



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 12-04929
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel

For Applicant: *Pro se*

March 31, 2015

Decision

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigation Processing (e-QIP) on March 25, 2013. (Government Exhibit 1.) On July 1, 2014, the Department of Defense issued a Statement of Reasons (SOR) detailing the security concerns under Guideline B (Foreign Influence).¹ 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 (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

¹The subparagraphs in the SOR are mis-lettered, going from 1.a to 1.d, 1.e, and 1.f. The SOR is amended as follows: subparagraph 1.d to 1.b, 1.e to 1.c, and 1.f to 1.d. (Directive, Additional Procedural Guidance at E3.1.10 and E3.1.17.)

Applicant submitted an Answer to the SOR on August 23, 2014, and requested a hearing before an administrative judge.² Department Counsel was prepared to proceed on October 9, 2014. I received the case assignment on October 21, 2014. DOHA issued a notice of hearing on October 27, 2014, and I convened the hearing as scheduled on December 8, 2014. The Government offered Government Exhibits 1 through 3, which were received without objection. Applicant testified on his own behalf, called two additional witnesses, and submitted Applicant Exhibits A through QQ, which were also admitted without objection. DOHA received the transcript (Tr.) of the hearing on December 29, 2014. Applicant requested that the record remain open until January 5, 2015, for the admission of additional documents. He timely submitted Applicant's Exhibits RR, SS, and TT, which were also admitted without objection. The record closed on January 5, 2015. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Procedural Ruling

Requests for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to the People's Republic of China (China). (Tr. 20-29.) The request was not admitted into evidence but is included in the record. The facts administratively noticed are set out in the Findings of Fact, below.

Applicant submitted a formal request that I take administrative notice of a publication from the Defense Personnel Security Research Center.³ He also asked that notice be taken of various DOHA decisions. Department Counsel had no objection to notice being taken. (Tr. 38-39.)

Findings of Fact

Applicant is 51, married with one child, and has a master's degree. He is a naturalized American citizen from a country other than China. He lived in the United States from 1992 through 1996, then returned to his country of birth. He returned to the United States in 2000 and has lived here ever since. He became a naturalized American citizen in 2008. (Applicant Exhibit A, and Q.)⁴ He has been employed by a

²Applicant's Answer was prepared with the assistance of counsel. He elected to represent himself at the hearing.

³Herbig, Katherine L., *Allegiance in a Time of Globalization* Technical Report 08-10, <http://www.dhra.mil/perserec/reports/tr08-10.pdf> (December 2008).

⁴Applicant's birth country is a close ally of the United States. His status as a naturalized citizen from that country presents no security issues.

defense contractor since 2000, and seeks to retain a security clearance he first obtained in 2008 in connection with his employment in the defense industry.

Applicant admitted all four allegations in the SOR. Those admissions are findings of fact. He also provided additional information to support his request for eligibility for a security clearance.

Paragraph 1 (Guideline B - Foreign Influence)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has foreign contacts and interests that could lead to the exercise of poor judgment, unreliability or untrustworthiness on his part, or make him vulnerable to pressure or coercion.

Applicant met his wife online in about 2010. This was a relationship site and not a marriage broker. She is now 28. He was working at a remote location in the United States and she was in China, where she worked as an English teacher. (Applicant Exhibit C.) Applicant does not speak Chinese. After communicating over the internet for several months he decided to visit China and see if there was the possibility of their having a relationship. He has visited China four times, the last trip in November 2012. (Applicant Exhibit B.) He followed appropriate security regulations before and after each trip. Once Applicant and his wife began to get serious, he did research on the DOHA website to see if her being a foreign national would have an adverse impact on his security clearance.⁵ (Tr. 111-114, 148-152; Applicant Exhibit X.)

In July 2011 Applicant submitted his "Petition for Alien Fiancé(e)" to U.S. Citizenship and Immigration Services (CIS). This petition is required in order for Applicant to receive permission to have his then-fiancée herself apply to the State Department to receive a K-1 visa to travel to the United States for the purpose of getting married. The Petition contains considerable evidence supporting the existence of an ongoing relationship between the parties at that point in time. (Applicant Exhibit RR.)

