



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



In the matter of:)	
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)	ISCR Case No. 14-05743
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: Sean M. Bigley, Esquire

February 29, 2016

Decision

MOGUL, Martin H., Administrative Judge:

On February 20, 2015, the Department of Defense Consolidated Adjudication Facility (DoD CAF) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines B and C 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 within the Department of Defense for SORs issued after September 1, 2006.

Applicant replied to the SOR (RSOR) in writing on April 14, 2015, and she requested a hearing before an Administrative Judge. The case was assigned to this Administrative Judge on July 13, 2015. DOHA issued a notice of hearing on July 16, 2015, and I convened the hearing as scheduled on August 26, 2015. At the hearing, the Government offered Exhibits 1 and 2, which were received and admitted without objection. Applicant testified on her own behalf and submitted Exhibits A through H, which were also admitted without objection. Two additional witness also testified on behalf of Applicant. DOHA received the transcript of the hearing (Tr) on September 3,

2015. Based upon a review of the pleadings, exhibits, and the testimony of Applicant and her witnesses, 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 (the PRC). The request and the attached documents were admitted into evidence as Exhibit 2. The facts administratively noticed are set out in the Findings of Fact, below.

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 the additional witnesses, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 45 years old. She was born in the PRC in 1970, and she moved to the United States in 1998, as a graduate student. She became a naturalized United States citizen in January 2010. Applicant has been married to her husband since 1995, and they have one daughter, age 7, who is a United States citizen. Her husband was born in the PRC, came to the United States in 1999, and became a U. S. citizen on the same day as Applicant.

Applicant received Masters and Ph.D. degrees from American universities in Civil Engineering. She is employed by a defense contractor, and she seeks a DoD security clearance in connection with her employment in the defense sector.

Paragraph 1 (Guideline B - Foreign Influence)

The SOR lists six allegations regarding Foreign Influence, under Adjudicative Guideline B:

1.a. It is alleged in the SOR that Applicant's father is a citizen and resident of the PRC. Applicant's father is 76 and retired. He was a chemical engineer for a local medicine chemical factory. She speaks to her father approximately once a month. She has only seen her parents once in the last 17 years, in 2006, when they came to visit Applicant in the U. S. (Tr at 57-59.) Applicant averred that none of her family members ever worked for the PRC Government, and she has never offered financial support to any of her PRC relatives. (Tr at 64, 71.)

1.b. It is alleged in the SOR that Applicant's mother is a citizen and resident of the PRC. Applicant's mother is also 76 and retired. She worked as a technician for the same medical chemical company as Applicant's father. Applicant speaks to her mother with the same frequency as her father. (Tr at 59.)

1.c. It is alleged in the SOR that Applicant's brother is a citizen and resident of the PRC. Applicant testified that her brother is 53, and was a chemical engineer for an automobile company, but he is also retired. She speaks to him once a year on Chinese New Year Day, and she has not seen him in 17 years. (Tr at 60-61.)

1.d. It is alleged in the SOR that Applicant's sister is a citizen and resident of the PRC. Applicant testified that she has not seen her sister in 17 years, and she contacts her by email approximately three or four times a year. (Tr at 61.) Applicant's sister is a nurse, and she works in a university. (Tr at 79.)

1.e. It is alleged in the SOR that Applicant's father-in-law and mother-in-law are citizens and residents of the PRC. Applicant testified that they are both 75 or 76 years old, and they are both retired. They previously were employed as medical doctors by a small community hospital. Applicant never calls her in-laws, and she only speaks with them, one or two times a year, as she picks up the phone to speak to them after her husband has been talking to them. (Tr at 61-62.)

1.f. It is alleged in the SOR that Applicant owns a home in the PRC in which her in-laws reside. Applicant testified that this house in the PRC was a gift from her in-laws to Applicant's husband, and it was never registered in her name. Her in-laws have never lived in this house. Applicant's husband was not informed of the gift until after the purchase was made. Since that time, Applicant's husband has transferred the property back to his father, so neither Applicant nor her husband has any current financial interest in the house or any other property in the PRC. (Tr at 64-65.) Exhibits B and C establish that Applicant and her husband have transferred the PRC property back to her husband's father, and the house is now owned by Applicant's father-in-law.

