



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 14-05876
)	
Applicant for Security Clearance)	

Appearances

For Government: Candace Le'i Garcia, Esq., Department Counsel
For Applicant: *Pro se*

12/07/2015

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline B (Foreign Influence). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on November 20, 2012. On January 6, 2015, the Department of Defense (DOD) sent her a Statement of Reasons (SOR) alleging security concerns under Guideline B. The DOD acted 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 (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

Applicant answered the SOR on February 2, 2015, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on July 13, 2015, and the case was assigned to me on September 17, 2015. On September 22, 2015, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for October 8, 2015. I convened the hearing as scheduled.

Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified, presented the testimony of two witnesses, and submitted Applicant's Exhibits (AX) A through G, which were admitted without objection. DOHA received the transcript (Tr.) on October 19, 2015.

I kept the record open until October 30, 2015, to enable both sides to submit requests to take administrative notice of relevant facts about the Philippines. Both sides timely submitted requests and supporting documentation. The facts administratively noticed are set out below.

Findings of Fact

In her answer to the SOR, Applicant admitted all the factual allegations. Her admissions in her answer and at the hearing are incorporated in my findings of fact.

Applicant is a 38-year-old project manager employed by defense contractors since 2004. She has held a security clearance since 2004. She received a top secret clearance in May 2008. (GX 1 at 43; Tr. 46.)

Applicant was born in the Philippines. She came to the United States with her parents in February 1993, when she was 15 years old. She completed high school in the United States and became a U.S. citizen in 1999. She renounced her Philippine citizenship and surrendered her Philippine passport when she became a U.S. citizen. (Tr. 35.) She attended U.S. universities and earned two bachelor's degrees, a master's degree in business administration, and a master's degree in information and telecommunications systems. She obtained her master's degrees by attending classes at night and working full time during the day. (GX 2 at 4.)

Applicant's parents, one of her sisters, and her sister's spouse are citizens and residents of the United States. Her two brothers are citizens and residents of the Philippines. Her older brother, age 47, is a lieutenant colonel in the Philippine Army and, until recently, commanded a Philippine intelligence unit. His spouse is a citizen and resident of the Philippines and is self-employed as a dentist. Her younger brother, age 46, and his spouse, a U.S. citizen, live in the Philippines, where they own and operate a private business.¹

Applicant's older brother was invited by the U.S. military to attend training in the United States, but his assignment was changed because he was too senior for the training. He is now attending training in Spain. Applicant does not know what his duties were with the intelligence unit. She does not know what type of training he was invited to attend in the United States or in Spain. She receives most of her information about her older brother from her mother. (Tr. 38-40, 55-56.)

¹ Unless otherwise indicated by a parenthetical citation to the record, Applicant's personal and family information is reflected in her security clearance application (GX 1).

During a personal subject interview (PSI) in December 2007, Applicant told an investigator that she had weekly contact with her brothers and their spouses by telephone or Skype. (GX 3 at 3.) In her SCA, submitted in November 2012, she stated that she had monthly contact with her older brother and weekly contact with her younger brother and her two sisters-in-law. (GX 1 at 23-28.) At the hearing, she testified that she now has telephonic contact with her brothers and their spouses about once a month and on special occasions such as holidays or birthdays. She and her brothers do not discuss her work during these conversations. Her family also uses a cell phone application to post messages containing family news or photographs, and she posts messages about once a week. (Tr. 34.)

Applicant traveled to the Philippines to visit her brothers and their spouses in December 1997, May 2001, April 2004, and May 2015. The May 2015 visit was to celebrate her parents' wedding anniversary. (GX 3 at 3; Tr. 35.) Her security manager submitted a statement that she has complied with all requirements for reporting foreign travel. (AX A.)

Applicant has no investments or property in the Philippines. She has a 401k account with her employer worth about \$55,100, and individual stock accounts worth about \$11,300. (AX B.) Her annual salary was \$98,803 in 2013 and \$198,821 in 2014. (AX D; AX G.) Her current net pay per two-week pay period is about \$18,687. (AX E.) She owns her home and her mortgage payments are current. (AX F.) Her student loan payments are current. (AX C.)

In response to the requests from both parties, I have taken administrative notice of the following relevant facts about the Philippines, based on the information provided in Enclosures I through IV to Hearing Exhibit (HX) II, HX IV, AX H, and AX I:

- The Philippines is a multi-party, constitutional republic with a bicameral legislature. The United States recognized the Philippines as an independent state and established diplomatic relations in 1946. The United States has designated the Philippines as a major non-NATO ally, and there are close and abiding security ties between the two nations, based on strong historical and cultural links and a shared commitment to democracy and human rights. The Manila Declaration of 2011 reaffirmed the 1951 U.S. Philippines Mutual defense Treaty as the foundation for a robust, balanced, and responsive security partnership.
- The United States is among the Philippines' top trading partners, and it traditionally has been the Philippines' largest foreign investor. The United States and the Philippines have a bilateral trade and investment framework and a tax treaty. Philippine imports from the United States include raw and semi-processed materials for the manufacture of semiconductors, electronics and electrical machinery, transport equipment, cereals, and cereal preparations.

