



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 13-00704
)
 Applicant for Security Clearance)

Appearances

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

10/18/2013

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 11, 2012. On June 26, 2013, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines C and B. DOD acted 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) implemented by DOD on September 1, 2006.

Applicant received the SOR on July 2, 2013; answered it on July 18, 2013; and requested a decision on the record without a hearing. Department Counsel requested a hearing on August 1, 2013, and was ready to proceed on August 20, 2013. (Hearing Exhibit (HX) I.) The case was assigned to me on August 23, 2013, and the Defense

Office of Hearings and Appeals (DOHA) issued a notice of hearing on the same day, scheduling the hearing for September 18, 2013. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified, but presented no witnesses or documents. DOHA received the transcript (Tr.) on September 26, 2013. My decision in this case was delayed by the furlough of all administrative judges from October 1 to October 11, 2013, due to the failure of Congress to timely appropriate funds for fiscal year 2014.

Administrative Notice

Department Counsel requested that I take administrative notice of relevant facts about the People's Republic of China (hereafter referred to as China) and the Hong Kong Special Administrative Region. The request and supporting documents are attached to the record as HX II. I took administrative notice as requested by Department Counsel. The facts administratively noticed are set out below in my findings of fact.

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations in the SOR. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 63-year-old engineer employed by a defense contractor since June 2003. He was born in Hong Kong, while it was a British colony. He came to the United States with his family in 1968, and he became a U.S. citizen in 1979. His parents are deceased. He testified that he has five siblings, one of whom is deceased, and all his surviving siblings are citizens and residents of the United States. (Tr. 38-39.)¹ He attended a U.S. university and received a bachelor's degree in June 1972 and a master's degree in June 1974. (Tr. 31-32.) He received a security clearance in September 1988.

Applicant's wife was born in China, moved with her family to Hong Kong and became a citizen of Hong Kong. She and Applicant were married in the United States in March 1992. She remained in the United States after their marriage and became a U.S. citizen in October 2001. Her parents were Hong Kong citizens who became Chinese citizens in July 1997, when the Nationality Law of China became applicable to Hong Kong. They reside in China. (GX 3 at 1.) Her three siblings are citizens and residents of China. (GX 2 at 6A.) Applicant and his wife have two children, ages 18 and 19, who are native-born U.S. citizens. (GX 1 at 20-21; Tr. 39.)

In 2009, Applicant, his wife, and his children traveled to Hong Kong for a few days of sightseeing; traveled to Beijing, China, for sightseeing; and then traveled to

¹ In his May 2012 SCA, Applicant listed six siblings, including a brother who lives in Hong King. (GX 1 at 21-28.) In a personal subject interview (PSI) in October 2012, and in response to DOHA interrogatories in June 2013, Applicant stated that he has one brother who lives in Hong Kong. He stated that he had no contact with this brother after 1968. (GX 2 at 6A, 23.) The discrepancies between Applicant's testimony and his SCA, PSI, and responses to interrogatories were not clarified at the hearing. However, whether Applicant has four or five surviving siblings who are U.S. citizens is not of decisional significance.

southern China and stayed with his mother-in-law for about 10-15 days. (GX 2 at 24.) His wife's siblings visited them during their China visit. (Tr. 39-40.) Applicant has not had any contact with his wife's siblings or their spouses since the 2009 visit to China. (Tr. 44.)

Applicant's wife has a "normal" relationship with her mother, who is a housewife and is now in her 80s. Applicant testified that he does not know how often they talk. (Tr. 43.) He talks to his mother-in-law about once a year. (Tr. 44.) His wife occasionally sends gifts of money to her mother. He thought his wife might send as much as \$1,000, but he was unsure. (Tr. 38, 50-51.) His wife visited her mother in China in 2012 and 2013, but Applicant does not know if she visited her sisters and brothers. (Tr. 47.) He avoids contact with his wife's family because he does not want to subject them to pressure from Chinese authorities due to his job and security clearance. He testified, "The less they know the better for them." (Tr. 48-49.)

In July 2009, while visiting Hong Kong, Applicant renewed his permanent identity card issued by the Hong Kong Special Administrative Region. When he discovered that his identity card raised security concerns, he destroyed it in the presence of his facility security officer. (GX 2 at 22; Tr. 29-30.)

