



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



In the matter of:

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) ISCR Case No. 09-01151
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Applicant for Security Clearance

Appearances

For Government: Philip J. Katauskas, Esq., Department Counsel

For Applicant: Steven Garcia, Personal Representative

September 23, 2011

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated the Government's security concerns under Guideline B, Foreign Influence. Applicant's eligibility for a security clearance is granted.

On June 1, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing 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) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR on June 17, 2011, and requested a hearing before an administrative judge. The case was assigned to me on July 29, 2011. DOHA issued a Notice of Hearing on August 9, 2011. I convened the hearing as scheduled on August 31, 2011. The Government offered Exhibit (GE) 1. Applicant did not object and it was admitted into evidence. The Government requested administrative notice be taken of

Hearing Exhibit I.¹ I granted the request. Applicant testified on her own behalf. She did not offer any exhibits. DOHA received the hearing transcript (Tr.) on September 8, 2011.

Procedural Matters

Department Counsel withdrew SOR ¶1.a.

Findings of Fact

Applicant admitted all of the allegations in the SOR. I have included her admission in my findings of fact. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 52 years old. She worked for a federal contractor for six years as a logistics manager. Applicant was born in Madagascar and met her husband there in 1979. He was a U. S. Marine at the time serving with the Marine Security Guard at the U.S. embassy. Prior to him transferring in January 1981, Applicant applied for and was granted a fiancée visa so she could accompany him to the United States and they could later marry. Applicant's husband reported to his new embassy assignment in Costa Rica. Applicant lived with her husband's parents during this time awaiting their pending nuptials. Their plan was to marry in Costa Rica after he got settled. In March 1981, before they were married, Applicant's husband and other Marines were targeted by terrorists and a bomb exploded, hitting them on their way to work. Her husband suffered severe injuries, including having both of his femurs shattered. They moved up their wedding date and were married in June 1981. Her husband was awarded the Purple Heart. After numerous operations he was medically retired in 1984 and receives disability compensation. Applicant became a naturalized U.S. citizen in 1988.²

Applicant and her husband have two daughters. Their eldest is 28 years old and they have a 15-year-old adopted daughter. They also have two granddaughters. In 1996, Applicant returned to Madagascar to attend the funeral of her sister. This is the only time since she left in 1981 that she has returned. Her deceased sister had a baby daughter who was 11 months old at the time. The father of the child was unable to care for the baby and asked Applicant to adopt her. Applicant and her husband agreed to adopt the baby. They consulted with the U.S. embassy in Madagascar to ensure they followed the proper procedures. They were advised that they needed to complete the adoption before the child could obtain a U.S. visa. Applicant remained in Madagascar for three to four months to complete the process. Once the child was legally adopted the proper visa and paperwork were issued, and Applicant and child returned to the United States. Upon entry into the United States, Applicant and her husband filed a Petition of

¹ HE II is Applicant's written closing statement.

² Tr.40-47, 61-62.

U.S. Residency with the U.S. Citizenship and Immigration Service (USCIS).³ They were informed by USCIS that they would receive additional documentation from the agency in the future. They never received additional documentation from the USCIS. They made an appointment with USCIS in early 2011 and were advised that during the transition from the U.S. Immigration Service to USCIS their paperwork was lost, so they had to resubmit it and start over. Applicant and her husband have resubmitted the appropriate documents for permanent residence status for their adopted daughter. Applicant admitted after they adopted their daughter and first submitted the required documents to USCIS, they forgot about following through, and they moved on with their lives raising their daughters. They did not think about their daughter's citizenship status. Their adopted daughter is in the United States legally.⁴

Applicant's father, stepmother, four brothers, and sister are citizens and residents of Madagascar. She has had minimal contact with all of them since leaving in 1981. She telephones them on holidays and birthdays. The last time she visited any family members in Madagascar was in 1996 when she returned for her sister's funeral. She has no plans to return there.⁵