- Philippine national elections have been generally free and fair, but independent observers have noted widespread vote buying, and dynastic political families have monopolized elective offices at the national and local level.
- The most significant human rights problems are extrajudicial killings, enforced disappearances undertaken by security forces and vigilante groups, a weak and overburdened criminal justice system, widespread official corruption and abuse of power, and impunity from prosecution for human rights abuses.
- Other human rights problems include prisoner and detainee torture and abuse by security forces, violence and harassment against human rights activists by security forces, warrantless arrests, lengthy pretrial detentions, poor prison conditions, killings and harassment of journalists, violence against women, abuse and sexual exploitation of children, and trafficking in persons.
- Muslim separatists, communist insurgencies, and terrorist organizations are active in the Philippines; and they have killed Philippine security forces, local government officials, and other civilians. Through joint U.S.-Philippine cooperation, the ability of these various groups to operate in the Philippines has been constrained but not eliminated. In 2014, there were numerous attacks with small arms and improvised explosive devices, kidnappings for ransom, and extortion efforts by suspected terrorist groups. Gangs of kidnappers have targeted foreigners, including Filipino-Americans. The U.S. State Department has recommended that all U.S. citizens defer non-essential travel to the Sulu Archipelago due to the high threat of kidnapping in that area. The State Department also has warned U.S. citizens to exercise extreme caution if traveling to the main island of Mindanao due to violent activities of terrorist and insurgent groups.
- The Philippine government has recognized the potential threat posed by radicalized Philippine citizens supporting the Islamic State in Iraq and the Levant (ISIL). In July 2014, the Philippine president's anti-terrorism council convened an ad hoc emergency technical working group focusing on persons of interest. The working group has tightened passport issuance, increased immigration screening, and increased monitoring of ISIL-related activity.
- None of the source documents submitted by Department Counsel and Applicant reflect that the Philippines engages in economic or military intelligence activity directed toward the United States.

A senior U.S. Government official, who worked with Applicant in another government agency, observed her deep commitment to the United States and her

trustworthiness in protecting sensitive information. He describes her as a “highly principled individual of the highest character and integrity.” (AX J.) A former coworker and current friend, who has known Applicant since 2008, considers her kind, generous, and a person of deep and sincere integrity. (AX K.) Another coworker and current friend, who has known Applicant since 2007, describes her as reliable, trustworthy, and “deeply rooted” in the United States. (AX L.)

A friend who has worked with Applicant for 15 years in church-related programs for children, including some “at-risk” youths, testified that she is reliable, upright, and an “up front” person. (Tr. 59-60.) A former coworker, who has held a security clearance for about six years and is now dating Applicant, believes that she is one of the most honorable and upstanding people he knows. He is confident that if Applicant’s older brother were to ask her anything about her work, she would immediately notify the appropriate security authorities. (Tr. 63-67.)

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the

applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline B, Foreign Influence

The SOR alleges that Applicant’s brother is a citizen and resident of the Philippines, serving as a major in the Philippine Army and assigned as the commander of an intelligence unit (SOR ¶ 1.a). It also alleges that she has another brother and a sister-in-law who are citizens and residents of the Philippines and a sister-in-law who is a citizen of the United States residing in the Philippines (SOR ¶¶ 1b-1.d).

The security concern under this guideline is set out in AG ¶ 6 as follows:

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.

Two disqualifying conditions under this guideline are relevant:

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.

When foreign family ties are involved, the totality of an applicant's family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003). Thus, I have considered not only Applicant's older brother's military connection and involvement in military intelligence, but also the presence of other family members in the Philippines who are vulnerable to kidnapping or exploitation by insurgent and terrorist elements.

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

Furthermore, "even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security." ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. Nevertheless, the nature of a nation's government, its relationship with the 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 has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence operations against the United States. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. *See generally* ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision to grant clearance where administrative judge did not consider terrorist activity in area where family members resided).

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. Department Counsel conceded at the

hearing that the “heightened risk” was not established. (Tr. 19.) However, I am not bound by that concession, and I have not accepted it. I am satisfied that the activities of insurgent and terrorist groups, the risks of kidnapping by gangs, and the danger of radicalized ISIL sympathizers in the Philippines are sufficient to establish the “heightened risk” in AG ¶ 7(a) and the potential conflict of interest in AG ¶ 7(b).

The following mitigating conditions under this guideline are potentially relevant:

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; and

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.

AG ¶ 8(a) is not established for the reasons set out in the above discussion of AG ¶¶ 7(a) and 7(b). However, Applicant's deep and longstanding relationships and loyalties in the United States are sufficient to establish AG ¶ 8(b). She has lived in the United States for 23 of her 38 years. She has been educated in the United States. She has been a citizen since 1999. She has held a security clearance since 2004. She is active in her community. Her closest friends, including her current romantic interest, are in the United States. She is financially secure and owns her home in the United States. She has spent her entire professional career in the United States, and most of her career has been in support of national defense.

AG ¶ 8(c) is not established. The frequency of Applicant's contacts with family members in the Philippines has decreased over the years. Applicant is considerably younger than her brothers. She left the Philippines as a teenager, and her interests and concerns are different from those of her older siblings and their spouses. However, there is a rebuttable presumption that contacts with an immediate family member in a foreign country are not casual, and Applicant has not rebutted that presumption. See ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002).

Whole-Person Concept

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. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

I have incorporated my comments under Guideline B in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant was candid, sincere, and credible at the hearing. Her testimony and documentary evidence submitted at the hearing reflect her understanding of the issues raised by her family connections and her strong relationships and loyalty to the United States. I am confident that she will resolve any conflict of interest in favor of the United States.

After weighing the disqualifying and mitigating conditions under Guideline B, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by her foreign family connections. Accordingly, I conclude she has carried her burden of showing that it is clearly consistent with the national interest to continue her eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline B (Foreign Influence):	FOR APPLICANT
Subparagraphs 1.a-1.d:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge