



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



In the matter of:)	
)	
-----)	ADP Case No. 10-04600
)	
Applicant for Public Trust Position)	

Appearances

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

February 9, 2011

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

On September 1, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant. The SOR enumerated trustworthiness concerns arising under Guideline B (Foreign Influence). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); DOD Regulation 5200.2-R; and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

In his September 10, 2010, answer to the SOR, Applicant admitted the five allegations raised under Guideline B and requested a decision without hearing. Department Counsel submitted a File of Relevant Material (FORM), dated November 16, 2010, and seven attached items. The FORM also contained a request that administrative notice be taken of certain facts related to the People’s Republic of China (PRC) and to the inclusion of 15 supporting documents regarding that country. Applicant received the FORM on December 7, 2011, but did not respond to the FORM, submit any additional information for consideration, or object to the information about the PRC. The case was assigned to me on February 1, 2010. In the absence of

objection, administrative notice is taken regarding the information submitted concerning the PRC and its efforts at information gathering.¹ Based on a review of the case file and exhibits, eligibility for assignment to a public trust position is denied.

Findings of Fact

Applicant is a 46-year-old senior software engineer who has worked for the same defense contractor since 1998. He has earned a PhD in computer science. He is married and has three minor children.

Applicant was born in the PRC in 1964. The PRC has an authoritarian government dominated by the Chinese Communist party. It is the most aggressive country conducting espionage against the United States, focusing on obtaining information and technologies beneficial to China's military modernization and economic development.² It has a poor record for human rights.³ Within this milieu, Applicant completed a bachelor's degree program in 1986. In 1988, while working on a master's degree, he married a colleague in the PRC. Applicant's master's degree program was paid for by the Chinese Government. After graduation, he taught and published numerous articles. He then completed a doctoral program in Japan, where his wife was already working on her doctoral studies. In 1995, Applicant applied for a research position in the United States. Once accepted, he immigrated to the United States and his wife followed him shortly thereafter. Applicant began his present employment in 1998. Applicant's employer sponsored his application for a green card in 1998. That same year, he was tentatively granted permanent alien resident status in Canada, but he was unable to meet Canada's residency status. He and his wife ultimately became U.S. citizens in 2008. Their children were born in the United States.

While Applicant and his wife have relocated and become U.S. citizens, both have close relatives remaining abroad. Applicant's mother is a retired factory worker and his father is a retired physician. While it is noted that they are octogenarians, there is scant information about their relationship with Applicant or the regularity of his contact with them. They and Applicant's four married sisters are residents and citizens of the PRC. Applicant maintains email contact with his siblings about twice a year and speaks to them by telephone one to four times a year. His father-in-law and four brothers-in-law are residents and citizens of the PRC. One of this brothers-in-law is union leader for industry, which is a Chinese Government position. Applicant visited the PRC in 2005 and 2008 for personal reasons. Applicant does not maintain contact with his in-laws, although his wife does.

¹See FORM at 3 and attachments I-IV, generally.

² FORM at 3, citing to attachment V (U.S.-China Economic and Security Review Commission, *2009 Report to Congress*, dated Nov. 2009) at 165.

³ FORM at 6.

Applicant stresses that his allegiance is with the United States. He notes that his family has acclimated to life in the United States. His children were given Anglicized names at birth. He wrote: “Since 1995, I have worked and integrated myself into the U.S. culture. I admire the opportunities and freedoms available to all U.S. citizens. I do not believe I would have had the same opportunities in China. . . . My family in China is my past family, and my wife and [children] are my present.”⁴

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.”⁵ As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. Positions designated as ADP I/II/III are classified as “sensitive positions.”⁶ “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.”⁷ 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.⁸

When evaluating an applicant’s suitability for a public trust position, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for a public trust position.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and common sense decision. The entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all

⁴ FORM, Item 7 (Affidavit, dated Jan. 27, 2010) at 2-3.

⁵ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

⁶ Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.

⁷ *Id.* at ¶ C6.1.1.1.

⁸ See *Id.* at ¶ C8.2.1.

available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.”⁹ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, an applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government’s case. The burden of disproving a mitigating condition never shifts to the Government.¹⁰

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 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. Furthermore, security clearance determinations, and by inference, public trust determinations, should err, if they must, on the side of denials.”¹¹ In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Based upon consideration of the evidence, I find Guideline B (Foreign Influence) to be the most pertinent to the case. Conditions pertaining to this adjudicative guideline that could raise a trustworthiness concern and may be disqualifying, as well as those which would mitigate such concerns, are discussed below.

