



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 14-06958
)	
Applicant for Security Clearance)	

Appearances

For Government: Pamela C. Benson, Esq., Department Counsel
For Applicant: *Pro se*

08/16/2016

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant did not mitigate security concerns raised by her connections to and contacts with foreign relatives, two of whom are employed by the government of South Korea. Notwithstanding the presence of some favorable information, Applicant did not meet her burden of persuasion for continued access to classified information. Clearance is denied.

History of the Case

On August 22, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) sent Applicant a Statement of Reasons (SOR) alleging that his circumstances raised security concerns under the foreign influence guideline.¹ Applicant answered the SOR and requested a determination on the administrative (written) record (Answer).

¹ This action was taken under Executive Order (E.O.) 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 implemented by the Department of Defense on September 1, 2006.

On January 8, 2016, Department Counsel prepared the Government's written case, a file of relevant material (FORM), and sent it to Applicant. The FORM contains the pleadings, two documentary exhibits, and the Government's request for administrative notice regarding South Korea, which were pre-marked Items 1 – 4.² Without objection, Items 1 – 4 were admitted into the record.

On January 19, 2016, Applicant filed her response to the FORM (Response). The Response was marked Exhibit A and, without objection, admitted into the record. On March 3, 2016, I was assigned Applicant's case for decision.³

Republic of Korea (South Korea)

Administrative notice may be taken of uncontroverted, easily verifiable facts regarding a foreign country set forth in reliable and relevant U.S. Government reports. Additionally, the official position of relevant federal agencies or the pertinent statements of key U.S. Government officials may be appropriate for administrative notice. Generally, the party requesting administrative notice of a particular matter must provide the source document, either the full document or the relevant portion of the source document, to allow an administrative judge to assess the reliability, accuracy, and relevancy of any matter requested for administrative notice.⁴

Department Counsel requested that I take administrative notice of certain matters regarding South Korea. Department Counsel forwarded to Applicant the Government's request for administrative notice, and either the full or portions of the 14 source documents cited in the notice. (Item 3) Applicant, in her Response, stated she had reviewed the notice and the accompanying documents. Although Applicant noted that she was unaware of the information reflected in the notice, she did not raise an objection nor provide further information regarding South Korea. (Exhibit A)

The following pertinent facts regarding South Korea are accepted for administrative notice:

South Korea is a stable, democratic country. The United States and South Korea have been close allies since 1950. U.S.-South Korea ties are based on common values of democracy, human rights, and the rule of law. The United States has maintained military personnel stationed in South Korea in support of the U.S. commitment to help

² In case of appellate review, Item 4, the summary of Applicant's background interview, follows the administrative notice request and the extensive documents forwarded in support of the request.

³ Administrative documents, including confirmation that Applicant is still being sponsored for a clearance, were collectively marked and attached to the record as Appellant Exhibit I.

⁴ See ISCR Case No. 08-09480 (App. Bd. Mar. 17, 2010); ISCR Case No. 05-11292 (App. Bd. Apr. 12, 2007). See also, Directive, Enclosure 3, ¶ E3.1.19 (the Federal Rules of Evidence (F.R.E.) shall serve as a guide in DOHA proceedings and technical rules of evidence may be relaxed to permit the development of a full and complete record); F.R.E. 201; F.R.E. 1006.

South Korea defend itself against external aggression, primarily from the Democratic People's Republic of Korea (North Korea).⁵

The government of South Korea generally respects the human rights of its citizens. Security forces reported to civilian authorities, which maintained effective control over security forces and those forces did not commit human rights abuses. The U.S. State Department's recent human rights report regarding South Korea reflects:

The primary human rights problems reported were the government's interpretation of the National Security Law (NSL) and other laws to limit freedom of expression and restrict access to the internet The law prohibits arbitrary arrest and detention, and the government generally observed these prohibitions. The NSL grants authorities the power to detain, arrest and imprison persons believed to have committed acts intended to endanger the "security of the state."⁶

South Korea has been the unauthorized recipient of export controlled dual-use U.S. technology, and South Korean companies have been implicated in industrial espionage involving U.S. technology with potential military applications. Nearly twenty years ago, a South Korean native who became an American citizen and worked as a computer specialist for the U.S. Navy was convicted of committing espionage for South Korea – he admitted to giving secret DOD and State Department documents to an agent of South Korea.⁷

Findings of Fact

Applicant, 42, has been working for a defense contractor since 2001. In connection with her employment, Applicant was granted a security clearance at the secret level in about 2002, which was then upgraded to top secret in 2009.

