



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
-----) ISCR Case No. 07-14650
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Francisco Mendez, Esq., Department Counsel
For Applicant: Greg D. McCormack, Esq.

February 24, 2009

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline B (Foreign Influence), based on Applicant’s family connections and property interests in Japan. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on August 24, 2006. On May 9, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline B. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

Applicant received the SOR on July 2, 2008; answered it on July 7, 2008; and requested a hearing before an administrative judge. DOHA received the request on July

9, 2008. Department Counsel was ready to proceed on October 24, 2008, and the case was assigned to an administrative judge on October 24, 2008. The case was reassigned to another administrative judge on November 17, 2008, when Applicant expressed a desire for a hearing on the east coast even though he lives and works in Okinawa, nearer to the west coast. The case was reassigned to me on December 3, 2008, to consolidate the docket. Scheduling the hearing was delayed by Applicant's overseas location and the availability of his counsel. DOHA issued a notice of hearing on January 5, 2009, scheduling the hearing for February 2, 2009. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Applicant testified on his own behalf and submitted Applicant's Exhibits (AX) A through D, which were admitted without objection. Applicant's exhibits each contained multiple separate documents, which were identified by a number in addition to a letter, e.g., AX A-1. The record closed upon adjournment of the hearing on February 2, 2009. DOHA received the transcript (Tr.) on February 13, 2009.

Administrative Notice

I granted Department Counsel's request that I take administrative notice of relevant facts about Japan (Tr. 17-19). The request and the documents attached as enclosures were not admitted in evidence but are attached to the record as Hearing Exhibit (HX) I. The facts administratively noticed are set out below in my findings of fact.

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegations in the SOR, except for the allegation that his spouse is a dual citizen of the U.S. and Japan. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 30-year-old senior network installation technician for a defense contractor. He has worked for his current employer since August 2000. He served on active duty in the U.S. Marine Corps from October 1996 to September 2000 (AX E-1). While on active duty, he twice received the Navy and Marine Corps Achievement Medal (AX E-3). He continued in the U.S. Marine Corps Reserve until March 2004, when he was honorably discharged as a sergeant (pay grade E-5) (AX E-2). His last fitness report before his discharge described him as technically competent, exceptionally talented, and a solid leader (AX E-4). He held a clearance in the Marine Corps and retained it when he began working for a defense contractor.

Applicant worked in network security as a Marine. He testified he believed he could do more for the Marine Corps as a civilian contractor, and he began work for his current employer while on terminal leave from the Marine Corps.

Applicant has been deployed to Okinawa, Japan, as a civilian contractor supporting Marine Corps communications networks since his release from active duty (AX A-1 to A-8). He provides tactical network security for the Marines and trains them on how to provide tactical network security in the field (Tr. 34-35). He interacts with the

Marines daily (Tr. 35). While working as a contractor, he completed the requirements for a bachelor of science degree in computer studies in May 2006 (AX F-3).

Applicant has no interaction with the Japanese Self-Defense Forces (Tr. 44). He does not speak Japanese, and his social circle consists of U.S. military personnel and fellow contractor employees (Tr. 40).

Applicant submitted 13 letters supporting the continuation of his security clearance. His program manager, who has known him for eight years, describes him as trustworthy, loyal, and dedicated, and states that he conducts himself like a Marine officer or senior noncommissioned officer (AX D-2). Two colleagues, one a retired chief master sergeant in the Air Force, regard him as dependable, highly respected, and continuing to live the motto of the Marines ("Semper Fidelis") (AX D-4, D-5). A Marine captain (AX D-6), three chief warrant officers (AX D-10, D-8, and D-13), two master sergeants (AX D-7, D-9), one gunnery sergeant (AX D-12), two staff sergeants (AX D-3, D-4), and a sergeant (AX D-1) describe him as highly competent, trustworthy, and totally dedicated to the Marines he supports. He received a certificate of commendation from the Marine Corps Base commander in August 2003 and a letter of recognition from the network operations officer in March 2008 for his exceptional performance (AX F-1, F-13).

Applicant married a citizen and resident of Japan in January 2002 (Tr. 26; GX 1 at 16). They have two sons, ages six and five, who are dual citizens of the U.S. and Japan (Tr. 27). His sons hold both U.S. and Japanese passports (Tr. 52). They attend private schools in Japan (Tr. 40). Until about two years ago, his spouse taught English to Japanese children, but she is not currently employed outside the home (Tr. 27). She has never lived in the U.S., but she spent time in the U.S. as an exchange student and visited once when Applicant's brother was married (Tr. 48).

Applicant's father-in-law, mother-in-law, and brother-in-law are citizens and residents of Japan. His father-in-law served as a pilot in the Japanese Self-Defense Forces and retired as a colonel in 1998 after about 36 years of service (Tr. 28). His brother-in-law currently serves as a pilot in the Japanese Self-Defense Forces and holds the rank of major.

