



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



In the matter of:)	
)	
)	ISCR Case No. 14-05955
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Andrew Henderson, Esquire, Department Counsel
For Applicant: Nina Marino, Esquire

January 22, 2016

Decision

CEFOLA, Richard A., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) on November 5, 2013. On April 26, 2015, 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 acknowledged receipt of the SOR on May 19, 2015. He answered the SOR in writing on June 1, 2015, and requested a hearing before an Administrative Judge. The Defense Office of Hearings and Appeals (DOHA) received the request soon thereafter, and I received the case assignment on August 18, 2015. I granted Applicant’s counsel’s request for a delay until October 28, 2015, in order for his counsel to be available. DOHA issued a notice of hearing on September 28, 2015, and I

convened the hearing as scheduled on October 28, 2015. The Government offered Exhibits (GX) 1, which was received without objection. Applicant testified on his own behalf and submitted Exhibits (AppXs) A through L, which were received without objection. DOHA received the transcript of the hearing (TR) on November 6, 2015. I granted Applicant's request to keep the record open until November 30, 2015, to submit additional matters. On November 30, 2015, he submitted Exhibit M, which was received without objection. The record closed on November 30, 2015. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Procedural and Evidentiary Rulings

Motion In Limine

At the hearing, Applicant made a Motion In Limine to exclude evidence of failed polygraph examinations. (TR at page 11 line 18 to page 12 line 8). That motion was denied in favor of a full administrative record. Furthermore, Department Counsel offered no such evidence.

Motion to Amend SOR

Department Counsel moved to amend the SOR by withdrawing Subparagraph 2.a., which alleged Personal Conduct under Guideline E. There being no objection, the SOR was so amended. (TR at page 10 line 19 to page 11 line 17.)

Findings of Fact

In his Answer to the SOR, Applicant admitted all the factual allegations in the remaining Subparagraphs of the SOR, 1.a.~1.f. with explanations.

Guideline B - Foreign Influence

Applicant has a Doctorate in computer science, has worked for a government contractor for "twenty-eight years," and has had no security clearance violations. (TR at page 146 line 13 to page 157 line 3, and GX 1 at page 11.) He is a native-born American, and has no foreign property or business interests. (TR at page 179 lines 4~14, and GX 1 at page 5.)

1.a. Applicant's spouse is dual national of Taiwan and of the United States. (GX 1 at pages 14~16.) She is willing to renounce her Taiwanese citizenship. (TR at page 86 lines 4~9.) She is "Doctor of Oriental Medicine," who's income exceeds that of her husband, and she has no foreign property interest. (TR at page 160 lines 4~19, at page 177 lines 9~14, and AppXs I and G.) His wife earns between \$200,000~\$400,000 a year, whereas Applicant's annual income is about \$180,000. (TR at page 177 lines 9~14.) Their net worth in the United States is in excess of \$1,000,000. (AppX B.)

1.b., 1.d. and 1.f. Applicant's mother-in-law and three brothers-in-law own a fish farm in Taiwan. (AppX G.) They are all citizens and residents of Taiwan. Since about 2003, he and his spouse, have contributed about \$150,000 to his mother-in-law to cover unexpected occurrences, such as a 2009 typhoon. (TR at page 118 line 7 to page 119 line 25, at page 121 line 11 to page 123 line 10, at page 135 line 11 to page 137 line 1, and AppX H~J.) He has visited Taiwan about 12 times since 1989. (TR at page 167 line 7 to page 168 line 4.) Although they stay with her family during these short 4~5 day visits; due to the language barrier, his interaction with his Taiwanese in-laws is limited. (*Id*, and TR at 170 line 14~20.) They do not know what Applicant "does for a living," (TR at page 106 line 21 to page 107 line 22), and they are not connected to any foreign government (TR at page 140 line 20 to page 141 line 2.)

1.c. Applicant has two nephews who also work on the family fish farm. (TR at page 103 line 6 to page 104 line 24, and at page 106 line 21 to page 107 line 22.) Again due to the language barrier, Applicant's interaction with his nephews is limited. (TR at page 170 line 14~20.) They do not know what Applicant "does for a living," (TR at page 106 line 21 to page 107 line 22), and they are not connected to any foreign government. (TR at page 140 line 20 to page 141 line 2.)

1.e. Applicant has little or no interaction with the other Taiwanese nationals that he delineated on his e-QIP. (TR at page 171 line 20 to page 172 line 5, and GX 1 at page 22.)

I also take administrative notice of the following facts. Taiwan, according to a 2008 report to Congress, was involved in criminal espionage and export controls cases. There have been numerous cases involving the illegal export, or attempted illegal export, of U.S. restricted, dual use technology.

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

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, Paragraph 7(a) is arguably applicable: “*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.*” Applicant’s wife is a dual national; and his mother-in-law, brothers-in-law and

nephews are citizens and residents of Taiwan. This is clearly countered, however, by the first mitigating condition 8(a), as “*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.*” Applicant’s wife is willing to renounce her Taiwanese citizenship, and he has little interaction with his Taiwanese in-laws, due to the language barrier, even when he visits them in Taiwan. Furthermore, his in-laws have little knowledge about his employment, and are not connected with the Taiwanese government.

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.

The record shows that the Applicant is well respected in the work place, as evidenced by the testimony of his colleagues (TR at page 25 line 2 to page 78 line 6), and by numerous letters of recommendation (AppX C) and by his numerous accolades in his field of expertise (AppXs D and E.)

I have considered all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. Overall, the record evidence leaves me without questions or doubts as to Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his alleged 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:	FOR APPLICANT
Subparagraph 1.a.	For Applicant
Subparagraph 1.b.	For Applicant
Subparagraph 1.c.	For Applicant
Subparagraph 1.d.	For Applicant
Subparagraph 1.e.	For Applicant
Subparagraph 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.

Richard A. Cefola
Administrative Judge