

KEYWORD: Foreign Influence

DIGEST: Applicant is a retired U.S. soldier employed by a defense contractor. He is married to a citizen of the Republic of Korea (ROK) who resides with him in the U.S. His wife's mother is dead. His wife has had no contact with her father for 23 years. She has two brothers living in the ROK, but she has not had contact with one of them for ten years. Her other brother, with whom she talks once or twice a month, owns and operates a taxi in the ROK. Applicant had only two visits with this brother. Applicant previously maintained casual and infrequent contacts with two former foreign military associates, but has had no contact with them for several years. Security concerns based on foreign influence have been mitigated. Clearance is granted.

CASENO: 04-09514.h1

DATE: 05/03/2007

DATE: May 3, 2007

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| In re: |) | |
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| ----- |) | ISCR Case No. 04-09514 |
| SSN: ----- |) | |
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| Applicant for Security Clearance |) | |

**DECISION OF ADMINISTRATIVE JUDGE
LEROY F. FOREMAN**

APPEARANCES

FOR GOVERNMENT

Stephanie C. Hess, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant is a retired U.S. soldier employed by a defense contractor. He is married to a citizen of the Republic of Korea (ROK) who resides with him in the U.S. His wife's mother is dead. His wife has had no contact with her father for 23 years. She has two brothers living in the ROK, but she has not had contact with one of them for ten years. Her other brother, with whom she talks once or twice a month, owns and operates a taxi in the ROK. Applicant had only two visits with this brother. Applicant previously maintained casual and infrequent contacts with two former foreign military associates, but has had no contact with them for several years. Security concerns based on foreign influence have been mitigated. Clearance is granted.

STATEMENT OF THE CASE

On July 21, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleged security concerns raised under Guideline B (Foreign Influence) of the Directive.

Applicant answered the SOR in writing on July 27, 2005, and elected to have a hearing before an administrative judge. The case was assigned to me on March 2, 2007, and heard on April 17, 2007, as scheduled. DOHA received the hearing transcript (Tr.) on April 24, 2007.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 46-year-old employee of a defense contractor. He served on active duty in the U.S. Army for 20 years and retired as a sergeant first class (pay grade E-7) (Applicant's Exhibit (AX) A). He held a security clearance for most of his military career, and he received numerous awards and decorations while on active duty. After retiring from the Army, he was employed by a defense contractor as an instructor in geospatial intelligence. He has earned a reputation as an excellent instructor, dedicated worker, and team player (AX D-H). He applied to renew his security clearance in July 2002, and that application is the subject of this decision (Government Exhibit (GX) 1).

In July 2004, Applicant was hired as a quality assurance engineer by a defense contractor in the business of creating digital mapping products and software (AX , J, L, and M). This position requires him to have a security clearance. His most recent performance appraisal reflects that he has performed very well in this position (AX K).

Applicant comes from a military family. His father, brother, sister, and an uncle served in the military and two nephews are currently serving (Tr. 95). He has Army friends who are still on active duty and serving in Iraq (Tr. 82).

At the time of an interview with a security investigator in October 2002, Applicant was living with a citizen of the Republic of Korea (ROK) who came to the U.S. in 2001. They met when Applicant was stationed in the ROK (Tr. 67). They were married in May 2005, and she obtained her "green card" in 2006. His wife intends to become a U.S. citizen as soon as she is eligible.

Applicant's wife is not employed outside the home. She has never been employed by or connected with the ROK Government, nor have any of her friends or family members (Tr. 84-85). The security concern based on her citizenship is alleged in SOR ¶ 1.a.¹

Applicant's wife's mother died 23 years ago, and his wife has had no contact with her father since her mother's death (Tr. 66). His wife has two brothers. She has been estranged from one brother for ten years and has had no contact with him, but she has telephonic contact once or twice a month with another brother who owns and operates a taxi in the ROK (Tr. 86). Applicant visited with this brother twice during business trips to the ROK in 2002 and 2003, but they had limited communication because of the language barrier (Tr. 61, 68). He has never met his wife's other brother (Tr. 61). Applicant's contacts with his wife's brothers are alleged in SOR ¶ 1.b.

