

STATEMENT OF THE CASE

On June 14, 2007, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on July 10, 2007, and requested a hearing. The case was assigned to another administrative judge on August 21, 2007. The case was received by the undersigned on August 23, 2007, and a Notice of Hearing was issued on September 6, 2007.

A hearing was held on September 25, 2007, at which the Government presented two documentary exhibits. Testimony was taken from the Applicant, who also submitted one exhibit. The Government also requested that Administrative Notice be taken of certain adjudicative facts about the Kingdom of Thailand. The request for Administrative Notice is marked Administrative Judge Exhibit I, and the documents attached to the request are marked as Administrative Judge Exhibits I(1) through I(4). The transcript was received on October 5, 2007.

RULINGS ON PROCEDURE

At the conclusion of the evidence, the Department Counsel moved to amend the SOR to comport with the evidence. Subparagraph 1.c. was amended to read, "Your spouse is a citizen of Thailand." Subparagraph 1.e. was amended to read, "Two of your five half-siblings are citizens and residents of Thailand." A new subparagraph 1.i. was added to the SOR stating, "Your two sons currently attend school in Thailand." The Applicant admitted these amended subparagraphs. (Transcript at 102-108.)

FINDINGS OF FACT

The Applicant is 48, married with three children, and has a Master of Science degree. He is employed by a defense contractor as an engineer, and he seeks to retain a Secret-level DoD security clearance previously granted in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a continued security clearance, based upon the allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Guideline B - Foreign Influence). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has foreign contacts and interests that could lead to the exercise of poor judgment, unreliability or untrustworthiness on the part of the Applicant.

The Applicant was born in Thailand in 1959. He emigrated from Thailand in 1976 when his American step-father, who was in the American military, returned to the United States with the Applicant's mother and family. The Applicant became a naturalized American citizen in November 1985. His wife was also born in Thailand. She is a Permanent Resident Alien in the United States. They were married in 1991, and have three children. All the children were born in Thailand, but the Applicant has filed the certification with the State Department declaring that they are American children born abroad. (Government Exhibit 1, Transcript at 48-49.) The Applicant and his wife have over \$2,000,000 in assets in the United States. (Government Exhibit 2 at 4.)

The Applicant has one brother, two half-brothers and five half-sisters. His brother, two half-brothers and one half-sister are American citizens. The Applicant does not know the citizenship status of two of his half-sisters who were born in Thailand of American fathers but live in the United States. Two of his half-sisters, one on each side of his family, are citizens of Thailand and reside there.¹ (Transcript at 68-84.)

The Applicant's mother-in-law and father-in-law are citizens of Thailand and reside there. They are both retired and are independently wealthy. The Applicant, his wife and children have a close relationship with her parents. (Transcript at 61-66.)

The Applicant and his wife lived in Thailand between 1991 and 1997. They were newly married, the Applicant had been laid off by his job in the United States, and the Applicant's wife wanted to be close to her family. The Applicant withdrew the assets from his 401(k) plan before moving to Thailand so that they would have money. After they moved to Thailand, his in-laws financially assisted the Applicant and his wife in founding and running a computer company in Thailand. The company was not financially successful and, after draining their assets, including the money from his 401(k), the Applicant made the decision to return to the United States in 1997 to find work. (Transcript at 38-43.)

The Applicant unintentionally did not have taxes withheld from his 401(k) funds when he withdrew them in 1991. When he returned to live and work in the United States in 1997, the IRS filed a tax lien and garnished his wages to pay the back taxes, interest and penalties. The Applicant worked overtime for about a year and was able to pay off the back taxes. The lien was released in 1998. (Transcript at 27-30.)

The Applicant's two older children are attending school in Thailand as of the date the record closed. They have been in Thailand since December 2006 and are due to return to the United States in March 2008. During most of this time the Applicant's wife and youngest child have also been in Thailand. When his wife is in Thailand, he speaks to her every day. (Transcript at 90-93.)

In addition to the times when the Applicant and/or his family have lived in Thailand, they have traveled there at least four additional times on extended trips. These trips occurred annually between December 2002 and August 2006. (Transcript at 87-90.)

¹Subparagraph 1.d. as amended above, states that the Applicant has five half-siblings. That is incorrect.

The Applicant's biological father is a retired brigadier general in the Royal Thai Army. The Applicant was unsure of his father's position, but it appears to be related to the medical field. The Applicant testified that he was closer to his late American step-father than he is to his father. (Transcript at 98-101.) The Applicant, however, does have a relationship with his father. They communicate by telephone several times a year. When the Applicant travels to Thailand, which he does on about a yearly basis, he stays with his father for several days. His father knows the Applicant works in the defense industry and that he has a security clearance. (Transcript at 52-61.)

During his testimony, the Applicant expressed considerable support for the military coup that toppled the elected civilian government in Thailand in 2006. (Transcript at 21-23.) The coup, and other pertinent matters involving Thailand, will be discussed immediately below.

