



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
) ISCR Case No. 10-10307
)
Applicant for Security Clearance)

Appearances

For Government: Marc G. Laverdiere, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

04/02/2012

Decision

RIVERA, Juan J., Administrative Judge:

While holding a security clearance, Applicant maintained numerous long-time friendships with foreign nationals. He contacted them frequently and travelled extensively to foreign countries to visit them. He placed himself in a position of vulnerability to be exploited. Additionally, he failed to timely file his 2006 and 2010 income tax returns, and to pay his income taxes. Clearance denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 29, 2010. On July 20, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) listing security concerns under Guideline B (Foreign Influence) and Guideline E (Personal Conduct).¹ Applicant answered the SOR

¹ DOHA acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (AG), implemented by the DOD on September 1, 2006.

on August 24, 2011, and requested a hearing before an administrative judge. On September 27, 2011, the case was assigned to another administrative judge who scheduled the hearing for December 6, 2011. The case was re-assigned to me on December 5, 2011, due to scheduling considerations.

At the hearing, the Government offered exhibits (GE) 1 through 9. Applicant testified, presented one witness, and submitted exhibits (AE) A through LL. I left the record open for Applicant to supplement the record. Post-hearing (PH), Applicant submitted PH AE AA through NN. All exhibits were made part of the record, without objections. DOHA received the hearing transcript (Tr.) on December 14, 2011.

Procedural Issue

Department Counsel moved to amend SOR ¶ 2.a by substituting (in the second line of the allegation) “January 29, 2010,” for “January 15, 2009,” and by substituting the number “19” for the number “20.” Applicant did not object and I granted the amendment as requested (Tr. 9-10)

Findings of Fact

Applicant admitted the factual allegations under SOR ¶¶ 1.a, 1.b, 2.b, 2.d, 2.f, and 2.g, with explanations. He denied the allegations under SOR ¶¶ 2.a, 2.c, and 2.e. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, and having observed Applicant’s demeanor and considered his testimony, I make the following additional findings of fact.

Applicant is a 38-year-old analyst employed by a defense contractor. He has never been married and he has no children. He completed a bachelor’s degree in 1996, and a master’s degree in 2002, both in East Asian Studies. He honorably served in the U.S. Army as a soldier (highest rank E-4) from October 1997 until August 1999, and as an officer (highest rank first lieutenant) from January 2002 until August 2004. He enlisted in the Army because he felt a strong obligation to serve his country. He received a medical disability discharge with severance pay.

Applicant received access to classified information while in the Army in 1997. As an officer, he held a secret clearance. After his discharge, Applicant worked for several government contractors and he held a top secret clearance. He was hired by his current employer in May 2009. He requires his security clearance to perform his job. Except for the SOR allegations, there is no evidence that he was involved in any prior incidents raising security concerns about his ability to protect classified information or to hold a security clearance.

From about 1997 to 2011, Applicant traveled frequently to many foreign countries including, but not limited to, the People’s Republic of China (China), Russia, Cambodia, Thailand, Malaysia, Indonesia, Singapore, Philippines, South Korea, Japan, and Vietnam. Most of his travel was “to visit with friends and tour the country.” (SCA)

Applicant used the Internet, and diverse social media, to stay in close contact with his extensive number of foreign national friends residing in the United States or in their foreign countries, and to establish new relationships. He would meet people online, establish a friendship with them, and then he would travel to the different foreign countries to visit them. Applicant sent nude pictures of himself over the Internet to online girlfriends in China, Thailand, and Brazil. He engaged in sexual intercourse in Thailand, the Philippines, and China with online friends. (Tr. 106-110) He also maintained correspondence with an Iranian national residing in the United States that he met online in 1998. (GE 2)

Applicant's foreign friendships date back to 1992, while he was in college. Applicant had foreign nationals as roommates, including: a Chinese-born person (who Applicant believes is now a Canadian citizen living in Singapore); a Mongolian national; and an Indian national. In June 2010, he had been sharing a room with a Thai citizen since March 2010. (GE 2)

In June 2008, Applicant met online a 17-year-old resident and citizen of China. They corresponded almost on a daily basis and became close friends. (SCA Section 28) In early 2009, they exchanged naked pictures of themselves over the Internet. She intended to attend college in the United States. Applicant convinced her to share an apartment with him while she was attending college. Her father gave Applicant \$1,000 as a deposit for the apartment Applicant was going to rent. In September 2009, she and her father came to the United States to meet with Applicant. Applicant rented an apartment for them to stay.

