

DATE: December 21, 2007

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In re:)	
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-----)	ISCR Case No. 06-22968
SSN: -----)	
)	
Applicant for Security Clearance)	
_____)	

**DECISION OF ADMINISTRATIVE JUDGE
CHRISTOPHER GRAHAM**

APPEARANCES

FOR GOVERNMENT

D. Michael Lyles, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 50-year-old programmer employed by a federal contractor. Applicant's brother is a citizen and resident of the Republic of South Korea (hereinafter "Korea"), her husband and two sons are citizens of Korea residing in the United States, and her mother, a brother, and two sisters are citizens of Korea living in the United States. She traveled to Korea in 1999 when her father became ill with cancer, and again in 2000 for his funeral. She did not submit mitigating evidence and did not allay the government's security concerns about foreign influence. Clearance is denied.

STATEMENT OF THE CASE

On December 5, 2006, Applicant submitted a Security Clearance Application (SF 86).¹ The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, DOHA issued a Statement of Reasons (SOR) on December 5, 2006, detailing the basis for its decision – security concerns raised under Guideline B (Foreign Influence). The President issued revised adjudicative guidelines (Guidelines) on December 30, 2005. DoD implemented them on September 1, 2006. Pending official amendment/reissue of DoD Directive 5220.6, the Guidelines are to be used in all cases when the SOR is dated on or after September 1, 2006. Because the SOR was issued after September 1, 2006, DoD policy requires that this case proceed under the revised guidelines.

Applicant answered the SOR in writing on December 18, 2006, and requested a decision without a hearing. Department Counsel submitted a file of relevant material (FORM) in support of the government’s case, a copy of which was received by Applicant on September 7, 2007. Applicant was afforded the opportunity to file objections and submit material in refutation, extenuation, or mitigation by October 7, 2007. She filed no response. The case was assigned to me on November 2, 2007.

PROCEDURAL RULINGS

Administrative Notice

Department Counsel requested administrative notice of the facts in Government Exhibits I through X. Applicant raised no objection.

Administrative or official notice is the appropriate type of notice used for administrative proceedings.² The most common basis for administrative notice at ISCR proceedings, is to notice facts that are either well known or from government reports.³ I took administrative notice of various facts derived from Government Exhibits I through X, as indicated under subheading “South Korea” of this decision.

FINDINGS OF FACT

¹Item 1 (Security Clearance Application (SF 86), dated December 5, 2006).

²See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004)); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)).

³See Stein, ADMINISTRATIVE LAW, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice).

Applicant admitted the allegations contained in the SOR. The admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 50-year-old programmer employed by a federal contractor.⁴ She is married and has three children.⁵ She has a college degree.⁶ She has no military service, and this is her first application for a security clearance.⁷

Applicant's brother is a citizen and resident of the Republic of South Korea (hereinafter "Korea".) He plans to immigrate to the United States to join the rest of his family as soon as he is able. Her husband and two sons are citizens of Korea residing in the United States. Her oldest son is a citizen of the U.S. One son is waiting for the final phase of citizenship, and the other son is in the process of application for citizenship. Her husband plans to apply for citizenship. Her mother, a brother, and two sisters are citizens of Korea living in the United States. They plan to apply for citizenship as soon as they have met the residency requirements. She traveled to Korea in 1999 when her father became ill with cancer, and again in 2000 for his funeral.⁸

The only evidence submitted by Applicant was her one-page answer to the SOR.⁹

South Korea

Even though South Korea (sometimes referred to as Korea) is a constitutional democracy with a history of friendly relations with the United States, in recent years South Korea has moved to strengthen economic and political ties with North Korea.¹⁰ South Korea is North Korea's second largest trading partner.¹¹ Since 1998, South Korean public opinion has been openly critical of the U.S. and its policies toward North Korea.¹² Since 2004, South Korea has exported more goods to the People's Republic of China (PRC) than to the U.S.¹³ These strengthening ties between South

⁴Item 1, *supra*, note 1, at 1-2.

⁵*Id.* at 3-6.

⁶*Id.* at 1.

⁷*Id.* at 8, 10.

⁸Answer to the SOR, dated December 18, 2006.

⁹*Id.*

¹⁰Item I: U.S. State Department Background Note: South Korea - January 2007.

¹¹*Id.*

¹²Item IV: Congressional Research Service (CRS), Report for Congress: Korea: *U.S. - Korean Relations - Issues for Congress - 2005*.

¹³Item V: CRS Report for Congress: *The Rise of China and its Effect on Taiwan, Japan, and South Korea: U.S. Policy Choices - 2006*.

Korea and North Korea and China increase the government's concern about applicant's who have family members who are citizens or residents of South Korea.

Some countries seek unauthorized access to classified information in order to reap the benefits of sensitive U.S. technology. Individuals from both private and public sectors in nearly 100 countries attempted to illegally acquire U.S. technology in FY 2004¹⁴, and South Korea has in the past used covert methods to acquire classified information by exploiting its relationship with American citizens of Korean descent, as in the case of U.S. v. Kim.¹⁵

POLICIES

In an evaluation of an applicant's security suitability, an administrative judge must consider the "Adjudicative Guidelines for Determining Eligibility For Access to Classified Information" (Guidelines). In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into Disqualifying Conditions (DC) and Mitigating Conditions (MC), which are used to determine an applicant's eligibility for access to classified information.

These guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process.¹⁶ An administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge considers all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.¹⁷

Specifically, an administrative judge should consider the nine adjudicative process factors listed at Guideline ¶ 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) 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."

Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that "any doubt concerning personnel being considered for access to classified information will be resolved in favor of national security."¹⁸ In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based

¹⁴Item VI: Annual report to Congress on Foreign Economic Collection and Industrial Espionage - 2004.

¹⁵Item X: Pleadings in *United States v. Kim*, No. CR-97-117-A (E.D. Va. Feb. 7, 2001).

¹⁶Guideline ¶ 2.

¹⁷Guideline ¶ 2(c).

¹⁸Guideline ¶ 2(b).

on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, facts must be established by “substantial evidence.”¹⁹ The Government initially has the burden of producing evidence to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant’s access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to present “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision.”²⁰ The burden of disproving a mitigating condition never shifts to the Government. ¹²

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

The scope of an administrative judge’s decision is limited. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism.²²

CONCLUSIONS

Guidelines ¶ 6. The Concern. 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

¹⁹“Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge’s] finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966). “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).

²⁰Directive ¶ E3.1.15.

²¹*See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005): “The Administrative Judge considers the record evidence as a whole, both favorable and unfavorable, evaluates Applicant’s past and current circumstances in light of the provisions of the Directive, and decide[s] whether Applicant has met his burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

²²Executive Order 10865, § 7.

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.

Guidelines ¶ 7. Conditions that *could raise* a security concern and may be disqualifying include:

(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;

(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; 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.

The government established its case under Guideline B. Applicant's admitted contacts and potential vulnerability based on those contacts make applicable the disqualifying conditions in Guidelines ¶ 7 (a), (b), and (d). Her close bonds to her immediate family, who are not citizens of the U.S., create the potential for foreign influence that could result in the compromise of classified information. 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, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information.²³ The Appeal Board has held that family ties with citizens or residents of a foreign country raise a *prima facie* security concern sufficient to require an applicant to present evidence of rebuttal, extenuation, or mitigation sufficient to meet her burden of persuasion--that it is clearly consistent with the national interest to grant or continue a security clearance for her.²⁴ The Government produced substantial evidence of these three disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove a mitigating condition. As previously indicated, the burden of disproving a mitigating condition never shifts to the Government.

Guidelines ¶ 8. Conditions that could *mitigate* security concerns include:

(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

²³See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

²⁴ISCR Case No. 99-0532 at 7 (App. Bd. Dec. 13, 2000).

between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;

(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;

(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;

(d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;

(e) 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; and

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

Applicant's Answer to the SOR does not detail how and whether any of the mitigating conditions apply. She did not provide evidence about her family's employment, social activities, and contacts in order to make a case that it would be unlikely that she would be placed in situations that would place her in a position of having to choose between foreign interests and the interests of the United States. She offered no evidence about her relatives and their jobs, activities, or financial interests, making it impossible to determine their susceptibility to pressure or coercion from the South Korean government or other foreign organizations or entities. She provided no information about her husband's interaction with his parents and relatives and whether or not there is a potential for influence based on those contacts. She has the burden to prove that her contacts with foreign nationals have no risk for foreign influence or exploitation. Since she did not prove that these contacts were casual and infrequent, I can only assume they are not. No mitigating conditions apply.

In SOR subparagraph 1.d., the government alleged that Applicant traveled to Korea in 1999 (when her father became ill with cancer) and again in 2000 (for his funeral). No other foreign travel is alleged. These trips are personal and are not determinative of her security suitability. I find for Applicant on this allegation.

Whole Person Analysis

In addition to the enumerated disqualifying and mitigating conditions as discussed previously, I have considered the general adjudicative guidelines related to the whole person concept under Directive ¶ E2.2.1. The directive lists nine adjudicative process factors which are used for "whole person" analysis. Foreign influence and foreign preference do not involve misconduct,

voluntariness of participation, rehabilitation and behavior changes, etc. Accordingly, the eighth adjudicative process factor is probably the most relevant. Directive ¶ E2.2.1.8. The eighth factor provides, “the potential for pressure, coercion, exploitation, or duress.”²⁵ Korea’s government is not hostile to the United States, but Applicant has not shown that there is no significant possibility of pressure, coercion, exploitation or duress.

Applicant has not provided any other countervailing, positive attributes to Applicant’s life as a U.S. citizen that weigh towards granting a clearance. The “whole person” analysis in a Guideline B case should include “the totality of an applicant’s conduct and circumstances (including the realistic potential for exploitation)” as well as the eighth factor discussed in the previous paragraph.²⁶ In this case, Applicant’s potential for exploitation is unknown. After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude Applicant has failed to meet her burden to mitigate the security concerns pertaining to foreign influence.

Based on the Appeal Board’s Guideline B jurisprudence pertaining to cases involving Korean-Americans, who have frequent contacts with family members living in Korea, Applicant’s security eligibility and suitability cannot be approved. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my “careful consideration of the whole person factors”²⁷ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under Enclosure 2 of the Directive. I conclude Applicant is not eligible 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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant

²⁵See ISCR Case No. 02-24566 at 3 (App. Bd. July 17, 2006) (stating that an analysis under the eighth whole person factor apparently without discussion of the other factors was sustainable); ISCR Case No. 03-10954 at 5 (App. Bd. Mar. 8, 2006) (sole whole person factor mentioned is eighth factor in discussion of Judge’s whole person analysis for Iranian-American’s case).

²⁶Compare ISCR Case No. 03-23259 at 2 (App. Bd. May 10, 2006) (noting Judge did not assess “the realistic potential for exploitation” but affirming denial of clearance based on contacts with Iranian family members); with ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006) (remanding grant of clearance because Judge did not assess “the realistic potential for exploitation”).

²⁷See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

DECISION

In light of all of the circumstances in this case, it is clearly not consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Christopher Graham
Administrative Judge