DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[REDACTED]	)	ISCR Case No. 17-03227
	)	
Applicant for Security Clearance	)	

Appearances

For Government: David Hayes, Esq., Department Counsel
For Applicant: *Pro se*

10/09/2018

Decision

HESS, Stephanie C., Administrative Judge:

Applicant has mitigated the foreign influence security concerns raised by his contacts and prior financial support of a friend in Cuba. Access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on May 19, 2015. On October 10, 2017, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guideline B, Foreign Influence. The DOD acted under Executive Order (Ex. 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) effective June 8, 2017.

Applicant answered the SOR on October 19, 2017, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on July 17, 2017,

and the case was assigned to me on February 9, 2018. On February 14, 2018, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for March 8, 2018. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. At Department Counsel's request, I admitted as Administrative Exhibit (AE) 2, without objection, the Administrative Notice memorandum and its supporting documents regarding facts about Cuba. Applicant testified and submitted Applicant's Exhibits (AX) A and B, which were admitted without objection. DOHA received the transcript (Tr.) on March 20, 2018.

Findings of Fact

The SOR alleges that Applicant regularly communicates with a citizen and resident of Cuba and that he provides $100 in financial support to her approximately every six weeks. Applicant admits that he has contact with his friend in Cuba, however he explains that the frequency of that contact is changed. He denies currently sending any financial support, however he admits that he did provide financial support for a period of time. His admissions are incorporated in my findings of fact.

Applicant, 63, is a mechanical engineer employed by a federal contractor since September 1977. He was born in Cuba and immigrated with his father to the United States in September 1969. Applicant's mother and sister joined the family in the United States in 1974. Applicant has been a naturalized United States citizen since March 1977. He received his bachelor's degree in mechanical engineering in June 1977. He has taken graduate courses and owns several patents. Applicant properly disclosed his foreign contacts during his background investigation. He is held a security clearance since 1977. (GX 1; GX 2; Tr. 26-27.)

Cuba is an authoritarian state governed by the Cuban Communist Party. Travel to Cuba from the United States remains restricted and travel for tourist activities is not permitted. In 2016, at least 16 U.S. Diplomats were likely the victims of sonic weapons, suffering brain damage, hearing loss, and blood disorders. The responsible party and the cause of these injuries remains unclear. Cuba has long targeted the United States for intensive espionage activities and there have been numerous reported cases of Cuban government-sanctioned and supported espionage against the United States. Cuba's human rights record remains poor, with abuses against its citizens including government threats, physical assault, intimidation, and interference and monitoring of private communications. (AE 2.)

The Guideline B SOR allegations arise because Applicant has had contact with and supplied some financial support to a citizen and resident of Cuba. Specifically, at the insistence of his mother, Applicant decided to invest more time practicing his Spanish. He went to an online chat room intending to communicate with a Spanish-speaking woman. He did not specifically seek a Cuban woman. However, Applicant began communicating with a woman in Cuba through the chat room in February 2016. In March 2016, the contact changed to email and telephone. Between March 2016 and approximately August 2017, they communicated, primarily by email, on a near daily basis. (GX 2; Tr. 32-33.)

Applicant and his friend communicated well and had a lot in common. In March 2016 at Applicant's suggestion, Applicant's friend applied for a visa for herself and her son to visit Applicant in the United States. Applicant completed the requisite documentation necessary for hosting foreign nationals. The visa was denied by the US government, citing concerns that Applicant's friend would remain in the United States. Following the denial of the visa, Applicant and his friend continued to communicate. In October 2016, Applicant applied for a fiancé visa for his friend. The visa would permit Applicant's friend and son to visit for up to 90 days. Applicant believed that this would give him and his friend enough time to decide whether or not they should pursue a relationship that led to marriage. US immigration officials contacted Applicant for confirmation that he and his friend had previously met in person. Applicant and his friend had not met in person and the visa was denied. (Tr. 34-35; GX 2.)

