

DATE: August 11, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-01207

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Ellen Mendelson, Esquire

SYNOPSIS

Applicant is a 57-year-old Senior Engineer for a major defense contractor. He was born in the Philippines in 1946 and came to the U.S. after graduating from college in 1967. He has worked in the defense sector, and held a DoD security clearance, for many years, without any problems. He has family members who are citizens of and reside in the Philippines. He rarely sees them and his closest contact is with his elderly mother by telephone. His property holdings in the Philippines are small in relation to his assets in the U.S. He credibly expressed his dedication to U.S. interests over that of any other country. Mitigation has been established. Clearance is granted.

STATEMENT OF THE CASE

On March 3, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons

why DOHA could not make the preliminary affirmative finding required under the Directive that it

is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and

determine whether a clearance should be granted, denied or revoked.

On March 15, 2003, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made after a hearing before a DOHA Administrative Judge. The matter was assigned to me on May 5, 2003. A Notice of Hearing was issued on May 19, 2003, and the hearing was conducted on June 3, 2003. At the hearing, Applicant testified and did not offer any exhibits. The Government did not call any witnesses, but offered two exhibits, which were marked and admitted as Government Exhibits (GX) 1 and 2. Applicant testified, but did not offer any exhibits. The transcript (Tr) was received at DOHA on June 18, 2003.

FINDINGS OF FACT

Applicant is a 43-year-old mathematician and consultant. The SOR contains five allegations, 1.a. - 1.d., under Guideline B (Foreign Influence), and one allegation, 2.a., under Guideline E (Personal Conduct). Applicant's response admits SOR 1.b., 1.d., and 1.e., and denies all other allegations. The admissions are incorporated herein as a finding of fact.

After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Guideline B (Foreign Influence)

1.a. - Applicant's brother is a citizen of and resident in the Philippines. The sister cited in the SOR now resides in the U.S.;

1.b. - Applicant's mother-in-law is a citizen of and resides in the Philippines. She is 83, and suffers from osteoporosis (Tr at 22).

1.c. - Some of Applicant's uncles, aunts, and cousins are citizens of and reside in the Philippines. Other relatives are citizens and residents of the U.S. or Canada;

1.d. - Applicant's wife owns real estate in the Philippines, inherited from her parents. The real estate is her separate property and she retains whatever income there is.

1.e. - Applicant owns real estate in the Philippines. These are two small vacant lots, worth about \$3000 to \$4,000 each. They produce no income, and Applicant intends to give the lots to his sons in the future. He does not consider the lots to be an investment.

As far as Applicant knows, none of his relatives are associated with the government of the Philippines. He has no business interests in the Philippines or any financial interests there of a substantial nature.

Guideline E (Personal Conduct)

2.a. - Applicant knowingly falsified material facts on his Questionnaire for National Security Positions (SF 86), when he answered "No" to Question 17.a. (financial interests in a foreign country), when he knew he should have answered "Yes" and reported the information in SOR 1.d. and 1.e., above. He misconstrued the question and thought the question asked only about "active" investments and he did not consider the real property to be "active"

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing 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 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 (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Considering the evidence as a whole, I find the following specific adjudicative guidelines to be most pertinent to this

case:

GUIDELINE B (Foreign Influence)

Condition that could raise a security concern and may be disqualifying:

1. An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of or resident or present in, a foreign country.

Condition that could mitigate security concerns include:

1. A determination that the immediate family member(s), cohabitant, or associate(s) in question would not constitute an unacceptable security risk.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of

whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either by the Applicant's admissions or by other evidence) and proves conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the Applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence

of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

CONCLUSIONS

Applicant was born in the Philippines in 1946. He graduated from college with a degree in Mechanical Engineering in 1967, emigrated to the U.S. in the 1970s, and became a U.S. citizen in 1980. He began working for his present employer in 1978, and is now a Senior Engineer. He has held a security clearance for many years and received a Q clearance in 1990 (GX 1 at Item 26). There is nothing in the record indicating he has ever had any problems relating to classified information.