In September 2009, she obtained a restraining order against Applicant, alleging that he posed a substantial likelihood of immediate danger and abuse against her. Applicant repeatedly denied he was ever a threat to her or her family. Applicant informed his facility security officer of the order filed against him. He also disclosed the order in his 2010 SCA.

SOR ¶ 2.a alleges that Applicant falsified his January 2010 SCA because he failed to disclose any of his long-term relationships with foreign nationals (as alleged in SOR ¶¶ 1.a and 1.b) in his answer to Question 19 (asking whether Applicant have or have had close and/or continuing contact with foreign nationals within the last seven years with whom he is bound by affection, influence, and/or obligation). Applicant admitted his long-term contact with some foreign nationals, but he claimed that he did not have a close relationship with any of them, and that he was not bound by affection, influence, or obligation to any of his foreign friends.

Although Applicant did not disclose in his SCA any of his long-term relationships with foreign nationals, he provided a detailed account of most of his foreign travel and indicated that the purpose of his travel was to visit with friends. Applicant also did not disclose in his answer to Question 19 his relationship with the Chinese national. However, he provided a detailed account of his relationship with the Chinese national in his answer to Section 28 (Involvement in Non-Criminal Court Actions) of his SCA.

I note that Applicant disclosed in his SCA the following adverse information: he left a job under unfavorable circumstances; he had financial problems; his debt to a prior employer for his use of a corporate credit card; and his failure to timely file his 2006 income tax return.

Applicant believed his relationship with foreign nationals was proper because when he was in the service, he was never informed it was against the law or regulations to meet, date, or maintain online contact with foreign women. Applicant's witness, a retired soldier who served with Applicant in an Asian country for 13 months, corroborated his testimony.

SOR ¶ 2.c alleges that Applicant used his employer's corporate credit card to pay for his personal travel expenses in foreign countries. Applicant credibly testified that his employer allowed him to use his corporate credit card to pay for combined (business and personal) travel expenses. In 2008, Applicant proposed a business development trip to a foreign country to his employer, and agreed to reimburse his company if he was unable to get the contract. The business development trip failed, and he acquired the trip expenses. Applicant established a repayment plan and started to make payments. The company was bought out, and Applicant was laid off in February 2009. The company kept Applicant's last pay check (\$1,525) and wrote off the remaining \$400. The company Chief Executive Officer (CEO) corroborated Applicant's testimony.

Applicant disclosed in his January 2010 SCA that he failed to timely file his 2006 federal income tax return. Applicant could not recall why he failed to timely file his 2006 income tax return. In 2009, the Internal Revenue Service (IRS) contacted Applicant about the delinquent 2006 income tax return and a resulting \$1,500 tax debt. He explained that in 2009, he was laid off and his records were in storage and he was not able to access his documents to file his 2006 income tax return.

Applicant failed to resolve his tax problem after he submitted his January 2010 SCA, after he was interviewed by a government investigator in June 2010, and after he answered DOHA interrogatories in April 2011. Applicant filed for an extension of time to file his 2010 income tax return in October 2011. He did not file his 2010 income tax return until December 12, 2011. He filed his 2006 income tax return with his 2010 income tax return.

At his hearing, Applicant acknowledged that he acted immaturely in his relationship with the Chinese national. He considered that his actions were not his wisest decision. He also acknowledged that emailing naked pictures of himself to a foreign country, and receiving naked pictures of his foreign girlfriends, was inappropriate behavior. He expressed remorse and apologized for his behavior.

Applicant now understands the security concerns raised by his actions. He believes that his actions are mitigated by the passage of time. He also has taken some actions to mitigate the security concerns. He claimed that he stopped using social media to stay in contact with his foreign friends in about 2009. Applicant was truthful

and forthcoming by disclosing the SOR incidents to his facility security officers at the time they happened, and by disclosing and discussing the information during the security clearance process. He believes that his years of honorable service to the United States and working for government contractors, without any security violations, should be considered in his favor.

