DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
(Redacted)	)	ISCR Case No. 15-05565
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Robert J. Kilmartin, Esq., Department Counsel
For Applicant: *Pro se*

04/19/2017

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant held about 250 ounces of gold for approximately ten years before selling over $70,000 worth in 2013. In August 2013, he facilitated the sale of another $500,000 in gold in the Cayman Islands. In July 2016, he mailed assets of $190,000 to a reputable depository. His involvement in these transactions, reportedly as a favor to a wealthy friend, raises security concerns that have not been adequately mitigated. Clearance is denied.

Statement of the Case

On March 15, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline F, financial considerations, and Guideline E, personal conduct, and explaining why it was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him. The DOD CAF took the action under Executive Order (EO) 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 for Determining Eligibility for Access to Classified Information* (AG) effective within the DOD on September 1, 2006.

On March 29, 2016, Applicant answered the SOR allegations and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On July 14, 2016, the case was assigned to me to conduct a hearing to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On July 22, 2016, I scheduled a hearing for August 9, 2016.

I convened the hearing as scheduled. Two Government exhibits (GEs 1-2) and one Applicant exhibit (AE A) were accepted into the record without objection. Applicant testified, as reflected in a transcript (Tr.) received on August 18, 2016.

Findings of Fact

The SOR alleges under Guideline F and cross-alleges under Guideline E (SOR ¶ 2.a) that Applicant began holding about 250 ounces of gold for a friend with United Kingdom (UK) and New Zealand dual citizenship (SOR ¶ 1.a); that Applicant sold some of his friend's gold between 2012 and 2013 and transferred the sales proceeds to his friend, including transfers of $60,000 and $12,040 in February 2013 (SOR ¶ 1.b); that Applicant sold about $500,000 of gold from his friend's safe deposit box in the Cayman Islands in August 2013 and transferred the funds to his friend (SOR ¶ 1.c); and that Applicant continues to hold approximately $100,009 of gold for his friend (SOR ¶ 1.d).

When he responded to the SOR, Applicant admitted that he began holding the gold as alleged in 2001 for his friend, who has dual citizenship but with the UK and the Netherlands "with Caymanian status." He explained that his friend wanted to have an emergency fund in the United States, which he agreed to keep for him, and that it was worth only $50,000 initially. He admitted the sales of gold coins on Craig's list in 2012-2013 to private individuals for cash and wire transfers of the sales proceeds to his friend at no compensation. Concerning his activities in the Cayman Islands in August 2013, Applicant indicated that he brought the gold from his friend's safe deposit box to a gold broker, who then transferred the funds via a wire transfer from the broker's account to his friend's account. Applicant denied that he had possessed any money in the transaction. Applicant admitted that he continued to hold a set of gold coins in trust for his friend, who now lives in New Zealand. Applicant denied the inference that his activities involving the gold cast doubt on his ability to live within his means or reflect unexplained affluence.

After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 51-year-old senior software engineer, who earned a bachelor's degree in June 1988 and a master's degree in June 1993. He has worked for his defense contractor employer since May 2007. He was granted a secret clearance in December 2007 and a top secret clearance in April 2009. (GE 1.)

On February 21, 2014, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86) to renew his security clearance

eligibility. During the course of Applicant's background investigation, an investigator for the Office of Personnel Management (OPM) discovered that Applicant had made two large deposits, of $12,040 and $60,000, into separate bank accounts in February 2013. Applicant's explanation for the money transactions follows.

Applicant attended graduate school with a dual citizen of the UK and the Netherlands from the Cayman Islands (friend X). Friend X was an only child who parents had moved to the Cayman Islands in 1970 and established a successful medical practice. Applicant and friend X shared an apartment in graduate school and stayed in close contact over the years. (GE 1; Tr. 24-25, 35-36.)

In 2001 or 2002, friend X asked Applicant to store about 250 ounces of gold for him as an emergency fund in case of instability in the Cayman Islands. According to Applicant, this was just a small portion of his friend's wealth. (Tr. 37-38.) Friend X spent most of his time in leisure activities and lived off his wealth in the Cayman Islands. (Tr. 29.) Applicant believes that his friend's property in the Cayman Islands, which is on the beach, is worth $5 million just for the land. (Tr. 36-37.)

Applicant kept the gold in the basement of his home as a favor for his good friend. (GE 2; Tr. 24-25.) Friend X had considered placing the gold with a gold depository but it would cost him money to do so.[1] (Tr. 57.) By the summer of 2012, friend X was in a common-law marriage and had two daughters. (Tr. 46-48.) He asked Applicant to sell some of the gold because the value of gold had quadrupled. Applicant sold some of friend X's gold on Craigslist to private buyers. Friend X left it to Applicant's discretion as to how to sell the gold. (Tr. 56.) Applicant made four or five deposits of accumulated sales proceeds into his own bank accounts, including deposits of $12,040 and $60,000 in February 2013,[2] before then wiring the money to friend X or depositing it into one of friend X's bank accounts in Japan. (GE 2; Tr. 49-52.)

By August 2013, friend X was attending graduate school in New Zealand and running out of cash. At friend X's request, Applicant flew to the Cayman Islands and, with a limited power of attorney, he took approximately $500,000 worth of gold from friend X's safe deposit box and delivered it to a broker. Applicant testified that he was "simply the courier delivering the gold bars" to a broker, who then wired funds directly to friend X's bank. (Tr. 44.) However, he told an OPM investigator in January 2015 that he had wired the funds to friend X from the Cayman Islands. (GE 2.) Applicant maintains that friend X trusted only him and it made sense for him to make the gold transfer because of the expense and distance for friend X to fly to the Cayman Islands. Applicant advised customs officials in the Cayman Islands that he was there for business. He saw no need to

[1] Applicant initially testified that it is expensive to store the gold with a private company. When asked why someone reportedly independently wealthy as friend X would not be willing to pay approximately $1,000 a year to a private company, Applicant responded that it would have been a nuisance to write checks to a depository company; that friend X trusted him more than a private company; but also that "there's a certain loss of control that you accept" when you place it with a depository. (Tr. 57-58.)

[2] Applicant testified that he deliberately made some large deposits to trigger the reporting requirement for large currency transactions in the United States because he did not want to do anything surreptitiously. (Tr. 49-50.)

elaborate to customs officials that he was there to transfer a large quantity of gold because he was not bringing anything in or out of the country. (Tr. 43-45.) Applicant testified that friend X reimbursed him for his airline ticket, but he received no other compensation. (Tr. 47.) He had indicated to an OPM investigator in January 2015 that friend X paid for his flight and hotel. (GE 2.)

Applicant disclosed on his February 2014 SF 86 that he had weekly telephone contact with friend X, a dual citizen of the Netherlands and the UK living in New Zealand. He also listed some foreign travel in the last seven years, including to the Cayman Islands for tourism and to visit family or friends in December 2007 and December 2008 and for tourism in August 2013. (GE 1.)

When interviewed by an authorized investigator for the OPM on January 8, 2015, Applicant admitted that he had close and continuing contact with friend X, with whom he spent one week in the Cayman Islands in December 2007 and December 2008. He indicated that his trip to the Cayman Islands in August 2013 was for tourism, and to complete a business transaction for friend X, *i.e.*, the sale of approximately $500,000 in gold from friend X's safe deposit box to a local dealer. He and friend X had agreed that it would be easier for him to travel to the Cayman Islands. When asked if he had any large deposits or withdrawals from any of his own bank accounts, Applicant disclosed that he had made four or five deposits, including two deposits exceeding $10,000 each in February 2013, from selling some of friend X's gold to private buyers on Craigslist. He indicated that he still had approximately $100,000-$150,000 of gold that he was holding for friend X. Applicant denied receiving any financial benefit as a result of holding and selling friend X's gold. Applicant indicated that to his knowledge, friend X did not use any of the proceeds from the gold sales for illegal activity. (GE 2.)

