



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 09-02782
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: *Pro se*

July 12, 2010

Decision

ROSS, Wilford H., Administrative Judge:

The Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP), on September 12, 2006. (Government Exhibit 1.) On July 30, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline B (Foreign Influence) concerning 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 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.

The Applicant answered the SOR in writing on August 12, 2009, and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on August 25, 2009. This case was assigned to me on September 2, 2009. DOHA issued a notice of hearing on September 14, 2009, and I convened the hearing as scheduled on October 22, 2009. The Government offered Government Exhibits 1

through 3, which were received without objection. The Applicant testified on his own behalf, called one additional witness, and submitted Applicant Exhibits A through J, which were also received without objection. DOHA received the transcript of the hearing, and the record closed, on November 3, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Procedural Ruling

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to Taiwan. (Transcript at 16-23.) The request and the allied documents were not admitted into evidence, but are included in the record. The facts administratively noticed are limited to matters of general knowledge and not subject to reasonable dispute. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

The Applicant is 61, married, and has a Doctorate degree. He is employed by a Defense contractor and seeks to retain a security clearance in connection with his employment in the defense industry. In his Answers to the SOR, Applicant admitted all the allegations in the SOR, with explanations in support of his request for access to classified information.

Paragraph 1 (Guideline B - Foreign Influence)

The Government alleges in this paragraph that 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.

Applicant was born in China in 1948. His family emigrated to Taiwan after the defeat of Nationalist Chinese forces by the Communists. His father has passed away in 2002.

Applicant came to the United States in 1971 to continue his education. He obtained his permanent resident status in 1978. Applicant became a naturalized American citizen in 1983. He has worked in the defense industry continuously since 1978. He has held a security clearance for that entire period.

Applicant submits that he has long-standing relationships and loyalties to the United States. His wife is also a naturalized American citizen. In fact, Applicant and his wife were naturalized on the same day in 1983. (Government Exhibit 1 at Sections 8

and 15.) They have two native born American children, who are successful people here in the United States. (Transcript at 60-64.) Finally, his mother and two sisters are also American citizens. (Transcript at 42-45, 90-94; Applicant's Exhibits E and F.)

Applicant has two brothers that continue to live in Taiwan. They are both younger than the Applicant. The next oldest brother to Applicant is 52 years old. He works for an entity connected to the Taiwanese government in a specialized field. Applicant has not spoken to this brother in 30 years. Applicant has no feelings of love or affinity towards him. (Transcript at 43-44, 52-55; Applicant Exhibit A at 4-5.)

Applicant's youngest brother is 50 years old. Applicant has not seen this brother for over 15 years. He also has a doctorate and works as a researcher in a medical related field. The organization he works for is also connected to the Taiwanese government. (Transcript at 43-44, 55-57; Applicant Exhibit A at 2-3.)

He is fully integrated into American society, and appreciates the life that he has here. (Transcript at 46.) Applicant's entire professional career has been spent in the defense industry. He is acknowledged to be the foremost expert in his field, and his direct contributions to the defense of the United States have been many and varied. His career is filled with awards and recognitions from his employers and the federal government. (Transcript at 73-77; Applicant's Exhibits D through H.)

Applicant's supervisor testified for him. The witness has known the Applicant since 1979, and been his supervisor since 1997. According to the witness, Applicant is extremely trustworthy and dependable. He follows all the security rules at all times and in all situations. The witness strongly supports the Applicant's eligibility for a security clearance. (Transcript at 31-41.) (See Applicant Exhibits B and C.)

Applicant is knowledgeable about the security requirements connected to his job in the defense industry, and the record shows that he fulfills them. (Transcript at 70-72, 77-78; Applicant Exhibit I.)

Applicant has considerable assets in the United States. As of the date the record closed, his net assets amounted to approximately \$2,000,000. (Transcript at 64-68.) He has no assets in Taiwan, and does not stand to inherit any property from Taiwan. (Transcript at 58.)

