



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



In the matter of:

SSN: -----

Applicant for Security Clearance

)
)
)
)
)
)

ISCR Case No. 07-08007

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro Se*

September 26, 2008

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant submitted for consideration a Security Clearance Application, Standard Form SF-86, signed April 12, 2006. On May 22, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline F (Financial Considerations) and Guideline B (Foreign Influence). The action was taken under Executive Order 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), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR and, on June 18, 2008, answered the SOR allegations. Applicant admitted four of the six financial allegations. He also admitted two of the three foreign influence allegations. The third allegation was denied to the extent that one of the two individuals cited in the SOR was misidentified; in his denial, Applicant corrected the identity of the relative. Applicant requested a decision be made without a hearing. On July 12, 2008, Department Counsel prepared a File of

Relevant Material (FORM) setting forth the government's case based on the SOR. Applicant received the FORM on July 31, 2008. He declined to timely submit any opposition to the FORM. The case was assigned to me on September 24, 2008, for administrative determination. Based upon a review of the limited case file and exhibits presented, Applicant failed to carry his burden and mitigate security concerns. Clearance is denied.

Findings of Fact

Applicant is a 50-year-old employee of a defense contractor. He has been a program manager with the same company since September 1982. Applicant is a naturalized United States citizen, having been naturalized in 1962. Applicant's parents are United States citizens. His father and mother were born in the United States and in Germany, respectively.

In 2000, Applicant married a citizen of Brazil who lives in the United States. She has applied for United States citizenship. His step-daughter is 11-years-old, is a permanent resident of the United States, and a citizen of Brazil. Applicant's wife's parents are residents and citizens of Brazil.¹ The father is retired from a city government and the mother works for a store. Applicant's relationship with his in-laws is ill defined, but it is noted he speaks to them three or four times a year by telephone. There is scant evidence as to the contact and relationship between his wife and her parents.

Between 2002 and 2003, Applicant spent approximately \$180,000 in funds from his 401(k) retirement plan to buy two properties in Brazil. The first is a home for the use of his parents. The second is a condominium which he expects to use upon retirement in approximately six years.

Based on Applicant's April 2006 credit bureau report and various credit bureau reports from 2008, there are six delinquent accounts at issue. They are referenced as six allegations under paragraph one of the SOR. First, there is a credit account charged off in the approximate amount of \$3,747 (SOR Allegation 1.a). Applicant alleges he tried to work out a payment plan on this balance, but that the terms offered were too high. No evidence of such negotiations was introduced. Second, there is an account charged off in the approximate amount of \$2,163. Applicant claims that he has no knowledge of this account and declined to indicate whether he has ever disputed its inclusion on his credit report (SOR Allegation 1.b). Third, there is an account charged off by a telecommunications company in the approximate amount of \$773 (SOR Allegation 1.c). Applicant claims the bill was for overseas calls made on his cell phone number without his knowledge, that he advised his carrier of this belief, but that no corrective action has been taken. No evidence of formal dispute of this account was introduced. Fourth, there is a past due amount owed on a mortgage totaling \$286,000, which Applicant states is now current (SR Allegation 1.d). No evidence, however, was introduced showing its current status.

¹ Although no evidence is offered to substantiate this claim, Applicant states that his wife is pursuing U.S. citizenship.

The fifth and sixth debts cited concern taxes. For the fifth obligation, there is an indebtedness to the Internal Revenue Service (IRS) for tax years 2002 and 2003 in the approximate amount of \$39,934.69 (SOR Allegation 1.e). Applicant writes that he is in a repayment plan to pay \$210 every two weeks. In his response to the SOR, he provided a pay stub indicating \$210 is deducted for payment on a "TAX LEVY." Sixth, there is a state franchise tax for tax years 2003 and 2004 in the approximate amount of \$6,037.97 owed (SOR Allegations 1.f). Applicant writes he is in a repayment plan to pay back this arrearage through \$130 payments every two weeks. In his response to the SOR, he offered a pay stub showing \$130 is deducted for "GARNISH PERCE." If these repayments were in place as depicted, Applicant's combined debt on the two tax accounts would be under \$35,000.

Applicant did not submit any additional materials or argument in response to the SOR. Additionally, he requested a decision based on the record in lieu of a hearing.

Policies

When evaluating an Applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. Under 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.

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

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." ² The burden of proof is something less than a

² See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

preponderance of evidence.³ The ultimate burden of persuasion to obtain a favorable clearance decision is on the applicant.⁴

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. Decisions include, by necessity, consideration of the possible risk 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.

Section 7 of Executive Order 10865 provides that decisions shall be “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). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁵ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁶ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁷ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon consideration of the evidence, I find the following guidelines from AG ¶ 6 and ¶ 18 to be the most pertinent to the evaluation of the facts in this case:

Guideline F - Financial Considerations. *The Concern:* Failure or an inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

³ *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

⁴ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁵ *Id.*

⁶ *Id.*

⁷ Executive Order 10865 § 7.

Guideline B – Foreign Influence. *The Concern:* The concern under this adjudicative guideline is that 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. The adjudication 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 U.S. citizens to obtain protected information and/or is associated with a risk of terrorism.

Conditions pertaining to these adjudicative guidelines that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, are set forth and discussed in the conclusions below.

