

KEYWORD: Foreign Influence

DIGEST: Applicant' wife and her family are citizens of and residents in the Republic of Korea (a/k/a South Korea). Applicant's wife is not qualified to immigrate to the United States. After consideration of the additional material submitted by Applicant, I conclude Applicant did not mitigate the foreign influence security concern. Clearance is denied.

CASENO: 02-20031.h2

DATE: 09/24/2004

DATE: September 24, 2004

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-20031

**REMAND DECISION OF ADMINISTRATIVE JUDGE**

**PHILIP S. HOWE**

**APPEARANCES**

**FOR GOVERNMENT**

Edward W. Loughran, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant's wife and her family are citizens of and residents in the Republic of Korea (a/k/a

South Korea). Applicant's wife is not qualified to immigrate to the United States. After consideration of the additional material submitted by Applicant, I conclude Applicant did not mitigate the foreign influence security concern. Clearance is denied.

**STATEMENT OF THE CASE**

On June 3, 2003, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under Guideline B (Foreign Influence) why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

In a signed and sworn statement, dated November 12, 2003, Applicant answered the SOR allegations, admitting all of them. He requested his case be decided on the written record in lieu of a hearing. This case was reopened after Applicant failed to respond in a timely manner to the SOR when it was originally mailed to him. Applicant's first response was on November 12th.

On March 2, 2004, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM) [\(U\)](#) was provided to the Applicant, and he was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the FORM on March 10, 2004. Applicant did not seem to file a response to the FORM as the file was originally presented to me. The case was assigned to me April 26, 2004.

### **APPELLATE ISSUE AND EXHIBIT**

On appeal, Applicant raised three issues. The only issue decided by the Appeal Board was whether Applicant submitted a timely response to the FORM. Applicant appended to his appeal a telephone bill and a typewritten FORM response that persuaded the DOHA Appeal Board he did submit a response to the FORM within the required time period. The Appeal Board remanded the case to me by a decision dated August 31, 2004, with instructions to allow the Department Counsel the opportunity to examine the response and raise or waive any objections to my consideration of the response. The Department Counsel, on September 14, 2004, informed me he had no objection to my consideration of the response. Applicant's response is dated April 8, 2004, and the Appeal Board found it was submitted to Department Counsel on April 10, 2004, as shown by the telephone bill for the facsimile transmission charges.

I examined carefully the April 8, 2004, response filed which the Appeal Board marked as an Appellate Exhibit. Applicant used the same sentences he submitted in his November 12, 2003, Answer to the SOR, with several additions. First, the introductory paragraph was changed and shortened because the purpose of the document had changed, and here Applicant was addressing the FORM information. Second, Applicant deleted the second sentence from the Answer to Paragraph 1.a., and leaving the first sentence as his response in the second paragraph to the FORM. Third, Applicant added a final sentence in his third paragraph of the FORM response to the language he presented in his Answer to Paragraph 1.b. of the SOR. Fourth, Applicant's fourth paragraph of his FORM response is the same as his Answer to Paragraph 1.c. of the SOR. Fifth, Applicant's fifth paragraph of his FORM response is the same as his Answer to Paragraph 1.d. of the SOR. Applicant concludes with a final paragraph in his FORM response arguing that his wife's family has little contact with him because of the language barriers and the security risk is, therefore, extremely small or nonexistent.

### **FINDINGS OF FACT**

Applicant admitted the SOR allegations. He admits his wife, mother-in-law, sister-in-law, and two brothers-in-law are citizens of the Republic of Korea, a/k/a South Korea (RSK). Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, including the April 8, 2004, FORM response, and upon due consideration of all the evidence, I make the following additional findings of fact on remand:

Applicant is a 41-year-old employee of a defense contractor. He married his wife in 1996. His wife is a citizen and resident of RSK. She does not have the legal status to immigrate to the United States. Applicant's mother and father-in-law live in the RSK where they hold citizenship. They do not speak English, so Applicant's communication with them is limited to greetings during telephone calls to his wife. (Item 4; Item 6; Response, Answer)

Applicant's sister-in-law and his two brothers-in-law are citizens of and resident within the RSK. They speak little if any English, and Applicant has little or no contact with them. (Item 4; Response, Answer)

## 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 restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the Administrative Judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. 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 that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk.

Initially, the Government must establish, by substantial evidence, that conditions exist 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 (App. Bd. Dec 19, 2002); *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.

Each adjudicative decision must also include an assessment of: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (4) the individual'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 (See Directive, Enclosure 2). Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

### **GUIDELINE B: Foreign Influence**

The Concern: A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure. Directive ¶ E2.A2.1.1.

Conditions that could raise a security concern and may be disqualifying include:

An immediate family member, 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.

Conditions that could mitigate security concerns include:

A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), 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.

### CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions above, I conclude the following with respect to each allegation set forth in the SOR:

The foreign influence alleged under Guideline B is based on Applicant's wife and her family members being citizens of and residents of the RSK. His wife does not have legal status for immigration. Applicant has periodic telephone contact with his wife and her family, primarily with his wife. The Government established by substantial evidence that Disqualifying Condition (DC) 1 applies to this case.

The burden of proof that any Mitigating Condition (MC) applies in a case is upon the Applicant. Here, Applicant did not meet his burden of showing his wife and her family members are not agents of a foreign power, or that they were not in a position to be exploited by a foreign power that could force Applicant to choose between loyalty to the person involved and the United States. Applicant presented no information about his wife's employment or that of her family members. In addition to that lack of information, Applicant's wife, if she seeks to join her husband in the United States, is in a position that could be exploited by a foreign power that could seek to assist her in qualifying for immigration in return for classified information from Applicant. Therefore, I conclude (MC) 1 does not apply.

MC 3 (contact and correspondence with foreign citizens are casual and infrequent) also does not apply because Applicant's contact with his wife is not casual or infrequent because of the intimate marital relationship. Applicant puts great emphasis on the language barrier he has with his wife's family, in an apparent attempt to have MC 3 apply in his case. Applicant is not persuasive in that regard. Also, I can find no other MC to apply in this case. Consequently, I find against Applicant on this guideline in this remand decision.

## **FORMAL FINDINGS**

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline B: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

## **DECISION**

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

Philip S. Howe

Administrative Judge

1. The Government submitted seven items in support of the SOR.