



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



In the matter of:)
)
) ISCR Case No. 12-00354
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

07/30/2013

Decision

LYNCH, Noreen A., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application on June 2, 2011. On September 4, 2012, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines B and C. 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 timely requested a hearing before an administrative judge. The case was assigned to me on May 8, 2013. A notice of hearing was issued on May 24, 2013, scheduling the hearing for July 2, 2013. Government

Exhibit (GX) 1 was admitted in evidence without objection. Applicant testified, presented the testimony of two witnesses, and submitted Applicant Exhibits (AX) A-L, which was admitted without objection. DOHA received the transcript (Tr.) on July 11, 2013. I kept the record open for Applicant to submit more documentation. He timely submitted AX M-O. The record closed on July 16, 2013.

Administrative Notice

Department Counsel requested that I take administrative notice of relevant facts about the People's Republic of China (PRC) and Taiwan. The request and supporting documents are attached to the record as HX I. Applicant also presented administrative notice and supporting documents. (Tr. 12) I admitted the documents into the record and took administrative notice as requested by Department Counsel. The facts administratively noticed are set out below in my findings of fact.

Findings of Fact

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

Applicant was born in the United States to a naturalized U.S. citizen from Taiwan. He is 32 years old. He received his undergraduate and graduate degree in the United States. He has received degrees in information technology. (AX B) Applicant is married. He and his wife are expecting their first child. Since 2007, he has been employed with his current employer as a programmer and information technology consultant. This is his first application for a security clearance. (GX 1)

In approximately late 2002, when Applicant graduated from university, he travelled to China to pursue employment opportunities. He had an undergraduate degree in information systems. He taught English to students. He is not proficient in the Chinese language. He met his future wife during this time. His future wife was a writer for a TV show. In approximately 2003, Applicant returned to the United States. He obtained gainful employment in the information technology field. However, he wished to visit his Chinese girlfriend to resume their relationship. He left his gainful employment in the information technology field to visit her in the PRC. (AX A)

Applicant returned to China in late 2004 to visit his future wife. In 2005, he moved to the PRC and worked for an Indian company for approximately 18 months. (Tr. 50) The position was a consultant in the information technology field. (GX 1) He opened a bank account to deposit his paychecks. (Tr. 39) He and his girlfriend lived together. Applicant met her family during that time. Applicant remained in China until 2007. (Tr. 40) He returned to visit family in China in 2010. Applicant noted in his security clearance application that he visits his wife's family when she visits China. He listed the contact as one to two times a year. (GX 1)

Applicant's wife is a native of China. They were married in the United States in 2007. She became a naturalized U.S. citizen in late 2011. (AX N). Applicant and his wife own a home in the United States. They do not own any property in the PRC.

Applicant's father-in-law is a citizen and resident of PRC. Applicant's interaction with him is limited to phone calls every two years. (Tr. 31) Applicant claimed he did not know the nature or frequency of his wife's contact with her father. (Tr. 31) Although upon questioning, he believes his wife uses Skype to talk to her father. (Tr. 44) Applicant's father-in-law visited Applicant in the United States when he married in 2007. Applicant also explained that his father-in-law will probably visit when his grandchild is born. (Tr. 43)

Applicant's wife's grandmother is a citizen and resident of the PRC. Applicant stated that he has seen her rarely, perhaps once every two years. (Tr. 31) He acknowledged that he visited her in China in February 2013 to present the news of his wife's pregnancy. Applicant and his wife stayed in her home during a part of the week visit.

Applicant's grandmother, who was a citizen and resident of Taiwan, is now deceased. (Tr. 44) Applicant's other family are U.S. citizens who reside in the United States. Applicant believed the last time he was in Taiwan was more than a decade ago.

The SOR alleged a security concern under Foreign Preference because Applicant admits that he had a Taiwanese passport. He received this passport but did not use it to travel. He explained that his father, who was born in Taiwan, thought it would be a good idea to have the passport. His father is a naturalized U.S. citizen. Applicant stated that the passport is lost, and most certainly is expired at this point in time. Most Taiwanese passports are valid for ten years. (AX O) The passport was issued in about 2000. (Tr. 42)

Applicant explained that he did not want to disagree with his father concerning the Taiwanese passport. His father believed it would be useful. Applicant viewed it as a souvenir of sorts. (Tr. 42) Applicant's frequent moves and travels to different places resulted in the loss of the Taiwanese passport. He did not appear concerned about the Taiwanese passport. He did not notify any authority about the loss of the passport.

Applicant has received favorable recommendations from his employer. He submitted evaluation appraisals from 2009 until 2012. His earlier evaluations describe him as technically competent but note that he did not follow certain guidelines and processes to produce quality work. (AX D) He has been rated as a team player. His 2010 evaluation describes him as doing a fine job. Applicant earned the respect of his peers. (AX E) An evaluation from 2011 noted that while Applicant generally meets deadlines, he needs to take care and pay more attention to details in documentation. His overall rating was "meets expectations." (AX F) The 2012 evaluation rated Applicant

as proficient but noted that his attention to detail could use improvement. His work frequently needs an in-depth review and rework. (AX G)

A senior manager, who holds a security clearance and who has known Applicant for four years, testified that Applicant performs as required in his position in the company. The senior manager, who supervises Applicant and interacts with him on a weekly basis, stated that Applicant follows rules. The manager is aware of the security concerns involved in the case. He recommends Applicant for a security clearance. (Tr. 19)

A principal employee for the client company, who holds a security clearance, testified that Applicant is trustworthy, open, and honest. Applicant has worked on numerous projects and has always performed in a positive manner. He recommends him without reservation for a security clearance. He is aware of the security concerns under foreign influence and foreign preference. (Tr. 23)

Applicant submitted five other letters of recommendation from friends and colleagues. Applicant is consistently described as a loyal and trustworthy friend. He has great knowledge and technical skill garnered from his work the past several years. Furthermore, Applicant is described as a valuable member of any team. He possesses dedication and skill. The letters also note that Applicant contributes to the community with his small business and works with organizations to support fundraising efforts. (AX L)

Administrative Notice

China is an increasingly industrialized world economic and military power. The country has a population in excess of one billion people who are governed by an authoritarian, communist regime. Geographically vast and developmentally diverse, the country has significant natural resources to help support its growing economy. China devotes most of its industry and domestic production to its military forces, and it has a strategic nuclear arsenal. China is in direct competition with the United States in many geopolitical and economic areas, and is known to actively collect military, economic, and industrial information from and about the United States. In 2012, it was reported to Congress that Chinese 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 the global information environment.

However, China and the U.S. are also major trading partners and share other common interests. After the terrorists attacks of September 2001, the two countries worked closely in counter-terrorism efforts. China and the United States also have worked closely on regional issues, especially those involving North Korea. However, U.S. China relations are sometimes complicated by events in Taiwan and Hong Kong. China is one of the most active collectors of U.S. defense information and technology.

The Chinese government has an abysmal human rights record. Officials continue to engage in suppression of personal and electronic expressions of political dissent. Arbitrary arrest and detention, forced confessions, torture, and other prisoner mistreatment are commonplace. Government and law enforcement practices are largely unchecked by any independent review.

Taiwan is a modern democracy with vibrant public participation during which demonstrations may become confrontational. The U.S. Department of State urges caution within the vicinity of any public demonstrations. Overall crime is noted as low.

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 relevant to this case. First, 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). Second, a disqualifying condition may be raised by “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.” AG ¶ 7(b). Third, a security concern may be raised if an applicant is “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, we know 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 United States, 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 United States. 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 is a U.S. citizen. His wife is a naturalized U.S. citizen from the PRC. His father-in-law and his wife’s relatives are residents and citizens of the PRC. China’s human rights record, combined with its history of aggressive espionage against the United States, indicates a willingness by the Chinese government to exert pressure on Applicant through his ties of affection in China. His wife, and her father present a heightened risk of exploitation by a foreign government. Applicant has stated that his contacts are not frequent with his father-in-law. However, he has visited him in China and his father-in-law has visited him in the United States. With the birth of a child, it can be expected that his father-in-law will return to the United States for a visit. Even though Applicant is not directly related to them and his wife resides with him in the United States, there is a rebuttable presumption that, because he is close to his wife, he would be affected by actions involving her father and family.

