DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 15-04103
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: Alex Laughlin, Esq.

09/29/2017

Decision

Curry, Marc, Administrative Judge:

Applicant no longer works for a wholly-owned subsidiary of an Israeli company, and his failure to disclose Israeli contacts to a facility security officer (FSO), with whom he worked in 2014, was not intentional. I conclude that he has mitigated the security concerns. Clearance is granted.

Statement of the Case

On August 24, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR), cross-alleging a security concern under Guidelines B (foreign influence) and outside activities (Guideline L), and alleging a security concern under Guideline E (personal conduct). The action was taken under Exec. Ord. 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), which became effective on September 1, 2006. The SOR further informed Applicant that, based on information available to the Government, DOD adjudicators could not make the affirmative finding that it is clearly consistent with the national interest to grant or continue Applicant's security clearance, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be granted, continued, denied, or revoked.

On September 20, 2016, Applicant responded to the SOR, admitting the allegation cross-alleged in Paragraphs 1 and 2, in part, and denying it, in part, and he denied the allegation set forth in Paragraph 3. He requested a hearing, and on April 7, 2017, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On May 25, 2017, DOHA issued a notice of the hearing, setting the hearing for June 21, 2017. The hearing was held as scheduled. I received three Government exhibits (GE 1 - GE 3), eight Applicant exhibits (AE A – F; AE H), together with the testimony of Applicant and one character witness. I took administrative notice of the facts set forth in AE G. In addition, at Department Counsel's request, I took administrative notice of the facts set forth in one document (AE G). I received the transcript of the hearing on June 29, 2017.

While my decision was pending, Security Executive Agent Directive 4 was issued establishing National Security Adjudicative Guidelines (AG) applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The AG supersede the adjudicative guidelines implemented in September 2006 and are effective for any adjudication made on or after June 8, 2017. Accordingly, I have adjudicated Applicant's security clearance eligibility under the new AG.

Findings of Fact

Applicant is a 54-year-old married man with two teenage children. He graduated from college in 1985, and in 1992, he earned a Master of Science degree. (AE A) He has spent his entire career working as a geospatial engineer. He has been working with his current employer, a defense contractor, since 2016. (AE A) According to his supervisor, he has a strong work ethic and is a highly professional and honest person. (AE B)

From 2011 to 2016, Applicant worked as the vice president of business development for a wholly-owned subsidiary of an Israeli company. (Answer at 1) His job duties were to market computer hardware and software to U.S. companies. (Tr. 34; GE 2 at 9) He was acquainted with the owner of the Israeli company before he took the job at the subsidiary, having met him at a trade show in 2006 and interacted with him twice through professional activities in 2009. (GE 2 at 9; Tr. 32)

Applicant was the only full-time employee of the subsidiary.(AE A at 2) He travelled to Israel while employed with the subsidiary, for planning and budgeting once in 2013, and twice in 2014 and 2015, respectively. (Tr. 16, 22; GE 2 at 9) Applicant was a subject-matter expert on the Israeli company's technology. (Tr. 45) The owners of the parent company had contracts with the Israeli government. (Tr. 34) Applicant was not privy to these contracts. (Tr. 34) He did not hold an Israeli security clearance. (Tr. 35)

Between 2013 and 2015, while working full-time for the subsidiary, Applicant worked part-time as a consultant for another company. (Tr. 37) Before beginning work,

his part-time employer required him to disclose all of his foreign contacts. He failed to disclose an Israeli contact, one of the owners of the parent company of the subsidiary where he was then working full-time. (Answer at 3) The oversight was unintentional. (Tr. 41; GE 2)

The Israeli parent company dissolved its U.S. subsidiary after Applicant resigned from it. The Israeli company now markets its products in the United States through a contract with the company where Applicant worked part-time as a consultant between 2013 and 2015. (Tr. 42) Applicant's current employer uses the Israeli company's technology, subject to the appropriate federal regulations governing the import of defense articles and services. (Tr. 35-36).

Applicant began working with his current employer upon resigning from the subsidiary. Applicant's current employer has a maintenance support agreement with the Israeli company that is managed by its U.S. contractor, the company that Applicant worked, part-time, between 2013 and 2015. (Tr. 47-48) Applicant's contact with Israeli nationals with whom he worked before leaving the subsidiary is limited too "maybe an e-mail or text once in awhile, but no continuing contact." (Tr. 45)

Applicant failed to list all of the times that he traveled to Israel between 2014 and 2015 on his 2014 security clearance application. While in the process of completing the application, he counted all of the stamps from the Israeli government to ascertain the number of trips there, but forgot that some time over the past few years, Israel stopped using stamps to record entry, and had switched to an electronic system. Applicant disclosed this oversight at the hearing. (Tr. 22-23)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "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 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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.

