



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



In the matter of:)
)
-----) ISCR Case No. 08-02449
)
Applicant for Security Clearance)

Appearances

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

For Applicant:
Anthony Camacho, Esq.

April 14, 2011

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on April 8, 2007. (Government Exhibit 3.) On March 26, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines E (Personal Conduct), D (Sexual Behavior) 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 for SORs issued after September 1, 2006.

Applicant answered the SOR on May 21, 2010, and requested a hearing. Department Counsel was prepared to proceed on December 8, 2010. This case was assigned to me on December 13, 2010. DOHA issued a notice of hearing on January 4, 2011. I convened the hearing as scheduled on January 24, 2011. The Government

offered Government Exhibits 1 through 6, which were admitted without objection. Applicant testified and submitted Applicant Exhibits A through P, which were admitted without objection. Applicant's counsel requested that the record remain open for the admission of additional documents. On February 14, 2011, Applicant Exhibit Q was received and admitted without objection. DOHA received the transcript of the hearing on February 9, 2011. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

Applicant is 50 and single. He has been married twice, from May 1981 through April 1988, and July 1988 through December 1991. Applicant has received two Associate of Applied Science degrees. (Applicant Exhibits F and P.) He is employed by a defense contractor and seeks to retain a security clearance in connection with his employment.

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 displays questionable judgment, dishonesty, or unwillingness to comply with rules and regulations.

Applicant admitted without reservation subparagraph 1.a. of the SOR. That admission is deemed a finding of fact. He admitted with reservations the factual allegations in subparagraphs 1.f. and 1.h. Applicant denied the remaining subparagraphs.

Applicant has, on occasion, frequented prostitutes for the purpose of sexual gratification. This first occurred in 1980, then in 1991. From 1992 through 1999 Applicant lived and worked in Saudi Arabia. The opportunities for single Americans to have normal social interactions were very limited. However, as further discussed below under Paragraph 3, from 1995 through 1999 Applicant had a Filipino girlfriend (Ms. A) who was also living and working in Saudi Arabia. During the period before and after he was dating Ms. A, Applicant would visit Thailand. During these visits, he would on occasion use the services of a prostitute. Applicant denied that he engaged in this activity on a daily basis while on his visits to Thailand. (Government Exhibits 4, 5 and 6.)

Applicant also engaged the services of prostitutes at massage parlors in the United States during 2002 and 2003. This conduct occurred, according to Applicant, because he was "bored and lonely." He went about ten times in 2002, and then began dating another woman from the Philippines, Ms. B, who was legally present in the United States. His relationship with Ms. B will be further discussed under Paragraph 3, below. He last used a prostitute in 2003, during his background investigation for access to a special program by another government agency. Applicant has stated he understands the use of prostitutes is inappropriate, and he has no interest or desire in using prostitutes in the future. (Transcript at 63-65; Government Exhibit 6 at 7.)

Primarily because of his sexual behavior, Applicant's access to special programs was denied by two different government agencies in 2004 and 2005. (Government Exhibit 6 at 11-15, 32-46.) Of particular interest is the statement of the Chief, Adjudications, of another government agency, dated August 24, 2004, affirming the denial of Applicant's access:

Cases involving a denial of access because of frequenting prostitutes is always difficult as no one wants to moralize or be "the morality police." However, if [Applicant] had engaged in shoplifting as recently and over the period that he has solicited prostitutes no one would challenge that denial of access was the correct call. Most disturbing is the fact that [Applicant] frequented a prostitute after his first polygraph when he was asked to extensively discuss this activity. Clearly he knew this was an issue of concern; yet, he availed himself of the service anyway. *[Applicant] needs to allow time to pass and he needs to conduct himself with self control and within the law during that period.* (Government Exhibit 6 at 39.) (Emphasis supplied.)

In addition to the allegations discussed above, subparagraph 1.g. states that Applicant used marijuana after being granted a security clearance by the Defense Department. Applicant admits using marijuana on about 20 occasions with a friend while he was stationed in Saudi Arabia, and also in Amsterdam. This occurred in the time period 1994-95, has not occurred since then, and Applicant has no desire to use marijuana in the future. Applicant submitted a signed, sworn statement indicating that he will not use any controlled substance in the future, and agreeing that any future use will result in automatic revocation of his security clearance. (Applicant's Exhibit Q at 4; Transcript at 42-44, 67-69, 71-73.)

Paragraph 2 (Guideline D, Sexual Behavior)

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in sexual behavior that is illegal, reflects a lack of judgment or discretion, or may subject Applicant to undue influence or coercion. Specifically, the Government alleges that the sexual conduct set forth above under Paragraph 1 has security significance under this Guideline as well.

Paragraph 3 (Guideline B, Foreign Influence)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has or had foreign contacts or interests that may leave him vulnerable to manipulation, pressure or coercion by a foreign interest.

Applicant resided in Saudi Arabia from 1992 through 1999, and on the island of Guam from 2005 to the present. From 1999 to 2005 he lived in the United States.

During the time Applicant lived in Saudi Arabia he visited the Philippines and Thailand on several occasions. He last visited Thailand in 2005. The ability to have

social contacts between men and women in Saudi Arabia are very limited. Where Applicant was stationed there were no single American women at all. He did develop a relationship with a Filipino woman, Ms. A, who was also legally working in Saudi Arabia. They dated for several years, and the two of them would travel together on occasion. The relationship has since ended. (Transcript at 36-42,.)

In 2002, while living in the United States, Applicant began dating a legal resident Philippine national, Ms. B. This relationship was open, as was his prior relationship with Ms. A, and continued for several years, ending in 2004. Applicant does not currently have a girlfriend. (Transcript at 47-50.)

Since living in Guam Applicant has visited the Philippines several times, the last time being in 2009. These visits are two-fold. First, Guam is a small island¹ and many residents there vacation in the Philippines, which is cheaper and a shorter flight than to the United States. Applicant is also nearing retirement age and is looking to possibly retire to the Philippines. (Transcript at 59-61, 65-66, 70.)

Mitigation

Applicant honorably served in the United States Air Force, and subsequently in the Air National Guard, from 1982 through 1991. (Applicant Exhibits A, B, C and D.) He received a letter of appreciation from the Royal Saudi Air Force for his work with them while stationed in Saudi Arabia. (Applicant Exhibit E.)

Applicant is a respected and valued worker at his current employment in Guam. His "Performance and Development Summary" for each year from 2005 through 2009 show that he either "meets" or "exceeds" his company standard. (Applicant Exhibit G, H, I, J and K.)

Applicant submitted letters of recommendation from work associates, including his current supervisor and past supervisors. His current supervisor finds Applicant "to be a reliable, trustworthy employee. He is consistent in his work ethic." (Applicant Exhibit L.) Applicant's past supervisors state he is "very dependable, reliable," "a valued employee," and "conscientious." (Applicant Exhibits M, N and O.)

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

¹Guam is 544 square kilometers, about three times the size of the District of Columbia, with an estimated 2011 population of 183,286. (Central Intelligence Agency, *World Fact Book, Guam*, <https://www.cia.gov/library/publications/the-world-factbook/geos/gq.html> (last updated February 28, 2011).)

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 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 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 for 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. 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 . . . 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

Paragraph 1 (Guideline E, Personal Conduct)

The security concern for Personal Conduct is set out in AG ¶ 15:

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. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Regarding all the allegations, the following Disqualifying Conditions are arguably applicable:

16.c. credible adverse information in several adjudicative 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; and

16.d. credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, 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.

16.e. personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Regarding all the allegations, the following Mitigating Conditions are applicable:

17.c. the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

17.d. the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

17.e. the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant admits that his conduct with prostitutes, particularly while stationed in Saudi Arabia from 1992 through 1998, and briefly in the United States in 2002 and 2003, was not appropriate. He especially understands the security significance of such behavior, given that two other governmental agencies denied his access based primarily on that conduct. However, it occurred at least eight years ago and there have been no recurrences. Applicant credibly stated that he has no interest or desire to visit prostitutes and shall not engage in such conduct again.

