

KEYWORD: Foreign Influence

DIGEST: Applicant is a 33-year-old employee of a government contractor seeking a position of public trust. She was born in China and became a naturalized U.S. citizen in June 2004. Her mother, father, brother and sister-in-law are citizens and residents of China. She submitted no evidence in extenuation or mitigation of foreign influence security concerns raised by these family connections. It is not clearly consistent with the national interest to grant or continue access to sensitive information, in an automated data processing (ADP) position designated ADP-I/II/III, to Applicant. Eligibility to occupy such a public trust position is denied.

CASENO: 06-22581.h1

DATE: 05/22/2007

DATE: May 22, 2007

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| In re: |) | |
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| |) | |
| ----- |) | ADP Case No. 06-22581 |
| SSN: ----- |) | |
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| Applicant for Public Trust Position |) | |
| |) | |

**DECISION OF ADMINISTRATIVE JUDGE
DAVID M. WHITE**

APPEARANCES

FOR GOVERNMENT

Candace L. Le'i, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 33-year-old employee of a government contractor seeking a position of public trust. She was born in China and became a naturalized U.S. citizen in June 2004. Her mother, father, brother and sister-in-law are citizens and residents of China. She submitted no evidence in

extenuation or mitigation of foreign influence security concerns raised by these family connections. It is not clearly consistent with the national interest to grant or continue access to sensitive information, in an automated data processing (ADP) position designated ADP-I/II/III, to Applicant. Eligibility to occupy such a public trust position is denied.

STATEMENT OF THE CASE

Applicant applied for a public trust position on September 28, 2004, in conjunction with her employment by a defense contractor in an automated data processing (ADP) position designated ADP-I/II/III. On December 14, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, pursuant to Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended. The SOR detailed reasons, under Guideline B (Foreign Influence), why DOHA could not make the preliminary affirmative finding, under the Directive and the revised adjudicative guidelines,¹ that it would be clearly consistent with the national interest to grant Applicant eligibility for an ADP-I/II/III-designated position, and recommended referral to an administrative judge to determine whether eligibility for a public trust position should be granted, continued, denied, or revoked.

Applicant responded to the SOR allegations by returning an annotated and notarized copy, dated January 26, 2007, admitting the truth of all of the allegations, and electing to have her case decided on the written record in lieu of a hearing.² Applicant did not submit any matters for consideration in extenuation or mitigation of her admissions.

Department Counsel submitted the government's written case on February 27, 2007. A complete copy of the file of relevant material (FORM)³ was provided to Applicant, and she was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant signed the document acknowledging receipt of her copy of the FORM on March 9, 2007, and returned it to DOHA. She did not submit any further response to the FORM by the April 9, 2007 due date, nor did she request an extension of time to respond. The case was assigned to me on May 2, 2007.

¹Undersecretary of Defense Memorandum, *Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (December 29, 2005), Aug. 30, 2006, directed implementation and use of the revised adjudicative guidelines for all security clearance adjudications and other determinations made under the Directive in which an SOR had not been issued by Sept. 1, 2006. Para. 6.1 of DoD 5200.2-R, *Personnel Security Program*, Jan. 1987, as amended, and Deputy Undersecretary of Defense (Counterintelligence and Security) Memorandum, *Adjudication of Trustworthiness Cases*, Nov. 19, 2004, direct that trustworthiness determinations be adjudicated utilizing the provisions of the Directive.

²Gov X 3 (Applicant's response copy of SOR dated Jan. 26, 2007).

³The government submitted four items in support of the allegations, and seven source documents in support of a request to take administrative notice of material facts concerning China.

FINDINGS OF FACT

Applicant admitted the truth of every factual allegation set forth in the SOR pertaining to foreign influence under Guideline B (subparagraphs 1.a through 1.c). Those admissions are incorporated herein as findings of fact. After complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 33-year-old employee of a defense contractor seeking to obtain eligibility for a public trust position for the first time.⁴ She was born in China, has lived in the United States since at least 1995, and became a naturalized citizen of the United States on June 16, 2004.⁵ Applicant reported on her public trust position application, and admitted in response to the SOR, that her father, her mother, her brother and her sister-in-law are citizens and residents of China. Her husband was also born in China, and is a naturalized U.S. citizen.⁶ Applicant further reported and admitted that she traveled to China for pleasure from August 16, 2003 to September 7, 2004.⁷ She stated that she has never held a U.S. passport and denied that she was ever a dual citizen of the U.S. and another country.⁸ Her lack of a U.S. passport and the length of her stay in China indicate that she must have traveled on a Chinese passport, especially since she did not become a U.S. citizen until June 2004.⁹

Department Counsel sought administrative notice of the material facts concerning China set forth in part III of the FORM, and provided seven official U.S. Government source documents supporting the truth of those facts.¹⁰ Applicant did not object to this request, and I did take administrative notice of those facts in reaching my decision in this case. Among the most pertinent of these facts are that China has an authoritarian communist government with a poor human rights record that, despite improving economic relations, remains a rival military and political power to the United States. China has targeted the U.S. with active intelligence gathering programs, and is one of the most aggressive countries in targeting sensitive and protected U.S. technologies. The large number of Americans of Chinese ancestry are considered prime intelligence targets by the People's Republic of China. Those traveling to, and living in China are subject to surveillance, monitoring and search by Chinese authorities without their consent or knowledge.

POLICIES

⁴Gov X 4 (Public Trust Position Application (SF-85P), dated Sep. 28, 2004) at 1, 4.