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 the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

> (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.

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. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

Analysis

Guideline B, Foreign Influence

Under this guideline, "foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they result in divided allegiance." (AG ¶ 6) The following disqualifying conditions are potentially applicable under AG ¶ 7:

> (a) contact, regardless of method, 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; and
>
> (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.
>
> (c) failure to report or fully disclose, when required, association with a foreign person, group, government, or country; and
>
> (f) substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business that could subject

the individual to a heightened risk of foreign inducement, manipulation, pressure, or coercion.

Friendly countries may just as readily conduct espionage against the U.S. as hostile countries. Consequently, Israel's status as a staunch ally of the United States does not end the security clearance analysis. It is merely one of several factors, including whether the country is known to target U.S. citizens, whether it is a stable democracy, and whether it is associated with a risk of terrorism. Such an assessment of the "'geopolitical situation' and the 'security/intelligence profile of the country vis-a-vis the U.S.' is crucial in Guideline B cases" (ISCR Case No 07-05686 (App. Bd., November 12, 2008 at 4). Here, the Government presented no such information. Consequently, I do not conclude that Applicant's contacts with relatives living in these countries generates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion. AG ¶ 7(a) does not apply. Similarly, the absence of a heightened risk analysis also renders AG ¶ 7(f) inapplicable.[1]

Applicant still is in contact with some of the Israeli citizens who were members of the parent company of the subsidiary where he worked from 2011 to 2016. AG ¶ 7(b) applies. This continuing contact is casual and infrequent. Consequently, the mitigating condition set forth under AG ¶ 8(c), "contact or communication with foreign citizens is so casual or infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation," applies.

Guideline L, Outside Activities

Under this guideline, "involvement in certain types of outside employment or activities is of security concern if it poses a conflict of interest with an individual's security responsibilities and could create an increased risk of unauthorized disclosure of classified or sensitive information." (AG ¶ 36) Applicant's employment with a subsidiary of an Israeli company triggers the application of AG ¶ 37(a)(2), "any employment or service, whether compensated or volunteer with any foreign national, organization, or other entity."

Applicant terminated his employment with the subsidiary in 2016, and any contact with employees or owners of the Israeli subsidiary is casual and infrequent, as discussed above. AG ¶ 38(b), "the individual terminated the employment . . . ," applies.

Guideline E, Personal Conduct

Under this guideline, "conduct involving questionable judgment, lack of candor, dishonest, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information." (AG ¶ 15) Applicant's failure to disclose his Israeli contacts during

[1] Assuming for the sake of argument that the business interest created a heightened risk of exploitation under AG ¶ 7(f), it has been mitigated because Applicant no longer either works for the Israeli subsidiary or has any residual business interest with the Israeli company.

a 2014 interview with an employer who subsequently hired him to work part-time, raises the issue of whether AG ¶ 16(a) "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities," applies. At the time Applicant interviewed for his part-time job in 2014, he was working full-time for a company that was a subsidiary of an Israeli company. Moreover, he was a subject-matter expert on technology that the parent company developed and was marketing in the United States through Applicant. Under these circumstances, it was axiomatic that Applicant would have contact with some Israeli citizens. Moreover, he voluntarily disclosed his omission of some of his travel to Israel at the hearing. I conclude that Applicant's failure to disclose his Israeli contact at the 2014 interview was unintentional, and that AG ¶ 16(a) does not apply. There are no personal conduct security concerns.

Whole-Person Concept

From Applicant's description, his field of expertise is a very discreet profession with experts that are not limited to U.S. borders. It also appears to be characterized by significant collegial interaction through trade shows and other international meetings. As such, anyone working at a subsidiary of a foreign multinational company in this field, such as Applicant between 2011 and 2016, generates a potential security risk. Applicant no longer works for the subsidiary, and his contact with representatives of his former employer is infrequent. Under these circumstances, the likelihood of any potential conflict of interest has been negated. Applicant has mitigated the security concerns.

Formal Findings

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

Paragraph 1, Guideline B:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline L:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the security interests of the United States to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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Marc Curry
Administrative Judge