



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 09-05160
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esquire, Department Counsel

For Applicant: *Pro se*

February 28, 2011

Decision

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigation Processing (e-QIP), on August 8, 2005. (Item 6.) On May 25, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline B (Foreign Influence). 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) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant submitted an Answer to the SOR on June 5, 2010, and requested that a decision be made without a hearing. (Item 5.) Department Counsel submitted a File of Relevant Material (FORM) to Applicant on August 5, 2010. The FORM contained eight Government documents, including a Motion to Amend the Statement of Reasons, dated August 3, 2010. Applicant received the FORM on September 2, 2010, and was given 30 days to submit any additional information. Applicant submitted additional information in

the form of a written statement (AR) on September 4, 2010. Department Counsel indicated that she had no objection to the AR, and it is admitted into the record. The case was assigned to me on September 23, 2010. Based upon a review of the written record eligibility for access to classified information is denied.

Procedural Ruling

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to the Islamic Republic of Pakistan. (FORM at Section IV.) The request and the attached documents were not admitted into evidence but were included in the record. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

Applicant is 54 and married. He is employed by a defense contractor, and seeks a security clearance in connection with his employment in the defense industry. Applicant admitted allegations 1.a. and 1.b. in the SOR. (Item 5.) Those admissions are deemed findings of fact. In his AR, while he did not specifically admit or deny allegations 2.a. or 2.b., his responses are deemed a denial. He further denied that his status or conduct shows that he is ineligible for a security clearance. Finally, Applicant also provided additional information to support his request for eligibility for a security clearance.

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 Applicant.

Applicant was born in Afghanistan. He came to the United States in 1991 and became a naturalized U.S. citizen in 2003. He has many in-laws who are citizens and residents of Pakistan. This includes his mother and father-in-law, as well as numerous brothers and sisters-in-law. One brother-in-law is a retired colonel in the Pakistani Army. Applicant is not close to this brother-in-law. According to Applicant, the last time he saw this person was in 1986. (Item 7 at 8.) On the other hand, as of September 2008, Applicant considered himself to be close to his parents-in-law, three of his sisters-in-law, and another brother-in-law. (Item 7 at 3-8.) In fact, Applicant considers this second brother-in-law to be his closest friend. (Item 8 at 17.)

In his AR at page 1 Applicant states:

I mention that in Oct 2005 to the CI (Counter-Intelligence) interview, and Afghan Pashtoon Tribe will never share any kind of information with their in-laws even if they are from their own country and their own tribe, because Pashtoon have their own culture and they are not friendly with their in-laws.

You can ask anybody that they are from Kandahar Afghanistan or around there. And they are not from my country or my tribe and I know that Pakistan is not one of our friendly country. I never called my in-laws in my life, but I can't stop my wife not to call her relatives or her parents, this is against her rights in USA.

Applicant has contacts with Pakistan. Accordingly, it is appropriate to discuss the current situation in Pakistan.¹ Pakistan is a parliamentary federal republic in South Asia. After September 11, 2001, Pakistan pledged its alliance with the U.S. in the Global War on Terror and made a commitment to eliminate terrorist camps on its territory. Despite these efforts, members of the Taliban are known to be operating inside Pakistani territory. Parts of Pakistan are viewed by the U.S. State Department as being terrorist safe havens. In addition, American citizens have been warned of the risks of traveling to Pakistan. The human rights situation in Pakistan remains poor. Major problems include extrajudicial killings, torture and disappearances.

Paragraph 2 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has made false statements to the Government during the clearance screening process, or otherwise engaged in conduct which shows poor judgment, unreliability or untrustworthiness. As stated above, Applicant is deemed to have denied the two allegations under this paragraph.

2.a. Applicant filled out a Security Clearance Application on August 8, 2005. In that Application he was required to answer Question 23., which asked, "Your Police Record: f. In the last 7 years, have you been arrested for, charged with or convicted of any offense(s) not listed in response to . . . [other subsections]?" He stated "No." This was a false answer to a relevant question concerning his criminal record. In September 2008 Applicant admitted during an interview that he had been arrested in a foreign country on September 11, 2001, for hitting an immigration official while with his sister-in-law. After diplomatic negotiations, Applicant was allowed to return to the United States. After returning to the United States, Applicant was charged in Federal court with Human Trafficking. In 2003 the charges were dismissed. (Item 7 at 11-12.)

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.

