

KEYWORD: Foreign Influence; Foreign Preference; Personal Conduct

DIGEST: Applicant is a 44-year-old naturalized U. S. Citizen. He attended a university in the United States in 1996 and became a naturalized citizen in 2002. His children were born in the United States. He has worked for a federal contractor since 2004. His mother is a resident and citizen of Hong Kong. Recently, he destroyed his current Chinese passport in the presence of his security officer. He did not mitigate the security concerns raised by foreign influence or preference, but did mitigate those raised under personal conduct. He is barred from holding a security clearance under the ASDC³ Memorandum. Clearance is denied.

CASENO: 06-18010.h1

DATE: 05/21/2007

DATE: May 21, 2007

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In re:)	
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-----)	ISCR Case No. 06-18010
SSN: -----)	
)	
Applicant for Security Clearance)	
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**DECISION OF ADMINISTRATIVE JUDGE
SHARI DAM**

APPEARANCES

FOR GOVERNMENT
Jeff A. Nagel, Esq.

FOR APPLICANT
Pro Se

SYNOPSIS

Applicant is a 44-year-old naturalized U. S. citizen. He attended a university in the United States in 1996 and became a naturalized citizen in 2002. His children were born in the United States. He has worked for a federal contractor since 2004. His mother is a resident and citizen of Hong Kong. Recently, he destroyed his current Chinese passport in the presence of his security officer. He did not mitigate the security concerns raised by foreign influence or preference, but did mitigate those raised under personal conduct. He is barred from holding a security clearance under the ASDC³ Memorandum. Clearance is denied.

STATEMENT OF THE CASE

On May 5, 2005, Applicant submitted a security clearance application (SCA). The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1992), as amended, DOHA issued a Statement of Reasons (SOR) on November 14, 2006, detailing the basis for its decision—security concerns raised under Guidelines B (Foreign Influence), C (Foreign Preference) and E (Personal Conduct) of the Adjudicative Guidelines issued on December 29, 2005, and implemented by the Department of Defense effective September 1, 2006. The revised guidelines were provided to Applicant when the SOR was issued.

On December 15, 2006, Applicant filed a response to the SOR, admitting all of the allegations, and elected to have the case decided on the written record in lieu of a hearing. On January 30, 2007, Department Counsel prepared a File of Relevant Material (FORM), containing five Government Exhibits (GX), and mailed Applicant a complete copy on February 5, 2007. The FORM also contained nine documents for which Department Counsel requested that I take administrative notice. Applicant had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation or mitigation. Applicant received the FORM on February 13, 2007, and submitted additional information on March 13, 2007. He did not object to the introduction of the documents offered for administrative notice. Department Counsel did not object to Applicant's additional submission. The case was assigned to me on March 28, 2007. After reviewing the nine documents submitted for administrative notice, I take notice of the information contained therein.

FINDINGS OF FACT

Based on the entire record, including Applicant's admissions in his response to the SOR, I make the following findings of fact:

Applicant is a 44-year-old married man. He was born in the Peoples Republic of China (PRC). He attended a university in the United States from 1996 to 1997 when he was awarded an advanced degree. He became a naturalized U.S. citizen in June 2002.¹ Since October 2004, he has

¹GX 4 at 1.

worked for a federal contractor.² He completed a security clearance application (SCA) in April 2005.

Applicant's wife was born in Taiwan in 1967. She became a U.S. citizen in December 1988. They have two children, both born in the United States. His in-laws are naturalized U.S. citizens.³ He does not have any financial interests in foreign property.⁴ In his March 12, 2007 letter, he stated, "I am a U.S. Citizen and I am proud for that. I never indicate a preference for a foreign country over the United States it was because United States is my country."

Applicant's parents were born in the PRC. His father is deceased and his mother is a citizen and resident of Hong Kong. He is one of two children, both born in PRC. His sister is a naturalized citizen and resident of the United States. His father-in-law and mother-in-law are naturalized U.S. citizens and residents.

