



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



In the matter of:)
)
) ADP Case No. 15-05230
)
Applicant for Public Trust Position)

Appearances

For Government: Rhett Petcher, Esq., Department Counsel
For Applicant: *Pro se*

03/31/2017

Decision

GARCIA, Candace Le'i, Administrative Judge:

Applicant mitigated the foreign influence and foreign preference trustworthiness concerns. Eligibility for access to sensitive information is granted.

Statement of the Case

On February 1, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing trustworthiness concerns under Guideline B, foreign preference, and Guideline C, foreign influence. The action was taken under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); DOD Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

Applicant answered the SOR on March 18, 2016, and elected to have the case decided on the written record in lieu of a hearing. The Government's written case was submitted on April 21, 2016. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the trustworthiness concerns. Applicant

received the FORM on May 16, 2016. As of June 24, 2016, he had not responded. The case was assigned to me on March 10, 2017.

Procedural and Evidentiary Rulings

Evidence

The Government exhibits identified as Items 1 through 3 are admitted in evidence without objection.

Request for Administrative Notice

Department Counsel requested that I take administrative notice of certain facts about the Philippines. The request was included in the record as Item 4. Applicant did not object. The request is not admitted in evidence but I have taken administrative notice of the facts contained in Item 4. The facts administratively noticed are summarized in the Findings of Fact, below.

Findings of Fact

Applicant is a 62-year-old web developer employed by a defense contractor. He has worked for his current employer since February 2015. He is seeking eligibility to hold a public trust position for the first time. Since he began working for his current company, he works part-time for his own company that he started in 1995. He obtained a bachelor's degree from a university in the Philippines in 1976. He is married with two adult children.¹

Applicant was born in the Philippines to Filipino parents. He immigrated to Australia in 1981. He became an Australian citizen in 1983, at which time he renounced his Filipino citizenship. He immigrated to the United States in 1989. He was naturalized as a U.S. citizen in July 2005, and obtained a U.S. passport in December 2005. He obtained an Australian passport in July 2012 that was not scheduled to expire until July 2022, but never used it. In March 2016, he surrendered it to a DOD personnel security specialist, who destroyed it. Applicant stated that this served as his renouncement of his Australian citizenship. Applicant considers himself solely a U.S. citizen.²

Applicant's wife and children, dual citizens of Australia and the United States, reside in the United States. Applicant has two sisters who are citizens and residents of the United States.³

Applicant's mother, father, brother, mother-in-law, and father-in-law are citizens and residents of the Philippines. His parents and parents-in-law are elderly. Applicant

¹ Items 2-3.

² Items 1-3.

³ Items 2-3.

talks to his mother quarterly, and communicates electronically with his mother and father quarterly. He talks to his father-in-law annually. He communicates electronically with his mother-in-law and brother annually. Applicant has not visited his family in the Philippines since October 2012.⁴

Applicant indicated that his family members do not have ties to the Philippine government or military. His mother is a homemaker. His father is a retired, self-employed owner of a company. His brother is a doctor. His father-in-law is a retired, self-employed businessman. His mother-in-law is a retired scientist in a city department.

Applicant stated that his allegiance lies with the United States. His wife and children work in the United States. Applicant has owned his home since December 2005.⁵

Philippines

The Philippines is a multi-party, constitutional republic with a bicameral legislature. However, dynastic political families continued to monopolize elective offices at the national and local level. There is widespread official corruption and abuse of power. Authorities failed at times to maintain effective control over the security forces. Security forces committed human rights abuses to include extrajudicial killings and enforced disappearances.

Other human rights problems include allegations of prisoner/detainee torture and abuse by security forces; violence and harassment against human rights activists by local security forces; warrantless arrests; lengthy pretrial detentions; overcrowded and inadequate prison conditions; killings and harassment of journalists; violence against women; abuse and sexual exploitation of children; and trafficking in persons.

Long-running Muslim separatists and communist insurgencies continued to result in the displacement of civilians and the killing of soldiers and police in armed clashes. Terrorist organizations are active in the Philippines; they have killed Philippine security forces, local government officials, and other civilians. Through strong counter-terrorism cooperation with the United States, the ability of these various groups to operate in the Philippines has been constrained but not eliminated.

