

DATE: April 21, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-10870

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esq., Department Counsel

FOR APPLICANT [\(1\)](#)

Lieutenant Colonel Joseph W. Angyal, U.S. Army, Personal Representative

SYNOPSIS

Applicant's spouse is a senior military officer in the armed forces of France. Both Applicant and her spouse work in the area of tactical military communications. The security concern based on foreign influence is not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On May 20, 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.⁽²⁾ The SOR alleges security concerns under Guideline B (Foreign Influence). It alleges her spouse is an officer in the French Army (§ 1.a.); her son is a dual citizen of the United States and Germany residing in Germany (§ 1.b.); her two stepsons are citizens and residents of France (§ 1.c.); and her mother-in-law, brother-in-law, and sister-in-law are citizens and residents of France (§ 1.d.).

Applicant answered the SOR in writing on June 14, 2005, offered explanations, and requested a hearing. The case was assigned to me on October 6, 2005. Scheduling was delayed until Applicant could return from her duty station in Germany for the hearing. On February 2, 2006, DOHA issued a notice of hearing setting the case for March 13, 2006. The case was heard as scheduled. DOHA received the transcript (Tr.) on March 23, 2006.

FINDINGS OF FACT

Applicant's admissions in her 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 senior systems analyst for a U.S. defense contractor in Germany. Her employer supports U.S.-sponsored planning conferences and military communications interoperability exercises, involving about 1,200 communicators from 43 countries.⁽³⁾ She has worked in Germany for U.S. defense contractors since January 1997 and for her current employer since May 1998. She served on active duty as a U.S. Army officer for three years, including duty in Germany from January to November 1996.⁽⁴⁾ She has held a security clearance since March 1995.⁽⁵⁾

Applicant has been married since February 2001 to a lieutenant colonel in the French Army. He has been nominated to command a regiment and to be promoted to colonel. His two sons, ages 15 and 13, are citizens and residents of France, residing with their mother. They visit their father and Applicant often on weekends.⁽⁶⁾ Her spouse's mother, brother, and sister are citizens and residents of France.⁽⁷⁾ Applicant's spouse lives and works near Paris, France; and she lives and works near Stuttgart, Germany. They spend weekends, holidays, and vacation time together. Applicant has no interest in seeking French citizenship.⁽⁸⁾

Applicant timely reported her engagement and subsequent marriage to her security officer. In October 1999, her security officer reported her intent to marry a French military officer to the Defense Industrial Security Office (DISCO).⁽⁹⁾ After the marriage was later reported, her security officer had no further communications with DISCO regarding the impact of Applicant's marriage on her clearance.⁽¹⁰⁾ Although Applicant's level of clearance was downgraded for administrative reasons in 2004, she has continued to hold a clearance since her marriage.⁽¹¹⁾

Applicant's spouse commands a signal unit, and his speciality is tactical communications. Through his testimony, Applicant introduced evidence of the French law on treason and espionage. Her spouse testified he believes it would be a crime for him to gather information or intelligence from any NATO nation without its consent, and unlawful for him to obey an order to do so.⁽¹²⁾

Applicant has never met her spouse's mother, brother, and sister; and she has no contact with them. Her spouse has virtually no contact with his sister, who ran away from home at an early age. He has little contact with his mother, who

divorced his father and "had a way of life [he] didn't agree with." No one in his immediate family is connected with the French government. While he still has feelings of affection for his family, they have different lives and little contact. [\(13\)](#)

Applicant was previously married to a citizen and resident of Germany. She has a 16-year-old son who is a dual citizen of the U.S. and Germany. He attends an international school in France. [\(14\)](#)

Applicant's project leader, program manager, immediate military supervisor, and several senior military officers, including several general and flag officers, submitted strong letters of support for her application. [\(15\)](#) All these individuals know Applicant and her husband. [\(16\)](#) She has a reputation for hard work, reliability, loyalty, and trustworthiness. She is "very compartmentalized," keeps her personal life separate from her work, and is very aware of her surroundings at all times. [\(17\)](#) She has received numerous awards, commendations, and outstanding performance appraisals from her employer. [\(18\)](#)

The United States and France have active and cordial relations. France is a charter member of the United Nations and one of the top three contributors of troops to the NATO Response Force. Although France opposed and did not participate in the use of force in Iraq, it has continued to cooperate with the U.S. on the war on terrorism, controlling the proliferation of weapons of mass destruction, and regional problems in Africa, Lebanon, and Kosovo. It participates with the U.S. in training the Afghan Army. [\(19\)](#)

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.

In evaluating an applicant's conduct, an administrative judge should consider: (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.

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. "[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

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. A disqualifying condition (DC 3) also may arise if an individual has relatives "who are connected with any foreign government." Directive ¶ E2.A2.1.2.3. Applicant's marriage to a French military officer who is a citizen and resident of France establishes DC 1 and DC 3.

