

KEYWORD: Foreign Influence

DIGEST: Applicant is a native of the Republic of Korea (ROK) and a naturalized U.S. citizen. His father, mother, and sister are citizens of the ROK. Applicant's mother is a permanent U.S. resident and lives with Applicant in a home they jointly own. Applicant's father intends to move to the U.S., but has remained temporarily in the ROK to care for his aging mother. Applicant's sister is a permanent U.S. resident but works in the ROK for a U.S.-owned company. Applicant visited his family four times in the ROK and once in the Peoples Republic of China (PRC) between 1996 and 2002. The security concern based on foreign influence is mitigated. Clearance is granted.

CASENO: 04-00406.h1

DATE: 09/29/2005

DATE: September 29, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-00406

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Jason R. Perry, Esq., Department Counsel

FOR APPLICANT

Thomas G. Fergusson, Personal Representative

SYNOPSIS

Applicant is a native of the Republic of Korea (ROK) and a naturalized U.S. citizen. His father, mother, and sister are citizens of the ROK. Applicant's mother is a permanent U.S. resident and lives with Applicant in a home they jointly own. Applicant's father intends to move to the U.S., but has remained temporarily in the ROK to care for his aging mother. Applicant's sister is a permanent U.S. resident but works in the ROK for a U.S.-owned company. Applicant visited his family four times in the ROK and once in the Peoples Republic of China (PRC) between 1996 and 2002. The security concern based on foreign influence is mitigated. Clearance is granted.

STATEMENT OF THE CASE

On February 24, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny Applicant a security clearance. 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). The SOR alleges security concerns under Guideline B (Foreign Influence). It alleges Applicant's father is a citizen and resident of the Republic of Korea (ROK) (§ 1.a.); his mother is a citizen of the ROK and resides with Applicant in the U.S. (§ 1.b.); his sister is a citizen and resident of the ROK but maintains U.S. resident alien status (§ 1.c.); Applicant traveled to the ROK from about July 2 to August 7, 1996, May 8 to August 13, 1997, July 31 to August 13, 1999, and January 30 to March 14, 2002 (§ 1.d.); and he traveled to the People's Republic of China (PRC) from July 17 to July 31, 1999, to visit his father (§ 1.e.).

Applicant answered the SOR in writing on March 23, 2005. He admitted all the allegations and requested a hearing. The case was assigned to me on June 27, 2005, and I convened the hearing on August 22, 2005. DOHA received the transcript (Tr.) on September 6, 2005.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I also make the following findings:

Applicant is a 29-year-old unmarried employee of a defense contractor. He was born in the ROK, where he lived for 11 years. In 1987, he and his family moved to Hong Kong and lived there for four years.⁽¹⁾ He came to the U.S. in 1991, attended college, and received a bachelor's degree in computer science in December 2001. He became a naturalized U.S. citizen on April 20, 2001, and obtained a U.S. passport on June 29, 2001.

Applicant held a ROK passport from May 1996 until it expired on May 23, 2001, but he did not use his ROK passport during the one month between its expiration and his naturalization.⁽²⁾ His father has removed him from the ROK census family register.⁽³⁾ As a naturalized U.S. citizen, he has no military obligation in the ROK.⁽⁴⁾ He has held interim clearances as a State Department contractor and in his current position as a contractor for the Drug Enforcement Administration.⁽⁵⁾

Applicant's father is a citizen and resident of the ROK. His father intends to come to the U.S. and live in the house jointly owned by Applicant and his mother, but he has remained in the ROK to care for his mother, who is in her late 80s.⁽⁶⁾ He intends to live in the U.S. after his mother is no longer requires his care.⁽⁷⁾ Applicant's father visits the family in the U.S. often, staying with Applicant and Applicant's mother for two or three months on each visit.⁽⁸⁾

Applicant's father worked for a large chemical conglomerate in the ROK. He was assigned to a branch office in Hong Kong for four years, accompanied by his family.⁽⁹⁾ He is now retired, but he still works as a consultant to the company. He occasionally travels to the PRC to promote business for ROK companies. Except for military service during his youth, Applicant's father has no past or present connection with the ROK government.⁽¹⁰⁾

Applicant's mother and sister are citizens of the ROK but they are registered in the U.S. as permanent resident aliens. His mother resides with him in the house they jointly own.⁽¹¹⁾ Applicant's sister attended high school and college in the U.S., but she lives in the ROK for a U.S.-owned company doing business in the ROK. Her company designs corporate logos and creates corporate marketing slogans.⁽¹²⁾ Applicant communicates with his sister once or twice a month.⁽¹³⁾

Applicant's mother has been a homemaker and housewife all her life and has no connection with the ROK government. (14) She returns to the ROK twice a year to visit her husband, and stays for two or three months each time. She is financially supported by Applicant while she is in the U.S. and by her husband while she is in the ROK. (15)