Applicant had been previously questioned in August 2007. During that interview, he discussed the arrest in a foreign country, but did not admit that he had been charged with a crime in the U.S. In addition, in response to a direct question about his “interactions or contacts with court systems in the U.S. or in other countries,” he stated that he had gone to court twice for traffic violations. Once again, he made no mention of the Federal court action in 2003. (Item 8 at 16.) In addition, there is a page of this exhibit entitled “Your Foreign Travel.” (Item 8 at 23.) This page, presumably in Applicant’s hand, makes no mention of his 2001 trip.

In his AR at page 2, presumably concerning this allegation, Applicant discusses a completely unrelated lawsuit regarding the fraudulent use by another person of his social security number.

2.b. The Government alleges in this subparagraph that Applicant intentionally created a fake U.S. Army contractor ID and presented this fake ID to an Army CI screener in August 2007.

Concerning this allegation Applicant states:

I admit that I had the copy of the CAC Card (Cat card) and I laminate that, but if I had any other purpose for the copy of the Cat Card or I knew copying the CAC card is against the law, why I will be showing the copy of the CAC card to the CI officer that I know who CI officer is.

Plus no body searched me and nobody asked me for that. I show the copy of CAC card to the CI officer and told her that I made this copy how it is?

She told me it is against the law. And I told her that I will never make that mistake again and I let (*sic*) the CAC card (ID) with her. (AR at 1.)

Mitigation

In his AR at pages 1-2 Applicant states:

I love USA because USA gave me and my whole family a new life and new hopes and I can do anything for it to keep USA safe and happy and the top country in the world, that is why I worked with Special Forces three and half years and mostly sleeping in the mountains to finish the terrorists and keep my country USA safe.

Policies

Security clearance decisions are not made in a vacuum. 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 to be used as appropriate 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. In addition, the administrative judge may also rely on his or her own common sense, as well as 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. Security clearance decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to 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 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 granting or 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.

Paragraph 1 (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.

The Applicant has family connections to Pakistan. He or his wife have substantial contacts with family members in Pakistan. One of these family members is a retired senior officer in the Pakistani military.

The following Disqualifying Conditions in AG ¶ 7 apply to this case based solely on the facts:

(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 following Mitigating Conditions in AG ¶ 8 also apply to this particular case, given his particular background:

(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.; and

(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.

Applicant has not proved that he is a conscientious and patriotic citizen, and member of the defense industry. He did not submit statements by family, friends or co-workers to show that his connections to the United States outweigh those to a foreign country. He also did not submit records of his service to show the nature of that service. Finally, by electing to have his case decided on a written record, I had no opportunity to observe his demeanor or hear his testimony.

Based on my analysis of the available information, which shows that he has close and continuing contact with his Pakistani relatives, the Applicant has not overcome the adverse inference of his family members' presence in Pakistan. Guideline B is found against the Applicant.

Paragraph 2 (Guideline E - Personal Conduct)

The security concern relating to the guideline for Personal Conduct is 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.

AG ¶ 16(a) states that it may be disqualifying where an Applicant engages in the "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities."

The record is clear that Applicant falsified his 2005 Security Clearance Application concerning the Federal charges that were laid against him for Human Trafficking. Indeed, it appears he also lied to Army Counter Intelligence investigators concerning the same topic in 2007. He submitted no evidence to explain or mitigate this allegation.

None of the Mitigating Conditions apply to this allegation. Subparagraph 2.a. is found against the Applicant.

The Applicant's conduct set forth under subparagraph 2.b., arguably brings into play disqualifying condition ¶ 16(d) under Guideline E:

credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

The following mitigating condition under Guideline E ¶ 17 applies to his conduct:

(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.

The particular facts of this case, including the Applicant's rational explanation, mitigates any security concerns for allegation 2.b. Accordingly, it is found for Applicant.

Because subparagraph 2.a. is found against the Applicant, Paragraph 2 of the SOR is found against 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. 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. 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. My Guideline B and E analysis is applicable to the whole-person analysis as well. Applicant failed to overcome the adverse inferences of his foreign influence and his falsification of a Government questionnaire. For those reasons, I cannot find that there is little or no "potential for pressure, coercion, exploitation, or duress" as set forth in AG ¶ 2(a)(8). Using the whole-person standard, the Applicant has not mitigated the security significance of his foreign influence and personal conduct and is not eligible for a security clearance.

On balance, it is concluded that the Applicant has not successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 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:	AGAINST THE APPLICANT
Subparagraph 1.a:	Against the Applicant
Subparagraph 1.b:	Against the Applicant
Paragraph 2, Guideline E:	AGAINST THE APPLICANT
Subparagraph 2.a:	Against the Applicant
Subparagraph 2.b:	For the Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

WILFORD H. ROSS
Administrative Judge