



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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-----) ISCR Case No. 11-00557
)
)
Applicant for Security Clearance)

Appearances

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

February 13, 2012

02/13/2012

Decision

MOGUL, Martin H., Administrative Judge:

On June 13, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines B and C 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 adjudicative guidelines (AG), effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant replied to the SOR (RSOR) in writing on July 10, 2011, and he requested a hearing before an Administrative Judge. The case was assigned to this Administrative Judge on October 17, 2011. DOHA issued a notice of hearing on November 4, 2011, and I convened the hearing as scheduled on November 30, 2011. The Government offered Exhibits 1 through 4, which were received and admitted without objection. Applicant testified on his own behalf and submitted Exhibit A, which was also admitted without objection. The record remained open until January 3, 2012, for Applicant to submit additional documents, and additional documents that were

received, have been identified and entered into evidence without objection as Exhibits B and C. DOHA received the transcript of the hearing (Tr) on December 13, 2011. Based upon a review of the pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is denied.

Request for Administrative Notice

Department Counsel requested that I take administrative notice of certain facts relating to the countries of Iraq and Kuwait. The request and the attached documents were admitted into evidence as Exhibits 3 and 4, respectively. The facts administratively noticed are set out in the Findings of Fact, below.

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 following findings of fact:

Applicant is 41 years old. He was born in Iraq in 1970. He served in the Iraqi army from 1988 to 1991. Applicant testified that when he left the army he simply deserted and crossed over into Saudi Arabia, where he was placed, first in a prisoner of war camp and then in a refugee camp, for about two years. He eventually received approval and moved to the United States in 1993. He became a United States citizen in September 2001. (Tr at 33-38.) Upon questioning, Applicant was not certain if he is considered a dual citizen of Iraq, because that is where he was born. (Tr at 33-44.) However, in his Security Clearance Application, Applicant wrote that he has been a dual citizen of the United States and Iraq from September 2001 until the present, and he has never renounced or attempted to renounce his foreign citizenship. (Exhibit 1.) Since 2004, he has lived and worked in Kuwait as a truck driver for United States defense contractors.

Applicant has been married since 2007 to his wife, who lives with him in Kuwait. He has no children. (Tr at 44-45.) He indicated that when his employment is completed overseas, he plans to return to the United States, although his wife has never lived in the United States. (Tr at 56-58.) Applicant is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline B - Foreign Influence)

The SOR lists eight allegations regarding Foreign Influence, under Adjudicative Guideline B:

1.a. It is alleged in the SOR that Applicant's wife is a citizen of Iraq and resides in Kuwait. In his RSOR, Applicant admitted this allegation. Applicant testified that his wife lives with him in Kuwait. She is not employed outside of the home. (Tr at 44-45.)

1.b. It is alleged in the SOR that Applicant's mother is a citizen and resident of Iraq. In his RSOR, Applicant admitted this allegation. Applicant testified that his mother is a housewife, who has never worked outside of the home. His father died in 1996. (Tr at 46-47.) He talks to his mother every two or three weeks. (Tr at 51.)

1.c. It is alleged in the SOR that Applicant's two brothers and one sister are citizens and residents of Iraq. In his RSOR, Applicant admitted this allegation. Applicant testified that his brothers are 39 and 35 years of age, and they own a welding shop. His sister is a housewife, and her husband owns a coffee shop. He speaks to his siblings every two or three weeks. (Tr at 51.)

1.d. It is alleged in the SOR that Applicant's mother-in-law is a citizen and resident of Kuwait. In his RSOR, Applicant wrote that his mother-in-law is a resident of Kuwait but a citizen of Iraq. Applicant testified that his wife's mother is a housewife who does not work outside of the home. (Tr at 53.)

1.e. It is alleged in the SOR that Applicant's wife has five sisters and two brothers who are citizens and residents of Kuwait. In his RSOR, Applicant wrote that his wife's five sisters are citizens and residents of Kuwait, but of her two brothers, one brother is a citizen of Iraq residing in Kuwait, and the other brother is a citizen and resident of Iraq. He testified that one brother is a reporter and one works in an office. (Tr at 51-54.)

1.f. It is alleged in the SOR that Applicant's wife has a brother who is a citizen of Kuwait and resides in Iraq. In his RSOR, Applicant wrote that his wife's brother is a citizen of Iraq residing in Kuwait. Applicant testified that this brother works for a private company, although he was not clear what his occupation is. This brother has been listed twice. He was also listed in 1.e., above, as one of Applicant's wife's two brothers. (Tr at 53-54.)

