



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of: )  
)  
) ISCR Case No. 16-01909  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Aubrey M. De Angelis, Esq., Department Counsel  
For Applicant: *Pro se*

06/07/2018

**Decision**

HEINTZELMAN, Caroline E., Administrative Judge:

This case involves security concerns raised under Guidelines B (Foreign Influence), C (Foreign Preference), D (Sexual Behavior), and E (Personal Conduct). Applicant failed to mitigate security concerns raised by his foreign contacts. He mitigated the foreign preference, sexual behavior, and personal conduct concerns. Eligibility for access to classified information is denied.

**History of the Case**

Applicant submitted security clearance applications (SCA) on June 9, 2014 and April 22, 2015. On October 29, 2016, the Department of Defense Consolidated Adjudication Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines B, C, D, and E. The DOD CAF acted 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 (AG) implemented by the DOD on September 1, 2006 (2006 AG).

Applicant answered the SOR on November 28, 2016, and requested a decision on the record without a hearing. A complete copy of the File of Relevant Material (FORM),

containing eight Items, was mailed to Applicant on November 3, 2017, and received by him on November 22, 2017. The FORM notified Applicant that he had an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM. Applicant did not object to the Government's evidence.<sup>1</sup> Items 1 through 8 are admitted into evidence without objection. He timely submitted additional evidence, which was admitted without objection as Applicant's Exhibit (AX) A. The case was assigned to me on March 5, 2018.

On June 8, 2017, the DOD implemented new AG (2017 AG).<sup>2</sup> Accordingly, I have applied the 2017 AG.<sup>3</sup> However, I have also considered the 2006 AG, because they were in effect on the date the SOR was issued. I conclude that my decision would have been the same under either version.

### **Findings of Fact**

Applicant is 45 years old and works as a mechanic for a defense contractor. He has worked for this employer since 2015, and requires a clearance for his employment. He has worked for defense contractors since approximately 1996. He was married between 1995 and 1996, and has one adult child with his ex-wife. Applicant has been married to his current wife since 2002. They have three children. Applicant has attended some college courses. He held a clearance while he served in the U.S. Army between 1990 and 1995. Due to misconduct, he received a General Discharge. (Items 4, 5, and 6)

Applicant has lived and worked in South Korea since approximately 2000. He met his current wife in South Korea. She is a citizen of the Russian Federation, holds a U.S. green card, and has been a South Korean resident since approximately 2002. Their three children were born in South Korea, and are citizens of the United States. Applicant's wife's mother, sister, and cousin are citizens and residents of Russia. He maintains yearly contact with his mother-in-law and sister-in-law. There is no record evidence of how often his wife is in contact with her immediate family members. (Items 3 and 6) There is insufficient evidence to support the SOR allegation that he maintains contact with Russian friends.

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<sup>1</sup> Applicant claimed the summary statements (Item 6) he purportedly made to the Department of State investigator during an interview was not accurate. He provided corrections, additions, deletions, and updates in his Response to the FORM (AX A).

<sup>2</sup> On December 10, 2016, the Security Executive Agent issued Directive 4 (SEAD-4), establishing a "single, common adjudicative criteria for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position." (SEAD-4 ¶ B, *Purpose*). The SEAD-4 guidelines became effective on June 8, 2017 (SEAD-4 ¶ F, *Effective Date*). The National Security Adjudicative Guidelines (AG), which are found at Appendix A to SEAD-4, apply to determine eligibility for initial or continued access to classified national security information. (SEAD-4 ¶ C, *Applicability*).

<sup>3</sup> ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003) (security clearance decisions must be based on current DOD policy and standards).

The SOR alleges Applicant prefers South Korea over the United States based upon his long residency in South Korea and statements he made to a government investigator. He denied that his residency in South Korea is a reflection of preference. He claims as a Status of Forces Agreement (SOFA) invited contractor he has supported the DOD and the U.S. Government through his 20 years of service. (Item 3)

Applicant did admit to preferring to live in South Korea over living in the United States, "Due to lesser crime rate and higher education provided for [his] family." He is afforded better employment opportunities in South Korea and his family is able to live a better lifestyle. However, he loves the United States and his allegiance is to the United States. There is no evidence he has taken steps to procure foreign citizenship for himself or his children, nor is there evidence he has accepted foreign benefits. (Item 3, Item 6 at 2, and AX A)

SOR ¶ 1.e. alleged Applicant engaged in "one-night stand" sexual contact approximately 20 times between 1991 and 2013 with citizens of Russia, Germany, the Philippines, and South Korea. Additionally, SOR ¶ 1.f. alleged that he paid for the services of prostitutes at massage parlors on at least three occasions from 2011 to 2013. Applicant denied both allegations.

