

KEYWORD: Guideline B; Guideline C

DIGEST: Applicant’s close relatives in Hong Kong could be a means through which Applicant comes to the attention of those who seek U.S. information and technology and would attempt to exert coercion. The record need not contain evidence of an actual threat of espionage. Factors such as the relatives’ obscurity or the failure of foreign authorities to contact those relatives in the past are not a meaningful measure of a trustworthiness risk There is no reason to disturb the Judge’s conclusion that Applicant’s relatives pose a heightened risk. Adverse decision affirmed.

CASENO: 14-01655.a2

DATE: 12/09/2015

DATE: December 9, 2015

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In Re:)	
-----)	ADP Case No. 14-01655
)	
Applicant for Public Trust Position)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a trustworthiness designation.¹ On June 13, 2014, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline B (Foreign Influence) and Guideline C (Foreign Preference) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On September 3, 2015, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Carol G. Ricciardello denied Applicant’s request for a trustworthiness designation. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. We remanded the case on November 3, 2015, for correction of the record. Our decision did not address the substantive issues raised by Applicant. The case file was returned to us on November 23, 2015, with some two dozen additional documents in the file.

Applicant raised the following issue on appeal: whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. The Judge’s favorable findings under Guideline C are not at issue in this appeal. Consistent with the following, we affirm.

The Judge’s Findings of Fact

The Judge made the following findings pertinent to the issues raised on appeal: Applicant was born in Hong Kong, coming to the U.S. in the late 1990s. He attended college in this country and became a U.S. citizen a few years ago. His wife, whom he married in the early 2000s, was born in Hong Kong and became a U.S. citizen, though the date of her naturalization is not known. Applicant and his wife have two children who were born in the U.S. Applicant has worked for a Federal contractor since the mid-2000s.

Applicant’s parents and sibling are citizens and residents of Hong Kong. Applicant has weekly contact with these relatives. The parents work for private companies, although it is not known whether these firms are associated with the Chinese government. Applicant’s father-in-law is a citizen and resident of Hong Kong. It is not known if he receives a governmental pension. Applicant speaks annually with his father-in-law and visits him when he goes to Hong Kong. The record does not say how much contact Applicant’s wife has with her father.

Applicant traveled to Hong Kong about 10 times since the early 2000s, visiting his parents and father-in-law. Applicant has never served in the Chinese military and has no financial interests in Hong Kong or China. He has no plans of returning to China to live.

¹The Statement of Reasons characterizes this case as a security clearance adjudication, as does correspondence from DOHA to Applicant prior to the Decision. On the other hand, the File of Relevant Material (FORM) and the Judge’s Decision treat it as a trustworthiness determination. Applicant’s job appears to be one for which a trustworthiness determination would be appropriate. This apparent discrepancy does not affect the outcome, insofar as the Guidelines apply to all adjudications under the Directive, including both security clearance and public trust cases. See Memorandum, *Implementation of Adjudicative Guidelines*, dated August 30, 2006, contained in Directive, Enclosure 2. The same standard applies to both security clearances and trustworthiness determinations as well. See, e.g., ADP Case 12-04343 at 3 (App. Bd. May 21, 2013).

China has an authoritarian government that is pursuing long term modernization of its military. It is the world's most active practitioner of economic espionage and is a growing threat to U.S. economic security. It utilizes a large network of factories, research institutes, and computer networks to facilitate the collection of sensitive information. It engages on an ongoing effort to obtain U.S. technologies and is one of the most aggressive countries conducting espionage against this country.

Hong Kong is a Special Administrative Region (SAR) with a high degree of autonomy, although its military and police are the responsibility of China. Persons born there are considered citizens of China. The Judge described Hong Kong as a free and open society, with an independent judiciary and respect for the rule of law. However, it has certain human rights problems, such as limitations on free speech. Other problems, such as arbitrary arrest and hampering free assembly, etc., are also concerns.

The Judge's Analysis

As stated above, the Judge cleared Applicant of the concerns alleged under Guideline C. Her analysis of Guideline B began with an evaluation of the extent to which the record raised concerns under that Guideline. In concluding that it did, the Judge cited to evidence that Applicant has close relatives in Hong Kong, with at least some of whom he communicates regularly. She concluded that such relatives living in proximity to China, a country that practices espionage against the U.S., created a heightened risk of exploitation and a potential conflict of interest for Applicant. In evaluating Applicant's case for mitigation, the Judge noted a paucity of evidence about such matters as Applicant's sibling's job or the extent, if any, of contact between Applicant's parents and the Chinese government. She found that Applicant is a relatively recent U.S. citizen who has significant ties to his foreign relatives. She concluded that there is insufficient evidence in the record to conclude that the mitigating conditions favorably apply.