"[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). Applicant has rebutted the presumption in this case. She has never met and has no contact with her spouse's immediate family.

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 an immediate family member who is a citizen or resident of a foreign country or who is connected with a foreign government, a mitigating condition (MC 1) may apply if the immediate family member is not an agent 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 France 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). France and other friendly countries have sought or received sensitive information from the United States in the recent past. See ISCR Case No. 03-23806 at 7 n. 9, 2005 WL 3134149 (App. Bd. Apr. 28, 2005), citing PERSEREC Technical Report 02-5, July 2002 at 22, 62, available at www.nacic.gov/archives/index/html.

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 son acquired dual nationality by virtue of his father's citizenship. He is a minor, subject to Applicant's parental control, and not vulnerable to exploitation by a foreign power. I conclude MC 1 is established for her son, and I resolve SOR ¶ 1.b. in her favor.

I conclude MC 1 is not established for Applicant's spouse. The first prong of MC 1 is not established because he is an agent of a foreign power. See ISCR Case No. 03-10954 (App. Bd. Mar. 8, 2006) (discussing the definition of "agent of a foreign power"). Turning to the second prong of MC 1, I have considered the testimony of Applicant's spouse in which he expressed his belief that gathering intelligence from a NATO country would violate French law and he would have an obligation to disobey an order to do so. Nevertheless, I have also considered that France has gathered sensitive information from the United States in the recent past. I am not convinced that Applicant's spouse, by virtue of his loyalty to France, the constraint of military discipline, and his own career aspirations, is not vulnerable to exploitation.

MC 3 applies where "[c]ontact and correspondence with foreign citizens are casual and infrequent." Applicant's stepsons are minors, living with their mother. Applicant sees them regularly on weekends. She presented no evidence regarding her feelings of affection for them, although she appears to regard them as part of her family. Based on the frequency of contact, I conclude MC 3 is not established for her stepsons. However, because of their age and lack of connection to the French government, I am satisfied there is no reasonable likelihood of foreign influence being exercised by or through them on Applicant. Accordingly, I resolve SOR ¶ 1.c. in her favor.

Applicant has no contact with her mother-in-law, brother-in-law, and sister-in-law. I conclude MC 3 is established for them, and I resolve SOR ¶ 1.d. in her favor.

MC 4 may apply where an applicant "has promptly reported to proper authorities all contacts, requests, or threats from

persons or organizations from a foreign country, as required." Directive ¶ E2.A2.1.3.4. Applicant faithfully reported each step of her relationship with her spouse. I conclude MC 4 is established.

Unquestionably, both Applicant and her spouse are loyal to their respective countries. They both enjoy impeccable reputations. Applicant is an unusually well-disciplined, dedicated, hard-working person. Several senior military officials, knowing her and her spouse well, have strongly supported her application for continued access to classified information. She has held a clearance and had access to classified materials since her marriage more than five years ago, without incident. On the other hand, her spouse is a senior military officer in the armed forces of a foreign country. She and her spouse both work in the area of tactical military communications.

After weighing the disqualifying and mitigating conditions and evaluating all the evidence in the context of the whole person, I conclude Applicant has not carried her burden of mitigating the security concern based on foreign influence. The facts of this case present circumstances that cannot be reconciled with the "clearly consistent" standard for granting a clearance. The potential for inadvertent disclosures or exploitation is too high. It is a hard, close case, but "security clearance determinations should err, if they must, on the side of denials." Egan, 484 U.S. at 531; see Directive ¶ E2.2.2.

FORMAL FINDINGS

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

Paragraph 1. Guideline B (Foreign Influence): AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

DECISION

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

LeRoy F. Foreman

Administrative Judge

1. Applicant's name is reflected in the case caption as it appears in the Statement of Reasons (SOR), where it is misspelled. It should be "Bobbi" instead of "Bobbie." See Government Exhibit (GX) 1 (Standard Form 86, Security Clearance Application) at 1; Tr. 4-5.
2. 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).
3. Applicant's Exhibit (AX) O; Tr. 45-46.
4. Tr. 116.
5. GX 1 at 1-3, 9.
6. Answer to SOR at 1; Tr. 97.
7. Id.; Tr. ***.
8. Tr. 88.
9. GX 2.
10. Tr. 56-59.
11. Tr. 58-59.
12. AX S, T, U; Tr. 84, 87-88.
13. Tr. 99-101.
14. GX 1 at 5; Answer to SOR at 1.
15. Answer to SOR at Exhibits A, B, and C; Applicant's Exhibits (AX) A-F; Tr. 37-38.
16. Tr. 24.
17. Tr. 68.
18. AX G-I.
19. See U.S. Dept. of State, Background Note: France at 6, 8-9 (October 2005), available on the web at www.state.gov/countries.