



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 20-03106

Appearances

For Government:
Andrew Henderson, Esquire, Department Counsel

For Applicant:
Pro se

November 29, 2022

Decision

ROSS, Wilford H., Administrative Judge:

Statement of the Case

Applicant submitted his most recent Electronic Questionnaires for Investigations Processing (e-QIP) on January 27, 2020. (Government Exhibit 1.) On May 28, 2021, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline J (Criminal Conduct), Guideline E (Personal Conduct), and 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); and the Adjudicative Guidelines effective within the Department of Defense after June 8, 2017.

Applicant answered the SOR in writing (Answer) on June 3, 2021, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on July 7, 2021. The case was assigned to me on April 12, 2022. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on April 15, 2022. The case was heard on May 24, 2022. DOHA received the transcript (Tr.) of the hearing on June 3, 2022.

The Government offered Government Exhibits 1 through 5, which were admitted without objection. Applicant testified on his own behalf and called one witness. He asked that the record remain open for the receipt of additional documentation. Applicant timely submitted Applicant Exhibit A, which was also admitted without objection.

Procedural Rulings

The Government requested I take administrative notice of certain facts relating to Taiwan and The People's Republic of China (China). Department Counsel provided an eight-page summary of the facts, supported by fourteen Government documents pertaining to Taiwan, identified as Administrative Notice - I (AN - I). Department Counsel also provided a nine-page summary of facts, supported by 22 Government documents pertaining to China, identified as Administrative Notice – II (AN – II). The documents provide elaboration and context for the summaries. I take administrative notice of the facts included in the U.S. Government reports. They are limited to matters of general knowledge, not subject to reasonable dispute. They are set out in the Findings of Fact. (Tr. 21-22.)

Findings of Fact

Applicant is 30 years old and single. He has received a bachelor's degree and master's degree from American universities. Applicant has been employed by a defense contractor since February 2018. He seeks to retain national security eligibility and a security clearance in connection with his employment. He has also been a member of the Navy Reserve since 2016, with the rank of petty officer second class (E-5). (Government Exhibit 1 at Sections 12, 13A, and 15; Tr. 6-7, 23-24.)

Paragraph 1 (Guideline J, Criminal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in criminal conduct that creates doubt about a person's judgment, reliability, and trustworthiness. Applicant denied this allegation with explanations.

Paragraph 2 (Guideline E, Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in activities that show questionable judgment, which raises questions about his reliability, trustworthiness and ability to protect classified or sensitive information. Applicant denied this allegation with explanations.

The Paragraph 1 and Paragraph 2 allegations concern the same event:

On August 20, 2019, Applicant was involved in a road-rage incident with another driver. Applicant and the other driver acted in provocative ways towards each other on the highway. When they got off the highway, Applicant stopped at a stop light with the other driver behind him. At this point, the other driver got out of his car and approached Applicant. Applicant became concerned that the other driver would attack him or his car. He then got out of his car holding a clasp knife for protection. He also stated that his intent was to scare the other driver off. The other driver charged Applicant and they got into a mutual fight during which Applicant was hit in the head at least once. During this fight, the other driver was cut on his leg by Applicant's knife. Applicant stated that this was an accident, and there is no evidence that it was intentional. After the other driver was cut, a third party separated them until police arrived and took statements from everyone concerned. Applicant was fully cooperative with the police. He was arrested on a charge of Assault with a Deadly Weapon. The district attorney elected not to move forward with any charges against Applicant. (Government Exhibit 2 at pages 5-6; Government Exhibit 3; Tr. 13-15, 24-36, 39-41.)

Applicant received a head injury during the fight with the other driver. Applicant Exhibit A is the medical report from his provider concerning this injury. (Tr. 38-39.)

Applicant informed his employer of the arrest as soon as possible after the arrest, and of the disposition. He also informed his military supervisor of the incident the evening it happened, which her testimony confirmed. (Government Exhibits 4 and 5; Tr. 45.)

Applicant stated he had never been involved in any other incident like this one. He further stated his intention was not to hurt anyone but to protect himself and his car. He regrets the incident, (Tr. 39-42.)

Paragraph 3 (Guideline B, Foreign Influence)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has foreign connections that may create a security concern. Applicant denied this allegation with explanations.

Applicant is a native-born American citizen. From 1992 through 2011, Applicant lived with his parents in Taiwan. He returned to the United States in 2011 to attend school and has lived in the United States continually since then. Applicant's mother lives in the

United States and is a recently naturalized American citizen. His sister is also a native-born American citizen who also lives in the United States. (Government Exhibit 1 at Sections 11 and 17; Tr. 17-18.)

Applicant's father is a citizen and resident of Taiwan. He and Applicant's mother are divorced. He works as an accountant in Taiwan. Other than Taiwan's mandatory military service when he was a young man, Applicant's father has no connection to the Taiwanese government. Applicant talks to his father every one or two weeks. His father came to the United States after the incident in 2019 to support Applicant. Applicant last visited Taiwan in 2016, before he joined the Navy. Applicant's father knows very little of what he does for a living. (Government Exhibit 2; Tr. 16-17, 36-37, 41.)

