



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



In the matter of:)
)
) ISCR Case No. 12-07944
)
Applicant for Security Clearance)

Appearances

For Government: Caroline E. Heintzelman, Department Counsel
For Applicant: *Pro se*

10/21/2015

Decision

DAM, Shari, Administrative Judge:

Applicant is a U.S. citizen. In 2010 and 2011, he invested \$35,000 in two Chinese companies through a Canadian company, with a subsidiary in the United States, which handled the financial transactions. Applicant has strong ties and sufficient financial interests in the United States to mitigate the foreign influence security concerns. Eligibility for access to classified information is granted

Statement of the Case

On June 27, 2011, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On February 13, 2015, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR), alleging security concerns under Guideline B, Foreign Influence. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), 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 after September 1, 2006.

Applicant answered the SOR in writing (Answer) on March 13, 2015, and requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) assigned the case to me on June 18, 2015, and issued a Notice of

Hearing on June 26, 2015, scheduling the hearing for July 22, 2015. The hearing convened as scheduled. Department Counsel offered Government Exhibits (GE) 1 through 3 into evidence, which were admitted without objection. Applicant testified. He offered Applicant Exhibits (AE) 1 through 18 into evidence, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on July 30, 2015. The record remained open until August 14, 2015, to give Applicant an opportunity to submit additional documents. He submitted three additional exhibits that I marked as AE 19 through 21, and admitted without objection.

Procedural Rulings

Department Counsel requested administrative notice (AN) of facts concerning China. She provided 20 supporting documents, available on line, to show detail and context for those facts (HE 1). Applicant did not object to the request or documents, and I granted Department Counsel's request. (Tr. 12.)

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); and *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986). Usually administrative notice at ISCR proceedings is accorded to facts that are either well known or from government reports. See Stein, *ADMINISTRATIVE LAW*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice).

Findings of Fact

In his Answer, Applicant admitted the allegations contained in SOR ¶¶ 1.a and 1.b. His admissions, including those made in an August 2011 Personal Subject Interview (PSI), are incorporated herein as findings of fact. (Answer; GE 2.)

Applicant was born in the United States. He is 47 years old and married. He and his native-born American wife have two children. All three of them were born in the United States. He served in the U.S. Army from 1986 to 1988, and received an honorable discharge. He held a security clearance during his service. Both his father and grandfather served in the U.S. military. He earned a bachelor's degree in engineering from a U.S. university after completing military service. In 2008 he started working with his current employer, a defense contractor. In that capacity he continues to work with the military. He is a manager. (Tr. 26-30, 59.)

In June or July 2010, Applicant and his wife attended a financial seminar given by a Canadian investment company. Subsequently, they deposited \$25,000 with a U.S. partnership that is a subsidiary or holding company for the Canadian company. That partnership invested their money in a Chinese pharmaceutical company, located in China. In 2011 they deposited another \$10,000 with the U.S. partnership to invest in a Chinese clothing company, located in China. (GE 2.) The Canadian company maintains Applicant's personal records. All communication about the investments comes through

the Canadian company. The U.S. partnership handles the financial and tax issues. (Tr. 43, 46.) The Chinese companies do not have any of his personal information and do not contact or communicate with him. (Tr. 47, 58.) Applicant explained that he does not have a “collaborative relationship” with the Chinese companies. (Tr. 58.) “It is purely a risk capital investment.” (Tr. 58; AE 15.) Applicant has not visited China. (Tr. 44.)

Applicant and his wife have held the investments for five years and not earned any money. He has not considered divesting himself of the \$35,000 investment because of a penalty that will be assessed for withdrawing it, and because the Chinese companies do not have any of his personal information. (Tr. 45-47.) He hopes that when the companies sell stock on the U.S. stock exchange, he will be able to sell his investments without a penalty or decrease in the investment amount. (Tr. 49.)

Applicant has owned a home since 1997. He built the home for \$165,000 and has a \$140,000 mortgage. (Tr. 32, 36.) His salary is \$133,000. He has about \$30,000 to \$40,000 in retirement and investment accounts. He and his wife are paying off a business debt that now has a balance of about \$7,000. A few years ago they started a consulting business which did not succeed. They also owe about \$24,000 in credit card debt, which they are paying. (Tr. 61-62.) His wife does not work outside of the home, but has a retirement portfolio from the time she was employed. (Tr. 31- 34.) She is looking for a position, as their children are now older. (Tr. 62.)

Applicant provided credible evidence concerning the quality of his professional performance and the level of responsibility his duties entail. His supervisor stated that Applicant “demonstrates high integrity and ethics in all aspects of his job.” He is confident that Applicant will diligently protect classified information. (AE 19.) Applicant received a good performance rating for his annual evaluations for 2013 and 2014. (AE 20, 21.) He is a Boy Scout leader for his children’s troop.

China

I take administrative notice of the facts set forth in the Administrative Notice documents concerning China, which are incorporated herein by reference.

China is a large and economically powerful country, with a population of over a billion people and an economy growing at about 10% per year. China has an authoritarian government, dominated by the Chinese Communist Party. It has a poor record with respect to human rights, suppresses political dissent, and engages in arbitrary arrests and detentions, forced confessions, torture, and mistreatment of prisoners.

China is one of the most aggressive countries in seeking sensitive and protected U.S. technology and economic intelligence. It targets the United States with active intelligence gathering programs, both legal and illegal. As a result, it is a growing threat to U.S. national security. In China, authorities routinely monitor telephone conversations, facsimile transmissions, e-mail, text messaging, and internet communications. Authorities open and censor mail. Its security services have entered

personal residences and offices to gain access to computers, telephones, and fax machines. All major hotels have a sizable internal security presence, and hotel guestrooms are sometimes bugged and searched for sensitive or proprietary materials. There are several recent cases involving actual or attempted espionage and the illegal export of information to China.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used 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 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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.

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 the 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. Directive ¶ E3.1.15 states that, "[t]he 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 applying for access to classified information seeks to enter 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. Decisions include, by necessity, consideration of the possible risk 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, “[a]ny 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

Foreign Influence

AG ¶ 6 explains the security concerns pertaining to foreign influence as follows:

Foreign contacts and interest 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.

AG ¶ 7 sets out four conditions that could raise a security concern and may be disqualifying in this case:

(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; and

(e) a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation.

The nature of a nation’s government; its relationship with the United States; and its human rights’ record are relevant in assessing the likelihood that an applicant is vulnerable to government coercion or inducement. The risk of coercion, persuasion, or duress is greater if the foreign country has an authoritarian government, the country is known to conduct intelligence collection operations against the United States, or is a known terrorist haven. These facts place a significant burden of persuasion on Applicant to demonstrate that his \$35,000 financial investment in two Chinese companies does not create a heightened risk of foreign influence and does not pose a security risk. Applicant should not be placed in a position where he might be forced to choose between loyalty to the United States and a financial interest in China. The evidence is sufficient to raise potential security concerns under AG ¶¶ 7(b), and 7(e). The

Government met its burden of production by raising the above disqualifying conditions and shifts the burden to Applicant to prove mitigation.

AG ¶ 8 lists three conditions that could mitigate foreign influence security concerns. Those with potential application in mitigating the security concerns in this case are:

(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;

(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; and

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

AG ¶ 8(b) provides mitigation. A key factor in the AG ¶ 8(b) analysis is Applicant's "deep and longstanding relationships and loyalties in the U.S.," such that he "can be expected to resolve any conflict of interest in favor of the U.S. interest." He is a natural-born American citizen, as are his wife and children. He honorably served in the U.S. military for two years and held a security clearance. He has worked for a defense contractor for seven years, where he continues to work with the military. He earned a degree from a university in the United States. He and his wife own a home they built in 1997. They established investment and retirement accounts through their employer. Applicant has deep and longstanding relationships and loyalties to the United States such that he can be expected to resolve any conflict of interest that would possibly arise in favor of the United States.

AG ¶ 8(c) provides mitigation for the security concerns raised. Applicant credibly stated and verified that he does not have communication or contact with either Chinese company and that neither has any of his personal information. The Canadian company insulates him from a direct relationship with the companies.

AG ¶ 8(f) has application. Applicant's assets in the United States are sufficient to outweigh the \$35,000 Applicant invested in the American subsidiary of a Canadian investment company, which invested his money in two Chinese companies. He has a home that he built in 1997 and maintained since then. He and his wife have between \$30,000 and \$40,000 in retirement accounts. His annual salary is \$133,000. Although he has a large mortgage and about \$40,000 in debt, his financial assets in the United States are greater than his investments in two Chinese companies, and are unlikely to create a conflict or be used effectively to influence, manipulate, or pressure him.

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 relevant 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 pertinent facts and circumstances surrounding this case. Sufficient mitigating evidence weighs in favor of granting Applicant a security clearance. He is an intelligent, articulate, and hardworking U.S. citizen. He served on active duty for two years and has worked for a defense contractor for seven years, continuing his work with the military. He submitted objective character references describing and complimenting his judgment, trustworthiness, integrity, and reliability. He and his wife have family and financial ties in the United States. He participates in a youth organization. He credibly testified that he has no contact or communication with the Chinese companies with whom he invested \$35,000 in 2010 and 2011 through a Canadian company. He stated that he has not withdrawn his money from the companies because he would suffer a loss and he is confident that they do not have any of his personal information. While it may be prudent for him to divest himself of interests in those companies when practicable, his explanation for not doing so now is reasonable. His connections and demonstrated dedication to the United States are significant.

After weighing the disqualifying and mitigating conditions, and all facts and circumstances in the context of the whole-person, Applicant mitigated the security concerns pertaining to foreign influence. Overall, the record evidence leaves no doubt as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under Guideline B.

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: FOR APPLICANT

Subparagraphs 1.a and 1.b: For Applicant

Conclusion

In light of all of the circumstances presented by the record 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.

Shari Dam
Administrative Judge