



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 09-00011
SSN: -----)
)
Applicant for Security Clearance)

Appearances

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

October 29, 2010

Decision

MOGUL, Martin H., Administrative Judge:

On October 29, 2009, 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.

On December 28, 2009, Applicant replied to the SOR (RSOR) in writing, and he requested a hearing before an Administrative Judge. I received the case assignment on February 8, 2010. DOHA issued a notice of hearing on June 4, 2010, and I convened the hearing as scheduled on June 21, 2010, by video teleconference. Because the teleconference hearing could not be concluded on that date, it was continued until June 30, 2010, when the hearing was concluded by video teleconference. The Government offered Exhibits 1 through 5, which were received and admitted without objection.

Applicant testified on his own behalf and submitted Exhibits A and B, at the time of hearing, which were also admitted without objection. DOHA received the transcript of the hearing (Tr) in two parts, for the two days of hearing, on July 9, 2010. I granted Applicant's request to keep the record open until July 12, 2010, to submit additional documents, and Department Counsel had until July 20, 2010 to indicate whether or not he objected to any of the documents. Applicant timely submitted two additional documents, which have been identified and entered into evidence, collectively without objection as Exhibit C. Based upon a review of the case file, pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is granted.

Request for Administrative Notice

Department Counsel requested that I take administrative notice of certain facts relating to the country of Japan. The request and the attached documents were admitted into evidence as Exhibit 5. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

In his RSOR, Applicant admitted that all of the SOR factual allegations 1.a. through 1.c., are correct, but denied that these allegations should be a consideration for a denial of his security clearance. The admitted allegations are incorporated herein as findings of fact.

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

Applicant is 29 years old. He has been married since 2003. His wife was born in Japan. Applicant and his wife have one son with another child on the way. Applicant served in the United States Marine Corps from 1999 to 2003. It was while he was serving as a Marine that he met his wife.

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

(Guideline B - Foreign Influence)

The SOR lists three allegations, regarding Foreign Influence, under Adjudicative Guideline B, which will be reviewed in the same order as they were listed on the SOR. As stated above, Applicant has admitted all of the allegations listed:

1.a. Applicant's spouse is a resident and citizen of Japan. Applicant testified that at the time he was in the process of marrying his wife, he was a member of the United States Marine Corps, and he followed all of the proper procedures before he married her. (Tr at 38-41.) Exhibit C includes a letter from Applicant's Commanding General to

him, dated April 25, 2003, indicating that Applicant's request to marry his wife was granted. The documentation also established that Applicant followed all of the requirements for the marriage, including attending a Pre-Marital Counseling Seminar.

1.b. Applicant's father-in-law, mother-in-law, and sister-in-law are citizens and residents of Japan. Applicant testified that his father in law is an electrician, his mother-in-law is not employed, and his sister-in-law is an office worker for a train station. To his knowledge none of them works in any capacity for the Japanese Government. He has only seen his father-in-law and mother-in-law "a couple of times." His sister-in-law comes to visit their home every other year. Applicant does not communicate with any of them by telephone. His wife speaks to her sister regularly and to her parents infrequently. He indicated that they speak only Japanese and his Japanese is extremely limited. (Tr at 45-47.)

1.c. Applicant's spouse is an active member in the Japanese military. Applicant testified that his wife at the time of hearing was a liaison for the Sergeant Major of her unit in the Japanese Self Defense Force. Her position involved interpreting documents between Japanese and English in coordination between the Japanese and United States military.

Applicant averred that his wife was in the process of separating from the military, and her last day would be June 30, 2010. She served for 16 years, and once her termination is finalized, she will have no future obligation to the Japanese military. It is her plan after her separation to stay at their home for at least a year to take care of their two children. (Tr at 41-43, 51-53, 60-61.) Exhibit C included an "Official Notification of Appointment/Dismissal," officially announcing that Applicant's wife's resignation from the Japanese military was approved on June 30, 2010.

At the hearing, Applicant reiterated that he started living in Japan during his enlistment in the Marine Corps, and after his separation he remained in Japan and worked for other companies there. (Tr at 48-50.)

During the second day of the hearing, Applicant testified that all of the members of his immediate family, including his parents, two sisters and one brother are all United States citizens and residents. He is planning to apply for a United States Green card for his wife, now that she is no longer in the Japanese military. (Tr(2) at 16-17.)

Mitigation

Applicant submitted seven very positive character letters in Exhibit A, from individuals, six of whom know and have known Applicant in a variety of employment situations and one who knew him as a Boy Scout. He was described by his fellow co-worker and supervisor who has known him for seven years, as "an American thru and thru [*sic*] and a United States patriot without a doubt." Another supervisor for whom Applicant has worked for seven years wrote that Applicant "has shown nothing but the highest level of trustworthiness to the United States Government." Additionally, he was

described as “faithful and loyal to the United States” and a “trustworthy and reliable individual.”

Applicant also submitted several documents in Exhibit B, establishing that he had earned the United States Marine Corps Meritorious Mast in November 2000, two Certificates of Commendation in September 2001 and March 2003, the Navy and Marine Corps Achievement Medal in January 2002, and the Certificate of Good Conduct in September 2002. Finally, he submitted DD Form 214 and his DD 256, establishing that on September 21, 2006, Applicant received an Honorable Discharge from the United States Marine Corps.

Current Status of Japan

I take administrative notice of the following facts regarding Japan. Japan has a constitutional monarchy with a parliamentary government. In general, Japan has good relations with the United States, has a military alliance with the United States, hosts some United States military forces, and has cooperated with the United States on a wide variety of diplomatic, foreign policy, and economic issues.

In recent years, the Japanese public has shown increased support for Japan’s Self Defense Forces, and Japan had been moving toward a more independent self defense posture.

In 2000, Japan was listed as among the most active collectors of economic and proprietary information based upon the survey by the National Counterintelligence Executive of selected Fortune 500 companies. In 2005 and 2007, Japan ranked high on the National Counterintelligence Executive’s list of foreign countries requesting the most visits to United States military facilities. High volume of such visits creates opportunities for foreign intelligence efforts against sensitive United States technologies.

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. Those that could be applicable in this case include the following: AG ¶ 7(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 wife, who is a citizen and resident of Japan, and who, until recently, was serving in a foreign military, make AG ¶ 7(a) a concern to the Government. I find that 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 . . . and the individual’s desire to help a foreign person, group, or country by providing that information” is also applicable in this case.

AG ¶ 8 provides conditions that could mitigate security concerns. I find that 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,” is applicable to this Applicant and controlling for the following reasons:

Applicant is a U.S. born citizen, who served honorably in the United States Marine Corps for four years. Appellant’s wife has resigned her position in the Japanese military. His contact with his in-laws is infrequent, and none of them has any involvement with the Japanese Government. His immediate family, including his parents, two sisters and one brother are solely U.S. born citizens and residents. Since his separation from the Marine Corps, Applicant has only been employed by United States companies. Finally, I considered the positive character letters Applicant’s behalf and his honorable record, while serving as a member of the United States Marine Corps. 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) 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 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 under Guideline B. Based on all of the reasons cited above as to why Mitigating Condition AG ¶ 8(b) applies, I find that the record evidence leaves me with no significant 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 has 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

Subparagraphs 1.a through 1.c.: For Applicant

Conclusion

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

Martin H. Mogul
Administrative Judge