



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 08-08654
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Alison O'Connell, Esquire, Department Counsel
For Applicant: *Pro se*

November 10, 2009

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant submitted her Security Clearance Application (SF 86) on May 22, 2008. On April 21, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny her application, citing security concerns under Guidelines B (Foreign Influence) and C (Foreign Preference). 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 acknowledged receipt of the SOR on June 4, 2009; answered it on the same day; and requested a hearing before an administrative judge. The case was assigned to me on August 5, 2009. DOHA issued a notice of hearing on August 27, 2009. I convened the hearing as scheduled on October 1, 2009. Government Exhibits (GE) 1 through 4 were admitted in evidence without objection. Applicant testified on her

own behalf. Applicant submitted Exhibits (AE) A-C, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on October 7, 2008. Eligibility for access to classified information is granted.

Procedural and Evidentiary Rulings

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to Thailand (Tr. 20). The request and the attached documents are included in the record as Hearing Exhibit I. The facts administratively noticed are set out in the Findings of Facts, below.

Findings of Fact

In her answer to the SOR, Applicant admitted the factual allegation in ¶ 1.a. She denied the factual allegation in ¶ 2.a. Her admissions in her answer to the SOR and at the hearing are incorporated in my findings of fact. I make the following findings:

Applicant is a 56-year-old employee of a defense contractor. She is regarded by her employer as a valuable asset to the company as a program analyst. She has worked in the computer programming field in the United States since 2000. Applicant is involved in certain projects that require a security clearance (Tr. 37). She has been employed with her current employer since May 2008 (GE 1).

Applicant was born in Thailand and moved to the United States in 1989 (Tr. 31). She graduated from high school and attended university in Thailand. In 1977, she obtained her degree in computer science. After college, she worked in her area of expertise in Thailand. Applicant pursued another degree in computer programming in the United States. She received a degree in 2001. She is married with no children (Tr. 54). She became a naturalized U.S. citizen in August 2000. Her husband is a naturalized American citizen. He became a U.S. citizen in 1992. All the members of his family live in the United States. He is from Laos (Tr. 48).

Applicant's parents are citizens and residents of Thailand (Tr. 37). They are both retired. Her father owned a grocery store and her mother worked in the family store. They are both more than 80 years old (Tr. 38). Applicant talks to her parents on a monthly basis. She visited them in 1998. Applicant has a brother who lives in Thailand. She emails him once a month (Tr.41). Applicant also has two sisters who live in Thailand. Applicant's family has no knowledge that Applicant is seeking a security clearance (GE 3).

In June 2008, Applicant told a security investigator that she would visit her family in Thailand once every two or three years (GE 3). However, Applicant's last visit to Thailand was in 1998. She cancelled her planned visit in 2006, because she became unemployed (Tr. 46). Since she started her new job, she has not had time to visit.

Applicant's Thai passport, issued on August 29, 1996, has been cancelled (AE C). She has not renewed her Thai passport. She will use her U.S. passport if she visits Thailand in the future. Initially, she believed that she would need a Thai passport to visit her family for extended periods of time. She learned that she can use her U.S. passport. She has no need for a Thai passport (Tr. 52). As of 2001, her Thai passport was cancelled.

Applicant was candid and straightforward at the hearing. She and her husband own a condominium in the United States valued at approximately \$90,000 (Tr. 58). Applicant does not receive any benefits from Thailand. Applicant credibly explained that when she was interviewed in 2008, she did not understand when asked about "allegiance." She misunderstood the question that was asked of her. She acknowledged that she struggles with the English language and its pronunciation (Tr. 32). She later asked her supervisor about the word "allegiance" and the SOR allegation that was at issue concerning Thailand. Her supervisor helped Applicant understand the meaning of the word (Tr. 29). When interviewed, Applicant believed that since she was a dual citizen of the United States and Thailand, she could still have a loyalty to her culture (Tr. 28). At the hearing, she was clear that she had no loyalty to the Thai government. She considers herself a loyal American citizen. When questioned, she replied that she was willing to renounce her Thai citizenship.

I have taken administrative notice that Thailand is a constitutional monarchy composed of a King, Prime Minister and bicameral Legislature. In 2006, a non-violent coup by top military officers, overthrew the government, repealed the constitution, and abolished both houses of Parliament. Before the military coup, Thailand enjoyed good relations and military alliances with the U.S. and cooperated with the United States on a wide variety of diplomatic and foreign policy issues. After the coup, the United States suspended funding for several military assistance programs, military education programs and joint counterterrorism programs. In December 2007, free and fair multi-party elections restored democratic governance. However, since this election, two subsequent Prime Ministers were forced to resign because of decisions by Thailand's court system. After political protests from May through December 2008, resulting in eight deaths and 700 injuries, a revised coalition came to power.

In addition to the political turmoil since the 2006 coup, Thailand has endured a persistent separatist insurgency in its majority Muslim southern provinces. Sectarian violence between insurgents and security forces in Thailand's majority Muslim provinces has left over 3,600 people dead since 2004. Since 2007, attacks have become more sophisticated and coordinated. This insurgency has resulted in numerous human rights abuses, including killings, committed by ethnic Malay Muslim insurgents, Buddhist defense volunteers and government security forces.

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . .

. control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon an applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk an 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.