Applicant's marijuana use was almost 15 years ago, and occurred when he was stationed in Saudi Arabia. He is not addicted to illegal drugs in any way, has no urge to use them, and willingly signed a statement stating he would not use drugs in the future with automatic revocation of his clearance for a positive drug test.

These incidents happened a long time ago, have not been repeated, and the Applicant has shown that they were situational in nature. He has mitigated the security significance of this conduct. Paragraph 1 is found for Applicant.

Paragraph 2 (Guideline D, Sexual Behavior)

The security concern for Sexual Behavior is set out in AG ¶ 12:

Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

The Government has presented enough evidence to meet their burden of proof, which is minimal. The following disqualifying conditions are arguably applicable based on this finding:

13.a. sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

13.b. a pattern of compulsive, self-destructive, or high risk sexual behavior that the person is unable to stop or that may be symptomatic of a personality disorder;

13.c. sexual behavior that causes an individual to be vulnerable to coercion, exploitation or duress;

13.d. sexual behavior of a public nature and/or that reflects lack of discretion or judgment.

Under the particular facts of this case, the following mitigating conditions have application. They are:

14.b. the sexual behavior happened so long ago, so infrequently, or under such circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

14.c. the behavior no longer serves as a basis for coercion, exploitation, or duress;

14.d. the sexual behavior is strictly private, consensual, and discreet.

The discussion concerning the allegations of subparagraphs 1.a. through 1.f. applies to this Guideline as well. While Applicant is certainly not proud of his conduct, it occurred at least eight years in the past, and he has no intentions of engaging in such conduct in the future. He has mitigated the security concerns under this Guideline as well. Paragraph 2 is found for Applicant.

Paragraph 3 (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 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 travelled to Thailand and the Philippines while stationed first in Saudi Arabia, then in Guam. He has dated two Filipino women at different times, one while in Saudi Arabia and the other in the United States. There is only one Disqualifying Condition which even arguably applies:

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.

The following Mitigating Conditions are applicable, given the factual status of this case:

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.;

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; and

8.c. contact or communications with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk of foreign influence or exploitation.

Applicant's travels to Thailand were, on the whole, done while he was in Saudi Arabia. He has not been back there in many years and has no desire to return. His trips to the Philippines are consistent with a person who lives on Guam, for whom the Philippines is a short plane ride away. He does not currently have a girlfriend, Filipino or otherwise, and there is no indication that his past girlfriends attempted to influence him in any way. He has overcome any lingering security concerns brought about by his travels and choice in girlfriends. Paragraph 3 is found for 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 relevant facts and circumstances surrounding this case. I specifically find that the Applicant has mitigated the Government's security concerns under the whole-person concept, independently of Guidelines E, D and B.

Applicant did not meet the standard expected of individuals who hold security clearances while stationed in a remote duty station abroad, and then for a period here at home. The admitted conduct occurred at least eight years ago, and concerning drugs almost 15 years ago, and has not been repeated. He has acknowledged his wrongdoing and promises not to engage in the conduct again. DOHA proceedings are not designed to punish any particular applicant for past conduct, but to make a reasoned decision whether, under all the circumstances, he or she can be trusted with the nation's secrets. Applicant has shown many behavioral changes, which show that he is trustworthy. Under the particular facts of this case, I find that there is little to no potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)); and that there is no likelihood of recurrence (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his alleged Personal Conduct, Sexual Behavior and Foreign Influence. On balance, I conclude that Applicant has successfully overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports granting his request for a security clearance.

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 E:	FOR APPLICANT
Subparagraphs 1.a. through 1.f.:	For Applicant
Paragraph 2, Guideline D:	FOR APPLICANT
Subparagraphs 2.a. through 2.f.:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraphs 3.a. through 3.d.:	For Applicant

Conclusion

In light of all of the circumstances presented by the record, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

WILFORD H. ROSS
Administrative Judge