Applicant's favorable evidence includes his good service record, performance appraisals, awards and decorations he received, and numerous favorable character statements. Applicant's references lauded his professionalism, language abilities, knowledge, technical competence, proficiency, and hardworking ethic. He is considered to be dependable, trustworthy, honest, and with good judgment. Many of them endorsed his access to classified information. Applicant is considered to be a loyal U.S. citizen, dedicated to his job and the United States. In his references' opinions, Applicant would never do anything to jeopardize the United States.

Policies

Eligibility for access to classified information may be granted "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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person's suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The "clearly consistent with the national interest" standard compels resolution of any

reasonable doubt about an applicant's suitability for access in favor of the Government. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Guideline B, Foreign Influence

The Government's concern under AG ¶ 6 is that:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, he or she 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 sets out conditions that could raise a security concern and may be disqualifying in this case, including:

- (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; and
- (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 or technology and the individual's desire to help a foreign person, group, or country by providing that information.

The Government produced substantial evidence raising these two potentially disqualifying conditions. Applicant has an extensive number of long-time friends who are foreign nationals. He maintained frequent contact with his foreign friends via online social networking. His online contacts include foreign nationals from China, Russia, Iran, Vietnam, Thailand, Cambodia, Indonesia, Malaysia, Singapore, Japan, South Korea, and the Philippines. He travelled extensively to foreign countries to visit with his foreign friends, to tour the foreign countries, and to make new friends.

Applicant exchanged naked pictures of himself with foreign girlfriends from China, Thailand, and Brazil. He engaged in sexual intercourse with foreign nationals from Thailand, Philippines, and China; and he shared his apartment with foreign nationals from China, Mongolia, India, and Thailand. He maintained frequent online contact with some of these roommates.

The burden shifted to Applicant to produce evidence and prove a mitigating condition. Two Foreign Influence Mitigating Conditions under AG ¶ 8 are applicable to the facts in this case:

(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.

After considering the facts and circumstances in Applicant's case, I conclude that the above mitigating conditions apply. In deciding whether Applicant placed himself in a position to be exploited, I considered the foreign countries' form of government,² their relationship with the United States, their human rights record, and whether the countries are known to conduct intelligence collection operations against the United States.

The relationship of some of the foreign countries with the United States (China, Russia, and Iran, in particular) places a significant burden of persuasion on Applicant to demonstrate that his travel to those countries and his relationships with his foreign national friends do not pose a security risk, and that he is not vulnerable to manipulation, or in a position to be forced to choose between loyalty to the United States and his foreign national connections.

Applicant was born, raised, and educated in the United States. He volunteered and served in the U.S. Army. He was honorably discharged for medical reasons. Since his discharge, he has worked for contractors in support of government agencies. He has held access to classified information since 1997. Except for the SOR allegations, there

² The focus is not the country or its people, but its rulers and the nature of the government they impose. This approach recognizes that it makes sense to treat each country in accordance with the level of security concern or threat it presents to the United States.

is no evidence that he was involved in any prior incidents raising security concerns about his ability to protect classified information or to hold a security clearance.

Applicant is considered to be dependable, trustworthy, honest, and with good judgment. In his references' opinions, Applicant is a loyal U.S. citizen, dedicated to his job and the United States. They believe Applicant would never do anything to jeopardize the United States.

Applicant displayed poor judgment, and placed himself in a vulnerable position by emailing naked pictures of himself to his girlfriends in foreign countries. Additionally, he displayed poor judgment in his relationship with the Chinese national and her family. Notwithstanding, the evidence as a whole supports a determination that Applicant's ties and sense of obligation to the United State are sufficiently strong that he could be expected to resolve any conflict of interest in favor of the United States. On balance, and considering the evidence as a whole, Applicant mitigated the Guideline B security concerns.

Guideline E, Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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.

SOR ¶¶ 2.f and 2.g allege the same facts alleged in SOR ¶¶ 1.a and 1.b – that while holding a security clearance, Applicant maintained numerous long-time friendships with foreign nationals. He contacted them frequently and travelled extensively to foreign countries to visit them. He placed himself in a position of vulnerability to be exploited. For the sake of brevity, the discussions under the Guideline B (AG ¶ 7) about these allegations are hereby incorporated by reference.