Discussion

Applicant argues that when speaking with his parents they discuss nothing improper and that showing respect for family is an important part of Chinese culture. We construe this as an argument that Applicant's circumstances do not raise trustworthiness concerns. The Directive presumes a nexus between admitted or proven conduct or circumstances under any of the Guidelines and an applicant's eligibility for a trustworthiness designation. *See, e.g.*, ADP Case No. 13-01305 at 3 (App. Bd. Sep. 5, 2014).

In the case before us, the Judge neither found nor assumed that Applicant's relatives were necessarily engaged in activity harmful to the U.S. or that their conversations with Applicant were in and of themselves suspicious. Rather, she found that the nature of these familial relationships, combined with China's status as an active collector of U.S. protected information, raise a concern that Applicant could be subjected to pressure. That is, Applicant's close relatives in Hong Kong could be a means through which Applicant comes to the attention of those who seek U.S. information and technology and who would attempt to exert coercion upon him. *See, e.g.*, ISCR

Case No. 14-02950 at 3 (App. Bd. May 14, 2015), in which the applicant’s foreign sibling was found to be a person through whom the applicant “could come to the attention of those interested in acquiring U.S. information.”

Moreover, the record does not have to contain evidence of an actual threat of espionage. Factors such as an applicant’s relatives’ obscurity or the failure of foreign authorities to contact those relatives in the past do not provide a meaningful measure of whether an applicant’s circumstances pose a trustworthiness risk. *See, e.g.*, ADP Case No. 12-03783 at 4 (App. Bd. Aug. 12, 2013). Under the facts of this case, we find no reason to disturb the Judge’s conclusion that Applicant’s foreign relatives pose a heightened risk of coercion² or could place Applicant in a conflict of interest.³ The record, viewed as a whole, does not provide a reason to rebut the presumption of nexus, insofar as there is a rational connection between an applicant’s family ties in a country whose interests are adverse to the U.S. and the risk that the applicant might fail to protect information entrusted to him by virtue of occupying a public trust position. *See, e.g.*, ADP Case No. 08-10099 at 3 (App. Bd. Jan. 28, 2011).

Applicant challenges the Judge’s findings that certain information about his wife and relatives is unknown, for example the date of his wife’s naturalization. He contends that all the information that the Judge found to be unknown is contained in his security clearance application (SCA). We have considered this argument in light of the record. While the SCA lists Applicant’s wife’s date of birth and the date of their marriage, it does not reflect when she became a U.S. citizen.⁴ In fact, Applicant acknowledged that he did not know the date of her naturalization in his clearance interview. Item 4, *Personal Subject Interview*, at 2. Moreover, the Judge’s finding that the record does not reflect the extent to which Applicant’s parents’ employers may have some relationship with the Chinese or Hong Kong government is sustainable. All in all, the Judge’s material findings of trustworthiness concern are supported by substantial record evidence. *See, e.g.*, ADP Case No. 08-10098 at 2 (App. Bd. Jan. 6, 2012). Even if the Judge’s findings contain errors, they are harmless, given the totality of facts and circumstances in the record. *See, e.g.*, ADP Case No. 13-01074 at 3 (App. Bd. Aug. 25, 2014).

Applicant describes the circumstances of his foreign travel, citing to evidence that it was for tourism, visiting family, etc . He also notes significant differences between Hong Kong and the rest of China, for example the former’s devotion to due process. Applicants argument are consistent with the Judge’s findings about China and Hong Kong, which state, for example, that Hong Kong

²Directive, Enclosure 2 ¶ 7(a): “contact 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[.]”

³Directive, Enclosure 2 ¶ 7(b): “connections to a foreign person . . . 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 . . . by providing that information[.]”

⁴The Judge did not find that there is a reason to question whether Applicant’s wife is legitimately a U.S. citizen. Rather, she only found that the date upon which this occurred is not contained in the record.

has independent courts and respects the rule of law. Her adverse decision was based in large measure upon the nature of the Chinese government and its history of espionage against the U.S. Applicant's arguments are not enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ADP Case No. 13-00584 at 3 (App. Bd. Apr. 24, 2014). Despite Applicant's argument to the contrary, we conclude that the Judge's whole-person analysis complied with the requirement of the Directive in that she evaluated Applicant's circumstances in light of the entirety of the record evidence. *See, e.g.*, ADP Case No. 06-02549 at 2 (App. Bd. Jul. 3, 2007).

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. The standard applicable to trustworthiness cases is that set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) regarding security clearances: such a determination "may be granted only when 'clearly consistent with the interests of the national security.'" *See, e.g.*, ADP Case No. 12-04343, *supra*, note 1. *See also Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013), *cert. denied*.

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board