Taiwan

Applicant has contacts with Taiwan. Accordingly, it is appropriate to look at the current situation concerning Taiwan. Taiwan is a multiparty democracy; whose authorities generally respect the human rights of its citizens. Taiwan is an active collector of industrial information and engages in industrial espionage, as shown by the administrative notice documents in the record. However, the record does not demonstrate that the Taiwanese government seeks to exert pressure on U.S. citizens to collect information from family members residing in country or abroad. Finally, it is worth noting that the U.S. Government, and the Defense Department in particular, have a close and continuing relationship with Taiwan and its military, in accordance with the Taiwan Relations Act of 1979, which has governed policy in the absence of diplomatic relations or a defense treaty with Taiwan.

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 more than 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 intelligence. 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 addition, China views Taiwan as part of China. China has engaged in many different coercive diplomatic and military activities, seeking to isolate and intimidate Taiwan into unification on China's terms.

Mitigation

Applicant's military supervisor, a senior chief petty officer (E-8), testified. She has known Applicant for six or seven years. She testified that he is a "good guy," and also stated that he is "a man of integrity." (Tr. 43-49.)

Policies

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's national security eligibility.

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. 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, "Any doubt concerning personnel being considered for national security eligibility 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14, requires the Government to 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 national security eligibility. 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 or sensitive information.

Finally, as emphasized in Section 7 of Executive Order 10865, “Any 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* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Paragraph 1 (Guideline J, Criminal Conduct)

The security concerns relating to the guideline for criminal conduct are set out in AG ¶ 30, which states:

Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules, and regulations.

AG ¶ 31 describes one condition that could raise security concerns and may be disqualifying in this case:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Applicant was involved in a road-rage incident with another driver in August 2019. He admitted foolishly getting out of his car with a knife, and from all indications accidentally cut the other person during a mutual fight. Police arrested him, but no charges were brought against Applicant by the district attorney. The stated disqualifying condition applies.

The guideline includes four conditions in AG ¶ 32 that could mitigate the security concerns arising from Applicant’s alleged criminal conduct. Two have possible application to the facts of this case:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant's single arrest occurred in 2019, three years ago. The district attorney elected not to proceed with any charges. Applicant admitted his fault in the incident. This single incident of poor judgement does not indicate a pattern on his part. His conduct has been exemplary since then, as confirmed by the testimony of his military supervisor. Both mitigating conditions apply. Paragraph 1 is found for Applicant.

Paragraph 2 (Guideline E, Personal Conduct)

The security concerns relating to the guideline for personal conduct are set out in AG ¶ 15, which states:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 describes three condition that could raise security concerns and may be disqualifying in this case:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of:

(2) any disruptive, violent, or other inappropriate behavior; and

(e) personal conduct or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing

Applicant was involved in a single road-rage incident, as described above. He was arrested at the time, but the district attorney declined to proceed with the case. All three disqualifying conditions apply to the facts of this case, shifting the burden to Applicant to mitigate them.

The guideline includes one condition in AG ¶ 17 that could mitigate the security concerns arising from Applicant's alleged personal conduct:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

Applicant admitted that his conduct was foolish. For all the reasons stated under Paragraph 1, above, I find that AG ¶ 17(c) applies and provides sufficient mitigation for Applicant's conduct. Paragraph 2 is found for Applicant.

Paragraph 3 (Guideline B, Foreign Influence)

¶ 6: The security concern relating to the guideline for Foreign Influence is set out in AG

Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they result in divided allegiance. They may also be a national security concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

The guideline notes several conditions that could raise security concerns under AG ¶ 7. Two are arguably applicable in this case:

- (a) contact, regardless of method, 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 classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology.

Applicant's father lives in Taiwan. He contacts his father every one or two weeks. The evidence is sufficient to raise these disqualifying conditions.

Taiwan is an active collector of industrial espionage. Accordingly, Applicant's family connections in that country have the potential to generate a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion under AG ¶ 7(a). The mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if only one relative lives in a foreign country and an applicant has contacts with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. (See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).)

AG ¶ 8 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 8 including:

- (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 United States;
- (b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, or allegiance to the group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States, 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.

Applicant is a native-born American citizen. His mother and sister are also American citizens. His relationship with his father is distant, consisting mainly of telephone calls. His personal, professional, and family connections in the United States strongly outweigh his connections to Taiwan. AG ¶¶ 8(a), (b), and (c) apply. Paragraph 3 is found for Applicant.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's potential for national security eligibility by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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.

Under AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant has mitigated the concerns regarding his single incident of criminal conduct and related personal conduct. His father's presence in Taiwan has also been mitigated. Overall, the record evidence does not create substantial doubt as to Applicant's present suitability for national security eligibility and a security clearance.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

- Paragraph 1, Guideline J: FOR APPLICANT
 - Subparagraph 1.a: For Applicant
- Paragraph 2, Guideline E: FOR APPLICANT
 - Subparagraph 2.a: For Applicant
- Paragraph 3, Guideline B: FOR APPLICANT
 - Subparagraph 3.a: 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 or continue Applicant's national security eligibility for a security clearance. Eligibility for access to classified information is granted.

WILFORD H. ROSS
Administrative Judge