“[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 has ties of affection to family members who are citizen-residents of the PRC. His contact with them ranges from calls to visits. Applicant has not rebutted this presumption.

After considering the totality of Applicant’s family ties to as well as each individual tie, I conclude that Applicant’s family ties are sufficient to raise a heightened

risk of foreign exploitation, inducement, manipulation, pressure, or coercion. Applicant traveled to PRC several times for work and to visit his wife's family. He saw his father-in-law when he visited the United States. He claims not to know how often his wife communicates with her family. Based on all these circumstances, I conclude that AG ¶¶ 7(a), (b), and (d) are raised.

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). China engages in economic and industrial espionage, and it has been involved in incidents involving illegal importation of restricted, dual-use technology from the United States. Applicant's father-in-law and his wife's grandmother are citizens and residents of China. Applicant lived and worked in China for a period of time. For these reasons, I conclude that AG ¶ 8(a) is not fully established.

Security concerns under this guideline can 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 is a U.S. citizen and was educated in the United States. I accept his claim that he is a loyal American, and it is reasonable that he has longstanding ties and relationships in the United States. However, the mitigating condition does not fully apply because Applicant's obligations to his wife and her family cannot be characterized as minimal when compared to relationships in the United States. I cannot conclude that Applicant would resolve any conflict between the interests of the United States and his family in China in favor of the United States. Thus, I conclude that AG ¶ 8(b) is not established.

Finally, I conclude AG ¶ 8(c) does not apply. Applicant's ties to his wife and her family are not casual. Actual contact may be infrequent, but Applicant traveled to China to visit his wife's family and his father-in-law visits him. He will soon be a grandfather and more visits will likely ensue. On balance, Applicant has not met his burden of persuasion in response to the Government's case. The security concerns about possible foreign influence are not mitigated.

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.

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). Applicant appeased his father by obtaining a Taiwanese passport in 2000. He did not use it travel. He viewed it as a souvenir. He did not keep track of the passport, and it has been lost during Applicant’s various moves. Applicant submitted information that the Taiwanese passport is usually valid for a ten year period. It would now be expired. He has no desire to live in China or lose his U.S. citizenship. He had no thought of the consequences for a future security clearance. Applicant has mitigated foreign preference security concerns as to SOR allegation 2.a

However, Applicant chose on two separate occasions to leave the United States and travel to China to seek employment opportunities. While there he met his future wife. After he returned to the United States, he wished to resume a relationship with her. He visited her in China and then decided in 2005 to move to the PRC. He left gainful employment in the United States. He was engaged in employment in the information technology field for an Indian company. He worked in that capacity for approximately 18 months. He met his future wife’s Chinese family. Applicant has not mitigated foreign preference security concerns as to SOR allegation 2.b.

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 in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

I have evaluated the facts presented in this case and have applied the appropriate adjudicative factors under Guidelines B and C. I have also reviewed the case in the context of the whole-person factors. Applicant is a U.S. citizen by birth. He disclosed information that supports a reasonable assumption that he has longstanding ties and relationships in the United States. Until his trips to the PRC to live and work, and marriage he had few personal interests outside the United States. However, his

marriage, and the presumed ties to his wife's father, present an unacceptable risk to the national interest were Applicant to have access to classified information. Decisions concerning such circumstances do not assign blame or personal misconduct by Applicant. However, the Government has a compelling interest in protecting sensitive and classified information. This requires that any doubts about the risks associated with Applicant's foreign contacts and preferences be resolved in favor of the government.

After weighing the disqualifying and mitigating conditions under Guideline B and Guideline C, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on foreign influence and foreign preference. Accordingly, I conclude he has not 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 allegations in the SOR:

Paragraph 1, Guideline B (Foreign Influence):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Paragraph 2, Guideline C (Foreign Preference):	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	Against Applicant

Conclusion

I conclude that 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.

Noreen A. Lynch
Administrative Judge