Applicant was born in South Korea and in about 1993 immigrated to the United States with her family. Applicant and her family were sponsored by her paternal uncle. Applicant became a naturalized U.S. citizen in about 1999. Her father and brother were also naturalized around the same time. Her mother is a permanent U.S. resident, but has not applied for U.S. citizenship. Applicant explained that her mother's English is poor and she is afraid of taking the naturalization exam. Applicant's parents reside with her and help care of her children while she is at work. Applicant, her children, and her parents live in the home that she has owned in the United States for the past 10 years. The SOR alleges that Applicant's connections to and contact with her mother raise a foreign influence concern. (SOR 1.a)

⁵ See U.S. State Department, U.S. Relations with South Korea, dated February 5, 2015, appended to the record as Appellate Exhibit II.

⁶ Item 3, source document XIV at 1 and 3.

⁷ Item 3 at 3-4.

Applicant earned a master's degree from a U.S. school in 2002. She married in 2005 and had two children. Her youngest child has been diagnosed with autism. Applicant's children are dual citizens of the United States and South Korea. They attained their U.S. citizenship through birth in the United States, and received their South Korean citizenship through their father. Applicant looked into renouncing her children's South Korean citizenship, but discovered she would first have to register them in South Korea. She elected not to go through with the process, as it would entail providing notice of her children to the South Korean government. She has not sought out any benefit on behalf of her children that they may be entitled to or derived from their South Korean citizenship. (Item 4 at 8) The SOR alleges that Applicant's connections to her children raise a foreign influence concern. (SOR 1.b)

Applicant divorced in about April 2014. During the background interview, Applicant explained that she acquiesced to her parents' request that she marry and they arranged her marriage to her former husband. When Applicant met her former in-laws, she was taken aback by a comment made by her former mother-in-law who said her son had "won the lottery" by marrying her, because it would allow him to move to the United States. (Item 4 at 7)

Applicant bore the brunt of the financial responsibility during the marriage, as her former husband was disinclined to seek gainful employment. She was also the primary caretaker of their young children. She never felt accepted by her in-laws and had limited contact with them during the marriage. Since separating from her husband in 2013, Applicant has had no contact with her former in-laws or any of his family in South Korea. She has limited contact with her former husband to arrange for visits with his children. He does not financially support their children. (Item 4 at 7-9)

During her May 2014 background interview, Applicant voluntarily disclosed that she maintained contact with several relatives in South Korea. She told the background investigator that she maintained frequent contact with her first cousin, communicating either by phone or text message about twice a month. Applicant and her children stayed with her cousin when she last visited South Korea in 2012. Her cousin's husband is employed as a contractor for the South Korean government. (Item 4 at 9) In her Answer, Applicant states that her cousin's husband's work for the South Korean government is not related to or in support of the South Korean defense industry. Rather, he works in the information technology field. Applicant also states in her Answer that the last time she had any contact with her cousin was in December 2014.

Applicant also disclosed during the background interview that one of her other relatives works for the embassy of South Korea. The relative in question is the daughter-in-law of the uncle who sponsored her family's immigration to the United States. This relative works in the consular office of the South Korean embassy assisting South Korean nationals in the United States, and has been a permanent U.S. resident for over 10 years. Applicant and her uncle's daughter-in-law have frequent contact, generally at family get-togethers at either Applicant's home or her uncle's home. (Item 4 at 11; Answer; Response)

Applicant told the background investigator that when asked by her foreign relatives, including the relative who works for the South Korean embassy, what she does for a living she has told them that she “tests submarines.” Applicant went on to state that this disclosure may have alerted her foreign relatives that she has access to classified information. Prior to the background interview, Applicant did not report her contact with her foreign relatives on her security clearance application or to her employer’s security office because she did not realize that they needed to be reported. (Item 4 at 11) Applicant’s connections and contacts with foreign relatives, including those who are employed by the South Korean government, are alleged in the SOR as a foreign influence concern. (SOR 1.c and 1.d)

Also, during the background interview, Applicant disclosed that she was involved in a security violation in 2013. She was in charge of a locked filing cabinet containing confidential documents and, during an audit, it was discovered that one of the documents was missing. A subsequent security investigation determined that the log listing the confidential document was incorrectly notated, as the document had been destroyed. Applicant’s employer decided to change the combination on the filing cabinet lock, and required Applicant to request the assistance of another employee whenever she needed access to the filing cabinet. (Item 4 at 10) Beyond the information Applicant provided the background investigator regarding this incident, the record is silent.⁸

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are eligible for access to classified information “only upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865 § 2.