Applicant's friend was employed as an accountant by the public school system in Cuba. Following Applicant's friends application for a visa to visit the United States, she was interviewed by representatives of the Cuban government. Applicant's friend was informed that her behavior was not consistent with the ideology of the Cuban government and she was terminated from her job. Between March 2017 and in September 2017, Applicant sent his friend $150 a month while she was unemployed. In August 2017, Applicant's friend began working as a hairstylist and Applicant sent her an additional $50 to purchase her necessary tools of the trade. Applicant has not helped support his friend since she returned to work and began earning an income. (AX A.) Applicant and his friend communicated by telephone infrequently because of the cost. Their last telephone conversation was in November 2017. Applicant maintains sporadic, infrequent contact with his friend in Cuba. (Tr. 41-42.)

Applicant did not initially report his communications with his friend in Cuba to his facility security officer (FSO) because he did not think it was required. Specifically, Applicant thought the contact was not a concern in light of the then-improving relationship between the United States and Cuba. However, once he applied for the initial visa in March 2016, he reported the contact to his FSO and was told that the contact was not a concern. (Tr. 52-54.) Applicant has not disclosed to his friend the nature of his employment, nor has she inquired about it. Applicant would consider such an inquiry to be a "huge flag." (Tr. 44.) Applicant has proffered that he will cease all communications with his friend if he is required to do so. (Tr. 40-40-41.)

In 1964, Applicant's father was sent to a forced labor camp in Cuba until he was permitted to emigrate in 1969. Cuba does not recognize Applicant as an American citizen and he is unable to travel to Cuba using his U.S. passport. However, Applicant does not have any desire to travel to Cuba. All of Applicant's family and financial interests, including the house he purchased in 1988, are in the United States. Applicant considers himself to be a loyal American. (Tr. 30-31; Tr. 49-50.) Applicant was sincere and credible during his testimony.

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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant's 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.

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." *See* 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 concern is set forth 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 following disqualifying conditions are applicable: AG ¶ 7

> 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

> AG ¶ 7(b): connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology.

AG ¶¶ 7(a) requires 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 or owning property in a foreign country. The mere possession of close contacts in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if an applicant has such a relationship, this factor alone is sufficient to create

the potential for foreign influence and could potentially result in the compromise of classified information. See Generally ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

The Cuban government is known to commit espionage against the United States and to commit human rights violations, including government intervention on personal freedoms. Applicant's friend lost her job following her application for a visa to visit Applicant in the United States. Given the potential targeting of Applicant's friend, Applicant's relationship creates a heightened risk of foreign exploitation and coercion and the potential risk for a conflict of interest. AG ¶¶ 7(a) and 7(b) are established.

The following mitigating conditions are potentially applicable:

> AG ¶ 8(a): the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the United States;
>
> AG ¶ 8(b): there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, or allegiance to the group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest; and
>
> AG ¶ 8(d): the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country.

The evidence in the record mitigates the concerns about Applicant's contacts with his friend in Cuba. Applicant's friend does not participate in a profession or in activities that are likely to place Applicant in a position of having to choose between foreign interests and U.S. interests. Applicant has lived in the United States since 1969 and has been a naturalized citizen since 1977. All of Applicant's family members and financial interests are in the United States, which he considers to be his home. Applicant's minimal financial support of his friend, which totaled $950, ended in September 2017 and does not raise security concerns. Applicant's current contact with his friend in Cuba is sporadic and infrequent. Applicant properly reported his contacts with his friend in Cuba to his FSO and was informed that the contact was not a concern. AG ¶¶ 8(a), 8(b), and 8(d) apply.

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 in light of the nine adjudicative process factors listed at AG ¶ 2(d).

I have incorporated my comments under Guideline B in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but I have also considered the following:

Applicant has worked for his current employer and held a security clearance for more than 30 years. He is been a naturalized U.S. citizen since 1977 and all his familial and financial ties are to the United States. Applicant was sincere and credible during his testimony

After weighing the applicable 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 contacts. 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

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

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

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Stephanie C. Hess
Administrative Judge