Applicant's father-in-law is employed by a financial institution in Japan that provides commercial loans. His only interaction with the U.S. military is to play golf with senior U.S. military officers on the Marine base (Tr. 28). Applicant's mother-in-law is not currently employed, but she previously worked as a professional chef (Tr. 30). Applicant's father-in-law and mother-in-law are "active grandparents," and he and his spouse have regular contact with them (Tr. 30-31). Applicant's brother-in-law is stationed on mainland Japan, and they only visit with him about every two years (Tr. 31). As far as Applicant knows, his father-in-law and brother-in-law are not involved with Japanese intelligence services (Tr. 43).

Applicant's father-in-law speaks broken English; his mother-in-law speaks virtually no English; and his brother-in-law speaks some English but is not fluent (Tr. 45). Conversation with his in-laws is mostly limited to "courtesy" conversation about golf and children (Tr. 45).

Applicant recently purchased land and built a house in Okinawa. It was completed in January 2008 at a cost of \$515,000. The house was financed through the Bank of Okinawa, which loaned him about \$420,000 (Tr. 25). He was required to finance the house through a Japanese bank, and he deposits funds in a Japanese bank account to make the house payments (Tr. 38). He has no other financial assets in Japan. His primary bank account is with a U.S.-based credit union, and his credit cards are issued by U.S. institutions (Tr. 39). He has a retirement account worth about \$80,000 and a savings account worth about \$8,000 in U.S. institutions (Tr. 47; AX C-3, C-4).

Applicant testified that the real estate market in Japan is based on the land, because there is little interest in buying previously occupied homes. He would lose about 40% of his investment if he sold his home, but he would be financially able to handle the loss (Tr. 46). He is financially secure and earns more than \$100,000 per year in his current job (AX C-1, C-2). He testified he is "not very attached" to the house, and he and his family would leave it if relations between the U.S. and Japan made it necessary (Tr. 50). He is aware that the U.S. is transferring forces from Okinawa to Guam. He testified he will go wherever his employer asks him to go (Tr. 49).

I have taken administrative notice of the following facts. Japan is a constitutional monarchy with a parliamentary government. It is one of the U.S.'s most important economic partners. Although Japan has some problems with child abuse, trafficking in persons, and discrimination against women, ethnic minorities, and foreigners, it has a generally good human rights record. The crime rate in Japan is lower than it is in the U.S., and there is no significant terrorist activity. The military alliance of the U.S. and Japan is the cornerstone of U.S. security interests in Asia and regional stability. U.S. and Japanese military forces routinely conduct joint exercises. Japan provides facilities, financial support, and material support to U.S. forward-deployed forces. Japan grants base rights on its territory in return for a U.S. promise to protect Japan's security. Japan has provided extensive logistical support to U.S. operations in Afghanistan, and it has supported the U.S. operations in Iraq. Over 100 countries, including allies like Japan, have been known to collect sensitive information and technology in the U.S. In its Annual Report to Congress on Foreign Economic Collection and Industrial Espionage for 2000, the National Counterintelligence Center included a survey of "nearly a dozen" selected Fortune 500 companies, concluding that Japan was among the seven most active collectors of U.S. economic and technological information. Japan has not been listed by name in any subsequent updates by the Office of the National Counterintelligence Executive.

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 have 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 criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. 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 that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the

facts. 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 AG ¶ 2(b).

Analysis

Guideline B, Foreign Influence

The SOR alleges Applicant’s spouse and two children are dual citizens of Japan and the U.S. (SOR ¶¶ 1.a and 1.b); his father-in-law is a citizen and resident of Japan and retired as a colonel from the Japanese Self-Defense Forces in 1998 (SOR ¶ 1.c); his mother-in-law is a citizen and resident of Japan (SOR ¶ 1.d); his brother-in-law is a citizen and resident of Japan currently serving as a pilot in the Japanese Self-Defense Forces (SOR ¶ 1.e); and he owns a house in Okinawa worth about \$515,000 that is financed by the Bank of Okinawa (SOR ¶ 1.f¹). The evidence shows that Applicant’s spouse is a citizen only of Japan and not a dual citizen as alleged.

The security concern under this guideline is set out in AG ¶ 6 as follows:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

Four disqualifying conditions under this guideline are relevant to this case. First, a disqualifying condition may be raised by “contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion.” AG ¶ 7(a). Second, a disqualifying condition may be raised by “connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual’s obligation to protect sensitive information or technology and the individual’s desire to help a foreign person, group, or country by providing that information.” AG ¶ 7(b). Third, a security concern may be raised if an applicant is “sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion” AG ¶ 7(d). Fourth, a security

¹ This subparagraph is incorrectly designated as 1.d in the SOR; it should be 1.f. I have made a handwritten correction to the SOR.

concern also may be raised by “a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation.” AG ¶ 7(e).

