

DATE: July 14, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-04268

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Daniel Crowley, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's spouse is a citizen of Thailand residing with him in the U.S. His mother-in-law, father-in-law, brother-in-law, and sister-in-law are citizens and residents of Thailand. His father-in-law is a retired air marshal of the Thai Air Force, and his brother-in-law is on active duty as an officer in the Thai Air Force. Applicant has no contact with his foreign in-laws and has taken affirmative steps to distance himself from them. The security concern based on foreign influence is mitigated. Clearance is granted.

STATEMENT OF THE CASE

On November 28, 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. The SOR alleges security concerns under Guideline B (Foreign Influence). It alleges Applicant's spouse is a citizen of Thailand (SOR ¶ 1.a); his mother-in-law, father-in-law, and brother-in-law are citizens and residents of Thailand (SOR ¶¶ 1.b, 1.c); his father-in-law was an officer in the Thai Air Force (SOR ¶1.d); and his brother-in-law is an officer in the Thai Air Force (SOR ¶ 1.e).

Applicant answered the SOR in writing on December 17, 2005. He admitted all the allegations except the allegation that his spouse's visa was expired. He disputed his father-in-law's rank in the Thai Air Force, offered explanations, and requested a hearing. The case was assigned to me on March 9, 2006. On April 13, 2006, DOHA issued a notice of hearing setting the case for May 3, 2006. The case was heard as scheduled. DOHA received the transcript (Tr.) on May 15, 2006.

FINDINGS OF FACT

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

Applicant is a 49-year-old employee of a defense contractor. He served on active duty as a U.S. Air Force officer from April 1981 to February 1999, was released from active duty in a reduction-in-force, and served as a reserve officer from February 1999 to July 2003. He has worked for defense contractors since his release from active duty. He received a clearance while in the Air Force and has retained it until the present. [\(1\)](#)

A friend and professional associate of Applicant, who has known him for almost five years and who has extensive experience in law enforcement and security adjudications, testified he regards Applicant as highly skilled, a patriot, and a person of highest integrity. [\(2\)](#) Applicant's supervisor for the past two years, a retired Army officer with 26 years of active service, testified Applicant has extensive technical ability, is a "man of integrity," and is "absolutely trustworthy" [\(3\)](#)

Applicant was married in July 1980 and divorced in August 1996. He met his current spouse in 2002 at the restaurant where she works as a waitress. They started dating in August 2003 and were married on September 16, 2005. His current spouse is a citizen of Thailand residing with him in the United States. [\(4\)](#) She entered the U.S. on a visitor's visa in 2001 and has overstayed the time restriction on her visa. She has applied for a work permit and permanent resident status. [\(5\)](#) At the time of their marriage, they executed a prenuptial agreement providing for separate ownership of all current and future wages and assets. [\(6\)](#) When Applicant realized his spouse had overstayed her visa, he notified the appropriate immigration authorities. [\(7\)](#)

Applicant's spouse was previously married to a pilot in the Thai Air Force who was killed in an airplane accident. She came to the U.S. after the death of her first spouse, at the invitation of a cousin who is a chef in a Thai restaurant in the U.S. She liked working and living in the U.S. and overstayed her visa. [\(8\)](#) She decided to stay in the U.S. after meeting Applicant. [\(9\)](#) She receives a death benefit of about \$200 per month from the Thai government, which is deposited in a bank in Thailand. She intends to open a bank account in the U.S. and transfer the money to a U.S. account as soon as she obtains a social security number. She testified she intends to become a U.S. citizen as soon as she is eligible. She talks to her mother twice a month, her father once a month, her brother once every three months, and her sister almost every week. [\(10\)](#)

Applicant's mother-in-law was a kindergarten teacher before she married. After her marriage she was a housewife and did not work outside the home. [\(11\)](#) She visited the U.S. and stayed with Applicant's now-spouse for about two years, from 2001-2003. [\(12\)](#) Applicant's father-in-law served as a pilot in the Thai Air Force from 1960 to 1998, retiring as an air marshal (equivalent to a major general in the U.S. Air Force [\(13\)](#)). He is in poor health and has not been employed since his retirement. [\(14\)](#) Applicant's brother-in-law has served as a pilot in the Thai Air Force from 1993 to the present, and he currently is a wing commander (equivalent to a colonel in the U.S. Air Force). [\(15\)](#) His sister-in-law is married and does not work outside the home. [\(16\)](#) His mother-in-law and sister-in-law are citizens and residents of Thailand but not connected with the Thai government or military services. [\(17\)](#) His father-in-law, mother-in-law, brother-in-law, and sister-in-law executed declarations that they are not "agents of a foreign power" as defined in 18 U.S.C. § 1801. [\(18\)](#)

Applicant has had only two brief telephone conversations with his mother-in-law and father-in-law, once before the marriage and once afterward to announce the marriage. Communication was difficult because of the language barrier. [\(19\)](#) He notified them in writing that he has no ties of affection or obligation to them. [\(20\)](#)

Thailand is a democratically-governed constitutional monarchy, with a legal system that blends the principles of traditional Thai and Western laws. The U.S. and Thailand have had close relations since World War II. Several bilateral treaties establish economic and military contacts. The U.S. has provided Thailand with military equipment, supplies, training, and assistance since 1950. The two countries have developed a vigorous military exercise program that now averages 40 joint exercises per year. [\(21\)](#) Thailand is not known to engage in industrial espionage or foreign intelligence gathering against the U.S.. [\(22\)](#)

Thailand has generally respected the human rights of its citizens. However, some criminal suspects and insurgents have

experienced torture and excessive force at the hands of police and security forces. Government corruption has been a persistent problem. [\(23\)](#)

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.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information. However, 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

The concern under Guideline B is that 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. "[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). 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. 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).

