



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 12-05015
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esq., Department Counsel

For Applicant: Barry M. Sax, Esq.

May 31, 2013

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted her Electronic Questionnaire for Investigations Processing (e-QIP) on February 7, 2012. (Government Exhibit 1.) On October 10, 2012, the Department of Defense issued a Statement of Reasons (SOR) detailing security concerns under Guidelines C (Foreign Preference) and B (Foreign Influence). The action was taken under Executive Order 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 (AG) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR on November 10, 2012, and requested a hearing. Department Counsel was prepared to proceed on December 14, 2012. This case was assigned to me on January 8, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on January 8, 2013. I convened the hearing as scheduled on February 6, 2013. The Government offered Government Exhibits 1 and 2, which were admitted into evidence without objection. Applicant testified, called one additional witness, and submitted Applicant Exhibits A through D, which were admitted

without objection. At the request of Applicant, the record was left open for the receipt of additional documents. Applicant submitted Applicant Exhibits E and F on February 20, 2013, which were admitted without objection. DOHA received the transcript (Tr.) of the hearing on February 13, 2013, and the record closed. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural Ruling

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to the Empire of Japan (Japan). (Tr. 7-9.) The request and the attached documents were not admitted into evidence but were included in the record. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

Applicant is 43 and engaged. She has a bachelor's degree and is applying for a security clearance in conjunction with her employment in the defense industry.

Paragraph 1 (Guideline C - Foreign Preference)

The Government alleges in this paragraph that Applicant is ineligible for clearance because she has acted in a way that shows a preference for another country instead of the United States. Applicant admitted all the allegations under this paragraph. Those admissions are findings of fact.

Applicant was born in the United States to Japanese parents in 1969. Accordingly, she was a dual citizen of the United States and Japan from birth. Her family continued to live in the United States until 1973, when her father's Japanese employer transferred him back to Japan. Applicant's family moved back to the United States in 1980, and lived here until 1986, when Applicant was 17 years old. At that time Applicant's father was again transferred back to Japan, and Applicant reluctantly returned to Japan with her family. She lived in Japan from 1986 until May 2011, when she moved permanently to live with her fiancé, a native-born American citizen. (Tr. 56-58, 91-92.)

Applicant has a current Japanese passport, which was issued in September 2006 and valid through September 2016. (Applicant Exhibit E.) She also has a current United States passport, which was issued in November 2009 and valid through November 2019. (Applicant Exhibit F.)

During the time Applicant was living in Japan she primarily used her Japanese passport. It is important to note that she was not employed by the United States

defense industry until January 2012. Rather, Applicant worked for a Japanese firm (Company One) from 1992 through February 2011. (Government Exhibit 1 at Section 13A.) As will be further discussed under Paragraph 2, below, Company One had a business relationship with Company Two, a major American defense contractor.

While working for Company One Applicant met her fiancé, who was an employee of Company Two, in about 2003. Starting in 2006 the two of them became romantically involved, and they had a long-distance relationship for several years, with Applicant in Japan and her fiancé in the United States. Finally, in 2011, she made the decision to quit her job and move to the United States to be with him. (Tr. 31-37, 99-109.)

During her period of working in Japan Applicant paid into the Japanese national pension program for 21 years. In order to receive a pension beginning in 2035 she would have had to contribute monthly for a continuous period of 25 years. After arriving in the United States Applicant stopped her contributions and, because the period was less than 25 years, she is not eligible for a pension. She presented documentary evidence of this fact. (Applicant Exhibit B; Tr. 75-76.)

After beginning work with her United States employer (Company Three) in January 2012 Applicant submitted her passport to the security office for safekeeping. (Applicant Exhibit A.) Subsequent to the hearing Applicant made a request that the Japanese passport be destroyed by the security office. She submitted evidence from the security office confirming that the passport was destroyed on February 12, 2013. (Applicant Exhibit E.)

While living in Japan Applicant acted as a Japanese citizen, voting in several national elections. She has not voted in Japanese elections since making the decision to move to the United States to live with her fiancé. Instead, as an American citizen, she has been involved in the American political process. (Tr. 74-75.)

Applicant discussed the fact that, as a child of Japanese parents born overseas, she was treated “differently” in Japan. While not discriminated against in the strict sense of the term, people like Applicant had problems adjusting to life in Japan. (Tr. 93-95.) This would also affect her work, where she was viewed as an American who spoke Japanese. (Tr. 101-104.) She stated the United States is “home,” and she is very comfortable living here, and thinks of herself only as an American citizen. (Tr. 85-85, 98, 107-108.)