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of an applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of an applicant. It is merely an indication an applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of an applicant that may disqualify an applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance

determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline B (Foreign Influence)

The SOR alleges Applicant’s mother and father are citizens and residents of Thailand (SOR ¶ 1.a). The security concern relating to Guideline B is set out in AG ¶ 6 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.

A disqualifying condition may be raised by “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.” AG ¶ 7(a). A disqualifying condition also may be raised by “connections to a foreign person, group, government, or country that creates 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(b). Applicant’ parents are citizens and residents of Thailand. She contacts her parents approximately once a month. She last visited them in 1998. Applicant hopes to visit them in the future. Based on this evidence, AG ¶¶ 7(a), and (b) are raised.

Since the government produced evidence to raise the disqualifying condition in AG ¶¶ 7(a), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns under this guideline can be mitigated by showing that “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.” AG ¶ 8(a). The totality of an applicant’s family ties to a foreign country as well

as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003). Similarly, 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.” Applicant has contacts with family members living in Thailand so these two mitigating conditions cannot be fully applied.

Guideline B is not limited to countries hostile to the United States. “The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States.” ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. See ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Nevertheless, the nature of a nation’s government, its relationship with the United States and its human rights record are relevant in assessing the likelihood that an applicant’s family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence operations against the United States.

Security concerns under this guideline also can be mitigated by showing “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 United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest.” Applicant lives with her husband in the U.S. AG ¶ 8(b). Applicant has lived in the United States since 1989. She is a naturalized American citizen. Her husband is a naturalized U.S. citizen. She visited Thailand in 1998, but has not returned. She has her family and property in the United States. Her career is in the United States. Applicant’s testimony at the hearing showed her willingness to sever her ties to Thailand. As such, her testimony supported this mitigating condition.

Guideline C (Foreign Preference)

The SOR alleges Applicant stated in a 2008 interview that she holds allegiance toward Thailand (¶ 2.a). The concern under this guideline is set out in AG ¶ 9 as follows: “When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.”

Dual citizenship standing alone is not sufficient to warrant an adverse security clearance decision. ISCR Case No. 99-0454 at 5, 2000 WL 1805219 (App. Bd. Oct. 17,

2000). Under Guideline C, “the issue is not whether an applicant is a dual national, but rather whether an applicant shows a preference for a foreign country through actions.” ISCR Case No. 98-0252 at 5 (App. Bd. Sep 15, 1999).

A disqualifying condition may arise from “exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen,” including but not limited to “possession of a current foreign passport.” AG ¶ 10(a)(1). Applicant possessed a Thai passport in 1996. AG ¶ 10(a)(1) is not established because Applicant cancelled the passport in 2001. Thus, Applicant does not have a “current foreign passport.”

AG 10(d) “any statement or action that shows allegiance to a country other than the United States: for example, declaration of intent to renounce United States citizenship; renunciation of United States citizenship.” Applicant responded in a 2008 interview that she is proud of her “roots” and has an allegiance to Thailand.

The burden shifted to Applicant to rebut, explain, mitigate, or extenuate the facts. Several mitigating conditions are potentially relevant.

Security concerns under this guideline may be mitigated by evidence that “dual citizenship is based solely on parents’ citizenship or birth in a foreign country.” AG ¶ 11(a). This mitigating condition applies.

Security concerns under this guideline also may be mitigated if “the individual has expressed a willingness to renounce dual citizenship.” Her testimony was sincere and credible on this issue. AG ¶ 11(e) “the passport has been destroyed, surrendered to the cognizant security authority, or otherwise is invalidated” applies because the passport was surrendered or invalidated by the Consulate.

Applicant does not possess a Thai passport. She has no intention of obtaining another one. She admitted that she told an investigator that she has “allegiance” to Thailand. She did not understand the nature and extent of the word. She later asked her supervisor to explain the word to her. Applicant loves her culture, but that does not mean that she is not a loyal U.S. citizen. She explained that her first loyalty is to the United States. She is willing to renounce her Thai citizenship. Applicant has mitigated the foreign preference concerns under the above mitigating conditions.

Whole Person Concept

Under the whole person concept, an 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. An 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept. Some of the factors in AG ¶ 2(a) were addressed above, but some warrant additional comment.

There are significant factors supporting the approval of Applicant's access to classified information. Applicant is a mature, well-educated, and intelligent adult. She loves her family and is proud of her culture and heritage. She is a naturalized U.S. citizen who has lived in the United States since 1989. Her spouse, born in Laos, is also a naturalized U.S. citizen. She and her husband have a home in the United States. Her husband's immediate family live in the United States. I do not believe she is a threat to the United States, but rather an honest, hardworking woman.

Applicant was born in Thailand and is a dual citizen because of her birth in Thailand. She had a Thai passport which is now cancelled. Her elderly parents are retired and live in Thailand. She has not seen them since 1998. She is willing to renounce her Thai citizenship. She misunderstood the investigator's question to her in 2008 concerning allegiance to Thailand.

After weighing the disqualifying and mitigating conditions under Guidelines B and C, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on foreign influence and foreign preference. Accordingly, I conclude she has carried her burden of showing that it is clearly consistent with the national interest to grant her eligibility for access to classified information.

Formal Findings

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25 of Enclosure 3:

Paragraph 1, Foreign Influence:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Foreign Preference:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

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

Noreen A. Lynch
Administrative Judge