Applicant's father is a 78-year-old retired businessman. Before he retired he owned a hardware store. He recently had a stroke and Applicant has called him on the telephone more often. Her father never served in the military and does not receive any pension or benefit from the government. He has never visited Applicant in the United States. Her father remarried seven years ago. His wife, Applicant's stepmother, is a 66-year-old housewife. She never served in the military and does not receive any benefits from the government.⁶

Applicant's brothers' ages are 57, 55, 51, and 44. Her eldest brother owns a restaurant. He is married. His wife is a homemaker. They have one child, 18 years old. Neither he nor his wife has served in the military or receive government benefits.⁷

Applicant's second brother is retired from the military. He is married. His wife is a homemaker. They have two children, ages 19 and 17. He enlisted in the country's Coast Guard and served twenty years. He receives a military pension. He retired from the military about ten years ago. Neither he nor his wife, or their children have any

³ U.S. Citizenship and Immigration Service was previously the United States Immigration Service.

⁴ Tr. 24, 47-61; Answer to the SOR. Applicant included with her Answer copies of her daughter's application for permanent residence and associated documents.

⁵ Tr. 25-29.

⁶ *Id.*

⁷ Tr. 29-40.

government affiliation. Except for his pension they do not receive any other benefit from the government.⁸

Applicant's third brother sells cars. He is married and has two sons, ages, 25 and 22. The sons are required to register with the country's selected service, but they have not been called to serve in the military. His wife is a homemaker. Neither he nor his wife served in the military and neither receives any benefit from the government.⁹

Applicant's youngest brother sells cars. He is married and has three children, ages 10, 8, and 5. Neither he nor his wife has served in the military. His wife works for the government's Department of Agriculture as a land surveyor.¹⁰

Applicant's sister is a homemaker. Applicant does not know her sister's husband's occupation. Her sister did not serve in the military and does not work for the government.¹¹

Applicant talks to her relatives in Madagascar, but on a very limited basis. Usually it is on holidays and other special occasions.

Applicant owned a small piece of land in Madagascar that she inherited from her mother. It is adjacent to land owned by a brother. Applicant relinquished the land to her brother in 2010 so he would have more property for his home. Applicant has no intention of going back to Madagascar to live.¹²

Applicant is her immediate family's primary means of support due to her husband's disability. All of their assets are in the United States. She stated she pledged her allegiance to the United States. She has been a law-abiding citizen since coming to the U.S.¹³

Madagascar¹⁴

The Malagasy Republic was proclaimed as an autonomous state within the French community in 1958. A provisional government ended with the adoption of a

⁸ *Id.*

⁹ Tr. 31-40.

¹⁰ Tr. 32-40.

¹¹ Tr. 34-40.

¹² Tr. 62-64.

¹³ Tr. 68-69.

¹⁴ HE I.

constitution in 1959 and full independence in 1960. Madagascar became a French Protectorate in 1985.

Madagascar has been marred by a recent period of upheaval. In 2009, protestors demonstrated in the capital and the president signed power over to the military, which in turn conferred the presidency on the elected mayor of its capital city, Antananarivo, and the leader of the demonstrators. The last presidential elections were held in December 2006. There is currently no legitimately elected president of Madagascar.

The United States has condemned the unconstitutional and undemocratic change in power and considers the events that led up to the installation of the present government to be a *de facto* military coup. As a result, the United States has suspended all assistance programs that directly benefit the government as well as all non-humanitarian assistance.

Madagascar's human rights record is troubling. There are numerous human rights problems, such as unlawful killings and other security forces abuses, harsh prison conditions, arbitrary arrest and detention, censorship, intimidation, arrest and violence toward journalists, societal discrimination, violence and trafficking in woman and children, and forced child labor.

There are reports that government agents committed arbitrary and unlawful killings and the police continue to use unwarranted lethal force during arrests.

After the *de facto* military coup, the United States has had limited engagement with the defector authorities. There is continued political unrest and the country's limited resources severely constrain its ability to confront a potential terrorist threat.

There are no current travel warnings issued by the United States for Madagascar. U.S. citizens visiting should not expect any hostility or aggressions based solely on their citizenship. However, there are warnings about crimes against tourists in general and recommendations to take appropriate precautions.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as

the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable security decision.”