During his September 2014 interview with the Department of State (DOS), Applicant purportedly told the investigator about the behavior alleged in SOR ¶¶ 1.e. and 1.f.<sup>4</sup> (Item 6 at 4 and 8) Additionally, it was reported that neither his current wife nor his ex-wife were aware of his infidelity, which is alleged in SOR ¶ 4.b. under Guideline E. In his answer, Applicant denied the underlying conduct in all three allegations. In AX A, Applicant denied disclosing this information to the government investigator. He claimed all of the sexual behavior took place when he was single and ended in 2002. He denied paying for sexual services while he was in the Philippines. Applicant submitted a signed and sworn statement from his wife, in which she stated she was aware of his sexual relationships. (Item 6 at 6; AX A) Applicant's sexual relationships alleged in SOR ¶¶ 1.e. and 1.f. are cross-alleged under Guideline E, which he also denied.

During his September 2014 DOS interview, Applicant volunteered that he opened a South Korean bank account in 2011 to handle finances related to his children's school. He did not report the bank account on either SCA due to an oversight because the account did not contain much money. (Item 6 at 6) In his answer, Applicant denied intentionally falsifying his SCAs. He also disclosed an additional South Korean bank account. He claimed he inadvertently failed to disclose his South Korean bank accounts. He provided documentation that one account was closed in 2009 and the other account was closed in 2013. (Item 3)

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<sup>4</sup> This statement was not originally authenticated by Applicant and his exhibit AX A made corrections to that statement.

## **Request for Administrative Notice**

Department Counsel requested that I take administrative notice of certain facts about The Russian Federation (Russia) and the Republic of Korea (South Korea). The requests were included in the record as Items 7 and 8. Applicant did not object. I have taken administrative notice of the facts contained in Items 7 and 8. The facts administratively noticed are summarized in the Findings of Fact, below.

### **Russia**

Russia “has a highly centralized, authoritarian political system dominated by President Vladimir Putin.” Although “[t]he United States has long sought a full and constructive relationship with Russia,” current relations between the two old war allies appear 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. 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. 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 (Item 8).

### **South Korea**

South Korea is one of the seven countries most actively engaged in foreign economic collection and industrial espionage against the United States. Although South Korea is an ally, it has been the unauthorized recipient of technology controlled under US export control laws, including material that could be used in missile delivery/reentry systems, encryption software, optics and prism data and infrared detectors and camera engines. Industrial espionage remains a high profile concern relating to South Korea and South Korean companies (Item 7).

## **Policies**

“[N]o one has a ‘right’ to a security clearance.”<sup>5</sup> 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.”<sup>6</sup> 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.”<sup>7</sup>

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<sup>5</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

<sup>6</sup> *Egan* at 527.

<sup>7</sup> EO 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. 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.

Adverse 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."<sup>8</sup> Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Security Executive Agent have established for issuing national security eligibility.

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.<sup>9</sup> "Substantial evidence" is "more than a scintilla but less than a preponderance."<sup>10</sup> The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability.<sup>11</sup> Once the Government establishes a disqualifying condition, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts.<sup>12</sup> An applicant has the burden of proving a potential mitigating condition, and the burden of disproving it never shifts to the Government.<sup>13</sup>

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<sup>8</sup> EO 10865 § 7.

<sup>9</sup> Directive ¶ E3.1.14.

<sup>10</sup> See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

<sup>11</sup> ISCR Case No. 92-1106 at 3, 1993 WL 545051 at \*3 (App. Bd. Oct. 7, 1993).

<sup>12</sup> Directive ¶ E3.1.15.

<sup>13</sup> 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.”<sup>14</sup> “[S]ecurity clearance determinations should err, if they must, on the side of denials.”<sup>15</sup>

## **Analysis**

### **Guideline B: Foreign Influence**

The security concern relating to the guideline for foreign influence is set out in AG ¶ 6:

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. They may also be a national security concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

The guideline includes several conditions that could raise security concerns under AG ¶ 7. Three are potentially applicable in this case:

(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;

(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; and

(d) sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.

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<sup>14</sup> ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); Directive ¶ E3.1.15.

<sup>15</sup> *Egan*, 484 U.S. at 531; See also AG ¶ 2(b).

The mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if only one relative lives in a foreign country and an applicant has contacts with that relative, that factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

Applicant's wife is a citizen of Russia and she has ongoing familial connections with her mother, sister, and extended relatives, who are citizens and residents of Russia. His Russian friends were not shown to support a distinct concern. These familial relationships create a heightened risk of foreign pressure or attempted exploitation because of the intelligence-gathering activities of Russia against U.S. national interests. The evidence and Applicant's admissions are sufficient to raise these disqualifying conditions.

Applicant, his wife, and their children are residents of South Korea, but there is no evidence he has been approached or targeted by the South Korean government. Nor is there evidence that he is subject to influence by relationships with South Koreans. Accordingly, there is insufficient evidence that their residence in South Korea raises disqualifying conditions.

After the Government produced substantial evidence of those disqualifying conditions, the burden shifted to Applicant to rebut them or otherwise prove mitigation. Three mitigating conditions under AG ¶ 8 are potentially applicable to the disqualifying security concerns based on the facts of this case:

(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;

(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; and

(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.

