

KEYWORD: Foreign Influence; Personal Conduct; Criminal Conduct

DIGEST: Applicant's brother, a U.S. citizen, resides in Hong Kong and works for a Chinese real estate management company. Applicant deliberately provided false information to an authorized investigator regarding a physical altercation with his former wife. Applicant failed to mitigate Guideline B, E, and J security concerns. Clearance is denied.

CASENO: 04-02058.h1

DATE: 03/31/2006

DATE: March 31, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-02058

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

Kathryn MacKinnon, Esq., Department Counsel

FOR APPLICANT

Leigh T. Hansson, Esq., Benjamin R. Lindorf, Esq.

SYNOPSIS

Applicant's brother, a U.S. citizen, resides in Hong Kong and works for a Chinese real estate

management company. Applicant deliberately provided false information to an authorized investigator regarding a physical altercation with his former wife. Applicant failed to mitigate Guideline B, E, and J security concerns. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On September 15, 2004, under the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision-security concerns raised under Guideline B (Foreign Influence), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing October 25, 2004, and elected to have a hearing before an administrative judge. The case was assigned to me on August 4, 2005. I convened a hearing on November 4, 2005, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses, introduced five exhibits, and offered nine documents for administrative notice. Applicant called two witnesses and introduced five exhibits (Ex.), which were identified as Ex. A through E. Applicant submitted a legal memorandum, which was not admitted into evidence but which was included in the administrative record of the proceeding. The Government's exhibits (Ex.) were numbered 1 through 5, and its documents offered for administrative notice were numbered I through IX. All exhibits marked and identified as evidence were admitted into evidence without objection. DOHA received the transcript (Tr.) of the proceeding November 21, 2005.

FINDINGS OF FACT

The SOR contains five allegations of disqualifying conduct under Guideline B, Foreign Influence, one allegation of disqualifying conduct under Guideline E, Personal Conduct, and one allegation of disqualifying conduct under Guideline J, Criminal Conduct. In his answer to the SOR, Applicant denied all allegations of disqualifying conduct.

Applicant is 53 years old. He is executive vice president, secretary, and co-owner of a government contracting company that employs several hundred people and has annual revenues of approximately \$30 million. (Ex. 1; Tr. 11) He has held a security clearance since 1994. (Tr. 70.)

Applicant was born in Taiwan, and he received his high school education there. From 1972 to 1974 he served mandatory military duty in the Taiwanese army. (Ex. 1; Ex. 2.) In 1975, he immigrated to the U.S. He attended college in the U.S. and, in 1979, he earned two degrees, one in accounting and one in computer science. (Tr. 37-38.) He became a U.S. citizen in 1981. (Ex. 1.) Applicant was a member of political party in Taiwan until 1981, when he became a U.S. citizen (Tr. 76-77.) Applicant has been married three times and is the father of one child, a daughter, born in 1987. (Ex. 1; Tr. 71-72.)

Applicant's father and mother immigrated to the U.S. and became U.S. citizens. (Ex. 1) Applicant's father, who died in 2000, held a high-level position of responsibility and trust in the government of Taiwan. He spent most of his career in Hong Kong. (Ex. E; Tr. 43; 61-62.) Applicant's mother died in January 2005. (Tr. 43.)

Applicant has three living brothers and two living sisters. All of Applicant's siblings are U.S. citizens. One of Applicant's brothers, a U.S. citizen, has lived and worked in Hong Kong and Shanghai since about 1991 or 1992. He works for a Chinese real estate investment and management company located in Hong Kong, People's Republic of China (PRC). (Tr.54; 65-66.)

Since coming to the U.S. in 1975, Applicant has traveled back to the Far East approximately six times. (Answer to SOR at 1.) In 1991, he and his second wife took their four-year-old daughter on a family vacation to Taiwan and Hong Kong, with a stop in Japan. In 1998, Applicant and his daughter traveled to Taiwan and Hong Kong, which was then a part of the PRC. In 2000, Applicant made two trips to Taiwan. One of his trips in 2000 was to attend the 50th anniversary of the founding of his high school. Applicant's brother who lives and works in Hong Kong also attended the reunion. (Tr. 67.) At the reunion, Applicant met the woman who became his third wife. (Tr. 50-51.) In 2001, Applicant traveled to Taiwan with his father's ashes and took them to rest in a place specified in the father's will. On that trip he also traveled to Beijing in the PRC. (Tr. 51.) Applicant also visited his brother in Hong Kong in August or September 2004 (Tr. 47.)

