



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



In the matter of:)
)
) ISCR Case No. 16-03862
)
Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: Eric Eisen, Esq.

08/31/2018

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for access to classified information. He presented sufficient evidence to explain, extenuate, or mitigate the security concern stemming from his contacts in South Korea. Accordingly, this case is decided for Applicant.

Statement of the Case

On February 8, 2017, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) sent Applicant a Statement of Reasons (SOR) alleging that his circumstances raised a security concern under Guideline B for foreign influence.¹ Applicant answered the SOR on February 23, 2017, and requested a hearing to establish his eligibility for access to classified information.

On July 5, 2018, a date mutually agreed to by the parties, a hearing was held. Applicant testified at the hearing, and the exhibits offered by the Government and by

¹ The DOD CAF took this action under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive).

Applicant at the hearing were admitted into the administrative record without objection. (Government Exhibits (GE) 1 and 2; Applicant Exhibits (AE) A, B, and C.) The transcript of the hearing (Tr.) was received on July 12, 2018.

Procedural Issues

On December 10, 2016, the Security Executive Agent issued Directive 4 (SEAD-4) establishing a “single, common adjudicative criteria for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position.”² The National Security Adjudicative Guidelines (hereinafter “new adjudicative guidelines” or “AG”), which are found in Appendix A to SEAD-4, are to be used in all security clearance cases decisions issued on or after June 8, 2017.³ In light of this explicit direction (and absent lawful authority to the contrary), I have applied the new adjudicative guidelines. ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003) (security clearance decisions must be based on current DoD policy and standards).⁴ DOD CAF adjudicators reviewed this case using the previous version of the adjudicative guidelines, dated September 1, 2006, which were then in effect. My decision and formal findings under the revised Guideline B would not be different under the 2006 Guideline.

Findings of Fact

The SOR alleged under Guideline B that (1) Applicant’s mother-in-law and father-in-law are citizens and residents of South Korea; and (2) Applicant maintains contact with extended family members who are citizens and residents of South Korea, one of whom is a logistician in the South Korean military.⁵ Applicant admitted that his mother-in-law and father-in-law are citizens and residents of South Korea. Applicant admitted that his brother-in-law is a citizen and resident of South Korea, that he retired from the South Korean military in July 2016, and now is an administrative official for a South Korean defense acquisition program.⁶

Applicant was born in the United States, is 35 years old, married with two sons, both born in the United States (ages five and one and one-half).⁷ He holds a bachelor’s

² SEAD-4, ¶ B, *Purpose*.

³ SEAD-4, ¶ C, *Applicability*.

⁴ See also ISCR Case No. 07-00029 at 3 (App. Bd. Dec. 7, 2007) (when the guidelines were last revised, the Board stated: “Quasi-judicial adjudications must be made within the bounds of applicable law and agency policy, not without regard to them.”)

⁵ SOR ¶ 1.

⁶ Answer, p. 2.

⁷ GE 1; Tr. 29.

and a master's degree from an American university. Since May 2012, Applicant has been employed by a defense contractor.⁸

Applicant's spouse was born in South Korea and became a naturalized United States citizen in 2013. She came to the United States to pursue her doctoral degree from the same university where Applicant was pursuing his master's degree; that's where they met in 2006. They married in 2009. Since 2010, Applicant's spouse has worked as a professional in a federal public health agency.⁹ Since September 2014, Applicant and his family have lived in a home he and his spouse own.¹⁰ Excluding any equity in their home, Applicant and his spouse have just under a half million dollars in assets.¹¹ For tax year 2016, Applicant and his spouse reported \$182,349 in adjusted gross income.¹² Applicant's latest credit score is in the top quintile.¹³

Applicant's mother (age 65) was born in Vietnam. His father (age 59) was born in Hong Kong. Applicant's sister (age 43) was born in Vietnam.¹⁴ They are all naturalized United States citizens and live in the United States. Applicant's father has worked for the federal government for 33 years, and Applicant's sister has served in the United States military since 1993.¹⁵

Applicant testified about his in-laws in South Korea. His father-in-law (age 73) is self-employed in the home security business, serving commercial entities and individual homes. He has never worked for the South Korean government. Applicant's mother-in-law does not work outside the home.¹⁶

As noted, one of Applicant's brothers-in-law did serve in the South Korean military as a logistician, but by the time the SOR was issued he had retired (in July 2016) and was employed by a South Korean defense acquisition program. Applicant believed that in that position his brother-in-law was doing in a civilian capacity what he did while in the military, handling food, equipment, and supplies.¹⁷ In April 2018, Applicant's spouse

⁸ GE 1.