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline B, Foreign Influence

AG ¶ 6 expresses the security concern regarding foreign influence:

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.

AG ¶ 7 describes disqualifying conditions that could raise a security concern. I have considered all of them and the following two are potentially applicable:

(a) 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; and

(b) 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(a) and 7(b) require evidence of a "heightened risk." The "heightened risk" necessary 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 or owning property in a foreign country. The totality of Applicant's family ties to a foreign country as well as each individual family tie must be considered.

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."¹⁵

Furthermore, "even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security."¹⁶ Friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. 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, or the country is known to conduct intelligence operations against the U.S. Madagascar's poor human rights record, the unconstitutional and undemocratic change of power resulting in a *de facto* military coup, and the country's limited resources constraining their ability to confront potential terrorist threats creates a heightened risk.

¹⁵ ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

¹⁶ ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002).

Applicant's father, stepmother, four brothers, and sister are citizens and residents of Madagascar. These facts potentially create a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion, and also create a potential conflict of interest. I find AG ¶¶ 7(a) and 7(b) apply. Department Counsel withdrew the allegation against Applicant's adopted daughter. Therefore, none of the above disqualifying conditions apply to her.

I have also analyzed all of the facts and considered all of the mitigating conditions for this security concern under AG ¶ 8 and conclude the following three are potentially applicable:

(a) the nature of the relationship 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 and interests of the U.S.;

(b) 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 interests in favor of the U.S. interests; and

(c) 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.

Applicant has had minimal contact with her family since she left Madagascar in 1981. She returned one time in 1996 for her sister's funeral. She telephones family members only on special occasions. None of her family have visited her in the United States. However, because Applicant still maintains contact with them her family ties are more than casual. Therefore, I find AG ¶ 8(c) does not apply.

The United States presently does not have diplomatic ties with Madagascar, except for humanitarian purposes. The United States has condemned the unconstitutional and undemocratic change of power through a de facto military coup. Madagascar's human rights record is poor and troubling. There are reports that Government agents committed arbitrary and unlawful killings and the police continue to use unwarranted lethal force during arrests. 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 was born in Madagascar, but moved to the United States in 1981 and married her husband, a U.S. Marine. She has been a naturalized U.S. citizen since 1988. Her eldest daughter and grandchildren were born in the United States. She has

returned to Madagascar only one time to attend her sister's funeral. She stayed until she could complete the procedure to adopt her sister's child and bring her back to the United States. The only asset Applicant had in Madagascar was a small piece of land that is adjacent to her brother's land that she inherited from her mother. She relinquished this land to her brother. Applicant does not intend on returning to Madagascar. Only one family member, her brother, who retired from the military, has any ties to the government. There is no indication that Applicant's relatives are in positions or involved in activities that would place Applicant in a position of having to choose between her family interests and those of the United States. There is no indication that Madagascar targets or exploits its own citizens to obtain intelligence. It is unlikely that intelligence officials would attempt to pressure Applicant's relatives in Madagascar to gather valuable or classified information from the United States through Applicant. In addition, I find that considering Applicant's deep and longstanding relationship and loyalties to the United States, that any potential conflict of interest that may arise would be resolved in favor of the United States. I find mitigating conditions AG ¶¶ 8 (a) and 8(b) apply.

Whole-Person Concept

Under the whole-person concept, the 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. The 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 commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. 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 has been a loyal and dedicated citizen of the United States since 1988. Her husband is a retired Marine. Her eldest daughter was born in the United States and her adopted daughter has lived with her since 1996. Applicant left Madagascar in 1981 and has only returned once for her sister's funeral. She talks to her family occasionally. Although she has family contacts in Madagascar, her loyalty and commitment is to the United States.

Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under the guideline for Foreign Influence.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline B:	FOR APPLICANT
Subparagraph 1.a:	Withdrawn
Subparagraphs 1.b-1.e:	For Applicant

Conclusion

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

Carol G. Ricciardello
Administrative Judge