From approximately 1991, when Applicant's brother left the U.S. to work in Hong Kong, until approximately 2000, Applicant had sporadic contact with his brother. After they attended their school reunion together in Taiwan in 2000, Applicant and his brother renewed their relationship. They now communicate, usually by e-mail, about once a month. (Tr. 66-67.)

In 1988, Applicant's second wife suffered a serious brain injury as the result of an automobile accident. Her recovery was slow and painful and affected the marriage. Applicant and his wife sought marriage counseling. In 1996, Applicant's mother came to visit him and his family during the Christmas holidays. (Tr. 53-55.)

On December 24, 1996, Applicant took his daughter to shop for holiday gifts. While shopping, he and his daughter met the daughter of one of his brothers and invited her back to their home. When they returned home, Applicant's wife was upset that Applicant and his daughter had invited a visitor without first consulting her. An argument ensued that resulted in physical violence by both parties. Applicant's wife kicked him and he grabbed her neck and shoved her against a wall. Applicant's wife received noticeable scratches and bruises from the encounter. (Ex. 4) She left the home with their daughter, went to the police, and filed a domestic violence complaint. A state district court granted her relief by issuing a protective order on January 3, 1997. Applicant was ordered to vacate the family home. Soon thereafter, Applicant and his wife initiated divorce proceedings. The divorce, which occurred in 1998, was not based on allegations of physical abuse. (Ex. 1; Ex. 4; Ex. 5; Tr-54-57.)

On August 23, 2000, Applicant was interviewed by a special agent of the Defense Security Service. When asked by the agent to discuss the court records describing the consequences of the events of December 24, 1996, Applicant denied he had used physical force in his argument with his wife. (Ex. B at 3.) On January 23, 2002, Applicant was re-interviewed and executed a signed, sworn statement in the presence of a special agent of the Defense Investigative Service in which he acknowledged that, on December 24, 1996, he and his second wife were involved in "a serious dispute and altercation" that led to physical violence. Applicant admitted grabbing his wife and pushing her against the wall, which caused her to sustain minor injuries "that did not require medical attention." He said it was the one and only time that an argument with his second wife had led to physical violence. Applicant further stated it was not his intent to mislead the investigator in his earlier interview, that this was a one-time incident in his life, and that he had never been arrested for or required to attend counseling for domestic violence. He stated he felt remorse for his conduct and, some six years after the event, enjoyed an amicable relationship with his second wife. (Ex. D; Ex. 3 at 2-3.)

Applicant presented two character witnesses, who testified to Applicant's trustworthiness and reliability. (Tr. 86; 99.)

I take administrative notice of on-going tensions between Taiwan and the PRC. Taiwan seeks to become an independent State, an aspiration which is strongly opposed by the PRC, which sees Taiwan as a province of the PRC. (U.S. Department of State: Overview of U.S. Policy Toward Taiwan at 2-4, Government Document VIII, for Administrative Notice.) Additionally, I take administrative notice of Taiwan's active and historic roles as collector of competitive information and perpetrator of industrial espionage against U.S. companies producing militarily critical technologies such as information systems, sensors and lasers, and electronics. (Annual Report to Congress on Foreign Economic

I also take administrative notice of a U.S. Department of State publication entitled 'Background Note: Hong Kong,' dated March 2005 (Government Document for Administrative Notice VI.), a U.S. Department of State Consular Information Sheet entitled "China, dated January 15, 2005 (Government Document for Administrative Notice III.), and the Annual Report to Congress on Foreign Economic Collection and Industrial Espionage:2000 (Government Document for Administrative Notice II.). The Government's documents for administrative notice VI and III state, in pertinent part, that since July 1, 1997, Hong Kong has been designated as a Special Administrative Region (SAR) of the PRC, a totalitarian state ruled by the Chinese Communist Party, and that Hong Kong is subject to the PRC in matters of defense and foreign affairs. The Government's document for administrative notice II states, in pertinent part, that the PRC has exercised active and historic roles as a collector of competitive information and as a perpetrator of industrial espionage against U.S. companies producing militarily critical technologies such as information systems, sensors and lasers, and electronics.

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 occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that 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 disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. 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.

