



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



In the matter of:)
)
) ISCR Case No. 09-06386
)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: Joseph Testan, Esq.

March 30, 2011

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant has mitigated the Personal Conduct security concerns related to his missionary work in China while possessing a security clearance. Eligibility for access to classified information is granted.

Statement of the Case

On July 27, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E, Personal Conduct. The action was taken under Executive Order (EO) 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); and the adjudicative guidelines (AG) effective for cases after September 1, 2006.

Applicant answered the SOR on August 24, 2010, and requested a hearing before an administrative judge of the Defense Office of Hearings and Appeals. The case was assigned to me on November 17, 2010. DOHA issued a notice of hearing on November 18, 2010, and the hearing was convened as scheduled on December 15,

2010. The Government offered Exhibits (GEs) 1 through 3, which were admitted without objection. Additionally, the Government offered documents relating to China for administrative notice marked I. Notice was taken, over the objection of Applicant's counsel. The Applicant offered Exhibits (AEs) A through E, which were admitted without objection, called six witnesses, and testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on January 3, 2011.

Findings of Fact

Applicant admitted SOR allegations 1.a. through 1.c., and 1.e. through 1.g. He denies allegation 1.d. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 54-year-old employee of a defense contractor since 2004. He has held a security clearance since 2004. He has been married 27 years and has two children, ages 24 and 19. He has had no violations of U.S. laws, other than minor traffic infractions. (GE 1; GE 2; Tr. 72-73.)

From 1997 through May 2010, Applicant engaged in missionary trips to China. He traveled to China approximately annually, for about three weeks each trip. However, in 2003, he was unemployed and was able to take three missionary trips to China. Seven of his trips to China occurred after he became employed in his present position. Most recently, he traveled to China in May 2010. Each trip was reported to his facility security officer prior to travel. He also clearly disclosed each trip on his security clearance application and indicated he was performing "short-term missions trip[s]" and that he was taking "Bibles and other Christian materials to house churches in China" on his applications. He underwent security briefings conducted by his security office on China prior to his most recent two trips. He openly told the person conducting the briefing of his missionary work in China. After his return from his two most recent trips, he completed a debriefing. He was never cautioned that his missionary work could create a security concern by his security office. (GE 1; GE 2; GE 3; Tr. 73-100.)

The purpose of his trips was to smuggle bibles and other religious materials into China for their distribution to underground evangelical churches. Applicant noted that bibles are not per se illegal in China, and are sold in official government churches. However, they are too costly for many Chinese nationals and were unavailable to Chinese nationals living outside major Chinese cities. On the other hand, he acknowledged that bringing religious materials into China was in violation of customs regulations. (GE 1; GE 2; GE 3; Tr. 73-100.)

On each trip, Applicant traveled from the U.S. to Hong Kong, where he would acquire bibles, and other Christian materials from publishers. Christian materials are legal in Hong Kong. Applicant had a bank account in Hong Kong to facilitate his purchases. He would discuss his plans with a friend in Hong Kong that traveled to China frequently, and his friend would advise him of the easiest places to cross into China with Christian contraband. A team from Applicant's church would then arrive in Hong Kong approximately a week after Applicant's arrival, and Applicant would lead them across

the border into China. Applicant traveled into China on a tourist visa. As a result of his missionary work, he maintained contact with Chinese nationals that he would see on his annual missionary trips. (AE D; Tr. 76, 89-90.)

On occasion, Applicant and/or his fellow travelers would be stopped and searched as they tried to enter China. When the religious materials were discovered, the materials would be confiscated and a receipt would be issued. The materials could be reclaimed upon exit. In some instances, members of Applicant's group would immediately go back through customs, retrieve the religious materials, and re-enter China with the religious materials. Witnesses indicated that no other repercussions were ever taken by Chinese customs officials as a result of attempting to smuggle religious materials into China. Applicant acknowledged that deportation and confiscation of the materials was possible, but he indicated such actions never occurred. (GE 3; Tr. 42-54, 75.)

