



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



In the matter of:

Applicant for Public Trust Position

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ADP Case No. 14-04242

Appearances

For Government: Caroline E. Heintzelman, Department Counsel
For Applicant: *Pro se*

05/22/2015

Decision

DAM, Shari, Administrative Judge:

Applicant was born in China 1955 and immigrated to the United States in 1989. He became a naturalized U.S. citizen in 1999. Applicant's mother, two siblings, and mother-in-law are citizens and residents of China. He sends his mother financial support. Applicant failed to present sufficient evidence to mitigate the foreign influence security concerns. Based upon a thorough review of the case file, pleadings, exhibits, and testimony, eligibility for access to ADP I/II/III sensitive information is denied.

Statement of the Case

On April 9, 1993, the Composite Health Care Systems Program Office (CHCSPO), the Defense Office of Hearings and Appeals (DOHA), and the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASD C3I), entered into a memorandum of agreement for DOHA to provide trustworthiness determinations for contractor personnel employed in Sensitive Information Systems Positions (ADP I/II/III), as defined in Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation).

On December 15, 2013, Applicant submitted a Public Trust Position Application (SF 85P). On October 3, 2014, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline B (Foreign Influence). 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); the Regulation (*supra*); and the adjudicative guidelines (AG) effective within the DoD CAF for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on October 15, 2014 (Answer), and requested a hearing before an administrative judge. DOHA assigned the case to me on February 24, 2015. DOHA issued a notice of hearing on March 10, 2015. I convened the hearing as scheduled on April 1, 2015. Department Counsel offered Government Exhibits (GE) 1 and 2, which were admitted without objection. Applicant testified and offered Applicant's Exhibits (AE) A through C, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on April 9, 2015. The record remained open until April 20, 2015, to give Applicant an opportunity to submit other exhibits. On April 6, 2015, he emailed Department Counsel additional information. She forwarded that email to me and I marked it as AE D, and admitted it without an objection.

Procedural Rulings

Department Counsel requested administrative notice (AN) of facts concerning China. She provided 20 supporting documents to show detail and context for those facts (HE 1.) Applicant did not object to the request or documents, and I granted Department Counsel's request. (Tr. 15.)

Findings of Fact

In his Answer, Applicant admitted the allegations contained in SOR ¶¶ 1.a through 1.f. His admissions, including those made in a January 29, 2013 Personal Subject Interview (PSI), are incorporated herein as findings of fact. (Answer; GE 2.)

Applicant was born in China in 1955. He is 60 years old. He attended high school and college there, and earned a bachelor's degree from a Chinese university. In 1987 he married his wife, who was a Chinese citizen and resident at the time. He moved to the United States in 1989 to be with his wife, who was attending graduate school. They have two adult children, both of whom were born in the United States. He became a naturalized U.S. citizen in 1999. (AE C.) He began working for his current employer in 2004. (Tr. 21.) His U.S. passport is current. (AE B.) The last time he visited China was in 2008. (Answer.)

Applicant's wife was born in China in 1956. She graduated from a Chinese university in 1984. She came to the United States in 1988 to attend graduate school. She works at a U.S. university. She returned to China in 2008 and 2013 to visit her family. (Tr. 34.) She is a naturalized U.S. citizen, the date of which is unknown. She is aware of this hearing. (Tr. 23; GE 2.)

Applicant's parents were born and raised in China. His father is deceased. His elderly mother is a citizen and resident of China. Applicant has provided about \$5,000

annually in financial support to his mother for years, although he thinks when he visited in 2008 he may have given his brother \$20,000 to assist with his mother's care. (Tr. 41.) The last time he sent her financial support was in 2013. (Tr. 37.) He has weekly communication with her. (Tr. 27; Answer; GE 2.) His mother visited Applicant in the United States in 2000 and 2002. (Tr. 27.) If his brother told him that his mother needed more money for her care, he would oblige. (Tr. 43.)

Applicant's two siblings were born in China and are Chinese citizens and residents. He has weekly contact with his brother, a professor at a Chinese university. His brother has visited Applicant in the United States. (Tr. 29-30; GE 2.) His sister is a retired teacher. He also maintains regular contact with her. (Tr. 31.)

Applicant's wife's parents were born and raised in China. His father-in-law is deceased. His mother-in-law is a citizen and resident of China. He has contact with her through his wife. He thinks his wife sends her mother financial support. (Tr. 35; GE 2.)

Applicant owns a house in the United States valued at \$205,000. He has a savings account with \$2,000 to \$3,000 in it. His 401(k) has approximately \$200,000 in it. (Tr. 43-45; AE D.)

Applicant provided evidence concerning the quality of his professional performance. His February 2015 Performance Summary noted an "Above Effective" rating. (AE A.) His supervisor stated that Applicant "had a very successful year in 2014." (AE A.)

China

I take administrative notice of the facts set forth in the Administrative Notice documents concerning China, which are incorporated herein by reference.

China is a large and economically powerful country, with a population of over a billion people and an economy growing at about 10% per year. China has an authoritarian government, dominated by the Chinese Communist Party. It has a poor record with respect to human rights, suppresses political dissent, and engages in arbitrary arrests and detentions, forced confessions, torture, and mistreatment of prisoners.

