



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



In the matter of:)	
)	
)	ADP Case No. 12-04764
)	
Applicant for Public Trust Position)	

Appearances

For Government: Daniel Crowley, Esq., Department Counsel
For Applicant: *Pro se*

01/25/2013

Decision

HEINY, Claude R., Administrative Judge:

Applicant’s step-father is a citizen and resident of Kuwait who has served in the Kuwaiti military for more than 35 years. Applicant has rebutted or mitigated the foreign influence trustworthiness concerns. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to sensitive information and eligibility for a public trust position is granted.

History of the Case

On October 10, 2012, the Department of Defense issued a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline B, foreign influence. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); Department of Defense Regulation 5200.2-R, *Personnel Security Program*, dated Jan. 1987, as amended (Regulation), and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

On October 17, 2012, Applicant answered the SOR and requested a hearing. On November 27, 2012, I was assigned the case. On November 28, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing for the hearing held on December 6, 2012.¹ At the hearing, the Government offered exhibits (Ex.) 1 and 2, which were admitted into evidence without objection. Applicant testified, as did her husband, and submitted Exs. A through H, which were admitted into evidence without objection. The record was held open to allow Applicant to submit additional information. On December 11, 2012, additional material was submitted. Department Counsel had no objection to the material, which was admitted into the record as Ex. I. On December 17, 2012, DOHA received the hearing transcript (Tr.).

Procedural Rulings

Department Counsel requested administrative notice of facts concerning the State of Kuwait (Kuwait) and provided supporting documents to show detail and context for those facts. Applicant agreed to the administrative notice request and the five documents were admitted as Hearing Exhibits (HE) I through V.

Administrative or official notice is the appropriate type of notice used for administrative proceedings. See 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)). The most common basis for administrative notice at ISCR proceedings, is to notice facts that are either well known or from government reports. See Stein, *Administrative Law*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice). I marked the documents as Ex. Exhibits I to V. See the Kuwait section of the Findings of Fact of this decision, *infra*, for the facts accepted by administrative notice.

Findings of Fact

In Applicant's Answer to the SOR, she admitted her step-father was a citizen and resident of Kuwait who had served in the Kuwaiti military for 35 years. This admission is incorporated herein. After a thorough review of the pleadings, exhibits, and testimony, I make the following additional findings of fact:

Applicant is a 39-year-old data entry specialist who has worked for a defense contractor since 2002, and seeks to maintain a position of trust. She received an exceptional performance award from the U.S. Army for her work in 1990 and 1991. (Ex. B) In 1992, her dedication and unselfish service was again recognized by the U.S. Army. (Ex. D) Coworkers and acquaintances indicate she is efficient, punctual, goal oriented, motivated, dedicated, dependable, hardworking, and a personable individual of high moral character whose dedication to duty and attention to detail are recognized. (Ex. A, C, F, G, I) She possesses a positive attitude. (Ex. H)

Applicant is married to a U.S. Army veteran who served four years of service from 2001 through 2005. In 2004, he served in Iraq for just over one year. (Tr. 25) Applicant and her husband have known each other for six years. They have been married four years and have two children ages three and six. (Tr. 26) During the time her husband has known her, her husband is aware of his wife having talked with her step-father, on the telephone, approximately ten times. (Tr. 27)

Applicant's step-father is a member of the Kuwaiti military who was stationed in the United States. He is an automation clerk. (Tr. 46) He was enrolled in a DoD language school in the United States with follow on assignments in the United States. In May 1977, her mother and step-father married. Applicant is the oldest of her siblings. (Tr. 41) At the time of the marriage, Applicant was four years old and her half-brother was four months old. From the marriage, came two additional children who are Applicant's half-sister and half-brother. All of her siblings were born in the United States. She was never adopted by her step-father. (Ex. I) Between 1977 and 1992, her step-father returned to Kuwait twice, once for a period of two years. (Tr. 29)

In June 1991, Applicant graduated from a U.S. high school. She has since taken continuing education through a U.S. college. (Ex. I) In October 1992, she accompanied her father, mother, and siblings to Kuwait. Following Operation Desert Storm, her step-father was reassigned to Kuwait. He was anxious to return to look after his aging mother who was still living in Kuwait. Applicant remained with her family in Kuwait for seven years. (Tr. 30)

