KEYWORD: Foreign Influence

DIGEST: Applicant is U.S. citizen by virtue of his father's citizenship and his birth in the U.S. He graduated from the U.S. Military Academy, served on active duty for five years, and has been recalled to active duty for service in Iraq. His mother has resided in the U.S. for 34 years but remains a citizen of the Republic of Korea (ROK). His wife is a citizen of the ROK residing with him in the U.S. His grandmother, mother-in-law, father-in-law, and brother-in-law are all citizens and residents of the ROK. He has mitigated the security concerns based on foreign influence. Clearance is granted.

CASENO: 06-12223.h1

DATE: 05/31/2007

DATE: May 31, 2007

In re:	)	
	)	
----------	)	ISCR Case No. 06-12223
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

DECISION OF ADMINISTRATIVE JUDGE
LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT
Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT
Philip D. Cave, Esq.

SYNOPSIS

Applicant is U.S. citizen by virtue of his father's citizenship and his birth in the U.S. He graduated from the U.S. Military Academy, served on active duty for five years, and has been recalled to active duty for service in Iraq. His mother has resided in the U.S. for 34 years but remains a citizen of the Republic of Korea (ROK). His wife is a citizen of the ROK residing with him in the U.S. His grandmother, mother-in-law, father-in-law, and brother-in-law are all citizens and residents of the ROK. He has mitigated the security concerns based on foreign influence. Clearance is granted.

STATEMENT OF THE CASE

On July 6, 2006, 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 20, 2006. He initially elected to have the case decided on the record in lieu of a hearing before an administrative judge. Department Counsel sent the File of Relevant Material to Applicant on August 23, 2006. On November 1, 2006, Applicant changed his election and requested a hearing. Scheduling the hearing was delayed because Applicant had been ordered to active duty in the U.S. Army Reserve and deployed to Iraq. The case was assigned to an administrative judge on January 25, 2007. The case was scheduled for April 27, 2007, and the hearing convened on that date; but the administrative judge granted a continuance until April 30, 2007, because of the unavailability of Applicant's counsel. The case was reassigned to me on April 27, 2007, and heard on April 30, 2007, as rescheduled. DOHA received the hearing transcript (Tr.) of the April 27 hearing on May 4, 2007, and the transcript of the April 30 hearing on May 9, 2007. All citations to the transcript in the decision below refer to the transcript of the April 30 hearing.

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 29-year-old analyst employed by a federal contractor since May 2004. He is a U.S. citizen by virtue of his father's citizenship and his birth in the U.S. His mother is a citizen of the ROK residing permanently in the U.S. He graduated from the U.S. Military Academy in May 1999 and served for five years on active duty, including tours of duty in Afghanistan and the ROK. He transferred to the U.S. Army Reserve upon his release from active duty, and he was recalled to active duty in April 2006 and deployed to Iraq in September 2006 (Tr. 51). He has held a security clearance continuously since 1997 (Tr. 57).

While on active duty and assigned to the ROK, he met his future wife, a citizen of the ROK. They were married in the ROK on September 3, 2002. They have two children, a two-year-old and a three-month-old (Tr. 68). They chose to be married in the ROK to make it easier for Applicant's extended Korean family and his wife's family to attend the ceremony (Tr. 56). Applicant's immediate family came to the ROK from the U.S. to attend the ceremony. His wife accompanied him when he was reassigned to the U.S. in March 2003, and now resides with him in the U.S. They do not have any assets, sources of income, or business connections in the ROK (Tr. 68-69).

Applicant's wife was working for a morale, welfare, and recreation activity for the U.S. Forces in Korea when Applicant met her.[1] She graduated from college in the ROK with a major in English education (Tr. 54). Her employment by a U.S. agency required that she undergo a background investigation. When Applicant requested and obtained permission to marry a foreign national, his intended wife was required to undergo another background investigation (Tr. 55). His wife is not employed outside the home (Tr. 73).

Applicant's mother married a U.S. soldier and came to the U.S. in 1974. Her first husband, Applicant's father, died when Applicant was three years old (Tr. 48, 50). She has since married another U.S. citizen. She is a housewife (Tr. 50). According to Applicant, she never applied for U.S. citizenship because she was busy raising her children, but she considers herself "more American than not" (Tr. 85). She visits the ROK every two or three years (Tr. 83).

