



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



In the matter of:)	
)	
)	ISCR Case No. 11-12671
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: Barry M. Sax, Esquire

June 7, 2013

Decision

CEFOLA, Richard A., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) on March 22, 2010. On November 7, 2012, the Department of Defense (DOD) 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 within the Department of Defense after September 1, 2006.

Applicant acknowledged receipt of the SOR on November 26, 2012. He answered the SOR in writing on January 2, 2013, and requested a hearing before an Administrative Judge. DOHA received the request on January 14, 2013, and I received the case assignment on March 25, 2013. DOHA issued a notice of hearing on April 2, 2013, and I convened the hearing as scheduled on May 9, 2013. The Government offered Exhibits (GXs) 1 through 5, which were received without objection. Applicant testified on his own behalf and submitted Exhibits (AppXs) A through H, which were

received without objection. DOHA received the transcript of the hearing (TR) on May 17, 2013. I granted Applicant's request to keep the record open until May 23, 2013, to submit additional matters. On May 17, 2013, he submitted Post Hearing Exhibits (PHXs) A~M and O~W, which were received in a timely fashion.¹ On May 29, 2013, Department Counsel averred that he had no objection to the PHXs. The record closed on May 29, 2013. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to Japan. The request was granted. 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

In his Answer to the SOR, Applicant admitted the factual allegations in Subparagraphs 1.a. through 1.h., and 1.j. through of the SOR, with explanations. He denied the factual allegation in Subparagraph 1.i. of the SOR. He also provided additional information to support his request for eligibility for a security clearance.

Guideline B - Foreign Influence

1.a. Applicant's spouse of 26 years is a permanent resident of the United States, but is a citizen of Japan. (TR at page 45 lines 22~24, GX 2 at pages 20~22, and GX 3 at page 1.) She has no intention of becoming a U.S. citizen, as "all of her family is in Japan. That's her cultural roots, where she grew up. She wants to be able to go back and forth between the United States and Japan, and be able to stay for extended periods in Japan with having to worry about a visa . . ." (TR at page 52 line 17 to page 53 line 16.) She knows Applicant has a security clearance. (TR at page 98 lines 4~23.)

1.c., and 1.f.~1.i. Applicant's wife is very close to her father, who for about 25 years was a Senator of the Japanese Government, retiring in a bout 1991. He is 86 years old and in poor health. (TR at page 53 line 24 to page 54 line 21, GX 2 at pages 28~29, and GX 3 at page 2.) He maintains contact with some of his former Japanese Government staff members. (*Id.*) As Applicant can speak very little Japanese, when his spouse and father-in-law communicate, he does not know the topic of their conversation. (TR at page 98 lines 4~23.)

Since 1989, Applicant has traveled to Japan on a yearly basis to visit his wife's family. (TR at page 70 line 17 to page 71 line 18, at page 92 lines 16~24, GX 1 at

¹No PHX N was submitted.

pages 28~30, GX 2 at pages 39~43, and at page 3 at page 4.) In 2004, Applicant also traveled to China with his wife and her father. That trip was paid for by Applicant's father-in-law, and Applicant attended a diner with the spouses of some of his father-in-law's Chinese contacts. (TR at page 72 line 5 to page 73 line 17.) In the 1970s, his father-in-law was instrumental in opening up relations between China and Japan. (*Id.*)

Applicant's in-laws have also provided monetary support to his family. In 1987, they received a wedding gift of about \$200,000. (TR at page 73 line 18 to page 74 line 11.) From 1987~1989, his in-laws paid for his family's living expenses so that Applicant could attend college full time. (TR at page 77 line 3 to page 78 line 15.) They also paid about \$70,000 in tuition costs for both Applicant's BS and MBA degrees. (TR at page 44 line 24 to page 45 line 3, and at page 47 lines 14~23.) In 1996, his in-laws paid the balance of Applicant's mortgage loan, about \$435,000. (TR at page 78 line 16 to 80 line 14.) At one time, his in-laws provided his spouse with a credit card by which they covered her routine yearly purchases of between \$4,000~\$5,000. (TR at page 80 line 15 to page 81 line 10.) His father-in-law no longer covers these credit card purchases. (*Id.*)