Before leaving for Kuwait, during Operations Desert Shield and Desert Storm, Applicant was a civilian employee for the U.S. Army working as an office automation clerk. (Ex. B, C, D, I) In 1993, her grandmother got her a job at the English speaking television station. She worked for the Ministry of Information, as did all station employees. (Ex. I) In 1996, her mother was depressed and wished to return to the United States, in part to see her son. (Tr. 31) Applicant's half-brother had returned to the United States in 1993 to live with relatives and finish high school. Applicant's step-father attempted to be reassigned back to the United States at the same U.S. military base where he was when he and his wife married.

In April 1996, Applicant returned to the United States with her mother, half-brother, and half-sister. Applicant paid for the airplane tickets back to the United States and incurred \$10,000 in credit card debt reestablishing the family in the United States. (Tr. 32) The plan was that her step-father would soon join them in the United States. However, this did not occur. Applicant returned to Kuwait to work and pay off the credit card debt she incurred from the family's relocation. (Ex. I, Tr. 32) However, shortly after returning to Kuwait she decided to return permanently to the United States. (Tr. 32)

In 2001, Applicant's mother and step-father divorced. Her step-father blames Applicant for the breakup of the marriage because she paid to have her mother and siblings return to the United States. (Tr. 54) Her step-father had married a second wife

in Kuwait while still married to Applicant's mother. (Tr. 37) Her mother suffers from diabetes and Applicant has contacted her step-father asking him to help address her mother's medical bills. Applicant's sister was raped, and beginning last year, Applicant would call her step-father asking that he call and talk with her half-sister to provide emotional support. (Tr. 35) Additionally, her half-sister needs financial assistance from her step-father and Applicant would contact him asking him to assist her half-sister. (Tr. 36) She would call her step-father approximately once a month. (Tr. 36, 41) They have never exchanged emails. (Tr. 37)

Applicant, her husband, children, mother, half-brothers, half-sister, and nephew all live close together. Applicant, her husband, children, and mother all live in the same house. (Tr. 39)

Kuwait is a small, oil-rich constitutional, hereditary emirate ruled by princes. Its constitution provides for an elected National Assembly and details the powers of the branches of government and the rights of citizens.² The Department of State remains concerned about the possibility of terrorist actions against U.S. citizens and interests abroad, specifically in the Middle East, including the Persian Gulf and Arabian Peninsula. The Near East region remains one of the most active in terms of terrorist activity. The threat of terrorism remains high in Kuwait.³ Kuwait lacks legal provisions that deal specifically with terrorism and terrorist financing. As a result of Kuwait's lack of a clear legal framework for prosecuting terrorism-related crimes, it often resorts to other legal statutes to try suspected terrorists, which hampers enforcement efforts.⁴

Strategic cooperation between the United States and Kuwait increased in 1987 with the implementation of a maritime protection regime that ensured the freedom of navigation through the Gulf. The U.S.–Kuwait strategic partnership intensified dramatically after Iraq's invasion of Kuwait and the U.S.–Kuwait relationship remains strong in the post-gulf War period.⁵ Kuwait is an important partner in the U.S. counterterrorism efforts.⁶

The principal human rights problems in Kuwait include limitation on citizens' right to change their government; trafficking in persons (especially in the domestic and unskilled service sectors) and limitation on workers' rights. Authorities restrict freedom of special foreign workers and stateless Arabs.⁷ Other human rights problems include reports of security forces abusing prisoners, restriction on freedom of movement,

² U.S. Department of State Country Specific Information, March 13, 2012, page 4. (HE I)

³ U.S. Department of State Country Reports on Terrorism 2011, July 2012, page 92. (HE IV)

⁴ *Id.* page 110. (HE IV)

⁵ U.S. Department of State Country Specific Information, March 13, 2012, page 10. (HE I)

⁶ *Id.* page 11. (HE I)

⁷ U.S. Department of State 2011 Human Rights Reports: Kuwait, May 24, 2012, page 1. (HE III)

limitation on freedom of press, association, and religion. Women do not enjoy equal rights.⁸

The constitution states that Islam is the state religion and that Sharia (Islamic law) is a main source of legislation. The constitution calls for “absolute freedom” of belief and for freedom of religious practice in accordance with established customs, provided that it does not conflict with public order or morals.⁹

Policies

Positions designated as ADP I and ADP II are classified as “sensitive positions.” (See Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.) “The standard that must be met for . . . assignment to sensitive duties is that, based on all available information, the person’s loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security.” (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. (See Regulation ¶ C8.2.1.)