When evaluating an applicant’s eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

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

⁸ The SOR did not allege the security violation and failure to report foreign contacts. I am not considering these non-alleged matters for disqualification, but will consider them in assessing mitigation and whole-person factors. A judge has the authority under the Directive to amend an SOR to conform to the evidence. However, considering the stage at which this case is at and that a further delay would not be in the interest of the parties, industry or DOD, I have decided not to exercise this discretionary authority.

Administrative Judges are responsible for ensuring that an applicant receives fair notice of the issues raised, has a reasonable opportunity to litigate those issues, and is not subjected to unfair surprise. ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014). In resolving the ultimate question regarding an applicant's eligibility, an administrative judge must resolve "[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security." AG ¶ 2(b). Moreover, recognizing the difficulty at times in making suitability determinations and the paramount importance of protecting national security, the Supreme Court has held that "security clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

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. 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 an 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.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

Analysis

Guideline B, Foreign Influence

The foreign influence security concern is explained at AG ¶ 6:

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.

Applicant's relationship with her mother and children do not raise a security concern. Accordingly, SOR 1.a and 1.b are decided in Applicant's favor. On the other hand, Applicant's connections to and contact with her other relatives who are citizens of South Korea does raise a foreign influence security concern.

An individual is not automatically disqualified from holding a security clearance because they have connections and contacts in a foreign country. Instead, in assessing an individual's vulnerability to foreign influence, an administrative judge must take into account the foreign government involved, the intelligence-gathering history of that government, the country's human rights record, and other pertinent factors.⁹

An individual with foreign familial connections and contacts faces a high, but not insurmountable hurdle in mitigating security concerns raised by such foreign ties. An applicant is not required "to sever all ties with a foreign country before he or she can be granted access to classified information."¹⁰ However, what factor or combination of factors will mitigate security concerns raised by an applicant with family members in a foreign country is not easily identifiable or quantifiable.¹¹

South Korea is a staunch ally of the United States, and is a democratic nation governed by the rule of law. However, foreign influence security concerns are not limited to countries hostile to the United States. The Appeal Board has cautioned against the overreliance on "simplistic distinctions between 'friendly' nations and 'hostile' nations when adjudicating cases under Guideline B," because such "ignores the historical reality that (i) relations between nations can shift, sometimes dramatically and unexpectedly; (ii) even friendly nations can have profound disagreements with the United States over matters that they view as important to their vital interests or national security; and (iii) not all cases of espionage against the United States have involved nations that were hostile to the United States." ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002).

Applicant's familial ties to South Korea, coupled with the facts administratively noticed regarding a past espionage case, export control violation and industrial espionage cases involving South Korea or South Korean companies, raise a heightened risk of foreign influence. The evidence also raises the following disqualifying conditions:

AG ¶ 7(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

AG ¶ 7(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.

⁹ ISCR Case No. 05-03250 at 4 (App. Bd. Apr. 6, 2007) (setting forth factors an administrative judge must consider in foreign influence cases).

¹⁰ ISCR Case No. 07-13739 at 4 (App. Bd. Nov. 12, 2008).

¹¹ ISCR Case No. 11-12202 at 5 (App. Bd. June 23, 2014).