Applicant's wife visited a friend who is a travel agent in the ROK for eight days during January 2007 (Tr. 86). They have telephonic contact about twice a week.

While Applicant was an instructor at an Army school in the U.S., he became acquainted with a Turkish military officer. For a while, they had occasional e-mail contact. Their last contact was in 2001, when Applicant contacted the Turkish officer to determine whether his family had survived an earthquake in Turkey (Tr. 62). Applicant's contacts with the Turkish officer are alleged in SOR ¶ 1.c.

While Applicant was on active duty and serving in the ROK, a soldier in the ROK Army served under his supervision. They had occasional social contact when Applicant went to the ROK on business after he retired, but they have had no contact since 2003 (Tr. 61). Applicant no longer knows how to contact his former subordinate (Tr. 68). His contacts with the ROK soldier are alleged in SOR ¶ 1.d.

At Department Counsel's request, and without objection from Applicant, I took administrative notice of the following adjudicative facts regarding the ROK.² The ROK is a highly developed, stable, democratic republic, with a generally good human rights record. While some human rights violations have occurred, they have not included mistreatment of suspects, police abuse of persons in custody, or torture and coercion of citizens by government officials. The United States maintains a strong military presence in the ROK, especially along the demilitarized zone between the ROK Korea and the Democratic People's Republic of Korea (DPRK). While military tension continues between the ROK and DPRK, they have moved forward on a number of economic cooperative projects, which are sometimes at odds with U.S. policy. Some ROK citizens are critical of U.S. policies and military presence. Anti-U.S. demonstrations are not uncommon. The DPRK has replaced the U.S. as the ROK's major trading partner, but the ROK is still the seventh largest U.S. trading partner. The ROK is an active practitioner of industrial espionage, often targeting protected U.S. commercial secrets that have military applications.

¹On my own motion, I amended SOR ¶ 1.a to allege that in October 2002 Applicant was cohabiting with a citizen of the Republic of Korea who is now his wife. I also amended SOR ¶ 1.b to substitute the word "wife's" for "cohabitant's" to conform to the evidence (Tr. 82-83).

²Department Counsel's request and the documents on which the request was based, are attached to the record as Hearing Exhibit (HX) I. I determined that two enclosures to the request were not proper subjects of administrative notice, and I designated them as GX 2 and 3 (Tr. 36-37).

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 occupy a position . . . that will give that person 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 and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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).

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through 6.3.6.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information. However, the decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It 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 which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *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). “[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant’s security suitability.” ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (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. ISCR Case No. 01-20700 at 3; *see* Directive ¶ E3.1.15. 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* Directive ¶ E2.2.2.

CONCLUSIONS

Guideline B (Foreign Influence)

The concern under this guideline is that a security risk may exist when an applicant's immediate family, or other persons to whom he or she may be bound by affection, influence, or obligation, are not citizens of the U.S. or may be subject to duress. "These situations could create the potential for foreign influence that could result in the compromise of classified information." Directive ¶ E2.A2.1.1. A disqualifying condition (DC 1) may arise when "[a]n immediate family member [spouse, father, mother, sons, daughters, brothers, sisters], or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country." Directive ¶ E2.A2.1.2.1. "[T]here is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse." ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at * 8 (App. Bd. Feb. 20, 2002).

A disqualifying condition (DC 2) also may arise when an applicant is "[s]haring living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists." Directive ¶ E2.A2.1.2.2. Where the cohabitant is also an immediate family member under DC 1, both disqualifying conditions may apply. The totality of an applicant's family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003). DC 1 and DC 2 are raised by the evidence in this case.

Family ties with persons in a foreign country are not, as a matter of law, automatically disqualifying under Guideline B. However, such ties raise a prima facie security concern sufficient to require an applicant to present evidence of rebuttal, extenuation or mitigation sufficient to meet the applicant's burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for the applicant. *See* Directive ¶ E3.1.15; ISCR Case No. 99-0424, 2001 DOHA LEXIS 59 (App. Bd. Feb. 8, 2001). Applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

In cases where an applicant has immediate family members who are citizens or residents of a foreign country or who are connected with a foreign government, a mitigating condition (MC 1) may apply if "the immediate family members, cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States." Directive ¶ E2.A2.1.3.1.

