



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ADP Case No. 14-01655
)
)
Applicant for Public Trust Position)

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

09/03/2015

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated the foreign preference trustworthiness concerns, but failed to mitigate the foreign influence trustworthiness concerns. Eligibility for access to sensitive information is denied.

Statement of the Case

On June 13, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing trustworthiness concerns under Guideline B, foreign influence, and Guideline C, foreign preference. The action was taken under Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); Department of Defense Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation); and the adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

On July 21, 2014, Applicant submitted an answer to the SOR, and he elected to have his case decided on the written record. On February 26, 2015, Department Counsel submitted the Government's file of relevant material (FORM). The FORM was

mailed to Applicant and it was received on April 30, 2015. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant submitted additional information. There were no objections to any of the documents offered. The Government and Applicant's exhibits are admitted into evidence. The case was assigned to me on August 12, 2015.

Request for Administrative Notice

As part of the FORM, Department Counsel requested that I take administrative notice of certain facts about the People's Republic of China (China). Applicant did not object, and I have taken administrative notice of the facts contained in the FORM that is supported by source documents from official U.S. Government publications. I have *sua sponte* taken administrative notice of certain facts about Hong Kong that are supported by source documents from official U.S. Government publications. The facts are summarized in the Findings of Fact, below.

Findings of Fact

Applicant admitted all of the allegations in SOR. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits, I make the following findings of fact.

Applicant is 36 years old. He was born in Hong Kong and entered the United States in 1997. He attended college in the U.S. from 1997 to 2000 and earned a bachelor's degree. He married in 2003. His wife was also born in Hong Kong. He became a naturalized citizen of the United States in 2012. His wife also became a naturalized citizen, but it is unknown what year. They have twin seven-year-old sons who were born in the United States. Applicant has been employed by a federal contractor since March 2005.¹

Applicant's father, mother, and brother are citizens and residents of Hong Kong, a Special Administrative Region of the People's Republic of China. Applicant has weekly contact with his parents and brother. His parents work for different private medical laboratories. It is unknown if the laboratories are affiliated in any way with the government. His brother's occupation is unknown.² Applicant's father-in-law is also a citizen and resident of Hong Kong. He is retired. It is unknown if he receives any type of pension or services from the government. Applicant has annual contact with his father-in-law by telephone. When Applicant visits Hong Kong he will visit with his father-in-law. The extent of contact Applicant's wife has with her father is unknown.

Applicant traveled to Hong Kong in 2002 (twice), 2003, 2004, 2005, 2007, 2009 (twice), 2010, and 2013. He visited his parents, brother, and father-in-law while there.³

¹ Item 3.

² Item 3.

³ Item 3, 4.

In November 2005, Applicant was issued a Chinese passport that was valid until November 2015. In response to the FORM, Applicant provided a statement that he “destroyed/invalidated his Chinese passport.” He noted that the China does not permit dual citizenship. He provided a copy of the passport showing the corners had been cut, thereby invalidating it. Since becoming a U.S. citizen he has exclusively used his U.S. passport when traveling.

Applicant has never voted in Hong Kong. He has not served in the Chinese military. He has not exercised any rights, privileges, or benefits from Hong Kong or China since becoming a U.S. citizen. He has no financial interests in Hong Kong or China. His job and family are in the United States, and he has no plans of returning to China to live.⁴

China⁵

China has an authoritarian government, dominated by the Chinese Communist Party (CCP). CCP members hold almost all the top government, police, and military positions. China’s People’s Liberation Army (PLA), which is the consolidated military organization for China’s land, sea, strategic missile, and air force, is pursuing long-term, comprehensive modernization of its military force. China has articulated roles and missions for the PLA that go beyond China’s coastal borders.

There is severe official repression of the freedoms of speech, religion, association and harsh restrictions on movement by the government of China. There are human rights problems within China including: extrajudicial killings; prolonged illegal detentions at unofficial holding facilities; torture and coerced confessions; lack of due process in judicial proceedings; monitoring communications; and failure to respect academic and artistic freedom, among other things. China does not recognize dual citizenship.

China is the world’s most active and persistent perpetrator of economic espionage and is a growing and persistent threat to U.S. economic security. China utilizes a large, well-organized network of enterprises, defense factories, affiliated research institutes, and computer network operations to facilitate the collection of sensitive information and export-controlled technology.

China uses state-sponsored industrial/technical espionage and economic espionage to obtain technologies and increase expertise available to support military research, development, and acquisition. China continues its efforts to acquire U.S. military and dual-use technologies including the use of its intelligence services through other than legal means. China is the most aggressive country conducting espionage against the United States. Multiple Chinese state entities are engaged in active efforts to acquire restricted U.S. technologies; the Chinese government also encourages and rewards the action of private individuals who obtain technology on its behalf.

⁴ Item 4.

⁵ The FORM lists the official source documents.

Key U.S. counterintelligence officials suggest that the Chinese intelligence collection effort is growing in scale, intensity and sophistication and represents a substantial threat to the U.S. national security. The U.S. Justice Department reports many cases since 2008 that involve actual and attempted espionage and illegal export of sensitive technology to China.

Hong Kong⁶

Hong Kong has been a Special Administrative Region (SAR) of China since July 1, 1997, ending more than 150 years of British colonial rule. Hong Kong has a high degree of autonomy, except in the areas of defense and foreign police, which are the responsibility of China. The Hong Kong SAR is headed by a Chief Executive voted on by an Election Committee made up of approximately 800 Hong Kong residents from four constituency groups, including the China's National People's Congress. Under Chinese nationality law, persons of Chinese descent who were born on the Chinese mainland or Hong Kong are considered citizens of China.

While 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, the most important human rights problems reported were the limited ability of citizens to participate in and change their government through the right to vote in free and fair elections, limitations on freedom of the press and incidents of violence against the media, and a legislature with limited power in which certain sectors of society wielded disproportionate political influence. Other human rights problems included denial of visas for political reasons, trafficking in persons, reports of arbitrary arrest or detention, and other aggressive police tactics hampering the freedom of assembly, and society prejudices against certain ethnic minorities. The government took steps to prosecute and punish officials who committed abuses.⁷

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." (See Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.) "The standard that must be met for . . . assignment to sensitive duties is that, based on all available information, the person's loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security." (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. (See Regulation ¶ C8.2.1.)

⁶ <http://www.state.gov/r/pa/ei/bgn/2747.htm>.

⁷ http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic_load_id=236436&year=2014#wrapper;
<http://travel.state.gov/content/passport/English/country/hongkong.html>

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the AG. 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 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.

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 [sensitive] information will be resolved in favor of national security."

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 applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable trustworthiness decision.

A person who seeks access to sensitive 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 sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive information.

Analysis

Guideline C, Foreign Preference

Under AG ¶ 9 the trustworthiness concern involving foreign preference is as follows:

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.

AG ¶ 10 describes conditions that could raise a trustworthiness concern and may be disqualifying. The following is potentially applicable:

(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. This includes but is not limited to: (1) possession of a current

foreign passport; (2) military service or a willingness to bear arms for a foreign country; (3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country; (4) residence in a foreign country to meet citizenship requirements; (5) using foreign citizenship to protect financial or business interests in another country.

Applicant held a Chinese passport that will not expire until November 2015. I find his actions of possessing a current foreign passport falls within the above disqualifying condition.

I have considered all of the mitigating conditions under AG ¶ 11 and the following is potentially applicable:

(e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

In response to the FORM, Applicant invalidated his Chinese passport. China does not recognize dual citizenship. Since becoming a U.S. citizen he has only traveled using his U.S. passport. AG ¶ 11(e) applies.

Guideline B, Foreign Influence

AG ¶ 6 expresses the trustworthiness concern regarding foreign influence:

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.

AG ¶ 7 describes conditions that could raise a trustworthiness concern and may be disqualifying. I have considered all of them and especially considered the following:

(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 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

(c) 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 7(c) 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.⁸

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.”⁹ 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.¹⁰

Applicant has close family ties to his parents, brother, and father-in-law in Hong Kong. It is unknown the extent of ties his wife has to her father in Hong Kong. Applicant has weekly contact with his family and visits them regularly, along with his father-in-law. China has a significant history of conducting espionage against the United States, to gain access to both industrial and military information. It has a poor human rights record. This creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, and coercion. It also creates a potential conflict of interest. AG ¶¶ 7(a), 7(b), and 7(c) have been raised by the evidence.

⁸ ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

⁹ ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **16-16 (App. Bd. Mar. 29, 2002).

¹⁰ 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 activities in area where family members resided.

I have also analyzed all of the facts and considered all of the mitigating conditions for this trustworthiness determination under AG ¶ 8. The following are potentially applicable:

(a) the nature of the relationship 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 and 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 interests in favor of the U.S. interests; 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.

Trustworthiness concerns are reduced where contact and correspondence with foreign citizens are casual and infrequent because the risk of foreign exploitation or pressure is less. Applicant has frequent contact with his parents and brother, communicating with them weekly. He visits them and his father-in-law regularly. The extent of contact his wife has with her father is unknown. Applicant's contact with his family is not infrequent or casual. AG ¶ 8(c) does not apply.

The foreign influence concerns are increased because China aggressively and actively engages in foreign economic collection and industrial espionage against the United States. It is unknown whether Applicant's parents have contact through their work with the Chinese government. Applicant's brother's profession is unknown. There is insufficient evidence to conclude that Applicant's familial connections in Hong Kong would make it unlikely that Applicant would be placed in a position of having to choose between his family interests and the interests of the United States. AG ¶ 8(a) does not apply.

Applicant is a relatively recent naturalized citizen of the United States. He obviously has significant ties to his parents and brother and travels to Hong Kong regularly to visit them. While there he also visits his father-in-law. The extent of his wife's contact with her father is unknown. There is insufficient evidence to conclude there is no conflict of interest, either because Applicant's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or Applicant has such deep and longstanding relationships and loyalties in the U.S., that he can be expected to resolve any conflict of interests in favor of the U.S. interests.

There is insufficient evidence to make a determination regarding Applicant's family's association with the Chinese government or their vulnerability to government

coercion. Although it is possible that Applicant's relatives in Hong Kong do not pose a security risk, I do not have sufficient information to make that determination. I find AG ¶ 8(b) does not apply.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a public trust position by considering the totality of the applicant's conduct and all relevant circumstances. 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines B and C in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is 36 years old, married, and the father of two children. He immigrated to the United States as a student in 1997 and became a naturalized citizen in 2012. He maintains frequent contact with his parents, brother, and father-in-law who are residents of Hong Kong. He held an active Chinese passport that he recently invalidated. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a public trust position. Applicant mitigated the trustworthiness concerns under Guideline C, foreign preference, but failed to mitigate the concerns under Guideline B, foreign influence.

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 |
| Subparagraphs 1.a-1.d: | Against Applicant |

Paragraph 2, Guideline C:

FOR APPLICANT

Subparagraph 2.a:

For Applicant

Conclusion

In light of all of the circumstances it is not clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Carol G. Ricciardello
Administrative Judge