



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



In the matter of:)
)
) ISCR Case No. 16-02605
)
Applicant for Security Clearance)

Appearances

For Government: Mary M. Foreman, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

11/08/2017

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline B, foreign influence. Eligibility for access to classified information is denied.

Statement of the Case

On November 10, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline B, foreign influence. The action was taken under Executive Order (EO) 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 (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006. On June 8, 2017, new AG were implemented and are effective for decisions issued after that date.¹

¹ I considered the previous AG, effective September 1, 2006, as well as the new AG, effective June 8, 2017. My decision would be the same if the case was considered under the previous AG.

Applicant answered the SOR on December 12, 2016, and requested a hearing before an administrative judge. The case was assigned to me on July 25, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 21, 2017. I convened the hearing as scheduled on September 21, 2017. The Government offered exhibit (GE) 1. Applicant testified and offered Applicant Exhibits (AE) A through L. There were no objections to any exhibits, and they were admitted into evidence. DOHA received the hearing transcript on October 3, 2017.

Request for Administrative Notice

Department Counsel submitted Hearing Exhibit (HE) I, a written request that I take administrative notice of certain facts about Kyrgyzstan. Applicant submitted HE III, a written request that I take administrative notice of certain facts about Kyrgyzstan. There were no objections, and I have taken administrative notice of the facts contained in the requests that are supported by source documents from official U.S. Government publications.² The facts are summarized in the Findings of Fact, below.

Findings of Fact

Applicant denied all of the allegations in the SOR. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 40 years old. He presently resides and works in a foreign country. He earned an associate's degree in 2001, a bachelor's degree in 2007, and a master of business administration in 2011. From approximately 2010 until the present, Applicant has worked for federal contractors. He has worked exclusively overseas, multiple times in Afghanistan, along with other Middle Eastern countries. He also worked in Kyrgyzstan from December 2012 to September 2013. In his present job, he works overseas in a Middle Eastern country.³

Applicant enlisted in the military after graduating high school in 1995. He served on active duty in the enlisted ranks and later was commissioned 2nd Lieutenant in 2009. While attending a military school, he was charged with adultery, conduct unbecoming an officer, and disobeying a lawful order under the Uniform Code of Military Justice. He accepted nonjudicial punishment, was administratively separated, and received a General Discharge under Honorable Conditions.⁴

² HE II are the source documents provided by the Government. Applicant's source documents are included as part of HE III. AE O was remarked as HE III.

³ Tr. 16-19, 44-45; GE 1; AE I.

⁴ Tr. 18, 46-49, 66-68; GE 1; AE C is Applicant's DD 214 discharge form. It appears to have an error, listing Applicant's year of birth as 1997.

Applicant was married from 1998 to 2006. He has two children, ages 17 and 13, from the marriage. He remarried later in 2006 and divorced in 2012. He has a 10-year-old child from this marriage. He maintains weekly contact with his children and pays child support. He remarried in August 2014. Applicant's wife was born in Russia and is a citizen and resident of Kyrgyzstan. Her 10-year-old son is also a citizen and resident of Kyrgyzstan. She and Applicant have a 3-year-old son from their marriage, who is a U.S. citizen, but resides with his mother in Kyrgyzstan.⁵

Applicant testified that in 1988, when his wife was two years old, she and her mother moved from the Soviet Union, now Russia, to Kyrgyzstan, after her father died to be close to her mother's family. She is an only child. Her father had relatives that lived in Russia. She completed high school and two years of college. She learned to speak English while in college.⁶

In 2011, Applicant met his wife in Afghanistan, while he was working for a federal contractor and she was working at a café on base. Her mother cared for her child while she worked in Afghanistan. Before she worked in Afghanistan, she worked at a jewelry store and a radio station in Kyrgyzstan. Applicant did not know what she did before these jobs. Applicant does not know how his wife got the job on the base in Afghanistan. They both lived on base. Applicant was not permitted to leave the base, so all contact he had with her occurred on base. Initially, they had a platonic relationship, but subsequently they began to date while in Afghanistan. Applicant met his future stepson in approximately 2012 when he and his wife went to Kyrgyzstan on vacation. They returned to Afghanistan for several months and then left in 2012. She returned to Kyrgyzstan. Applicant accepted a job with a federal contractor in Kyrgyzstan beginning in December 2012. Applicant testified that he did not intentionally get a job in Kyrgyzstan, but rather it just worked out that way. He was not required to live on base in Kyrgyzstan, and from December 2012 to September 2013, he had daily contact with his wife. When his contract expired, he left Kyrgyzstan and returned to Afghanistan. His wife remained in Kyrgyzstan. When he was on leave, Applicant visited her, either in Kyrgyzstan or another country.⁷