⁹ Answer, pp. 1-2; AE B; Tr. 10-12. Applicant's spouse has a public trust clearance. *Id.* 27.

¹⁰ GE 1.

¹¹ AE C.

¹² Answer (Attachment 3).

¹³ AE C.

¹⁴ GE 1.

¹⁵ Answer, p. 1.

¹⁶ Tr. 14, 24.

¹⁷ Tr. 14-16, 24-25. Applicant's other brother-in-law works for a telecomm company, but Applicant did not know specifically what he did for that company. *Id.* 22-23.

learned in a telephone call with her mother that Applicant's retired brother-in-law had suffered a stroke. His ability to communicate is poor, and he needs around-the-clock care. Applicant testified that his brother-in-law is unable to work and will likely remain disabled for the foreseeable future.¹⁸

Applicant testified about his contacts with his in-laws. In twelve years, he has been to South Korea four times, the last time was just after his youngest son was born. Applicant had never been to South Korea before he met his wife.¹⁹ Before her brother had his stroke, Applicant's spouse telephoned her mother about every two weeks. Since the stroke, she calls more frequently to check on her brother's condition. Because Applicant cannot converse very well in the Korean language, his spouse does most of the talking. His sons understand some of what their grandmother is saying, but cannot answer her back.²⁰ Neither he nor his spouse have any business interests or property interests in South Korea.

Applicant and his family fully intend to stay in the state where they now live and own a home. He and his spouse have already established prepaid college trusts for their sons. Applicant has no plan to relocate to South Korea. He never lived in South Korea and has never been to that country except for personal travel. To relocate his family to South Korea "isn't even a consideration."²¹

Applicant submitted eight character reference letters. He is uniformly described as demonstrating "a high level of integrity, trustworthiness, and responsibility." Others respect him as being "hardworking, dependable, and talented." Two other authors who hold Top Secret/Sensitive Compartmented Information clearances endorsed him as "an excellent candidate for the high-level security he requires to perform his duties."²²

Administrative Notice (Republic of South Korea)

In response to the Government's request, to which Applicant did not object, I have taken administrative notice of the following relevant facts about South Korea:²³

South Korea, officially the Republic of Korea, is a self-governing state located in the southern part of the peninsula of Korea. The United States and South Korea share a long history of friendship and cooperation based on shared values and interests. The two countries work together to combat regional and global threats and to strengthen their

¹⁸ Tr. 17-18, 25-26.

¹⁹ Tr. 13-14,

²⁰ Tr. 15-16, 22.

²¹ Tr. 20.

²² AE B, pp. 2, 5, 7.

²³ GE 2.

economies. South Korea is now the United States' sixth-largest trading partner with a trillion-dollar economy. The longstanding relationship between the United States and South Korea has brought positive rewards to the U.S. economy including more job opportunities for American.

The South Korean government has generally respected the human rights of its citizens. Human rights problems, however, have been reported including: the government's interpretations of national security and other laws limiting freedom of expression and restricting access to the internet; official corruption; the lack of comprehensive antidiscrimination laws; sexual and domestic violence; child prostitution; and trafficking in persons.

