



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



In the matter of:)	
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)	ISCR Case No. 11-11748
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: Joseph Testan, Esquire

June 26, 2012

Decision

MOGUL, Martin H., Administrative Judge:

On January 31, 2012 the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline 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), effective after September 1, 2006.

On February 28, 2012, Applicant replied to the SOR (RSOR) in writing, and he requested a decision based on a hearing before an Administrative Judge. I received the case assignment on April 13, 2012. DOHA issued a notice of hearing on May 2, 2012, and the hearing was convened on May 18, 2012. At the hearing, the Government offered Exhibits 1 through 3, which were received without objection. Applicant testified on his own behalf and submitted Exhibits A through F, which were also admitted without objection. The record was left open until May 25, 2012, to submit additional information, and the additional one page letter that was received has been identified and entered into evidence as Exhibit G. DOHA received the transcript of the hearing (Tr) on May 30,

2012. Based upon a review of the pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is granted.

Request for Administrative Notice

Department Counsel requested that I take administrative notice of certain facts relating to the People's Republic of China (PRC). The request and the attached documents were admitted into evidence as Exhibit 3. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

In his RSOR, Applicant admitted all the SOR allegations, 1.a., b., and c. 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 following additional findings of fact:

Applicant is 44 years old. He was born in the United States. He has earned a Bachelor's degree and a Master's degree in Physics, a Master's degree in Business Administration, and a Ph.D. in another scientific discipline. He has been married to his wife from 1999 to the present. His wife was born in the PRC and moved to the United States in 1999. She became a U.S. citizen in February 2005. Applicant has a stepson, who is Applicant's wife's child from a previous marriage. The boy is 17 years of age, and has lived in the United States since 2001. He became U.S. citizen in May 2005. Applicant and his wife have a nine year old son, who is a U.S. born citizen. Applicant's other relatives, who are U.S. born citizens, include his mother, father, two aunts, one uncle, and five cousins. (Tr at 31-37.)

Applicant has been employed by a defense contractor for the past 13 years, and he seeks a DoD security clearance in connection with his employment in the defense sector.

(Guideline B - Foreign Influence)

The SOR lists three allegations regarding Foreign Influence, 1.a. through 1c., under Adjudicative Guideline B, which will be reviewed in the same order as they were listed on the SOR:

1.a. It is alleged in the SOR that Applicant's sister-in-law is a citizen and resident of the PRC. Applicant testified that his sister-in-law only speaks Chinese and he does not speak Chinese, and he described his contact with her as "nonexistent." He estimated that he last saw her six years ago, and the only other contact he may have is if she sends him an email to wish him a happy birthday or if she calls his wife and he happens to pick up the phone. (Tr at 38-40.)

1.b. It is alleged in the SOR that Applicant's sister-in-law is employed as a travel coordinator for the Government of the PRC. Applicant testified that his sister-in-law works for a local or state government in China, but not for the National PRC. He stated that it was his belief that she arranged the travel coordination for the people who worked in her office. (Tr at 37-38.)

1.c. It is alleged in the SOR that Applicant's brother-in-law is a citizen and resident of the PRC. Applicant testified that he has no contact with his brother-in-law. He last saw him in 1999, and again he only speaks Chinese while Applicant speaks no Chinese. (Tr at 42.)

Applicant denied having any feelings of affection, obligation, or loyalty to either his sister-in-law or his brother-in-law. He estimated that his wife talks to her sister approximately two times a quarter, and she has no conversations with her brother. He also testified that he felt no loyalty or allegiance to the PRC, and if either of his in-laws was threatened, he would report it to his company security and then to the U.S. authorities. (Tr at 41-42.)

Applicant testified that his equity in his residence is approximately \$500,000. He and his wife also co-own rental property in another state, in which his equity is approximately \$30,000 and that has a positive cash flow. Applicant also is the co-owner with two other individuals of an apartment building in another state. This building also has a positive cash flow. Applicant owns no property in the PRC. Applicant also indicated that he has no intention to travel or to move to the PRC. (Tr at 43-45.) Finally, Applicant testified that his wife has no assets in the PRC, nor does she stand to inherit any property in the PRC in the future. (Tr at 56.)

Mitigation

Applicant submitted 12 positive character letters, 11 from those who know him in his professional capacity and one from a long time friend. (Exhibit A.) All of the letters were extremely laudatory. He was described as "a person of high integrity. . . . very honest and trustworthy," and someone who always uses "excellent judgement."

Applicant also submitted two financial statements, showing that he has \$310,388.75 in his 401k with his current employer, and \$155,929.33 in an account that he shares with his parents. (Exhibit B.)

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 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, and has nuclear arms and weapons. 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 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 makes 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.

AG ¶ 8 provides conditions that could mitigate security concerns. I 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 U.S. born citizen and resident. Applicant’s wife and stepson were born in the PRC, but are now U.S. citizens and residents. Applicant’s son, mother, father, two aunts, uncle and 15 cousins are all U.S. born citizens and residents. His contact with and feelings for his brother-in-law and sister-in-law in the PRC is extremely limited.

Applicant owns a home in the United States with his equity valued at \$500,000, and he has significant additional assets including two investment properties and two investment accounts. He has no assets outside of the country. Based on all of these reasons, I conclude Guideline B for Applicant.

AG ¶ 8(c) is also applicable, “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.”

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. Based on all of the reasons cited above as to why mitigating conditions AG ¶ 8(b) and (c) apply, considered together with the positive character letters on behalf of Applicant, I find that the record evidence leaves me with no significant questions or 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 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 B: FOR APPLICANT

Subparagraphs 1.a through 1.c.: 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.

Martin H. Mogul
Administrative Judge