Although none of Applicant's foreign contacts are employed by the Russian government, the intelligence-gathering activities of Russia present an unacceptable risk that Applicant may be placed in a position of having to choose

between the interests of a foreign individual, group, or government and the interests of the United States. Mitigation under AG ¶ 8(a) was not established.

Applicant has been a U.S. citizen since birth, but has not resided in the United States for approximately 20 years. There is insufficient evidence of long-standing relationships in the United States to overcome the close familial obligations stemming from his 16-year marriage to a Russian citizen. AG ¶ 8(b) has some applicability in this case, but does not mitigate the underlying concern.

Applicant maintains a close relationship with his wife. Based upon the evidence in the file, it is not clear if he maintains a close relationship with her family members; however, a spouse's close relationships are equally of concern. Applicant has not overcome the presumption of a non-casual relationship with his spouse and her immediate family members. AG ¶ 8(c) does not apply.

### **Guideline C: Foreign Preference**

The security concern relating to the guideline for foreign preference is set out in AG ¶ 9:

When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may provide information or make decisions that are harmful to the interests of the United States. Foreign involvement raises concerns about an individual's judgment, reliability, and trustworthiness when it is in conflict with U.S. national interests or when the individual acts to conceal it. *By itself*; the fact that a U.S. citizen is also a citizen of another country is not disqualifying without an objective showing of such conflict or attempt at concealment. The same is true for a U.S. citizen's exercise of any right or privilege of foreign citizenship and any action to acquire or obtain recognition of a foreign citizenship.

Under AG ¶ 10, there are no conditions that could raise a security concern established by the facts in this record. Applicant indicated a preference for living and raising his children in South Korea, but he did not indicate that his allegiance is to South Korea. He is dedicated to the United States and his work is in support of the U.S. government. Accordingly, the Guideline C allegations are decided for Applicant.

### **Guideline D: Sexual Behavior**

The security concern relating to the guideline for foreign influence is set out in AG ¶ 12:

Sexual behavior that involves a criminal offense, reflects a lack of judgment or discretion, or may subject the individual to undue influence of coercion, exploitation, or duress raises a security concern.



Under AG ¶ 13, there are no conditions that could raise a security concern established by the facts in this record. Applicant denies he told the DOS investigator that he paid for sexual services in the Philippines and he denied cheating on his wives. His statement on this key point was un rebutted as the DOS interview summary was not adopted by Applicant. Accordingly, the Guideline D allegation is decided for Applicant.

#### **Guideline E: Personal Conduct**

The security concern under this guideline is set out 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a security concern and be disqualifying. One is potentially applicable under the established facts in this case:

(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.

When a falsification allegation is controverted, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission.<sup>16</sup> An applicant's level of education and business

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<sup>16</sup> See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

experience are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate.<sup>17</sup>

In this case, Applicant denied all of the Guideline E allegations. He volunteered information about his foreign bank accounts to the DOS investigator and in his answer. He claimed his failure to disclose them in his SCAs was an oversight due to the minor amount of money involved. Applicant reiterated his claims in his answer and in his Response to the FORM.

The SOR also cross-alleged Applicant's sexual behavior as a concern under Guideline E, and alleged that his spouse is unaware of that information. As explained previously, he denied the underlying conduct and there was no evidence to rebut his assertions. His wife's sworn statement directly contradicts the allegation concerning her ignorance of his previous sexual relationships. Accordingly, all Guideline E allegations are decided for Applicant.

### **Whole-Person Concept**

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the applicable guidelines, each of which is to be evaluated in the context of the whole person. An 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.

I have incorporated my comments under the guidelines at issue in my whole-person analysis, and I have considered the factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under these guidelines, and evaluating all the evidence in the context of the whole person, Applicant has not mitigated the foreign influence security concerns at issue. The potential conflicts and heightened risk of pressure, coercion, exploitation, or duress, which stem from his close and committed familial relations to and through his Russian-born wife remain substantial. He refuted the foreign preference, sexual behavior and personal conduct security concerns. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the

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<sup>17</sup> ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

interests of national security of the United States to grant him eligibility for access to classified information.

### **Formal Findings**

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

Paragraph 1, Guideline B:	AGAINST APPLICANT
Subparagraphs 1.a. – 1.c.:	Against Applicant
Subparagraph 1.d. – 1.f.:	For Applicant
Paragraph 2, Guideline C:	FOR APPLICANT
Subparagraphs 2.a. – 2.b.:	For Applicant
Paragraph 3, Guideline D:	FOR APPLICANT
Subparagraph 3.a.:	For Applicant
Paragraph 4, Guideline E:	FOR APPLICANT
Subparagraphs 4.a. – 4.d.:	For Applicant

### **Conclusion**

I conclude that it is not clearly consistent with the interests of national security of the United States to grant or continue Applicant's eligibility for access to classified information. National security eligibility for access to classified information is denied.

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CAROLINE E. HEINTZELMAN  
Administrative Judge