Applicant testified that her husband and she earn approximately \$255,000 plus bonuses per year. She also has approximately \$800,000 saved in United States financial institutions. Additionally, Applicant owns a townhouse in which she has paid \$120,000 of a \$320,000 mortgage. Finally, Applicant testified that she has no financial interest in the PRC or any professional affiliations with the country. (Tr at 51-52., Exhibit F.)

Paragraph 2 (Guideline C - Foreign Preference)

The SOR lists one allegation regarding Foreign Preference, under Adjudicative Guideline C.

2.a. It is alleged in the SOR that Applicant possesses a PRC passport issued in June 2008, and not scheduled to expire until June 2018.

Applicant testified that after she became a United States citizen, she was not sure what to do with her passport. She has since given her current passport and an expired passport to her Facility Security Officer (FSO), and they have been destroyed. Exhibit G confirms that the FSO of Applicant's employer did destroy Applicant's current and expired PRC passports on March 11, 2015.

Applicant further testified that “My heart is in the United States.” Since she came to the United States more than 17 years ago, she has never once returned to the PRC. She also has no friends from the PRC with whom she still has contact. Finally, she reiterated that she has no intention to return to the PRC, and she has no potential divided loyalty between the PRC and the United States, because her loyalty lies completely with the United States. (Tr at 53-54, 77-79.)

Mitigation

As reviewed above, two witnesses also testified on behalf of Applicant. One is an Associate Director and the other is a Principal Director of Applicant’s current employer. The witnesses recommended Applicant as “super conscientious” and someone with “impeccable” character. (Tr at 22-36.)

Applicant also submitted nine extremely positive and laudatory character letters, two of which were from the witnesses described above. (Exhibit H.) Applicant was described as someone with “a remarkable work ethic [who has] demonstrated a high degree of integrity, both in her work and in character.”

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 has 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, has nuclear arms, and nuclear bombs. 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. (Exhibit 2.)

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

Paragraph 2 (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 family members, who are citizens and residents of the PRC make AG ¶ 7(a) a concern to the Government. AG ¶ 7 (e) “a substantial business, financial, or property interest in a foreign country . . . which could subject the individual to heightened risk of foreign influence or exploitation” is also potentially applicable because of Applicant’s alleged property in the PRC.

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 because of the following: Applicant, her husband and their daughter are all United States citizens and residents. Applicant received her Ph.D. in the United States, and she has a net worth of more than \$800,000 here. Applicant has not visited the PRC since she first came to the United States, more than 17 years ago. Additionally, the two witnesses and the submitted character letters were extremely positive in extolling Applicant’s exemplary character and integrity. Finally Applicant testified credibly and convincingly that her loyalty lies with the United States, and she has no divided loyalty with the PRC.

While there was a house that had been gifted to Applicant’s husband without his knowledge, that home has been now returned to Applicant’s father-in-law. Because of Applicant’s significant assets in the United States, even if the house in the PRC had not been returned, AG ¶ 8(f) would be applicable, because “the value . . . [of the] property interests is such that they are unlikely to result in a conflict and could not be used to effectively to influence, manipulate, or pressure the individual.” As a result of all of these factors, I conclude Guideline B for Applicant.

Guideline C, Foreign Preference

Under AG ¶ 9 the security concern involving foreign preference arises, “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.”

Applicant’s retention of her passport from the PRC raises foreign preference concerns under disqualifying condition AG ¶ 10(a) as the “exercise of any right, privilege or obligation of foreign citizenship.”

However, Applicant never has taken any affirmative act of foreign citizenship after becoming a United States citizen, including not using her PRC passport after she became a United States citizen, and she has now destroyed her PRC passport. Therefore, I find that mitigating conditions AG ¶ 11(a), (c) and (e) apply to this case. After considering all of the evidence of record under Guideline C, I conclude that the mitigating evidence substantially outweighs any disqualifying evidence.

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 under Guidelines B and C. Based on all of the reasons cited above as to why the mitigating conditions are applicable and controlling under both Guidelines, I find that the 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 under the whole-person concept.

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. - 1.f.: 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 the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Martin H. Mogul
Administrative Judge