



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 12-05514

Appearances

For Government: Melvin A. Howry, Esq., Department Counsel

For Applicant: *Pro se*

01/23/2013

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

On September 14, 2012, the Department of Defense (DOD) issued a Statement of Reasons (SOR) noting security concerns arising under Guideline B (Foreign Influence) and Guideline F (Financial Considerations). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AG).

On October 2, 2012, Applicant responded to the SOR. She admitted all of the allegations except allegation ¶ 1.c, which she wrote was a duplicate entry for the allegation noted at ¶ 1.b. She elected to have her case decided on the written record in lieu of a hearing by a Defense Office of Hearings and Appeals (DOHA) administrative judge. On November 13, 2012, Department Counsel submitted a File of Relevant Material (FORM), which included nine attached items. The FORM also included a request for administrative notice of certain facts and materials pertaining to the People’s Republic of China (PRC) and Hong Kong, which were supported by 16 accompanying documents. Applicant failed to respond to the FORM or object to the request for

administrative notice within 30 days after her receipt of those materials. The case was assigned to me on January 11, 2013. Based on a review of the case file, I find Applicant failed to meet her burden regarding the security concerns raised under Guideline B and Guideline F. Security clearance is denied.

Administrative Notice

Department Counsel submitted a Request for Administrative Notice regarding certain facts and materials regarding Hong Kong and the PRC. That request was contained in the FORM and supported by 16 documents. Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings is to notice facts that are either well known or from government reports. See Stein, *Administrative Law*, Section 25.01 (Bender & Co. 2006) (listing 15 types of facts for administrative notice).

Hong Kong became a Special Administrative Region of the PRC on July 1, 1997. Hong Kong has a population of 6.9 million and 95% of Hong Kong's population is of Chinese descent. The PRC has given Hong Kong a high degree of autonomy, except the PRC has retained responsibility for defense and foreign policy. Recently, the PRC has taken a more active oversight role of Hong Kong's control of political developments.

The Hong Kong government generally respects the human rights of its citizens; however, reported human rights problems include some political restrictions on the legislature's power, press self-censorship, violence and discrimination against women, and restrictions on workers' rights to organize and bargain collectively.

The PRC's Military Intelligence Department, First Bureau, is responsible for collecting military information about the United States. The PRC's Ministry of State Security is the "preeminent civilian intelligence collection agency in [the PRC]," and maintains intelligence operations in Hong Kong and Macau through a bureau utilizing PRC nationals with Hong Kong or Macau connections.

The PRC has an authoritarian, Communist government. It has a poor human rights record, suppresses political dissent, and practices arbitrary arrest and detention, forced confessions, torture, and other prisoner mistreatment. In addition, it is a nuclear power with a large army. It is geographically vast, and has a population of over one billion people.

The PRC aggressively competes with the United States in many areas. PRC's competitive relationship with the United States exacerbates the risk posed by Applicant's Hong Kong connections. It actively collects military, economic, and proprietary industrial information about the United States because of the following circumstances: (1) its position as a global superpower; (2) its military, political, and economic investments in the Pacific Rim and Asia; (3) its leading role in development of

advanced technology that the PRC desires for economic growth; and (4) the PRC considers the large number of Americans of Chinese ancestry as intelligence targets. The PRC's active intelligence gathering programs focus on sensitive and protected U.S. technologies.

Findings of Fact

Applicant is a 60-year-old supervisor who has worked for the same defense contractor since 1981. She is a college graduate. Applicant was born in Hong Kong, while the region was still a British colony. She first came to the United States in 1976. She became a naturalized United States citizen in 1985, years before the July 1997 transfer of governance of Hong Kong from the United Kingdom to the PRC. Applicant is a widow with two grown children.

Applicant's father resides in the United States and her mother is deceased. Applicant's two brothers are residents of Hong Kong and citizens of the PRC. One brother is a retired tour bus driver with no connection to a foreign government. He and Applicant speak by telephone annually and visit in person about every five years. Applicant's other brother is currently a driver for a transportation company with no discernable connection to a foreign government. He and Applicant also speak by telephone annually and visit personally about every five years. Applicant last visited the PRC in 2010.