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). “[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).

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).

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. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. See *generally* ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision to grant clearance where administrative judge did not consider terrorist activity in area where family members resided).

AG ¶¶ 7(a), (d), and (e) all require substantial evidence of a “heightened risk.” The “heightened risk” required to raise one of these disqualifying conditions is a relatively low standard. “Heightened risk” denotes a risk greater than the normal risk inherent in having a family member living under a foreign government.

A “heightened risk” is not raised by the nature of the government of Japan, because it is one of our closest allies and it has a good human rights record. Japanese industries have been known to target sensitive information and technology in the U.S., but many other industrialized countries, including allies, also practice economic and industrial espionage. Although Applicant does not appear to have particular feelings of affection for his brother-in-law, he has not rebutted the presumption that he has feelings of obligation toward his spouse’s immediate family members. Applicant’s brother-in-law is an officer in the Japanese Self-Defense Forces, but the military forces of the U.S. and Japan work closely together and share information on a regular basis. His brother-in-law

is a pilot, not an intelligence agent. Applicant's father-in-law is retired from the Japanese military, but he is in the business of providing commercial loans and thus is connected with Japanese economic interests. The crime rate in Japan is much lower than in the U.S., and there is no evidence of significant terrorism in Okinawa or mainland Japan. Applicant has a significant financial investment in his home, but Japan does not have a record of taking property or using any other coercive measures to obtain information.

Nevertheless, after considering the relatively low level risk involved in the term "heightened risk," and the relatively low level of proof required to raise a disqualifying condition, i.e., more than a scintilla of evidence but less than a preponderance, I conclude the government has met its burden of raising the concerns based on "heightened risk" in AG ¶¶ 7(a), (d), and (e). The "heightened risk" also raises the potential conflict of interest in AG ¶ 7(b), shifting the burden to Applicant 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 never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns under this guideline can be mitigated by showing that "the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S." AG ¶ 8(a). In light of the nature of the Japanese government and its relationships with the U.S., I am satisfied it is unlikely Applicant will be placed in a position of having to choose between the interests of the U.S. government and the Japanese government, but I am not satisfied of the unlikelihood that he might be placed in the position of having to choose between the interests of the U.S. and his spouse or in-laws. Thus, I conclude AG ¶ 8(a) is not established.

Security concerns under this guideline also can be mitigated by showing "there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest." AG ¶ 8(b). Applicant's loyalty to his spouse and her family is not "minimal," but his loyalties to the U.S. and the U.S. Marines he supports are deep and longstanding. His entire world, except for his immediate family, is centered on the Marines in Okinawa. His social life is among the military community, and he has virtually no social or professional life outside of his relationship with the Marines. I conclude this mitigating condition is established.

Security concerns under this guideline also may be mitigated by showing that "contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation." AG ¶ 8(c). There is a rebuttable presumption that contacts with an immediate family member in a foreign country are not casual. ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002). This presumption does not apply to Applicant's in-laws, because they are not immediate

family members as the term is used in the adjudicative guidelines. Applicant's contacts with his brother-in-law are infrequent and limited to exchange of pleasantries. On the other hand, Applicant's contacts with his mother-in-law and father-in-law are not infrequent. As he described it, they are active grandparents. Even though there is a language barrier, contacts are mutually motivated by familial affection. I conclude AG ¶ 8(c) is applicable to Applicant's brother-in-law, but not to his father-in-law and mother-in-law.

Security concerns arising from financial interests can be mitigated if "the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual." AG ¶ 8(f). Applicant's investment in his home is substantial, and its loss would cause him and his family considerable hardship, even though he is satisfied he could absorb such a loss. The likelihood that Japan would use his home to manipulate or pressure him is virtually nil, but the substantial value of his property makes this mitigating condition inapplicable.

Whole Person Concept

Under the whole person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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 individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept. I have incorporated my comments under Guideline B in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant took off his Marine uniform more than eight years ago, but he has never left the Marine Corps. He is mentally and emotionally still a Marine. He is totally dedicated to his mission and the interests of the U.S. He has held a clearance continuously for more than 12 years without incident. He was sincere, candid, and persuasive at the hearing. He has thoughtfully considered the financial impact of leaving Japan if it were necessary, and he knows that redeployment of U.S. forces could require him and his family to leave Japan. His spouse and in-laws are not involved in politics or

associated with Japanese intelligence agencies or directly involved in high technology businesses.

After weighing the disqualifying and mitigating conditions under Guideline B, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on foreign influence. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

Formal Findings

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25:

Paragraph 1, Guideline B (Foreign Influence):	FOR APPLICANT
---	---------------

Subparagraphs 1.a-1.f:	For Applicant
------------------------	---------------

Conclusion

In light of all of the circumstances, it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge