



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 11-10332
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Department Counsel
For Applicant: *Pro se*

April 10, 2013

Decision

LOKEY-ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on February 8, 2012. (Government Exhibit 1.) On September 26, 2012, the Department of Defense (DoD) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines B and E 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 after September 1, 2006.

Applicant responded to the SOR on October 17, 2012, and he requested a hearing before an administrative judge. This case was assigned to the undersigned on December 12, 2012. A notice of hearing was issued on January 16, 2013, scheduling the hearing for February 13, 2013. The Government presented eight exhibits, referred to as Government Exhibits 1 through 8, which were admitted without objection. Applicant presented four exhibits, referred to as Applicant's Exhibits A through D, which were admitted without objection. Applicant also testified on his own behalf. The record remained open until close of business on February 19, 2013, to allow Applicant to submit additional documentation. Applicant submitted one Post-Hearing Exhibit consisting of seven pages referred to as Applicant's Post-Hearing Exhibit A, which was admitted without objection. The official transcript (Tr.) was received on February 22,

2013. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

FINDINGS OF FACT

Applicant is 26 years old and unmarried with two children. He is employed by a defense contractor as a janitor, and is applying for a security clearance in connection with his employment.

The Government opposes Applicant's request for a security clearance, on the basis of allegations set forth in the SOR.(already defined above) The following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline B - Foreign Influence). The Government alleges in this paragraph that Applicant is ineligible for clearance because he has foreign contacts that could create the potential for foreign influence, which could result in the compromise of classified information.

Applicant admitted each of the allegations set forth in the SOR under this Guideline. (See Applicant's Answer to SOR.) Applicant was born in the United States and has lived here his entire life. In November 2010 he began working for his current employer, a defense contractor. Applicant has no past history of any disciplinary actions, misconduct, or failure to follow rules and regulations at his current job or at any previous employment. (Tr. 36.) His grandfather, who was known as honest and hard-working, was employed for twenty years at the same company as a janitor before he retired. Applicant's father is also a janitor, but works for the school district.

Applicant met his fiancée, an illegal alien from Mexico, in 2008 or 2009. (Tr. p. 38.) They have two small children together, they reside together, and they have recently married. Applicant testified that when he met her, he was not aware that she was here illegally. (Tr. p. 39.) He found out about it several months later. Applicant explained that his wife was brought to the United States by her mother when she was six years old in pursuit of a better life. (Tr. p. 42.) His wife has lived in the United States since then, and has never returned to Mexico. Although she has some relatives in Mexico, his wife has no plans to ever return to Mexico. Applicant stated that she had not applied for legal status yet because they have not had the money to do so. (Tr. p. 63.) She had planned to begin the process once Applicant received his income tax refunds. Applicant has been candid and open about his fiancée's illegal status. He reported to his company Facility Security Officer that his fiancée was an illegal alien from Mexico. He also revealed this information on his security clearance application and during his subject interview with an authorized investigator for the DoD. (Government Exhibit 1 and Tr. pp. 47-48.)

Applicant's wife's mother and two sisters are citizens of Mexico.(her would refer to the mom) His wife's mother resides in the United States and she has a visa. Applicant's wife has three sisters. Two of her sisters are in the process of obtaining their residency and are married to United States citizens. The other is a legal United States citizen. (Tr. p. 45.)

Paragraph 2 (Guideline E - Personal Conduct). The Government alleges that Applicant is ineligible for clearance because he has engaged in conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness 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.

Applicant admitted allegations 2(a) and 2(b), and denied allegations 2(c) and 2(d) of the SOR set forth under this Guideline. (See Applicant's Answer to SOR.) Applicant completed his Electronic Questionnaire for Investigations Processing dated December 15, 2010. Question 23(a) asked Applicant if in the last seven years, has he used any illegal substances. Applicant answered, "No". (Government Exhibit 1.) This was an inaccurate response. Applicant failed to disclose the fact that he used marijuana on one occasion in November 2008. (Government Exhibit 1.) Applicant testified that he must have misread the question. (Tr. p. 57.) He stated that he did not purposefully fail to list his marijuana use, and had no intent to deceive the Government. (Tr. pp. 57-58.) He used marijuana once or twice on the same day in 2008, and has never used it again. He revealed his one time use of marijuana to the investigator during his subject interview. He also stated that he has no plans to ever use marijuana again. He does not drink alcohol or smoke cigarettes.

