

DATE: November 29, 2005

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-26618

## **DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Jennifer I. Campbell, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant is a citizen of the United States of South Korean ancestry. She has mitigated the security concern alleged based upon her having immediate family members and friends who are citizens and residents of South Korea. Clearance is granted.

### **STATEMENT OF THE CASE**

On February 14, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.<sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline B (foreign influence). Applicant submitted a response to the SOR that was received by DOHA on February 25, 2005, requested a hearing, and admitted both SOR allegations.

The case was assigned to me on August 10, 2005. A notice of hearing was issued on September 7, 2005, scheduling the hearing for September 21, 2005.<sup>(2)</sup> The government submitted four documentary exhibits that were marked as Government Exhibits (GE) 1-4, and admitted into the record without objection.<sup>(3)</sup> Applicant testified and called one witness to testify on her behalf. The transcript was received October 6, 2005.

### **FINDINGS OF FACT**

After a thorough review of the pleadings, testimony, and exhibits, I make the following findings of fact:

Applicant is a 31-year-old woman who has been employed as a systems engineer by a defense contractor since May 2003. She was born in the Republic of Korea (South Korea) in 1974, and graduated from high school and attended one year of college in South Korea, before coming to the United States on a student visa in March 1995 to study at a major state-supported university. She has obtained a bachelor of science degree in mathematics and a master of science degree

in statistics from that university, the last degree being awarded in May 2003.

Applicant met her husband, a native-born U.S. citizen, while she was a student at the university, and they married in February 1996. Applicant and her husband have two children, a two-year-old son and a three-month-old daughter. Applicant returned to South Korea in February 1996, worked briefly as a teacher in that country, and immigrated permanently to the U.S. in September 1996. She became a naturalized U.S. citizen in July 2000.

In addition to pursuing academic studies in the U.S., Applicant has worked as a waitress from September 1996 to June 1999, a university research assistant from December 1999 to February 2001, and as a university teaching assistant from August 2001 to May 2003. She also reports periods of unemployment from June 1999 to December 1999, and February 2001 to August 2001. Applicant is considered by her supervisor to be professional and one of the company's top statistical analysts in their building. She had an interim security clearance from May 2003 to February 2005, and in her supervisor's opinion appeared to take all security matters seriously and conducted herself appropriately.

Applicant's mother and father are citizens and residents of South Korea. Her parents are divorced, and she has not had any contact with her father since 1996. Her mother is a 53-year-old self-employed wholesaler, engaged in selling wrapping paper to clothing outlets. Her mother lives with Applicant's only sibling, a 30-year-old brother and his wife, in an apartment or condominium that the mother owns. Applicant's brother works as a commercial real estate agent. He served two years compulsory military service in the South Korean armed forces about ten years ago.

In addition to returning to South Korea in 1996, Applicant traveled for pleasure to that country with her husband in May/June 1999, August 2000, February 2002, and August 2004. Each of the trips was of either one or two weeks duration, and on each occasion they stayed with her mother. She plans on visiting South Korea again in 2006, so her mother can meet her new daughter. Applicant speaks with her mother by telephone approximately once a week. She only speaks with her brother by phone when he happens to answer the calls she places to her mother.

Applicant maintains contact with two friends in South Korea. One is a college graduate student, and the other is married and stays at home raising her child(ren). Applicant believes the married friend's husband is employed as some sort of a salesman. Applicant exchanges e-mails with these friends about once every month or two, and visits with them when she is in South Korea.

None of Applicant's immediate family or friends have ever visited her in the United States. She would be willing to sponsor her mother or brother if they wanted to immigrate to the U.S., but neither has any plan of so doing.

South Korea does not recognize dual citizenship, and a South Korean national who naturalizes in another country (after having emigrated) loses their South Korean citizenship. (GE 3) Applicant has avowed her complete loyalty to the United States and professed a willingness to bear arms in defense of the U.S. if necessary. She does not own any property in South Korea, and does not anticipate inheriting any property in that country. All her assets are located in the United States. She does not provide support for any person in South Korea, and seldom even sends them gifts.

South Korea is a highly developed, stable, democratic republic with a modern economy. It has dispatched troops to support the war against terrorism that is being led by the United States in Iraq. South Korean forces previously supported U.S. combat operations in Viet Nam and during the Gulf War. South Korea legally remains in a state of war with the Democratic People's Republic of Korea (North Korea) with peace being maintained under an Armistice signed in 1953. That Armistice ended hostilities that pitted United Nations' military forces, including those of the United States and South Korea, against communist aggression.

## POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be

measured against this policy guidance. Considering the evidence as a whole, Guideline B, pertaining to foreign influence with its respective DC and MC, is most relevant in this case.

### **BURDEN OF PROOF**

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(4)</sup> The government has the burden of proving controverted facts.<sup>(5)</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence,<sup>(6)</sup> although the government is required to present substantial evidence to meet its burden of proof.<sup>(7)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(8)</sup> Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.<sup>(9)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(10)</sup>

No one has a right to a security clearance<sup>(11)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(12)</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.<sup>(13)</sup>

### **CONCLUSIONS**

**Foreign Influence.** 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.

Based upon the allegations in the SOR, Disqualifying Condition (DC) 1: *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* must be evaluated in determining whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant under Guideline B:

DC 1 applies in this case because of Applicant's close ties of affection to her mother, as exhibited by their regular telephone contact and Applicant's travels to South Korea to visit with her. While Applicant has much more limited contact with her brother, there is nothing in the record that would tend to overcome the presumption of close ties of affection that arises from their familial relationship.

Applicant has long been estranged from her father, has had no contact with him since 1996, and, therefore, his South Korean citizenship and residency do not create any security concern. She maintains minimal e-mail contact with two friends in South Korea and visits them on her travels to that country. There is nothing about their relationship that creates an independent security concern.

Once the government meets its burden of proving controverted facts<sup>(14)</sup> the burden shifts to an applicant to present evidence demonstrating extenuation, mitigation, or changed circumstances.<sup>(15)</sup> Further, the government is under no duty to present evidence to disprove any Adjudicative Guideline mitigating conditions, and an Administrative Judge cannot assume or infer that any particular mitigating condition is applicable merely because the government does not present evidence to disprove that particular mitigating condition.<sup>(16)</sup>

The following Mitigating Conditions (MC) must be evaluated in determining whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant under Guideline B: MC 1: *A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitants, 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;* and MC 3:

*Contact and correspondence with foreign citizens are casual and infrequent.*

Applicant's contact and correspondence with her mother is frequent. However, she has limited contact with her brother, and only speaks with him when he chances to answer the telephone when she calls her mother or during her visits to South Korea. Similarly, her contacts with her two friends in South Korea are limited to infrequent e-mail exchanges and visits during her South Korean trips. Accordingly, while MC 3 applies to her relationship with her brother<sup>(17)</sup> and friends, it is inapplicable as to her mother.

Applicant's family members and friends are not, and never have been, South Korean agents, with the limited exception of her brother's two years of compulsory military service, so the issue under MC 1 is whether they are in a position to be exploited by South Korea. South Korea is a highly developed, stable, democratic republic with a modern economy that has dispatched troops to support the war against terrorism being led by the United States in Iraq. South Korea is a country that has been and continues to be friendly with the United States, standing side by side with the U.S. in war and peace for more than 50 years. Further, there is no record evidence that South Korea has ever attempted to exploit any resident of South Korea for the purpose of compromising a security clearance holder within the United States.<sup>(18)</sup>

Common sense strongly suggests a finding that friendly, stable, democratically elected allies of the United States are highly unlikely to exploit their citizens and residents in a way that would force a United States citizen to choose between loyalty to the U.S. and their foreign relatives within the meaning and intent of MC 1. When those allies have sacrificed the lives of their soldiers, sailors, airmen, and marines supporting U.S. war efforts around the world for more than a half a century a contrary finding is untenable, absent some evidence to the contrary.

More specific to the facts of this case, Applicant has been a continuous resident of the United States for more than nine years, and a U.S. citizen for more than five years. Her South Korean relatives have resided in that country during this time, and she and her husband have traveled to South Korea on a several occasions. The best predictor of whether Applicant's relatives are in a position to be exploited in the future is the South Korean government's past conduct. Since Applicant came to the United States temporarily in 1995, and returned to stay in 1996, the South Korean government has not attempted to exploit her relationship with relatives in South Korea.

Still, the Applicant bears the burden of demonstrating her ties with relatives and friends living in South Korea do not pose a security risk. To that end she has introduced evidence of her minimal contacts with all relatives and friends in South Korea, except her mother, her strong ties to the U.S., her lack of any financial interest in South Korea,<sup>(19)</sup> and the recommendation of a responsible security clearance holder who supervises her on a close basis. Considering all those factors, I am satisfied that MC 1 applies. The minimal contact she has with all but her mother also provides her some very limited consideration under C 3.

In all adjudications the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

As applied to this case, those considerations must answer the question whether there is a legitimate concern under the facts presented herein that the South Korean government or its agents might exploit Applicant's mother, brother, or friends in such a way that this U.S. citizen would have to choose between her pledged loyalty to the U.S. and those relatives and friends. Or, to put it another way, is it reasonable to assume that this loyal ally of the United States might do in the future what there is no evidence to suggest it has ever done in the past. Applying sound judgment, mature thinking, and careful analysis, the answer is no.

I am satisfied that Applicant has presented sufficient evidence of refutation, extenuation, and mitigation to overcome the case against him. Accordingly, Guideline B is decided for Applicant.

### **FORMAL FINDINGS**

SOR ¶ 1-Guideline B: For Applicant

Subparagraph a: For Applicant

Subparagraph b: For Applicant

### DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Applicant was provided oral notice of the intended hearing date by Department Counsel more than 15 days prior to the hearing, and agreed with scheduling the hearing on September 21, 2005.
3. GE 4 is a document entitled: *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage*. This document was offered by Department Counsel because it "lists Korea as one of the targeters actively targeting the United States to collect economic espionage information." (Tr. p. 15) 'Korea' is listed on page 15 of GE 4 as one of the most active collectors of economic espionage without any attempt made to identify whether this claim is directed at the Republic of Korea or the Democratic People's Republic of Korea. Further, the basis for the assertion that 'Korea' is engaged in economic espionage is nothing more than the 'distillation' of opinions of unidentified individuals from a dozen unidentified Fortune 500 companies expressed to unidentified officers of the National Counterintelligence Center. No effort is made in GE 4 to lay any foundation for the opinions expressed. The distillation of those opinions is the rankest form of hearsay. Accordingly, I have given no weight to the opinions expressed in GE 4.
4. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
6. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
11. *Egan*, 484 U.S. at 528, 531.
12. Id at 531.
13. *Egan*, Executive Order 10865, and the Directive.
14. Directive, Additional Procedural Guidance, Item E3.1.14
15. Directive, Additional Procedural Guidance, Item E3.1.15
16. ISCR Case No. 99-0597 (December 13, 2000)

17. The fact that Applicant's only contact with her brother is the happenstance occurrences when he chances to answer the telephone when she calls her mother, or on the relatively infrequent occasions when she visits Korea, is sufficient to bring her contact with her brother within the meaning of 'casual' as used in MC 3.

18. Noting the lack of record evidence that the South Korean government has never engaged in such conduct is not to imply that the government had any burden of proof to present such evidence. It is intended as a statement of fact to state exactly what it does state, and nothing more. If such evidence existed, and the government wished to present that evidence, it could have. It had no burden to do so, and, not having done so, the record is devoid of evidence on which I could base a finding that the South Korean government has either engaged or not engaged in such conduct.

19. Although there is no SOR allegation that Applicant possesses foreign financial interests, she is still entitled to application of MC 5: *Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities.*