



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-12870
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jennifer I. Goldstein, Esquire, Department Counsel
For Applicant: B. Daniel Lynch, Esquire

July 14, 2008

Decision

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on March 11, 2005 and amended it on May 8, 2007 (Government Exhibit 1). On January 3, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant, which detailed security concerns under Guidelines E and B stating 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 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 revised adjudicative guidelines (AG) promulgated by President Bush on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on January 11, 2008. He answered the SOR in writing on February 21, 2008, and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on March 17, 2008, and I received the case assignment on March 20, 2008. DOHA issued a notice of hearing on April 4, 2008, and I convened the hearing as scheduled on April 21, 2008. The Government offered Government Exhibits (Ex.) 1 through 5, which were received without objection. The Applicant testified. Five witnesses testified on the Applicant's behalf and he submitted Applicant's Exhibits A through F, without objection. DOHA received the transcript of the hearing (Tr.) on April 30, 2008. The record closed on that date. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

Motion to Amend SOR

Department Counsel moved to amend the SOR by deleting the original SOR subparagraph 1.a., and substituting the following, "You deliberately failed to report your intended marriage to a foreign national to appropriate security personnel because you felt it was your own personal business unrelated to your employment."

The Applicant did not object to the amendment, and stated he did not need additional time to respond to the amendment. The motion to amend was granted, and the Applicant denied the additional subparagraph. (Transcript at 8-10.)

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to Socialist Republic of Vietnam (Vietnam). (Transcript at 10-11.) The request and the attached documents were not admitted into evidence but were included in the record as Administrative Notice Exhibits I through V. The Applicant also asked that two additional documents be admitted as Administrative Notice Exhibits VI and VII. (Transcript at 147-150.) The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

The Applicant is 49, married, and has an Associate of Science degree. He is employed as a System Analyst and seeks to retain a Top Secret level clearance in connection with his employment in the defense industry. The Applicant denied subparagraph 1.a. as amended, and admitted subparagraphs 2.a., 2.b., and 2.c. of the SOR, with explanations. He also provided additional information to support his request for eligibility for a security clearance.

Paragraph 1 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in conduct which shows questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations.

The Applicant has worked in the Defense industry since 1987. For most of that time he has held a security clearance. From approximately 2001 to August 2004 the Applicant also had access to Special Access Programs (SAP). (Transcript at 65-66.)

The Applicant went to Vietnam as a tourist in February 2003. He traveled with his house mate, an American woman of Vietnamese descent who also works in the Defense industry and has a security clearance. At that time she and the Applicant had been house mates since 1997. While in Vietnam the Applicant met his house mate's niece.

After returning to the United States, the Applicant and the niece began to have a personal relationship by use of the Internet, telephone and the mail. By about July 2003 the Applicant and the niece decided to marry. At this point the Applicant began the procedure to get the niece a fiancé visa that would allow her to move to the United States. The niece, now his fiancé, came to the United States in May 2004. The Applicant and the niece were married July 1, 2004. At the first available date after the marriage, the Applicant informed his company's security officials of his marriage. The Applicant admits that this was the first time anyone in his company, or the Government, had notice that he was having any type of personal relationship with a foreign national.

As stated earlier, at the time he married his current wife, the Applicant had access to a SAP. These programs have security procedures above those of collateral security clearances, such as Top Secret. One of these procedures is the requirement that holder of SAP access must report as soon as possible the existence of a personal relationship with a foreign national. Because the Applicant did not do that, "As of 19 Aug 2004, a temporary suspension of Access to Special Access Programs (SAP) has been imposed due to unreported foreign contacts." (Government Exhibit 1 at page 10, question 43.)

The Applicant has given several reasons for his failure not to report his relationship with his wife until after his marriage. First of all, based on his testimony, and that of his witnesses, it is clear that the Applicant is a very private person. He keeps a strict separation between his personal life and his professional life. He says, "I wish to state that I regret not notifying the appropriate security personnel of my intent of marriage to a foreign national . . . Rightly or wrongly, I felt this was a private and personal matter and I do not make it a habit of discussing my personal life at work." (Government Exhibit 5 at 4.)

He also states, "I did not know, and still do not know of any requirement to report the intent to marry." (Applicant's Answer at 1.) He further states that, though he had

been given security briefings about having SAP access, he could not recall anything in them regarding the reporting of foreign contacts. (Transcript at 66.) However, several of the Applicant's witnesses, including former supervisors, discussed the fact that the security briefings concerning SAP access the Applicant received include reporting "significant contact with a foreign national." (Transcript at 92-94.)¹

The Applicant also did not report the fact that his then fiancé was living with him before their marriage in May and June 2004. He testified, "At that time, I didn't really consider her a foreign national at that time. She had come through the U.S. Consulate in Vietnam through the U.S. Citizenship and Immigration Service. So, she was already screened and allowed to come to the United States." (Transcript at 43-44.)

Paragraph 2 (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.

As stated above, the Applicant traveled to Vietnam in 2003, where he met his wife. The Applicant's wife is a citizen of Vietnam and has a large family still there. This includes her parents as well as at least 11 siblings still living in Vietnam. One sister lives in the United States. The evidence shows that the Applicant has very little knowledge of his in-laws, including the sexes and employment histories of his wife's siblings. (Government Exhibit 1 at 9, Transcript at 47-64.)