Applicant and his wife became engaged in early 2014, married in 2014 in Kyrgyzstan, and their son was born in 2014. Applicant has never met his stepson's father. He testified that he believed all parental rights of the father were terminated. Applicant does not think his stepson has contact with him. Applicant's spouse does not have contact with her ex-husband. Applicant's wife works at a factory in Kyrgyzstan. When she moved back to Kyrgyzstan, Applicant provided her with \$200 every two to three months. After she became pregnant, he provided her regular financial support. Since their marriage, he provides financial support to her. He sees her twice a year for two to three weeks.⁸

⁵ Tr. 20, 22-24, 28-29, 39-41; AE B.

⁶ Tr. 53-54, 68.

⁷ Tr. 29-37, 42, 49-54, 70.

⁸ Tr. 22-23, 26, 37-39, 54-56, 61-62.

Applicant's mother-in-law is a citizen and resident of Kyrgyzstan. She does not work for the government. She works in the same field that Applicant does. She and Applicant's wife lived together before his wife moved to Afghanistan. Applicant met his mother-in-law when he vacationed in Kyrgyzstan in 2012. Since his wife's return to Kyrgyzstan, she and her mother do not live together. Neither Applicant nor his wife provide her mother financial assistance. Applicant's wife has regular contact with her mother, who sometimes babysits the children. Applicant testified that he does not discuss his work with any of his family.⁹

Applicant has applied for an immigration visa for his wife and stepson. He testified that their I-130 petition was approved. She needs to submit additional paperwork and then schedule an interview. According to the U.S. Citizenship and Immigration Service website, this petition is the first step in helping a relative immigrate to the United States. Eligible family members must wait until there is a visa number available before they can apply to become a lawful permanent resident.¹⁰ Applicant does not intend to adopt his stepson. His wife has never visited the United States. She has no assets in Kyrgyzstan. He has some retirement investments in the United States, but does not own any real estate in the United States. He will complete the contract with his federal contractor in November 2017 and intends to then complete the immigration process for his family so they may move to the United States.¹¹

Applicant's military discharge documents noted he received numerous medals, awards and certificates, along with campaign medals earned while serving on active duty.¹² He provided a resume with a list of his jobs and a bank statement.¹³ Character statements describe him as honest, trustworthy, dependable, experienced, customer-focused, committed to excellence, an expert in his field, a team player, reliable, dedicated, knowledgeable, and a person of good character.¹⁴

Kyrgyzstan¹⁵

Kyrgyzstan was a Soviet Republic until the dissolution of the U.S.S.R in 1991. It experienced its first peaceful transfer of presidential power as an independent nation in 2011. It is a parliamentary republic. Its Constitution provides for individual rights and the ability to freely choose its government. There are human rights protections that allow for

⁹ Tr. 24-25, 42-43, 56-60.

¹⁰ Tr. 19; AE A, F; <https://www.uscis.gov/i-130>.

¹¹ Tr. 19-20, 25-26, 58-59.

¹² Tr. 21; AE E, G, H.

¹³ AE I, L.

¹⁴ Tr. 20-21; AE D, N.

¹⁵ HE I, II, III.

freedom of expression, freedom of religion, and the media. In 2016, human rights problems included violations of fundamental procedural protections throughout the judicial process, harassment of local nongovernmental organizations, activists, and journalists; and attacks, threats, and systematic police-driven extortion of sexual and ethnic minority groups. Authorities did investigate reports of official abuse in the security services, but successful prosecution and punishment for human rights violations were rare. The payment of bribes to avoid investigation or prosecution is a major problem at all levels of law enforcement. Extorting cash payment from citizens by law enforcement is frequently employed.

The U.S. Director of National Intelligence has assessed that since events in Ukraine in 2014, Russia is increasing its presence in the region to prevent future regime change in the former Soviet Republics and to accelerate a shift to a multi-polar world in which Russia is the uncontested influence in the region. The U.S. intelligence community expects Russia to continue to push for greater regional integration, raising pressure on neighboring states, to include Kyrgyzstan.

Counterterrorism efforts employed by Kyrgyzstan have been a priority, and it has expressed a willingness to work with the United States. It has participated in international organizations and programs to train its personnel on counterterrorism-related skills. It is seriously concerned about ISIS and other regional terrorism. The U.S. Department of State is concerned that the recession in Russia has increased unemployment in Kyrgyzstan and potentially leaves the population vulnerable to terrorist recruitment. During 2016, Kyrgyzstan remained vulnerable to transnational threats and porous borders with neighboring countries that could facilitate the establishment of safe havens. Due primarily to resources, Kyrgyzstan does not typically support international or multinational efforts to report or counter violent extremism.