Applicant's sister-in-law is about 60 years old and is a retired laborer. Her husband also is retired. Applicant does not know what his sister-in-law's husband did before retirement. (Tr. 40-41.)

One of Applicant's brothers-in-law owns a small hotel, and the other brother-in-law works at the hotel. The spouses of both brothers-in-law are housewives who do not work outside the home. None of Applicant's in-laws have worked for the Chinese government or have been affiliated with the Chinese military. (Tr. 42.)

Applicant's father-in-law was born in Indonesia. He is wealthy and supports Applicant's in-laws who live in China. Applicant has virtually no contact with him. (Tr. 42-43.)

Applicant has no assets in Hong Kong or China. He owns his home in the United States, which is worth about \$300,000, and he estimates that his total net worth is about \$2,000,000. (Tr. 36-37.)

Applicant testified that he feels some attachment to Hong Kong because it is his birthplace. However, he emphatically stated that his allegiance is to the United States, because he and his children live here, and they have a good future that he is unwilling to jeopardize. (Tr. 35-36.)

In late 2009, Applicant was required to complete a new security clearance application, in order to renew his clearance. He did not realize the urgency of completing the application and experienced some difficulty obtaining updated information about his relatives. He procrastinated in submitting the application, and his

clearance was not renewed. (GX 2 at 26.) It apparently was reinstated on a date not reflected in the record.

For 150 years, Hong Kong was a British colony. In 1997, China resumed the exercise of sovereignty over Hong Kong, and designated Hong Kong as a special administrative region. Hong Kong enjoys a high degree of autonomy, except in the areas of defense and foreign policy. While defense and foreign policy are a Chinese responsibility, Hong Kong is an independent customs authority and economic entity separate from China, with the authority to make international agreements on its own behalf in commercial and economic matters.

Human rights concerns in Hong Kong include limited ability of citizens to participate in and change their government, limitations on freedom of the press, denial of visas for political reasons, election fraud, trafficking in persons, societal prejudice against certain ethnic minorities, arbitrary arrest or detention, aggressive police tactics hampering freedom of assembly, and a legislature with limited powers in which certain sectors of society wield disproportionate political influence.

Hong Kong is an active member of the global coalition against terrorism. It has cooperated in eliminating funding for terrorist networks and combating money laundering, and it has enacted legislation designed to comply with the United Nations anti-terror resolutions and financial task force recommendations.

China has an authoritarian government dominated by the Communist Party. It has large and increasingly sophisticated military forces. The United States and China have been rivals since the Cold War. Despite political disagreements, the United States and China have become major economic and trading partners. China aggressively targets sensitive and protected U.S. technology and military information, using worldwide intelligence operations, including those in Hong Kong. It is one of the most aggressive practitioners of industrial espionage. U.S. citizens of Chinese ancestry are considered prime intelligence targets.

China has a poor human rights record. It suppresses political dissent, and it practices arbitrary arrest and detention, forced confessions, torture, and mistreatment of prisoners. Travelers to China can expect to be placed under surveillance, with their hotel rooms, telephones, and fax machines monitored and personal possessions, including computers, searched without their knowledge or consent.

China considers persons of Chinese descent born in Hong Kong to be Chinese citizens. However, China and the United States have agreed that all U.S. citizens entering Hong Kong on U.S. passports will be considered as U.S. citizens by Hong Kong authorities, even though such persons may be considered Chinese citizens by Chinese authorities.

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 and 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 that 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 C, Foreign Preference

The SOR alleges that Applicant renewed his expired Hong Kong permanent identity card in July 2009 (SOR ¶ 1.a). The concern under this guideline is set out in AG ¶ 9: “When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.” The relevant disqualifying condition is AG ¶ 10(a): “exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member.” The relevant illustrative examples of the exercise of foreign citizenship include AG ¶ 10(a)(1) (possession of a current foreign passport) and AG ¶ 10(a)(3) (accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country).

