



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 11-04374
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esquire, Department Counsel

For Applicant: *Pro se*

December 14, 2012

Decision

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigation Processing (e-QIP), on May 10, 2010. (Item 4.) On June 20, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns 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 Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant submitted an Answer to the SOR on July 6, 2012, and requested that a decision be made without a hearing. (Item 5.) Department Counsel submitted a File of Relevant Material (FORM) to Applicant on October 3, 2012. The FORM contained six Government documents. Applicant received the FORM on October 10, 2012, and was given 30 days to submit any additional information. Applicant submitted additional information in the form of a written statement (AR) on October 16, 2012. Department

Counsel indicated that she had no objection to the AR, and it is admitted into the record. The case was assigned to me on October 29, 2012. Based upon a review of the written record eligibility for access to classified information is denied.

Procedural Ruling

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to the People's Republic of China (China). (FORM at Section III.) The request and the attached documents were not admitted into evidence but were included in the record. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

Applicant is 52, married, and has two children. He is employed by a defense contractor, and seeks a security clearance in connection with his employment in the defense industry. Applicant admitted all the allegations in the SOR. (Item 3.) Those admissions are deemed findings of fact. He further denied that his status shows that he is ineligible for a security clearance. Finally, Applicant also provided additional information to support his request for eligibility for a security clearance.

Guideline B - Foreign Influence

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has foreign contacts and interests that could lead to manipulation or inducement to help a foreign entity in a way that is not in U.S. interests, or vulnerability to foreign pressure or coercion.

Applicant was born in China in 1960. He came to the United States in 1987 to attend school. He became a naturalized U.S. citizen in 1999. Applicant is married and his wife is also a naturalized American citizen. Applicant and his wife have two children, who were both born in the United States.

Applicant's mother, father, and one of his two brothers are citizens and residents of China. Applicant stated in his Answer that his younger brother was a British citizen living in China. (See Item 4 at Section 18.) In his Answer Applicant states he has "infrequent contact" with them. When interviewed by an investigator from the Office of Personnel Management concerning communication with his parents it was reported, "The subject [Applicant] has every other week contact as they exchange phone calls." (Item 5 at 12.) He contacts his two brothers on a less frequent basis. Applicant's sister is a Chinese citizen, residing here as a U.S. Permanent Resident waiting to receive U.S. citizenship.

Applicant's mother-in-law is a Chinese citizen and U.S. Permanent Resident. Applicant stated that she currently stays with Applicant's family. His sister-in-law is a Chinese citizen, but is currently on an extended visit to her son's family in Canada.

Applicant has contacts with China. Accordingly, it is appropriate to discuss the current situation in China.¹ China is the most populous country in the world, with an authoritarian government dominated by the Chinese Communist Party (CCP). China's military arm, the People's Liberation Army (PLA) is pursuing comprehensive transformation and modernization of its forces to improve its capacity for power projection. Department of Defense publication *Annual Report to Congress: Military and Security Developments Involving the People's Republic of China 2012* states at page 10:

Chinese actors are the world's most active and persistent perpetrators of economic espionage. Chinese attempts to collect U.S. technological and economic information will continue at a high level and will represent a growing and persistent threat to U.S. economic security. The nature of the cyber threat will evolve with continuing technological advances in global information environment. (Item 6, Attachment III.)

The United States is also concerned about the human rights situation in China. Incidents of concern include arbitrary and unlawful killings by security forces, physical abuse and torture of prisoners, arbitrary arrest and detention, denial of fair public trials, and other incidents of concern. (U.S. Department of State, *2011 Human Rights Report: China (includes Tibet, Hong Kong, and Macau)*, dated August 21, 2012. (Item 6, Attachment I.)

Mitigation

In his Answer Applicant stated that since he became an American citizen, "I have been very loyal to the United States. I consider the United States to be my mother country and I am very proud of the United States as my homeland, as I have enjoyed a wide range of freedoms here that would not have been possible in China."

In his AR Applicant states, "I am a very loyal citizen to the United States. Although some of my relatives are still in China, they have no ties to the Chinese military and they have no influence over my affiliation with the United States. They have no threats to the national interests of the United States."

¹All of the following statements are supported by the documents submitted by the Department Counsel in support of her request for administrative notice and its attachments.

Policies

Security clearance decisions are not made in a vacuum. 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 as appropriate 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 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. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature and the ways of the world, in making a reasoned 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 the applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion as to obtaining a favorable clearance 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. Security clearance decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to 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.

Finally, as emphasized in Section 7 of Executive Order 10865, "Any determination under this order . . . shall be a determination 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

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the applicant's conduct or circumstances and the granting or continued holding of a security clearance. If such a case has been established, the burden then shifts to the applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

Guideline B - Foreign Influence

The concern under Guideline B is styled as follows:

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.

Applicant has several close family connections to China. He has substantial contacts with family members in China.

The following Disqualifying Conditions in AG ¶ 7 apply to this case based solely on the facts:

(a) 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; and

(b) connections to a foreign person . . . 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 . . . by providing that information.

The following Mitigating Conditions in AG ¶ 8 partially apply to this particular case, given Applicant's particular background:

(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or 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

(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.

Applicant has not successfully overcome the security significance of his family members in China. It is assumed that he is a patriotic and loyal American citizen. That is not in question. However, he did not submit statements by family, friends or co-workers to show that his connections to the United States outweigh those to a foreign country. Merely stating that his family members in China are not a threat to national security is insufficient, especially given the nature of China's government and its attempts to obtain all types of information by any means necessary.

Applicant provided no evidence concerning the quality of his professional performance, the level of responsibility his duties entail, or his track record with respect to handling sensitive information and observation of security procedures. He submitted no character references or other evidence tending to establish good judgment, trustworthiness, or reliability. I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing.

Based on my analysis of the available information, which shows that he has close and continuing contact with his Chinese relatives, the Applicant has not overcome the adverse security risks raised by his family members' presence in China. Guideline B is found against the 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. 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. 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. My Guideline B analysis is applicable to the whole-person analysis as well. As stated above, Applicant failed to overcome the adverse inferences arising from his susceptibility to foreign influence. For those reasons, I cannot find that there is little or no "potential for pressure, coercion, exploitation, or duress" as set forth in AG ¶ 2(a)(8). Using the whole-person standard, the Applicant has not mitigated the security significance of his foreign influence and is not eligible for a security clearance.

On balance, it is concluded that the Applicant has not successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

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 through 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 national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

WILFORD H. ROSS
Administrative Judge