In January 2017, the U.S. Department of State assessed Bishkek, the capital of Kyrgyzstan, as being a medium-threat location for terrorist activity directed at or affecting official U.S. Government interests, and a high-threat for political violence. Impediments to effective law enforcement against terrorism include interagency rivalries, a lack of communication between its agencies, budgetary constraints, ineffective bureaucratic structures, corruption, low salaries, and frequent personnel turnover. Kyrgyzstan does not maintain a terrorist screening watch list or have biographic or biometric screening capabilities at points of entry.

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the AG. 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 national security eligibility will be resolved in favor of the 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. Directive ¶ E3.1.15 states 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 as to obtaining 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 that an applicant may deliberately or inadvertently fail to 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.

Section 7 of EO 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, including, but not limited to, business, financial, and property interests, are a national security concern if they resulted in divided allegiance. They may also be a national security concern if they create circumstances in which the individual may be manipulated or

induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is it associated with a risk of terrorism.

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

(a) contact, regardless of method, 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 classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information.

AG ¶ 7(a) requires evidence of a "heightened risk." The "heightened risk" required to raise this disqualifying condition 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.

The mere possession of a close personal relationship with a person who is a citizen and resident of a foreign country is not, as a matter of law, disqualifying under Guideline B. However, depending on the facts and circumstances, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information.

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."¹⁶

The United States has serious concerns about the threat of terrorist activities in Kyrgyzstan that are directed toward U.S. Government interests. Kyrgyzstan remained vulnerable to transnational threats and porous borders with neighboring countries that could facilitate the establishment of safe havens for terrorist activity. Due primarily to

¹⁶ ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

resources, Kyrgyzstan does not typically support international or multinational efforts to prevent or counter violent extremism. The U.S. State Department assessed Kyrgyzstan's capital as being a medium-threat location for terrorist activity directed at or affecting official U.S. Government interests, and a high-threat for political violence. Impediments to effective law enforcement against terrorism include interagency rivalries, a lack of communication between its agencies, budgetary constraints, ineffective bureaucratic structures, corruption, low salaries, and frequent personnel turnover. Kyrgyzstan does not maintain a terrorist screening watch list or have biographic or biometric screening capabilities at points of entry. In addition, as indicated above, Kyrgyzstan also has human rights issues that raise concerns.

Applicant's wife, stepson, and mother-in-law are citizens and residents of Kyrgyzstan. These ties create a heightened risk, a potential foreign influence concern, and a potential conflict of interest. AG ¶¶ 7(a) and 7(b) have been raised by the evidence. His three-year-old son is a citizen of the United States. I find his status does not raise security concerns.

I have analyzed the facts and considered all of the mitigating conditions under AG ¶ 8 and conclude the following 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 an obvious close relationship with his wife, son, and stepson. He also has a relationship with his mother-in-law having spent time in Kyrgyzstan. His wife has a close relationship with her mother. Although Applicant has applied for his wife and stepson to immigrate to the United States, they continue to remain in Kyrgyzstan. There is limited information about Applicant's wife's prior job history and other potential ties in Kyrgyzstan. This is also true of her mother. Applicant demonstrates his close ties with his family in Kyrgyzstan through his continued contacts and financial support.

I cannot find that Applicant's relationships with his wife, stepson, and mother-in-law are casual or infrequent as they maintain regular contact. Applicant's familial

relationships may place him in a position of having to choose between his family in Kyrgyzstan and the interests of the United States, and could create a conflict of interest that would place him in a similar position. I cannot find that his sense of obligation to his family is minimal. In fact, Applicant, as a husband and stepfather, is dedicated to his family, and is devoted to protecting them. Considering the security and terrorist issues, and human rights problems in Kyrgyzstan, as discussed above, I cannot find that it is unlikely that Applicant would be placed in a position of having to choose between his family in Kyrgyzstan and the interests of the United States. I find AG ¶¶ 8(a), 8(b), and 8(c) do not 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(d):

(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(d) were addressed under that guideline, but some warrant additional comment.

Applicant is a 40-year-old veteran. He has worked overseas for federal contractors. He married in 2014, and his wife, stepson, and mother-in-law are citizens and residents of Kyrgyzstan. He has applied for his wife and stepson to immigrate to the United States. Applicant maintains regular contact with his family there. The heightened risks raised by his contacts raise security concerns and are unmitigated. The record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns under Guideline B, 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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant

Conclusion

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

Carol G. Ricciardello
Administrative Judge