When evaluating an applicant’s suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of sensitive information is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate,

⁸ Id. page 1.(HE III)

⁹ U.S. Department of State, International Religious Freedom Report for 2011, page 1.(HE V)

or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion as to obtaining a favorable trustworthiness decision.

A person who seeks access to sensitive 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 sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Section 7 of Executive Order (EO) 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline B, Foreign Influence

AG ¶ 6 explains the Government’s security concern regarding foreign influence:

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 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.

AG ¶ 7 describes a condition that could raise a security concern and may be disqualifying in this case:

(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;¹⁰

¹⁰ 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

Applicant has monthly telephone contact with her step-father, who is a resident and citizen of Kuwait. He has been a member of the Kuwaiti military for 35 years. The relationship with her step-father creates a potential conflict of interest because the relationship is sufficiently close in nature and could raise a security concern over her desire to help her step-father.

Three mitigating conditions under AG ¶ 8 are potentially applicable:

(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 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; and

The U.S.–Kuwait relationship remains strong in the post-Gulf War period. Kuwait is an important partner in the U.S. counterterrorism efforts. It is unlikely that Kuwait would attempt to exploit Applicant's relationship with her step-father. Her contact with him is infrequent and limited to attempting to have him assist her mother financially or support her half-sister emotionally. Telephone calls are approximately once a month. They do not engage in email communication. AG ¶ 8(a) and AG ¶ 8(c) apply.

Applicant established the application of AG ¶ 8(b). Based on her relationship and depth of loyalty to the United States, she can be expected to resolve any conflict of interest in favor of U.S. interests. She was born in the United States, as were all her siblings, and lived here until a few years after graduating from high school. From October 1992 through 1996, she lived with her step-father, mother, and siblings in Kuwait. In 1996, she took steps to have her mother and siblings relocated to the United States. Her step-father believed this action influenced the 2001 divorce between him and Applicant's mother.

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).

Whole-Person Concept

Under the whole-person concept, the 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. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 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) 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.

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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case and carefully considered Applicant's connection to her step-father, a citizen and resident of Kuwait. There is substantial evidence in mitigation. Applicant was born and raised in U.S. Her husband, children, mother, siblings, and nephew are all native born U.S. citizen who lives in the U.S. Her husband is a U.S. Army veteran who served in Iraq.

Applicant has no meaningful relationship with her step-father. Her communication with him is limited to asking that he provide financial support for her mother and emotional support for her half-sister. As the oldest sibling she believes this is her duty. She has no relationship with the other members of her step-father's family who live in Kuwait. Her step-father has remarried. She has no financial ties overseas in contrast to her U.S. financial ties. There is no evidence she has ever taken any action which could cause potential harm to the United States.

Applicant is dedicated, dependable, and hardworking. She has the respect and support of her coworkers and acquaintances. Her employer's confidence and trust in her is very high. She received letters of commendation for her work as a civilian employee when working for the U.S. Army. Her step-father has been a clerk in the Kuwaiti military for 35 years, but neither he or and members of his family have been foreign agents. There is no evidence suggesting the Kuwaiti government has used its resident citizens to extract information from U.S. relatives. The likelihood of such an occurrence appears remote.

This Analysis must answer the question whether there is a legitimate concern under the facts presented that the Kuwaiti Government or its agents might exploit or

attempt to exploit Applicant's step-father in such a way that this U.S. citizen would have to choose between her pledged loyalty to the U.S. and her step-father. After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude Applicant has mitigated the security concerns pertaining to foreign influence.

Formal Findings

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

Paragraph 1, Foreign Influence: FOR APPLICANT

Subparagraph 1.a: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interest of national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information and occupying a public trust position is granted.

CLAUDE R. HEINY II
Administrative Judge