Applicant’s possession and renewal of a Hong Kong identity card entitled him to stay in Hong Kong longer than would be permitted on a tourist visa. Thus, AG ¶ 10(a)(3) was established. Although an identity card is not a passport, its destruction is similar to the mitigating condition in AG ¶ 11(e) (“the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated”). Department Counsel conceded that the security concerns raised by Applicant’s Hong Kong identity card were mitigated. (Tr. 55.)

Guideline B, Foreign Influence

The SOR alleges that Applicant’s mother-in-law is a citizen of the Hong Kong Special Administration Region, residing in China (SOR ¶ 1.a), and his wife’s three siblings are citizens and residents of China (SOR ¶ 1.b). The security concern under this guideline is set out in AG ¶ 6 as follows:

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:

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;

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; and

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.

AG ¶¶ 7(a) and (d) require substantial evidence of a "heightened risk." The "heightened risk" required to raise one of these disqualifying conditions is a relatively low standard. "Heightened risk" denotes a risk greater than the normal risk inherent in having a family member living under a foreign government.

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, we know 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 United States, 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 United States. 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).

The totality of an applicant's family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003). An applicant with foreign family ties to a country that is hostile to the United States has a very heavy burden of persuasion to show that neither he nor his family members are subject to influence by that country. ISCR Case No. 11-01888 (App. Bd. Jun. 1, 2012), citing ISCR Case No. 07-00029 (App. Bd. Dec. 7, 2007). "[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's wife travels to China regularly to visit her mother, and she is vulnerable to direct pressure and coercion during those visits. During his testimony, Applicant acknowledged that his wife's family members were vulnerable to pressure, and he has minimized his contact with them to minimize their vulnerability. He has virtually no contact with his wife's father or siblings, but he has not rebutted the presumption that he has ties of obligation to his wife's family. Thus, I conclude that the evidence establishes the heightened risk under AG ¶ 7(a) and (d) and the potential conflict of interest under AG ¶ 7(b) are established.

Three mitigating conditions under this guideline are potentially relevant:

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): 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

AG ¶ 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.

AG ¶ 8(a) is not established, for the reasons set out in the above discussion of AG ¶ 7(a) and (b). However, I have considered that Applicant's in-laws appear to be independently wealthy, making them less vulnerable to financial pressure from Chinese authorities.

AG ¶ 8(b) is established. Applicant has no sense of loyalty or obligation to China. He, his wife, and their families grew up in Hong Kong when it was a British colony. However, his wife's family now resides in China, where they are vulnerable to coercion and exploitation. His wife regularly visits her family in China, and her vulnerability to direct coercion and exploitation is increased during her visits.

Applicant has recognized the vulnerability of his wife's family members, and he has minimized his contacts with them. Most importantly, Applicant has deep and longstanding relationships and loyalties in the United States. All his immediate family members, except one brother, are citizens and residents of the United States. One brother lives in Hong Kong, but Applicant has had no contact with this brother since 1968. Applicant has lived in the United States since 1968, been a U.S. citizen since 1979, and received a security clearance in 1988. His wife has resided in the United States since 1992 and been a U.S. citizen since 2001. His children are native-born U.S. citizens. He has spent his entire professional career in the United States, and all his assets, which are significant, are in the United States. Although he has some emotional attachment to Hong Kong, his birthplace, he readily destroyed his Hong Kong identity card when he learned that it raised security concerns. I am confident that he would resolve any conflict of interest in favor of the United States.

AG ¶ 8(c) is established for Applicant's father-in-law and his wife's siblings, with whom he has virtually no contact. However, it is not established for Applicant's mother-in-law.

Whole-Person Concept

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. In applying 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.

I have incorporated my comments under Guidelines C and B in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant was candid, sincere, and credible at the hearing. He is a mature adult who was educated in the United States and spent all his adult life in the United States. He has held a security clearance for many years. He left Hong Kong before it fell under Chinese control. He feels some attachment to Hong Kong because it is his birthplace, but he readily disposed of his Hong Kong identity card when he learned that it raised security concerns. He feels no attachment to China or the Chinese government. He recognizes the potential pressure that might be placed on his in-laws by Chinese authorities, and he has carefully insulated himself from that pressure.

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

Formal Findings

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

Paragraph 1, Guideline C (Foreign Preference):	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline B (Foreign Influence):	FOR APPLICANT
Subparagraphs 2.a-2.b:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge