DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 15-07182
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Rhett Petcher, Esq., Department Counsel
For Applicant: Jonathan Bell, Esq.

03/30/2017

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline B (Foreign Influence). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on October 21, 2014. On May 5, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline B. The DOD CAF acted under Executive Order (Exec. Or.) 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 by the DOD on September 1, 2006. The adjudicative guidelines are codified in 32 C.F.R. § 154, Appendix H (2006), and they replaced the guidelines in Enclosure 2 to the Directive.

Applicant answered the SOR on June 1, 2016, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on October 28, 2016, and the case was assigned to me on December 14, 2016. On December 16, 2016, the

Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for January 10, 2017. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through Q, which were admitted without objection. I kept the record open until January 17, 2017, to enable Applicant to submit additional documentary evidence. He did not submit any additional evidence. DOHA received the transcript (Tr.) on January 19, 2017.

Administrative Notice

Department Counsel requested that I take administrative notice of relevant facts about Tunisia. The request and supporting documents are attached to the record as Hearing Exhibits (HX) II and III.[1] I took administrative notice as requested. Applicant also submitted documents regarding Tunisia (AX A through C) and I considered them in my decision to take administrative notice. The facts administratively noticed are set out below in my findings of fact.

Findings of Fact[2]

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a, 1.c, and 1.d. He admitted SOR ¶ 1.b in part. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 46-year-old linguist employed by defense contractors since August 2008. He held a security clearance from 2011 to May 2015, when it was administratively terminated. (Tr. 28, 45.) He is seeking a clearance in order to accept a linguist position in Iraq. (Tr. 46-47.)

Applicant was born in Tunisia, came to the United States in July 1998, and became a U.S. citizen in August 2005. He married in November 2007 and divorced in April 2013. He has no children. His ex-wife was born in Tunisia but was a citizen and resident of the United States when they married. (Tr. 47.)

Applicant attended various colleges in the United States. He received an associate's degree in December 2002, a bachelor's degree in political science in September 2004, and a master's degree in international relations in July 2007. (AX P; AX Q; Tr. 25-26.)

Applicant enlisted in the Army National Guard in April 2009, deployed to Iraq from April to July 2011 with a military intelligence unit, and received an honorable discharge in November 2012. He was discharged before completing his eight-year service

[1] Hearing Exhibit I is a procedural document unrelated to the request to take administrative notice.

[2] Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

commitment in the National Guard because of service-connected injuries to his back and knees, and he receives benefits as a 40% disabled veteran. (GX 2 at 8; AX L; AX N; Tr. 40, 71.) His injuries do not interfere with his duties as a linguist, which are mostly sedentary. (Tr. 71.)

As a civilian linguist employed by defense contractors, Applicant worked in the detention facility in Guantanamo Bay, Cuba, from October 2012 to May 2013 and from August 2013 to December 2013. He had regular contact with detainees, who regarded him as a traitor and infidel, and he was subjected to cursing, insults, and being splashed with feces and urine. (Tr. 29-30.) He served with the U.S. military forces in Africa from March 2014 until May 2015. (GX 1 at 10; AX D; Tr. 45-46.)

Applicant testified that he joined the National Guard to repay the United States for giving him the opportunity to obtain an education. He testified that Tunisia is "just a land of birth" and his life is in the United States. He considers his employment as a linguist as "a continuation of my military duty to contribute again for the safety and the interest of my country." (Tr. 27-28.) He testified that if he found himself in a situation where he had to choose between loyalty to the United States and his family, he "wouldn't have a second thought" about putting his loyalty to the United States first. (Tr. 34.)

Applicant held a Tunisian passport that was valid until 2013, but he surrendered it to his security officer in the National Guard in 2010 and renounced his Tunisian citizenship. (GX 2 at 7.) He was not sure about the validity of his effort to renounce his Tunisian citizenship in 2010, because of the change in Tunisian government after the Arab Spring in 2010. Therefore, he recently submitted a renunciation of his Tunisian citizenship to the Embassy of Tunisia in Washington, D.C. (AX Q; Tr. 41-42.) He testified that he had no hesitation about renouncing his Tunisian citizenship. (Tr. 50.)

Applicant's instructor in the National Guard, who later became his co-worker in Africa, described him as a skilled translator and a dependable and disciplined soldier. He performed well as a translator for senior officers and key leaders of foreign military forces. He is regarded as honest, trustworthy, and loyal. (AX D.) The site manager in Africa described Applicant as dependable, enthusiastic, motivated, and talented. (AX F.)

Applicant's site manager in Guantanamo described him as one of his most loyal and committed employees. He lauded Applicant's understanding of the military mission, his cultural awareness, hard work, sense of responsibility, and interpersonal skills. (AX E.)

The president of the parent company sponsoring Applicant for a clearance regards him as a loyal, trustworthy, "mission first" person. (AX G.) A senior exercise manager for Applicant's employer considers him invaluable. (AX H.)

Applicant's mother, sister, and two brothers are citizens and residents of Tunisia. His mother has never worked outside the home. His father was a farmer before he passed away. (Tr. 51.) His sister was formerly employed by the Tunisian government, but she is

now employed by a private-sector bank in Tunisia. (Tr. 31.) His two brothers are self-employed. One is a land developer and the other owns several apartments. (GX 2 at 14; Tr. 33.) His mother and siblings live away from the Libyan border, where most terrorist activity occurs. (Tr. 52, 54, 58

Applicant sent his mother money totaling about $300 per month as a matter of cultural tradition until he learned that it raised security concerns. He no longer sends his mother money, but his two brothers are financially secure, and they take care of their mother's needs. (GX 2 at 13; Tr. 32-33, 54.)