Applicant's grandmother is a citizen and resident of the ROK, but she spends about half the time in the U.S. with her family (Tr. 81). She is more than 80 years old. She is a housewife and lives on her own assets. She does not depend on any benefits from the ROK government and has never had any ties to the ROK government or military. Applicant visited her often when he was stationed in the ROK. Now he calls her twice a year. Applicant's wife calls her about every ten days (Applicant's Exhibit A).

Applicant's mother-in-law, father-in-law, and brother-in-law are citizens and residents of the ROK. None of his in-laws are politically active, connected with the ROK government or military, or dependent on the ROK government for any benefits (AX A-D).

Applicant's mother-in-law was a homemaker for most of her life, but she is now working in real estate (Tr. 78). Applicant writes to her twice a year and calls about four times a year. His wife writes about four times a year and calls her every week (AX B).

Applicant's father-in-law worked as an architect until he was injured in a car accident about ten years ago. After he was injured, he stopped working (Tr. 78). Applicant calls him about once a month, and Applicant's wife calls him once a week (AX C).

Applicant's brother-in-law works as a commercial truck driver (Tr. 79). He performed his mandatory military service in the ROK armed forces, but he has no other connection with the ROK government or military. Applicant calls him once or twice a year and Applicant's wife calls four or five times a year. (AX D.)

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 and the Democratic People's Republic of Korea (DPRK). While military tension continues between the ROK and DPRK, they have moved forward

[1]Morale, welfare, and recreation activities are U.S. instrumentalities, but they are self-supporting and do not receive appropriated funds.

on a number of economic cooperative projects, which are sometimes at odds with U.S. policy. The ROK is the seventh largest U.S. trading partner and the 11th largest economy in the world.[2]

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.

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)).

---

[2]At Department Counsel's request, I took administrative notice of adjudicative facts concerning the ROK, based on Hearing Exhibit (HX) III (U.S. Dept. of State, *Country Reports on Human Rights Practices, Republic of Korea* (Mar. 8, 2006) and HX IV (U.S. Dept. of State, *Background Note: South Korea* (Apr. 2006). I declined to take administrative notice based on HX I (National Counterintelligence Center, *Report to Congress, 2000*) based on the age of the publication and its dubious relevance in light of its reference only to "Korea" without specifying either the ROK or the DPRK. I also declined to take administrative notice based on HX II (Larry A. Niksch, Congressional Research Service, *Korea: U.S.-Korean Relations -- Issues for Congress* (Jun. 16, 2005), because Department Counsel was unable to demonstrate that the opinions expressed by the author were accepted by the U.S. government as facts not subject to reasonable dispute. However, I admitted HX II as a learned treatise and redesignated it as GX 2.

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). 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).

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 evidence in this case is sufficient to raise both DC 1 and DC 2.

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).

Since the government produced substantial evidence to establish DC 1, the burden shifted to Applicant to produce evidence 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 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, 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).

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.

None of Applicant's family members are agents of a foreign power, connected to a foreign government or its military services, politically active, or dependent on the ROK government for any benefits. None of them are involved in businesses likely to be involved in economic or industrial espionage. While these individual family circumstances are not determinative, Applicant's evidence demonstrating his family's absence of governmental connections, financial dependence on the government, or business connections susceptible to industrial espionage is relevant in assessing whether MC 1 applies. The nature of the ROK's government, its human rights record, and its relationship with the U.S. also are not determinative, but they are all relevant factors in determining whether the ROK would risk damaging its relationship with the U.S. by exploiting or threatening its private citizens in order to force a U.S. citizen to betray the U.S. After considering the totality of Applicant's family ties to the ROK as well as each individual family tie, 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. at 5 (App. Bd. Feb. 1, 2002). Applicant has no immediate family members in the ROK, but he maintains regular contact with his grandmother, mother-in-law, father-in-law, and brother-in-law. I conclude MC 3 is not established.

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. Some of these factors were discussed above, but some merit additional comment.

Applicant is a mature adult who spent five years on active duty as an Army officer, and he has been recalled for service in Iraq. His grandmother remains a resident of the ROK, but she spends half her time in the U.S. His mother has never bothered to become a U.S. citizen, but she has lived in the U.S. for 32 years, had two American husbands, raised a loyal soldier-son, and clearly is an American at heart. 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 his commitment to the U.S. and his family ties in the U.S. are relevant considerations under the whole-person concept.

After weighing the disqualifying and mitigating conditions under Guidelines B, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on foreign influence. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to continue his security clearance.

FORMAL FINDINGS

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

Paragraph 1. Guideline B:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	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