



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



In the matter of:)
)
-----) ADP Case No. 07-04462
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: James W. Green, Esquire

May 22, 2008

Decision

MOGUL, Martin H., Administrative Judge:

Applicant submitted two Questionnaires for Public Trust Position (SF 85P) on June 21, 2005 (Exhibit 1), and March 4, 2005 (Exhibit 2). On October 25, 2007, 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, 1960), 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 answered the SOR in writing (RSOR) on November 1, 2007, and requested a hearing before an Administrative Judge. I received the case assignment on January 29, 2008. DOHA issued a notice of hearing on February 13, 2007, and I convened the hearing as scheduled on March 7, 2008, in San Diego, California. The government offered Exhibits 1 through 5.

Applicant submitted Exhibits A through M. All of the exhibits were received without objection. Applicant and five additional witnesses testified on Applicant's behalf. DOHA received the transcript of the hearing (Tr) on March 17, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to Hong Kong. The request and the attached documents were admitted into evidence as Exhibit 5. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

In his RSOR, Applicant denied all of the factual allegations in the SOR.

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant and the other witnesses, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 39 years old and was born in Hong Kong in 1968. He moved to Canada in 1986, and moved to the United States in 1987. He became a naturalized United States citizen in 1999. Applicant received a Master's degree in Computer Science and Bachelor's Degree in Finance and Accounting from a United States university. Applicant is not married, and he has no children.

(Guideline B - Foreign Influence)

Applicant is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

The SOR lists 3 allegations, 1.a. through 1.c., under Adjudicative Guideline B. The allegations will be discussed in the same order as they were listed in the SOR:

1.a. Applicant's mother and father are citizens of Portugal (Macao) and reside in Hong Kong, which is under the control of the People's Republic of China (PRC).

Despite Applicant's denial of this allegation of the SOR and the other two in his RSOR, Applicant admitted all of the SOR allegations during his testimony.

Applicant testified that his parents moved to Hong Kong when they were very young and have lived there since then, with the exception of 2001, when they lived in the U.S. for approximately one year. Applicant speaks to them about once a week, and he stated that he had a good relationship with them. Applicant further testified that his parents hold green cards from the United States, and they plan to move here when Applicant purchases a home in the U.S, which he estimated that would be within one

year. Applicant previously owned homes in another part of the United States when he worked there.

Applicant's father is 78, and he still works as an electrician for the company that he owns. His mother is 76, and she has always been a housewife. Neither has ever worked for the Government of Hong Kong.

1.b. Applicant's sister is a citizen of Portugal (Macao) and resides in Hong Kong. Applicant is very close to his sister, who is 37 years of age. She works as a graphic designer. Applicant speaks to his sister once a month or once every other month. Applicant testified that he applied for a green card for his sister a few years ago, and she also plans to move to the U.S., when she receives her green card.

1.c. Applicant traveled to the PRC (including Hong Kong and /or Macao) during the years 1999, 2001, 2003, and 2005. He traveled to Taiwan in 2000 and 2005. Applicant's trips have been to visit his family and also for pleasure.

Applicant testified that his net worth in the United States is approximately \$150,000. He has no assets in Hong Kong.

Applicant has some other relatives in Hong Kong, but his only contact with them has been when he has traveled there.

He has one cousin who lives in the United States, and he has contact with him once a month.

Current Status of Hong Kong

I take administrative notice of the following facts regarding Hong Kong. In 1997 China resumed the exercise of sovereignty over Hong Kong. Hong Kong is a Special Administrative Region of the People's Republic of China (PRC) with a high degree of autonomy in all matters except foreign and defense affairs. According to the Sino-British Joint Declaration (1984) and the Basic Law, Hong Kong will retain its political, economic, and judicial systems and unique way of life for 50 years after reversion and will continue to participate in international agreements and organizations under the name Hong Kong, China. In the past two years, China has taken on a more active role in overseeing the Hong Kong Government's management of political developments in the Special Administrative Region. 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, Hong Kong groups have alleged manipulation or pressure in connection with the September 12, 2004 Legislative Council election.

Under PRC nationality law, persons who are of Chinese descent and who were born in the mainland of China or Hong Kong are PRC citizens. However, under an agreement between the United States and the PRC, all U.S. citizens entering Hong Kong on their U.S. passports including such person as may be considered PRC nationals by the PRC authorities, are considered U.S. citizens by the Hong Kong SAR authorities for purposes of ensuring consular access and protection.

As discussed above, five witnesses testified on behalf of Applicant. They all know him through their mutual employment, and they have all worked with him for approximately three years. Applicant was described as “honest, good character outside of work, outstanding work performance”

Applicant also submitted seven letters of recommendation (Exhibits A through G) in which the writers all spoke in extremely laudatory terms about Applicant.

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

AG ¶ 6 expresses the security 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 security concern and may be disqualifying (DC). Those that could be applicable in this case include 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; Applicant’s relatives, including his parents and his sister, who are residents of Hong Kong, make DC (a) a concern to the Government.

AG ¶ 8 provides conditions that could mitigate security concerns (MC):

(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 interest in favor of the U.S. interest.

I find that MC (b) is applicable to this Applicant and strongly controlling for the following reasons: Applicant, who is 39 years old, has lived in the United States for 20 years, more than half his life, and he has been a U.S. citizen since 1999. He received all of his education in the U.S. and has only worked here. His parents and his sister plan to move to the United States, and he has no continuing contact with any other residents of any county outside of the U.S. Finally, the witnesses who spoke on his behalf were extremely laudatory about Applicant's character and veracity.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance 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 security clearance 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. Based on all of the reasons cited above as to why MC (b) applies, I also find that the record evidence leaves me without questions or doubts that Applicant has mitigated the trustworthiness concerns arising from his 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
Subparagraph 1.c:	For Applicant

Conclusion

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

Martin H. Mogul
Administrative Judge