Applicant had resided with his fiancée who was in the United States illegally. Applicant's Post-Hearing Exhibit A indicates that Applicant and his fiancée were married on March 7, 2013 (See copy of marriage license). His wife has already applied for her United States citizenship (See copy of wife's application for citizenship).

Question 26(d) of the same questionnaire asked Applicant if he had a lien placed against him for failing to pay taxes or other debts. Applicant answered, "No". (Government Exhibit 1.) The Government contends that this was an inaccurate response since Applicant failed to disclose a tax lien that was filed against him in November 2007 in the amount of \$398.00. Applicant explained that he has never owned property and was not aware of a tax lien filed against him. After looking into the matter, Applicant discovered that the tax lien is not his, but his father's who has the same name. (Tr. p. 53.)

Question 26(g) of the same application asked Applicant if he has ever had bills or debts turned over to a collection agency. Applicant answered, "No". (Government Exhibit 1.) This was an inaccurate response. The Government alleges that Applicant failed to list two outstanding debts: one owed to a creditor in the amount of \$1,866.00; the other owed to a creditor in the amount of \$301. Applicant testified that he did not know about the debts or he would have listed them. He had recently applied for a debit card through his credit union and was told that he had only one outstanding debt. (Tr. pp. 49-50.) He paid off the debt before he started working for his current employer. He submitted proof of payment. (Applicant's Exhibit C.)

Applicant was asked by Department Counsel if someone were to bribe him in exchange for access to classified information what would he do. Applicant indicated that he would report it to his security department. (Tr. p. 60.)

A letter from Applicant's Manager attests to Applicant's outstanding work performance and good character. He is said to have strong work ethics and a level of maturity rare for his age. He is recommended for a security clearance. (Applicant's Exhibit A.)

Letters from people who work with Applicant, including his facility administrator, a maintenance mechanic, and a lead electrician, attest to his honesty, trustworthiness, dedication to the job, hard working nature, and integrity. (Applicant's Exhibit B.)

Applicant provided copies of his valid state driver's license and his social security card. (Applicant's Exhibit D.)

Mexico is a Spanish-speaking country, consisting of 31 states and one federal district. The U.S. and Mexico share a 2000-mile border and are partners in the North American Free Trade Agreement (NAFTA). The U.S. and Mexico have a history of cooperation in many areas of concern including environmental and natural resource issues, health issues, telecommunication services and efforts to fight organized crime. Millions of U.S. citizens visit Mexico each year to study, tourism, and business. The Mexican government makes a considerable effort to protect U.S. citizens and other visitors to major tourist destinations, and there is no evidence that Transnational Criminal Organizations (TCOs) have targeted U.S. visitors and residents based on their nationality. Nevertheless, U.S. travelers must be aware that crime and violence, including narcotics trafficking and other unlawful activities are serious problems throughout the country. U.S. citizens have fallen victim to TCO activity, including homicide, gun battles, kidnapping, carjacking and highway robbery. The number of U.S. citizens reported to the Department of State as murdered under all circumstances in Mexico was 113 in 2011 and 32 in the first six months of 2012. (See Government Exhibits 6, 7 and 8).

POLICIES

Enclosure 2 and Section E.2.2. of the Directive set forth adjudication policies divided into "Disqualifying Conditions" and "Mitigating Conditions." The following Disqualifying Conditions and Mitigating Conditions are found to be applicable in this case:

Guideline B (Foreign Influence)

6. *The Concern.* 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.

Conditions that could raise a security concern:

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;

7. (d) sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.