As of the time Applicant responded to the September 2012 SOR, she had a delinquent utility bill for approximately \$211 that had been placed in collection. (SOR allegation ¶ 2.a). Applicant wrote that the debt was related to an out-of-state property that had been sold in 2007, and noted that the balance had been forgotten. She commented that she would "fix it."

Also in that response, Applicant admitted that she was over 120 days past due in the approximate amount of \$2,927 for a total debt of \$58,168 (SOR allegation ¶ 1.b).¹ No other comment was made. Applicant similarly admitted that she was indebted to a bank on a mortgage in foreclosure in the approximate amount of \$400,000 and to another bank on a mortgage in foreclosure for about \$182,000 (SOR allegations ¶¶ 1.d-1.e, respectively) without additional comment. Applicant did not respond to the FORM. Therefore, the current status of the two delinquent debts and the two foreclosure-related mortgage accounts are unknown. There is no evidence showing Applicant has received financial counseling.

¹ With regard to allegation ¶ 1.c, stating Applicant was 120 past due in the approximate amount of \$11,039 on a total debt of \$57,927, Applicant noted that this allegation is duplicative of allegation ¶ 1.b. Applicant provided no evidence linking the two attributed debts. Given the ultimate disposition of the case, however, and given the similar sums reflected for the total debts at issue, I find that this allegation is a duplicate.

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the AG. The AG lists potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's over-arching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a scrutiny of a number of variables known as the whole-person concept. An 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 that "[a]ny 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.

The United States Government (Government) must present evidence to establish controverted facts alleged in the SOR. It is an applicant's responsibility to present "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." ² The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant. ³

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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. 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.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." ⁴ "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." ⁵ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be

² See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

³ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁴ See also EO 12968, § 3.1(b) and EO 10865 § 7.

⁵ *Navy v Egan*, 484 U.S. 518, 531 (1988).

resolved in favor of protecting such information.⁶ A security clearance denial does not necessarily reflect badly on an applicant's character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

Analysis

Guideline B – Foreign Influence

The concern under Guideline B is that 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. Consideration should be given to 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 U.S. citizens to obtain protected information or is associated with a risk of terrorism. Conditions pertaining to this adjudicative guideline that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, are discussed in the conclusions below. Here, in addition to the administrative region of Hong Kong, concerns are raised by the Applicant's brothers' PRC citizenship. The PRC is a known collector of U.S. military, economic, and proprietary industrial information. It has been known to target U.S. citizens of Chinese descent.

Applicant's relatives of issue are her brothers. They are residents of Hong Kong and citizens of the PRC. These facts, in conjunction with the information offered regarding the PRC, are sufficient to raise Foreign Influence Disqualifying Conditions 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 exploitation, inducement, manipulation, pressure, or coercion*) and 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*) apply. With disqualifying conditions thus raised, the burden shifts to Applicant to mitigate security concerns.

In declining an administrative hearing and relying on the administrative record, Applicant's case rests on scant facts. She wrote that one brother is a retired tour bus operator and that her other brother is presently a bus driver. She wrote that neither brother has a connection with a foreign government, but provided no additional facts to flesh out their positions in post-1997 Hong Kong, nor has she provided relevant information about their family members (*i.e.*, spouses, partners, children, etc.), contacts, or activities. Moreover, there is little information about the Applicant's relationships with her siblings, her life in the United States, her feelings toward Hong

⁶ *Egan, supra*, note 5.

Kong and the PRC, and the like. While on its face, these brothers seem to present little genuine concern for foreign influence, there are insufficient facts available to properly analyze whether Foreign Influence Mitigating Conditions such as AG ¶ 8(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.*); AG ¶ 8(b) (*to the foreign person, group, government, or country is so minimal, or there is no conflict of interest, either because the individual's sense of loyalty to or obligation 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 ¶ 8(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*) apply.