As of the issuance of the SOR on March 15, 2016, Applicant still held at least $100,000-$150,000 worth of gold for friend X. Applicant informed friend X that the DOD had some concerns about him holding the assets. Friend X opened an account with a gold depository service in the United States, and on July 30, 2016, Applicant shipped four packages to friend X's account with the depository service. He valued the four shipments at $190,000. (AE A; Tr. 26-27, 53.) Applicant believes friend X wanted to keep the gold in the United States because it would have been more complicated to transfer it to New Zealand, and he sees the United States as safe. (Tr. 62.)

To Applicant's knowledge, he did not assist friend X in evading any tax liabilities, although he never asked friend X if he was helping him avoid taxes. (Tr. 62-63, 66.) Applicant did not consult with an attorney before holding the gold for friend X, selling some on Craigslist, depositing some of the sales proceeds in his own bank account, or wiring funds to friend X. Applicant did some independent research on the Internet to ensure that he did not violate regulations concerning money transfers. Since he held and sold the assets for a personal friend without any compensation or consideration, he did not need a license to transmit the money. (Tr. 64.)

Applicant talks with friend X by telephone at least once a week, usually about family issues. Applicant is reviewing some of friend X's work toward a doctorate degree. (Tr. 46-47.) Friend X told him that he has named him as executor of his estate in his will. (Tr. 67.) Applicant does not discuss his work with friend X, even though they have been close friends for 26 years. (Tr. 65.) Applicant owns his home worth over $350,000, drives a 1996 model-year vehicle, and does not live an extravagant lifestyle. (Tr. 65-66.) He reported no source of employment income apart from his current salary of $130,000 annually. (Answer.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overall 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 to obtain 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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Section 7 of EO 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

Guideline F, Financial Considerations

The security concerns about financial considerations are articulated in AG ¶ 18:

> Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

During Applicant's background investigation, the government discovered that Applicant had made single deposits of $12,040 and $60,000 into his accounts with two separate banks in February 2013. Applicant's employment income is approximately $130,000 annually, which is sufficient to maintain his lifestyle, but not enough to explain some $72,000 in bank deposits in February 2013. Money transfers that cannot be explained by one's legal sources of income raise security concerns under AG ¶ 19(h), "unexplained affluence, as shown by a lifestyle or standard of living, increase in net worth, or money transfers that cannot be explained by subject's known legal sources of income."

The burden is on Applicant to show that the funds were from legal sources. In that regard, when asked during his OPM interview about any large deposits, Applicant explained that he kept about 250 ounces of gold for his friend, a resident of the Cayman Islands, as an emergency fund. He hid the gold in his basement from 2001 until the summer of 2012, when, at his friend's request, he began selling some of the gold and transferring the proceeds to his friend. Applicant sold the gold to private buyers through Craigslist until approximately February 2013. He made four or five temporary deposits of the sales proceeds into his own bank accounts, including the two large sums in February 2013, before wiring the funds to his friend's account in Japan. In August 2013, Applicant traveled to the Cayman Islands, took about $500,000 in gold from his friend's safe deposit box, and brought it to a local gold dealer at his friend's request. Applicant admitted that as of March 2016, when the SOR was issued, he still held a substantial amount of gold for his friend. He presented mailing receipts to prove that he shipped $190,000 in assets to a legitimate depository in July 2016.