Conditions that could mitigate security concerns:

8. (a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those person 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.;

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 to the U. S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;

8. (c) 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.

Guideline E (Personal Conduct)

15. *The Concern.* 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.

Conditions that could raise a security concern:

None.

Conditions that could mitigate security concerns:

None.

In addition, as set forth in Enclosure 2 of the Directive at pages 18-19, in evaluating the relevance of an individual's conduct, the administrative judge should consider the following general factors:

- a. The nature, extent, and seriousness of the conduct;
- b. The circumstances surrounding the conduct, to include knowledgeable participation;
- c. The frequency and recency of the conduct;
- d. The individual's age and maturity at the time of the conduct;
- e. The extent to which participation is voluntary;
- f. The presence or absence of rehabilitation and other permanent behavior changes;
- g. The motivation for the conduct;
- h. The potential for pressure, coercion, exploitation, or duress; and
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole-person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination." The administrative judge can draw only those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order adverse to an applicant 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."

CONCLUSION

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an applicant for clearance may be involved in foreign influence or dishonesty that demonstrates poor judgment or unreliability.

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 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.

This evidence indicates reliability and trustworthiness on the part of Applicant. Because of the scope and nature of Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility. Considering all of the evidence, Applicant has introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case under Guidelines B and E of the SOR.

Under Foreign Influence, Guideline B, Disqualifying Conditions 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*, and 7 . (d) *sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion* apply. Mitigation Conditions 8. (a) *the nature of the relationships with foreign person, the country in which these persons are located, or the positions or activities of those person 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.*; 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 to the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest*; and 8. (c) *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* are also applicable.

This is a unique case. Applicant is a native born American citizen. His fiancéé is now his wife, and is in the process of becoming a legal citizen of the United States. They have two native-born American children. Applicant's employment and his family are in the United States. His wife has already applied for legal citizenship, as she has no intentions of ever returning to Mexico. His wife's immediate family, including her mother and two sisters, all reside here in the United States and are in the process of obtaining legal status in the United States. Applicant has little if any contact with anyone in Mexico. Applicant has no foreign family members who may be influenced by the Mexican Government. There is no emotional bond that Applicant has with his wife's family in Mexico. His wife's foreign family members reside in the United States and are in the process of becoming citizens. Thus, Applicant's foreign contacts do not pose a security risk. Under the heightened scrutiny analysis, Applicant's Mexican family

members do not pose a significant security risk. Accordingly, I find for Applicant under this guideline.

Under Personal Conduct, Guideline E, none of the Disqualifying Conditions are applicable. Although he answered the questions incorrectly, Applicant did not deliberately omit, conceal, or falsify relevant facts from any personnel security questionnaire. Accordingly, this guideline is also found for Applicant.

I have also considered the “whole-person concept” in evaluating Applicant’s eligibility for access to classified information. Under the particular facts of this case, the totality of the conduct and circumstances set forth under all of the guidelines viewed as a whole, supports a whole-person assessment of good judgement, trustworthiness, reliability, candor, and willingness to comply with rules and regulations. There are no characteristics indicating that the person may not properly safeguard classified information. I have also considered his favorable evidence, including his awards and favorable letters of recommendation. The evidence mitigates the negative effects his foreign contacts and personal conduct could have on his ability to safeguard classified information.

On balance, it is concluded that Applicant has overcome the Government’s case opposing his request for a security clearance. Accordingly, the evidence supports a finding for Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the SOR.

FORMAL FINDINGS

Formal findings for or against Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1:	For Applicant.
Subpara. 1.a.:	For Applicant.
Subpara. 1.b.:	For Applicant.
Paragraph 2:	For Applicant.
Subpara. 2.a.:	For Applicant.
Subpara. 2.b.:	For Applicant.
Subpara. 2.c.:	For Applicant.
Subpara. 2.d.:	For Applicant.

CONCLUSION

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

Darlene Lokey-Anderson
Administrative Judge