Guideline F – Financial Considerations

Under Guideline F, failure or an inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information.⁷ The burden in these proceedings is placed squarely on an applicant. Here, Applicant admitted responsibility for two homes now in foreclosure, one collection account, and a significantly past due account with a total balance of over \$50,000. Financial Considerations Disqualifying Conditions AG ¶ 19(a) (*inability or unwillingness to satisfy debts*) and AG ¶ 19(c) (*a history of not meeting financial obligations*) apply. With such conditions raised, it is left to Applicant to mitigate security concerns.

Little is known about the properties at issue, and less is known of Applicant's efforts, if any, to address associated debts related to those properties. It is unclear what factors resulted in the creation of these debts and have continued to hinder her ability to address them in some manner. With regard to SOR allegation ¶ 1.a, Applicant stated in her October 2012 response to the SOR that she would "fix" her oversight of the debt at issue, but she provided no evidence of her efforts to address that obligation in response to the November 2012 FORM. As for the 120-day past due balance (\$2,927) at ¶ 1.b and the two foreclosures (\$400,000 and \$182,000) noted at ¶¶ 1.d-1.e, there is no evidence as to their current status, nor did Applicant show that she had the resources and commitment to honor these debts. She provided no detailed description as to any proposed methodologies or plans she or a financial counselor may have developed to effectively address these debts. Also lacking is a current, up-dated description of her financial situation. In short, without more evidence, progress, if any, on these delinquent obligations cannot be discerned. Consequently, potential Financial Considerations Mitigating Conditions such as AG ¶ 20(a) (*the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does*

⁷ AG ¶ 18.

not cast doubt on the individual's current reliability, trustworthiness, or good judgment); AG ¶ 20(b) (20(b) (the conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation) and the individual acted responsibly under the circumstances); AG ¶ 20(c) (the person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control); and AG ¶ 20(d) (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts) cannot apply.

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 an applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). 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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the whole-person factors. In choosing a decision without a hearing, however, there are scant facts of record upon which to mitigate security concerns. It is noted that Applicant is a 60-year-old woman with many years of experience in the area of supervision. She is well educated. She has been with the same employer for about 30 years. An immigrant to this country from colonial (pre-1997) Hong Kong, she has spent the majority of her life in the United States as a U.S. citizen. Here, she married, raised her children, managed a successful career, and became a part of her community. While it appears her entire life is here in the United States, she has two brothers who remained in Hong Kong after the transfer of authority for that region from the United Kingdom to the PRC, a known collector of U.S. military and industrial information. Little has been disclosed about these siblings. Without more information, their status as potential sources for foreign influence cannot be appropriately analyzed.

Of more obvious concern are Applicant's finances. Applicant has two foreclosed properties, a modest collection debt, and a significantly past due balance on a large loan. She was apprised of this situation in the September 2012 SOR. No progress was shown when she responded to the SOR in October 2012. Similarly, no progress was shown in response to the November 2012 FORM. Consequently, the record is devoid of documentary evidence showing that any progress has been made on these obligations. This process does not require that an applicant satisfy all outstanding debts. It does, however, demand that an applicant show that a reasonable and workable plan has been devised to satisfy the debts at issue, and that some efforts have been exerted to successfully implement that plan. Here, there is no evidence such a plan has been devised or implemented.

An adverse determination in this case does not necessarily raise any issues regarding Applicant's loyalty to the United State. Rather, it simply indicates that she failed to meet the evidentiary burden this process places on applicants for a security clearance. In short, there is insufficient evidence of record to mitigate the security concerns raised in the SOR. The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials. Clearance is denied.

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:

Paragraph 1, Guideline B:	AGAINST APPLICANT
Subparagraph 1.a-1b:	Against Applicant
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraphs 2.a-2b:	Against Applicant
Subparagraphs 2.c:	For Applicant
Subparagraphs 2.d-2e:	Against Applicant

Conclusion

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

ARTHUR E. MARSHALL, JR.
Administrative Judge