Application of mitigating condition AG ¶ 20(f), "the affluence resulted from a legal source," depends largely on the credibility of Applicant's account. His conduct in storing

250 ounces of gold in his basement, and his travel to the Cayman Islands, which is well known as a tax haven, raise suspicions. He provided no corroboration for his account. His case would certainly have been aided by an affidavit from his foreign friend attesting that he inherited the funds from his parents and that Applicant acted on his behalf without compensation. Applicant testified about the sales proceeds that he wired to friend X in 2013 that the receiving bank was in Japan. (Tr. 52.) Applicant did not provide an adequate explanation for why he transferred the funds to Japan when his friend was studying in New Zealand. Concerning Applicant's trip to the Cayman Islands in August 2013, his testimony is that he acted only as a courier in the sale of $500,000 worth of gold to a dealer who wired the funds to friend X. Applicant discrepantly indicated to an OPM investigator that he was the person who wired the funds to friend X in New Zealand. Registered mail receipts stamped by his local post office (AE A) show that Applicant shipped assets of $190,000 to a reputable depository in July 2016. Applicant provided friend X's name and an account number on the mailing receipts. Even so, the documentation is inadequate to prove that no criminal activity was involved in acquiring or handling the assets. The evidence falls short of establishing AG ¶ 20(f).

Guideline E, Personal Conduct

The security concerns about personal conduct are articulated in AG ¶ 15:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Applicant may have been doing a favor for a longtime close friend, but one has to question his judgment in storing the gold in his basement rather than in a safe deposit box or with a legal depository where it would have been more secure. The cost of storing the gold with a reputable service at approximately $1,000 annually is not an adequate explanation, given his friend's wealth. While paying a company might have been a nuisance, it certainly would have been less risky. Similarly, while the sales of the gold were at his friend's request, the manner was at Applicant's discretion. His decision to sell to private buyers on Craigslist may have led to higher proceeds for his friend, but it also involved more risk than had he sold the gold through a reputable dealer.

Applicant has not been shown to have violated any regulation or law by selling on Craigslist, and his friend assumed the risk of loss. He testified that he deliberately made large deposits to his bank account so that the currency transactions would trigger bank reporting requirements. However, there are too many unanswered questions about the transactions. He reportedly held the gold for his friend, who was concerned about the stability of the Cayman Islands and regarded the United States as a safe place. Yet, neither friend X nor Applicant had a problem with Applicant removing some $500,000 in gold from a safe deposit box in the Cayman Islands and taking it to a dealer without any

security in place to ensure no problem in the transfer. Applicant was not forthcoming with Caymanian officials about his intentions during his trip in August 2013. When asked about the July 2016 shipment of assets to the depository, Applicant testified that he could have sent them to New Zealand, but that "the problem is then, first of all there would be a transfer across a sovereign border, which would be more complicated." When asked about possible tax evasion, Applicant claimed to not know friend X's intentions, but he also testified that if friend X becomes a resident of New Zealand, he will have to pay a lot of taxes. (Tr. 62-63.)

AG 16(c) applies to "credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment." Applicant exercised questionable judgment in several aspects. He denies that he knowingly assisted his friend in tax evasion or other criminal activity, but it is troubling that he sought no legal or professional advice before storing the gold, selling some gold on Craigslist, wiring proceeds to a third country (Japan), or facilitating the sale of $500,000 in gold in the Cayman Islands. Applicant provided no records of bank deposits or sales receipts that could support a conclusion that all of his conduct was legal and appropriately documented. None of the mitigating conditions under AG ¶ 17 are established.

Whole-Person Concept

Under the whole-person concept, the administrative judge must consider the totality of an applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(a).[3] The analyses under Guideline F and Guideline E are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant submits that he has demonstrated he can be counted on to handle classified information appropriately by not violating the considerable trust that his close friend from graduate school placed in him. He provided no information from other sources to establish that his storing and selling the gold and making large money transfers on behalf of a longtime friend were legitimate. It is well settled that once a security concern arises, there is a strong presumption against the grant or continuation of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied,* 499 U.S. 905 (1991). For the reasons discussed, I am unable to conclude that it is clearly consistent with the national interest to grant to continue security clearance eligibility for Applicant.

[3] The factors under AG ¶ 2(a) are as follows:

> (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.

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 F:	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

_____
Elizabeth M. Matchinski
Administrative Judge