

KEYWORD: Foreign Influence; Personal Conduct

DIGEST: Applicant is a 50-year-old software engineer who has worked for a federal contractor since 2001. She is a naturalized citizen from the People's Republic of China and has many relatives that are citizens and residents there. She maintains contact with her relatives and intends to do so in the future. Applicant failed to list on her security clearance application that she had been charged with shoplifting and went through a diversion program. Applicant failed to mitigate the security concerns with regards to Guideline B, foreign influence, and Guideline E, personal conduct. Clearance is denied.

CASENO: 04-10821.h1

DATE: 01/26/2006

DATE: January 26, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No.04-10821

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

SYNOPSIS

Applicant is a 50-year-old software engineer who has worked for a federal contractor since 2001. She is a naturalized citizen from the People's Republic of China and has many relatives that are citizens and residents there. She maintains contact with her relatives and intends to do so in the future. Applicant failed to list on her security clearance application that she had been charged with shoplifting and went through a diversion program. Applicant failed to mitigate the security concerns with regards to Guideline B, foreign influence, and Guideline E, personal conduct. Clearance is denied.

STATEMENT OF CASE

On July 5, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline B, foreign influence, and Guideline E, personal conduct.

In a sworn statement dated July 23, 2005, Applicant responded to the SOR allegations. Applicant elected to have her case decided on the written record. Department Counsel submitted the government's file of relevant material (FORM) on August 22, 2005. The FORM was mailed to Applicant on September 19, 2005, and received on October 3, 2005. In the FORM Department Counsel moved to amend SOR allegations 2.a. and 2.a.(1), deleting in both paragraphs the word "arrested" and substituting the word "cited." Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant responded on November 2, 2005. Applicant did not object to the Department Counsel motion to amend the SOR. The motion is granted and the SOR is amended. Applicant provided additional material. Department Counsel did not object. The case was assigned to me on December 6, 2005.

FINDINGS OF FACT

Applicant is 50 years old and has been a software engineer for a defense contractor since 2001. Applicant was born in the People's Republic of China (China), came to the United States in 1985, and became a naturalized citizen in 1998. Applicant is married and her husband was also born in the China. He immigrated to the United States in approximately 1984, and became a naturalized citizen in 1999. They were married in China and have two children. The eldest child was born in China and is a naturalized citizen of the United States, and the younger child was born in the United States.

Applicant's parents are citizens of China, and live in the United States. In the past they have resided with Applicant and her husband. Recently they acquired their own residence, but still spend time in Applicant's home. Applicant's father taught physics at a university in China, and her mother worked on the staff of the biology department at a university in China. They both hold United States green cards.

Applicant's sister, two brothers, and brother-in-law are citizens and residents of China. Her sister is a high school physics teacher and her brother-in-law is retired, but worked in the clothing industry. One brother teaches engineering at a university, and the other is an accountant who studied chemistry while in college. He is now retired.

Applicant's father-in-law is 85 years old and is a retired government worker for the city of Shanghai. He is a citizen and resident of China. Her mother-in-law is deceased.

In the past, Applicant has sent money to her family in China, including her parents and her father-in-law. It was approximately a couple of hundred of dollars, and no information was provided as to how often she sent it.

Applicant traveled to China in August 1996, December 1999, October 2000, and May 2004. The purpose of the visits were to see her relatives. Her husband anticipates making annual trips to China due to his father's age. Applicant stays in contact with her family in China and visits them when she travels there. Applicant talks to her family in China, but no information was provided as to how often she communicates with them. Applicant does not own any property in China.

On November 12, 1999, Applicant received a citation and was later charged with shoplifting two polo shirts and two packets of developed pictures from a retail store. She admits she shoplifted. She was permitted to go through a diversion program that if she successfully completed the charges would be dismissed. She completed the program, paid a fine of \$220.00, and the charges were later dismissed.

On her security clearance application (SCA) Applicant answered "No" to Question 26 (*Your Police Recorded-Other Offenses In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.) For this item report information regardless of whether the recorded in your case has been 'sealed' or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607*). That answer was false in that although Applicant was not formally arrested she was charged with shoplifting in 1999.

Applicant is considered by some of her co-workers to be dedicated, conscientious, trustworthy and a hard working employee. ⁽²⁾

The People's Republic of China is a communist led state. ⁽³⁾ China's human rights violations are well documented and in violation of internationally recognized norms, that stem from the government's intolerance of dissent and the inadequacy of legal safeguards for basic freedoms. ⁽⁴⁾ China's abuses are vast and extreme. ⁽⁵⁾ China is listed as one of the top seven active collectors of foreign economic information and industrial espionage. ⁽⁶⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Considering the evidence as a whole, Guideline B, pertaining to foreign influence, and Guideline E, person conduct, with their respective DC and MC, apply in this case. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. 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.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. ⁽⁷⁾ The government has the burden of proving controverted facts. ⁽⁸⁾ The burden of proof is something less than a preponderance of evidence. ⁽⁹⁾ 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.⁽¹⁰⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹¹⁾

No one has a right to a security clearance⁽¹²⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹³⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽¹⁴⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽¹⁵⁾ 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.