1.g. It is alleged in the SOR that Applicant has a bank account in Kuwait. In his RSOR, Applicant admitted this allegation. Applicant testified that at the time of the hearing he had \$200,000 in the account. This is from the money he receives for his employment. His bank account in the United States has \$300 in it. (Tr at 54-56.) Applicant plans to move his money from Kuwait to the United States when he moves back here. He plans to use it to purchase a house in the United States. (Tr at 64-67.) The record was kept open to allow Applicant to transfer his funds to a United States bank. Exhibit B includes a bank statement from a U.S. bank showing a savings balance as of December 21, 2011, of \$50,258.09. There is no record of whether these funds came from Applicant's bank account in Kuwait, so it has not been established, and I cannot rule, that his bank account in Kuwait has been reduced.

1.h. It is alleged in the SOR that Applicant has a Kuwait residency permit. In his RSOR, Applicant admitted this allegation. Applicant testified that this is similar to a green card, and it is required for him to have this card if he is to work for his company. (Tr at 58-59.)

Paragraph 2 (Guideline C - Foreign Preference)

The SOR lists one allegation regarding Foreign Preference, under Adjudicative Guideline C:

2.a. It is alleged in the SOR that Applicant served in the Iraqi Army between 1988 and 1991. In his RSOR, Applicant admitted this allegation. Applicant testified that when he left the army, he simply deserted and crossed over into Saudi Arabia. (Tr at 33-34.)

Mitigation

Applicant submitted a positive character letter in which his former supervisor wrote that Applicant had done an excellent job for his previous employer, and was an asset to their organization. (Exhibit B.)

Applicant also submitted a certificate that he received for “5 years of dedicated service” to his current employer.(Exhibit C.)

Current Status of Iraq

I take administrative notice of the following facts regarding Iraq. In 2003 a United States led coalition removed Saddam Hussein and his Ba’athist regime from power. In March 2006, Iraq’s new government took office after being freely elected by the Iraqi people.

Terrorism committed by illegal armed groups receiving weapons and training from Iran continued to endanger the security and stability of Iraq. Despite Iraqi Security Forces efforts, numerous insurgent groups remain active throughout Iraq. In addition to terrorist attacks, sectarian violence occurs often. Foreigners, primarily dual American-Iraqi citizens, and Iraqi citizens are targets of kidnaping. Finally, there are substantiated reports of human rights abuses, including: extremist and terrorist bombings and executions, and torture and other cruel, inhuman treatment.

Current Status of Kuwait

I take administrative notice of the following facts regarding Kuwait. Kuwait is a small oil-rich constitutional hereditary emirate, bordering Iraq and Saudi Arabia and ruled by the Al-Sabah family. While Kuwait has made measured progress in combating terrorism, it lacks legal provisions that deal specifically with terrorism. Although Kuwait has been an effective and reliable partner in providing security for United States military installations and convoys, the risk in Kuwait has remained high.

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.

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, mother, siblings, mother-in-law, brothers-in law, and sisters-in-law, who are citizens and residents of Iraq or Kuwait, make AG ¶ 7(a) a concern to the Government. Applicant’s bank account in Kuwait worth \$200,000 is also a concern under ¶ 7(e) “a substantial business, financial, or property interest in a foreign country, . . . which could subject the individual to heightened risk of foreign influence or exploitation.”

AG ¶ 8 provides conditions that could mitigate security concerns. AG ¶ 8(b) and (f) will be reviewed as the ones that could potentially apply. I do not find that any of the others are even potentially applicable.

I do not 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 for the following reasons:

Applicant was born in Iraq in 1970 and moved to the United States in 1993. He became a United States citizen in September 2001, but has represented in his SCA that he is a dual citizen of the United States and Iraq, who has never renounced or attempted to renounce his foreign citizenship. Since 2004, he has lived and worked in Kuwait. All of Applicant’s relatives, including most significantly his wife, mother, and siblings, are citizens and residents of either Iraq or Kuwait. He has no relatives in the United States.

I also do not find that AG ¶ 8(f) the value or routine nature of the foreign business, financial or property interests . . . could not be used effectively to influence, manipulate, or pressure the individual” could be applied. Applicant has at least \$200,00 in Kuwait and only \$50,000 in assets in the United States, so the value of his assets is far greater outside of the United States than in it, and it could potentially be used to pressure the individual. As a result of the lack of any applicable mitigating circumstances, I conclude Guideline B against Applicant.

Guideline C, Foreign Preference

Under AG ¶ 9 the security concern involving foreign preference arises, “[W]hen an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.” I find that Applicant serving in the military of Iraq for three years, and then deserting and escaping to Saudi Arabia, several years before he moved to the United States and later became a U.S. citizen, does not raise any foreign preference concern under any of the disqualifying conditions in AG ¶ 10. I therefore conclude Guideline C 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 Guidelines B and C. Based on all of the reasons cited above as to why the mitigating conditions do not apply under Guideline B, and the very limited attachment of Applicant to the United States, I find that the evidence leaves me with significant questions and 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 not 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:	AGAINST APPLICANT
Subparagraphs 1.a.-h.:	Against Applicant
Paragraph 2, Guideline C:	FOR APPLICANT
Subparagraphs 2.a.:	For Applicant

Conclusion

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

Martin H. Mogul
Administrative Judge