The Government established a case for disqualification under Guideline E. Applicant admitted his continuing contact with his foreign national friends. His claim that he did not have a close relationship with any of his friends, or that he was or is not bound by affection, influence, and/or obligation to any of his foreign friends, is belied by the record in this case. Applicant was required to disclose in his answer to Question 19 his long-term contacts with those foreign nationals who were his roommates, and those with whom he engaged in a relationship beyond just a mere friendship.

Notwithstanding, considering the record as a whole, including his demeanor and testimony, I find that Applicant did not deliberately falsify his January 2010 SCA. He provided a detailed account of most of his foreign travel and indicated that the purpose

of his travel was to visit with friends. He also provided a detailed account of his relationship with the Chinese national in his answer to Section 28 (Involvement in Non-Criminal Court Actions) of his SCA. Additionally, he disclosed adverse personal and financial information, including his failure to timely file his 2006 income tax return.

SOR ¶ 2.b alleges that the Chinese citizen filed a protective order against Applicant. Applicant admitted that the order was filed, but denied the basis for the protective order. He credibly testified that he was never a threat to the Chinese national or her father. Notwithstanding, Applicant demonstrated extremely poor judgment when he befriended a 17-year-old Chinese national, exchanged naked pictures online, developed something more than a friendly relationship, entered into an agreement to share an apartment, accepted \$1,000 as a deposit for the apartment, and rented an apartment for the Chinese national and her father to stay during their visit.

Concerning Applicant's use of a corporate credit card for personal use (SOR ¶ 2.c), I am satisfied that Applicant's company authorized his personal use of the credit card for a business development venture. Applicant's testimony is corroborated by the CEO of the company that acquired the debt.

Applicant's failure to timely file his 2006 and 2010 federal income tax returns are of more concern. He provided no reasonable explanation to justify his failure to timely file his 2006 income tax return. Applicant failed to resolve the situation after he was contacted by the IRS in 2009; after he submitted his January 2010 SCA; after he was interviewed by a government investigator in June 2010; and after he answered DOHA interrogatories in April 2011. Applicant filed for an extension of time to file his 2010 income tax return, but he failed to file his 2010 return within the authorized period. Applicant did not file his 2006 and 2010 income tax returns until December 12, 2011, after his security clearance hearing.

Considering the evidence as a whole, I find that Applicant's long-term close contact with foreign national friends, his relationship with the Chinese national, and his failure to timely file his federal income taxes, trigger the applicability of the following disqualifying conditions under AG ¶ 16:

- (c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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;
- (d) 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. This includes but is not limited to consideration of: . . . (3) a pattern of dishonesty or rule violations; and

(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.

AG ¶ 17 lists three conditions that could potentially mitigate the personal conduct security concerns:

(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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Having considered the above mitigating conditions in light of the evidence as a whole, I find that none apply. Applicant's questionable behavior is recent and it occurred during many years. Applicant's long-term friendship and continued contact with citizens of nations whose governments are known to conduct intelligence collection operations against the United States, or have interests inimical to the United States, create a concern (China, Russia, and Iran). Applicant's exchange of nude pictures of himself and having sexual relationships with foreign nationals placed him in a position of vulnerability to be exploited by those foreign governments. Although he did not falsify his application, his failure to disclose his long-term contacts with foreign nationals raises security concerns.

Applicant's extensive travel to foreign nations adversely affected his financial situation. Although he brought his financial situation under control (there are no financial allegations in the SOR), he failed to comply with his legal obligation to timely file his 2006 and 2010 income tax returns and to pay his taxes. Applicant's filing of his taxes in

December 2011, does not mitigate the fact that he demonstrated poor judgment and an unwillingness to comply with rules and regulations.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c). Applicant receives credit for his service to the United States, his good work for federal contractors, and his many years of holding a security clearance without incidents of concern (except for the SOR allegations).

Nevertheless, Applicant's behavior demonstrates poor judgment and shows his unwillingness to comply with rules and regulations. The record evidence fails to convince me of Applicant's eligibility and suitability for a security clearance, and of his ability to comply with rules and regulations.

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 and 1.b:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a – 2.c:	For Applicant
Subparagraphs 2.d – 2.g:	Against Applicant

Conclusion

Under the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant eligibility for a security clearance to Applicant. Clearance denied.

JUAN J. RIVERA
Administrative Judge