as a potential foreign influence concern at SOR 1.a and 1.b.

Applicant was granted a security clearance in 2009, to work on a classified project for another U.S. Government agency. He destroyed his Russian passport at the time. His company's security officer witnessed the destruction of the Russian passport. Applicant does not presently hold a foreign passport. He only uses his U.S. passport when traveling abroad. He submitted a security clearance application in 2014, fully reporting his foreign connections, contacts, and travel. He then discussed his foreign connections, contacts, and travel with a security clearance background investigator.[14]

Applicant's current supervisor submitted a letter, writing that he has witnessed Applicant on multiple occasions properly handling classified and sensitive information. His coworkers and federal employees who serve as second-line supervisors provided their favorable opinions regarding Applicant's professionalism, work ethic, reliability, security conscientiousness, and loyalty to the United States.[15]

[11] Tr. 41-43, 56.

[12] Tr. 57.

[13] Tr. 50-56.

[14] Tr. 44-45; Exhibits 1, 2. Neither side provided Applicant's security clearance application nor the clearance interview that preceded the U.S. Government granting him a security clearance in 2009. However, no allegation was raised that he previously failed to disclose his foreign connections, contacts, or travel.

[15] Tr. 12-20; Exhibits A – D.

Administrative Notice – The Russian Federation (Russia).[16]

Russia "has a highly centralized, authoritarian political system dominated by President Vladimir Putin."[17] Although "[t]he United States has long sought a full and constructive relationship with Russia,"[18] current relations between the two old war allies appears to have again turned adversarial. Of note, in August 2017, the President signed into U.S. law sanctions targeting Russia for, in part, Russian interference in the 2016 U.S. elections and Russia's aggression in Ukraine, including its continuing unlawful annexation of Crimea.[19] In 2015, the (former) Director of National Intelligence reported to Congress that the leading state intelligence threats to the United States will continue to come from two main countries, one of which is Russia.[20] A recent human rights report from the U.S. State Department reflects the commission of significant human rights violations in Russia, including restrictions on political participation and freedom of expression, electoral irregularities, and the lack of due process in politically motivated cases.[21]

Law, Policies, and Regulations

This case is decided under Executive Order (E.O.) 10865*, Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented on June 8, 2017, through Security Executive Agent Directive 4 (SEAD-4). ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003) (security clearance decisions must be based on current DoD policy and standards).

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Instead, persons are only eligible for access to classified information "upon a finding that it is clearly consistent with the national interest" to authorize such access. E.O. 10865 § 2.

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[16] The parties elected not to present country-specific information regarding Kazakhstan. Department Counsel noted that "The Government's primary concern, and the reason why we went forward with the case today, was based on the fact that [Applicant] had served in the [Soviet military and worked in the Russian lab from 1994-96]." (Tr. 72) The information herein on Russia is generally taken from the matters submitted and accepted without objection for administrative notice (Appellate Exhibit IV), as updated by recent reports from the U.S. State Department and an official Statement by the President. These new matters are publically available on the websites for the State Department and White House. They, as well as a summary of Public Law 115-44, are appended to the record as Appellate Exhibit VII.

[17] U.S. State Department, *Russia 2016 Human Rights Report*, Executive Summary. (Appellate Exhibit VII)

[18] U.S. State Department, Fact Sheet on U.S. Relations with Russia at 1. (Appellate Exhibit VII)

[19] President's August 2, 2017 Signing Statement and Summary of Public Law 115-44, *Countering America's Adversaries through Sanctions Act*. (Appellate Exhibit VII)

[20] Director of National Intelligence, Statement before the Senate Armed Services Committee, *Worldwide Threat Assessment of the U.S. Intelligence Community* at 1-2, February 26, 2015. (Appellate Exhibit IV)

[21] U.S. State Department, *Russia 2016 Human Rights Report*, Executive Summary. (Appellate Exhibit VII)

When evaluating an applicant's eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. AG ¶ 2.

