

KEYWORD: Foreign Influence; Personal Conduct

DIGEST: Applicant's wife is a citizen of the People's Republic of China (China). Her parents are citizens and residents of China. Applicant traveled to China in 2004 to visit his in-laws. He has failed to mitigate the foreign influence concerns that exist. Trustworthiness determination is denied.

CASENO: 05-05658.h1

DATE: 05/16/2006

DATE: May 16, 2006

In re:

SSN: -----

Applicant for ADP I/II/III Position

ADP Case No. 05-05658

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's wife is a citizen of the People's Republic of China (China). Her parents are citizens and residents of China. Applicant traveled to China in 2004 to visit his in-laws. He has failed to mitigate the foreign influence concerns that exist. Trustworthiness determination is denied.

STATEMENT OF THE CASE

On October 28, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were recommending his case be submitted to an Administrative Judge for a determination that he is not eligible to occupy an Information Systems Position designated ADP I/II/III. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline B (foreign influence) and Guideline E (personal conduct).

Applicant submitted a sworn answer to the SOR that was received by DOHA on December 2, 2005, and requested a decision be issued without a hearing. Applicant admitted all SOR allegations.

Department Counsel prepared a File of Relevant Material (FORM) on December 13, 2005, that was mailed to Applicant on December 28, 2005. Applicant acknowledged receipt of the FORM on January 31, 2006. The cover letter accompanying the FORM informed Applicant he had 30 days from receipt of the documents to submit his objections or information he wished to be considered. Applicant did not submit any objections or otherwise respond to the FORM within the time allotted. The case was assigned to me March 28, 2006.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings and exhibits⁽²⁾, I make the following findings of fact:

Applicant is 33 years old and has been employed by a government contractor as a software engineer since August 2000. He was born in the People's Republic of China (China), immigrated to the United States at an unknown time, and became a naturalized U.S. citizen on July 7, 1996. He attended college in the U.S. from September 1998 until December 2003, and was awarded a bachelor of science degree.

Applicant's mother is 57 years old, resides in the U.S., is a citizen of China, and obtained permanent resident status in the U.S. in or about 1989. Applicant's father is 59 years old, resides in the U.S., and is a U.S. citizen. Applicant married a Chinese citizen in November 2000. His wife obtained permanent resident status in the U.S. in or about May 2004. Applicant's mother-in-law and father-in-law are citizens and residents of China. He traveled to China to visit his parents-in-law in February 2004. Applicant does not have contact with anyone in China other than his parents-in-law.

On April 25, 1999, Applicant was a passenger in a vehicle that was stopped by police because the occupants were not wearing seatbelts. The police officer asked Applicant to display a driver's license issued by the state in which he was stopped. Because Applicant's driver's license had been issued by another state, he informed the officer he did not have the requested license. The officer searched Applicant, discovered the foreign state license, arrested Applicant and charged him with Giving False Information to Police. Applicant appeared in court and was fined \$20.00.

Applicant signed a Public Trust Position Application (SF 85P) on January 15, 2004, in which he answered "No" to question 16: ***Your Police Record*** *In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s)? (Leave out traffic fines of less than \$150.)* In the statement he provided to a Special Investigator for the Office of Professional Management (OPM) on September 30, 2004, Applicant stated he didn't list the 1999 arrest in the SF 85P because he didn't realize the incident was considered criminal.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a trustworthiness position. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline B, pertaining to foreign influence, and Guideline E, pertaining to personal conduct, with their respective DC and MC, are most relevant in this case.

BURDEN OF PROOF

The sole purpose of a trustworthiness determination is to decide if it is clearly consistent with the national interest for an applicant to be granted eligibility to hold a position requiring such trust. The government has the burden of proving controverted facts. The burden of proof is something less than a preponderance of evidence, although the government is required to present substantial evidence to meet its burden of proof. Substantial evidence is more than a scintilla, but less than a preponderance of the evidence. Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.

The clearly consistent standard indicates that trustworthiness determinations should err, if they must, on the side of denials. Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.

CONCLUSIONS

Foreign Influence. A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

Public trust position decisions are not loyalty determinations and should not be construed as such. Instead, the issue is whether it is clearly consistent with the national interest to grant an Applicant eligibility for occupancy of a public trust position in a particular case. No suggestion has been made, and there is no reason to doubt, that Applicant is anything but a loyal, honorable, and faithful U.S. citizen. However, the analysis does not stop there.

Applicant's wife is a citizen of China and her parents are citizens and residents of China. Applicant visited his parents-in-law in China in February 2004. Disqualifying Conditions (DC) 1: *An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country;* and DC 2: *Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists* apply based upon Applicant's presumed close ties of affection and obligation with his wife and, at least vicariously through her, with his parents-in-laws.

The Chinese Communist Party is authoritarian in structure and ideology and it dominates the government of China (GE 7). The government of China has a history of human rights abuses in violation of internationally recognized norms (GE 7). The presence of Applicant's parents-in-law in China clearly places them in a position where they can be exploited by the Chinese government.

Once the government met its burden in this case by establishing the existence of the above noted potentially disqualifying conditions, the burden shifted to Applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. Having that burden, Applicant failed to provide any information upon which to base a finding that any foreign influence mitigating condition applies in this case. Specifically, there is no evidence supporting application of Mitigating Conditions (MC) 1: *A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States* or MC 3: *Contact and correspondence with foreign citizens are casual and infrequent*. The remaining Guideline B mitigating conditions have no applicability to the facts of this case. Accordingly, Guideline B is decided against Applicant.

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Applicant wrote "I admit" next to the various paragraphs contained in the sole Guideline E allegation. However, the explanation he provided to an OPM investigator on September 30, 2004 for not listing the offense that forms the basis of the Guideline E allegation is credible. Reading his statement and SOR response together, and considering the nature and disposition of the offense involved, it is apparent he misunderstood the gravamen (i.e., a deliberate falsification) of the Guideline E allegation. Accordingly, and despite Applicant's apparent admission to the allegation, I find he did not deliberately fail to disclose the arrest and conviction in the SF 85P he submitted.

FORMAL FINDINGS

SOR ¶ 1-Guideline B: Against Applicant

Subparagraphs a-c: Against Applicant

SOR ¶ 2-Guideline E: For Applicant

Subparagraph a: For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility to occupy a sensitive position requiring an ADP clearance.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865, DoD Directive 5200.2-R, dated January 1987, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directives).
2. In addition to the pleadings, the sparse information contained in the FORM on which I must base a decision consists of: a Public Trust Position Application (SF 85P) consisting of 20 questions (GE 4); a statement signed by Applicant on September 30, 2004 (GE 5); an arrest record (GE 6); and two documents containing information about the People's Republic of China (GE 7 and GE 8).