



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 09-04480
)
)
Applicant for Security Clearance)

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: *Pro Se*

February 24, 2010

Decision

DAM, Shari, Administrative Judge:

Based upon a review of the record evidence as a whole, eligibility for access to classified information is granted.

On April 13, 2009, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On September 17, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline E (Personal Conduct). 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 answered the SOR on or about October 19, 2009, and requested a hearing. DOHA assigned the case to me on November 3, 2009, and issued a Notice of Hearing the same day. The case was heard on November 19, 2009, as scheduled. Department Counsel offered Government Exhibits (GE) 1 through 7 in evidence without objection. Applicant testified and offered Applicant Exhibits (AE) A through C in

evidence without objection. DOHA received the hearing transcript (Tr.) on December 4, 2009.

Findings of Fact

Applicant admitted the five allegations contained in Paragraph 1 of the SOR under Guideline E.

Applicant is 55 years old and married to his second wife. He was born in the northern section of Iraq and graduated from high school in 1972. From October 1973 to July 1977, he was conscripted into the Iraqi army. After finishing the military term, he decided to leave Iraq because of Saddam Hussein's regime. He went to Country One until 1980 when he was accepted as an immigrant to Country Two. He left Country Two in May 1982 and moved to the United States to live with and work for his brother. (GE 1, 2; 5.) From August 1982 until June 1983, he had no legal status with Country Two and was in the United States illegally, as he had overstayed his visa. (GE 4.) While here, he learned from the U.S. Office of Immigration that this government was preparing to deport him.¹ (*Id.*)

In early spring 1983, through his family, Applicant met an American woman, who had two children. After relating his immigration problems to her, they agreed to marry so he could avoid deportation. (Tr. 39.) In June 1983, they went to another state and got "drunk and married." (GE 5 at 13.) He became a permanent resident shortly thereafter. (Tr. 20; GE 5 at 4.) He admitted that initially their marriage was a "business relationship," but over time they became a family and he grew to love her. (Tr. 59.) Although he offered to give her money as part of the marriage arrangement, he never did. (Tr. 40.) They lived together as man and wife until June 1985. While married, he supported her children. He has not had contact with her since 1985. (GE 1.) He became a U.S. citizen in April 1992.

In May 1993, Applicant married his current wife, who was born in Iraq. He sponsored her into the United States and she became a naturalized U.S. citizen in 2000. (GE 1; Tr. 42-43.) They have no children.

From July 1990 to May 2004, Applicant worked as an auto mechanic. He then obtained a position with a defense contractor, as a linguist for the U.S. Army and deployed to Iraq, where he was in combat multiple times. (GE 4 at 5.) He speaks English, Arabic, and Greek. He returned to the United States in December 2005 after learning that his mother was ill. He was unemployed for six months and then resumed work as a linguist, returning to Iraq in June 2006.

In mid-May 2007, Applicant's employer terminated him after he was involved in an alcohol-related incident on base, in violation of General Order Number One pertinent

¹It is not clear in the record whether Applicant was to be deported to Country One or Iraq.

to consumption of alcohol in a combat zone. (GE 7.) When Applicant came home one evening, he discovered that his roommate and friends were consuming alcohol in their trailer. After the military police arrived, everyone in the trailer was arrested and taken to the military police station. (GE 5, 7; Tr. 32.) Later, they were sent home to the United States. In an interview with a government investigator, he admitted that he had a drink of alcohol. (GE 5 at 11.) On May 21, 2007, he received an Installation Bar Order, barring him from working in Iraq for one year. (GE 6.) Applicant appealed the Order, and on May 25, 2007, the commanding officer lifted that Order and allowed him to return to work. (Tr. 33; AE C.) He subsequently worked for another defense contractor as an Iraqi advisor from June 2007 until February 2008, when he returned home because he no longer held a security clearance. (Tr. 35.) He was unemployed until April 2009, when he accepted his current position as an Army linguist for which he needs a security clearance. (GE 1, 4.) While deployed, he worked in a volatile area of Iraq. He helped the U.S. Army form an Iraqi ground force. (Tr. 22.)

The SOR alleged that Applicant married an American woman in 1983 to avoid deportation and that he failed to disclose the circumstances around that marriage when he completed a Counterintelligence and Security Screening Questionnaire (CIS) in May 2004 (GE 2), another one in June 2006 (GE 3), and during an investigation by the Immigration and Naturalization Service (INS) after the marriage.

