DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No.: 14-06046
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Tovah A. Minster, Esq., Department Counsel
For Applicant: *Pro se*

03/24/2016

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Decision

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CERVI, Gregg A., Administrative Judge:

This case involves security concerns raised under Guideline B (Foreign Influence). Eligibility for access to classified information is denied.

Statement of the Case

Applicant completed a Questionnaire for National Security Positions (SF 86)[1] on January 6, 2014. On February 3, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline B, Foreign Influence. The action was taken under Executive Order (EO) 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) implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on February 18 and February 24, 2015, and elected to have the case decided on the written record in lieu of a hearing. The

[1] Also known as a Security Clearance Application (SCA).

Government's written brief with supporting documents, known as the File of Relevant Material (FORM), was submitted by Department Counsel on August 11, 2015.

A complete copy of the FORM was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on September 21, 2015, and again on October 16, 2015. He did not file a response to the FORM within the time allowed, nor did he assert any objections to the Government's evidence.

The case was assigned to me on March 1, 2016. The Government's exhibits included in the FORM (Items 1 to 3) are admitted into evidence without objection. In addition, Department Counsel requested I take administrative notice of Government documents from which relevant facts about the Philippines are derived. The facts administratively noticed are set out below.

Findings of Fact

In his answer to the SOR,[2] Applicant admitted all the factual allegations with explanations annotated on the SOR and in a separate document. His admissions and explanations are incorporated in my findings of fact.

Applicant is a 66-year-old mechanical engineer employed by a defense contractor since 2010.[3] He is normally assigned to work overseas, and regularly visits his family in the Philippines during his time off. He has not served in the military and was investigated for a security clearance in 2004.[4] He is a U.S. citizen by birth, and is not a citizen of any other country.

Applicant was previously married in the U.S. in 1972, and divorced in 2001.[5] He has two adult children from his first marriage. Despite being legally married in the U.S. at the time, he stated he was also "married" under Philippine common law to a citizen and resident of the Philippines. The status of his "marriage" is unclear as he noted in his SF 86 that he has a Philippine marriage certificate, however, he stated to an OPM investigator that he met his current "spouse" in 1994 while on vacation in the Philippines, and was considered "married" on October 14, 1994, under Philippine common law.[6] Applicant claimed in his PSI that he had no church or government-

[2] Item 1.

[3] Item 2.

[4] Item 3. Applicant did not report this clearance investigation in his SF 86, however he acknowledged it in his personal subject interview (PSI). It is unclear whether he currently holds a clearance.

[5] Item 2 (SF 86). Applicant stated in his PSI that he was estimating the divorce date and that he had never seen the divorce certificate.

[6] Item 3 (PSI).

recognized marriage and he is unsure whether his "marriage" would be recognized in the U.S.[7]

Applicant's spouse is a 44-year-old homemaker, who is a citizen and resident of the Philippines.[8] They have four children born between 1995 and 2004, all citizens and residents of the Philippines. Applicant's two oldest children were attending college in the Philippines, and have obtained dual U.S. citizenship. His two youngest children were attending junior high and high school in the Philippines. Applicant claimed that he planned to apply for U.S. citizenship for them in 2015.[9] He travels frequently to the Philippines and maintains daily contact with his family members.

Applicant stated that all of his financial interests are in the U.S., including his retirement account, 401k, bank accounts, etc.,[10] however, he has provided no documentation to show the extent of his financial interests. Applicant listed a home in the U.S. as his permanent residence since 2012, however, he acknowledged that it is owned by his niece and he has never lived there, but uses it as a U.S. mailing address.[11] He claimed to have no investments or property in the Philippines, however, he sends $4,000 per month to his spouse to support his family, and is apparently their sole financial supporter. His spouse owns her home.

Applicant's mother-in-law and father-in-law are residents and citizens of the Philippines. He emphasized in his Answer that he has no "interaction with them, period," because he does not speak Tagalog. However, in his PSI, he noted that while his father-in-law does not speak English, his mother-in-law speaks some English and he sees them when he is in the Philippines. Applicant stated that his spouse, children and parents-in-law do not have connections to the Philippine government.

In response to the request from Department Counsel and without objection of Applicant, I have taken administrative notice of the following relevant facts about the Philippines:

The Philippines is a multi-party, constitutional republic with a bicameral legislature. The United States recognized the Philippines as an independent state and established diplomatic relations in 1946. The United States has designated the Philippines as a major non-NATO ally, and there are close and abiding security ties between the two nations, based on strong historical and cultural links and a shared commitment to democracy and human rights. The Manila Declaration of 2011

[7] Item 3.

[8] Item 2.

[9] Item 1. It is unclear whether they have since applied for U.S. citizenship.

[10] Item 1.