Applicant talks to his mother every 10-14 days. (Tr. 52.) He talks to his sister every three or four months. (Tr. 55.) He talks to his brothers "occasionally." (Tr. 59.) He has no contact with his former in-laws. He last visited his family in Tunisia in April 2016 and he stayed about 32 days. (Tr. 66.) His family members are not aware of his employment as a linguist. (Tr. 33-34.)

Applicant has no property or financial assets in Tunisia. He lives with his ex-wife when he is at home in the United States. He lives in a large metropolitan area and has no need for an automobile. He has about $19,000 in savings. (Tr. 75.)

Tunisia is a constitutional republic with a multiparty, unicameral parliamentary system. In early 2014, the parliament ratified a democratic constitution that respects individual rights. Civilian authorities maintain control over the security forces, but international organizations have reported instances of harsh treatment of detainees, poor prison conditions, and lack of judicial independence. There have been complaints of lax prosecution with poor transparency, and gender-based discrimination and violence.

Terrorist attacks have targeted Tunisian government and security forces and popular tourist sites. The U.S. Department State has warned U.S. citizens to avoid travel to southeastern Tunisia along the Libyan border as well as the mountainous areas in the country's west.

In May 2015, the United States designated Tunisia as its 16th major non-NATO ally (MNNA). MNNA status reflects a close relationship between the two countries, and it confers tangible privileges including eligibility for training, loans of equipment for cooperative research and development, and foreign military financial for commercial leasing of defense equipment.[3] Tunisia cooperates with NATO in the fight against terrorism, cyber defense, defense planning and management, and scientific cooperation. The administrative notice documents submitted by both parties reflect no evidence that Tunisia competes economically or militarily with the United States and no evidence that Tunisia targets the United States for military or economic intelligence.

[3] Other countries enjoying MNNA status include Australia, New Zealand, Israel, Japan, and South Korea.

Policies

"[N]o 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 applicants 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 § 2.

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, an administrative judge applies these guidelines 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 and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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. An applicant has the burden of proving a mitigating condition,

and the burden of disproving it never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Guideline B, Foreign Influence

The security concern under this guideline is set out in AG ¶ 6 as follows:

> Foreign 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. Adjudication under this Guideline 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 United States citizens to obtain protected information and/or is associated with a risk of terrorism.

Two disqualifying conditions under this guideline are relevant:

> 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; and
>
> 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 sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information.

AG ¶ 7 (a) requires substantial evidence of a "heightened risk." The "heightened risk" required to raise this disqualifying condition is a relatively low standard. "Heightened risk" denotes a risk greater than the normal risk inherent in having a family member living under a foreign government. There is no indication that Tunisia competes with the United States economically or militarily and no indication that Tunisia targets the United States for economic or military intelligence. There is a heightened risk, however, posed by terrorist elements operating in Tunisia, as evidenced by the U.S. State Department warnings to tourists. Thus, I conclude that the evidence is sufficient to establish the heightened risk in AG ¶ 7(a) and the potential conflict of interest in AG ¶ 7(b).

The following mitigating conditions under this guideline are potentially relevant:

> 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 U.S;
>
> AG ¶ 8(b): 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; and
>
> 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;

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

Furthermore, "even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security." ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. Nevertheless, the nature of a nation's government, its relationship with the United States, and its human rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence operations against the United States. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. *See generally* ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision to grant clearance where administrative judge did not consider terrorist activity in area where family members resided).

Applicant's mother and siblings live in a country with a developing democratic government that is friendly to the United States, but the unstable situation in surrounding countries and the continuing threat of terrorism preclude application of AG ¶ 8(a).

Generally, an applicant's prior history of complying with security procedures and regulations is considered to be of relatively low probative value for the purposes of

refuting, mitigating, or extenuating the security concerns raised by that applicant's more immediate disqualifying circumstances. However, where an applicant has established by credible, independent evidence that his or her compliance with security procedures and regulations occurred in the context of dangerous, high-risk circumstances in which the applicant made a significant contribution to the national security, such circumstances give credibility to an applicant's assertion that he or she will recognize, resist, and report a foreign power or terrorist's attempts at coercion or exploitation. In this case, Applicant has a track record of complying with security regulations and procedures under combat conditions in Iraq and emotionally difficult duties in Guantanamo, and he made significant contributions to national security in both locations. *See* ISCR Case No. 07-06030 at 3 (App. Bd. Jun. 19, 2008); ISCR Case No. 06-25928 at 4 (App. Bd. Apr 9. 2008). Thus, I conclude that AG ¶ 8(b) is established.

Although Applicant's contacts with his siblings are infrequent, he has not refuted the presumption that his contacts are not casual. *See* ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002). Thus, I conclude that AG ¶ 8(c) is not established.

Whole-Person Concept

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. In applying the whole-person concept, an 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. An 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.

I have incorporated my comments under Guideline B in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant was candid, sincere, and credible at the hearing. He came to the United States seeking a better life. He has been educated in the United States. He is grateful for the blessings of living in the United States. He voluntarily joined the Army National Guard and deployed to a combat zone with a military intelligence unit. He endured insults and abuse from detainees in Guantanamo. He stopped sending money to his mother when he learned that it raised security concerns. He held a security clearance from 2011 to

2015 and served with distinction in several sensitive positions. He is highly regarded by his co-workers and his supervisors.

After weighing the disqualifying and mitigating conditions under Guideline B, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his foreign family connections. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline B (Foreign Influence): FOR APPLICANT

Subparagraphs 1.a-1.e: For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman
Administrative Judge