



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



In the matter of:)
)
)
)
Applicant for Security Clearance)

ISCR Case No. 11-09891

Appearances

For Government: Robert Kilmartin, Esq., Department Counsel
For Applicant: Emma V. Broomfield, Esq., and Kristen E. Ittig, Esq.

05/17/2013

Decision

O'BRIEN, Rita C., Administrative Judge:

Based on a review of the pleadings, testimony, and exhibits, I conclude that Applicant has mitigated the security concerns related to foreign influence. Accordingly, his request for a security clearance is granted.

Statement of the Case

On October 4, 2012, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) that detailed security concerns under Guideline B (Foreign Influence). This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992) as amended; and the Adjudicative Guidelines (AG) implemented by the Department of Defense on September 1, 2006.

In his Answer to the SOR, signed and notarized on November 19, 2012, Applicant admitted all the factual allegations under Guideline B. The case was assigned to me on January 22, 2013. DOHA issued a Notice of Hearing on February 7, 2013, and I convened the hearing as scheduled on February 27, 2013. The Government offered two exhibits, which I admitted into evidence as Government Exhibits (GE) 1 and 2. Applicant testified and offered three exhibits, which I admitted into evidence as Applicant's Exhibits (AE) A through C. I held the record open until March 27, 2013, to allow Applicant to present additional documentation. He timely submitted four documents, which I admitted without objection as AE D through G. DOHA received the transcript of the hearing (Tr.) on March 7, 2013.

Procedural Ruling

I take administrative notice of facts related to Kyrgyzstan, included in U.S. Government documents provided by Department Counsel (Hearing Exhibit [HE] I), and U.S. Government documents submitted by Applicant (HE II). The facts are limited to matters of general knowledge, not subject to reasonable dispute, and are set out in the Findings of Fact.

Findings of Fact

Applicant's admissions in response to the SOR are incorporated as findings of fact. After a thorough review of the pleadings, Applicant's response to the SOR, and the evidence, I make the following additional findings of fact.

Applicant is a 70-year-old native-born U.S. citizen. He married in 1960 and divorced in 1976. He has two adult daughters from that marriage and two grandchildren. He completed a bachelor's degree in 1975. After about 15 years working in information systems, Applicant started his own business in 1979. He is currently president and chief executive officer of that company. The company received its first defense department contract in 1982, and has provided information technology services to federal government agencies for more than 30 years.¹ In about 1985, Applicant was granted a top secret security clearance, and has held that level continuously without incident. (GE 1; AE C; Tr. 23-29, 92-93)

Applicant's wife is 57 years old. She met Applicant in 1997. They married in 2000, and currently she is a homemaker. She was born in Kyrgyzstan and worked there in the medical field. She came to the United States in 1996, received U.S. resident alien status in 2003, and became a naturalized U.S. citizen in 2006. Applicant's wife has traveled to Kyrgyzstan to see family about once per year. Applicant accompanied her annually from about 2007. In about 2009 when her mother became ill, she visited three times. Applicant's mother-in-law died in 2009, and in 2010, they returned to Kyrgyzstan for her memorial service; Applicant has not been there since 2010. Applicant's wife has no

¹ Applicant testified that 35 of his employees were working in the section of the Pentagon struck by terrorists on September 11, 2001. But for the recently installed wall reinforcements, his employees would have perished in that attack. (Tr. 52-53)

friends in Kyrgyzstan, and no contact with any Kyrgyz community in the United States. (GE 1; Tr. 29-32, 71-76, 82-85, 99-103, 110-111)

In the late 1990s, Applicant hosted a business delegation from Kyrgyzstan, and a few months later, he visited Kyrgyzstan to determine the likelihood of business opportunities. He testified that he had a meeting with a government organization, but could not remember its name. He learned that there were no business possibilities there. Applicant had no further official contacts there, and has no current business interests in Kyrgyzstan. (Tr. 29, 32-34, 80-81)

In about 1998, Applicant became acquainted with his wife's brother, who lived in the United States at the time. He is a citizen-resident of Kyrgyzstan and an attorney. In the mid to late 1990s, he worked for the Kyrgyz ministry of foreign affairs, and during that time he worked at the Kyrgyz embassy in the United States. Subsequently, he returned to Kyrgyzstan. He is married and has a teenage daughter and a six-year-old son. His wife is a homemaker. In his interrogatory response, Applicant said he had contact with his brother-in-law eight times per year. At times it was less frequent, and it averages about four times per year. Since 1999, Applicant's brother-in-law has worked in Kyrgyzstan for a U.S. legal association. In this position, he has managed assistance programs for U.S. Agency for International Development (USAID), the U.S. Department of State, and the U.S. embassy in Kyrgyzstan. He attends the association's conferences annually in the United States. In a character reference, he noted Applicant's dignity, maturity, "absolute honesty" and ethical behavior. He also stated that, "I assure that none of my family members, including myself, have worked for the Kyrgyz Government for the past 14 years." (GE 2; AE A; Tr. 41, 56, 69, 73-75, 81, 109, 114-122)