Analysis

Guideline F – Financial Considerations

In his answer to the SOR, Applicant acknowledges he has a domestic mortgage for approximately \$286,000 and admits the allegation that it was past due as of about May 2008. He further admits he is about \$3,800 past due on a credit account and has taxes owed in the approximate amount of at least \$35,000. Such facts are sufficient to determine Financial Considerations Disqualifying Condition (FC DC) AG ¶ 19(c) (“a history of not meeting financial obligations”) and AG ¶ 19(a) (“inability or unwillingness to satisfy debts”) apply. With such conditions established, the burden shifts to Appellant to overcome the case against him and mitigate security concerns.

Because Applicant offered so few facts, and since the few facts argued were largely uncorroborated with documentary evidence, there is scant basis upon which to raise Financial Considerations Mitigating Condition (FC MC) AG ¶ 20(b) (“the conditions that resulted in the behavior were largely beyond the person’s control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation) and the individual acted responsibly under the circumstances”). For similar reasons, AG ¶ 20(a) (“the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment”) does not apply.

Applicant failed to link “TAX LEVY” and “GARNISH - - - - -” with the tax liabilities alleged in the SOR. Assuming they are, in fact, these two tax accounts, he also neglected to substantiate how long these payroll deductions have been going on or document the current balances owed. Had he so linked and documented these two accounts, however, he still would have failed to substantiate any other efforts with regard to the majority of other accounts alleged. Therefore, AG ¶ 20(d), (“the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts”) does not apply. For the same reason, and in the absence of evidence he has received requisite financial counseling, AG ¶ 20(c) (“the person has received or is receiving

counseling for the problem and/or there are clear indications that the problem is being resolved or is under control”) does not apply. This is particularly true in the absence of evidence as to his current finances and a demonstration of improved circumstances. In sum, Applicant failed to provide sufficient information to mitigate security concerns under AG ¶¶ 20(a)-20(d).

Guideline B – Foreign Influence

Although Applicant’s wife and step-daughter are permanent residents of the United States, they are still citizens of Brazil. Moreover, while nothing is offered with regard to Applicant’s in-laws’ backgrounds, occupations, or relationships with their daughter, it is established that they were born in Brazil and currently reside in that country. Similarly, little is offered with regard to Applicant’s own parents, except that he has provided them with a house of indeterminate description in Brazil. Finally, Applicant’s Brazilian real estate ownership extends beyond his parents’ home to some type of condominium for his retirement. Such facts give rise to Foreign Influence Disqualifying Conditions (FI DC) AG 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”), AG ¶ 7(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”), and AG ¶ 7(e) (“substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-influenced business, which could subject the individual to heightened risk of foreign influence”) apply.

Regarding the term “heightened risk,” family ties and financial interests alone are not enough to establish a concern under the guideline. Heightened risk must also be present. Heightened risk, however, does not necessarily require the foreign country at issue to be hostile. The Appeal Board has recognized that not all countries that might seek classified information do so in order to harm the United States.⁸ As well, even in the absence of coercions being brought to bear on family members in a foreign country, the security significance of family ties cannot be evaluated in a simplistic manner.⁹ Here, the heightened risk is Applicant’s financial stake in Brazil, having shifted a significant amount of money from his retirement fund to Brazil in order to house family members, and the absence of facts concerning his family members’ situations and circumstances with foreign connections.

With disqualifying conditions thus raised, Applicant has the opportunity to mitigate security concerns. Here, Foreign Influence Mitigating Condition AG ¶ 8(a) requires that circumstances make it unlikely that an Applicant will be required to choose between the interests of a foreign individual, groups, organizations, or government and the interests of the U.S. Applicant, however, introduced insufficient evidence to

⁸ ISCR Case No. 3-26976 at 5 (App. Bd. Oct. 22, 2004).

⁹ ISCR Case No. 98-0507 at 8 (App. Bd. May 17, 1999).

establish this mitigating condition. Similarly, there is insufficient evidence upon which to judge whether 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”) or 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”) applies. Although AG ¶ 8(e) applies if the value or routine nature of the foreign interest (*ie.* business or property) makes it unlikely to result in conflict, there is insufficient evidence this mitigating condition applies.

In conclusion, Applicant’s spouse and step-daughter are citizens of Brazil. His spouse’s parents are citizens and residents of Brazil. He has substantially invested in Brazilian property. Applicant did not meet his burden of proving any mitigating condition(s) apply.

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 circumstances. 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) 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.” Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the “whole person” factors noted above. Here, little is known about the Applicant aside from the fact that he is a mature man with considerable work experience. This is largely because he did not provide documentation to support the mitigation of security concerns. The limited information he did provide gives little insight into his extended family, their relationship with Brazil, his foreign real estate, any plan to resolve all his delinquent debts, or his current finances. As it now stands, questions remain regarding foreign influence and financial considerations. I conclude that it is not clearly consistent with national security to grant Applicant a security clearance. Clearance is denied.

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 F:	AGAINST APPLICANT
---------------------------	-------------------

Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant

Paragraph 2, Guideline B:	AGAINST APPLICANT
---------------------------	-------------------

Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant

Conclusion

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

ARTHUR E. MARSHALL, JR.
Administrative Judge