⁹ “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

¹⁰ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

¹¹ *Egan*, 484 U.S. at 531.

Analysis

Guideline B - Foreign Influence

The concern under Guideline B is that 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.¹² The adjudication 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 U.S. citizens to obtain protected information or is associated with a risk of terrorism.¹³ Conditions pertaining to this adjudicative guideline that could raise a trustworthiness concern and may be disqualifying, as well as those which would mitigate security concerns, are set forth and discussed in the conclusions below.

The SOR contains five allegations under this guideline. Applicant admits all five allegations. They concern his immediate family members and in-laws living and residing in the PRC, as well as two recent visits to that country.

Applicant stresses that his family members remaining in the PRC are his past, noting that his present life is with his wife and children in the United States. While that may be true, the presence of close family members and in-laws in the PRC is sufficient to raise Foreign Influence Disqualifying Conditions 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 exploitation, inducement, manipulation, pressure, or coercion) and 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 or technology and the individual's desire to help a foreign person, group, or country by providing that information).

Applicant provided scant information regarding his relationships and frequency of contact with his octogenarian parents, making analysis of their interpersonal ties impossible. While Applicant described his contact with his siblings as relatively infrequent, he also depicted it as somewhat regular. Little more is offered about their relationships. He also returned to visit his family abroad in 2002 and 2005. Consequently, the nature of their relationships is difficult to discern. Consequently, Foreign Influence Mitigating Conditions AG ¶ 8(a) (the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or

¹² AG ¶ 6.

¹³ The country at issue is the PRC, which is known for its efforts at information gathering.

activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.) and AG ¶ 8(c) (contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation) do not apply to his parents or siblings.

While Applicant does not maintain a relationship with his in-laws, his wife apparently does. Spousal familial relationships are routinely attributed to an applicant in these cases. Here, however, there is little information describing Applicant's wife's relationships or contact with her family members in the PRC. Therefore, AG ¶ 8(a) and AG ¶ 8(c) also do not apply to Applicant's in-laws.

Applicant provided concise and persuasive narrative that his loyalties are to the United States and not to the PRC. Other than his wife, children, and work, however, Applicant failed to provide additional information firmly establishing his roots in the United States and in his community since becoming a U.S. citizen. Such factors would be highly indicative of an established relationship with this country to the exclusion of ties abroad. While his current family may have supplanted the family he left behind in the PRC in many ways, he continues to maintain ties to his family members abroad, albeit understandably. He has also returned to the PRC twice in the past decade. Based on the limited facts of record, however, there is insufficient information to raise 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). None of the other mitigating conditions apply.

While there is no reason to question Applicant's loyalty to the United States, the limited information provided fails to persuasively raise any of the available mitigating conditions. Therefore, foreign influence trustworthiness concerns remain unmitigated.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for assignment to a sensitive 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). Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for assignment to a sensitive position 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, as well as the “whole-person” factors. I note that the information submitted by the Applicant is limited. Applicant is a highly educated and accomplished professional. He has been married for over two decades and is the father of three young children. He left the PRC in search of better opportunities, pursuing options in the United States and in Canada. He has successfully maintained the same position with his current employer for over a decade.

Applicant is highly appreciative of the opportunities he has found in the United States. This country is now home for Applicant, his wife, and their children. While he portrays his relatives and in-laws in the PRC as old family, they remain close relatives with whom he maintains direct or vicarious relationships. While the depth of those relationships cannot be discerned from the FORM, there is evidence that he has maintained those relationships and regular contact through telephone, emails, and personal visits. Because the available evidence is limited, questions remain regarding Applicant’s vulnerability to foreign influence.

The burden in these cases is placed squarely on the Applicant. Here, Applicant failed to carry that burden. As noted above, any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. In light of the security concerns remaining unmitigated, clearance is denied.

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:	AGAINST APPLICANT
Subparagraphs 1.a-1.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 interests of national security to grant Applicant eligibility for assignment to a sensitive position. Eligibility denied.

ARTHUR E. MARSHALL, JR.
Administrative Judge