Based upon consideration of all the evidence, I find the following adjudicative guideline most pertinent to the evaluation of the facts in this case:

Guideline B-Foreign Influence is a concern because 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 obligations 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 interest in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

Guideline E-Personal Conduct is a security concern when an individual's conduct involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, pertaining to the adjudicative guideline are set forth and discussed in the conclusions below.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a prima facie case for disqualification under Guideline B and Guideline E.

Based on all the evidence, Foreign Influence Disqualifying Condition (FI DC) E2.A2.1.2.1 (*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*), FI DC E2.A2.1.2.2 (*Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists*), and FI DC E2.A2.1.2.3 (*Relatives, cohabitants, or associates who are connected with any foreign government*) all apply. Applicant's sister, two brothers, and father-in-law, are immediate family members who are citizens and residents of China. There is a rebuttable presumption that a person has close ties of affection for, or obligation to, the immediate family members of the person's spouse. ⁽¹⁶⁾ Immediate family members include spouse, father, mother, sons, daughters, brothers, and sisters. ⁽¹⁷⁾ Applicant's parents are citizens of China and occasionally share living quarters with Applicant and her husband. Applicant's father-in-law is a retired government official and she sends money to her family in China. Applicant and her husband travel to China to visit family and intend on doing so in the future. There is potential for foreign influence due to Applicant's family ties.

I have considered all the Foreign Influence Mitigating Conditions (FC MC) especially FC MC E2.A2.a.3.1 (*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*) and FC C E2.1.3.3 (*Contact and correspondence with foreign citizens are casual and infrequent*) and conclude none apply. Applicant's relatives live in China, a country with a history of human rights violations and active participation in espionage. Applicant has more than casual and infrequent ties to her family in China. She sends money to her family, communicates with them, travels to visit them, with the intention of doing so again in the future. Applicant's father-in-law is a former government official. These ties make Applicant vulnerable to exploitation that could force her to choose between loyalty to her family vice those to her country. Applicant has failed to meet her burden.

Based on all the evidence, Personal Conduct Disqualifying Condition (PE DC) E2.A5.1.2.2 (*The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*), and PE DC E2.A5.1.2.4 (*Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*) apply in this case. Applicant falsely answered "No" to questions 26 on her SCA. Although Applicant may have been confused about whether she was arrested or cited, it is clear she was charged and fully aware of her participation in a diversion program. Had she not been charged she would not have gone through a diversion program. The question is also clear on the requirement to list all incidents regardless of whether the charge was sealed or stricken from the record. She has offered no convincing evidence as to why she failed to be honest on her SCA.

I have considered all the mitigating conditions and especially considered Personal Conduct Mitigating Condition (PC

MC) E2.A5.1.3.2 (*The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*), PC MC E2.A5.1.3.3 (*The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*), and PC MC E2.A5.1.3.5 (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*). I find Applicant's falsification is an isolated incident, however because it was in answering a question on her SCA it is recent. There is no evidence to show that Applicant provided the correct information before she was confronted. She completed her SCA on July 1, 2003, and did not provide the essential information until June 22, 2004, almost a year later. I find PC MC E2.A5.1.3.2, PC C E2.A5.1.3.3, and PC MC E2.A5.1.3.5 do not apply.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I considered all the evidence provided and also considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. I find Applicant has failed to mitigate the security concerns raised by the foreign influence concerns and personal conduct concerns. Therefore, I am persuaded by the totality of the evidence in this case, that it is not clearly consistent with the national interest to grant Applicant a security clearance. Accordingly, Guideline B and Guideline E are decided against Applicant.

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 Foreign Influence (Guideline B) AGAINST THE APPLICANT

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Subparagraph 1.e. Against the Applicant

Subparagraph 1.f. Against the Applicant

Subparagraph 1.g. Against the Applicant

Subparagraph 1.h. Against the Applicant

Paragraph 2 Personal Conduct (Guideline E) AGAINST THE APPLICANT

Subparagraph 2.a. Against the 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 a security clearance for Applicant. Clearance is denied.

Carol. G. Ricciardello

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Applicant Exhibits A, B, and C.
3. GE 6 at 1. U.S. Department of State: Background Note: China, dated March 2005.

4. *Id.* at 9.

5. *Id.*

6. GE 7 at 15; he 2000 National Counterintelligence Center Annual Report to Congress on Foreign Economic Collection and Industrial Espionage.

7. ISCR Case No. 96-0277 at 2 (App. Bd. Jul. 11, 1997).

8. ISCR Case No. 97-0016 at 3 (App. Bd. Dec. 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.

9. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

10. ISCR Case No. 94-1075 at pp. 3-4 (App. Bd. Aug. 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.

11. ISCR Case No. 93-1390 at pp. 7-8 (App. Bd. Jan. 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.

12. *Egan*, 484 U.S. at 531.

13. *Id.*

14. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

15. Executive Order 10865 § 7.

16. ISCR Case No. 01-02452 (App. Bd. Nov. 21, 2002).

17. Directive E2.A2.1.3.1.