



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



In the matter of:)	
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)	ISCR Case No. 09-06772
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: *Pro se*

February 24, 2011

Decision

MOGUL, Martin H., Administrative Judge:

On June 30, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines C and 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); and the 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 replied to the SOR (RSOR) in writing with an undated response, and he requested the case be decided on the administrative record. On August 18, 2010, Applicant requested that the case be converted to a hearing before an Administrative Judge. The case was assigned to this Administrative Judge on November 1, 2010. DOHA issued a notice of hearing on November 1, 2010, and I convened the hearing as scheduled on November 26, 2010. The Government offered Exhibits 1 through 4, which were received and admitted without objection. Applicant testified on his own behalf and submitted Exhibits A through C, which were also admitted without objection. DOHA

received the transcript of the hearing (Tr) on December 13, 2010. Based upon a review of the pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is denied.

Request for Administrative Notice

Department Counsel requested that I take administrative notice of certain facts relating to the country of the People's Republic of China (PRC). The request and the attached documents were admitted into evidence as Exhibit 4. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

In his RSOR, Applicant admitted all of the SOR allegations, 1.a. through 1.e., and 2.a. through 2.e. The admitted allegations are incorporated herein as findings of fact.

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 upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 60 years old, and he was born in the United States. He was married from 1972 to 2008, and he has been remarried for 2 ½ years. He has two daughters and four grandchildren.

Applicant has been in the Merchant Marines from 1991 to 2009. He is seeking a DoD security clearance in connection with his potential employment in the defense sector.

Paragraph 1 (Guideline C - Foreign Preference)

The SOR lists five allegations regarding Foreign Preference, under Adjudicative Guideline C, which will be reviewed in the same order as they were listed on the SOR. As stated above, Applicant has admitted in his RSOR all of the allegations listed:

1.a. It is alleged in the SOR that Applicant possessed an Australian passport that was issued on September 25, 2002, and would not expire until September 25, 2012. Applicant testified that he first was issued an Australian passport in 1987, when he was working for the Australia Government, but on a joint project with the United States Government. The Australia Government wanted Applicant to have an Australian security clearance, so he was required to apply for and become an Australian citizen, which he did, with the approval of the United States Government. (Tr at 35-39.) Exhibit A includes a letter from the United States Consul, dated July 14, 1988, indicating that Applicant did not lose his United States citizenship, as it was not his intention to relinquish his American citizenship, when he received his Australian citizenship.

After Applicant left the position that required he have Australian citizenship and an Australian passport, he could have renounced his Australian citizenship and revoked

his Australian passport, but he chose to retain them. (Tr at 64.) He also reapplied for an Australian security clearance in 1995. While he does not believe he has retained his Australian clearance, he indicated that he may be applying for one again in the future, based on potential future employment in Australia. Therefore, he is not willing to renounce his Australian citizenship or return his Australian passport. (Tr at 66-68.)

1.b. It is alleged in the SOR that Applicant used his Australian passport in lieu of his United States passport, to travel to China in May 2007, and to Australia on several occasions. Applicant testified that he used his Australian passport to go to the PRC in 2007, and he traveled there to meet his future in-laws. Applicant estimated that he used his Australian passport to go to Australia, approximately 15 or 20 times over the course of the last 10 years, and as recently as May 2010. He used his Australian passport to go to the PRC and Australia as a matter of convenience. (Tr at 42-46.)

1.c. It is alleged in the SOR that Applicant applied for Australian retirement and health benefits. Applicant testified that he has taken money out of his Australian retirement fund in 1989 to purchase a home in Australia. He estimated that he still has approximately \$15,000 in retirement funds that are available to him, and when he retires he can withdraw those funds. (Tr at 46-48.) Applicant indicated that he probably will retire in Australia.

1.d. It is alleged in the SOR that Applicant maintains two mutual funds in Australia with approximate values of \$10,000 and \$3,000 in Australian currency. Applicant testified that these two funds are the retirement funds that are referred to in 1.c., above. (Tr at 48.) Applicant owns some mutual funds in the United States as well. He estimated their value at approximately \$80,000.

1.e. It is alleged in the SOR that Applicant maintains two residential properties in Australia with approximate values of \$350,000 and \$250,000 in Australian currency. Applicant testified that his more valuable house is being occupied by his ex-wife, who is ill. A friend of his oversees the property, including paying the bills and keeping the property maintained. The other house has a caretaker in the house. He does not make any rent from either house. Applicant indicated that he owns both homes free and clear, and he will keep both houses until he retires, when he will probably sell one. (Tr at 49-50.) Applicant also owns one home in the United States, for which he estimated the value at \$40,000. He has willed that home to his grandson, but at this time the house is abandoned. (Tr at 69.)

Paragraph 2 (Guideline B - Foreign Influence)

The SOR lists five allegations regarding Foreign Influence, under Adjudicative Guideline B, which will be reviewed in the same order as they were listed on the SOR. As stated above, Applicant has admitted in his RSOR all of the allegations listed:

2.a. Applicant's wife is a citizen of the PRC, who maintains a work visa to reside in the United States. His wife holds a permanent visa from Australia. Applicant testified that his wife, who is 32 years old, was born in the PRC and lived there until 2004. In

anticipation of Applicant taking an employment position in Australia, she was able to apply for and receive a permanent visa from Australia. (Tr at 51-54.) Applicant's wife never worked for the PRC Government.