Applicant bears a heavy burden in mitigating the security concerns raised by her foreign familial relationships, notably, her connection to and contact with family members employed by the South Korean government. Guideline B sets forth a number of conditions that may mitigate the foreign influence security concern in this case. I have considered all the mitigating conditions in assessing the security concerns at issue, including the following:

AG ¶ 8(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.;

AG ¶ 8(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;

AG ¶ 8(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

AG ¶ 8(e): the individual has promptly complied with existing agency requirements regarding the reporting of contacts . . . from a foreign country;

Applicant has established a life for herself and her family in the United States. However, she failed to establish AG ¶ 8(b) or any of the other available mitigating conditions. In reaching this conclusion, I took into account that:

- (a) Applicant, who holds a top secret clearance and has worked for a major defense contractor for 15 years, failed to report her foreign contacts, including a continuing contact with an agent of a foreign power, until she was recently queried about these potential associations during her background interview.¹²
- (b) Applicant told her foreign relatives, including the relative who works directly for the South Korean government, a key detail about her job which could have inadvertently alerted her relatives to her access to classified information.

¹² No evidence was supplied that Applicant's employer has a specific foreign contact reporting requirement or that Applicant, as a cleared contractor with top secret eligibility, had a separate reporting requirement beyond that mandated by the relevant question in the security clearance application. However, Applicant was required to report such contacts in her application and did not. (Item 2 at 27)

The above raise serious questions about whether Applicant appreciates her security obligations and responsibilities when it comes to her foreign relatives. Applicant's lack of discretion in revealing a key detail about her job to individuals who do not have a need to know undercuts Applicant's mitigation case. Specifically, Applicant freely revealed this information to relatives who work for the South Korean government through whom her access to sensitive U.S. information may come to the attention of those interested in acquiring such information.

Additionally, Applicant's relationship with her foreign relatives is not so casual that there is little likelihood of a risk of foreign influence in light of the matters accepted for administrative notice. Even though the two relatives who are employed by the government of South Korea are related to Applicant only by marriage, her familial ties to these individuals is quite strong. One is the husband of a cousin with whom she stayed with for a month when she visited South Korea in 2012, and thereafter had frequent contact with until recently. While the other relative, is the daughter-in-law of the uncle who sponsored Applicant and her family's immigration to the United States. Applicant has ongoing frequent contact with this person.

After considering and weighing all the evidence, both favorable and unfavorable, including the whole-person factors discussed herein, Applicant failed to meet her burden of persuasion in mitigating the foreign influence security concern. At the same time, I specifically note that this adverse finding is *not* a comment on Applicant's patriotism or loyalty, but merely an acknowledgment that people may act in unpredictable ways when faced with choices that could be important to a loved one, such as a family member. ISCR Case No. 08-10025 at 4 (App. Bd. Nov. 3, 2009).

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 an applicant's conduct and all the relevant circumstances. An administrative judge should consider the factors listed at AG ¶ 2(a). I hereby incorporate my comments under Guideline B that incorporated some of these factors and highlight some additional whole-person factors.

Applicant immigrated to the United States with her family over 20 years ago. She earned a master's degree and started her professional career in the United States. Over the past 15 years, Applicant has been employed by a defense contractor. She has owned a home in the United States for over 10 years and is strongly committed to her children, including caring and raising a young child with special needs without financial or other support from her former husband. I also specifically considered the security conscientiousness Applicant demonstrated in not starting the process to renounce her children's South Korean citizenship. Such action would have entailed bringing further unneeded foreign government attention onto herself and her children, and placed her in the unenviable position of having to rely upon a foreign government to grant her petition. She also has not sought out any benefit from the South Korean government that her children may be entitled to from their passively held dual citizenship with South Korea.

Furthermore, the information regarding the foreign connections at issue were reported by Applicant during the background interview. All of the preceding raise favorable inferences regarding Applicant's character and security clearance suitability. However, Applicant's security record is not spotless. She failed to report her foreign contacts with foreign relatives, including two who are employed by a foreign government. It is these connections and contacts that raise unmitigated doubts about her eligibility for continued access to classified information.

A security clearance determination requires a judge to resolve any doubt raised by the evidence in favor of national security and once a security concern is raised an applicant bears a heavy burden in mitigating those concerns. Here, notwithstanding the favorable record evidence, Applicant's connections to and contacts with her foreign relatives, as alleged in SOR 1.c and 1.d, continue to raise a security concern. Consequently, I find that Applicant failed to meet her burden of persuasion for continued access to classified information.

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 (Foreign Influence):	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant
Subparagraphs 1.c and 1.d:	Against Applicant

Conclusion

In light of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant continued access to classified information. Applicant's request for a security clearance is denied.

Francisco Mendez
Administrative Judge