Applicant's brother-in-law has a daughter who was born in the United States while her father was working at the Kyrgyz embassy. She returned with her parents to Kyrgyzstan. In 2006, when she was eight years old, her parents wished to provide better opportunities for her, and allowed Applicant and his wife to adopt her and raise her. The girl attended school in the United States, but became homesick after one year, and returned to Kyrgyzstan in 2007. In 2012, when she was 14 years old, she asked and was allowed to return to the United States. She plans to return to Kyrgyzstan to live permanently when the school year ends. Her parents have assumed full responsibility for her welfare, and Applicant provided a statement dated March 16, 2013, signed by her biological parents, agreeing that they will be responsible as of June 20, 2013, for her "care, raising, schooling, essentials, and medical needs. . ." Applicant's brother-in-law earns a substantial salary as the employee of a U.S. association, and has the financial means to support her. Applicant and his wife planned to initiate proceedings to terminate their parental status in March 2013. (GE 1; AE F, G; Tr. 39-46, 56, 106-107, 117, 122-125)

Applicant's two stepsons are citizens of Kyrgyzstan, residing in the United States. One has a work visa, and has been employed for several years in the accounting department at Applicant's company. He has applied for legal resident status. The other is a legal permanent resident, currently attending college and working part time. He also

intends to work in the accounting field. Applicant's wife stated her sons intend to become citizens and make their life in the United States. (GE 1; Tr. 37-39, 76-77, 105-106)

Applicant's 86-year-old father-in-law is a citizen-resident of Kyrgyzstan. Applicant's wife testified that her father was a university professor at a time when universities were government-controlled. Applicant's interrogatory response indicates his father-in-law worked for the ministry of education from 1967 to 1978, and headed a history department at a state medical institute from 1978 to 1990. He retired in 1991. Applicant saw his father-in-law in person about once per year from 2007 to 2010. Applicant's wife talks with her father about once per month. Applicant talks to him on occasion, but only briefly because neither speaks the other's language and his wife must interpret. Applicant's father-in-law and his youngest sister-in-law live in a property Applicant previously owned. (GE 2; Tr. 47, 70-73, 78, 110, 116-117)

Applicant's wife has three sisters who are citizens of Kyrgyzstan. The oldest, who lives in Belarus, is a judge on a constitutional court. She is retiring in June 2013, and will return to Kyrgyzstan. The middle and youngest sisters live in Kyrgyzstan. The middle sister is a dermatologist and works in a hospital in Kyrgyzstan. The youngest sister is disabled and lives with her father in the apartment Applicant owned. Applicant's wife talks with her siblings occasionally, and Applicant seldom talks with them because they speak Russian and he does not. Applicant does not provide financial support to any members of his wife's family in Kyrgyzstan. Applicant testified that he does not have an emotional relationship with any members of his wife's family in Kyrgyzstan. None has ever asked him for protected information, and he stated he would report any such effort to his facility security officer. (Tr. 37, 48-50, 78, 107-109)

Applicant and his wife owned property in Kyrgyzstan. In his security interview, and at the hearing, he stated they bought it in about 2008 when his mother-in-law was sick, and she lived there for about a year, before she died in 2009. However, the documents Applicant offered show the following: In June 2008, Applicant's brother-in-law bought the property. (AE B/3) On March 25, 2009, a document was created showing that Applicant's brother-in-law gifted the apartment to Applicant and his wife. (AE B/2)² Applicant, his wife, and his brother-in-law signed the gift agreement in March 2010. (AE B/2) Applicant testified that he intended the apartment to be used by his mother-in-law, who was diagnosed with stomach cancer in about 2008. He testified that he would not have taken title to foreign property if he realized it constituted a security concern. (GE 1, 2; AE B, D, E, F; Tr.34-37, 77-79, 84, 102-104)

² I have divided Exhibit AE B into four parts: AE B comprises emails from Applicant, his brother-in-law, and his brother-in-law's attorney, regarding the property transfer. AE B-1 is a Technical Certificate that lists the items contained in the apartment, which Applicant's brother-in-law transferred to Applicant and his wife. AE B-2 is a Real Estate Gift Agreement. The document was created on March 25, 2009, and signed on March 25, 2010, by Applicant's brother-in-law and two individuals holding power of attorney for Applicant and his wife. AE B-3 is a June 30, 2008 agreement showing the purchase of the property by Applicant's brother-in-law from the seller.

In February 2013, Applicant informed his brother-in-law that he wished to transfer the property ownership to him. His brother-in-law contacted an attorney in Kyrgyzstan to handle the transfer. Applicant provided evidence showing that, as of March 20, 2013, he had gifted the property and transferred title to his brother-in-law. He currently has no property or financial interests in Kyrgyzstan. Applicant's U.S. assets include his closely held business, real estate, retirement accounts, and investments. Excluding liabilities for mortgage loans and credit cards, Applicant's assets total almost \$10,000,000. The property in Kyrgyzstan is worth \$200,000, or about 2% of his U.S. assets. (GE 2; AE B, C, D, E, F Tr.34-37, 77-79, 102-104)

Applicant submitted ten reference letters attesting to his character, including letters from his chief financial officer, brother-in-law, accountant, consultants, executive director, business development director, and the contracting officer's representative of Applicant's company, a former federal senior executive service (SES) and Air Force colonel who worked for Applicant's company. All but his brother-in-law hold or have held security clearances, and have been active military members or worked for federal government agencies for many years. They uniformly describe Applicant as conscientious, highly trustworthy, discrete, and having an exceptional work ethic, prudent judgment, and a reputation for strong ethical values. More than one noted, "I would trust him with my life." (AE A)

The director of corporate planning of Applicant's company, who worked for Applicant for eight years, formerly worked for the defense department in military and civilian positions, and held the highest clearances as an SES. He noted that 96% of Applicant's employees hold security clearances, and Applicant required strong security practices of them and himself. He knew of no security breaches during his employment at Applicant's company. He stated that Applicant has demonstrated his trustworthiness by providing high-quality services to the federal government, and has "been a loyal faithful servant to this nation for his entire life and especially so in his role as president/CEO of [company] for the past 33 plus years." (AE A)

Administrative Notice³

Kyrgyzstan is a small, central Asian country that gained its independence after the dissolution of the former Soviet Union. It is a constitutional republic with a president and prime minister. It maintains close ties to former Soviet countries, particularly Kazakhstan and Russia. Kyrgyzstan has been subject to political turbulence and ethnic unrest. Ethnic tensions in June 2010 led to violent clashes in the southern portion of the country. In late 2010, three terrorist attacks or attempted terrorist attacks were reported. Human rights concerns in Kyrgyzstan include reports of arbitrary killings and arrests, torture, abuse by law enforcement officials, lack of judicial independence, pervasive corruption, and discrimination against women and minorities.

³ The information for administrative notice appears in the U.S. government documents included in Hearing Exhibits I and II.

Since 2001, Kyrgyzstan has hosted the Manas Air Base, an important logistical hub for the Coalition efforts in Afghanistan. In mid-2009, Kyrgyz authorities threatened to close the base, but kept it open after the United States agreed to a higher lease and other financial inducements.

In October 2011, President Obama congratulated the Kyrgyz people and government on a “democratic and peaceful presidential election” which demonstrated “their commitment to an orderly and open transition of power.” In January 2013, the U.S. assistant secretary for south and central Asian affairs described the Kyrgyz Republic’s democracy as a model for the region.

Policies

Each security clearance decision must be a fair and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the AG.⁴ Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the Guidelines, commonly referred to as the “whole-person” concept. The presence or absence of a disqualifying or mitigating condition does not determine a conclusion for or against an applicant. However, specific applicable guidelines are followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline B.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁵ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the Government’s case.

Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion.⁶ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring that each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the national interests as his or his own. The “clearly consistent with the national interest”

⁴ Directive. 6.3.

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁶ See *Egan*, 484 U.S. at 528, 531.

standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.⁷

Analysis

Guideline B, Foreign Influence

AG ¶ 6 expresses the security concern under Guideline B:

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 conditions that could raise a security concern and may be disqualifying. I have considered all the disqualifying conditions, especially the following:

- (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;
- (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; and
- (e) 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.

The mere possession of close family ties to persons in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if only one relative lives in a foreign country and an applicant has frequent, non-casual contacts with that relative, this factor alone is sufficient to create the potential for foreign influence. Through his wife, Applicant has ties to relatives who are citizens and residents of Kyrgyzstan, including his brother-in-law, father-in-law, and sisters-in-law. Applicant's brother-in-law

⁷ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

worked for the Kyrgyz ministry of foreign affairs, and his father-in-law worked in government positions until 1990. One of his sisters-in-law is a judge in Belarus. He also has contact with his two step-sons, who are citizens of Kyrgyzstan and residents of the United States. The country in question must also be considered.⁸ Kyrgyzstan has been subject to ethnic tension and terrorist attacks. Arbitrary killings and arrests, corruption and discrimination remain a concern. Applicant's ties to family members who are citizens of Kyrgyzstan create a heightened risk of foreign exploitation and the potential for a conflict of interest. Applicant also held title to property in Kyrgyzstan worth \$200,000. AG ¶¶ 7(a), (b), and (e) apply.

I have considered the mitigating conditions under AG ¶ 8, especially the following:

(a) 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.;

(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 interest in favor of the U.S. interest;

(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; and

(f) 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.

Applicant's wife, a U.S. citizen, has not lived in Kyrgyzstan in 16 years. Her sons live and work in the United States. One is a legal resident and the other is in process of obtaining his permanent residency. The adoption of Applicant's wife's niece was not successful. She has decided to live with her family in Kyrgyzstan, and will return there in June. Applicant is preparing to initiate the process to terminate his parental rights.

Contacts between Applicant's family members and the Kyrgyz government have decreased. Applicant's father-in-law held government positions for many years. However, he is now 86 years old and has been retired for 22 years. Applicant's wife

⁸ See ISCR Case No. 04-07766 at 3 (App. Bd., Sep 26, 2006) (the nature of the foreign government involved must be evaluated in foreign influence cases).

testified that her sister, who has worked as a judge in Belarus, will be retiring in one month. Applicant's brother-in-law worked for the Kyrgyz government in the 1990s. However, since 1999, he has worked for a U.S. legal association, often supporting U.S. federal agencies. He stated that none of his family has had Kyrgyz government connections in the past 14 years. Moreover, Applicant has little contact with his foreign relatives because of the language barrier. AG ¶¶ 8(a) and (c) apply.

Applicant has not visited Kyrgyzstan since 2010, and has no intention of returning. He had an apartment valued at \$200,000 in Kyrgyzstan, which represented about 2% of his net worth. After becoming aware that the property represented a security concern, he transferred it to his wife's brother. He has no bank accounts, property, or other foreign financial interests that could be used to manipulate him. On the other hand, his connections with the United States include his U.S. citizenship; U.S. education; his life-long residence here; almost \$10,000,000 in U.S. assets; and his decades of service to the Government through the defense contracting company he created and has operated for 33 years. Given these connections, I conclude Applicant would choose the United States over Kyrgyzstan, were a conflict of interest to arise. Mitigating conditions AG ¶ 8(b) and (f) apply.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the relevant circumstances. I have evaluated the facts presented and have applied the appropriate adjudicative factors. I have also reviewed the record before me in the context of the whole-person factors listed in 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the cited guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Guideline B cases do not focus on an applicant's loyalty to the United States, and here, Applicant's loyalty is not in question. Although he has relatives in Kyrgyzstan, most of his contacts with them are limited because of the language barrier. He has no emotional connections with his relatives in Kyrgyzstan. His only relative with a

government connection is retiring in one month. His wife's niece is returning to live in Kyrgyzstan permanently. Applicant has not been in the country in three years, and has no plans to return. Because the Kyrgyz property was a security concern, he has divested himself of the property, demonstrating his willingness to place the interests of the United States above his own. Moreover, he has strong ties to the United States through his wife, his children, his property, and the defense contracting company he started three decades ago. He has held top-level security clearances for decades without incident, including the past 15 years when he had ties to his wife's foreign family. He has supported the defense department during those years, and his character reference letters attest to his integrity, trustworthiness, and long record of strong performance. Given his substantial financial resources, it is unlikely he would be vulnerable to financial coercion. In sum, based on his history, conduct, and strong U.S. ties, I conclude that Applicant would resolve any conflict of interest in favor of the United States.

For all these reasons, I conclude Applicant has mitigated the cited security concerns. A fair and commonsense assessment of the available information bearing on Applicant's suitability for a security clearance shows he has satisfied the doubts raised under the guideline for foreign influence.

Formal Findings

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

Paragraph 1, Guideline B	FOR APPLICANT
Subparagraphs 1.a – 1.g	For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the national interest to allow Applicant access to classified information. Applicant's request for a security clearance is granted.

RITA C. O'BRIEN
Administrative Judge