CONCLUSIONS

Guideline B - Foreign Influence

In the SOR, DOHA alleged, under Guideline B of the Directive, that Applicant's brother, a U.S. citizen, currently resides in Hong Kong and has done so since about 1991 or 1992, and that Applicant has monthly e-mail and telephone contact with him (¶ 1.a.); that Applicant's father is a retired employee of the Government of Taiwan (¶ 1.b.); that Applicant traveled to Taiwan in 1991, in 1998, and twice in 2000 (¶ 1.c.); that Applicant traveled to the People's Republic of China in 1998 (¶ 1.d.); and that Applicant traveled to Hong Kong in 1998 (¶ 1.e.).

A Guideline B security concern exists when an individual seeking clearance is bound by ties of affection, influence, or obligation to immediate family, close friends, or professional associates in a foreign country, or to persons in the United States whose first loyalties are to a foreign country. A person who places a high value on family obligations or fidelity to relationships in another country may be vulnerable to duress by the intelligence service of the foreign country or by agents from that country engaged in industrial espionage, terrorism or other criminal activity. The more faithful an individual is to family ties and obligations, the more likely the chance that the ties might be exploited to the detriment of the United States.

Applicant's case requires the recognition that Taiwan and the PRC are engaged in an on-going struggle regarding Taiwan's political and economic autonomy and identity. In their efforts to gain strategic or economic advantage, some individuals and groups in Taiwan seek to obtain, through illegal methods, militarily critical technologies from companies doing business as government contractors in the United States. These actions threaten U.S. security interests.

Applicant's case also requires the recognition that the PRC, a totalitarian regime, exercises governmental control over Hong Kong and is able to use that control if it so wishes to obtain, through illegal methods, militarily critical technologies from companies doing business as government contractors in the United States. These actions threaten U.S. security interests. American citizens with immediate family members who are citizens or residents of Hong Kong could be vulnerable to coercion, exploitation, or pressure.

Applicant denied all allegations under Guideline B. The record evidence and Applicant's testimony establish the Government's case as to the allegations in ¶¶ 1.a., 1.c., and 1.e. of the SOR. The allegation in ¶1.d. of the SOR is a duplication of the allegation in ¶1.e. Since Applicant's father died in 2000, Applicant has successfully rebutted the allegation in ¶ 1.b. of the SOR. The allegations established by the Government raise security concerns under Disqualifying Conditions (DC) E2.A2.1.2.1. and E2.A2.1.2.6. of Guideline B. Applicant's brother, a U.S. citizen, is a resident of Hong Kong and has resided in Hong Kong since approximately 1991. The presence of this immediate family member in Hong Kong raises security concerns under E2.A2.1.2.1. of Guideline B.

Applicant acknowledged six trips to Taiwan, Hong Kong, and the PRC since 1991. Since 1991, he has visited Taiwan five times, Hong Kong four times, Beijing once, and Shanghai once. His last visit to his brother in Hong Kong occurred in 2004. Applicant's visits to Taiwan and Hong Kong show closeness to his associates in Taiwan and suggest a closeness to his brother in Hong Kong that could make him vulnerable under DC E2.A2.1.2.6 of Guideline B to coercion, exploitation, or pressure by individuals or groups seeking militarily critical technologies to be used by the government of Taiwan.

An applicant may mitigate foreign influence security concerns by demonstrating that immediate family members are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force an applicant to choose between loyalty to the foreign associates and loyalty to the U.S. mitigating Condition (MC) E2.A2.1.3.1. While the evidence does not establish that Applicant's brother, a U.S. citizen and resident of Hong Kong, is an agent of a foreign power, he is a resident of a country with an uncertain political future where groups engaged in industrial espionage or illegal data collection are not constrained from acting against U.S. interests. Applicant offered no persuasive evidence to rebut the Government's assertion that his brother in Hong Kong could be exploited by these groups in a way that could force him to choose between loyalty to his family and the security interests of the United States. (ISCR Case No. 03-15485, at 4-6 (App. Bd. June 2, 2005) Accordingly, MC E2.A2.1.3.1 does not apply to Applicant's case. No other mitigating conditions are applicable to Applicant's case.

Nothing in Applicant's answers to the Guideline B allegations in the SOR suggested he was not a loyal American citizen and a credit to his adopted country. However, he was unable to put forward evidence that could mitigate the security concerns alleged in subparagraphs 1.a., 1.c., and 1.e. of the SOR and demonstrate that he would not be vulnerable to foreign influence that would result in the compromise of classified information. Accordingly, allegations in SOR subparagraphs 1.a., 1.c. and 1.e. are concluded against the Applicant. The allegation in subparagraph 1.b. of the SOR is moot, since his father, the subject of the allegation, is no longer living. Additionally, the allegation at subparagraph 1.d. is concluded for Applicant, since he credibly testified that his trip to the PRC, alleged in subparagraph 1.d. was the same as his trip to Hong Kong, PRC, alleged in subparagraph 1.e. of the SOR.