The Applicant has many contacts with Thailand. Accordingly, it is appropriate to discuss the situation in Thailand at this time.² The Kingdom of Thailand is a constitutional monarchy. The current ruler is treated with deep reverence and respect. On September 19, 2006, the current ruling regime came to power through a bloodless coup, whereby military leaders overthrew the democratically elected Prime Minister. The coup leaders, now called the Council for National Security, assert that the Prime Minister was corrupt and that the last election was fraudulent. In the following months they abolished Parliament, declared martial law, and issued decrees limiting civil liberties including limits on free speech, free press and freedom of assembly.

Thailand has a free-enterprise economy with a well-developed infrastructure, and pro-investment policies. Approximately 40% of Thailand's labor force is agricultural, with rice being the most important crop. It also has an increasingly diversified manufacturing sector. The United States is Thailand's largest export market and second largest supplier.

In the past, Thailand had excellent military relations with the United States, including joint training and maneuvers. In addition, Thailand cooperated with the United States on a wide variety of foreign policy issues, including the Global War on Terror. However, as a result of the military coup in September 2006, the United States suspended Foreign Military Financing, International Military Training funds, and peace-keeping operation funds with Thailand.

The United States Government, through the State Department, has criticized the Thai government's overall human rights record for several years. Prior to the coup, the Thai constitution prohibited such practices as torture and arbitrary arrest and detention. However, instances of disappearances, torture, arbitrary arrests and detentions have been reported under past and present Thai regimes. The Emergency Decree and martial law orders in effect since the coup permit authorities to conduct searches without a warrant. Further, despite constitutional protections afforded to freedom of speech and the press, the coup leaders have suspended these rights and have banned articles, messages, speeches and any other type of discourse that could undermine the coup.

²All of the following statements are supported by the documents submitted by the Department Counsel in support of her request for administrative notice. (Administrative Judge Exhibit I and attachments.)

Finally, Thailand's southern provinces continue to be the source of sectarian violence between Muslim insurgents and Thai security forces. While the extremist groups primarily focus on Thai government interests in the south, recent violence has also targeted public places, including tourist areas.

Mitigation.

The Applicant submitted several letters from co-workers and supervisors. He is described by these people as a loyal, intelligent, trustworthy and reliable friend and colleague. (Applicant's Exhibit A.)

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case will be set forth under CONCLUSIONS, below.

In addition, as set forth in Enclosure 2 of the Directive at pages 18-19, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- (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 voluntariness of participation
- (6) The presence or absence of rehabilitation and other pertinent behavior changes
- (7) The motivation for the conduct

- (8) The potential for pressure, coercion, exploitation or duress
- (9) The likelihood of continuation or recurrence.”

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may have foreign contacts and interests that may lead to poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant has foreign connections which could cause a security concern (Guideline B).

The Applicant, on the other hand, has not successfully mitigated the Government's case, except in part. Subparagraph 1.g. is found for the Applicant as I find it has no current security significance.

The Applicant has many and varied connections to Thailand on both sides of his family. The Applicant obviously loves his late American step-father and considers this man his real father.

However, he is not estranged from his father, a retired general in the Thai Army. Their relationship may not be particularly close, but the fact remains that he stays at his father's house and talks to him on the phone several times a year. In addition, there is the extremely close relationship the Applicant, his wife, and his children have with his in-laws. As described above, two of the Applicant's children are currently attending school in Thailand. The Applicant and his wife also lived in Thailand for six years after he lost his job in 1991, where his in-laws provided the Applicant and his wife considerable financial assistance.

All of these connections must also be viewed in the context of the current Thai government, and its strained relations with the United States after the coup. The Applicant certainly has a right to indicate his support for the coup, but that support must also be considered in determining whether he should have a security clearance at this time. To his credit, the Applicant repeatedly stated that he is a loyal American citizen, that he understands his responsibilities as a security clearance holder, and that he would bear arms against Thailand if necessary. However, given the depth and extent of his current connections with Thailand, he has failed to meet his burden of showing an unequivocal connection to the United States. He is not eligible for a security clearance at the present time.

Based on the evidence the Government has presented, the following Disqualifying Conditions apply to this case: 7.(a) *Contact with a foreign family member . . . 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 . . . 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 . . . by providing that information;* and (d) *sharing 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.* I have also considered the information concerning the current Thai government, which came to power through a military coup, provided by Department Counsel in Administrative Judge's Exhibit I and its attachments I(1) through I(4).

The Applicant has not provided compelling evidence to show that the following Mitigating Conditions also apply to this particular case, given his particular background: 7(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.;* and (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.*

On balance, it is concluded that the Applicant has not successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: Against the Applicant.

Subparagraph 1.a.: Against the Applicant.

Subparagraph 1.b.: Against the Applicant.

Subparagraph 1.c.: Against the Applicant.

Subparagraph 1.d.: Against the Applicant.

Subparagraph 1.e.: Against the Applicant.

Subparagraph 1.f.: Against the Applicant.

Subparagraph 1.g.: For the Applicant.

Subparagraph 1.h.: Against the Applicant.

Subparagraph 1.i.: Against the Applicant.

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Wilford H. Ross
Administrative Judge