



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



In the matter of:)
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Applicant for Security Clearance)

ISCR Case No. 12-05266

Appearances

For Government: Christopher Morin, Esq., Department Counsel
For Applicant: *Pro se*

01/31/2013

Decision

LYNCH, Noreen A., Administrative Judge:

This case involves security concerns raised under Guideline B (Foreign Influence). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on February 10, 2011. On September 26, 2012, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline B (Foreign Influence). DOD acted 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) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR, and requested a hearing before an administrative judge. The case was assigned to me on November 15, 2012. A notice of hearing was issued on November 26, 2012, scheduling the hearing for December 11, 2012. Government Exhibit (GX) 1 and 2 were admitted in evidence without objection.

Applicant testified but did not present any exhibits. I received the transcript (Tr.) on December 21, 2012.

Procedural Issue

The Government, through Department Counsel requested that I take administrative notice of certain facts with respect to Hong Kong (China). Applicant did not object to the documents. A packet was labeled Hearing Exhibit I and entered into the record.

Findings of Fact

In his answer to the SOR, Applicant denied the factual allegations in the SOR under Guideline B (Foreign Influence) with explanations. He provided additional information to support his case. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Foreign Influence

Applicant was born in Hong Kong in 1963, and he attended high school in Hong Kong. In May 1990, Applicant came to the United States. He has been with his current employer since 1992. He has held a U.S. passport since 1997. His professional life in the United States has been in the information technology field. He became a naturalized U.S. citizen in February 1997. (GX 1) Applicant has held a security clearance for ten years. Applicant is married to a naturalized U.S. citizen, who was also born in Hong Kong. They have two adult children who are U.S. citizens. (Tr. 9)

Applicant and his wife own a home in the United States. He earns about \$80,000 a year. He and his wife have savings accounts. (Tr. 28) He has no bank accounts or investments in Hong Kong.

Applicant's father and mother, who are both deceased, left the People's Republic of China (PRC) and settled in Hong Kong. Applicant's mother lived in the United States from 1985 until 2002.

Applicant's brother is a citizen and resident of Hong Kong. He is a self-employed painter. Applicant does not maintain contact with him. Applicant saw him at a funeral in 2010.

Applicant has a sister who is a citizen and resident of Hong Kong. His older sister is a naturalized U.S. citizen. She came to the United States with Applicant's mother in 1985. However, she returned to Hong Kong in 1995 and works as an accountant. She pays federal income tax to the United States. (Tr.50) Applicant saw his sisters when he returned for a funeral in 2010 and 2012. (Tr. 52) He calls his sisters several times a year. (Tr. 47)

Applicant's mother-in-law died in October 2012. He went to the funeral with his family. The Government has withdrawn allegation SOR ¶ 1.c which applied to his mother-in-law.

Applicant's sister-in-law is a citizen and resident of Hong Kong. Applicant's wife maintains contact with her. (Tr. 80)

Applicant has two nephews who are citizens and residents of Hong Kong. One nephew lived with Applicant while attending college in the United States. Applicant saw them at a funeral in 2010. Applicant does not maintain contact with them.

Applicant has two friends who are residents and citizens of Hong Kong. (Tr. 63) Applicant calls them each year to wish them a Happy New Year. He saw them at the funeral in 2010. He also had dinner with them in Hong Kong in October 2012 when he was attending his mother-in-law's funeral. (Tr. 64)

Applicant has no financial interest in Hong Kong. He does not provide any financial support to anyone in Hong Kong. He has a Hong Kong Identification Card (HKID) which he received before he came to the United States. It could provide benefits to him upon return to Hong Kong, but Applicant has no intention of leaving the United States. He also offered to relinquish the HKID card if necessary. He does not wish to retire in Hong Kong.

Applicant explained that he has been in the United States for 30 years and considers the United States his home. He noted that he has held a security clearance for ten years without incident. When he traveled to Hong Kong, he used his U.S. passport and notified his employer through his facility security officer (FSO). His trips to Hong Kong in 2000, 2004, 2007, 2010, and 2012 were to attend a family funeral. He has not travelled to mainland China since he immigrated to the United States. (Tr. 11) He has no contact with the PRC government nor do any of his family members.

Administrative Notice

Hong Kong is a special administrative region. After more than 150 years of British control, on July 1, 1997, China exercised its sovereignty over Hong Kong, establishing it as a Special Administrative Region (HKSAR). HKSAR retains a high degree of autonomy from China in all matters except foreign and defense affairs, and has retained its political, economic, and judicial systems since 1997. Hong Kong remains a free and open society where human rights are respected, courts are independent, and there is a well-established respect for the rule of law. Hong Kong is a strong ally of the United States in the global coalition against terrorism.