South Korea is one of the seven countries most actively engaged in foreign economic collection and industrial espionage against the United States. Although South Korea is considered an ally, it has been the unauthorized recipient of technology controlled under U.S. export control laws, including material that could be used in missile delivery/reentry systems, encryption software, optics and prism data and infrared detectors and camera engines. Industrial espionage remains a high profile concern relating to South Korea and South Korean companies. In July 2014, a South Korean chemical company agreed to pay a criminal penalty of over two million dollars to resolve an investigation into the company's attempted theft of a U.S. company's trade secrets regarding a meta-aramid fiber used in protective fabrics, electrical insulation, and lightweight structural support for aircraft. Sources have also reported that South Korea may have attempted to compromise protected technology of U.S. F-15 fighters that it purchased.

Law and Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individuals 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; SEAD-4, ¶ E.4.

When evaluating an applicant's eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. 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. SEAD-4, Appendix A, ¶¶ 2(c), 2(d).

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.

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, "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." SEAD-4, Appendix A, ¶ 2(b). See also SEAD-4, ¶ E.4. Moreover, the Supreme Court has held that officials making "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.

Discussion

Guideline B - Foreign Influence

The security concern for foreign influence is set out in AG ¶ 6:

Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they result 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 associated with a risk of terrorism.

The guideline notes several conditions that could raise security concerns under AG ¶ 7. The following are potentially applicable in this case:

- (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;
- (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 or technology; and

(e) shared living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.

The guideline also notes several conditions in AG ¶ 8 that could mitigate security concerns raised under AG ¶ 7. The following are potentially applicable in this case:

(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 United States;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, or allegiance to the group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest; 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.

The nature of a nation's government, its relationship with the United States, 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 is known to conduct intelligence operations against the United States.

AG ¶ 7(a) requires substantial evidence of a "heightened risk." The "heightened risk" required to raise one of these disqualifying conditions is a relatively low standard. "Heightened risk" denotes a risk greater than the normal risk inherent in having a family member living under a foreign government. Because Applicant's in-laws are citizens and residents of South Korea, which has a record of engaging in foreign economic collection and industrial espionage against the United States, AG ¶ 7(a) applies. Applicant's South Korean familial relationships also make AG ¶¶ 7 (b) and (e) applicable. The next inquiry is whether any mitigating conditions apply.

Applicant was born, raised, and educated in the United States. His parents and only sibling are naturalized U.S. citizens. His sibling has served in our armed forces since 1993. Applicant's spouse is a naturalized U.S. citizen. His two sons were born in the U.S. Applicant and his spouse are financially well off and have significant assets here in addition to their home. Since 2010, his spouse has worked for a federal public health agency in a position of public trust. Applicant's only connection to South Korea is by virtue of his spouse, who was born in South Korea, and whose parents and two brothers are

citizens and residents of South Korea. His father-in-law is self-employed in the private sector and has not worked for the South Korean government. Applicant and his spouse have no property or other assets in South Korea. Applicant and his spouse have no intention of relocating to South Korea. Applicant and his spouse have traveled to South Korea four times in the last 12 years.

Applicant's brother-in-law served in the South Korean military and retired in July 2016. He took a South Korean government position when he retired, doing much the same work he did while in the military. In April of this year, that brother-in-law had a stroke, lost much of his ability to communicate, is in rehabilitation, and is likely to remain so for the foreseeable future.²⁴ Applicant's spouse calls her mother frequently to keep abreast of her brother's condition. Because Applicant knows very little of the Korean language, he speaks rarely to his mother-in-law.

Applicant's numerous character reference letters portray him as having integrity, and being trustworthy, dependable, and an excellent candidate for a high-level security clearance. Applicant and his family have deep roots in the United States. Faced with any conflict posed by his South Korean family members, Applicant's deep and longstanding loyalties to the U.S. are such that he would resolve any conflict in favor of the United States. AG ¶¶ 8(a), (b), and (c) apply.

The record does not raise doubts about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.²⁵ Accordingly, I conclude that Applicant met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for 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):	For Applicant
Subparagraphs 1.a-1.b:	For Applicant

²⁴ Applicant's other brother-in-law works in the telecom industry, but Applicant knows no specifics about his job.

²⁵ AG ¶ 2(a)(1)-(9).

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant access to classified information.

Philip J. Katauskas
Administrative Judge