



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



In the matter of:)	
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)	ISCR Case No. 11-03994
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: Joseph Testan, Esquire

December 6, 2012

Decision

MOGUL, Martin H., Administrative Judge:

On February 21, 2012 the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline B 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 after September 1, 2006.

On April 27, 2012, Applicant replied to the SOR (RSOR) in writing, and he requested a decision based on a hearing before an Administrative Judge. I received the case assignment on September 21, 2012. DOHA issued a notice of hearing on October 5, 2012, and the hearing was convened on November 2, 2012. At the hearing, the Government offered Exhibits 1 through 4, which were received without objection. Applicant testified on his own behalf and submitted Exhibits A through J, which were also admitted without objection. The record was left open until November 9, 2012, to allow Applicant to submit additional information regarding one issue which will be addressed below, and Applicant's counsel indicated that Applicant had no further

information on that issue. DOHA received the transcript of the hearing (Tr) on November 13, 2012. Based upon a review of the pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is granted.

Request for Administrative Notice

Department Counsel requested that I take administrative notice of certain facts relating to Belarus and the Ukraine. The request and the attached documents were admitted into evidence as Exhibits 3 and 4. Applicant's Counsel also requested that I take notice of some facts regarding the Ukraine in Exhibit A. 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 43 years old. He was born in the United States. He earned a Bachelor's degree in Mechanical Engineering in 1999. Applicant served in the United States Marine Corps (USMC) on active duty from 1987 to 1991, when he received an Honorable Discharge. He also served in two different state National Guards from 1995 to 2000, and he also received Honorable Discharges from each unit in which he served. Applicant served in the first Gulf War, in Desert Storm and Desert Shield. (Tr at 32-35.)

Applicant's father is deceased. His relatives, who are U.S. born citizens and residents include his mother, two brothers, three nieces and one nephew from his brothers, and a combination of seven aunts and uncles plus their spouses. Applicant expressed feelings of affection towards all of his American family. (Tr at 41-44.) Applicant is currently married and he was married previously from 2007 to 2009.

Applicant is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

(Guideline B - Foreign Influence)

The SOR lists four allegations regarding Foreign Influence, 1.a. through 1.d., under Adjudicative Guideline B. At the request of Department Counsel, and based on evidence introduced at the hearing, allegation 1.a. was amended. Also, two additional allegations, 1.e. and 1.f., were added to the SOR at the hearing. The SOR allegations will be reviewed in the same order as they were listed on the SOR:

1.a. It is alleged in the SOR that Applicant's girlfriend, a former Ukraine Government employee, is a citizen and resident of Ukraine. As discussed above this allegation was amended to include the following: "Your former girlfriend became your wife on July 27, 2012, and now resides in the United States." Applicant admitted the initial allegation in his RSOR, and he admitted the amended allegation at the hearing.

Applicant's wife worked for a local Ukrainian Government office. (Tr at 65.) Exhibit B is a letter from his wife wherein she wrote that she worked for the Ukraine land grant office, which is a local government office not a national government office.

Applicant testified that his wife moved to the United States in July 15, 2012. She currently lives with Applicant's brother and his family in the U. S. while Applicant is working for an American company outside of the United States. She plans to join her husband in whatever country he is working once she has received her Green Card. (Tr at 37-38.) His wife's plan is to eventually become a United States citizen and live the rest of her life in the United States with her husband. (Tr at 50.) (Exhibit B.) Applicant also submitted several documents to establish that his wife lives and got married in the United States and is now applying for permanent residence here. (Exhibits C, D, E, and F.)

1.b. It is alleged in the SOR that Applicant's friend is a dual-citizen of Belarus and the United States. Applicant admitted this allegation in his RSOR. Applicant first met this person in 2007 when he hired him for a work project in the United States. (Tr at 58.) This individual lives with his family in the United States. (Tr at 72.)

Applicant testified that he no longer has a relationship with this individual. He explained that his friendship with this man had not been particularly strong, and that Applicant ended the friendship when he believed it could hurt his chances of having a security clearance. (Tr at 45-46.) Applicant has never traveled to Belarus. (Tr at 77-78.)

1.c. It is alleged in the SOR that Applicant disclosed to his Ukrainian girlfriend that he was applying for a security clearance. Applicant denied this allegation in his RSOR and at the hearing he testified that he had not told his wife he was applying for a security clearance. (Tr at 39.)

Applicant explained that when he spoke to a Government investigator he stated that he told his wife he could not talk about his job, and he does construction overseas. Applicant believed that the investigator may have misunderstood what he was saying, and that was why the investigator indicated in the Personal Subject Interview (PSI) that Applicant stated to his wife that he was applying for a security clearance. (Tr at 39.) (Exhibit 2.)

1.d. It is alleged in the SOR that Applicant disclosed to his dual citizen friend, referred to in 1.b., above, that he was applying for a security clearance. Applicant denied this allegation in his RSOR, and he testified that he had not told his friend he was applying for a security clearance. (Tr at 39-40.)