The Applicant has numerous ties to Vietnam. It is therefore appropriate to discuss the relationship of the United States and Vietnam at this time. Support for these statements can be found in the Administrative Notice documents I through VII. Vietnam is an authoritarian state ruled by the Communist Party of Vietnam. It often works with China, its largest trading partner. U.S.-Vietnam relations have gradually been normalizing since the 1990s, although tensions remain regarding human rights issues. Arbitrary detentions, particularly with regard to political activities, remain a problem. Three American citizens were arrested in Vietnam in 2005 while visiting relatives and charged with plotting violence against the Vietnamese government. Police sometimes mistreat those under arrest or in custody and arbitrary detentions remain a problem. Freedom of speech and of the press is restricted, particularly with regard to the Internet and cyber-dissidents. It is not unusual for Vietnamese citizens to be monitored and visitors may be put under surveillance. Timely notice to the U.S. of the detention of a U.S. citizen in Vietnam is rare and access to such detainees can be difficult, particularly if they are former citizens of Vietnam. There has been progress with Vietnam on regional security issues, and the Vietnamese government has been helpful in the anti-terrorism arena.

¹See Transcript at 113-114, 124-125, 140-142.

Mitigation

Seven witnesses testified and submitted statements on the Applicant's behalf, and two other people submitted written statements. (Applicant's Exhibits A through F.) The witnesses included co-workers and former supervisors, six of whom have known the Applicant for at least 12 years. Without exception, the Applicant is described by these people as one of the hardest working employees they know. His supervisors, former and current, state he is one of their best workers: reliable, honest, dependable. All of them recommend that he retain his security clearance, even with knowledge of his failure to report his growing personal relationship with his now wife.

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. Instead, 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. 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 own common sense, as well as his 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 "[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.

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. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable security 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. 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.

Finally, as emphasized by President Eisenhower in Section 7 of 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." 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 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 intentionally failed to report his growing relationship with his wife during the year before they were married (Guideline E); and that the Applicant has significant connections with Vietnam (Guideline B). The Applicant, on the other hand, has not successfully mitigated the Government's case.

Paragraph 1 (Guideline E - Personal Conduct)

Turning first to Guideline E, the concern is stated as follows, *Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information.*

The Applicant has not mitigated the Government's concerns about his intentional failure to report his growing relationship with his wife. The Applicant is far from the first person with a security clearance to meet and marry someone from overseas, or even

from Vietnam.² The difference here is that he intentionally chose to conceal from the Government and his company's security officials the fact of his relationship with his wife.

The Applicant has stated that he did not know of the requirement to report significant contacts with a foreign national. This testimony is simply not credible for several reasons. First, as shown in the testimony of four of his witnesses, this requirement is well-known among his co-workers, based on a briefing that all of them receive on an annual basis. Second, the Applicant is an intelligent man, with many years in the Defense industry. He is meticulous and driven. As such, I find that he knew, or should have known, what the requirements are. Third, the Applicant is a private person, who does not bring his private life to work, and this particular relationship is the essence of a private life.

In addition, the Applicant also testified that he came to the conclusion that, because his wife received a fiancé visa, that somehow abrogated his responsibility to report that she was there to marry him. This may be closer to the truth, but once again does not annul the reporting requirements.

Based on all the available evidence, I find that the Applicant intentionally decided not to report his personal relationship with a foreign national, his wife. He did this for a reason that he is as yet unwilling to articulate to the Government. Such conduct brings him within the strictures of Disqualifying Condition 16.(c):

Credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

I have considered the Mitigating Conditions under this Guideline. None of them apply. Paragraph 1 is found Against the Applicant.

Paragraph 2 (Guideline B - Foreign Influence)

The concern under Guideline B is styled 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

²See ISCR Case No. 08-08128 (June 27, 2008).

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.

The Applicant has many and varied connections to Vietnam. The problem is that he is unsure of what his wife's relatives do in Vietnam, or even what their sexes are. His wife, as to be expected, is close to her family and talks to them on a regular basis.

All of these connections must also be viewed in the context of the Vietnamese government, and in particular that government's history of coercion with regard to its citizens, and the detention of Americans. Once again, his intentional failure to report his growing relationship with his wife affects his ability to mitigate this guideline as well. Under the current state of the record, he has failed to meet his burden of showing that it is unlikely he will be forced to choose between the interests of Vietnam and those of the United States.

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;* (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 (f) *Failure to report, when required, association with a foreign national.* I have also considered the information concerning the Vietnamese government, provided by Department Counsel and Applicant's Counsel in Administrative Notice Exhibits I through VII.

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.;* (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 (e) *The individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country.* Paragraph 2 is found against the 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 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 security clearance 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. I have also kept in mind the fact that it is the Applicant's burden to submit evidence mitigating the security significance of his conduct and of his family situation. He has done neither.

As stated earlier, I find that the Applicant made the conscious decision to withhold information from the Government and his employer about his relationship with his wife. I also find that he was required to do so, and that he knew or should have known he had to report it. His reasons may have been benign, but it is his responsibility to explain his actions, and he has not done so satisfactorily. (AG ¶ 2(a)(2) and 2(a)(5).)

Given the failure to explain his conduct, and also his inability to show that he is not vulnerable to coercion, I cannot find that there is the "presence or absence of rehabilitation and other permanent behavioral changes," as set forth under AG ¶ 2(a)(6). Finally, given the particular facts of this case, it is impossible for me to find that there is little or no "potential for pressure, coercion, exploitation, or duress" as set forth in AG ¶ 2(a)(8).

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 Paragraphs 1 and 2 of the Government's Statement of Reasons.

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 E:	AGAINST THE APPLICANT
Subparagraph 1.a:	Against the Applicant
Paragraph 2, Guideline B:	AGAINST THE APPLICANT
Subparagraph 2.a:	Against the Applicant
Subparagraph 2.b:	Against the Applicant
Subparagraph 2.c:	Against the 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. Eligibility for access to classified information is denied.

WILFORD H. ROSS
Administrative Judge