



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



In the matter of:)
)
) ISCR Case No. 11-09266
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: *Pro se*

02/11/2013

Decision

LYNCH, Noreen A., Administrative Judge:

This case involves security concerns raised under Guideline B (Foreign Influence) and Guideline C (Foreign Preference). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on January 11, 2011. On October 15, 2012, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline B (Foreign Influence) and Guideline C (Foreign Preference). DOD acted 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) implemented by the DOD on September 1, 2006.

Applicant received the SOR, and requested a hearing before an administrative judge. The case was assigned to me on November 29, 2012. A notice of hearing was issued on December 18, 2012, scheduling the hearing for January 18, 2013.

Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified and submitted two exhibits (AX) A and B. At Applicant's request, I held the record open until January 31, 2013. Applicant submitted one exhibit which was marked as AX C and entered into the record. I received the transcript (Tr.) on February 6, 2013.

Procedural Issue

The Government requested that I take administrative notice of certain facts with respect to Hong Kong (China). Applicant did not object to the documents. The Government's submission was labeled Hearing Exhibit I and entered into the record.

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegations in the SOR 1.a, 2.b, and 2.c under Guideline B (Foreign Influence) and Guideline C (Foreign Preference) with explanations. He denied the remaining SOR allegations. He provided additional information to support his case. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Foreign Influence

Applicant was born in Hong Kong in 1961, and he attended high school in Hong Kong. In May 1971, Applicant came to the United States. He completed his undergraduate degree in 1987. He became a naturalized U.S. citizen in 1987. Applicant has been with his current employer since 1988. He has held a U.S. passport since 1997. Applicant's professional life in the United States has been in the mechanical engineering field. (GX 1) Applicant has never held a security clearance. (Tr. 21)

Applicant is married to a naturalized U.S. citizen, who was also born in Hong Kong. They have one adult child who is a U.S. citizen. (Tr. 22) Applicant and his wife own a home in the United States. The home mortgage loan on their primary residence is paid. The current value of the home is approximately \$675,000. He has a vacation home which is valued at \$310,000. Applicant's wife is also professionally employed. He and his wife have significant retirement savings accounts. (Tr. 28) He has no bank accounts or investments in Hong Kong. He provides no financial support to anyone in Hong Kong.

Applicant's father and mother left the People's Republic of China (PRC) and settled in Hong Kong to escape communist rule. (Tr. 9) Applicant's mother and father are naturalized U.S. citizens living in the United States. Applicant also has two brothers who are naturalized U.S. citizens who reside in the United States. (Tr. 19)

Applicant's wife has a grandmother who lives in a nursing home in mainland China. She is almost 92 years old. His wife does not have any brothers.

Applicant's mother-in-law is a permanent resident of the United States who travels to Hong Kong and mainland China on a yearly basis to help her ill mother who lives in a nursing home, as noted above. (Tr. 24)

Applicant's wife has one aunt and two cousins who are citizens and residents of Hong Kong. She calls her aunt on the phone occasionally. She sends an occasional email to her cousins. (Tr. 27) Applicant has no phone contact with them. He did see his wife's family when they traveled to Hong Kong in 2010.

Applicant explained that he has lived in the United States for 40 years and considers the United States his home. His immediate family is in the United States, living as naturalized U.S. citizens. He has no contact with the PRC government nor do any of his family members. Applicant was credible and sincere concerning his loyalty to the United States.

Applicant's employer recommends him for a security clearance. He describes Applicant as an extremely competent and conscientious individual. He is extremely knowledgeable in specialized areas of mechanical systems. Applicant has earned many promotions. He has known Applicant for 20 years. (AX A) A colleague of Applicant also recommends him for a security clearance. Applicant is described as having an excellent work ethic, loyalty, and overall professional attitude in his field of expertise. (AX B)

Foreign Preference

Applicant travelled to Hong Kong in 2007 with his wife and son. At that time, the family visited his wife's grandmother who lives in mainland China. (Tr. 28) In 2008, Applicant travelled to Hong Kong alone and he applied for a Hong Kong Identification Card (HKID). Applicant explained that he obtained the HKID for travel convenience. He also would receive free health care if he needed it on the trip. Applicant decided to apply for a Hong Kong passport so that he could travel easily to Asia without a visa. He received the Hong Kong passport in 2009. However, that was before he applied for a security clearance. He surrendered the passport immediately to his facility security officer (FSO) when he was requested to do so. (Tr. 31; AX C) Applicant noted that he was not asked to surrender the HKID, but he offered to do so if needed to obtain a security clearance. Applicant submitted the HKID to his FSO after the hearing. (AX C) He no longer possesses his Hong Kong passport or the HKID.

Administrative Notice

Hong Kong is a special administrative region. After more than 150 years of British control, on July 1, 1997, China exercised its sovereignty over Hong Kong, establishing it as a Special Administrative Region (HKSAR). HKSAR retains a high degree of autonomy from China in all matters except foreign and defense affairs, and has retained its political, economic, and judicial systems since 1997. 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 is a strong ally of the United States in the global coalition against terrorism.

The Nationality Law of the PRC has been applied to the HKSAR since July 1, 1997. Hong Kong residents who are of Chinese descent and were born in the Chinese territories (including Hong Kong), or persons who satisfy the criteria set out in the PRC as having Chinese nationality, are citizens of the PRC.

The PRC has an authoritarian government, dominated by the Chinese Communist Party. 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 the U.S. economic security. The nature of the cyber threat will evolve with continuing technological advances in the global information environment.

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “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). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline B, Foreign Influence

The security concern under this guideline is set out in AG ¶ 6:

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.