During a personal subject interview conducted by an agent of the Office of Personnel Management in October 2008, Applicant indicated that he intended to continue his missionary work in China. However, now that he understands the Government's concern, he has discontinued his missionary work in China. He has informed the pastors in writing at his church that he will no longer participate in the trips to China. Since his May 2010 trip, he has closed his bank account in Hong Kong and no longer has contact with Chinese citizens. (GE 3; AE D; AE E; Tr. 57-62, 67-70, 76, 79.)

Applicant presented 40 letters of recommendation and called six witnesses to testify to his trustworthiness. His colleagues and supervisors see Applicant as a man of integrity and high ethical standards. Applicant is seen as a role model and has the trust of each colleague, friend, pastor, and supervisor that wrote or testified on his behalf. Additionally, his talents and work performance are praised by his supervisors and co-workers. His performance evaluations reflect he performs satisfactorily in his position at work and note that he is an excellent employee. (AE A; AE B; AE C; Tr. 28-70.)

Administrative notice documents, presented by Department Counsel, establish that the People's Republic of China is a large and economically powerful country, with a population of over a billion people and an economy growing at about 10% per year. China has an authoritarian government, dominated by the Chinese Communist Party. China has a poor record with respect to human rights, including failure to respect freedom of speech and the press; failure to respect academic and artistic freedom; severe restrictions on peaceful assembly and associations; restrictions on freedom of association; and restrictions on the freedom of religion. (I.)

China is one of the most aggressive countries in seeking sensitive and protected U.S. technology and economic intelligence. It targets the United States with active intelligence gathering programs, both legal and illegal. As a result, it is a growing threat to U.S. national security. In China, authorities routinely monitor telephone conversations, facsimile transmissions, e-mail, text messaging, and internet communications. Authorities open and censor mail. Its security services have entered personal residences and offices to gain access to computers, telephones, and fax

machines. All major hotels have a sizable internal security presence, and hotel guestrooms are sometimes bugged and searched for sensitive or proprietary materials. There are several recent cases involving actual or attempted espionage and the illegal export of information to China. (I.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense 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 classified 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.

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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified 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 classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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 E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is potentially applicable:

(e) personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person’s personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant admits that his missionary actions in China were in violations of Chinese laws. His actions in distributing bibles and other religious materials in China created a vulnerability to exploitation, manipulation or duress. Thus AG ¶ 16(e) is disqualifying.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant acknowledges that his behavior in China was illegal and carried security risks. He now understands the security significance of his missionary work in

China. He has vowed not to return to missionary work while possessing a security clearance. He showed that he has taken steps to end his missionary work in China by informing his church pastors of his decision. His decision to cease further missionary work in China is a positive step that alleviates future risk. As attested to by his character witnesses and through numerous character letters, Applicant is an honest man of his word and can be expected to follow through on this promise. AG ¶¶ 17(d) and 17(e) apply.

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 relevant 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) the 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. I have incorporated my comments under Guideline E in my whole-person analysis.

Applicant's has performed successfully at work, receiving good ratings. He is well respected by his friends, colleagues, supervisors, and pastors. He has ceased his missionary work in China. While his last trip was relatively recent, he is a man of his word, as attested to by his witnesses, and can be expected to follow through on his promise not to take future missionary trips to China.

Overall, the record evidence satisfies the doubts raised about Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from the cited adjudicative guidelines.

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 E:	FOR APPLICANT
Subparagraph 1.a.:	For Applicant
Subparagraph 1.b.:	For Applicant
Subparagraph 1.c.:	For Applicant
Subparagraph 1.d.:	For Applicant
Subparagraph 1.e.:	For Applicant
Subparagraph 1.f.:	For Applicant
Subparagraph 1.g.:	For Applicant

Conclusion

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

Jennifer I. Goldstein
Administrative Judge