Notwithstanding the facially disjunctive language of MC 1 ("agents of a foreign power **or** in a position to be exploited"), it requires proof "that an applicant's family members, cohabitant, or associates in question are (a) not agents of a foreign power, **and** (b) not in a position to be exploited by a foreign power in a way that could force the applicant to chose between the person(s) involved and the United States." ISCR Case No. 02-14995 at 5 (App. Bd. Jul. 26, 2004); *see* 50 U.S.C. § 1801(b) (defining "agent of a foreign power").

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). Although the ROK historically has been regarded as friendly to the U.S., the distinctions between friendly and unfriendly governments must be made with caution. Relations between nations can shift, sometimes dramatically and unexpectedly.

Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. *See* ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Nevertheless, the nature of a nation’s government, its relationship with the U.S., 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 U.S.

Applicant’s wife and her immediate family members are not agents of a foreign power. Furthermore, they are not connected to the ROK government or any industrial enterprises likely to engage in industrial espionage. The ROK is a close ally and a major trading partner of the U.S., and it is dependent on the U.S. for its defense. The nature of the ROK’s government, its human rights record, and its relationship with the U.S. are not determinative; but they are relevant factors in determining whether the ROK would risk damaging its relationship with the U.S. by exploiting or threatening its private citizens to force a U.S. citizen to betray the U.S. The ROK police and governmental officials do not have a reputation for coercing or abusing their citizens to obtain sensitive military information or to conduct industrial espionage.

Any foreign influence on Applicant would be indirect. It would require that Applicant’s brother-in-law or his wife’s friend in the ROK persuade his wife to attempt to influence him. For the attempt to be successful, it would be necessary to persuade Applicant to turn his back on his country, his military friends, and his family. After considering all the circumstances of this case, I conclude MC 1 is established.

A mitigating condition (MC 3) may apply if “[c]ontact and correspondence with foreign citizens are casual and infrequent.” Directive ¶ E2.A2.1.3.3. There is a rebuttable presumption that contacts with an immediate family member in a foreign country are not casual. ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002). Applicant has rebutted this presumption with respect to his wife’s brothers.

MC 3 also applies to Applicant’s contacts with the Turkish officer and the ROK soldier. Although it appears that these two contacts were casual and infrequent from the beginning, they are now nonexistent. MC 3 applies to these two contacts.

Whole Person Analysis

In addition to considering the specific disqualifying and mitigating conditions under each guideline, I have also considered the general adjudicative guidelines in the Directive ¶ E2.2.1. I have considered: (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 applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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. Directive ¶¶ E2.2.1.1 through E2.2.1.9. Although several of these factors were incorporated in the above discussion of Guideline B, several merit additional comment.

Applicant is a mature adult who served with distinction in the U.S. Army for 20 years. He has held a security clearance for most of his adult life, without incident. He remains intensely loyal to his military friends and his family members with military connections. He was sincere, candid, and persuasive during his testimony at the hearing.

Under the revised adjudicative guidelines implemented by the Department of Defense for cases where the SOR was issued on or after September 1, 2006 (Guidelines), a mitigating condition may be established by showing "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." Guidelines ¶ 8(b). While Applicant's case is not covered by the revised guidelines, the strength and depth of Applicant's devotion to the U.S., his military friends, and his family members who are serving or have served in the U.S. armed forces is a relevant consideration under the whole-person concept.

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 based on based on foreign influence. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the interests of national interest to continue his security clearance.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

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| Paragraph 1. Guideline B (Foreign Influence): | FOR APPLICANT |
| Subparagraph 1.a: | For Applicant |
| Subparagraph 1.b: | For Applicant |
| Subparagraph 1.c: | For Applicant |
| Subparagraph 1.d: | For Applicant |

DECISION

In light of all of the circumstances in this case, it is clearly consistent with the national interest to continue Applicant's security clearance. Clearance is granted.

LeRoy F. Foreman
Administrative Judge