Over the course of the past seven years, Applicant traveled to Canada once on business in 1997. It was his only trip out of the United States in 17 years.⁵ At the time, he used his Hong Kong passport that was issued in 1997 because he did not have a U.S. passport. His Hong Kong passport expires in September 2007.⁶ After being notified that possessing a current foreign passport created security concerns, Applicant mailed it to DOHA for destruction, but DOHA returned it to him because DOHA is not authorized to accept it.⁷ He subsequently ripped it up in front of his security officer on March 19, 2007, and mailed a picture of it along with a confirming letter from his company security officer.⁸

In August 2002 and March 2004, Applicant was arrested for Domestic Spousal Battery. Both charges were dismissed. The incidents arose after his wife, who suffers from a seemingly difficult case of bipolar disorder, called the police during an argument about her refusal to take prescribed medication.⁹ When he completed his SCA, he failed to disclose the two arrests in response to Question 26. Your Police Record - Other Offenses, because he misunderstood the question. He did not realize he was required to disclose any arrest regardless of the outcome of the case. After speaking to an investigator, he realized he made a mistake in not listing the two incidents.¹⁰

I take administrative notice of the nine Administrative Notice Exhibits submitted by Department Counsel that pertain to the PRC and Hong Kong. The Government's documents, when

²*Id.* at 2.

³*Id.* at 4-5.

⁴*Id.* at 6.

⁵Letter dated March 12, 2007.

⁶GX 4 at 6.

⁷Letter contained in documents submitted on or about March 20, 2007.

⁸Letter dated March 19, 2007.

⁹GX 3 and 5.

¹⁰Letter dated March 12, 2007.

reviewed in their entirety, indicate that since July 1, 1997, Hong Kong has been designated as a Special Administrative Region (SAR) of the PRC, a totalitarian state ruled by the Chinese Communist Party, and that Hong Kong is subject to the PRC in matters of defense and foreign affairs. The Government's documents also note that the PRC has exercised active and historic roles as a collector of competitive information and as a perpetrator of industrial espionage against U.S. companies producing militarily critical technologies such as information systems, sensors and lasers, and electronics. In addition, the PRC has a poor record with respect to human rights.

POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, sets forth criteria which must be evaluated when determining security clearance eligibility. Within the Revised Guidelines are factors to consider in denying or revoking an individual's request for access to classified information (Disqualifying Conditions), and factors to consider in granting an individual's request for access to classified information (Mitigating Conditions). By recognizing that individual circumstances of each case are different, the guidelines provide substantive standards to assist an administrative judge in weighing the evidence in order to reach a fair, impartial and common sense decision.

Granting an applicant's clearance for access to classified information is based on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not only the *actual* risk of disclosure of classified information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information. Directive, Enclosure 2, ¶ E2.2.2. The decision to deny an individual a security clearance is not necessarily a judgment about an applicant's loyalty. Executive Order 10865, § 7. Instead, it is a determination that an applicant has not met the strict guidelines established by the Department of Defense for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). The Directive presumes a rational connection between past proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the corresponding burden of rebuttal shifts to the applicant to present evidence in refutation, extenuation, or mitigation sufficient to overcome the position of the government. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); Directive, Enclosure 3, ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his clearance." *Id.*

Based upon the allegations contained in the SOR and a consideration of the evidence as a whole, the following revised adjudicative guidelines are pertinent to an evaluation of the facts of this case:

Guideline B (Foreign Influence): The Concern -Foreign contacts and interests 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 U.S. interest, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline 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.

Guideline C (Foreign Preference): The Concern -When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

Guideline E (Personal Conduct): The Concerns - 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

CONCLUSIONS

After considering all facts in evidence and legal standards, including the "whole person" concept, I conclude the following in regard to the allegations contained in the SOR:

Guideline B: Foreign Influence

Based on Applicant's admission that his mother is a resident citizen of Hong Kong, the Government established a disqualifying condition under Foreign Influence Disqualifying Condition (FI DC) 7(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 the information."

While family ties with persons in a foreign country are not, as a matter of law, disqualifying under Guideline B, such ties do raise a *prima facie* security concern. This concern is sufficient to require an applicant to present evidence of rebuttal, extenuation or mitigation sufficient to meet the applicant's burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance. ISCR Case No. 99-0424, 2001 (App. Bd. Feb. 8, 2001).