Applicant has rebutted the presumption of close ties to his in-laws. He had two minimal contacts with his mother-in-law and father-in-law. He has no contact with his sister-in-law and brother-in-law, and he has intentionally distanced himself as much as possible from his spouse's family. However, DC 1 is established by Applicant's marriage to a citizen of Thailand, and DC 3 is established by his brother-in-law's status as an officer in the Thai Air Force.

Mere possession of family ties with persons in a foreign country is not, as a matter of law, automatically disqualifying under Guideline B. However, the possession of such ties does raise a prima facie security concern sufficient to require an applicant to present evidence of rebuttal, extenuation or mitigation sufficient to meet the applicant's burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for the applicant. *See* Directive, Additional Procedural Guidance, Item E3.1.15.; ISCR Case No. 99-0424, 2001 DOHA LEXIS 59 at 33-34 (App. Bd. Feb. 8, 2001).

Since the government produced substantial evidence to establish DC 1 and DC 3, 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 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, 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. 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."

Applicant's in-laws all executed documents attesting that they are not agents of a foreign power as defined in 50 U.S.C. § 1801(b). His mother-in-law, father-in-law, and sister-in-law are not agents of a foreign power under either the statutory definition in 50 U.S.C. § 1801(b) or the broader definition adopted by the Appeal Board. *See* ISCR Case No. 02-24254, 2004 WL 2152747 at *4-5 (App. Bd. Jun. 29, 2004) (employee of foreign government need not be employed at a high level or in a position involving intelligence, military, or other national security duties to be an agent of a foreign power for purposes of MC 1). However, his brother-in-law falls within the Appeal Board's definition. [\(24\)](#) I conclude the first prong of MC 1 is established for all of Applicant's in-laws except his brother-in-law.

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 Thailand 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.

The nature of Thailand's government, its human rights record, and its relationship with the U.S. are clearly not determinative. Nevertheless, they are all relevant factors in determining whether Thailand 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. I conclude the MC 1 is established for all of Applicant's in-laws except his brother-in-law.

A mitigating condition (MC 3) may apply if "[c]ontact and correspondence with foreign citizens are casual and infrequent." Directive ¶ E2.A2.1.3.3. Applicant made two brief courtesy calls to his mother-in-law and father-in-law, but he has had no other contact with his in-laws. He has intentionally distanced himself from them. Thus, I conclude MC 3 is established for all his in-laws.

Applicant's spouse left Thailand after the untimely death of her first spouse and has not returned. She overstayed her visa because she loved living and working in the U.S. She decided to remain in the U.S. permanently after meeting Applicant. Applicant has disclosed her immigration status to the appropriate authorities, thereby removing the potential for coercion by threats to expose her status to immigration authorities. Except for the small death benefit she receives from the Thai government, she has no connection to the Thai government and no political or economic connections that would make her vulnerable to pressure, coercion, or duress.

Applicant has a reputation for high integrity and reliability. He has spent most of his adult life either in military service or working for defense contractors. He has held a security clearance for much of his adult life. He is aware of the risks posed by foreign family ties and has taken extraordinary measures to minimize those risks. The potential for coercion, persuasion, or duress exercised directly on him by his foreign family members is nil. The potential for indirect coercion, persuasion, or duress exercised through his spouse is very low. After weighing the disqualifying and mitigating conditions, considering the totality of Applicant's foreign family ties as well as each individual tie, and making a commonsense evaluation of the evidence in the context of the whole person, 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

1. Tr. 6, 107.

2. Tr. 84-86.

3. Tr. 95-98.
4. Applicant's Exhibit (AX) A
5. Government Exhibit (GX) 2 at 2-4.
6. AX B.
7. AX O.
8. Tr. 75-76.
9. Tr. 78.
10. Tr. 69-71, 76-77.
11. Tr. 71-72.
12. Tr. 116; AX F at 2.
13. Tr. 114.
14. AX D at 1; Tr. 72-73, 114.
15. AX E at 1.
16. Tr. 74.
17. AX F at 1, G at 1.
18. AX H.
19. Tr. 112, 128.
20. Tr. 112; AX H
21. Hearing Exhibit (HX) I (U.S. Dept. of State, *Background Note: Thailand*, October 2005) at 1, 3, 5-6.
22. AX J, K, L.
23. U.S. Dept. of State, *Country Reports on Human Rights Practices, Thailand*, Mar. 8, 2006 at 1, available on the internet at www.state.gov.
24. The Appeal Board has declined to reexamine its broad definition of "agent of a foreign power," but it has not addressed the applicability of 50 U.S.C. § 438(6), which expressly applies the definitions in 50 U.S.C. § 1801(b) to security clearance determinations. *See* ISCR Case No. 03-10954 at 7-8 (App. Bd. Mar. 8, 2006).