



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



In the matter of:

SSN: -----

Applicant for Public Trust Position

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ADP Case No. 07-03518

Appearances

For Government: Daniel F. Crowley, Esquire, Department Counsel

For Applicant: *Pro Se*

October 9, 2008

Decision

ABLARD, Charles D., Administrative Judge:

Applicant submitted his Questionnaires for Public Trust Position (SF 85P), on November 3, 2004. On March 28, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline B for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated Jan. 1987, as amended (Regulation), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on April 14, 2008. He answered the SOR in writing on April 30, 2008, and requested a hearing before an Administrative Judge. DOHA received the request on May 5, 2008. Department Counsel was prepared to proceed on May 30, 2008. Another judge was assigned the case on June 2, 2008, but could not proceed with it because of a medical emergency, and requested a

postponement. I received the case assignment on July 21, 2008. DOHA issued a notice of hearing on July 24, 2008, and I convened the hearing as scheduled on August 27, 2008. The government offered Exhibits (Ex.) 1 through 3, which were received without objection. Applicant testified on his own behalf and submitted Exhibits A through C, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on September 4, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to sensitive information is granted.

Procedural and Evidentiary Rulings

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to the Peoples' Republic of China (PRC). (Tr. 33) The request and the attached documents were not admitted into evidence but were included in the record for the purpose offered. The facts administratively noticed are set out below.

Findings of Fact

In his Answer, Applicant denied the allegations in SOR ¶ 1. relating the security concerns arising from the possibilities of divided loyalties, and admitted the allegations in SOR ¶¶1.a, and 1.b, concerning three relatives who are citizens of the PRC and his two trips there in the 1990's with explanations. He also provided additional information to support his request for eligibility for a public trust position.

Applicant is a 47-year-old computer scientist who received a master's degree in 2001 from a leading U.S. university. He received an undergraduate degree in electrical engineering in China before coming to the U.S. in 1987. In China he briefly taught computer control technology at the university level (Tr. 19). He became a citizen of the U.S. in 2000. After receiving his advanced degree in 2001, he worked in industry for eight years as a web developer for three companies. He has worked for his present employer as an applications developer (Tr. 22) for four years developing tools for inspection and scoring relating to civilian records (Tr. 46). In this work he does not use actual records of civilian employees but uses "dummy data" (Tr. 36). His employer is a sub-contractor to a major defense contractor. He has no access to classified information.

When Applicant first came to the U.S. he worked as a manager in a Chinese restaurant for seven years saving his money for education and a family. In 1998 he married a U.S. citizen of Chinese origin whom he met at the restaurant where she also worked. They were married in 1997. They have two children who are four and eight.

Applicant's mother is a 75-year-old retired doctor. She worked in a government clinic and lives in China. She visited him once for a month in the U.S. in 2001. His brother is a citizen of and lives in China where he runs a small private store selling wood flooring that is owned by an American (Tr. 25). Before taking his present job he was a public high school teacher.

Applicant has one sister who is a citizen of and lives in China in a home for mentally disabled. His second sister has lived in the U.S. since 1976 and is a U.S. citizen. Her husband was born in China but is a U.S. citizen. She and Applicant lived with their father's family in China in their youth after their parents were divorced. She came to the U.S. two years before Applicant. His brother and sister in China lived with their mother's family in China after the divorce (Tr. 31). The father's side of the family has had fewer contacts with his mother's side of the family since the divorce. He now has four or five contacts via phone or e-mail with his brother every year, and calls his mother a few times a year on special holidays or anniversaries (Tr. 29). He has no contact with his sister in China because of her incapacity.

In 1992 Applicant traveled to China because of the illness of his father who died soon after the visit. In 1997 he traveled again to China to introduce his family to his wife. He has no plans for further travel to China. He regards himself as a loyal citizen of the U.S. who has settled here and regards it as his country (Tr. 10-11).

Applicant is well regarded by his employer for his skills and dedication to accomplishing the work he does for the company (Exhs. B and C). He is highly regarded for his truthfulness, honesty, and loyalty by two colleagues who testified for him (Tr. 40-58). His supervisor for the past three years also testified for him as to his character, honesty, and trustworthiness. He rated him 4.7 on a scale of 1-5 for his work performance (Tr. 57).

Applicant has all his financial assets in the U.S. and none in China. He owns a home worth over \$250,000, a 401k account worth well over \$20,000, a life insurance policy, and mutual funds. His wife and father-in-law own a small restaurant that his wife operates (Tr. 73-74).

I take administrative notice of the following facts relating to the PRC from the documents offered at the hearing. China has an authoritarian government, dominated by the Chinese Communist Party. China and the U.S. have been rivals with particular disagreements over Taiwan, and the civil liberties of Chinese citizens. They also collaborate on such matters as nuclear issues in North Korea. The U.S. is a primary intelligence target for China. U.S. citizens of Chinese birth are often intelligence targets by the PRC. China has a poor record for human rights as exemplified by the Tiananmen Square incidents in 1989, and other suppressions of dissent by the government. Some acts of terrorism have occurred on Chinese soil.

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.).

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 over-arching adjudicative goal is a fair, impartial and common sense 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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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 as to obtaining 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 protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Section 7 of Executive Order (EO) 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline B, Foreign Influence

The trustworthiness concern relating to the guideline for Foreign Influence is set out in AG ¶ 6:

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

Conditions under Guideline B that could raise a security concern and may be disqualifying include contact with a foreign family member 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 ¶ 7a).

Based on the evidence of record, including Applicant's acknowledgment of family members living abroad and travel there twice in the 1990's, the Government established a basis for a security concern over foreign influence. The Applicant had the burden to establish security suitability through evidence which refutes, mitigates, or extenuates the disqualification and demonstrates that it is clearly consistent with the national interest to grant a security clearance. ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

The guideline also includes examples of conditions that could mitigate trustworthiness concerns arising from foreign influence. Under AG ¶ 8. Mitigating conditions (MC) that might be applicable are a determination that the nature of the relationships with foreign persons, the country in which the persons are located, or the positions or activities of those persons in that country are such that is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual group or government and the interests of the U.S. (AG ¶ 8a).

Applicant is a person of substance and veracity who is well educated and holds a responsible position in the defense industry. He provided sincere and credible testimony concerning his loyalty to the U.S., and his relationships with his family.

While the PRC is a country of concern to the U.S., the fact that Applicant has lived in the U.S. for 20 years, been a citizen for eight years, and has all his investments and immediate family in the U.S. outweigh the concerns raised by his few relatives who reside in the PRC. There is no heightened risk for him in receiving a trustworthy

determination. His reputation for loyalty among his associates and supervisor as indicated at the hearing is further evidence to support mitigation of the security concerns raised.

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 the 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) 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 common sense 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. The security concerns do not arise because of any misconduct by Applicant, but solely because three family members live in China where he was born, and that he took two trips to visit them over ten years ago. The above cited factors are not precisely relevant to this type of case. Of relevance is his expressed feelings concerning his identity as an American citizen and where his loyalty and obligations belong. He is well-motivated and well-educated with firm ties to the U.S.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant mitigated the trustworthiness concerns arising from 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: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is granted.

Charles D. Ablard
Administrative Judge