China is one of the most aggressive countries in seeking sensitive and protected U.S. technology and economic information. It targets the United States with active intelligence gathering programs, both legal and illegal. As a result, it is a growing threat to U.S. national security. In China authorities routinely monitor telephone conversations, facsimile transmissions, e-mail, text messaging, and internet communications. Authorities open and censor mail. Its security services have entered personal residences and offices to gain access to computers, telephones, and fax machines. All major hotels have a sizable internal security presence, and hotel guestrooms are sometimes bugged and searched for sensitive or proprietary materials. There are

several recent cases involving actual or attempted espionage and the illegal export of information to China.

Policies

Positions designated as ADP I, II, and III are classified as “sensitive positions.” (Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.) “The standard that must be met for . . . assignment to sensitive duties is that, based on all available information, the person’s loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security.” (Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. (Regulation ¶ C8.2.1.)

When evaluating an applicant’s suitability for a public trust position, 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 to be used in evaluating an applicant’s eligibility for access to classified or sensitive 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 AG ¶ 2 describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 [or sensitive] information will be resolved in favor of the 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. Directive ¶ E3.1.15 states that, “[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.”

A person applying for access to sensitive information seeks to enter 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 protected information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Finally, as emphasized in Section 7 of Executive Order 10865, “[a]ny 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.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Foreign Influence

AG ¶ 6 explains the trustworthiness concerns pertaining to foreign influence as follows:

Foreign contacts and interest 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 sets out two conditions that could raise a trustworthiness concern and may be disqualifying in this case:

- (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
- (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 or technology and the individual’s desire to help a foreign person, group, or country by providing that information.

China is known to target U.S. citizens to obtain protected information, and has a significant interest in acquiring defense-related and other technology. While there is no

evidence that intelligence operatives from China seek or have sought classified or economic information from or through Applicant or his family, nevertheless, it is not prudent to rule out such a possibility in the future. Applicant's relationships with his two siblings, mother-in-law, and mother for whom he provides financial support create substantial potential for conflict of interest. Those circumstances could place Applicant in a position of having to choose between family members residing in China, a country that generates a heightened risk of coercion, and the United States. The evidence is sufficient to raise potential trustworthiness concerns under AG ¶¶ 7(a), and 7(b). The Government met its burden of production by raising the above disqualifying conditions and shifts the burden to Applicant to prove mitigation.

AG ¶ 8 lists three conditions that could mitigate foreign influence trustworthiness concerns. Those with potential application in mitigating the concerns in this case are:

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

AG ¶ 8(a) does not have application under the facts in this case. Applicant's two siblings, mother, and mother-in law, are citizens and residents of China. The family's physical presence in that country creates a heightened potential for exploitation, inducement, manipulation, pressure, or coercion, as there is strong evidence of China's human rights abuses toward citizens and residents. Thus, Applicant's family interests could be threatened to the point that he would confront a choice between their interests and those of the United States should adverse actors learn of Applicant's work for the U.S. Government.

AG ¶ 8(b) provides some mitigation. A key factor in the AG ¶ 8(b) analysis is Applicant's "deep and longstanding relationships and loyalties in the U.S.," such that he "can be expected to resolve any conflict of interest in favor of the U.S. interest." He has lived in the United States since 1989 and became a citizen in 1999. His wife is a naturalized U.S. citizen, and his two children are U.S. citizens. He has successfully worked for his employer for over ten years. He has economic ties to the United States, including a financial interest in real estate, and a sizable amount of money in a 401(k).

While those factors weigh in Applicant's favor, he maintains strong ties to his Chinese family members, as demonstrated by his ongoing support for his elderly mother and interaction with his siblings.

AG ¶ 8(c) does not provide mitigation for the trustworthiness concerns raised. Applicant maintains regular contact with his mother and two siblings. He has some contact with his mother-in-law. All of these people are citizens and residents of China. He routinely sends his mother financial support. In 2008 he visited family members in China. These family relationships are commendable, but the contacts have been sufficiently regular and recent that they cannot be construed as casual or infrequent.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for a public trust position by considering the totality of the Applicant's conduct and relevant circumstances. Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. 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.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Some mitigating evidence weighs in favor of granting Applicant a public trust position. He is an intelligent, articulate, and hardworking person, who has lived in the United States for 26 years. His wife and two children are U.S. citizens and residents. He has accumulated over \$400,000 of assets in the United States.

Four circumstances weigh against Applicant in the whole-person analysis. First, Applicant had numerous connections to China before he immigrated to the United States in 1989. He spent his formative years there and earned a college degree at a Chinese university. Second, three of Applicant's immediate family members are citizens and residents of China, as is his mother-in-law. Third, China is a known collector of U.S. technological and economic information. Fourth, and more importantly for security purposes, the Chinese government is hostile to the United States and actively seeks classified and sensitive information. The Chinese government could attempt to use Applicant's family members to obtain protected information and compromise Applicant's responsibilities to the United States.

After weighing the disqualifying and mitigating conditions, and all facts and circumstances in the context of the whole-person, Applicant has not sufficiently mitigated the trustworthiness concerns pertaining to foreign influence. Overall, the record evidence leaves doubt as to Applicant's eligibility and suitability for a position of trust. For all these reasons, I conclude Applicant did not mitigate the trustworthiness concerns arising under Guideline B.

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
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Subparagraphs 1.a through 1.f:	Against Applicant
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Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a public trust position. Eligibility for access to ADP I/II/III sensitive information is denied.

Shari Dam
Administrative Judge