Three disqualifying conditions under this guideline are potentially applicable. A disqualifying condition may be raised by “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.” AG ¶ 7(a). Also, AG ¶ 7(b) states that “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." In addition, AG ¶ 7(d) states that "sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure or coercion."

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

Furthermore, "even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security." ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Finally, friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. Nevertheless, the nature of a nation's government, its relationship with the U.S., and its human rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence operations against the U.S. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. See *generally* ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision to grant clearance where administrative judge did not consider terrorist activity in area where family members resided).

Applicant has lived and worked in the United States since 1971. He is a naturalized U.S. citizen. Applicant's wife is a naturalized citizen of the United States. Applicant's son is a U.S. citizen. Applicant shares living quarters with his wife who maintains some contact with her grandmother who lives in mainland China, and her aunt and cousins, who are citizens and residents of Hong Kong.

Applicant's immediate family resides in the United States. His mother-in-law is a permanent resident of the United States who sometimes travels to mainland China to visit her mother in a nursing home. "[T]here is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse." ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at * 8 (App. Bd. Feb. 20, 2002). Applicant maintains some relationship with these family members, albeit a distant one. He visited them with his wife in 2010.

After considering the totality of Applicant's family ties to Hong Kong as well as each individual tie, I conclude that Applicant's family ties are sufficient to raise an issue of a heightened risk of foreign exploitation, inducement, manipulation, pressure or coercion. Based on all these circumstances, I conclude that AG ¶ 7(a), 7(b), and 7(d) are applicable.

Security concerns under this guideline can be mitigated by showing that “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.” AG ¶ 8(a).

Security concerns under this guideline can also be mitigated by showing “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.” AG ¶ 8(b).

Applicant came to the United States in 1971. He has been a naturalized U.S. citizen since 1987. His wife and son are U.S. citizens. His professional life is in the United States. He has been with his current employer for 25 years. He has no immediate family members who are citizens or residents of Hong Kong. His wife maintains some contact with her elderly, ill grandmother, but Applicant does not. His mother-in-law is a permanent resident of the United States who travels to Hong Kong and mainland China periodically to visit her mother and sister. Applicant has significant professional, personal, and financial ties to the United States. In light of Applicant’s close ties to the United States, it is unlikely that he would choose his distant relatives in Hong Kong over his life in the United States. His wealth and assets are in the United States. I find mitigating condition AG ¶ 8(b) applies. Even if security concerns are not mitigated under 8(b), they are mitigated under the whole-person concept, *infra*.

Foreign Preference

When 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. AG ¶ 9.

Dual citizenship standing alone is not sufficient to warrant an adverse security clearance decision. ISCR Case No. 99-0454 at 5, 2000 WL 1805219 (App. Bd. Oct. 17, 2000). Under Guideline C, “the issue is not whether an applicant is a dual national, but rather whether an applicant shows a preference for a foreign country through actions.” ISCR Case N. 98-0252 at 5 (App. Bd. Sep. 15, 1999).

A disqualifying condition may arise from “exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member.” This includes but is not limited to: “(1) possession of a current foreign passport.” AG ¶ 10(a)(1). In 2009, after becoming a naturalized U.S. citizen, but before applying for a security clearance, Applicant obtained a Hong Kong passport and a HKID. He did so for travel convenience. He had no thought of the

consequences for a future security clearance. Applicant has surrendered both his passport and HKID to his FSO. He surrendered his HKID in January 2013.

Security concerns under this guideline may be mitigated by evidence that “dual citizenship is based solely on parents’ citizenship or birth in a foreign country.” AG 11(a) Applicant was born to parents who are considered Chinese. He chose to exercise his foreign citizenship by obtaining a Hong Kong passport and HKID in 2009. He receives mitigation under AG 11(e) “the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.”

Whole-Person Concept

Under the whole-person concept, an 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. An 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 have incorporated my comments under Guideline B and C in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant has been in the United States for 40 years. He has spent a considerable amount of time in the United States as a professional working in the mechanical engineering field. In 1987, he became a naturalized U.S. citizen. His wife is a naturalized U.S. citizen. His son is a U.S. citizen. He was articulate, candid, sincere, and credible at the hearing. Applicant’s home is in the United States. Applicant has been successful in his work. Applicant has no immediate family members in Hong Kong.

Applicant chose to leave his home and pursue his career in the United States. He is firmly established in the United States. His assets are located in the United States. Although Applicant has some distant familial ties to Hong Kong through his wife, I am convinced that he will resolve any issues in favor of the United States. Moreover, while Hong Kong is considered part of the PRC, it is a special administrative region with a high degree of autonomy.

Applicant has surrendered to his FSO his passport from Hong Kong and a HKID that he obtained in 2009 for travel convenience. When he obtained these documents, he did not understand any future consequence involving a security clearance. He was a naturalized citizen at that time but he had not applied for a security clearance.

There is no evidence any of his in-laws living in Hong Kong or PRC are involved with, or under scrutiny, or have interests antithetical to the United States. His distant family members in Hong Kong do not know the specifics of his work.

Regarding Applicant's life in the United States, he is an American citizen, with a stable family, social, and professional life. His life is focused here. He has loyalty to the United States. There is no evidence indicating that he may be manipulated or induced to help a foreign power or interest.

After weighing the disqualifying and mitigating conditions under Guidelines B and C, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on foreign influence and foreign preference. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegation in the SOR:

Paragraph 1, Guideline B:	FOR APPLICANT
Subparagraphs 1.a-1.c:	For Applicant
Paragraph 2, Guideline C:	FOR APPLICANT
Subparagraphs 2.a-2.c:	For Applicant

Conclusion

In view of all the circumstances presented 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.

Noreen A. Lynch
Administrative Judge