The Nationality Law of the PRC has been applied to the HKSAR since July 1, 1997. Hong Kong residents who are of Chinese descent and were born in the Chinese territories (including Hong Kong), or persons who satisfy the criteria set out in the PRC as having Chinese nationality, are citizens of the PRC.

The PRC has an authoritarian government, dominated by the Chinese Communist Party. 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 the U.S. economic security. The nature of the cyber threat will evolve with continuing technological advances in the global information environment.

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "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). The guidelines presume a nexus or rational connection between proven conduct under any of the

criteria listed therein and an applicant's security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline B, Foreign Influence

The security concern under this guideline is set out in 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.

Three disqualifying conditions under this guideline are relevant. A disqualifying condition may be raised by "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." AG ¶ 7(a) Also, AG ¶ 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 that information is applicable. In addition, AG ¶ 7(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" is potentially applicable.

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it,

regardless of whether that person, organization, or country has interests inimical to those of the United States.” ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

Furthermore, “even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security.” ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Finally, friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. Nevertheless, the nature of a nation’s government, its relationship with the U.S., and its human rights record are relevant in assessing the likelihood that an applicant’s family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence operations against the U.S. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. See *generally* ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision to grant clearance where administrative judge did not consider terrorist activity in area where family members resided).

Applicant has lived and worked in the United States since 1990. He is a naturalized U.S. citizen. Applicant’s wife is a naturalized citizen of the United States. Applicant’s adult children are U.S. citizens. Applicant shares living quarters with his wife who maintains contact with her sister, who is a citizen and resident of Hong Kong.

Applicant’s brother, two sisters, his two nephews and two friends live in Hong Kong. “[T]here is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person’s spouse.” ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at * 8 (App. Bd. Feb. 20, 2002). Applicant maintains some relationship with these family members, with the exception of his one brother.

After considering the totality of Applicant’s family ties to Hong Kong as well as each individual tie, I conclude that Applicant’s family ties are sufficient to raise an issue of a heightened risk of foreign exploitation, inducement, manipulation, pressure or coercion. Based on all these circumstances, I conclude that AG ¶ 7(a), 7(b) and 7(d) are raised.

Security concerns under this guideline can be mitigated by showing that “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.” AG ¶ 8(a).

Security concerns under this guideline can also be mitigated by showing “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.” AG ¶ 8(b).

Applicant came to the United States in 1990. He has been a naturalized U.S. citizen since 1997. His wife and children are U.S. citizens. His professional life is in the United States. He has held a clearance for ten years. He has traveled to Hong Kong for funerals in 2000, 2004, 2007, 2010, and 2012 since holding a security clearance. His brother still lives in Hong Kong but he does not maintain any contact with him. He does maintain contact with his sisters. One of his sisters is a naturalized U.S. citizen. His wife maintains contact with her sister, but Applicant does not. His mother-in-law died in October 2012. His parents are deceased. Applicant has two nephews. He does not maintain contact with them. He saw them at a funeral in 2010 and 2012. Applicant has significant professional, personal, and financial ties to the United States. In light of Applicant’s close ties to the United States, it is unlikely that he would choose his relatives in Hong Kong over his life in the United States. His wealth and assets are in the United States. I find mitigating condition AG ¶ 8(b) applies. Even if security concerns are not mitigated under 8(b), they are mitigated under the whole-person concept, *infra*.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of the applicant’s conduct and all relevant circumstances. An 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.

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. I have incorporated my comments under Guideline B in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant has been in the United States since 1990. He has spent a considerable amount of time in the United States as a professional working in the information technology field. He has held a security clearance for ten years without incident. In 1997, he became a naturalized U.S. citizen. His wife is a naturalized U.S. citizen. His two adult children are U.S. citizens. He was articulate, candid, sincere, and credible at

the hearing. Applicant's home is in the United States. Applicant has been successful in his work.

Applicant chose to leave his home and pursue his career in the United States. He is firmly established in the United States. His assets are located in the United States. Applicant has reported his trips to Hong Kong to his FSO. He has no desire to retire in Hong Kong. Although Applicant has some familial ties to Hong Kong, I am convinced that he will resolve any issues in favor of the United States. Moreover, while Hong Kong is considered part of the PRC, it is a special administrative region with a high degree of autonomy. Applicant has not visited mainland China.

There is no evidence any of the individuals at issue are involved with, or under scrutiny, have interests antithetical to the United States. His family members in Hong Kong do not know the specifics of his work.

Regarding Applicant's life in the United States, he is an American citizen, with a stable family, social, and professional life. His life is focused here. He has loyalty to the United States. There is no evidence indicating that he may be manipulated or induced to help a foreign power or interest.

After weighing the disqualifying and mitigating conditions under Guideline B, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on foreign influence. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegation in the SOR:

Paragraph 1, Guideline B:	FOR APPLICANT
Subparagraphs 1.a-1.f:	For Applicant

Conclusion

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

Noreen A. Lynch
Administrative Judge