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

Administrative Judges must remain fair and impartial, and conduct all hearings in a timely and orderly manner. Judges must carefully balance the needs for the expedient resolution of a case with the demands of due process. Therefore, an administrative judge will ensure that an applicant: (a) receives fair notice of the issues, (b) has a reasonable opportunity to address those issues, and (c) is not subjected to unfair surprise. Directive, ¶ E3.1.10; ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

In evaluating the evidence, a judge applies a "substantial evidence" standard, which is something less than a preponderance of the evidence. Specifically, substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive, ¶ E3.1.32.1.[22]

Any doubt raised by the evidence must be resolved in favor of the national security. AG ¶ 2(b). *See also* SEAD-4, ¶ E.4. Additionally, the Supreme Court has held that responsible officials making "security clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

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. 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 an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

[22] However, a judge's mere disbelief of an applicant's testimony, without actual evidence of disqualifying conduct or admission by an applicant to the disqualifying conduct, is not enough to sustain an unfavorable finding. ISCR Case No. 15-05565 (App. Bd. Aug. 2, 2017); ISCR Case No. 02-24452 (App. Bd. Aug. 4, 2004). Furthermore, an unfavorable decision cannot be based on solely non-alleged conduct. ISCR Case No. 14-05986 (App. Bd. May 26, 2017). Likewise, a judge can only use non-alleged conduct for specific limited purposes, such as, assessing mitigation and credibility, unless an applicant is placed on notice that such conduct also raises a security concern. ISCR Case No. 16-02877 at 3 (App. Bd. Oct. 2, 2017).

Analysis

Foreign contacts and interests are a national security concern if they result in divided allegiance. Likewise, a concern arises if a person's connections, contacts, or interests in a foreign country leave them vulnerable to pressure or coercion by any foreign interest. However, a person is not *per se* disqualified from holding a security clearance because they have familial or other ties to a foreign country. Instead, in assessing a person's potential vulnerability to foreign influence, a judge considers the foreign country involved, the country's human rights record, and other pertinent factors.[23]

In assessing the security concerns at issue, I considered all disqualifying and mitigating conditions listed under Guideline B, including the following:

> AG ¶ 7(a): 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): connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology;
>
> AG ¶ 8(a): 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 United States;
>
> AG ¶ 8(b): there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, or allegiance to the group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;
>
> AG ¶ 8(c): 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; and
>
> AG ¶ 8(e): the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country.

[23] *See generally* AG ¶ 6. *See also* ISCR Case No. 05-03250 at 4 (App. Bd. Apr. 6, 2007) (setting forth factors an administrative judge must consider in foreign influence cases).

An applicant with relatives, financial interests or other substantial connections to a foreign country faces a high, but not insurmountable hurdle, in mitigating security concerns raised by such foreign ties. An applicant is not required "to sever all ties with a foreign country before he or she can be granted access to classified information."[24] However, what factor or combination of factors may mitigate security concerns raised by an applicant with foreign relatives is not easily identifiable or quantifiable.[25] Moreover, an applicant with familial or other connections to a hostile foreign country faces a *very heavy burden* in mitigating security concerns raised by such foreign ties.[26]

Here, Applicant's ties to Russia and Kazakhstan are so attenuated, while his bonds to the United States are so strong and deep that he can be expected to resolve any conflict raised by his weak foreign ties in favor of U.S. interests. Of note, Applicant's ties to both countries have significantly decreased in the eight years that have passed since he was granted a security clearance. At the same time, his relationships in and bonds to the United States have only gotten stronger. He has lived in the United States for over 20 years, and has been in the employ of the U.S. Government since starting his professional career in 1994. While in the employ of the U.S. Government, he has been provided access to sensitive U.S. information. He has established a track record showing that he properly handles and safeguards such information.

Security clearance assessments about a person require a judge to closely examine the individual's conduct and circumstances. In a Guideline B case this assessment necessarily requires a judge to consider the relevant country or countries at issue. Moreover, a past favorable clearance adjudication does not bar security officials from reassessing an applicant's eligibility, especially when new matters arise, such as the recent retrenchment in U.S.-Russian relations. However, after reviewing the entire record and weighing the evidence, both favorable and unfavorable, I agree with Department Counsel that Applicant presented sufficient evidence mitigating the security concerns at issue. AG ¶¶ 8(a) – 8(c) and 8(e) apply, in full or in part.[27]

Formal Findings

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

Paragraph 1, Guideline B (Foreign Influence):	FOR APPLICANT
Subparagraphs 1.a – 1.e:	For Applicant

[24] ISCR Case No. 07-13739 at 4 (App. Bd. Nov. 12, 2008).

[25] ISCR Case No. 11-12202 at 5 (App. Bd. June 23, 2014).

[26] ISCR Case No. 12-05092 at 5 (App. Bd. Mar. 22, 2017).

[27] Also, several factors falling under the whole-person concept were raised by the evidence and weigh in favor of granting a clearance in this case. *See generally* AG ¶ 2; SEAD-4, ¶ E.4.

Conclusion

In light of the record evidence, it is clearly consistent with the interests of national security to grant Applicant initial or continued eligibility for access to classified information. Applicant's request for a security clearance is granted.

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Francisco Mendez
Administrative Judge