Applicant has not traveled to Taiwan in 30 years. He travels very little, and has not been outside the United States in 13 years. (Transcript at 15-16, 78-79; Applicant Exhibit J.)

Applicant has family ties to Taiwan. It is appropriate to discuss the situation in Taiwan at this time.¹ Taiwan is a multi-party democracy with a population of about 23

¹All of the following statements are supported by the documents submitted by the Department Counsel in support of his request for administrative notice and its attachments.

million. It is one of the most active collectors of sensitive United States information and technology. Numerous individuals and companies have been subjected to civil penalties or prosecuted for illegally exporting, or attempting to illegally export, sensitive United States technology to Taiwan. One United States government official was recently convicted of crimes relating to his improper relationship with a Taiwanese intelligence official.

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the 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 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 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 has family members in Taiwan (Guideline B). The Applicant, on the other hand, has successfully mitigated the Government's case.

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 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.

In this case, Applicant has two brothers living in Taiwan. They are both professionals, with advanced degrees, who work for entities connected to the Taiwanese government. However, as stated earlier, Applicant has had no contact with these two people for 15 and 30 years, respectively.

Based on the evidence the Government has presented, the following Disqualifying Conditions arguably 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; and

(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.

The Applicant has provided compelling evidence to show that the following Mitigating Conditions also apply to this particular case, given his particular background:

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.;

(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;

(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; 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.

Applicant has shown over an extensive period of years his connections to the United States and his desire not only to be a good citizen, but also a security aware citizen. Applicant submitted documentation showing that he is scrupulously aware of the requirement to report contact with foreign citizens, and does so. (Applicant Exhibit I.)

The Applicant has extensive financial ties to the United States. In addition, he is a deeply respected member of the defense industry, who makes a substantial income. Under the particular facts of this case, the Applicant has shown that he has deep and longstanding loyalties in the United States. Based on the facts of this case, including a consideration of the positions of the Applicant's brothers, and the espionage activities of

the Taiwanese government, I find that the Applicant “can be expected to resolve any conflict of interest in favor of the U.S. interest.”

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.

“[A] Judge is not limited to Adjudicative Guidelines mitigating conditions when deciding whether an applicant has demonstrated extenuation or mitigation.”² The application of the Directive’s General Factors to the Applicant’s foreign connections, specifically relevant General Factor (8), also justifies granting the Applicant a security clearance. The totality of this Applicant’s conduct and circumstances, as set forth at length above, including the virtually non-existent potential for exploitation, shows that he warrants a favorable finding under the whole-person standard.³

The record shows that the Applicant has been a patriotic American citizen for many years, is a successful and respected member of the defense industry, and has substantial financial assets in the United States. His two brothers live in Taiwan, but the evidence shows that they are virtually strangers to the Applicant, and he would successfully withstand any hypothetical attempt at coercion. Applicant is alert to the security concerns presented by his particular circumstances and the responsibilities incumbent upon him. Applicant testified about his pride in being an American citizen and a member of the defense industry. Using the whole-person standard, Applicant has

²ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006).

³I conclude that the whole-person analysis weighs heavily toward approval of the Applicant’s security clearance. I find that the whole-person analysis standing alone is sufficient to support approval of a security clearance in this case independently of my decision under Guideline B.

mitigated the security significance of his foreign connections and is eligible for a security clearance.⁴

On balance, it is concluded that Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 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 B: **FOR THE APPLICANT**

Subparagraphs 1.a. through 1.d.: **For the 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.

WILFORD H. ROSS
Administrative Judge

⁴ “[Matters], such as evidence of an applicant’s personal loyalties, the nature and extent of an applicant’s family ties to the U.S. relative to his ties to a foreign country, his or her social ties within the U.S., and many others raised by the facts of a given case can properly be factored in to a judge’s evaluation of an applicant’s worthiness for a security clearance.” ISCR Case No. 04-11414 at 4 (App. Bd. Mar. 5, 2007). (Citations omitted.)