Applicant admitted that the circumstances surrounding his marriage are not contained in the two forms, but he denied that he withheld information from the government. Applicant explained that he did not personally input the answers into the two CIS forms. Rather, he discussed his answers with government investigators on both occasions, who then filled in the forms. (Tr. 57.) He did not sign the forms or review them at the end of the interview.² (Tr. 57.) He asserted that he discussed the circumstances surrounding his first marriage and his desire to avoid deportation with the investigators. (Tr. 58.) He thinks that the investigator, who interviewed him for the second CIS in 2006, relied on information included in the 2004 CIS. (Tr. 52.) The first interview took a couple hours; the second interview took about twenty minutes. (Tr. 51-52.) He disclosed the circumstances surrounding his first marriage in the CIS he completed in April 2009. (GE 4.) He did not try to hide any information from the government. (Tr. 53; 58.) He asserted, "I never have, sir. I never will. I mean I'm not ashamed, or I'm not scared." (Tr. 53.) He denied that he intentionally failed to disclose the "business arrangement" to INS during an interview. (Tr. 41.) He hired a lawyer to assist him in resolving the situation with the INS.³ (Tr. 40.)

Applicant submitted eight Certificates of Appreciation for his work in Iraq. (AE A) Applicant received the Commander's Award for Civilian Service for his work from July 6, 2006, to July 1, 2007, as the senior interpreter for Iraqi ground forces. According to the commander, Applicant displayed "unquestionable courage and dedication to duty. In

²Question 6.2 of the May 2004 CIS contains an error. Applicant's former spouse did not work at a casino in Las Vegas as recorded on GE 2. She worked in a restaurant in her home state. (Tr. 44.)

³There is no evidence that the INS took any action after interviewing Applicant.

addition to his bravery, [Applicant's] eloquent style, perfect Arabic, and professionalism set him far above his contemporaries." (AE A at 9.) He also received Certificates of Appreciation on December 2005, June 16, 2006, and December 26, 2006. (AE A.)

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 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.

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.

Directive ¶ E3.1.14 requires the government to present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable clearance decision." 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."

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.

Analysis

Guideline E, Personal Conduct

The security concerns pertaining to the personal conduct guideline are 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.

The government alleged in SOR ¶¶ 1.b, 1.c, and 1.d, that Applicant withheld information about the underlying reasons for his first marriage. Although Applicant admitted those allegations in his Answer, he denied that he intentionally falsified information to the government while testifying.

When a falsification allegation is controverted or denied, as in this case, the Government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. (See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

Based on the record evidence, which includes the fact that English is not Applicant's native language, that the CIS forms were not verified, that one of those forms contains a mistake, that Applicant disclosed the circumstances surrounding his first marriage in his April 2007 interview and in the April 2009 CIS, and that he was candid and not evasive during this hearing, his explanations and testimony are credible. Hence, said allegations are found in his favor.

SOR ¶ 1.a alleged that Applicant married a woman for the sole purpose of avoiding deportation. SOR ¶ 1.d alleged that he violated a General Order regarding the use of alcohol in a combat area while he was deployed to Iraq.

AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying as to those allegations:

(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; and

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

In 1983, Applicant married an American woman in order to avoid deportation. That conduct could create a vulnerability to exploitation, in that it may affect his community standing, if known. The evidence is sufficient to establish AG ¶ 16(e). Applicant was involved in a situation that violated a written regulation regarding the use of alcohol while on base in Iraq. AG ¶ 16(f) is established. The evidence supporting these two disqualifying conditions requires a balancing of resulting security concerns with any potentially mitigating matters, and shifts the burden to Applicant rebut, explain, extenuate, or mitigate those concerns.

AG ¶ 17 includes one condition that could mitigate the two security concerns arising under this guideline:

(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.

As to the allegation contained in SOR ¶ 1.a, Applicant candidly admits that he married a woman to avoid deportation in 1983. He also acknowledged that they subsequently lived as husband and wife, and that he supported her and her children. Although his past conduct cannot be condoned, it occurred more than twenty-five years ago and under circumstances unlikely to recur, as he became a U.S. citizen in 1992 and married his current wife in 1993. At this time, it appears that the circumstances surrounding that marriage are well known to his family. AG ¶ 17(c) is established.

Within a few days of issuing an Installation Bar Order in May 2007 against Applicant, the Commander lifted the Order and allowed Applicant to return to work in Iraq. Obviously, the offense was minor and unique, and does not cast doubt on Applicant's reliability or good judgment. AG ¶ 17(c) is established as to the allegation contained in SOR ¶ 1.e.

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). They include the following:

(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.

According to AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must include 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. Applicant is a 55-year-old man, who was born in Iraq. In 1983, he married an American woman to avoid deportation and remain in the United States with his family. For the next two years, he and the woman became a family. He does not deny the questionable circumstances surrounding his first marriage. He has lived in the United States for the past 25 years, remarried, and held various jobs. In May 2004, he became a linguist for the U.S. Army, serving in a hostile, high-risk area in Iraq. He presented impressive commendations from his command regarding his service and assistance to our troops. He has made significant contributions to our national security. He would like to return to Iraq and work with the Army.

Overall, the record evidence leaves me without questions as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under personal conduct.

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.e: For Applicant

Conclusion

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

SHARI DAM
Administrative Judge