Applicant explained that when he spoke to the Government investigator he also stated that he told his friend he could not talk about his job, and he does construction overseas. Applicant believed that the investigator may have had the same misunderstanding that Applicant told his friend that he was applying for a security clearance and that was why he put it in the PSI. (Tr at 39-40.) (Exhibit 2.)

Applicant conceded that when he reviewed the PSI he had not noticed what he considered to be the errors that stated he had disclosed to his wife and friend that he was applying for a security clearance, and that if he had noticed it, he would have corrected those incorrect statements. (Tr at 40-41.)

1.e. As reviewed above, allegation 1.e. was added to the SOR at the hearing. The amended SOR states: "Your father-in-law, your mother-in-law, and your brother-in-law are Ukrainian citizens and residents." Applicant admitted this allegation during his testimony. He testified that since none of his in-laws speak English, he is unable to communicate with them. He also stated that none of them work for the Ukrainian Government. Finally, he averred that, if his in-laws were threatened, he would never reveal classified information to rescue them, but would rather he would reveal the threat to his Facility Security Officer (FSO). (Tr at 46-47.)

1.f. Allegation 1.f. was also added to the SOR at the hearing. The amended SOR states: "You traveled to the Ukraine on approximately 10 occasions from 2009 to 2011 for the purpose of visting your girlfriend who is now your wife." Applicant admitted this allegation during his testimony, and he explained that his only reason for these visits was to see his girlfriend. (Tr at 74-75.) The record was left open to allow Applicant to submit documentation as to the exact number of trips he had taken to visit his girlfriend in the Ukraine, but Applicant had no documentation that would establish exactly how many trips he took.

Applicant denied having any feelings of affection, obligation, or loyalty to the Ukraine. He testified that he owns a home in the United States, and he has no assets in the Ukraine or in any foreign country. He also has no intention of visiting the Ukraine in the future. (Tr at 49-50.)

Mitigation

Among the documents offered into evidence on behalf of Applicant were his records confirming his honorable service in the United States military. (Exhibit G.) Applicant also offered 12 positive, laudatory character letters, 11 from those who know him in his professional capacity, and one from his brother. (Exhibit I.)

Applicant also submitted financial documents, confirming that he owns a home in the United States and that he owns significant additional assets here. (Exhibit J.)

Current Status of Belarus

I take administrative notice of the following facts regarding Belarus. Belarus purports to be a democratic republic; however it is in fact an autocratic regime. Under its constitution, the citizens have the right to vote, freedom of religion, and freedom of travel. However, the Belarusian authorities have secretly curtailed and infringed upon its citizens' ability to exercise these constitutional rights, as well as workers' rights, which also are specifically provided by the Belarusian Constitution.

United States and Belarusian relations have worsened steadily since 1998. This is due to human rights issues and illegal sales of arms, as well as the illegal seizure of diplomatic residences including that of the U.S. Ambassador by the Belarusian authorities.

Current Status of the Ukraine

I take administrative notice of the following facts regarding the Ukraine. The Ukraine is ruled by a presidential-parliamentary form of Government. In 2008, the United States signed the U.S.-Ukraine charter on Strategic Partnership, which highlights the importance of the bilateral relationship and outlines enhanced cooperation in the areas of defense, security, economics and trade, energy, security, democracy, and cultural exchanges.

A cornerstone for the continuing partnership between the United States and the Ukraine has been the Freedom Support Act, from which the Ukraine has received from the United States more than \$4.1 billion since its independence. Ukraine has contributed troops and military personnel to the missions in Iraq and Afghanistan.

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, who is a citizen of the Ukraine, and his in-laws, who are citizens and residents of the Ukraine makes AG ¶ 7(a) a concern to the Government. I find that AG ¶ 7(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 . . . and the individual’s desire to help a foreign person, group, or country by providing that information,” is also applicable in this case.

AG ¶ 8 provides conditions that could mitigate security concerns. I 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 and controlling for the following reasons:

Applicant is a U.S. born citizen and resident. Applicant’s mother, two brothers, three nieces and one nephew, and seven aunts and uncles along with their spouses are all U.S. born citizens and residents. Applicant served his country honorably in the USMC and in state National Guards. Applicant’s wife was born in the Ukraine, but is now a U.S. resident and plans to eventually become a United States citizen.

Applicant’s contact with and feelings for his mother-in-law, father-in-law, and brother-in-law in the Ukraine are extremely limited. His friendship with his friend, who is a dual citizen of Belarus and the United States, has ended.

Applicant owns a home in the United States, and he has additional assets here. He has no assets outside of the country. Finally, Applicant received many positive recommendations by people who know him. Based on all of these reasons, I conclude Guideline B for Applicant.

AG ¶ 8(c) is also applicable, “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.”

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. Based on all of the reasons cited above as to why mitigating conditions AG ¶ 8(b) and (c) apply, I find that the record evidence leaves me with no significant questions or 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 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: FOR APPLICANT

Subparagraphs 1.a through 1.f.: For Applicant

Conclusion

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

Martin H. Mogul
Administrative Judge