2.b.. Applicant's wife's mother and father are citizens and residents of the PRC. His wife contacts them "a couple of times a week just on the telephone" and also on the computer by Skype. Her mother is employed in a toy factory as a factory worker, and her father is retired, but was an accountant and/or a machinist; Applicant's was not certain. His wife also has one sister who resides in the PRC. She is employed as a sales clerk. None of his wife's family was ever employed by the PRC Government. (Tr at 54-57.) Since Applicant speaks no Chinese and his in-laws speak no English, he has no contact with them.

2.c.. Applicant has two daughters, who are citizens and residents of Australia. He also has four grandchildren who are citizens and residents of Australia. He has one grandson who lives in the United States. (Tr at 58.)

2.d.. Applicant's best friend is a citizen and resident of Australia. He is 74 and retired. He was previously employed as an officer in the Australia Signal Corp. (Tr at 58-59.)

2.e. The SOR also alleges that allegations 1.d. and 1.e., above should also be considered adversely under Guideline B.

Mitigation

Applicant submitted a certificate showing that he received a United States Merchant Marine Expeditionary Award for his contribution supporting Operations Enduring Freedom and Iraqi Freedom. He also submitted a number of other certificates, showing that he has received extensive training from the military for his employment. Finally, he submitted his diploma, establishing that he received a Bachelor of Science degree with a major in Electronic Engineering Technology. (Exhibit A.)

Current Status of the PRC

I take administrative notice of the following facts regarding the PRC. The PRC, the most populous country in the world, is economically powerful, and is an important trading partner of the United States. It is run by the Communist Party which controls all aspects of the PRC government. It has strong military forces, and has its own foreign-policy. Although there has been some cooperation, there has been much more conflict with the United States in the past. The PRC has an extremely large army, a sophisticated defense establishment, and space capability. The PRC has launched satellites, has ballistic missiles, has nuclear arms, and nuclear bombs. Its diplomatic and military dispute with the Republic of China (Taiwan), foreshadows a possible military conflict, which the United States opposes as a resolution of the conflict. The PRC has an abysmal human rights record, which includes arbitrary killings; detention or incarceration without notice in mental facilities; torture; arbitrary arrest, detention or

exile; no right to a public, fair trial; a politically controlled judiciary; lack of due process; restrictions on free speech, on religious freedom, on freedom of travel, on freedom of assembly; and no rights of privacy - family, home or correspondence.

The PRC engages in espionage against the United States through an extensive network of businesses, personnel, and specific programs designed to acquire advanced U.S. military technology. One approach is to covertly conduct espionage by personnel from government ministries, commissions, institutes, and military industries, independently of the PRC intelligence services. This is believed to be the major method of PRC intelligence activity in the United States. It also tries to identify ethnic Chinese in the United States who have access to sensitive information, and sometimes is able to enlist their cooperation in illegal technology information transfers.

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 useful 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, 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 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. 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 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 Executive Order 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 C, Foreign Preference

Under AG ¶ 9 the security concern involving foreign preference arises, “[W]hen an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.”

Applicant’s application, receipt, and retention of Australian citizenship and an Australian passport, and the continued use of the Australian passport, raises foreign preference concerns under Disqualifying Condition AG ¶ 10 (a) as the “exercise of any right, privilege or obligation of foreign citizenship.”

Since Applicant was unwilling to renounce his Australian citizenship, and revoke his Australian passport, I find that no Mitigating Conditions under AG ¶ 11 apply to this case. After considering all of the evidence of record under Guideline C, I conclude that the disqualifying evidence substantially outweighs any mitigating evidence.

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. Those that could be applicable in this case include the following: AG ¶ 7 (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, who are citizens and residents of the PRC and who continue to have a close bond to Applicant, make AG ¶ 7(a) a concern to the Government. I find that AG ¶ 7(b) “connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual’s obligation to protect sensitive information . . . and the individual’s desire to help a foreign person, group, or country by providing that information” is also applicable in this case. Finally, AG ¶ 7(e) “a substantial business, financial, or property interest in a foreign country. . . which could subject the individual to heightened risk of foreign influence or exploitation” could be applicable because of the two homes and other financial holdings owned by Applicant in Australia.

AG ¶ 8 provides conditions that could mitigate security concerns. While Applicant is a natural born United States citizen, I cannot find that AG ¶ 8(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,” is applicable to this Applicant and controlling for the following reasons:

Applicant is a dual citizen of the U.S. and Australia, who has lived in Australia for many years. He continues to retain his Australian citizenship and passport, which he is not willing to relinquish. He plans to retire in Australia, where he has considerably more financial assets than in the United States, including two homes, and also where his two daughters and four of his five grandchildren reside. I do not find that any other Mitigating Condition is applicable under AG ¶ 8. I therefore conclude Guideline B against Applicant.

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) 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 under Guidelines C and B. Based on all of the reasons cited above as to why the Disqualifying Conditions apply, and the very powerful attachment of Applicant to Australia, I find that the evidence leaves me with significant questions and doubts as to Applicant's eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has not mitigated the security concerns.

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 C:	AGAINST APPLICANT
Subparagraphs 1.a. through 1.e.:	Against Applicant
Paragraph 2, Guideline B:	AGAINST APPLICANT
Subparagraphs 2.a. through 2.e.:	Against Applicant

Conclusion

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 Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Martin H. Mogul
Administrative Judge