[11] Items 2 and 3.

reaffirmed the 1951 U.S. Philippines Mutual defense Treaty as the foundation for a robust, balanced, and responsive security partnership.

The United States is among the Philippines' top trading partners, and it traditionally has been the Philippines' largest foreign investor. Philippine national elections have been generally free and fair, but independent observers have noted widespread vote buying, and dynastic political families have monopolized elective offices at the national and local level.

The most significant human rights problems are extrajudicial killings, enforced disappearances undertaken by security forces and vigilante groups, a weak and overburdened criminal justice system, widespread official corruption and abuse of power, and impunity from prosecution for human rights abuses.

Other human rights problems include prisoner and detainee torture and abuse by security forces, violence and harassment against human rights activists by security forces, warrantless arrests, lengthy pretrial detentions, poor prison conditions, killings and harassment of journalists, violence against women, abuse and sexual exploitation of children, and trafficking in persons. Forced labor and sex trafficking of men, women, and children within the country remain a significant problem. Pervasive corruption undermined government efforts to combat trafficking. Public officials, including those in diplomatic missions abroad, law enforcement agencies, and other government entities, are reported to be complicit in trafficking or allow traffickers to operate with impunity.

Muslim separatists, communist insurgencies, and terrorist organizations are active in the Philippines; and they have killed Philippine security forces, local government officials, and other civilians. Through joint U.S.–Philippine cooperation, the ability of these various groups to operate in the Philippines has been constrained but not eliminated. In 2014, there were numerous attacks with small arms and improvised explosive devices, kidnappings for ransom, and extortion efforts by suspected terrorist groups. Gangs of kidnappers have targeted foreigners, including Filipino-Americans. The U.S. State Department has recommended that all U.S. citizens defer non-essential travel to the Sulu Archipelago due to the high threat of kidnapping in that area. The State Department also warned U.S. citizens to exercise extreme caution if traveling to the main island of Mindanao due to violent activities of terrorist and insurgent groups.

The Philippine government has recognized the potential threat posed by radicalized Philippine citizens supporting the Islamic State in Iraq and the Levant (ISIL). In July 2014, the Philippine president's anti-terrorism council convened an ad hoc emergency technical working group focusing on persons of interest. The working group has tightened passport issuance, increased immigration screening, and increased monitoring of ISIL-related activity.

None of the source documents submitted by Department Counsel reflect that the Philippines engages in economic or military intelligence activity directed toward the United States.

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 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 SOR alleges that Applicant's spouse, children, mother-in-law, and father-in-law are citizens and residents of the Philippines.

The security concern under this guideline is set out in AG ¶ 6 as follows:

> 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.

Two disqualifying conditions under this guideline are relevant:

> AG ¶ 7(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; 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 sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information.

When foreign family ties are involved, 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). Thus, I have considered not only Applicant's frequent travel to, and financial and personal support for his family members in the Philippines, but also the citizenship and residency of his family members who may be vulnerable to kidnapping or exploitation by insurgent and terrorist elements.

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).

Furthermore, "even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security." ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. Nevertheless, the nature of a nation's government, its relationship with the United States, 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 United States. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. *See generally* ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision to grant clearance where administrative judge did not consider terrorist activity in area where family members resided).

AG ¶ 7(a) requires substantial evidence of a "heightened risk." The "heightened risk" required to raise one of these disqualifying conditions 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. I am satisfied that the activities of insurgent and terrorist groups, the risks of kidnapping by criminal elements, and the danger of radicalized ISIL sympathizers in the Philippines are sufficient to establish the "heightened risk" in AG ¶ 7(a) and the potential conflict of interest in AG ¶ 7(b).

The following mitigating conditions under this guideline are potentially relevant:

> 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 U.S;
>
> AG ¶ 8(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; and

AG ¶ 8(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.

Applicant has close and continuing ties of affinity to his spouse and children in the Philippines, although I do not find that his ties to his in-laws are of a sufficient nature to raise similar concerns under Guideline B. He provides his immediate family with their sole means of support and visits regularly. He maintains daily contact, is active in their lives, provides financial support, is very knowledgeable about his children's individual goals and accomplishments, has applied for U.S. citizenship on their behalf, and is rightfully very proud of them. Although Applicant stated that his retirement and financial accounts are in the U.S., he has not provided documentation to show the extent of his U.S. assets. Alternatively, Applicant normally works and lives overseas, he returns to the Philippines during his time off, his entire family is in the Philippines and he is their sole means of support. I do not have sufficient evidence to determine whether his U.S. ties and financial interests outweigh his foreign interests.

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. An 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.

I have incorporated my comments under Guideline B in my whole-person analysis. 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 not mitigated the security concerns raised by his foreign family connections. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant or continue his eligibility for access to classified information.

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, Guideline B:	Against Applicant
Subparagraphs 1.a – 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Gregg A. Cervi
Administrative Judge