Applicant also discussed the fact that, at the present time, she was unwilling to express an intent to renounce her Japanese citizenship. She explained that she wanted the ability to move back to Japan for more than three months if she was much older and her fiancé had passed away. She also stated that her intention always was to move back to the United States at some point in time. (Tr. 90-91.) She stated, “So it’s not because I’m loyal to the Japanese, or not because I miss Japan. Just because I might want to stay there for more than three months.” (Tr. 110-111.)

Paragraph 2 (Guideline B - Foreign Influence)

The Government alleges in this paragraph that Applicant is ineligible for a clearance because she has foreign contacts and interests that could lead to the exercise of poor judgment, unreliability or untrustworthiness on the part of Applicant. Applicant admitted all of the allegations under this paragraph. Those admissions are findings of fact.

Applicant's mother and father are Japanese citizens and live in Japan. Her father is retired and takes care of Applicant's mother, who is disabled. Her sister was born in the United States and is thus, like Applicant, a dual citizen of Japan and the United States by birth. She resides in Japan. None of her relatives are involved with the Japanese government or defense industry. (Tr. 76-79.)

As stated, Applicant worked for Company One, which had a cooperative arrangement with Company Two. This arrangement concerned the sale of military equipment made by Company Two to the Japanese government. This arrangement was entirely legal and approved by the appropriate authorities in both Japan and the United States. (Tr. 30-31, 39-40, 45-51, 53-54.)

For the last several years of her employment Applicant served as liaison between these two companies and the Japanese government. (Tr. 37-38, 59-60, 62-63, 65-67, 102.) In the course of her job Applicant made friends with other employees of Company One. She maintains infrequent email contact with some of these people, primarily in issues concerning her personal life with her fiancé. (Tr. 82-84.)

During her employment with Company One Applicant was required to attend several meetings that were held in classified areas on American naval bases in Japan, or in the American Embassy in Tokyo. In order to attend these meetings Applicant received a Japanese security clearance that was analogous to an American Secret clearance. However, nothing involving the military equipment was classified by either country. Applicant lost this clearance when she quit her job and moved to the United States. Both Japanese and American officials knew Applicant was a dual citizen of Japan and the United States. (Tr. 51, 60-61, 84-85.)

Applicant testified that she would follow proper procedures if any of her relatives or friends in Japan were to attempt to induce Applicant to reveal classified or sensitive information. (Tr. 80-82)

Applicant has visited Japan two times since coming to the United States full-time. For each trip she used her United States passport. (Applicant Exhibit F.)

Because of her long-term employment with Company One Applicant had been able to save a substantial amount of money, which was being held in a Japanese bank. Applicant has transferred all of the funds to an American bank and no longer has any financial holdings in Japan. (Applicant Exhibit C; Tr. 85.)

Applicant has connections to Japan. Accordingly, it is appropriate to examine Japan's relationships with the United States in the realm of protection of information.¹ In 2000 Japan was listed as among the most active collectors of economic and proprietary information based upon a survey by the National Counterintelligence Executive of selected Fortune 500 companies. Furthermore, in 2005 and 2007, Japan ranked high on the National Counterintelligence Executive's list of foreign countries requesting the most visits to U.S. military facilities, defense contractors, and Department of Energy National Nuclear Security Administration facilities. A high volume of such visits creates opportunities for foreign intelligence efforts against sensitive U.S. technologies. In fact, foreign government organizations, including intelligence and security services, frequently target and collect information through official contacts and visits to the U.S.

Mitigation

Applicant submitted a letter of reference from the international programs manager for Company Two. He has known Applicant since 1996. He states, "[Applicant] is a reliable individual that demonstrates commitment to her work through her daily actions." (Applicant Exhibit D.)

Policies

Security clearance decisions are not made in a vacuum. When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used as appropriate 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 AG ¶ 2(a) describing 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. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that, "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this

¹All of the following statements are supported by the documents submitted by the Department Counsel in support of his request for administrative notice and its attachments.

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. Under Directive ¶ E3.1.15, the 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 for obtaining a favorable clearance 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. Security clearance decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to protect or 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.

Finally, as emphasized in Section 7 of Executive Order 10865, “Any determination under this order adverse to an Applicant 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.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

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 circumstances and the granting or 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.

Paragraph 1 (Guideline C - Foreign Preference)

The concern about Applicant's alleged Foreign Preference is stated thus under this Guideline at ¶ 9:

When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

In this case, the Government has met its initial burden of proving by substantial evidence that Applicant had a Japanese passport that would not expire until 2016. In addition, while a dual citizen of Japan and the United States from birth, Applicant voted in several Japanese elections. Finally, Applicant had been employed in Japan for a substantial period of time and was coming close to the time where she would have a vested financial interest in the Japanese national pension plan.

Accordingly, AG ¶ 10 applies to the facts of this case. Conditions that could raise a security concern and may be disqualifying include:

(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to:

(1) possession of a current foreign passport;

(5) using foreign citizenship to protect financial or business interests in another country; and

(7) voting in a foreign election.

Applicant's Japanese passport has been destroyed. She has moved to the United States on a full-time basis and travels only on her U.S. passport. Finally, she has officially renounced her interest in the Japanese national pension plan.

The following provisions under AG ¶ 11 apply and mitigate the security concerns found in Paragraph 1:

(a) dual citizenship is based solely on parents' citizenship or birth in a foreign country; and

(e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

Paragraph 2 (Guideline B - Foreign Influence)

The concern under Guideline B is styled as follows under ¶ 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 has family and personal connections in Japan. She worked in Japanese industry for many years, and for a considerable period of time acted as the liaison between Company One, Company Two, and the Japanese armed forces. She has an American fiancé, and has moved to the United States full-time, but was unable to state an unequivocal preference for the United States, stating that she might want to return to Japan as a Japanese citizen at some unknown time in the future. Applicant continues to have close family members in Japan, as well as friends in the Japanese defense industry, and she held a Japanese security clearance until 2011.

The following Disqualifying Conditions apply to this case:

AG ¶ 7(a) contact with a foreign family member, business or professional associate, 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 sensitive information or technology and the individual's desire to help a foreign person, group or country by providing that information.

Applicant has not provided compelling evidence to show that the following Mitigating Conditions apply to this particular case, given her particular background:²

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.;

(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;

(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

²AG ¶¶ 8(d) and (e) do not apply to the facts of this particular case.

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

Applicant has not submitted sufficient evidence to show that her family and financial ties in the United States outweigh her relationship to Japan at this time. Until 2011 Applicant worked for a Japanese defense contractor, assisting an American company. During that time she held a Japanese security clearance. While she has been romantically involved with her fiancé for several years, she only moved back to the U.S. full-time about two years ago. She is an American citizen by birth, but the fact remains that she has spent substantial time in Japan, living as a Japanese citizen. She has proven that all of her finances are located in the United States.

Based on my analysis of the available information, Applicant has not overcome the adverse inference of her familial and personal connections to Japan. Guideline B is found against Applicant.

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 relevant circumstances. 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. The 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. My Guideline B and C analysis is applicable to the whole-person analysis as well. This is an extremely close and unusual case. Applicant is a dual citizen by birth, who stayed in Japan for many years until meeting her fiancé. She was a faithful employee of Company One for over 20 years, assisting Company Two in its negotiations with the Japanese government. In order to perform her job she obtained a Japanese government security clearance. She has close emotional ties to both nations. One thing that became clear is that she has certain aspects of her personal long-term relationship between the U.S. and Japan to work out. For example, it appears that Applicant moved to the U.S. to be with her fiancé, not because she felt an overwhelming desire to be only an American citizen into the future.

It is Applicant's burden to present compelling evidence showing that her preference is for the United States and not Japan. She has not done so at this time. For those reasons, I cannot find that there is little or no "potential for pressure, coercion, exploitation, or duress" as set forth in AG ¶ 2(a)(8). Using the whole-person standard, Applicant has not mitigated the security significance of her foreign connections. She is not currently eligible for a security clearance.

On balance, it is concluded that Applicant has not successfully overcome the Government's case opposing her request for a security clearance. Accordingly, the evidence supports a finding against Applicant as to the factual and conclusionary allegations expressed in Paragraph 2 of the Government's Statement of Reasons. As stated above, Paragraph 1 is found for Applicant.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline C:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Paragraph 2, Guideline B:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d:	Against Applicant
Subparagraph 2.e:	Against Applicant
Subparagraph 2.f:	Against Applicant
Subparagraph 2.g:	For Applicant

Conclusion

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

WILFORD H. ROSS
Administrative Judge