Applicant's mother's sister is married to a retired Army colonel who spent his career as a military intelligence officer with a top secret clearance and has been employed for the last five years for a defense contractor currently supporting the Office of the Secretary of Defense. Applicant's uncle-in-law has known him since 1997-98, when Applicant was in college. His uncle-in-law knows Applicant's parents well and regards them as loyal to the U.S. He testified Applicant's family has been planning for two years to live permanently in the U.S., but full execution of the plan has been delayed by the need for Applicant's father to care for his aging mother. (16)

Applicant has traveled to the ROK three times to visit his family. He visited Beijing, PRC, once while his father was working there. (17)

The ROK does not have a repressive or authoritarian government. It is a stable democratic republic with an elected president and legislature and an independent judiciary. It is a friend and ally of the U.S. The U.S. is obligated under the 1954 Mutual Defense Treaty to help the ROK defend itself against external aggression. The ROK economy is growing, and the ROK is a major trading partner with the U.S. (18)

Privately sponsored economic espionage and government sponsored industrial espionage are matters of serious concern to the U.S. The U.S. is vulnerable to economic and industrial espionage from friends like the ROK as well as enemies. (19) The ROK intelligence community is known to target the U.S. (20)

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.

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 (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.

CONCLUSIONS

A security risk may exist when an applicant's immediate family, or other persons to whom he 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. Furthermore, a disqualifying condition (DC 2) may arise if an applicant is "[s]haring living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists." 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). DC 1 is established because members of Applicant's immediate family are citizens or residents of a foreign country. DC 2 also is established, because Applicant and his mother share living quarters.

In cases where an Applicant has immediate family members who are citizens or residents of a foreign country or who are connected with a foreign government, a mitigating condition (MC 1) may apply if "the immediate family members . . . 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 ¶ E2A2.1.3.1.

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); *see* 50 U.S.C. § 1801(b) (defining "agent of a foreign power"). 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.

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 the ROK 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). 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 father is not an agent of a foreign power. He has worked in private industry all his adult life. He has no present or past connection with the ROK government. His travel to the PRC was to promote the business of his private employer in the ROK. He does not depend on the ROK for financial support. His work as a consultant is connected with seeking new business opportunities rather than development of new technology. As such, his business connections are not likely to make him vulnerable to coercion, persuasion, or duress by practitioners of private economic espionage or government industrial espionage. He intends to emigrate to the U.S. as soon as he is relieved of his obligation to his aging mother.

Applicant's mother is a permanent resident of the U.S. and spends more than half her time in the U.S. She has never been connected with the ROK government and is not dependent on the government for financial support. She has no business connections that would lend themselves to exploitation, private economic espionage, or government industrial espionage.

Applicant's travel to the ROK and the PRC was related to his relationships with his parents, and it raises no security concern independent of his relationship with his parents and sister.

Applicant's sister is a permanent resident of the U.S. She temporarily resides in the ROK for business purposes, and is not connected with the ROK government. Her work in commercial graphic design does not lend itself to exploitation, private economic espionage, or government industrial espionage.

None of the individual family circumstances discussed above are determinative. They must be considered together in light of the record evidence as a whole. The Appeal Board has made it clear that the burden of disproving a mitigating condition is never shifted to the Government. ⁽²¹⁾ Nevertheless, Applicant's evidence of his family's absence of governmental connections, financial dependence on the government, or business connections susceptible to industrial espionage is relevant. To ignore such evidence would establish a virtual per se rule against clearing applicants with foreign family ties. After evaluating each family member's individual circumstances as well as the totality of Applicant's family ties to the ROK, I conclude MC 1 is established.

The ROK is a close ally, friend, and trading partner of the U.S., and relies on the U.S. for help defending itself. It has a good human rights record. The nature of the ROK's government, its human rights record, and its relationship with the U.S. are clearly not determinative. Nevertheless, they are all relevant factors in evaluating the likelihood that the ROK would risk damaging its relationship with the U.S. by exploiting or threatening its private citizens in order to force a U.S. citizen to betray the U.S. After weighing the disqualifying and mitigating conditions and making a commonsense evaluation of the evidence, I conclude the security concern based on foreign influence is mitigated.

FORMAL FINDINGS

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

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

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: 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 Applicant a security clearance. Clearance is granted.

LeRoy F. Foreman

Administrative Judge

2. Tr. 87.
3. Tr. 73.
4. Tr. 72-73; Hearing Exhibit I, p. 5.
5. Tr. 71.
6. Tr. 56, 60.
7. Tr. 85.
8. Tr 57.
9. Tr. 77.
10. Tr. 66-67.
11. Tr. 55-56.
12. Tr. 57.
13. Tr. 84.
14. Tr. 68.
15. Tr. 83-84.
16. Tr. 49, 53-56
17. Tr. 87.
18. See U.S. Dept. Of State, *Background Note: South Korea* 3, 5, 7 (Apr. 2005), attached to the record as Appellate Exhibit III.
19. See generally Office of the National Counterintelligence Executive, *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage* (2004), attached to the record as Appellate Exhibit VIII, and the annual reports for 2000-2003, attached to the record as Appellate Exhibits II, V, VI, and VII.
20. Hearing Exhibit VI, p. 4.
21. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).