Kidnap for ransom gangs have targeted foreigners to include Filipino-Americans. The U.S. State Department has recommended that all U.S. citizens defer all non-essential travel to the Sulu Archipelago, due to the high threat of kidnapping in that area. The State Department has also warned U.S. citizens to exercise extreme caution if traveling to the main island of Mindanao due to violent activities of terrorist and insurgent groups.

⁴ Items 2-3.

⁵ Items 2-3.

Policies

Positions designated as ADP I and ADP II are classified as “sensitive positions.” (See Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.) “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.” (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. 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. (See Regulation ¶ C8.2.1.)

When evaluating an applicant’s suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the AG. 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.

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 [sensitive] information will be resolved in favor of national security.”

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 to obtain a favorable trustworthiness decision.

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. The government reposes a high degree of trust and confidence in 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 of potential, rather than actual, risk of compromise of sensitive information.

Analysis

Guideline B, Foreign Influence

The trustworthiness concern for foreign influence is set out in AG ¶ 6:

Foreign contacts and interests may be a trustworthiness 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.

The guideline notes several conditions that could raise trustworthiness concerns under AG ¶ 7. The following are potentially applicable in this case:

- (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;
- (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; and
- (d) 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).

AG ¶ 7(a) requires substantial evidence of a "heightened risk." The "heightened risk" required to raise one of these disqualifying conditions is a relatively low standard. "Heightened risk" denotes a risk greater than the normal risk inherent in having a family member living under a foreign government. Applicant's family members are citizens and residents of the Philippines. Widespread official corruption, human rights problems, and terrorist organizations are present in the Philippines. Kidnapping or exploitation by insurgent and terrorist elements is also a problem. Applicant's foreign contacts create a potential conflict of interest and a heightened risk of foreign exploitation, inducement, manipulation, pressure, and coercion, both directly and through his wife. AG ¶¶ 7(a), 7(b), and 7(d) have been raised by the evidence.

Conditions that could mitigate foreign influence trustworthiness concerns are provided under AG ¶ 8. The following are potentially applicable:

- (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.;
- (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; and
- (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.

AG ¶ 8(a) is not established for the reasons set out in the above discussion of AG ¶¶ 7(a), 7(b), and 7(d). However, Applicant's deep and longstanding relationships and loyalties in the United States are sufficient to establish AG ¶ 8(b). He has lived in the United States since 1989. He started his own business in the United States in 1995. He has been a citizen since 2005. His wife, children, and two siblings are in the United States. He owns his home in the United States.

AG ¶ 8(c) is not established. Applicant has not visited his family in the Philippines since 2012. He talks to his mother quarterly and father-in-law annually. He communicates electronically with his father quarterly, and mother-in-law and brother annually. However, there is a rebuttable presumption that contacts with an immediate family member in a foreign country are not casual, and Applicant has not rebutted that presumption. See ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002).

Guideline C, Foreign Preference

The trustworthiness concern for foreign preference is set out in AG ¶ 9:

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.

The guideline notes several conditions that could raise trustworthiness concerns under AG ¶ 10. The following are potentially applicable in this case:

(a) 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; and

(b) action to acquire or obtain recognition of a foreign citizenship by an American citizen.

Applicant obtained and possessed an Australian passport while a U.S. citizen. AG ¶ 10(a) is applicable. The renewal of his Australian passport while a U.S. citizen could raise concerns under AG ¶ 10(b), as an action to obtain recognition of his Australian citizenship.

Conditions that could mitigate foreign preference trustworthiness concerns are provided under AG ¶ 11. The following are potentially applicable:

(b) the individual has expressed a willingness to renounce dual citizenship; and

(e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

Applicant surrendered his Australian passport to a DOD personnel security specialist who destroyed it. Applicant stated that this served as his renouncement of his Australian citizenship. He considers himself solely a U.S. citizen. AG ¶¶ 11(b) and 11(e) are applicable.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a public trust position by considering the totality of the applicant's conduct and all relevant 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 public trust position 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. Applicant's ties to the Philippines are outweighed by his deep and longstanding relationships and loyalties in the United States. I am confident that he will resolve any conflict of interest in favor of the United States.

After weighing the disqualifying and mitigating conditions under Guideline B, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the trustworthiness concerns raised by his foreign family connections. 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 sensitive information.

Formal Findings

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

Paragraph 1, Guideline B: For Applicant

Subparagraph 1.a: For Applicant

Paragraph 2, Guideline C:

For Applicant

Subparagraph 2.a.

For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is granted.

Candace Le'i Garcia
Administrative Judge