1.b. Applicant's two children are dual nationals, but both intend to renounce their Japanese citizenship when they reach 24 years of age. (TR at page 47 line 25 to page 52 line 16.) It is Applicant's understanding that Japan does not recognize dual citizenship of a person who has reached the age of 24. (*Id.*)

1.d. Applicant's sister-in-law and brother-in-law are both citizens and residents of Japan. She is a housewife and he is a medical doctor. Neither of these in-laws have any connection with the Japanese Government. (TR at page 67 line 17 to page 68 line 5, at page 98 line 24 to page 99 line 9.)

1.e. Applicant's spouse has a friend who is a citizen of Japan, but resides in the United States. (TR at page 69 line 24 to page 70 line 16, at page 99 lines 10~23, and GX 3 at page 4.) She works for a U.S. university. (TR at page 99 lines 10~23.)

I also take administrative notice of the following facts. In 2000, Japan was listed as among the most active collectors of economic and proprietary information based upon a survey by the National Counterintelligence Executive of selected Fortune 500 companies. Furthermore, in 2005 and 2007, Japan ranked high on the National Counterintelligence Executive's list of foreign countries requesting the most visits to U.S. military facilities, defense contractors, and Department of Energy National Nuclear Security Administration facilities. A high volume of such visits creates opportunities for foreign intelligence efforts against sensitive U.S. technologies. In fact, foreign government organizations, including intelligence and security services, frequently target and collect information through official contacts and visits to the U.S.

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 Paragraph 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. Paragraph 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 Paragraph E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive Paragraph 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

Paragraph 6 of the adjudicative guidelines sets out the security concern relating to Foreign Influence:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign 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 a foreign interest.

Here, Paragraphs 7(a), 7(d) and 7(h) are applicable: 7(a) "*contacts 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*"; 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*"; and 7(h) "*indications that representatives or nationals from a foreign country are acting to increase vulnerability of the individual to possible future exploitation, inducement, manipulation, pressure, or coercion.*" Applicant's spouse, with whom he obviously shares living quarters, and her father are citizens of Japan. His father-in-law was a high ranking official in the Japanese Government. He has also contributed in excess of \$700,000 to Applicant and to Applicant's immediate family.

I find no countervailing mitigating condition that is applicable, here. The first mitigating condition under Paragraph 8(a) is applicable where "*the nature of the relationships with foreign persons, . . . 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 . . . and the interests of the U.S.*" Here, however, Applicant's spouse, and to perhaps a lesser extent Applicant, are clearly beholden to Applicant's father-in-law, a former long-standing Japanese Senator, due to his extensive financial support. She is a Japanese national, who speaks to her father in Japanese, a language Applicant does not understand. As a minimum, there is a heightened risk that, unbeknownst to Applicant and perhaps even to his spouse, she may be used to manipulate 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 also 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 have considered all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. Although it is clear that the Applicant is a patriot and highly respected by all who know him (AppXs A~H, and PHXs A~M and O~W); overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For this reason, I conclude Applicant has not mitigated the security concerns arising from his Foreign Influence.

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
Subparagraph 1.a.	Against Applicant
Subparagraph 1.b.	For Applicant
Subparagraph 1.c.	Against Applicant
Subparagraph 1.d.	For Applicant
Subparagraph 1.e.	For Applicant
Subparagraph 1.f.	Against Applicant
Subparagraph 1.g.	Against Applicant
Subparagraph 1.h.	Against Applicant
Subparagraph 1.i.	Against Applicant
Subparagraph 1.j.	Against Applicant

Subparagraph 1.k. Against Applicant

Subparagraph 1.l. Against 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.

Richard A. Cefola
Administrative Judge