The petition was granted, and his fiancée received her visa and moved to the United States. Applicant and his wife were married on April 15, 2012. (Applicant Exhibit SS at 16-17.) In accordance with US immigration law Applicant's wife was granted a conditional two-year permanent resident status because it was "based on a marriage that was less than 2 years old on the day [she was] given permanent residence."⁶

In June 2014 Applicant and his wife filed a joint petition to remove the conditions on her permanent resident status. That petition was granted and Applicant's wife is now

⁵See Applicant's administrative notice request.

⁶U.S. Citizenship and Immigration Services, *Remove Conditions on Permanent Residence Based on Marriage*, <http://www.uscis.gov/green-card/after-green-card-granted/conditional-permanent-residence/remove-conditions-permanent-residence-based-marriage> (last reviewed/updated Feb. 12, 2014).

a lawful permanent resident of the United States without conditions. She states, "I am seeking my citizenship as soon as possible." (Applicant Exhibits C, and CC.) Their child was born in the United States on May 20, 2013. (Applicant Exhibit TT at 10.)

Applicant's mother-in-law and father-in-law are citizens and residents of China. Applicant and his wife have virtually no relationship with her father, from whom she has been estranged for many years. She states, "My dad was drunk and abusive. I was so happy when he moved out when I was 13 because he beat my mom so hard. It was unlivable." She last saw her father in November 2012, along with Applicant. It was not a pleasant experience. Applicant's wife concludes, "Since 2012, we never had any kind of communication to this day. And I don't think we will." (Tr. 119-120; Applicant Exhibit C.)

Applicant's wife has a closer relationship with her mother, who visited the United States for six months around the time her grandchild was born. She has since returned to China, where she lives with Applicant's brother. He provides support to their mother. Applicant's wife talks to her mother, primarily by Skype, on a fairly regular basis. Her mother does not speak English. Applicant does not provide his mother-in-law any financial support.(Tr. 116-119; Applicant Exhibit C.)

Applicant's wife has one sibling, a brother. She is not that close with him, primarily because he is six years older than she is. She states, "I am not really deeply connected with him at this point. I am not expecting him to be interested in my life and talk." She speaks with her brother about once every three months or so. (Applicant Exhibit C.) His English is poor. He is employed by a non-Chinese company in the food-service business. It has been about a year or so since Applicant had any communication with his brother-in-law. (Tr. 120-122.)

None of these people have any relationship with the Chinese government, defense industry, or the Chinese Communist Party. Applicant stated that he would immediately report any attempts to influence or coerce him to the appropriate authorities. (Tr. 95-96, 113-114, 123-124.)

Administrative Notice

Applicant has contacts with China. Accordingly, it is appropriate to discuss the current situation in China.⁷ China is the most populous country in the world, with an authoritarian government dominated by the Chinese Communist Party (CCP). China's military arm, the People's Liberation Army (PLA) is pursuing comprehensive transformation and modernization of its forces to improve its capacity for power projection. Department of Defense publication *Annual Report to Congress: Military and Security Developments Involving the People's Republic of China 2012* states at page 10:

⁷All of the following statements are supported by the documents submitted by the Department Counsel in support of his request for administrative notice and its attachments.

Chinese actors are the world's most active and persistent perpetrators of economic espionage. Chinese attempts to collect U.S. technological and economic information will continue at a high level and will represent a growing and persistent threat to U.S. economic security. The nature of the cyber threat will evolve with continuing technological advances in global information environment. (Attachment XII.)

The United States is also concerned about the human rights situation in China. Incidents of concern include arbitrary and unlawful killings by security forces, physical abuse and torture of prisoners, arbitrary arrest and detention, denial of fair public trials, and other incidents of concern. (U.S. Department of State, *Country Reports on Human Rights Practices for 2013: China (includes Tibet, Hong Kong, and Macau)*. (Attachment I.)

Mitigation

Applicant is deeply respected by his co-workers, including his current and former supervisors. Many of them pointed out his outstanding personal security habits, as well as his efforts to increase security awareness at his workplace. Applicant is viewed as a man of "integrity," "honest, responsible, and loyal to the United States," and "competent and trustworthy." His co-workers were aware that Applicant was having a relationship with a woman from China before he got married. All of these people have known Applicant for several years, some more than ten years, and a few more than 20. (Tr. 53-71, 73-87; Applicant Exhibits E through L, Y through BB.)

Applicant testified and submitted documentation concerning his ongoing efforts to be security conscious and proactive at the workplace. It is particularly noted that Applicant specifically notified his employer's security department of his wife's nationality in order to determine whether she could attend an open house at his facility. (Tr. 122-127, 136-143; Applicant Exhibits FF, GG, JJ through QQ.)

Evaluations and other written commendations show Applicant to be a consistently high performer, acknowledged to be an expert in his field. (Applicant Exhibits O, S, T, and U.) Applicant and his wife have no assets in China. His net worth in the United States is over \$1 million. (Tr. 110-111; Applicant Exhibit II.)

Policies

Security clearance decisions are not made in a vacuum. When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used as appropriate in evaluating an applicant's eligibility for access to classified 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(a) describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny 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. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that, "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of 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. 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 access to classified information. Security clearance decisions include, by necessity, consideration of the possible risk that 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 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* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between applicant's conduct and the continued holding of a security clearance. If such a case has been established, the

burden then shifts to applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government's case. An applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

Paragraph 1 (Guideline B - Foreign Influence)

The concern under Guideline B is styled as follows at AG ¶ 6:

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 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.

The Applicant has family connections to China through his wife, who remains a Chinese citizen herself. Connections with China are reviewed under a heightened risk standard. The following Disqualifying Conditions apply to this case under AG ¶ 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;
- (b) connections to a foreign person, group, government, or country that create a potential conflict of interest between an individual's obligations to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information; and
- (d) sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.

Applicant has provided compelling evidence to show that the following Mitigating Conditions under AG ¶ 8 also apply to this particular case, given his particular background:

- (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.

Applicant has proved that he is a conscientious and patriotic citizen, and member of the defense industry. He has substantial family and financial ties in the United States that outweigh his wife's relationship to China. While his wife still has family in China, and is currently a Chinese citizen, Applicant has shown that his loyalties are to the United States. Applicant, who is not of Chinese ancestry, met his wife on the internet. He realized the security concerns of being involved with a person from China, and has been proactive in protecting the national security during the entirety of their courtship and marriage. His wife's relationship with her mother and brother are relatively close, but it is clear that her home is with Applicant and their American child in the United States. I have thoroughly examined the extensive evidence provided by Applicant showing the existence of a close relationship between Applicant and his wife before their marriage. Based on my analysis of the available information, Applicant has overcome the adverse inference arising from his wife's family members' presence in China. Guideline B is found for Applicant.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance 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 the facts and circumstances surrounding this case. My Guideline B analysis is applicable to the whole-person analysis as well. I have also specifically examined the intelligence activities of China, and Applicant's connections to China, under the heightened scrutiny standard. The evidence shows that the Applicant is a patriotic American citizen. Applicant eloquently testified about the importance to him of being a citizen of the United States, and his pride in being a member of the defense industry. He is knowledgeable about security and understands his responsibility, particularly with regards to China. He has a level of security awareness that is rare, which makes him even less likely to be subject to coercion. The testimony and letters of recommendation from people who have known him many years support a finding that it is clearly in the national interest to grant him a security clearance. Accordingly, I find that there is little or no "potential for pressure, coercion, exploitation, or duress" as set forth in AG ¶ 2(a)(8). Using the whole-person standard, Applicant has mitigated the security significance of his alleged foreign connections and is eligible for a security clearance.

On balance, it is concluded that Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

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 B:	FOR APPLICANT
Subparagraphs 1.a through 1.d:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

WILFORD H. ROSS
Administrative Judge