⁵*Id.* at 1, 2, 3.

⁶*Id.* at 3, 8.

⁷*Id.* at 4; Gov X 3, *supra* n. 2, at 2.

⁸Gov X 4, *supra* n. 4, at 1.

⁹The information concerning the dates of her travel to China, provided by Applicant in Gov X 4, may be in error. It appears inconsistent that she could have become a naturalized U.S. citizen in June 2004 if she was traveling in China from August 2003 through September 2004. However, she provided no clarifying or corrective information in response to the SOR or FORM.

¹⁰Department Counsel listed and identified the seven source documents on pages 6 and 7 of the FORM. They are attached behind Gov X 4.

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability and trustworthiness determinations, including those involving ADP I, II, and III positions.¹¹ In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into disqualifying conditions (DC) that may raise security concerns, and mitigating conditions (MC) that may reduce or negate security concerns. Applicable DCs and MCs must be considered in deciding whether to grant, continue, deny or revoke an individual's eligibility for a position of public trust. The adjudicative guideline relevant to Applicant's case is Guideline B: Foreign Influence. Potentially applicable DCs and MCs under this guideline are discussed in detail below, in connection with my conclusions.

An administrative judge need not view the adjudicative guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are intended to be applied in conjunction with the factors set forth in the Adjudicative Process provision of the Directive,¹² to assist the administrative judge in reaching fair and impartial, common sense decisions. The entire decision-making process is a conscientious scrutiny of a number of variables known as the "whole person concept."

All available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider, in addition to the applicable guidelines, are: (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.

Protection of the national security is the paramount consideration, so the final decision in each case must be arrived at by applying the standard that issuance of a trustworthiness determination must be clearly consistent with the interests of national security. Any doubt as to whether access to sensitive information is clearly consistent with national security must be resolved in favor of the national security.¹³

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.

¹¹*See supra*, n. 1.

¹²Directive, Enclosure 2, *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, dated August 2006 ¶ 2.

¹³*Id.*, at ¶¶ 2(b), 2(c).

In the decision-making process, facts must be established by substantial evidence.¹⁴ The burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to sensitive ADP-I/II/III information. "Department Counsel is responsible for presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted."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 [Applicant] has the ultimate burden of persuasion as to obtaining a favorable [clearance] decision."¹⁶ Once the government has met its initial burden of production, the burden of persuasion (including any burden to disprove a mitigating condition) never shifts to the government, but remains with Applicant.¹⁷

A person who seeks access to sensitive information in a position of public trust seeks to enter a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to sensitive information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard sensitive information or ADP systems. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described above, I conclude the following with respect to each allegation set forth in the SOR:

Guideline B (Foreign Influence)

"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 in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this guideline can and should consider the

¹⁴"Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

¹⁵Directive ¶ E3.1.14.

¹⁶Directive ¶ E3.1.15.

¹⁷ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005); "The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

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.”¹⁸

Applicant’s mother, father, brother and sister-in-law are all citizens and residents of China, and she reported that she traveled there to visit them from August 2003 to September 2004. These circumstances raise security concerns under foreign influence disqualifying condition (FI DC) 7(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”). China is active in the collection of protected information, including from U.S. citizens, so her temporary and their permanent presence there creates a heightened risk of foreign exploitation, inducement, manipulation, pressure or coercion. 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 this information”) also potentially applies to Applicant’s Chinese connections. There need not be evidence of an actual conflict of interest to raise security concerns, the potential conflict, arising from Applicant’s numerous and close ties to Chinese citizens and residents, is sufficient to shift the burden to her to disprove its existence or otherwise mitigate the concerns. Finally, her extended visit to China raises security concerns under FI DC 7(i) (“conduct, especially when traveling outside the U.S., which may make the individual vulnerable to exploitation, pressure, or coercion by a foreign person, group, government, or country”) based on China’s documented practice of surveillance and monitoring of visitors.

Applicant has neither asserted that any foreign influence mitigating condition (FI MC) applies to her circumstances, nor is there any evidence in the record that would support the application of any FI MC. I have reviewed each potential FI MC and conclude that, on this record, none apply.

Whole Person Analysis

Except for her husband, Applicant’s entire immediate family are citizens and residents of China. Applicant submitted neither evidence nor other information from which any mitigating condition or circumstance might be applied to lessen the security concerns raised by the potential for conflict of interest, coercion, pressure, duress or manipulation created by her foreign connections. These foreign connections will continue into the foreseeable future. Applicant is a mature and educated individual who failed to alleviate security concerns in the face of her burden to do so. Given China’s reportedly active collection of protected information, this burden is significant, and Applicant failed to overcome it. For the reasons stated, I conclude Applicant has not demonstrated that it is clearly consistent with the interests of national security to grant her access to sensitive information or eligibility for a public trust position.

FORMAL FINDINGS

¹⁸Directive, Enclosure 2 ¶ 6.

Formal Findings For or Against Applicant on the allegations set forth in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

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| Paragraph 1, Guideline B: | AGAINST APPLICANT |
| Subparagraph 1.a: | Against Applicant |
| Subparagraph 1.b: | Against Applicant |
| Subparagraph 1.c: | Against Applicant |

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue access to sensitive information, in an automated data processing (ADP) position designated ADP-I/II/III, to Applicant. Eligibility to occupy such a public trust position is denied.

David M. White
Administrative Judge