



Homeland Security Alert

Recent developments in homeland security law

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Nixon Peabody wins judgment for employee in appeal of security clearance denial

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In today's workplace, a security clearance is a valuable commodity. For some employees, it is more than that – it is a job requirement. When working for employers who handle sensitive information, federal and private-sector employees alike often must obtain security clearances to gain access to information that is restricted to the general population.

Historically, the majority of the clearance holders in the United States have been members of the military. But the current workforce comprises a number of emerging fields, including contracting, technology, and consulting, in which a current security clearance is a prerequisite for working on certain projects. Thus, it can be devastating to an employee's career – and damaging to the employer – if s/he applies for, but is denied, a required security clearance.

Obtaining a clearance from the Department of Defense (DOD) is a lengthy process that consists of a voluminous, detailed, written application (commonly known as an SF-86 form) and a background check. The results of this check, and the information provided by the applicant on the SF-86 form, establish the basis for the DOD's decision to grant or deny the applicant a security clearance.

If, after considering an application, the DOD reaches a preliminary decision that it should not grant the applicant a security clearance, it refers the matter to the Defense Office of Hearings and Appeals (DOHA). DOHA ultimately decides whether to grant the clearance or to deny it. If it chooses to deny a security clearance application, DOHA sends the applicant a letter of intent that includes a statement of reasons for the denial.

Upon receiving such a denial letter from DOHA, an applicant can challenge it in two ways: rebut the statement of reasons in writing, or submit a writing *and* request a hearing in front of a DOHA administrative judge. If the applicant appeals by writing alone, an administrative judge reviews the written record and makes a final decision based on the written materials submitted by the applicant and by the government. If an applicant requests a DOHA hearing, however, s/he will have the opportunity to present her/his own witnesses and evidence, and to cross-examine any witnesses that the government puts forth.

Recently, Nixon Peabody won a judgment on behalf of an applicant who challenged the

denial of his secret-level security clearance through the DOHA appeals process. In addition to submitting written materials to DOHA, Nixon Peabody partner Anjali Chaturvedi and associate Rebekah Stafford argued on the applicant's behalf at a hearing in front of an administrative judge. Their client, an Algerian national who has resided in the United States for 30 years, was denied the secret-level security clearance that he needed for his job with a major defense contractor. He had applied for and had been granted a secret-level security clearance more than a decade earlier, relating to work for the same employer, but the clearance had expired. In refusing to renew his security clearance, the Department of Defense issued a statement of facts that cited its concerns about the applicant's foreign contacts and interests, and about his dual citizenship with Algeria, as the bases for denying his application.

In preparation for the DOHA hearing, Ms. Chaturvedi and Ms. Stafford submitted an informal brief to the administrative judge. The brief summarized their client's personal and professional history and his ties to the United States, and explained why the bases provided in the statement of reasons were not accurate or did not apply to him. They also provided legal advice to their client regarding actions he could take that would put him in the most favorable position on appeal, and they prepared him to testify at the hearing.

During the hearing before the DOHA administrative judge in June 2007, Ms. Chaturvedi and Ms. Stafford examined witnesses on the client's behalf, and challenged the government's assertions about their client's relationship to Algeria. They drew on the facts and holdings of previous DOHA decisions to explain why their client should be granted a clearance, and they presented the judge with compelling documentary evidence, including numerous letters of support written by his colleagues, family, and friends.

In September 2007, after reviewing the evidence presented at the hearing and in the record, the judge ruled in the applicant's favor: The judge, finding that it was consistent with the national interest to approve the application, granted him a security clearance. The client's secret security clearance was reinstated in early October 2007, and he is back at work doing what he was trained and hired to do.

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