Applicant's case requires the recognition that the PRC, a totalitarian regime, exercised governmental control over Hong Kong and is able to use that control if it so wishes to obtain, through illegal methods, militarily critical technologies from companies doing business as government contractors in the United States. These actions threaten U.S. security interests. American citizens with immediate family members who are citizens or residents of Hong Kong could be vulnerable to coercion, exploitation, or pressure.

The Government having established a disqualification, the burden shifted to Applicant to rebut or mitigate the allegations. After considering all mitigating conditions under this guideline,

8(a)-(f), I conclude none of them apply, as Applicant failed to provide any information pertinent to their application.

Guideline C: Foreign Preference

Possession of Chinese Passport

The Memorandum of Assistant Secretary of Defense Arthur L. Money, dated August 16, 2000, hereinafter “ASDC³ Memorandum” mandates that “consistent application of the guideline requires that any clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government.” However, the passport cannot be surrendered to a Department of Defense security officer. It must be surrendered to the issuing authority. ISCR Case No. 03-06174 at 3-5 (App. Bd. Feb. 28, 2005). Although Applicant demonstrated his intent to surrender his current passport, he must notify the appropriate authority of his intentions, and thereafter be divested of all opportunity to hold the passport. Hence, I conclude that the ASDC3 memorandum bars Applicant’s clearance because he did not properly notify Hong Kong, the issuing authority, of his intention to surrender his rights to hold a foreign passport. Hence, the allegations contained in SOR ¶ 2.a are concluded against him.

A discussion of disqualifying and mitigating conditions is not necessary, given the strict applicability of the above memo.

Guideline E: Personal Conduct

The Government alleged a potential disqualification under Personal Conduct Disqualifying Condition (PC DC) ¶ 16(a) “ the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status determines security clearance eligibility or trustworthiness, or award fiduciary responsibilities.” SOR ¶ 2.a alleges that Applicant falsified his SCA by failing to disclose the 2002 and 2004 arrests. Although Applicant admitted he did not disclose the information, he denied that he intentionally attempted to deceive the Government.

When a falsification allegation is controverted or denied, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant’s state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant’s state of mind at the time the omission occurred. ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004).

Applicant’s explanation that he misunderstood Question 26, requiring him to disclose the two arrests regardless of their dismissal, is credible. That confusion is typical for many applicants, and once he learned he should have listed the information, he readily admitted he made a mistake. Hence, I conclude he did not intentionally falsify the SCA as alleged in SOR ¶ 3.a.

“Whole Person” Analysis

In addition to evaluating the disqualifying and mitigating conditions under the guideline, the adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. Directive ¶ E2.2.1 describes the essence of scrutinizing all appropriate variables in a case as the “whole person concept.” In evaluating the conduct of an applicant, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual’s age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other 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. Because foreign influence does not involve misconduct, voluntariness of participation, rehabilitation, and behavior changes, etc., the eighth factor in this series is the most relevant.

The Appeal Board suggests that the whole person analysis address “evidence of an applicant’s personal loyalties; the nature and extent of an applicant’s family’s ties to the U.S. relative to his ties to a foreign country; his or her ties social ties within the U.S.; and many others raised by the facts of a given case.” ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007).

In the present case, there is a dearth of information about positive attributes to Applicant’s life as a U.S. citizen that could weigh in favor of granting him a security clearance, in response to the disqualification under Guideline B. Essentially, the only pertinent evidence in the record is information that he has been a naturalized U.S. citizen for five years, his wife and her family are naturalized citizens, and his children were born in the United States. He also claims he is a patriotic U.S. citizen and does not have a criminal record or unresolved financial problems. Consequently, Applicant did not provide sufficient evidence to mitigate those security concerns raised under foreign influence. The allegations raised under Guideline B are found against him.

Accordingly, Guideline E is decided for him, and Guidelines B and C are decided against him.

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 as follows:

Paragraph 1: Guideline B (Foreign Influence)	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2: Guideline C (Foreign Preference)	AGAINST Applicant
Subparagraph 2.a:	Against Applicant
Paragraph 3: Guideline E (Personal Conduct)	FOR APPLICANT

Subparagraph 3.a:

For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly not consistent with the national interest to grant Applicant a security clearance. Clearance is denied.

Shari Dam
Administrative Judge