



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



In the matter of:)
)
) ISCR Case No. 08-04508
SSN:)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: Earl A. Partington, Esquire

September 16, 2008

Decision

MOGUL, Martin H., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on September 28, 2006. On May 22, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline B for Applicant. 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 the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant replied to the SOR (RSOR) in writing on June 3, 2008, and requested a hearing before an Administrative Judge. I received the case assignment on July 9, 2008, and DOHA issued a notice of hearing on that date. I convened the hearing as scheduled on August 13, 2008, in Honolulu, Hawaii. The Government offered Exhibits 1 through 3, which were received without objection. Applicant testified on his own behalf. Through counsel, he also submitted Exhibits A and B, which were entered into evidence without objection. DOHA received the transcript of the hearing on September 5, 2008.

Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to the country of Iraq. The request and the attached documents were admitted into evidence as Exhibit 2. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

In his RSOR, Applicant admitted the one SOR allegation, 1.a. The admitted allegation is incorporated herein as a finding of fact.

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, the testimony of Applicant, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 60 years old, and he was born in the United States. Applicant is married, and he has two sons. His younger son is a Captain in the United States Army. Applicant has received a Bachelor's degree in Communications and a Master's degree in Management. Additionally, Applicant served in the United States military in a combination of positions in both the Navy and the Army for approximately 28 years. He retired from the Army in 2000.

Applicant is currently employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

(Guideline B - Foreign Influence)

1.a. From January to September 2006, Applicant entered into a business relationship with an Iraqi citizen (Ic), who gave Applicant \$30,000 as investment capital. This business ultimately failed, and all investment capital was lost and unrecoverable. Applicant has continued to have contact with this Iraqi citizen.

At the hearing, Applicant testified that in 2003, in his position as a security consultant for an American private security company operating in Iraq, Applicant met the Ic, who is the subject of this case, and who was an employee of this company. This Ic worked for Applicant, and they developed a good working relationship and eventually a friendship, as Applicant found this Ic to be trustworthy. In November 2004, Applicant left this company, and they stopped working together, but they had developed a relationship where they continued to communicate through email and occasionally they telephoned each other.

In 2005, Applicant formed an American company that was to be involved in excavation in the United States. During Applicant's conversations with him, the Ic had

expressed an interest in being an investor, and eventually he invested \$30,000 in this company. Unfortunately, the company failed and all the investment capital was lost.

Applicant testified that it was clear, that since the money that the Ic gave to Applicant was for an investment, which was ultimately lost, Applicant had no requirement to return Ic's investment capital to him. Applicant stated that the Ic agreed that Applicant had no duty to return the money that the Ic had invested, and that they still remained friends.

Applicant learned that in November 2007, the Ic, his wife and son moved to the United States, where they now reside and intend to continue residing, as legal aliens. Applicant has not seen the Ic since 2006, but their communication now consists of sending each other humorous emails.

Applicant introduced Exhibit A, which consists of a copy of a cashier's check, dated August 8, 2008, in the amount of \$30,000 from Applicant to the Ic. Exhibit B is a copy of the letter, dated August 12, 2008, from Applicant to the Ic, in which he informed the Ic that he was enclosing a cashier's check of \$30,000 to him, and a copy of the priority mail envelope addressed to the Ic in the United States. Applicant testified that he received the funds to make this payment by taking a mortgage on his home, and he would be paying back the loan at the rate of \$430 a month for 10 years.

Applicant explained that while neither he nor the Ic believed Applicant had any duty or responsibility to return the Ic's investment of \$30,000, he is doing so anyway, to remove any suspicion of undue influence or contact with a foreign national.

Applicant's attorney represented to the Court, that immediately upon the conclusion of the hearing in this matter, he would be placing this letter and the enclosed cashier's check into the United States mail to be sent to the Ic.

Current Status of Iraq

I take administrative notice of the following facts regarding Iraq. In 2003, a United States led coalition removed Saddam Hussein and his regime from power. In March 2006, Iraq's new government took office after being freely elected by the Iraqi people. However, violence, which has been perpetrated by Al Quaeda terrorists, Sunni insurgents, and Shiite militias and death squads, continues to engulf the country, including terrorism against U.S. citizens. Finally, there are United States substantiated reports of human rights abuses including a climate of violence, a misappropriation of official authority, arbitrary deprivation of life and torture, and other cruel and inhuman treatment or punishment.

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.

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.

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).

Analysis

Guideline B, Foreign Influence

AG ¶ 6 expresses the security concern regarding foreign influence:

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.

AG ¶ 7 describes conditions that could raise a security concern and may be disqualifying (DC). The one that could be applicable in this case is (a) contact with a foreign family member, business or professional associate, friend, or other person 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. Applicant's business contact with the Ic, who is a citizen of Iraq, but now resides in the United States, make DC (a) a concern to the Government.

AG ¶ 8 provides conditions that could mitigate security concerns (MC):

(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.

I find that MC (b) is applicable to this Applicant and strongly controlling for the following reasons: Applicant is a natural born United States citizen, who served his country honorably in the United States military for 28 years. His son now serves as a Captain in the United States Army. Applicant formed a United States business, with the intention to do business in the United States. His business relationship with the Ic, who was an investor only in Applicant's company, had ended in 2006, and there were no additional financial requirements or entanglements, once the company was dissolved. However, although not legally or morally obligated to do so, Applicant has returned the Ic's \$30,000 investment, in an attempt to eliminate the appearance of any continued business entanglement. Finally, the Ic and his family are now legal residents of the United States. I therefore, conclude Guideline B 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 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. Based on all of the reasons cited above as to why MC (b) applies, I also find that the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance under the whole person concept. For all these reasons, I conclude Applicant mitigated the security concerns.

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 B: FOR APPLICANT

Subparagraph 1.a: For Applicant

Conclusion

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

Martin H. Mogul
Administrative Judge