Guideline E - Personal Conduct

In the SOR, DOHA alleged Applicant raised concerns under Guideline E, Personal Conduct, when he falsified material facts in an interview with a special agent of the Defense Security Service in August 2000 by denying he had been physically abusive toward his second wife during an argument with her in December 1996, whereas in truth he deliberately failed to disclose he grabbed his spouse by the neck and shoved her against the wall during the argument, which caused a protective order to be issued against him in January 1997 (¶ 2.a.).

Guideline E conduct, which involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, could indicate an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

With respect to the Guideline E conduct alleged in the SOR, the Government has established its case. Applicant's deliberate false statements to an authorized investigator in connection with a personal security or trustworthiness determination raises concerns under DC E2. A5.1.2.3. In his signed, sworn statement, dated January 23, 2002, Applicant acknowledged that he and his second wife had an altercation that led to physical violence, and he expressed remorse for his conduct. Applicant's concealment of information he considered embarrassing or professionally damaging could make him vulnerable to coercion and blackmail. DC E2.A5.1.2.4. His conduct raises additional concerns under DC E2.A5.1.2.5. because it suggests a pattern of dishonesty or rule violation. Applicant's reticence to reveal the truth about his conduct suggests that, under some circumstances, he may put his interests before those of the Government.

Mitigating Condition (MC) E2.A5.1.3.1 does not apply to the facts of this case: the information Applicant withheld is pertinent to a determination of his judgment, trustworthiness, and reliability. Two other mitigating conditions under Guideline E might be applicable to the instant case. The security concern raised by Applicant's disqualifying conduct could be mitigated if the falsification was an isolated incident, was not recent, and if the Applicant subsequently provided the correct information voluntarily. MC E.2.A.5.1.3.2. The security concern could also be mitigated if Applicant made prompt, good-faith efforts to correct the falsification before being confronted with the facts. MC E2.A5.1.3.3. The evidence suggests that Applicant's falsification was an isolated incident and was not recent. When interviewed by a special agent of the Defense Security Service in August 2000, he denied his quarrel with his wife led to physical violence between them. Later, when re-interviewed and questioned again by an authorized investigator, he provided a voluntary statement on January 23, 2002, providing the correct information. Accordingly, MC E2.A5.1.3.2. applies in part to Applicant's case. However, MC E2.A5.1.3.3 does not apply, since Applicant did not make a prompt good-faith effort to correct the falsification before being confronted with the facts. The Guideline E allegations in the SOR are concluded against the Applicant.

Guideline J - Criminal Conduct

DOHA alleged Applicant's deliberate material falsification and attempt to conceal unfavorable information about his domestic violence incident from an authorized investigator of the Defense Security Service, as alleged in ¶ 2.a. of the SOR, constituted a violation of Federal law under section 1001 of Title 18, United States Code. (¶ 3.a.)

Under section Title 18, Section 1001, of the United States Code, it is a felony crime to knowingly make a materially false, fictitious, or fraudulent statement to a department or agency of the Federal government. In his signed, sworn statement of January 23, 2002, Applicant admitted that his argument with his wife in December 1996 resulted in physical violence, but he said it was not his intent to mislead the authorized investigator by concealing unfavorable material information.

Applicant's conduct raises security concerns under Disqualifying Condition (DC) E2.A10.1.2.1. His history of criminal activity raises doubts about his judgment, reliability and trustworthiness. Directive E2.A10.1.1. A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. Where the facts proven by the Government or admitted by the applicant raise doubts about the applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nevertheless security worthy.

Applicant's falsification of his alleged criminal conduct in his interview with an authorized investigator took place in August 2000, although he allowed the falsification to stand uncorrected until January 2002. While his criminal behavior was not recent, it was ongoing and not an isolated incident. Thus, while MC E2.A10.1.3.1. of Guideline J applies to Applicant's conduct, MC E2.A10.1.3.2. does not. Additionally, no other mitigating conditions under Guideline J are applicable to the facts of Applicant's case. Accordingly, the Guideline J allegations in the SOR are concluded against the Applicant.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline B: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Paragraph 3. Guideline J: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

DECISION

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 or continue a security clearance for Applicant. Clearance is denied.

Joan Caton Anthony

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.