The concerns stated in the SOR are cited under Guideline B and are based on the risk of foreign influence by family members in the Philippines. The presence of an applicant's close relatives who are citizens of and/or resident in a foreign country is certainly a matter of security concern. Just as clearly, however, not all foreign countries create the same level of risk. In the present case, I take official notice that the Philippines has traditionally been friendly to U.S. interests to the extent that a number of individuals from the Philippines are accepted into the U.S. military even before becoming naturalized citizens. Although the risk exists that Applicant might be asked to disclose classified information by family members in the Philippines, the risk is less than with many other countries, and must be considered in context with other important factors.

While the language in Disqualifying Condition (DC) 1 indicates that the presence of close family in a foreign country is of concern, that concern can be mitigated by evidence that the risk of pressure being applied is not unacceptable *and* that the applicant is not likely to feel "forced to choose between loyalty to the persons involved and the United States."

When asked if anyone had asked him to act improperly during the 28 years he has been in the U.S., he responded "No," and if anyone did, he would not agree, because "it is wrong" (Tr at 43).

He would also report it to his security officer, because this his "fourth clearance already," and he knows what his responsibilities are. Every time he leaves U.S. territory, he "reports where he is going" (Tr at 44). Applicant's two witnesses speak high of him and do not believe he has ever violated any company rules, or done anything dishonest, or

ever did or said anything suggesting he was not dedicated to U.S. interests (Tr at 46 - 53).

There is always a chance that Applicant might be asked to act improperly in the future, even though he not been asked to do so in the past. However, this is speculative since there is no direct or indirect evidence that it has occurred, or is likely to occur. I note that Applicant has worked for a major defense contractor for 25 years, even before he became a U.S. citizen in 1980 (Tr at 18), ⁽¹⁾ and that he has held a high security clearance during much of that period. The SOR in this matter is based on Applicant's 1996 security clearance application, and there is no suggestion in the record of any problematic conduct by Applicant since that time, except for continuing the family relationships cited in GX 1.

Applicant's explanations as to his relationships with his family members in the Philippines, the lack of any problems in the past, and his clear recognition of his security responsibilities, lead me to conclude that there is minimal risk of Applicant acting against U.S. interests. Foreign Influence Disqualifying Condition 1 (family in foreign country) is applicable but, under Mitigating Condition 1, the relationships "would not constitute an unacceptable security risk."

Guideline E (Personal Conduct)

Applicant's explanation for not citing the property interests expressed in SOR 1.d. is that the property was his wife's and not his, so that under Question 17.a., "Do *you* have any foreign property, business connections, or financial interests" (emphasis added), he did not think a "Yes" answer was appropriate (Tr at 26, 27). As to SOR 1.e., his explanation is that the two vacant lots did not generate income and produced no profit, so that he did not consider them to be a "financial interest." This explanation ignores the fact that the lots were "property" and should have reported. However, in context, the value of the property is so minimal that it does not support a conclusion that Applicant was seeking to deceive the Government when he answered: "No" to Question 17.a.

In summary, Applicant has expressed strong feelings about his identity as an American, and about where his loyalty, allegiance, and obligations belong. From Applicant's testimony and demeanor, I find his testimony to be highly credible. He has contributed to American society for 28 years, without apparent problems suggesting questionable judgment, unreliability, or untrustworthiness. Under these circumstances, there is no basis for concluding that a risk exists that he might now start acting against U.S. interests.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline B (Foreign Influence) For the Applicant

Subparagraph 1.a.. For the Applicant

Subparagraph 1.b. For the Applicant

Subparagraph 1.c. For the Applicant

Subparagraph 1.d. For the Applicant

Subparagraph 1.e. For the Applicant

Guideline E (Personal Conduct) For the Applicant

Subparagraph 2.a. For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent

with the national interest to grant or continue a security clearance for Applicant.

BARRY M. SAX

ADMINISTRATIVE JUDGE

1. Prior to the hearing, Counsel for Applicant submitted documents suggesting errors and omissions in the transcript. She submitted what she believed to be language that corrected such errors and omissions. All documents were submitted to me through Department Counsel, who did not contest the suggested changes that would make the transcript correct in stating the actual testimony. These documents have been added to the case file. Although I accept the indicated corrections, I conclude they do not affect the evaluation of the overall evidence.